



Case no: LM144Jan20

In the large merger between:

Thabong Coal (Pty) Ltd

Primary Acquiring Firm

And

South32 SA Coal Holdings (Pty) Ltd

Primary Target Firm

Panel	: AW Wessels (Presiding member)
	: M Mazwai (Tribunal member)
	: E Daniels (Tribunal member)
Heard on	: 3, 4, 7, 9, 10, 17 and 18 December 2020
Order Issued on	: 23 December 2020
Reasons Issued on	: 05 February 2024

REASONS FOR DECISION

INTRODUCTION

1. The Competition Tribunal ("Tribunal") conditionally approved the proposed merger in terms of which Thabong Coal Proprietary Limited ("Thabong Coal"), a subsidiary of Seriti Resources Holdings (Pty) Ltd ("Seriti"), intends to acquire control over South32 SA Coal Holdings Proprietary Limited (referred to hereinafter as "SAEC" or "South32"). Seriti and SAEC will collectively be referred to as "the merging parties".
2. Thabong Coal is a wholly owned subsidiary of Seriti, a broad based, black-owned and controlled South African mining company that is, in turn, ultimately co-owned by four black-owned South African anchor shareholders.

3. Pre-merger the entire issued share capital of SAEC is held by South32 SA Holdings Limited, which is ultimately a subsidiary of South32 Limited. South32 Limited is a firm headquartered in Perth, Australia, and has its primary listing on the Australian Securities Exchange, and secondary listings on the London Stock Exchange and the JSE Limited.
4. The proposed transaction was notified to the Competition Commission (“Commission”) on 10 December 2019. On 31 August 2020, the Commission referred the proposed transaction to the Tribunal for determination in terms of section 14A of the Competition Act 89 of 1998, as amended (“the Act”), recommending its approval subject to a set of conditions agreed between the Commission and the merging parties.
5. The Commission conducted a lengthy investigation and engaged a large number of stakeholders including certain customers of the merging parties, competitors, government departments, industry representatives, trade unions and affected communities. Third parties contacted by the Commission included the Department of Mineral Resources and Energy (“the DMRE”), the Department of Public Enterprises (“Public Enterprises”), National Treasury, the National Energy Regulator of South Africa (“NERSA”), the Richards Bay Coal Terminal (“RBCT”), the South African Energy Forum, the Phola Ogies Rural Mining Forum Coal Community Cluster, the Mineral Council of South Africa and the Mineral Resources Investment Corporation representing Paciflex Coal (Pty) Ltd, Invasion (Pty) Ltd, Zurivision (Pty) Ltd, Tantodex (Pty) Ltd, Asabisource (Pty) Ltd and Zakusize (Pty) Ltd. The Commission also engaged the Phembani Group (Pty) Ltd (“Phembani Group”) – the pre-merger BEE shareholder of SAEC, as well as relevant trade unions namely the Association of Mineworkers and Construction Union (“AMCU”), the National Union of Mineworkers (“NUM”), the United Association of South Africa (“UASA”) and Solidarity.
6. Ultimately, the Commission recommended the approval of the proposed transaction subject to a divestiture condition, conditions to address concerns about

post-merger information exchange, as well as various conditions related to public interest.

7. Upon referral of the Commission's recommendation to the Tribunal in September 2020, we invited a number of third parties to a pre-hearing to ascertain whether these parties would seek to participate in our proceedings, including (i) Eskom Holdings SOC Limited ("Eskom"); (ii) the DMRE; (iii) Lurco Mining Services¹; (iv) UASA; (v) parties representing the Phola Ogies Community; and (vi) South African Energy Forum ("SAEF"). Zurivision² could not attend the pre-hearing but indicated via correspondence that it would seek to participate in the Tribunal's proceedings.
8. Subsequently, three third parties sought formal leave to intervene in the Tribunal's proceedings namely (i) parties representing the Phola Ogies Communities; (ii) Zurivision³; and (iii) SAEF.
9. The Tribunal granted the Phola Community, the Phola Mining Community Development Trust and the Phola Ogies Rural Mining Forum Community Cluster intervention rights relating to the public interest considerations contemplated in sections 12A(3)(a) to (c) of the Act (these parties will be collectively referred to as the "Intervenors").⁴
10. As background, the Phola Ogies Community is a community of around 150 000 residents staying in the Phola Township in a town known as Ogies in the magisterial district of Witbank, Mpumalanga. The Commission found that the area around Ogies is surrounded by coal mines including SAEC, Glencore, ARM, Anglo American, Seriti, Beryl Coal, Wescoal, African Exploration, Mwelase Mining and other coal processing companies which operate in a radius of 20km from Ogies.⁵

¹ A customer of SAEC that initially raised concerns about the proposed transaction.

² Also see footnote 3.

³ The intervention application was brought by Zurivision (Pty) Ltd; Zokusize (Pty) Ltd; Paciflex Coal Mining (Pty) Ltd; Tantodex (Pty) Ltd; Inavision (Pty) Ltd; and Asabisource (Pty) Ltd (collectively referred to as "Zurivision").

⁴ See Tribunal order of 19 October 2020.

⁵ See Commission's Report, paragraph 492.

11. The Tribunal dismissed the intervention applications brought by Zurivision and Others⁶ and SAEF⁷. We provided separate reasons for these intervention decisions.

12. Eskom, a thermal coal customer of both Seriti and SAEC, is the single largest purchaser of thermal coal in South Africa and therefore plays a central role in the coal sector in South Africa. The Tribunal summonsed Eskom representatives to appear at the hearing to give evidence regarding the effect of the proposed transaction on competition and public interest issues. The summonsed Eskom employees were:

- Mr Snehal Nagar (“Nagar”), the Senior Manager Finance Business Partner (Primary Energy) and Acting General Manager – Primary Energy;
- Mr Petros Mazibuko (“Mazibuko”), the Senior Coal Supply Manager – Primary Energy and Acting General Manager Coal Operations in Primary Energy;
- Ms Precious Edward-Pesha (“Edward-Pesha”), the Senior Manager Contracts Negotiations – Primary Energy and Acting General Manager Fuel Sourcing within the Primary Energy business unit; and
- Mr Sagie Chetty (“Chetty”), the Senior Manager Coal – Primary Energy.

13. Eskom filed factual witness statements dealing with a list of issues identified by the Tribunal. These issues included (i) coal procurement, including Eskom’s current and future coal procurement strategy and sources of coal supply; (ii) the relative size of the merging parties’ coal supply to Eskom and Eskom’s relative dependence on Seriti and SAEC; (iii) the types of coal contracts that Eskom enters into and the features of each type of contract, including pricing and other contractual terms; (iv) price and other negotiations with coal suppliers; (v) Eskom’s degree of countervailing power post merger vis-à-vis the merged entity; (vi) potential switching by Eskom to alternative coal suppliers; (vii) the effects of the

⁶ See Tribunal’s order and reasons of 04 November 2020 under case number LM144Jan20/INT130Sep20.

⁷ See Tribunal’s reasons of 25 October 2021 under case number LM144Jan20/INT131Sep20.

proposed transaction on Eskom and the relevant product market(s); (viii) the anticipated effects of the proposed transaction on the energy sector and energy security in South Africa; and (ix) any concerns with the proposed transaction, including any proposed remedies.

14. The hearing was conducted over seven days in December 2020.

15. The following individuals gave factual evidence for the merger parties:

- Mr Mike Teke (“Teke”), the CEO of Seriti;
- Ms Sibongile Shongwe (“Shongwe”), the Transformation and Compliance Manager at SAEC who testified regarding SAEC’s social and labour plans;
- Mr. Michael James Falconer (“Falconer”), the Group Manager, Corporate Development, Africa and Exploration for South32 Limited; and
- Mr. Douglas Robert Gain (“Gain”), the Chief Financial Officer of the Seriti Group of Companies.

16. Mr Patrick Smith (“Smith”) from RBB Economics testified as an economic expert for the merging parties.

17. Although the merging parties agreed with the Commission to a set of conditions, they submitted that the proposed transaction will not result in a substantial prevention or lessening of competition in any relevant market since there is virtually no overlap between the coal activities of Seriti and SAEC in South Africa since (i) the three operating Seriti coal mines are committed to the supply of coal to specific Eskom power stations; (ii) two of the SAEC mines are also committed to supply coal to specific Eskom power stations in terms of long-term agreements; and (iii) SAEC’s remaining two coal mines are effectively export mines. They argued that the proposed transaction will also not remove a future competitive constraint on either Seriti or SAEC given (i) the location of their respective coal operations/reserves; (ii) the quality of their coal reserves; (iii) the lifespan of the coal reserves; and (iv) the staggered dates on which the merging parties’ long-term coal agreements with Eskom come to an end. The merging parties furthermore

submitted that the proposed transaction would have a positive impact on the public interest, in particular in relation to the promotion of a greater black ownership and providing both employees and communities with a free and unencumbered shareholding in SAEC.

18. Following questions/issues raised by the Tribunal and the Intervenor during the hearing, the merging parties submitted an enhanced set of conditions.

PROPOSED TRANSACTION, RATIONALE AND OTHER CONDITIONS

Proposed transaction

19. The proposed transaction entails Thabong Coal acquiring 90% of the issued share capital of SAEC and thus sole control over SAEC in terms of section 12(2)(a) of the Act. The remaining 10% in SAEC will be acquired in equal shares of 5% by each of an Employee Trust and a Community Trust. (We shall discuss these trusts below under the public interest assessment.)
20. The merging parties submitted that SAEC will remain a separate legal entity and its existing rights and obligations will remain unaffected. SAEC and its underlying businesses will in this sense continue to operate in the ordinary course following the implementation of the proposed transaction.

Rationale

21. Seriti submitted that its rationale for the proposed transaction lies principally in its focus on becoming a meaningful domestic coal supplier in order to contribute positively to South Africa's energy requirements. In addition, the proposed transaction provides Seriti with the opportunity to become an exporter of coal, enabling it to diversify its customer base and earn hard currency revenues in the export markets.⁸ The merging parties furthermore argued that having SAEC in the Seriti group will enable the merged entity to unlock technical and cost efficiencies

⁸ Pre-merger Seriti does not export any coal from South Africa; SAEC, on the other hand, exports coal from South Africa.

that are supportive of the effective running of a sustainable, large-scale mining business.

22. South32 Limited submitted that it, as a global diversified miner, has taken a broad strategic portfolio decision to exit from thermal/energy coal as a commodity. It is seeking to transition towards the production of base metals and to rather focus on “greener” commodities that have a significant export dimension, as opposed to those that may be concentrated in a particular country.

Suspensive conditions: Eskom consent

23. The merging parties submitted that the proposed transaction cannot proceed without the consent and involvement of Eskom. This they submitted is evident from the suspensive conditions of the transaction, which include that:

- 23.1. Eskom must consent in writing to the change in control of SAEC in terms of the rights afforded to Eskom under a coal supply agreement (“CSA”) pertaining to the supply of coal to Eskom’s Duvha power plant (“the Duvha CSA”); and
- 23.2. SAEC and Eskom enter into an amendment to the Duvha CSA or a restatement of the Duvha CSA in order to address the (alleged) current loss-making and uneconomical nature of the contract.

Other suspensive conditions

24. Other suspensive conditions include approval by the Minister of the DMRE in terms of Section 11 of the Mineral and Petroleum Resources Development Act and approval by the RBCT board for the change of control of SAEC.

COMPETITION ASSESSMENT

Merging parties’ activities and product overlap

25. Both Seriti and SAEC are active in the mining and supply of thermal coal in South Africa.

26. The coal mining firms that are active in South Africa fall into three categories: (i) firms that are only involved in domestic coal production and sales; (ii) firms that are only involved in the exportation of coal; and (iii) multiproduct firms - referring to firms that supply coal to both the local and export markets. In South Africa, coal is exported through the RBCT to various export destinations, being transported by Transnet Freight Rail ("TFR") from the relevant mines to the port.
27. There is no overlap between the merging parties' activities in relation to the export of coal from South Africa since Seriti does not currently export any coal from South Africa (also see its rationale for the proposed transaction above). Seriti has also not had any entitlement to export coal through the RBCT. SAEC, on the other hand, sells coal to both the local and export markets. According to South32's 2020 Annual Report, its domestic sales accounted for approximately 57% of total sales by volume, with exports making up the rest.
28. Three primary customer groupings use thermal coal – (i) Eskom, the largest user in South Africa; (ii) Sasol; and (iii) so-called 'residual customers'.
29. Sasol is largely (with the exception of the tied Isibonelo mine) vertically integrated and neither Seriti nor SAEC supplies coal to Sasol. We therefore do not deal with Sasol any further.
30. The merging parties' activities furthermore do not overlap with regards to the supply of coal to residual customers since Seriti has not made any coal sales to any domestic customers other than Eskom. Moreover, the residual customers make up a relatively small proportion of the total domestic sales of coal.
31. Given that Eskom is the merging parties' single largest coal customer and in fact Seriti's only coal customer, the primary potential competitive effects of a transaction between Seriti and SAEC are in respect of coal sales to Eskom. Thus, the latter is the focus of our assessment.

32. We shall below deal with the nature and the features of each of the types of coal contracts that Eskom enters into with its coal suppliers. For present purposes we note that Eskom enters into three types of Coal Supply Agreements (“CSAs”): (i) so-called ‘cost-plus’ contracts; (ii) ‘long-term fixed price’ contracts; and (iii) ‘short/medium-term’ contracts. Eskom does not procure coal on a spot basis.
33. Seriti’s current operating coal mines in South Africa are (i) Kriel; (ii) New Denmark; and (iii) New Vaal. These three coal mines historically have been dedicated to supply Eskom in terms of cost-plus CSAs. Seriti also has a joint controlling interest in the ‘New Largo project’ - earmarked to supply thermal coal to Eskom’s Kusile power station.
34. SAEC has three coal mining complexes in South Africa namely:
- (i) the Klipspruit mine – which is largely an export mine;
 - (ii) the Khutala colliery – which is dedicated to supply Eskom’s Kendal power station in terms of a cost-plus CSA; and
 - (iii) Middelburg Mining Services,⁹ comprising the Wolvekrans and Ifalethu mines.
- Wolvekrans is also an export focussed mine; it is currently on “pause” and not producing coal.¹⁰
 - Ifalethu supplies coal to Eskom’s Duvha power station in terms of a long-term fixed price CSA. We note in relation to the latter that SAEC and Eskom are engaged in negotiations arising from SAEC’s invocation of hardship.
35. **Table 1** below provides an overview of the merging parties’ current coal supply (per coal mine) to Eskom; the Eskom power station supplied from each mine; the relevant type of CSA with Eskom and the duration of the CSA¹¹:

⁹ Formerly known as the Wolvekrans Middelburg Complex.

¹⁰ Wolvekrans’ export pits are currently on “pause”.

¹¹ See witness statement of Mazibuko, paragraph 9.

Table 1 Merging parties' coal supply to Eskom power stations

Supplier	Coal mine	Location	Eskom power station	Contract type	Contract duration (years)
Seriti	Kriel	Kriel, Mpumalanga	Kriel	Cost-plus	■
	New Denmark	Standerton, Mpumalanga	Tutuka	Cost-plus	■■■■■■■■■■ ■■■■■■■■■■ ■■■■■■■■■■
	New Vaal	Vereeniging, Free State	Lethabo	Cost-plus	■
SAEC	Khutala	Ogies, Mpumalanga	Kendal	Cost-plus	■
	Wolvekrans / MMS (Duvha)	Emalahleni, Mpumalanga	Duvha - supplied from the Ifalethu colliery	Long-term fixed price	■

36. As can be seen from **Table 1**, in terms of the current coal supply by Seriti and SAEC to Eskom, all the relevant power stations are supplied through either a cost-plus or long-term fixed price CSA. Of the five relevant Eskom power stations, four are supplied through a cost-plus CSA and Seriti holds three of these cost-plus contracts namely the Kriel, Lethabo and Tutuka CSAs; whereas SAEC holds the Kendal cost-plus CSA supplied from its Khutala colliery. SAEC's other current Eskom contract is the Duvha long-term fixed price CSA supplied from Ifalethu.

37. We note that the expiry dates of the relevant contracts are staggered.¹²

Industry background

38. Eskom classifies its coal suppliers into two groups: (i) major suppliers; and (ii) emerging or junior miners. The major coal mining companies are well established ones, typically with (multinational) exposure to various commodities and significant coal resources. The junior miners are typically defined as mid-tier producers and small companies who are relatively new to the mining industry. Emerging miners are classified as the many smaller companies at development stage, mining contractors and value adding suppliers.

¹² Further detail will be provided below when we assess each CSA individually.

39. In terms of logistics, coal supply to Eskom takes two forms: (i) direct from the (adjacent) coal mine to the relevant Eskom power station via conveyor belt; or (ii) via rail and/or road transport. From Eskom's perspective, as confirmed by its factual witnesses, the latter is significantly more expensive since the coal must be transported by rail/road. The Eskom representatives indicated that in the case of coal deliveries to its power stations taking place via conveyor, the logistics costs are (relatively) minimal, whereas in the case of suppliers delivering coal via road and/or rail the logistics costs are on average ■% of the delivered coal costs.¹³
40. Infrastructure challenges associated with the RBCT rail link have largely contributed to South Africa underutilizing its port capacity for exporting coal, especially during commodity booms.¹⁴ The actual export volume is far below the terminal's nameplate potential of 91 million tonnes per annum.
41. From a sector regulation perspective, the Commission found that coal is a cost component included in the primary energy costs accounted for in the electricity tariff application. NERSA informed the Commission that it does not consider the individual cost components as part of its electricity tariff determination but focuses on the total costs expected to be incurred (which would include primary energy costs as well as operating expenditure), as well as total volumes to be generated.
42. We note with concern the drastic increases in Eskom's coal procurement costs over the past decade. Public Enterprises in a 2019 report notes that historically coal has been a cost-effective source of primary energy in South Africa but that no longer applies. In its 2019 report it states: *"South Africa's competitive advantage in attracting industry for decades has been access to cheap coal for power generation. However, this advantage is being lost because of the rising electricity costs driven by coal costs and the Eskom build programme. At points during the past decade coal costs have at most times grown at double inflation. This is*

¹³ *Inter alia* witness statement of Edward-Pesha, paragraph 9.1.

¹⁴ Witness statement of Edward-Pesha, paragraph 6.2.

*primarily due to poor and corrupt business decisions of not investing in cost plus mines and not procuring coal on a long term basis*¹⁵ (our emphasis). We shall deal with the substantial increases in Eskom's coal costs in more detail below.

43. Coal will remain important for future economic growth and industrialisation and the lifetime of Eskom's coal-fired plants will continue for at least another decade and more in the case of Eskom's Medupi and Kusile power plants.¹⁶

Product market

44. Industries in the domestic market use thermal coal for energy generation and as a carbon reductant in boilers, kilns and furnaces. Eskom submitted that the domestic market (excluding Eskom) uses about 10-15 million tonnes of thermal coal per annum.¹⁷

45. The Commission found that the coal supplied to Eskom is of a lower quality relative to the coal that is generally supplied to the export market and to the rest of the domestic market. It stated that although there may be minor overlaps, generally the coal supplied to the export market and to other domestic customers has higher specifications than the coal supplied to Eskom. The minor overlaps relate to particular coal mines and power stations. **Table 2** below summarises the different domestic coal specifications and grades.

¹⁵ See *The Roadmap for Eskom in a reformed Electricity Supply Industry*, Public Enterprises, October 2019 ("Roadmap for Eskom"), available on the internet at: www.dpe.gov.za, page 28.

¹⁶ See *Roadmap for Eskom*, page 24.

¹⁷ Witness statement of Edward-Pesha, paragraph 10.1.

Table 2 Domestic coal specifications and grades

Domestic coal specifications					
Parameter	Units	A grade	B grade	C grade	D grade
Calorific value	MJ /kg ad	>27.5	>26.5	>25.5	>24.5
Total moisture	Maximum % (AR)	12.0	12.0	8.0	8.0
Ash	Maximum % (AR)	15.0	16.0	18.0	21.0
Volatile matter	Minimum % (AR)	24.0	23.0	23.0	23.0
Sulphur	Maximum % (AR)	1.0	1.0	1.0	1.5

46. According to Eskom, substitution with its coal requirements is very low for the abovementioned grades A-C; for example, the cement industry will only use grades A-C. Eskom further submitted that although grade D could have the potential to substitute for utility coal, the volumes required by it are also low.

47. From an Eskom usage perspective, the Commission found that an individual coal mine can produce coal of a quality that can be utilized in more than one Eskom power station. The Commission further noted differing dynamics in Eskom's coal procurement through long-term versus short/medium-term CSAs. The Commission also found that Eskom has [REDACTED] of short/medium-term contracts to procure coal - at a [REDACTED] to it.

48. Although noting the dynamics associated with supply under the different coal contract types, from a product market delineation perspective the Commission considered the overall supply of thermal coal to Eskom (irrespective of the different contract types).

49. In our assessment of the competition effects of the proposed transaction we focus on the supply of thermal coal to Eskom. Included in our analysis is the nature and features of the different types of CSAs that Eskom enters into with coal suppliers. Also relevant is whether these existing contracts can be extended/renewed, as

well as any new contracts that may be entered into in future and how the proposed transaction would affect those negotiation dynamics.

Geographic market(s)

50. In assessing the parameters of the relevant geographic market(s), the Commission considered the supply of coal to each of the relevant Eskom power stations - Duvha, Kendal, Kriel, Lethabo and Tutuka. It analysed the distances over which Eskom sources coal for each of these power stations and mapped these distances using isochrones. This indicated that Eskom's geographic procurement area for coal differs per individual power station.

51. The Commission found that, barring Duvha and Lethabo, Eskom sources coal for its individual power stations from suppliers other than the anchor supplier to varying degrees and distances, depending on *inter alia* the quality needs of the respective power station.

52. The Commission concluded that while each of Seriti or SAEC may exclusively supply a specific Eskom power station, based on the overall supplier information per power station, Eskom's geographic area in which it procures coal is wider, conceivably to geographic areas of between a radius of 95¹⁸ and 150km.¹⁹ Based on this the Commission considered the impact of the proposed transaction in the following regional markets:

- (i) a radius of up to 95km²⁰ from a power station - representing the area in which the majority of coal suppliers are uniformly located for all the power stations concerned; and
- (ii) a radius of up to 150km²¹ from a power station - representing Eskom's furthest procurement distance for the power stations considered.

¹⁸ 110km road distance.

¹⁹ 193km road distance.

²⁰ 110km road distance.

²¹ 193km road distance.

53. We note that the Commission's abovementioned approach to the geographic market delineation simply considers Eskom's total coal procurement patterns in terms of its current suppliers with no regard to any differences in the price paid to the different suppliers/differences in the delivered cost of the various coal suppliers (relative to the base load or anchor supplier).

54. We leave the exact parameters of the relevant geographic market(s) open since it does not alter our ultimate conclusion with regards to the competition effects of the proposed transaction.

Market size and concentration levels/trends

55. According to Eskom, 255 million tonnes of coal has been produced per annum in South Africa over the last decade. Although the production profile has remained relatively flat, the demand for coal, both domestic and export, has been able to match the supply profile. Local coal sales have hovered around 180 million tonnes per annum;²² and exports via the RBCT has averaged around 70 million tonnes per annum over the last ten years.

56. Eskom further indicated that the concentration levels in coal supply in South Africa has increased in the last five to six years with several larger mining firms divesting their coal mining assets in South Africa, with Seriti leading the charge in terms of acquisitions.²³ According to Eskom's estimates, the top five coal producers in the country in 2020 will be responsible for 63% of South Africa's total coal production.²⁴ Eskom further submitted that by 2025, Exxaro is expected to continue growing further as the Grootegeluk, Belfast and Thabametsi mines are expected to drive growth. Seriti will also continue to grow if the merger with SAEC is implemented.²⁵

²² Witness statement of Edward-Pesha, paragraph 6.2.

²³ Witness statement of Edward-Pesha, paragraph 6.2.

²⁴ Witness statement of Edward-Pesha, paragraph 6.2.

²⁵ Witness statement of Edward-Pesha, paragraph 6.2.

57. The Commission's analysis of pre-merger concentration found that Exxaro is the largest supplier of coal to Eskom, supplying seven out of Eskom's 15 coal-fired power stations. Pre-merger Seriti supplied the second highest volume of coal to Eskom (approximately █%) for FY2019 and SAEC supplied the third highest volume (approximately █%). Thus, combined the merging parties represent approximately █% of the total coal supply by volume to Eskom for FY2019.
58. When considering a regional geographic market with a radius of up to 150km, the Commission found the following: 13 of Eskom's 15 coal-fired power stations fall within this area,²⁶ and the merging parties have combined market shares of approximately 40 - 50% in terms of FY2018 and FY2019 coal supply volumes, with an accretion as a result of the proposed transaction of approximately 10 - 20%.
59. For the narrower regional geographic market with a radius of up to 95km, the Commission found that the merging parties have a combined market share of approximately 40 - 50% based on FY2018 coal volumes and 40 - 50% based on FY2019 volumes. The estimated accretion in market share as a result of the proposed transaction is between 20 - 30%.²⁷
60. The Commission furthermore considered the merging parties' market shares if Seriti commences its anticipated coal supply of 12Mt from the New Largo coal resource to Eskom's Kusile power station, anticipated for FY2024. When including this volume in the concentration analysis, Seriti's market share increases from 20 - 30% (in terms of FY2019 volumes) to an estimated 30 - 40%.
61. The Commission also considered concentration in terms of Eskom's total coal procurement. Based on Eskom's FY2019 total coal procurement volumes, the merging parties' combined market share is approximately 30 - 40% (or █Mt).

²⁶ This excludes the two power stations located in Limpopo, i.e., Medupi and Matimba.

²⁷ We note that the Lethabo power station (supplied solely by Seriti's New Vaal Colliery) is not included in this market share estimation.

62. The Commission also considered concentration in terms of Eskom's total energy generated. It found that the merging parties and Exxaro are responsible for the highest proportion of energy sent out by Eskom (measured in GWh) for FY2019. In terms of the total energy generated by Eskom for FY2019, the merging parties accounted for approximately ■% of the energy sent out by Eskom (Seriti accounted for approximately ■% and SAEC for approximately ■%). As comparison: Exxaro accounted for approximately [30-40]% of the total energy sent out by Eskom.

Commission's theory of harm and unilateral assessment

63. The Commission found that since coal price determination takes place in a bargaining setting, the main theory of harm to be assessed is likely post-merger changes in the bargaining position of the merged entity (Seriti) in relation to its contractual arrangements/negotiations with Eskom. In other words, the extent to which bargaining dynamics will change post merger given that Seriti will become Eskom's single largest coal supplier.

64. The Commission in its competition assessment considered *inter alia* (i) barriers to entry; (ii) Eskom's coal procurement strategy as well as the salient features each of Eskom's CSAs; (iii) Eskom and the merged entity's outside options (i.e., alternatives) with regards to coal demand and supply; (iv) Eskom's incentive to switch from long-term contracts to other contract types; and (v) the likely effect of the merger on Seriti's bargaining position vis-à-vis that of Eskom.

65. Regarding barriers to entry, the Commission found that barriers to entry into the production and supply of thermal coal to Eskom are high. It furthermore found that it is unlikely that a new entrant would enter in a timely manner and at a sufficient scale to effectively supply Eskom. We concur with this finding of high entry barriers and unlikely entry.

66. The Commission further found that it unlikely that Eskom's outside options/alternatives per individual power station (if any) will be able to sufficiently supply the affected Eskom power station absent supply by the merged entity. It found on the calculated potential total excess coal supply available in the market that (potential) alternative suppliers will not be able to supply the volumes procured from Seriti and SAEC in the event of negotiations collapsing.
67. The Commission further found it unlikely that Eskom could increase its coal procurement by purchasing domestic coal currently sold to the export market or to other domestic customers other than Eskom. This is *inter alia* because the export market and other domestic customers generally require coal of a higher quality than the coal required at Eskom's power stations.
68. In relation to potential switching by Eskom between different contract types, the Commission found that there is little to no incentive for Eskom to switch away from the bulk of its current cost-plus and long-term fixed price contracted coal supply since its coal procurement strategy favours security of supply via long-term contracts.
69. With regards to price differences between the different contract types, the Commission found that Eskom's short/medium-term contracts are generally more expensive than its long-term contracts. This is due *inter alia* to the higher logistics costs of transporting coal via rail and/or road.
70. In relation to the extent to which Seriti post merger could potentially switch coal supply away from Eskom towards other coal purchasers,²⁸ the Commission found that it could do so only through the coal currently supplied via any long-term fixed price CSA and not via the cost-plus CSAs.

²⁸ Other domestic buyers or export customers.

71. From a supply-perspective, the Commission concluded that it is unlikely that the merged entity would be able to switch substantial coal volumes to alternative buyers given that Eskom is the largest and most significant buyer of coal in the domestic market. It also submitted that Seriti's ability to switch to other customers may be affected by a lack of capital to operate the mines independently of Eskom's funding and/or to beneficiate the coal.

72. According to the Commission, competition to supply coal to Eskom takes place when the various coal mining firms bid for a tender. Once a particular tender process is concluded, prices will remain fixed (in terms of the contracts entered into) until the coal supply contract expires or the terms are renegotiated (if the coal agreement terms provide for the latter option). In relation to the potential effects of the proposed transaction on the negotiation dynamics, the Commission described the relationship between Eskom and the merging parties as symbiotic and ultimately concluded that the proposed transaction will not significantly affect the post-merger negotiation dynamics.

73. In relation to the types of coal contracts that the merged entity will hold, the Commission considered that Seriti will hold (i) four out of Eskom's current five cost-plus contracts (thus, it will hold one additional cost-plus CSA as a result of the proposed transaction,); and (ii) one of Eskom's current three long-term fixed price contracts i.e., the Duvha CSA (in relation to which hardship has been invoked, as indicated above). The Commission averred that due to the abovementioned symbiotic relationship between Eskom and specifically its cost-plus contract holders, as well as the limited outside options of the merged entity, both parties are equally reliant on establishing mutual agreement with respect to the continuation of the cost-plus contracts going forward.

74. In summary, the Commission came to the following conclusions in relation to the competition effects of the proposed transaction:

74.1. given the individualised nature of the price determination of coal arising from the contracts entered into by Eskom with coal suppliers, it is unlikely that

the proposed merger will impact the manner in which this price determination occurs such as to allow for the merged entity to leverage its position on all its CSAs with Eskom;

74.2. the negotiations for each CSA occur by taking into account the peculiar factors applicable to that individual CSA. Even if Seriti post merger embarks in more repetitive negotiation interactions with Eskom, the outcomes from one negotiation cannot be implemented/applied on the next set of negotiations since capital contributions, working costs and returns are peculiar to a particular mine; and

74.3. in spite of the structural change from the merger where Seriti will post merger be the largest coal supplier to Eskom, Seriti's larger size is unlikely to directly translate into more leverage power during the individualised contract negotiations. Seriti will only take over one additional cost-plus contract (i.e., the Kendal CSA) because SAEC has declared hardship on its Duvha CSA (and furthermore the resolution of that contract comprises one of the suspensive conditions to the proposed merger).

75. We note that given the Commission's findings and recommended conditional approval, it did not apply the established tests in assessing the merging parties' claimed merger-specific efficiencies. Since we were not presented with evaluated evidence of the claimed efficiencies, we do not assess those in our reasons.

Our competition assessment

76. We first deal with the post-merger information exchange concerns identified by the Commission and the remedy that the Tribunal imposed to address those concerns.

Post merger information exchange

77. The Commission found that the proposed transaction gives rise to several structural links in the market and that such structural linkages may create a platform for the post-merger exchange of competitively sensitive information.

78. The Commission considered *inter alia* that Phembani Group, a BEE partner that held 8.165% of the shares in SAEC, has interests in other firms that supply coal to Eskom. However, Phembani Group decided to sell its shares back to South32 Limited and therefore will not be “tagging along” in the Seriti transaction. In light of this, the Commission was satisfied that the proposed merger will not perpetuate the linkages arising from Phembani Group. We concur with this finding.

79. The remaining concern was that the Seriti shareholders have interests in other coal mining companies and therefore the proposed transaction may facilitate the exchange of competitively sensitive information between the target, SAEC, and the coal firms in which the Seriti shareholders hold stakes. The Commission recommended that conditions be imposed to ensure that there is no flow of competitively sensitive information between the Seriti shareholders’ affiliated coal mining companies and SAEC. The merging parties agreed to conditions to this effect.

80. We concur that the proposed transaction raises post-merger information exchange concerns given the various structural links. To remedy this, we approved the proposed transaction subject to the following behavioural conditions:

80.1. For as long as the Shareholders of Seriti²⁹ are entitled to appoint or nominate representatives to the board of directors of Seriti, Seriti Coal Proprietary Limited and other Seriti coal operating subsidiaries and/or of SAEC they shall ensure that their respective representatives on such board(s):

²⁹ “Shareholders of Seriti” means Masimong Beneficiation Proprietary Limited, Kamanda Investments Proprietary Limited, Thebe SPV 011 Proprietary Limited and CIH Projects Proprietary Limited.

- 80.1.1. are not the same person serving or appointed on any board or management committees of any holding companies and/or any Affiliate Companies³⁰ of the Shareholders of Seriti which are involved/active in the supply of coal, or any other entity which may have the potential (prospecting and/or mining rights) to supply coal to Eskom or any other entity in the future, in competition or potential competition with SAEC; and
- 80.1.2. shall only become eligible for appointment on the board of SAEC, three years after they have resigned as a director or a member of the board or management committee in any Affiliated Companies of the Shareholders of Seriti that are active in the supply of coal.
- 80.2. The directors of SAEC, Seriti and Seriti Coal shall not disclose Competitively Sensitive Information³¹ relating to SAEC to the Shareholders of Seriti's holding companies and/or any Affiliate Companies of the Shareholders of Seriti that are involved/active in the supply of coal to Eskom or any other entity or have potential (prospecting and/or mining rights) to supply coal to Eskom or any other entity in the future, in competition or potential competition with SAEC.
- 80.3. The Shareholders of Seriti shall not disclose to the directors of Seriti and Seriti Coal Competitively Sensitive Information relating to any holding companies and/or any Affiliate Companies of the Shareholders of Seriti that are involved/active in the supply of coal to Eskom or any other entity or have potential (prospecting and/or mining rights) to supply coal to Eskom or any other entity in the future, in competition or potential competition with SAEC.

³⁰ "Affiliate Companies" means companies in which Shareholders of Seriti have a stake.

³¹ "Competitively Sensitive Information" means any competitively sensitive trade, business, strategic or industrial information including but not limited to that relating to: (i) pricing – including pricing related to specific products, prices/discounts/rebates offered to specific customers and planned price reductions or increases; (ii) margin information by product or by customer; (iii) cost information, including production and logistical/transportation costs; (iv) information on specific customers and customer strategy – including information with respect to sales' volumes of customers; (v) budgets, business plans, marketing strategies and any other strategic document containing competitively sensitive information; and (vi) agreements and other (non-standard) terms and conditions relating to supply and distribution.

80.4. Every individual that serves on the SAEC, Seriti and Seriti Coal board of directors shall be required to sign a confidentiality undertaking giving effect to the relevant imposed conditions.

81. The above imposed conditions in our view adequately address the competition concerns relating to post-merger information exchange.

Barriers to entry

82. As indicated above, we concur with the Commission's finding that barriers to entry into coal production and supply to Eskom are high and that timely and sufficient entry into this market is highly unlikely.

Concentration levels

83. We have dealt with the Commission's market concentration analyses that show that the market for the supply of thermal coal to Eskom is highly concentrated. The merging parties' combined market shares are, depending on the basis on which the market shares are assessed, and the relevant geographic market considered, between an estimated ■■■% (in terms of the energy sent out by Eskom for FY2019) and ■■■% when the anticipated future supply from the New Largo coal resource to Eskom's Kusile power station is included in the concentration analysis.

84. The Tribunal also requested information from Eskom regarding its relative dependence on the merging parties for coal per individual power station and Eskom submitted the following figures for FY2021:³²

³² Nagar witness statement, paragraph 6.1.2.2. Based on April to Sept 2020 actuals and October 2020 to March 2021 projections.

Table 3 Percentage of each power station's total coal requirements supplied by Seriti or SAEC

Power station	Contract	% of power station's requirements
Lethabo	Seriti: New Vaal colliery	■
Duvha	SAEC: Middleburg mine services (excl. ATC)	■
Kendal	SAEC: Khutala colliery	■
Kriel	Seriti: Kriel colliery	■
Tutuka	Seriti: New Denmark colliery	■

85. **Table 3** shows Eskom's relative dependence on its tied or baseload supplier, which differs per power station, ranging from ■% to ■%. We note that although Eskom sources meaningful proportions of its total coal needs for certain power stations from suppliers other than Seriti and SAEC, it remains heavily reliant on the baseload or anchor supplier of each power station.

Coal quality

86. In terms of Eskom's quality requirements, the quality of the coal is particular to a specific power station and the use of thermal coal that is of an incorrect grade could result in damage to the power station.³³ That is, each Eskom power station is designed to use thermal coal of a particular quality, typically the quality mined at the adjacent or baseload coal supplier. However, as reflected in **Table 3** above, coal is in many instances purchased from other sources than the baseload supplier.

Eskom's coal procurement strategy

87. Eskom indicated that its coal procurement strategy is to pursue long-term CSA's to achieve the optimal volume mix over the life of each of its power stations.³⁴ Nagar explained that Eskom prefers to conclude long-term CSAs in respect of the

³³ Transcript, Naga *inter alia* pages 602, 603 and 640.

³⁴ *Inter alia* witness statement of Edward-Pesha, paragraph 6.1.1.

full resources/reserves of a particular coal mine in an endeavour to procure as much of the coal required at a given Eskom power station for its life of operation. This could be a period of up to 40 or 50 years. This affords Eskom the required quality and volumes of coal for longer durations, as well as stability and predictability in price and supply. Therefore, where possible, Eskom prefers to contract for so-called “life of mine”.³⁵ Supply of a longer duration also enables the optimisation of logistics for rail and road deliveries (where applicable).

88. From the mining firm’s perspective, a long-term CSA provides it with a long-term off-take agreement to amortise the development cost of the mine over the life of the colliery (if paid for by the mining firm).³⁶ (We shall below discuss the features of Eskom’s various CSAs in terms of *inter alia* development costs).

89. In relation to the cost-plus CSAs, Eskom explained that its strategy is to maximise the volumes that it obtains from its cost-plus mines in order to reduce the unit cost of the coal, in theory, to allow for competitive coal pricing.³⁷ The further strategy is to, where possible, extend the cost-plus agreements.³⁸

90. When it is possible to extend agreements, Eskom submitted that it would seek to secure the entire resource that is available from a mining perspective to achieve economies of scale.³⁹ It further submitted that, where possible, it concludes CSAs for extension projects that may be available at/contiguous to the baseload colliery.

Delivery mode and transportations costs

91. Given the costs associated with moving coal from a colliery, Eskom prefers to procure coal from suppliers that are contiguous, or as close as possible, to each of its particular power stations (provided that the coal is of the correct quality). To this end, Eskom’s power stations have typically been designed and constructed with

³⁵ Witness statement of Edward-Pesha, paragraph 9.2.

³⁶ Transcript pages 459 to 460, 481 to 482 and 564.

³⁷ Nagar, Transcript page 418.

³⁸ Nagar, Transcript page 418.

³⁹ Nagar, Transcript page 441.

the coal source next to that power station in mind. This, according to Eskom, is intended to maximise the efficiency of its coal supply agreements concluded with the baseload supplier.

92. As indicated above, procuring coal from suppliers other than the adjacent coal mine - where the coal is typically delivered by conveyor belt to Eskom - results in significant additional logistics costs. According to Eskom, transport costs on average account for approximately ■% of the cost of the coal if supplied via road and/or rail. We note that the actual cost for each power station will depend on the actual distance and the route.⁴⁰

Coal procurement negotiation

93. The prices, quantities and other terms under which coal is supplied to Eskom are principally determined through bilateral negotiations between it and the coal supplier. These negotiations, according to Eskom, take place on a power-station-by-power station or contract-by-contract basis.⁴¹

94. Eskom submitted that it procures coal by way of an open tender process in terms of the provisions of the PFMA and PPPFA. It indicated that during negotiations from an open tender process, it aims to contract as much as possible with the lowest priced tenderer who complies with all of the required criteria, including the legislative and regulatory criteria. In practice, cross functional teams from Eskom and the shortlisted tenderer typically negotiate the CSA's. The approval to conclude CSAs is adjudicated by Eskom's internal governance committees.⁴²

95. In terms of the effects of the proposed transaction on post-merger (price) negotiation, Eskom held the view that the negotiations will be handled in the same manner as pre-merger. It submitted that its countervailing power would depend on

⁴⁰ Nagar, Transcript *inter alia* pages 418, 419, 448 and 480.

⁴¹ Nagar, Transcript page 642.

⁴² Witness statement of Edward-Pesha, paragraph 8.1.1.

whether it has readily available alternatives when dealing with any coal supplier at a specific point in time.⁴³ (We shall assess Eskom's countervailing power below).

Eskom's different types of CSAs and their typical terms

96. As indicated above, Eskom historically has contracted with so-called baseload coal mines on the basis of long-term 'life of mine' cost-plus or fixed price contracts. We have also explained that all the merging parties' current CSAs with Eskom are either of a cost-plus or fixed price nature. We discuss the three types of CSAs in turn, starting with the cost-plus CSAs.

(i) Cost-plus CSAs

97. Four of the five Eskom power stations relevant to this transaction are supplied through a cost-plus CSA. Pre-merger Seriti holds three of these contracts namely the Kriel, Lethabo and Tutuka CSAs. SAEC holds the Kendal CSA supplied by its Khutala colliery. Seriti, therefore, as result of the proposed transaction will hold one additional cost-plus CSA, the Kendal CSA.

98. The cost-plus CSAs have the following typical features:⁴⁴

Delivery / transportation mode

98.1. The relevant coal mine is adjacent to the particular Eskom power station and the coal is supplied by conveyor belt directly to the power station.⁴⁵

Access to the coal by third parties

98.2. The coal reserves are dedicated to Eskom for the CSA's duration and can only be mined for supply to Eskom.

⁴³ Witness statement of Edward-Pesha, paragraph 9.4.

⁴⁴ Witness statement of Nagar, paragraph 7.1.1. Witness statement of Edward-Pesha, paragraph 7.1.1. Witness statement of Mazibuko, paragraph 7.1.1.1.

⁴⁵ This should be contrasted to the short/medium-term CSAs where coal is delivered via road/rail, with [REDACTED] implications.

Duration

98.3. These CSAs typically have a duration of ■ years or longer.

Capital, price and costs

98.4. Historically the establishment capital for the relevant coal mine was provided by both Eskom and the mining firm, i.e., Eskom and the mining firm jointly invested capital to develop the mine.

'Plus' aspect

98.4.1. The mining firm earns a Return on Investment ("ROI") for its capital contribution to the establishment of the mine. In other words, the ROI represents the rate of return on the establishment capital contributed by the mining firm (as agreed between Eskom and the mining firm at the time of the conclusion of the CSA).

98.4.2. The ROI has two components: (i) a fixed component - ■%; and (ii) a variable component - ■% - the latter is linked to the ■■■■■
■■■■■.⁴⁶

98.4.3. The ROI and management fee (see below) that the mining firm earns, ■■■■■ by a ■■■■■ of the ■■■■■.

'Cost' aspect

98.4.4. The cost aspect of the CSA entails Eskom funding the mining costs by paying the full operational costs and stay-in-business capital expenditure requirements of the colliery – based on capital and operational expenditure plans approved by Eskom, in advance, on an annual basis. Nagar explained that Eskom pays for all working costs and also has the obligation to provide for the rehabilitation and closure costs for the mine.

⁴⁶ The mining firm will ■■■■■ when it produces the contractual nominal volume, with ■■■■■ when Eskom calls for more than the contractual amount. When the mining firm supplies below the contractual coal volume, the ■■■■■

He further indicated that the working costs would vary depending on the nature and conditions of a mine, for example opencast and underground mines would incur costs differently. The level and timing of investment, e.g., equipment or new sections, also significantly impact the working costs.

98.4.5. The mining firm receives a management fee for operating the mine.

98.4.6. Mazibuko explained the cost-plus CSAs in practical terms as follows: the volumes required by Eskom on an annual basis are stated in the agreement. Each year Eskom will provide notice to the coal mine of its coal requirements for the respective power station in line with the planned burn and contracted tons. The mine then uses the information provided by Eskom to compile a revised capital (Capex) and operational expenditure plan (Opex) for the following year. The capital and operational plans (budget) are presented to Eskom for approval at least three months before the budget is placed in execution to ensure that mutual agreement of the budget is reached before the commencement of the new financial year. Upon approval, the budget is monitored by Eskom on a monthly basis, deviations are tracked, and action plans put in place to ensure recovery to the original approved budget.⁴⁷

Contract extensions

98.5. In line with Eskom's strategy, a cost-plus CSA can potentially be extended if it is approaching the end of its duration based on the dedicated resources to Eskom. Hence, new terms may be negotiated to extend the existing cost-plus CSA, for example to allow an alignment with the extended life of the power station and/or changed legislative requirements.⁴⁸ The latter will involve renegotiations. Renegotiations, according to Eskom, are guided by

⁴⁷ Witness statement of Mazibuko, paragraph 7.1.2.5.

⁴⁸ Witness statement of Mazibuko, paragraph 7.1.4.1.

the agreed contractual terms and conditions and may result in a review of the existing ROI.⁴⁹

(ii) Fixed price contracts

99. Three of Eskom's power stations are supplied via a long-term fixed price CSA, i.e., Duvha, Medupi and Matimba.⁵⁰ As already indicated, SAEC holds the Duvha CSA. Thus, as a result of the proposed transaction, Seriti will hold one fixed cost CSA, the Duvha CSA.

100. We note that Eskom in the early 1990's converted two initial cost-plus CSAs to long-term fixed price CSAs namely (i) the MMS/Duvha CSA; and (ii) the Optimum/Hendrina CSA (which has since expired). According to Eskom, these conversions were based on the principle of allowing the mine to convert into multiproduct operations to enable the mining firm to export higher quality coal and to in turn provide Eskom with the middlings product at a subsidized cost.⁵¹ Despite this change in relation to Duvha, as mentioned above, hardship has now been declared and is being assessed by Eskom.

101. The long-term fixed price CSAs typically have the following features:⁵²

Delivery / transportation mode

101.1. The relevant coal mine is adjacent to the particular Eskom power station and the coal is supplied by conveyor.

Access to the coal by third parties and volumes

101.2. The relevant coal reserve is not dedicated to Eskom supply only meaning that the mining firm may supply into other markets such as to the export market or to domestic customers other than Eskom.

⁴⁹ Witness statement of Mazibuko, paragraph 8.1.1.

⁵⁰ Medupi and Matimba are in the Lephalale area and Exxaro is supplying both these power stations (see Nagar, Transcript page 462).

⁵¹ Witness statement of Mazibuko, paragraph 7.1.5.3.

⁵² Witness statement of Nagar, paragraph 7.1.2. Witness statement of Edward-Pesha, paragraph 7.1.2. Witness statement of Mazibuko, paragraph 7.1.1.2.

101.3. The coal quality and minimum coal volumes to be supplied to Eskom are negotiated upfront and are fixed for the duration of the CSA. The coal suppliers are obligated to supply coal in accordance with the contractual provisions save for when there is a force majeure event notified by the supplier. Eskom submitted that should the supplier not deliver as per the contractual terms and conditions, there are contractual recourses including but not limited to rectification of undersupply and penalties.

101.4. The total contracted energy or volume will expire once this total energy or volume has been delivered to Eskom. Should the coal supplier not be able to deliver the contractual volumes, or Eskom is not able to offtake the volumes, the CSAs provide for rectification measures that must be agreed to by both parties.⁵³ Should the agreed rectification plan fail, then penalties will apply.

Duration

101.5. These CSAs have a duration of ■ years plus.

Capital, price and costs

101.6. According to Eskom, these CSAs are arm's length agreements where the mining firm is responsible for all costs associated with operating the colliery, i.e., the capital and operational expenditure, as well as all the associated mining risks. The mining firm must ensure that it is adequately capitalised to deliver its contractual requirements to Eskom and Eskom makes no capital contribution and theoretically has no exposure to new capital requirements or cost overruns. Eskom also has no influence in how the mine is operated.

101.7. The coal is supplied to Eskom at a pre-determined base price which is negotiated considering the various factors that impact the mining process and

⁵³ The coal to be supplied via the rectification process can be from an approved alternate source to the one contracted.

the duration of the agreement. The base price is then escalated annually by applying an escalation formula based on a specific contractual escalation basket (of indices). Eskom submitted that a typical escalation basket utilises a set of published indices to calculate the escalations to the base price. The final agreed escalation basket depends on the outcome of the negotiations.

Other contractual terms

101.8. According to Eskom these contracts have clauses that allow the parties to engage with each other to resolve issues that may arise during the execution of the contract, including dispute resolution, hardship and arbitration mechanisms.

101.9. Should the hardship clause be invoked during the tenure of the CSA, the parties engage to determine why hardship was declared and whether it is valid. This may lead to renegotiation on aspects of the CSA which may include price and volumes.⁵⁴ As indicated, hardship has been declared in relation to the Duvha CSA and engagements between Eskom and SAEC are ongoing on the hardship claim.⁵⁵

Extensions of contracts

101.10. Mazibuko indicated that some of the long-term CSA's have a [REDACTED] extension option as part of the contract terms.

(iii) Short/medium-term CSAs

102. Eskom also enters into short/medium-term contracts, but these are not applicable to the merging parties. The short/medium-term contracts typically have the following features:⁵⁶

⁵⁴ Witness statement of Mazibuko, paragraph 8.1.2.

⁵⁵ Witness statement of Mazibuko, paragraph 7.1.4.2.

⁵⁶ Witness statement of Edward-Pesha, paragraph 7.1.3. Witness statement of Mazibuko, paragraph 7.1.1.3.

Delivery / transportation mode

102.1. The coal mine typically is not adjacent to the Eskom power station and therefore the coal is delivered via road and/or rail and the contracts include terms and conditions which govern rail and road deliveries. Transport costs are negotiated depending on the terms of the coal supply agreement and are benchmarked to a transport model.⁵⁷

Duration

102.2. The short-term CSAs have durations of three years or less; and the medium-term CSAs have durations of more than three years but less than 40 years. A specific agreement's duration depends on the coal resource lifespan offered to Eskom, as well as Eskom's shortfall coal requirements at the time of the conclusion of the CSA.

Coal quality requirements

102.3. According to Eskom, it has implemented pre-certification procedures for quality management which ensures compliance to its quality requirements. It rejects "out of specification" coal and the supplier incurs penalties for not meeting quality specifications.

Prices and costs

102.4. Eskom has no influence in how the coal mine is operated. The pricing model is based on an agreed base price linked to an escalation basket. The pre-determined base price is negotiated considering the various factors that impact the mining process and the duration of the contract. The base price is fixed and then escalates according to a negotiated basket of indices, on a contract-by-contract basis.

102.5. The warranties provided for are similar to the long-term fixed price agreements.

⁵⁷ The transportation is either done by Eskom contracted trucks on a 'Free Carrier Agreement' basis or by the supplier's trucks on a 'Delivered At Terminal' basis.

Other contractual terms

102.6. According to Eskom the contractual terms and conditions include dispute resolution, hardship and arbitration mechanisms.

103. We note that Eskom's reliance on coal supply through short/medium-term contracts has significantly increased. According to the Commission's findings, the proportion of Eskom's coal purchased through these contracts has significantly increased from ■% in FY2009, to ■% in FY2019, and ■% in FY2020.

104. Nagar gave an historic overview and provided the following reasons for Eskom's increased coal procurement by means of short/medium-term agreements:

104.1. Until the early 1990's most, if not all, of Eskom's coal was delivered over conveyor as per the cost-plus and long-term fixed price CSAs. From then on there were short-term purchases to supplement these CSAs based on Eskom's coal burn requirements. However, this amounted to less than ■% of Eskom's coal purchases.

104.2. In 1991 Eskom commissioned the Tutuka power station and in 1996 the Majuba station. The colliery tied to Tutuka however could not deliver its full burn requirements due to operational and geological reasons; and the colliery tied to Majuba had to be shut down due to geological constraints. Hence additional coal had to be procured on a short/medium-term basis to meet Eskom's coal demand at these two power stations.

104.3. The under-performance from the tied collieries, more specifically around FY2007 and FY2008, and the return to power service stations (namely Camden, Grootvlei and Komati) also led to an increase in the volumes procured by Eskom on a short/medium-term basis.

104.4. As a result of the continual decreasing supply from the cost-plus coal mines over the last few years, the coal supply from short/medium-term CSAs is steadily increasing in order to fill the volume gap.⁵⁸

Eskom's future coal requirements

105. In relation to potential new power stations being built, Nagar testified that Eskom, at this point, has no decision to build any new coal-fired power station.⁵⁹

106. Eskom submitted that it has secured coal to meet its needs in the short term but has implemented several steps to manage its future requirements in the longer term, including the following:⁶⁰

- 106.1. recapitalise the cost-plus mines: by recapitalising and extending the life of the cost-plus mines, Eskom expects to secure approximately 250 million tonnes of coal. Eskom and the cost-plus mine owners are exploring technical options and conducting studies to determine the most economically feasible options;
- 106.2. commenced the process to extend the cost-plus CSAs to match the life of the reserve and the power station;
- 106.3. initiated the means to extend the existing long-term indexed fixed price CSAs for designated power stations;
- 106.4. implement a robust open tender process to source coal for the remaining life of the power stations; and
- 106.5. incentivising suppliers to develop new mines with a predictable long-term Eskom offtake and potential to export the balance of coal to earn premium returns.

⁵⁸ Nagar witness statement, paragraphs 7.3.2 and 7.3.3.

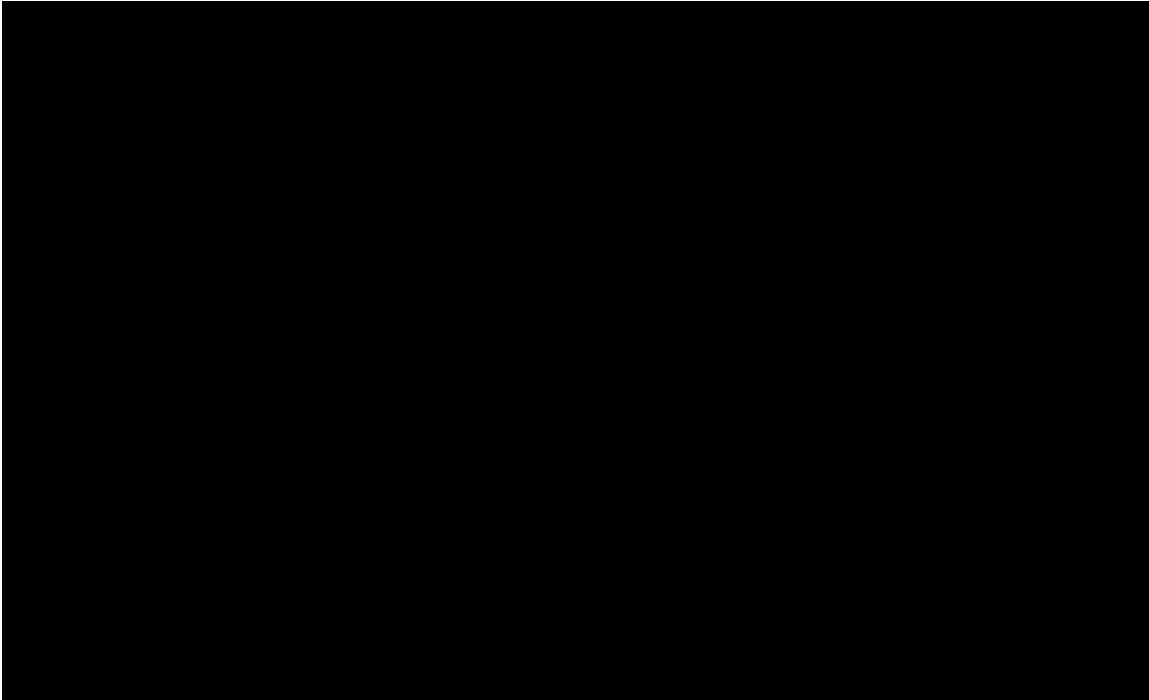
⁵⁹ Nagar, Transcript page 436.

⁶⁰ Witness statement of Edward-Pesha, paragraph 6.1.

Eskom's coal costs over time and per contract type

107. An analysis of the average coal prices (per ton) paid by Eskom over the past decade, and the increases in those prices across all three contract types, paint a grave picture in terms of its escalating costs, as is evident from **Figure 1** below.

Figure 1: Average price per ton per contract type, FY2009 to FY2020



Source: Commission's Report, based on Eskom submissions

108. The Commission made the following observations in relation to Eskom's coal prices over time:⁶¹

- 108.1. the short/medium-term fixed price contracts have maintained higher prices than the long-term contracts over time;
- 108.2. on average, coal prices for all contract types combined have increased drastically from about R■■■■/ton to R■■■■/ton between 2009 and 2020; and
- 108.3. notably, the cost-plus contract price spiked around 2016, and since 2018 has been increasing relative to other types of contracts.

⁶¹ Commission's Report, paragraphs 101 and 102.

109. Eskom's submissions regarding its coal costs per contract type included:

109.1. In FY2020, the average unit cost for the cost-plus CSAs was higher compared to that of the fixed price CSAs. Nagar attributed this to the current low production quantities at the cost-plus mines making them less efficient.

109.2. The short/medium-term CSAs were the most expensive. One reason for this is the (additional) logistics cost associated with road and/or rail transportation of the coal. Hence the need to optimise logistics solutions, according to Eskom.⁶²

110. Nagar attributed the increases in Eskom's coal costs since 2007/2008 to *inter alia* the following components:

110.1. certain Eskom power stations were burning harder, meaning more volume was required than what its long-term coal contracts could supply; and

110.2. from FY2007 for the long-term contracts, especially the cost-plus contracts, *"the production starts [REDACTED] a bit. So, you see your cost-plus volume starting [REDACTED] ... your cost-plus mine volumes that [REDACTED] And because you're now [REDACTED] your cost-plus volumes, over time you start seeing us [REDACTED] from our, call it [REDACTED] [REDACTED] the power stations. So, you've got this triple effect of – and reason for, call it [REDACTED] over time";⁶³ "your unit cost of your coal of your cost-plus mines are ... [REDACTED], because your [REDACTED] [REDACTED]. So, it's [REDACTED] your unit cost";⁶⁴ and "you're [REDACTED] [REDACTED] coal, which is costing you [REDACTED] for the coal, because this is [REDACTED] And then you're effectively [REDACTED] the power station. So, when you take those three factors into account you will see your [REDACTED] [REDACTED] compared to expectations."⁶⁵*

⁶² Nagar Witness statement, paragraph 7.3.5.

⁶³ Nagar, Transcript pages 567 and 568.

⁶⁴ Nagar, Transcript page 568.

⁶⁵ Nagar, Transcript page 568.

111. Nagar further submitted that Eskom's average coal costs have been affected by:

111.1. the Optimum mine going into business rescue and stopping coal production and delivery to the Hendrina power station;

111.2. the Duvha mine not giving Eskom its contractual commitments: "*you're now removing your most cheapest supply out of the system being, Optimum's Hendrina supply, and this Duvha Power Station supply*".⁶⁶; and

111.3. the Medupi power station increasing its volume requirements since 2012/13/14.⁶⁷

112. The Commission found that the decline in Eskom's procurement by means of long-term contracts is attributed *inter alia* to the fact that the cost-plus CSAs have been severely compromised by the lack of timely working capital injections by Eskom, leading to a reduced supply of coal volumes from the cost-plus mines.⁶⁸ This accords with Public Enterprises' finding that at points during the past decade coal costs have at most times grown at double inflation primarily due to poor and corrupt business decisions of not investing in the cost-plus mines and not procuring coal on a long-term basis (also see paragraph 42 above).

113. Counsel for the merging parties, referring to the abovementioned publication of Public Enterprises, noted that Eskom's coal contracts and coal transportation are squarely mentioned in the report within the rubric of corruption:⁶⁹ "*Eskom has been at the heart of the state capture in South Africa and as a result has suffered severe damage which has directly led to its current financial and operational situation. Eskom demonstrates how public and private actors colluded to establish networks that clustered around the utility to corruptly extract benefit and rents from it 8[1]. Forensic investigations have revealed the abuse in a wide range of areas, including: the new build programmes of Medupi and Kusile Power Stations; the transmission projects associated with these builds; coal contracts; coal*

⁶⁶ Nagar, Transcript page 569.

⁶⁷ Nagar, Transcript pages 568 and 569.

⁶⁸ Commission's Report, paragraph 103.

⁶⁹ Transcript, page 1071.

transportation; ... Of course, these activities were enabled and by Eskom employees and officials starting with the Board and Executive Management and then cascading down through the organisation. This situation has directly contributed to the Eskom's inability to sustainably provide electricity supply, the accumulation of mountains of debt, threaten the sovereign and have impacted disastrously on the potential for economic growth in South Africa (emphasis added). Public Enterprises further in its report states "Eskom now has a coal procurement strategy to reinvest in cost plus mines to reduce the rate of growth of coal costs as well as the extraction of efficiency on existing contracts. Government has already engaged with coal suppliers to transparently review their cost structure, return on investment and a fair price/cost of coal to Eskom on existing contracts"⁷⁰ (emphasis added). The report also states "Over the past two years Government and the new Eskom Board have implemented several measures to arrest the situation brought about by corruption. Eskom is reviewing various contracts, including those for coal and has stopped those contracts found to have been inflated"⁷¹ (emphasis added).

Theory of harm

114. With the above context of the industry and pricing and other dynamics, the main theory of competitive harm to be considered is whether the proposed transaction will substantially prevent or lessen competition by materially reducing the bargaining/negotiation power of Eskom vis-à-vis Seriti. Given the market characteristics and dynamics that we have outlined, including the existing contracts that are in place between Eskom and the merging parties, the main question therefore is whether the proposed merger is likely to have a significant impact on competitive outcomes arising from future negotiations between Eskom and Seriti.

115. In relation to the merging parties' existing long-term CSAs, they for their currency have agreed pricing and defined supply requirements, which were

⁷⁰ See Roadmap for Eskom, page 28.

⁷¹ See Roadmap for Eskom, page 29.

negotiated at the commencement of each supply agreement. These agreements - during the currency of the relevant supply agreement - would not generally be subject to renegotiation unless renegotiation is, for example, triggered by hardship, as in the case of the Duvha CSA.⁷²

116. Eskom however submitted that the CSAs may be extended with new terms negotiated, for example to align with the extended life of a particular Eskom power station. If the coal reserve is dedicated to Eskom, and the supply period in the agreement has expired but there are additional coal reserves, the parties will negotiate to increase the tenure of the agreement.⁷³ In the case of a cost-plus arrangement the underlying agreement could potentially change in relation to, for example, the ROI paid to the firm and the quality requirement of the coal.⁷⁴ To the extent that the reserve is not dedicated to Eskom, the negotiation with the coal mining firm would be for them to dedicate that additional reserve to Eskom.

117. We note that both Seriti and SAEC have development and expansion projects that are not currently (fully) committed to Eskom in terms of CSAs.

118. Therefore, there are two forms of likely future (price) negotiations between Eskom and Seriti:

- (i) in the case of an existing CSA, potential renegotiation or contract extension; and
- (ii) terms of supply relating to future development projects.

119. One of the factors that we have considered in our competition analysis is the extent to which Seriti and SAEC currently and in the future could constrain each other in the supply of coal to Eskom. We have also considered if the proposed merger has an effect on the outside options available to both Eskom and Seriti at a general level, as well as in respect of each relevant CSA/colliery individually.

⁷² Transcript pages 642 and 652.

⁷³ Nagar, Transcript page 425.

⁷⁴ Nagar, Transcript page 425.

120. In terms of economic theory, the principal mechanism through which one party can seek to obtain more favourable terms in a negotiation is by threatening to forego the transaction altogether. The credibility of such threat will depend on the alternatives to the transaction that each party has i.e., the relative strength of each party's outside option(s). Theoretically, even if the outside options available to one of the parties to a negotiation are weak, that party may still hold a degree of bargaining power if the outside options available to the other party are similarly weak or limited.
121. Theoretically, the proposed merger may post merger result in a reduction in the relative bargaining power of Eskom if: (i) the merger weakens the outside options available to Eskom relative to the relevant counterfactual, for example if Seriti and SAEC represent alternatives to Eskom in the relevant negotiation; or (ii) the merger enhances the merging parties' outside options relative to the relevant counterfactual, for example if the merger makes available or enhances the possibility of supplying alternate buyers of coal other than Eskom, such as export customers.
122. In evaluating the outside options of Eskom, one typically would consider whether there are other suppliers that are capable, individually or collectively, of supplying coal of the required quality, at the required volumes, and price, to a particular Eskom power plant. Whether a potential outside option would be a real/economic alternative from Eskom's perspective, will depend principally on the volumes and the cost at which the coal can be supplied by the potential alternative supplier. Key determinants of this would include the transport costs associated with moving the coal from the colliery to the power plant, as well as, in some instances, whether further processing and/or blending may be required to meet the quality specifications of the power plant.
123. Theoretically the outside options available to the merging parties post merger may be affected by *inter alia* the potential buyer's quality and volume requirements and price that it is willing to pay for the coal, the likely cost of supplying the

customer, and the expected risk and profitability of supplying the coal. In the case of a coal reserve that has yet to be developed, the available outside options may also be affected by the willingness of customers providing long-term purchase commitments against which capital can be raised to develop the reserve.

124. Before we consider each relevant CSA/colliery individually, we at the level of principle consider Eskom's potential countervailing power in its negotiations with coal suppliers.

Eskom's countervailing power

125. Based on the evidence before us, Eskom's bargaining power is nuanced and would depend *inter alia* on its real alternatives (in economic terms) at a specific point in time. In other words, Eskom's degree of countervailing power in a given negotiation will depend on whether it has (potential) real alternatives when negotiating with a specific coal supplier.⁷⁵ Edward-Pesha explained that in order for an alternative to be commercially viable, the total cost of ownership to Eskom or the delivered cost to the respective power station has to be comparable to the supplier being negotiated with.⁷⁶

126. Nagar's testimony pointed to Eskom's degree of countervailing power being influenced by factors such as: (i) when Eskom is entering the market from the demand side; (ii) what Eskom is requiring; and (iii) the terms that Eskom is requiring.⁷⁷ He went on to explain that Eskom's countervailing power at a particular point in time is dependent on: (i) the quality of coal that Eskom requires; (ii) the number of suppliers or the availability of supply in the market; (iii) other market conditions like the export markets and where they are at; and (iv) the nature of the supplier that Eskom is dealing with, whether, for example, it is a coal miner or a coal trader; (v) whether Eskom at the time has stockpiles; (vi) whether it has another contract that can be utilised to divert coal to where the coal is needed; and

⁷⁵ Witness statement of Edward-Pesha, paragraph 9.1.

⁷⁶ Witness statement of Edward-Pesha, paragraph 9.1.

⁷⁷ Nagar, Transcript page 622.

(vii) whether existing suppliers have excess capacity that is not committed to another market.⁷⁸

Current and future competition between Seriti and SAEC to supply Eskom

127. In this section we consider whether Seriti and SAEC currently are a competitive constraint on one another and whether in future, for contract expansions or new projects, Seriti and SAEC would compete absent the proposed transaction. We individually assess each coal resource and the relevant Eskom power station.

128. Nagar's testimony was that Seriti and SAEC have not tendered against each other in relation to any of the RFPs that Eskom has issued.⁷⁹ He indicated that there currently is no overlap between the coal activities of the merging parties in relation to Eskom, even in respect of the Kriel power station - as the small volume of coal delivered to Kriel in terms of the Duvha CSA was in fact sourced from Glencore.⁸⁰ His view was "... *at this point in time we, from a pricing point of view, negotiate separately, evaluate across all different entities and parties and I don't see a constraining effect, or any pricing effect taking place between the two entities*";⁸¹ "... *at this point in time for all of our contractual costs that we have it's [the merger] going to do absolutely nothing, because the terms and conditions of our current agreements stand. The only ...exception to that is the Duvha contract*";⁸² and "*And when I look at the four contracts that are up for negotiation, if you look at the suppliers under Seriti and South32, the Seriti supply ends in – ended in [REDACTED] and we are negotiating. The others end – the other three under their portfolio all ... end in [REDACTED] And I don't see South32, except South32's Khutala supplier, I don't see how South32's resources and reserves would affect the renegotiation in [REDACTED], because they merged or not merged.*"⁸³ In relation to future

⁷⁸ Nagar, Transcript pages 623 and 624.

⁷⁹ Nagar, Transcript page 676.

⁸⁰ Nagar, Transcript page 641.

⁸¹ Nagar, Transcript page 674.

⁸² Nagar, Transcript page 680.

⁸³ Nagar, Transcript page 677.

negotiations, Nagar further testified that any future negotiations between Eskom and Seriti would be contract specific.

129. Before we consider each relevant coal mining facility, we discuss the Leandra Project that the merging parties agreed to divest to a consortium of junior miners in the South African thermal coal mining industry.

Divestiture of the Leandra Project

130. Given the concentration of mineral resources under Seriti as a result of the proposed transaction, the Commission invited the parties to proffer remedies that may address this concern. This resulted in the commitment by the merging parties to divest of the Leandra Project, which is a thermal coal project located approximately 100km east of Johannesburg on the Gauteng/Mpumalanga border region and comprises what are known as the following areas: “Leandra Gauteng”, “Leandra Leeuwkop”, “Leandra Mpumalanga”, “Leandra Balance of Delmas” and “Leandra Winterhoek”. There currently are no mining rights associated with this resource; it has prospecting rights.

131. The evidence was that Leandra is a large coal resource⁸⁴ which comprises approximately one third of SAEC’s total resources.⁸⁵ The Commission’s Report confirms that Leandra is the largest unmined resource under the SAEC portfolio, comprising about 36% of its total unmined coal resources.

132. In terms of the divestiture conditions that the Tribunal imposed, Seriti must dispose of the Leandra Project to a consortium which is intended to include BEE entities, junior miners, women, youth, the community and workers. The purchaser of the divested business i.e., any pending or awarded prospecting right(s) and/or mining right(s) associated with the Leandra Project, must be independent and shall not directly or indirectly be affiliated or related to either of the merging parties and shall include junior miners. The imposed conditions further require that in selecting

⁸⁴ Nagar, Transcript page 436.

⁸⁵ Falconer, Transcript page 747.

the purchaser, a purchaser which meets the following requirements shall enjoy preference:

- (i) employee participation (5%);
- (ii) community participation (5%);
- (iii) youth participation;
- (iv) the participation of BEE controlled junior miners (being smaller scale miners operating in the domestic market); and
- (v) BEE female participation (5%).

Other coal facilities

133. We next consider each of Seriti's and SAEC's coal facilities separately in terms of its current supply to Eskom and potential supply to third parties. We start with the three relevant Seriti coal mines, New Vaal, New Denmark, and Kriel. We then consider the two SAEC coal facilities, Khutala and Ifalethu. We also consider the SAEC export mines, Wolvekrans and Klipspruit. Finally, we consider certain development projects.

New Vaal (Seriti)

134. The New Vaal mine is a very large-scale opencast mine located on the Free State side of the Vaal River.⁸⁶ It is connected via a 400m conveyor belt system to the Lethabo power station to which it is exclusively committed in terms of a cost-plus contract.⁸⁷ The Lethabo power station was designed to utilise the coal specification produced at the New Vaal colliery. [REDACTED] Lethabo's requirements are sourced from [REDACTED] (also see [REDACTED] above).⁸⁸

135. Given that all of Lethabo's requirements are sourced from New Vaal, and all of the output of New Vaal is committed to Lethabo for the duration of the cost-plus

⁸⁶ Gain, Transcript page 759.

⁸⁷ Gain, Transcript page 759.

⁸⁸ Nagar, Transcript page 638.

contract, it follows that Seriti cannot supply coal from the New Vaal mine to any third party.

136. The CSA is expected to endure till [REDACTED] or [REDACTED].⁸⁹ In Eskom's view Seriti has sufficient reserves to supply Lethabo via New Vaal until [REDACTED].⁹⁰

137. From a coal quality perspective, New Vaal has the lowest quality coal in the system with a very low energy value that could not be used in other power stations, for example in Arnot. The coal is suitable only for Lethabo.⁹¹ This also means that this coal cannot be exported due to its low quality.

138. Gain indicated that apart from the current mining reserves, New Vaal has extensive life extension reserves, which are available to be developed should Eskom desire that coal post the end of the current contractual period.⁹² He indicated that there are [REDACTED] for Seriti in relation to New Vaal's additional reserves given the [REDACTED] - the future coal production [REDACTED] [REDACTED].⁹³ Thus, given the [REDACTED] of the coal, as well as New Vaal's [REDACTED], Seriti's outside options for the coal supplied from New Vaal are [REDACTED].

139. There are no SAEC reserves near New Vaal that could compete with Seriti for potential supply to Lethabo.⁹⁴ Gain testified that SAEC has no coal assets that are capable of competing with the New Vaal mine (or its life extension) on any reasonable basis.⁹⁵ He indicated that SAEC's Klipspruit mine (which is an export mine) would be the closest mine to Lethabo, but that it is more than 100km from New Vaal, which would make the transport costs punitive and unfeasible.⁹⁶

⁸⁹ Gain, Transcript page 759.

⁹⁰ Nagar, Transcript pages 462 and 638.

⁹¹ Nagar, Transcript page 442. Gain, Transcript pages 759 to 760.

⁹² Gain, transcript page 760.

⁹³ Gain, transcript page 760.

⁹⁴ Gain, Transcript pages 761 and 806.

⁹⁵ Gain, Transcript page 806.

⁹⁶ Gain, Transcript page 806.

140. Given the above, there is currently and for the duration of the supply contract no competition between Seriti and SAEC in relation to New Vaal's supply to Eskom's Lethabo power station. Nor was there any evidence to suggest that SAEC and Seriti could compete with each other in relation to a contract for any extension arrangement after 2029.

New Denmark (Seriti)

141. New Denmark is an extensive underground mine situated in the Standerton region in South-Eastern Mpumalanga. The colliery is connected via a 7km conveyor belt system to the Tutuka power station which was designed to utilise the coal specification produced at the New Denmark colliery. It is a cost-plus mine dedicated to Tutuka meaning that the coal is ring-fenced and dedicated to Eskom and cannot compete with any other mine until the expiry of the CSA.

142. The CSA is expected to expire in approximately [REDACTED]⁹⁷ - although Eskom's position is that it will expire [REDACTED]. Gain confirmed that there is a [REDACTED] when the coal supply agreement ends; Seriti's view is that the coal supply agreement will terminate on or round [REDACTED], being the [REDACTED] of the power station and the delivery of some [REDACTED] of coal from the initial commissioning of the six-boiler set at that power station.⁹⁸

143. Seriti has a mining right in relation to the [REDACTED], an [REDACTED] and Gain indicated that [REDACTED] will enable New Denmark to [REDACTED].⁹⁹

144. In terms of its geographic location in the Standerton region, New Denmark is located 80 to 100km from the heartland of the Witbank coalfields.¹⁰⁰ Gain submitted that because of this distance, absent the merger, New Denmark would not face

⁹⁷ Gain, Transcript pages 761 and 762.

⁹⁸ Gain, Transcript pages 761 and 762.

⁹⁹ Gain, Transcript page 762.

¹⁰⁰ Gain, Transcript page 762.

any significant competition from any of the SAEC resources – *“From a geographic perspective Standerton is stranded from the heart of the Witbank basin and exists ... some 60 to 80 kilometres from the theoretically competing SAEC assets. That distance ... would make it commercially unfeasible on any volume or long-term basis to enable SAEC to provide a reasonable alternative solution to Tutuka”*.¹⁰¹ Thus, the merging parties contended that it is unlikely for there to be competitive rivalry between SAEC and Seriti in relation to the supply of coal to Tutuka and we have no evidence to dispute this.

Kriel

145. The Kriel power station is located in the heart of the Witbank coalfield area and is currently supplied by various suppliers with Seriti as the baseload supplier.¹⁰² The Kriel colliery is connected via a 2.5km conveyor belt system to the Kriel power station and the power station was designed to utilise the coal specification produced at the Kriel colliery. The entire output of the Kriel colliery was dedicated to Eskom in terms of a cost-plus CSA.

146. The original CSA has expired – the agreement ended in [REDACTED].¹⁰³ Nagar indicated that Eskom has extended the current agreement for [REDACTED] and is considering further extending the cost-plus agreement, for which it already is in substantial negotiations with Seriti.¹⁰⁴

147. From a volume perspective, Gain’s evidence was that due to Eskom’s perpetual underinvestment in the Kriel cost-plus mine, the supply volumes to the power station have dropped significantly over the last five or six years.¹⁰⁵

¹⁰¹ Gain, Transcript page 809.

¹⁰² Gain, Transcript page 809.

¹⁰³ Nagar, Transcript page 636.

¹⁰⁴ Nagar, Transcript pages 464, 465 and 636.

¹⁰⁵ Gain, Transcript page 763.

148. The Kriel mine has two sets of reserves and potential expansion projects, being an open cast mine and an underground mine.¹⁰⁶ Eskom has [REDACTED] [REDACTED] in relation to the underground mine;¹⁰⁷ it [REDACTED] [REDACTED] for the development of the first life extension on the underground side, and thus coal supply from Kriel [REDACTED] [REDACTED]¹⁰⁸

149. Gain indicated that Seriti's Kriel coal resources could supply the Kriel power station for the rest of its useful life, which they understand is going to track until around [REDACTED]¹⁰⁹

150. In terms of outside options, Gain's evidence was that Seriti will [REDACTED] [REDACTED] for this coal [REDACTED] because it will [REDACTED] the coal that it intends to mine on [REDACTED] [REDACTED] and the coal [REDACTED]¹¹⁰

151. Gain furthermore testified that there are no operating SAEC mine which would be a [REDACTED] to the Kriel mine - "*Klipspruit ... is [REDACTED]. Ifalethu is [REDACTED]. Wolvekrans is [REDACTED]. Pegasus is [REDACTED]. There are [REDACTED] in the SAEC stable, which could otherwise [REDACTED] the Kriel contract*".¹¹¹

152. In conclusion, there is no evidence of existing or potential future competition between SAEC and Seriti in relation to the supply of coal to the Kriel power station.

¹⁰⁶ Gain, Transcript page 763 and Nagar, Transcript page 636.

¹⁰⁷ Gain, Transcript page 763.

¹⁰⁸ Gain, Transcript page 763.

¹⁰⁹ Gain, Transcript page 765.

¹¹⁰ Gain, Transcript pages 764 and 812.

¹¹¹ Gain, Transcript pages 809 to 810.

Khutala (SAEC)

153. Khutala is a large-scale mine that has a cost-plus contract to supply Eskom's Kendal power station. The mine is connected via a conveyor belt system to the Kendal power station.
154. The existing agreement is expected to expire in [REDACTED].¹¹² Eskom however estimates that the existing reserves might be exhausted sooner.¹¹³ Nagar's view was that it sees the Khutala mine supplying six to seven million tonnes till about 2028.¹¹⁴ The merging parties also indicated that the current reserves are estimated to be exhausted by [REDACTED]. However, Khutala has [REDACTED] [REDACTED] which [REDACTED].¹¹⁵ A potential life extension project at Khutala is currently the subject of consideration by Eskom.¹¹⁶
155. Falconer testified that the entire resource of Khutala (with the exception of the five-seam coal, which is a very small fraction of the overall production, and potentially exportable) are dedicated to Eskom.¹¹⁷
156. Regarding the coal quality and outside options, the merging parties indicated that the Khutala coal from the two and four seam is of a fairly low Eskom quality and is not exportable.¹¹⁸
157. Geographically the Kendal power station is located near the Kusile power station.¹¹⁹ Nagar indicated that there are other mines in the vicinity of the Khutala colliery, including Seriti's New Largo. The merging parties however submitted that as far as New Largo is concerned, once that is dedicated to supply coal to Kusile

¹¹² Gain, Transcript page 766.

¹¹³ Nagar, Transcript page 635.

¹¹⁴ Nagar, Transcript page 635.

¹¹⁵ Gain, Transcript page 766.

¹¹⁶ Nagar, Transcript page 635.

¹¹⁷ Falconer, Transcript page 743. Gain, Transcript page 766.

¹¹⁸ Gain, Transcript page 766.

¹¹⁹ Nagar, Transcript page 471.

(which is a precondition for the development of the main mine), it will not be a meaningful alternative for the supply of coal to Kendal.

158. We have no evidence to contradict the merging parties view of a lack of competition between Seriti and SAEC in relation to the supply of coal to the Kendal power station.

Ifalethu (SAEC)

159. SAEC is required to supply ■ Mtpa to the Duvha power station in terms of a fixed price CSA. The Ifalethu mine is connected via a conveyor belt system to the Duvha power station.

160. SAEC is committed to supply the Duvha power station until ■■■■■.¹²⁰ Eskom has a contractual option to extend the contract on the same terms and conditions for a further ■■■■■ period until ■■■■■¹²¹ and has indeed elected to extend this coal supply agreement to ■■■■■.¹²²

161. Regarding the coal quality and outside options, the merging parties submitted that the quality of coal required at Duvha is very high by Eskom standards and that Seriti does not have any nearby resources of such a calibre. The merging parties further submitted that none of Seriti's operations are potential alternatives to Ifalethu in relation to the supply of coal to Duvha as they are all committed to specific Eskom plants (or are in the process of being so committed).

162. As mentioned above, the merging parties claim that the Duvha CSA is a loss-making contract as SAEC's costs of mining are significantly higher than the fixed price at which it supplies coal to Eskom.¹²³ SAEC and Eskom are engaged in

¹²⁰ Nagar, Transcript pages 465 and 634.

¹²¹ Nagar, Transcript pages 443, 465 and 634.

¹²² Nagar, Transcript page 634.

¹²³ Nagar, Transcript page 634.

negotiations arising from the invocation of hardship by SAEC.¹²⁴ As also indicated above, one of the conditions precedent to the proposed merger is that SAEC and Eskom enter into an amendment to the Duvha CSA or a restatement of the Duvha CSA in order to address the current loss-making and uneconomical nature of the contract. This means that Eskom effectively has a veto right over the merger. Nagar confirmed “*we need to solve the hardship issue or the financial distress at, call it, the Ifaethu Wolvekrans Complex ... it is my understanding that one of the CPs to, call it, Seriti ...buying the shares of SAEC is that they have to find a financially viable or, and a sustainable solution for this complex*”¹²⁵.

Wolvekrans (SAEC)

163. The SAEC Wolvekrans mine, which forms part of the Middelburg Mining Services complex (along with Ifaethu),¹²⁶ is an export-orientated mine. Nagar indicated that it is currently on care and maintenance.¹²⁷

164. Falconer testified that the project to mine Wolvekrans through pillar mining would entail washing the coal that is produced at the mine in order to remove the discard and “*tramp metal*” and having washed the coal it would make sense to upgrade the coal to export it.¹²⁸ Gain confirmed that the Wolvekrans complex has “*expensive and well-functioning wash plants.*”¹²⁹

165. Given that Seriti does not produce any export quality coal, there is currently no overlap between the Seriti coal mines and the Wolvekrans mine and given its export ability, it follows that Wolvekrans is unlikely to be a meaningful source of potential coal supply to Eskom in the future.

¹²⁴ Nagar, Transcript pages 443 and 465.

¹²⁵ Nagar, Transcript page 653.

¹²⁶ Formerly known as the Wolvekrans Middelburg Complex or ‘WMC’.

¹²⁷ Nagar, Transcript page 555.

¹²⁸ Falconer, Transcript page 742.

¹²⁹ Gain, Transcript page 768.

Klipspruit (SAEC)

166. The Klipspruit mine is an export mine with the overwhelming majority of its output being exported. Nagar confirmed Klipspruit being an export-focussed mine that it is not geared for Eskom and that does not currently supply Eskom;¹³⁰ Eskom has no relationship with Klipspruit colliery at this point in time.¹³¹
167. Of relevance is that the Klipspruit colliery is located adjacent to the Phola washing plant (which is part owned by SAEC) and thus SAEC has an incentive to use the available capacity at this plant by processing offtake from Klipspruit for export purchases. Also worth noting is that SAEC has take-or-pay obligations of [REDACTED] Mtpa with Transnet in respect of the railway into RBCT ([REDACTED] Mtpa if its annual option to acquire additional rail capacity is exercised) and thus has an incentive to export any export quality coal it produces (until those obligations have been met).
168. The Klipspruit main pit is nearing the end of its life and Falconer's evidence was that the expansion project in relation to Klipspruit is to extend the life of the mine as an export operation.¹³²
169. Given that Seriti currently does not produce any export quality coal, there is no overlap between the Klipspruit mine and any of Seriti's mines. Furthermore, given Klipspruit's current and future export-orientation it is unlikely to be a potential meaningful constraint in the supply of coal to Eskom.
170. We next consider the merging parties' future projects, including Seriti's New Largo plans and SAEC's Pegasus and Naudesbank projects. Leandra, which is the subject of the divestiture condition, has been dealt with above.

¹³⁰ Nagar, Transcript pages 497 and 643.

¹³¹ Nagar, Transcript page 655.

¹³² Falconer, Transcript page 742.

New Largo (Seriti - to supply Kusile)

171. Gain confirmed that New Largo has been earmarked for the supply of coal to Kusile.¹³³ Eskom's Kusile power station was built next to New Largo as the intention is that Kusile would obtain its baseload requirements from New Largo.¹³⁴ Kusile was designed to utilise the coal specification produced at New Largo and it is intended that a conveyor belt system will be constructed to connect the colliery to the power station. New Largo comprises a [REDACTED] resource¹³⁵ that will be capable of supplying [REDACTED] Mtpa to [REDACTED] for [REDACTED]. The merging parties indicated that the development of New Largo would be [REDACTED]
[REDACTED].¹³⁶

172. At this point in time Kusile however does not have a dedicated mine supplying coal to it.¹³⁷ All of Kusile's current coal requirements are being supplied by other miners. According to Nagar, because Eskom has to go through procurement process and hurdles, no agreement has been signed with Seriti.¹³⁸

173. The merging parties further submitted that once New Largo is committed to Kusile, its production will not be an alternative to any other coal produced. There is also no evidence to suggest that any existing SAEC mine represents a credible outside option for baseload coal supply to Kusile.

174. In conclusion, there is no evidence that the proposed merger will change Eskom's outside options in relation to Seriti's New Largo development project. Eskom's outside options include supplies from other miners for part of the anticipated coal needs of Kusile (as mentioned above, currently all of Kusile's coal supply come from other miners since no agreement is in place with Seriti). This does not change as a result of the proposed merger.

¹³³ Gain, Transcript page 767.

¹³⁴ Gain, Transcript page 773; Nagar, Transcript page 468.

¹³⁵ Nagar, Transcript page 497.

¹³⁶ Gain, Transcript page 773.

¹³⁷ Nagar, Transcript page 468.

¹³⁸ Nagar, Transcript pages 469 and 498.

Pegasus (SAEC project)

175. According to the Commission, Pegasus is estimated to start producing around 2025 and there has been no expression of interest by Eskom to buy any coal from Pegasus (and Leandra, see below) to date.

176. Pegasus is a small resource (13 mt) of inherently high-quality coal reserves located North of Witbank. It is short-life opportunity and will be exhausted within a four-to-five-year period¹³⁹ - only approximately 1 to 1.5 Mtpa of coal is expected to be extracted over a period of approximately five years.

177. SAEC submitted that as its own production is dropping, it will have to find new export quality coal in order to meet its take-or-pay obligations (as mentioned above).¹⁴⁰ Gain's testimony was that Pegasus contains high quality exportable coal and that SAEC will need to export this coal in order to meet its obligations to Transnet Freight Rail (and thereby avoid penalties), as well as to earn revenue to address its significantly loss-making position.

178. In summary, the evidence was that Pegasus has too small a reserve to meaningfully supply Eskom on a long-term basis, will be unable to compete to be a baseload supplier to Eskom, and will be export-focussed.

Naudesbank (SAEC Project)

179. Naudesbank is located close to Breyton in Mpumalanga – near Carolina. It is principally an export project.¹⁴¹

180. Gain testified that Naudesbank is running some [REDACTED] Pegasus and [REDACTED] The expectation is to be in a position within the [REDACTED] to commence mining at Naudesbank,

¹³⁹ Falconer, Transcript page 746. Gain, Transcript pages 770, 772 and 802.

¹⁴⁰ Gain, Transcript pages 769 to 770.

¹⁴¹ Gain, Transcript pages 771 and 820.

albeit it [REDACTED].¹⁴² He further testified that, owing to [REDACTED] and the area being a [REDACTED] area, and depending on how one would actually mine the reserve, some [REDACTED] would be extractable.¹⁴³

181. Given the above, the merging parties submitted that Naudesbank is unlikely to be a meaningful constraint to any of the Seriti coal resources when the relevant long-term agreements end as (i) it is not located close to any of these reserves; (ii) it will principally be an export mine; and (iii) it is of a relatively modest size.

Conclusion on individual coal facilities

182. Based on the above analysis per coal facility, we conclude that there is no evidence that suggests that the proposed merger would not result in a relaxation of any pre-merger competitive constraint that Seriti and SAEC have on each other in the supply of coal to specific Eskom power stations, or any meaningful constraint absent the proposed merger.

183. Having assessed each coal facility/project separately, we next consider the outside options of the parties from a broader perspective.

Parties' outside options

184. Recall that the Commission found that in the event the parties fail to reach an agreement with Eskom for the various contracts, it is unlikely that Eskom's outside options will be able to sufficiently supply the affected Eskom power stations. We concur with this finding. We have also found that Eskom's countervailing power is nuanced and must be assessed at a specific point in time considering the prevailing circumstances and real alternatives available to Eskom.

185. As set out above, the history relating to the establishment of each of the power stations is that Eskom selected an appropriate coalfield or reserve and established

¹⁴² Gain, Transcript page 804.

¹⁴³ Gain, Transcript pages 771, 820 and 821.

a power station at or close to that coal reserve. This means that the relevant Eskom power station is designed to burn the coal from the specific coal reserve, and also that the power station and the mine are connected by way of a conveyor belt to minimise logistics costs.¹⁴⁴ Furthermore, Eskom contracted with the baseload supplier on the basis of long term often referred to as “life of mine” cost-plus or fixed price contracts. From Eskom’s perspective the long-term supply arrangements give it security of supply, the requisite quality of coal, and it avoids the logistics costs associated with transportation of the coal via road and/or rail.¹⁴⁵

186. In the case of the multiproduct mines, the possibility exists theoretical that supply to the export market or the domestic market (i.e., customers other than Eskom) could be prioritized over Eskom. This may pose a risk to Eskom and affect its security of supply.

187. As regards the ability to export coal from South Africa, the Commission noted that the market for lower grade coal has changed significantly over the past decade: whereas this was traditionally a monopsonistic market with Eskom as the only buyer, the growth in demand for low-grade coal from other developing countries (specifically in South-East Asia) has created opportunities/competition for this coal. It stated that a decline in South Africa’s geological profile and lessening demand from Europe and Japan has resulted in South African thermal coal producers exporting coal of a lower average quality into new markets and market sectors.

188. The Commission noted that coal producing firms in South Africa may prioritize sales to the export market if they are able to obtain higher prices in those markets. This may be possible due to these firms benefiting from the weakness in the ZAR/USD exchange rate.

¹⁴⁴ Nagar, Transcript page 415.

¹⁴⁵ Nagar, Transcript pages 415 and 416.

189. Eskom indicated to the Commission that more diversion by the merging parties of coal to exports post merger may have the implication that less reserves are available to supply it in future. Thus, the merging parties could potentially increase their export volumes post merger by beneficiating (washing) coal to an export grade. Recall that Seriti will be a new entrant in the export market and may therefore have different export strategies than SAEC.
190. The relevant issue to consider in the context of this transaction is if the proposed transaction changes incentives and outside options. Seriti's incentive to post merger divert coal and supplement exports will depend *inter alia* on the profit margins gained from the export of the coal versus the cost of the penalty (as per its contractual terms with Eskom).¹⁴⁶ Other considerations include the additional costs to upgrade i.e., wash the coal.
191. In the analysis of Seriti's potential outside options other factors must be factored in such as that there are currently infrastructure restrictions in port allocation, rail capacity issues and take-or-pay agreements with Transnet.¹⁴⁷
192. The merging parties advanced the following reasons why the proposed transaction would not result in any change in their thermal coal export volumes or a change in Seriti's incentives in relation to the export of coal from South Africa post transaction:
- (i) the three relevant Seriti coal mines are dedicated to the supply of a particular grade of coal to Eskom. This means that Seriti does not produce any coal which could be exported as all of the coal which it produces is dedicated to Eskom in terms of its contractual commitments to Eskom;
 - (ii) the quality of coal produced at these mines is such that it is not suitable for export and the coal would have to be upgraded in order to make it viable to export;

¹⁴⁶ Witness statement of Edward-Pesha, paragraph 10.2.

¹⁴⁷ Witness statement of Edward-Pesha, paragraphs 10.1 and 10.2.

- (iii) SAEC already exports the majority of coal from two of its mines namely Klipspruit and Wolwekrans while Ifalethu and Khutala are dedicated to the supply of thermal coal to respectively the Duvha and Kendal power plants and this coal could not (absent the consent of Eskom) be diverted to the export market; and
- (iv) given the significant penalties prescribed in the CSAs between SAEC and Eskom, it would not be a rational strategy for the merged entity to breach the CSAs in order to divert coal production into the export market, as the extent of the penalties in the CSAs would negate the benefit of any increased price achieved in the export market (hence this strategy would not ultimately be a profitable one for Seriti).

Cost-plus CSAs

193. Recall that for the cost-plus mines the methodology for compensating the coal mining firm is set out in the CSA. Eskom typically pays the operating costs, negotiates the quantum of the investment it will make and is responsible for the rehabilitation at the end of the operation of the mine.¹⁴⁸ Eskom is exposed operationally and financially to the contract and therefore involved in assessing and approving the costs of the cost-plus mines.¹⁴⁹ Therefore, according to Eskom, it regards the cost-plus mines as effectively a form of vertical integration, described by Nagar as “*contract miner*” arrangements;¹⁵⁰ “*So, you get a lot more detail into, call it, the engine room of the cost-plus mine than you would in any other agreement.... So, those are – you get into a lot of detail in terms of approving those cost categories and understanding what the mine is doing.*”¹⁵¹

194. The reserves of the cost-plus mines are dedicated to Eskom and the miner cannot divert the coal to any other customer (whether domestic or an export customers) – “*... they cannot take that coal and supply it to anybody else. They*

¹⁴⁸ Nagar, Transcript page 417.

¹⁴⁹ Nagar, Transcript pages 505 and 506.

¹⁵⁰ Nagar, Transcript page 499. Also see Gain, Transcript page 818.

¹⁵¹ Nagar, Transcript page 506.

*can only take that reserve and mine it for Eskom's use. So there's a reserve that's dedicated to Eskom"*¹⁵². Gain testified: *"all of our cost-plus reserves ... across our three mines are [REDACTED]. ... We don't enjoy the [REDACTED] [REDACTED] coal to [REDACTED] markets"*.¹⁵³

195. Nagar further indicated that from Eskom's perspective the coal reserves associated with the current cost-plus agreements are not of a sufficiently high quality that the coal mines could (convert this to a fixed price mine) and exploit this as an export opportunity.¹⁵⁴

196. The available evidence therefore suggests that there would not be any significant diversion of coal produced at the merging parties' cost-plus mines without Eskom's agreement. This would apply to the Kriel, New Denmark, New Vaal and Khutala coal that is dedicated to Eskom.

Fixed price CSAs

197. Recall that since the fixed term contract mines usually are multiproduct mines, they may sell their coal to multiple customers, including to the export market. One existing fixed price contract is relevant, i.e., the Duvha CSA.

198. Essentially, considering SAEC's RBCT export entitlement, the merged entity's ability to divert additional coal volumes to exports post merger would be limited to the capacity that is currently not utilised by SAEC through its own production. The merging parties submitted that SAEC currently utilises its full RBCT capacity, either through its own equity sales or coal buy-ins. According to SAEC, although there are differences between its effective RBCT entitlement of [REDACTED] Mtpa and the amount actually utilised, this can be attributed to factors such as that the RBCT does not run at full capacity as it is constrained by Transnet's Freight Rail's capacity

¹⁵² Nagar, Transcript *inter alia* pages 424, 425 and 614.

¹⁵³ Gain, Transcript page 767.

¹⁵⁴ Nagar, Transcript page 650.

on the Richards Bay Rail Line (which links into RBCT), which has a nameplate capacity of only 81 Mtpa.

199. A further possibility is that the merged entity could lease RBCT capacity from other third parties to export more coal. However, because of the Transnet railway capacity issue, the Commission was unable to ascertain practically what exact RBCT capacity is not utilised in any given year.

200. A further potential concern raised was that any increase in exports post merger could mean that less of SAEC's available RBCT capacity could be leased to junior miners. SAEC (under Seriti) may also no longer purchase coal from junior miners for export purposes. We shall assess these issues below under public interest.

201. Considering the relevant mines, the Klipspruit and Wolwekrans mines pre-merger are mainly dedicated to exports with minimal volumes sold to domestic customers. We also note that there are currently no contracts for these two mines to supply coal to Eskom.

202. For the Duvha CSA, although the mine is not restricted from also selling coal to other domestic customers or exporting the coal, there is a contractual obligation for the mine to meet the contractual volume requirement of Eskom for the duration of the contract. However, as noted, a higher diversion of coal to exports may hold the risk that the relevant coal reserves may be depleted before the Eskom contract ends.

203. Eskom confirmed that an undersupply of coal in terms of the fixed price contracts will incur penalties.¹⁵⁵ Thus, from a security of supply perspective Eskom has some contractual remedies for undersupply as per the agreed contracts.¹⁵⁶

204. Recall further that Eskom has a veto right relating to Duvha – it must consent to the transfer of ownership in terms of the Duvha contract and Eskom would have

¹⁵⁵ *Inter alia* Witness statement of Edward-Pesha, paragraph 10.1.

¹⁵⁶ Witness statement of Mazibuko, paragraph 9.1.2.

to agree to an appropriate Duvha solution (as this is a condition precedent to the transaction). Eskom could also impose pre-conditions to its consent if it believed that was necessary. This will be informed by a due diligence.¹⁵⁷

New Largo

205. In relation to potential coal exports from Seriti's New Largo coal mine (of which the intention is to develop to supply the Kusile power station under a fixed term contract), we noted that this contract is still under negotiation. We have indicated that the merging parties submitted that given the [REDACTED] of the proposed mine and the [REDACTED] coal which it would produce, Eskom is the [REDACTED] for the New Largo reserves, and we have no evidence that contradicts this.

206. Given the above, we conclude that there is no credible evidence pointing to the proposed merger significantly altering the merging parties' outside options in relation to the diversion of sales from Eskom to export markets.

Conclusion on competition effects

207. Given the evidence as a whole and considering the evidence of Eskom as the key customer, read with the set of conditions that we have imposed, including the divestiture and information sharing conditions, we have approved the proposed transaction. Other than the public interest conditions dealt with below, our decision is informed by *inter alia*:

- (i) the divestiture of SAEC's Leandra Project, a substantial coal resource, to a consortium which is intended to include BEE entities, junior miners, women, the youth, and community and worker participation;
- (ii) the characteristics of Seriti's long-term cost-plus CSAs of which all three existing coal mines are tied to Eskom;

¹⁵⁷ Nagar, Transcript page 702.

- (iii) pre-merger the SAEC's mines are export-orientated or tied to an Eskom power station through a long-term CSA (i.e., the Kendal cost-plus CSA and the fixed price Duvha CSA);
- (iv) the number and characteristics of the cost-plus and the fixed price CSAs – namely, one cost-plus and one long-term fixed price CSA will be added to Seriti's three cost-plus CSAs;
- (v) the particular circumstances regarding the Duvha fixed price CSA given the declared hardship and Eskom's veto power in that regard;
- (vi) the available evidence per coal facility/power station that suggests that the proposed merger will not result in a relaxation of any pre-merger competitive constraint that Seriti and SAEC have on each other in the supply of coal to Eskom, or any significant constraint existing between them absent the proposed transaction;
- (vii) an evaluation of the outside options of the merging parties regarding the coal that they currently supply to Eskom and that they potentially could supply to Eskom in future, which suggests that the proposed merger will not significantly enhance the outside options available to the merging parties post merger; and
- (viii) no distinct evidence that the proposed merger will significantly enhance the merging parties' bargaining power in future negotiations.

208. We note that we have in our overall decision to conditionally approve the proposed transaction considered the positive effects of the proposed transaction on certain public interest considerations, as discussed next.

209. Given the high levels of concentration in the supply of thermal coal to Eskom and the security of supply/sector concerns associated with that, in relation to the competition effects, we recommend that the Commission in future transactions involving thermal coal supply to Eskom focus specifically on potential competition effects in the context of the extension/expansion/renewal of existing contracts as well as new contracts relating to future coal projects, and the likely impact of the merger on negotiation dynamics in relation to those contracts.

PUBLIC INTEREST

210. The Commission assessed a number of public interest issues, including:
- (i) the impact of the proposed transaction on employment including likely job losses and the Employee Trust;
 - (ii) effects on a particular industrial sector including industry concertation (in terms of mining rights and reserves), the effect on procurement, social and labour plans, potential diversion of coal to the export market, RBCT capacity allocations and a Community Trust; and
 - (iii) effects on small business and ownership including any potential impact on junior miners.
211. As noted above, following the Tribunal hearing and questions raised, the merging parties tendered a revised set of remedies.

Effects on employment and the Employee Trust

Employment

212. The merging parties submitted that SAEC will remain a separate legal entity, with its own rights and obligations concerning employees. In other words, SAEC and its underlying businesses will continue to operate in the ordinary course post transaction and all the employees of Seriti and SAEC will remain employed by their current employer.
213. The merging parties further confirmed that the proposed transaction will not affect or change any contractual relationships currently in place between Seriti and its employees, nor between SAEC and its employees. Accordingly, the proposed transaction will not give rise to any change in the working conditions of any Seriti or SAEC employees and will similarly not affect any collective bargaining agreements in place at Seriti or SAEC.
214. The merging parties also indicated that their currently operating coal mines are not geographically near to each other and as such there is no job duplications that could arise from the proposed transaction at a mine level. They however indicated

that the proposed transaction may result in certain duplication at head office or back-office level impacting an anticipated maximum 25 positions.

215. Given the potential retrenchment of up to 25 employees as a result of duplications, the Commission concluded that these retrenchments are merger-specific. We concur that these job losses would be merger-specific.

216. To contextualise the number of retrenchments, we note that the merging parties' combined workforce (including contractors) is 12 066. SAEC employs 4 731 employees: 4 522 permanent employees and 209 fixed-term contract employees. Seriti employs a total of 7 335 employees: 3 919 permanent employees and 3 416 contractors.¹⁵⁸

217. In terms of the skills levels of the 25 affected positions, Seriti submitted that the affected positions involve employees that can either be classified as professionally qualified and experienced specialists (on the low end) or top management/executives (on the high end).

218. Given the merging parties' total employment numbers, the Commission concluded that the up to 25 potential retrenchments are not substantial. It however remained concerned that there may be further post-merger retrenchments. Therefore, in order to ensure that the merging parties limit the retrenchments as a result of the proposed transaction to a maximum of 25 employees as identified, the Commission recommended that the proposed transaction should be approved subject to the condition that the retrenchments be capped at a maximum of 25 skilled employees (within the identified 25 affected positions).

219. We approved the proposed transaction subject to the condition that with the exception of the 25 Affected Employees¹⁵⁹ which have been identified as being potentially duplicative, the merged entity shall not retrench any permanent or fixed-

¹⁵⁸ Commission's Report, paragraph 457.

¹⁵⁹ "Affected Employees" mean 25 skilled employees employed in job positions within the merged entity and that fall within the Paterson job grading of grade D and above.

term contract employees of the merging parties as a result of the merger for a period of 24 months from the implementation date of the transaction.

220. The above condition adequately addresses any employment concerns associated with the proposed transaction.

SAEC Employee Trust

221. The proposed transaction entails the establishment of the SAEC Employee Trust as a condition to the merger approval. The Employee Trust will acquire 5% of the issued share capital of SAEC on a free-carry basis. It was confirmed during the Tribunal hearing that the Employee Trust has been established and registered.

222. The Commission noted that employees in permanent employment will benefit under the Employee Trust as and when shareholder dividends are declared by SAEC and received by the Employee Trust. However, for purposes of continuity and to enable the benefits accruing under the Employee Trust to not only flow to current qualifying employees but also future qualifying employees, the ESOP has been structured as a trust. The Commission concluded that the SAEC Employee Trust will provide a positive economic empowerment effect towards the SAEC employees.

223. It was confirmed during the hearing that the beneficiaries of the Employee Trust will include all permanent employees of SAEC (including its subsidiaries).

224. The Employee Trust will be administered by trustees for the benefit of all qualifying employees. The first trustee of the Employee Trust shall ensure that five additional trustees are appointed as follows:

- (i) two persons which have been nominated by the Employee Trust Founder (being Thabong Coal) in writing; and
- (ii) three persons which have been nominated by a forum established by the Employee Trust Founder who, through a recognised trade union, represents and promotes the interests of at least 75% of the qualifying

employees (the “Forum”). Such persons shall be participants (of the Employee Trust) and at least one person shall be a black person who is female.

225. The merging parties submitted that the trustees of the Employee Trust will allocate benefits to such persons or categories of persons who are permanently employed by SAEC or any of its subsidiaries, which benefits will confer on the participants the right to, in essence: (i) receive at least 85% of the distributions declared and paid by SAEC (in respect of the ordinary shares in SAEC held by the Employee Trust from time to time (the “Shares”)) in accordance with their respective participation percentage; (ii) instruct the Trustees to vote the Shares in SAEC at a shareholder meeting; and (iii) receive any remaining assets of the Employee Trust (if any), or the proceeds thereof if they are sold, in the event of a winding-up of the Employee Trust.

226. The merging parties further submitted that the Forum would undertake to consult with at least 90% of the qualifying employees (whether directly or indirectly, through trade unions (whether such trade unions are recognised by SAEC or not) regarding who to nominate as trustees, prior to making such nominations.

227. We approved the proposed transaction subject to the condition that the Employee Trust shall acquire ordinary shares constituting 5% of the issued share capital of SAEC pursuant to the implementation of the merger. Furthermore, no less than 85% of the benefits allocated to employees will be allocated to participants who are black persons. These conditions represent an increase in the levels of ownership for the benefit of workers compared to the pre-merger situation since there is no equity participation by employees or by the community(ies) (dealt with below) in the SAEC business pre-merger. Furthermore, this 5% shareholding is being acquired by the SAEC Employee Trust on an unencumbered, ‘free-carry’ basis - that is, at no cost to the SAEC Employee Trust. The Employee Trust conditions therefore have a positive economic empowerment effect in relation to the qualifying employees.

HDP ownership including the Community Trust

HDP Ownership

228. The merging parties submitted that SAEC's BEE ownership level as determined under the Mining Charter is 36.5% of which 8.135% is attributable to equity ownership and the balance of which is attributable to credit arising from the historic sale of attributable units of production to BEE entities. Seriti, on the other hand, is a 90% black-owned mining group.

229. The merging parties also submitted that since SAEC will post merger be owned by a black-owned and controlled South African company, the proposed transaction will bring the equity ownership in and ultimate decision-making/strategic control over SAEC, that currently is in Australian hands, back to South Africa.

230. The Commission concluded that the proposed transaction would result in an increase in SAEC's BEE equity ownership level to approximately 90%. This is because Seriti has undertaken that Thabong Coal will be at least 90% black owned and controlled and at least 23% black woman owned and controlled, on an indirect basis, as contemplated by the B-BBEE Act and the B-BBEE Codes. We concur with this finding of the Commission.

Community Trust

231. Coal mining operations inevitably have an impact on the surrounding communities and therefore it is important for any parties contemplating a merger to engage with the affected communities to explain the proposed transaction, its structure and its implications, including its consequences and/or benefits for the communities.

232. A number of communities are affected by this proposed transaction - the merging parties submitted that in total some 28 community structures were consulted.

233. The Commission and merging parties agreed for the proposed transaction to be approved subject to the acquisition by a Community Trust of a 5% interest in SAEC for the benefit of the adjacent communities. This 5% shareholding is being acquired by a Community Trust on an unencumbered, 'free-carry' basis.
234. Various entities representing groups within the Phola Community (that were granted leave to intervene in the proceedings on public interest grounds, referred to as the "Intervenors") made submissions concerning the Community Trust and the Tribunal also raised various queries during the course of the hearing. These interventions resulted in the merging parties tendering an enhanced set of conditions in relation to the Community Trust.
235. Before we deal with certain of the concerns raised by the Intervenors, we outline the conditions that we imposed in relation to the Community Trust. These conditions relate to *inter alia* the shareholding of the Community Trust in SAEC, the beneficiaries of the Community Trust and its trustees.
236. In relation to the shareholding by the Community Trust in SAEC, we have approved the proposed transaction subject to the following conditions:
- "The transaction entails the acquisition of shareholdings in SAEC by Thabong ... and a Community Trust on a "carried interest" basis as defined in the mining Charter as follows: "... shares issued to ... host communities at no cost to them and free of any encumbrance...""; and*
- "The Community Trust shall acquire ordinary shares constituting five percent of the issued share capital of SAEC pursuant to the implementation of the Merger."*
237. Our imposed conditions furthermore deal with the beneficiaries of the Community Trust, the appointment of trustees and engagement with the communities in the affected areas. The imposed conditions are:

“The beneficiaries of the Community Trust shall reside in the “Affected Areas”, being the areas which are adjacent to the operational mines of SAEC and being the relevant “host communities” for the purposes of the Mining Charter (the “Affected Areas”). At least 85% of the beneficiaries will be historically disadvantaged individuals who will benefit from the trust activities (as listed in the Trust Deed of the Community Trust (the “Trust Deed”));

“At least one of the individuals to be appointed as trustee to the Community Trust shall be a person who has been nominated by the communities in the Affected Areas (through the Community Consultative Forum structure established by Seriti/Thabong) who meets the requirements of a trustee as stipulated in the Trust Deed”;

“Thabong will procure that the trustees of the Community Trust engage with the communities in the Affected Areas (through the Community Consultative Forum structure established by Seriti/Thabong) to identify appropriate trust activities which are suitable for the Community Trust to undertake and/or fund”; and

“Thabong will, within nine months of the Implementation Date, (i) procure that the trustees of the Community Trust identify the initial activities and/or projects to be undertaken for the benefit of the beneficiaries of the Community Trust and (ii) finalise, and/or procure that the trustees of the Community Trust finalise, the further appointments of trustees of the Community Trust”.

238. Amongst the concerns initially raised by the Intervenor was that the Community Trust has not been expressly and specifically established to acquire a 5% shareholding in SAEC. Our imposed conditions however clarify that the Community Trust will acquire a 5% shareholding in SAEC.

239. Other concerns/issues raised by the Intervenor included (i) an alleged lack of consultation in relation to the formation of the Community Trust; (ii) the lack of a clear identification of the Community Trust’s beneficiaries; (iii) that Seriti would

allegedly control the Community Trust; (iv) recommending that each of the communities adjacent to the relevant mining operations should have their own sub-trust; (v) that the Intervenors allegedly will be excluded from benefiting under the Community Trust; (vi) alleged “trickery” in relation to the New Largo Community Trust; and (vii) the merging parties’ alleged non-compliance with their committed social and labour plans.

240. Given that the merging parties enhanced their tendered conditions in relation to the Community Trust following queries and interventions from both the Tribunal and the Intervenors, we shall not deal with each of the abovementioned concerns/issues raised by the Intervenors but highlight some of the issues below (in the context of the imposed conditions).

Consultation

241. The Intervenors raised the concern that they were not consulted in regard to the establishment of the Community Trust. The merging parties however disputed any allegations in relation to a lack of consultation. We shall not in detail deal with the merging parties’ responses but provide a brief summary below that demonstrates their consultation process/initiatives.

242. The merging parties in correspondence with the Commission¹⁶⁰ confirmed that the proposed transaction would entail the establishment of a Community Trust that would acquire part of the issued share capital of SAEC. A forum – the Community Consultative Forum – was duly established “*to identify appropriate beneficiaries of the Community Trust and engage with them further*”.¹⁶¹ The terms of reference of the Community Consultative Forum were signed on 29 July 2020 and the terms of reference were acknowledged and agreed by a large group of community structures.¹⁶²

¹⁶⁰ Letter of 5 August 2020.

¹⁶¹ See pages 34 and 76 to 78 of the Intervention application.

¹⁶² Pages 67 to 78 of the Intervention application.

243. The merging parties further provided confirmation of consultative meetings held on 4, 9, 22 and 30 June 2020 with the Phola and Ogies communities. Further meetings were held on 13, 21 and 29 July 2020. There were also other meetings held on 17 and 21 September 2020 and 28 October 2020.¹⁶³

Recommendation for a separate Community Trust for each community

244. The Intervenors mooted that each community adjacent to a mining operation should have its own individual community trust or sub-trust. This suggestion however in our view was not adequately motivated. The merging parties argued that such an approach would not be workable and could be problematic from the perspective of the affected communities. They indicated that the linking of adjacent communities to a particular mining operation could create significant complications and have unintended consequences, for example, if the mining operation in question is not profitable or becomes dormant, it would be unfair to the communities adjacent to that operation that they should derive no benefit from the activities of the company as a whole. They argued that it would be better to pool the benefits in one trust to the benefit of all affected communities.¹⁶⁴ We found no convincing reasons in this case to deviate from the latter approach.

Seriti's alleged control over the Community Trust

245. The Intervenors raised the concern that the Community Trust would be controlled by Seriti and/or an alter ego of Seriti. We however note the following in this regard:

245.1. The powers of the Trustees are regulated by the Deed of Trust. Clause 8.1 states that there shall always be three trustees, no more and no less.

245.2. Clause 8.4.1 makes it clear that two out of the three trustees must be independent.¹⁶⁵

¹⁶³ Record pages 358 and 359.

¹⁶⁴ Also see Teke, Transcript page 387.

¹⁶⁵ Record pages 5982 and 5983.

245.3. The trustees can only act as prescribed by the Trust Deed. Their function is to oversee the discharge of the Trust activities which must be for the benefit of the community. The trustees may also not act in breach of their obligation under the Trust Property Control Act.

245.4. The Trustees would have an interest in ensuring that the beneficiaries of the Community Trust benefit from its proceeds.

246. On the evidence before us, and given the imposed conditions, we found no real remaining concern in relation to control of the Community Trust.

Beneficiary identification

247. The Intervenors raised questions regarding a clear mechanism for beneficiary identification. This issue was clarified during the hearing. The Deed of Trust constituting the SAEC Community Trust shows who the beneficiaries will be. Clause 7 of the Deed of Trust sets this out. Clause 7.4 sets out the criteria for eligibility.¹⁶⁶

247.1. First, the beneficiaries are *“individuals (of which at least 85% are Historically Disadvantaged Individuals¹⁶⁷) residing in any of the affected areas¹⁶⁸, for the sole purpose of such individuals receiving benefits arising out of the carrying on by the Trust itself of the Trust activities”*.

248. Second, *“groups of persons or communities located in the Affected Areas, for the sole purpose of such groups of persons or communities receiving benefits arising out of the carrying on by the Trust itself of the Trust Activities, provided that such groups of persons or communities shall comprise of predominantly Historically Disadvantaged Individuals residing in any of the Affected Areas”*.

¹⁶⁶ Record page 5979.

¹⁶⁷ A “Historically Disadvantaged Individual” is defined as “any individual person, category of individual persons or community, disadvantaged by unfair discrimination before the Constitution of the RSA, 200 of 1993 came into operation”. See Record page 5970.

¹⁶⁸ The Deed defines “Affected Areas” as “those areas within a local or metropolitan municipality ... immediately adjacent to the operational mines”. See Record page 5965.

248.1. Third, *“one or more Entities which has as its principal object(s) one or more of the Trust Activities and which carries out such objects) for the benefit of predominately Historically Disadvantaged Persons in any of the Affected Areas, provided that at least 85% of the ultimate beneficiaries who benefit from the carrying on of such principal object(s) are Historically Disadvantaged Individuals residing in any of the Affected Areas”*.

248.2. We note that the definitions are sourced from the definitions of “Host Community” and “Historically Disadvantaged Individual” in the 2018 Mining Charter.

249. Trust activities, which must be for the benefit of the Community, are set out in the Deed and they include:

- (i) the provision of poverty relief;
- (ii) community development for poor and needy persons and anti-poverty initiatives;
- (iii) the provision of healthcare services to poor and needy persons;
- (iv) the building and supply of equipment to clinics, crèches, community centres, sports facilities or facilities of a similar nature;
- (v) the provision of training, support or assistance to emerging farmers in order to improve capacity to start and manage agricultural operations;
- (vi) the training of unemployed persons with the purpose of enabling them to obtain employment;
- (vii) the training or education of persons with severe physical or mental disability;
- (viii) the provision of early childhood development services for pre-school children;
- (ix) the provision of school buildings or equipment for public schools and educational institutions engaged in public benefit activities; and
- (x) the provision of scholarships, bursaries, awards and loans for study, research and teaching.

250. Given the above, we conclude that beneficiary identification as provided for is adequate.

Conclusion on (spread of) ownership

251. SAEC historically had no community involvement in the form of a trust. Moreover, more than 90% of SAEC's issued share capital was ultimately owned by a listed Australian company. The proposed transaction and its structure alter this: the issued share capital shall be owned locally and by entities that are black owned or black controlled. In addition, there will be a Community Trust that will hold 5% of the issued share capital of SAEC and also an Employee Trust, which also will own 5% of the issued share capital of SAEC. Given this, we conclude that the proposed transaction will promote BEE ownership as well as both community and employee ownership.

Potential effects on junior miners

252. Industry-wide concerns were raised during the Commission's investigation pertaining to the position of junior miners in the South African coal mining sector, as we shall highlight below.

253. To enable coal export by BEE miners, a tonnage of 4 Mtpa have been allocated to BEE miners at the RBCT, known in the industry as the 'Quattro Tonnage'. The Commission however noted that there currently is significant underutilisation by the BEE miners of their allocated RBCT capacity. The RBCT submitted that in the past four years on average the BEE miners have utilised only 53% of their 4 Mtpa capacity. This may be attributed to the challenges that the junior coal miners face in the coal mining sector, as summarised below.

254. Seriti currently does not buy any coal from junior miners and supplies its entire thermal coal output to Eskom. SAEC, on the other hand, leases RBCT capacity to

junior miners and also buys coal from junior miners to be exported, as well as to supplement the volume that it supplies to Eskom.

255. Regarding access to SAEC's RBCT capacity not utilised by it, the Commission engaged the third parties that in the past made use of this. None of these third parties raised concerns regarding the proposed transaction. The Commission furthermore found that in the past two years SAEC did not lease RBCT capacity to any junior miners, and therefore concluded that it is unlikely that the proposed merger will negatively affect the junior minors in relation to SAEC's RBCT capacity. The Commission also noted that junior miners potentially could sell their export quality coal to other players that have underutilised RBCT capacity or could lease excess RBCT capacity of the other players holding such capacity.

256. In relation to SAEC purchasing coal from junior miners to supply Eskom, the Commission found that it purchases relatively low volumes from junior miners for this purpose, none of whom are currently reliant to a significant extent on SAEC.

257. From a sector-wide perspective the Commission noted that junior miners have raised concerns relating to their participation in the coal sector including alleged discriminatory coal contracting arrangements, excessive environmental compliance costs for the application of mining rights, and limited access to capital funding for coal projects.

258. The Commission enquired with Eskom as to the impact that its strategy to increase the procurement of coal via long-term tied contracts could have on coal procured from junior miners. According to Eskom, with this strategy, the junior/emerging miners have opportunities to supply coal to Eskom by responding to tenders issued to the market as part of the lever to secure uncontracted coal for the remaining life of power stations. Eskom however acknowledged that the junior miners face challenges including a lack of access to pre-feasibility funding, a lack of access to technical expertise, limited operating history, and restrictions imposed by the mineral rights regime. Furthermore, the mining costs for junior/emerging

miners are often higher than for established miners given their risk profile, higher cost of capital, as well as often small resources and a lack of scale economies, which all contribute to their relatively higher costs.

259. The Commission noted that to address issues relating to junior miners, an Emerging Miners Strategy was launched in December 2012 by the then Minister of Public Enterprises.¹⁶⁹ Initial work commenced in 2013/14 with identification of funding partners such as the IDC, as well as funding options. Eskom had pledged R██████ for this initiative, however, the financial problems that transpired at Eskom following the launch of the initiative hampered the implementation of the strategy. According to the Commission the strategy is currently suspended.

260. We note the sector-wide concerns of the junior/emerging coal miners and challenges that they face to effectively compete in the coal sector, as acknowledged by Eskom and other stakeholders. These concerns however are not merger-specific and there is no evidence before us that this proposed transaction will have a significant negative effect on junior miners. The sector-wide issues should be addressed by the various role players in the industry including the relevant Government Departments, Eskom, NERSA and the Commission.

Potential effects on domestic customers

261. The Commission assessed whether the proposed transaction would have any negative effects on domestic customers (other than Eskom) that currently purchase coal from SAEC.

262. The merging parties submitted that SAEC only has relatively small sales of thermal coal in the residual domestic market, much of which comprises sales of thermal coal of a quality that generally cannot be used by Eskom. The Commission confirmed that the volumes supplied by SAEC to other domestic customers

¹⁶⁹ The objective of the strategy, amongst others, was to expedite the transformation of the coal sector through leveraging Eskom coal supply agreements as well as to assist emerging/junior miners with access to capital for the development of their coal projects.

accounted for less than 1% of SAEC's 2018 and 2019 coal volumes. The merging parties further indicated that with the exception of Lurco, all other SAEC domestic coal supply contracts had expired and ceased on their stated contract end dates. Lurco initially expressed interest in the Tribunal proceedings but after further engagement with the merging parties raised no further concerns regarding the proposed transaction. Therefore, there is no evidence of any negative effects on domestic customers (other than Eskom) as a result of the proposed transaction.

Potential effects on procurement

263. According to the Commission, SAEC has a large overall supplier base of over 1 000 active suppliers, supplying a variety of goods and services to SAEC including but not limited to logistics, lubes, explosives, earth moving equipment, fuel, conveyor belt splicing, drilling rigs and equipment, dragline bucket repairs and security services. It considered the proposed transaction's potential effects on procurement, in particular procurement from firms controlled or owned by HDPs.

264. The merging parties submitted that the proposed transaction will not have a significant impact on the ability of small-and medium-sized businesses ("SMMEs") or firms controlled or owned by HDPs to effectively enter, participate in or expand within market(s). They stated that both Seriti and SAEC currently comply with the procurement percentages stipulated in the Mining Charter for the procurement of goods and services from HDPs and SMME suppliers. Seriti further submitted that it will continue transacting with the firms that currently form part of SAEC's procurement scheme, if they meet the requisite technical, health and safety, and cost parameters of the business.

265. Upon further probing by the Commission, the merging parties submitted that Seriti would seek to optimise its group input cost by re-tendering its various supply requirements to ensure that it is paying a competitive price for goods and services. This process is expected to include the consolidation of procurement volumes and/or suppliers to attract best possible terms, whilst remaining committed to

enterprise and supplier development initiatives which are focus areas for both the Seriti and the SAEC businesses.

266. The Mining Charter prescribes certain minimum requirements in relation to mining companies' procurement of mining goods and services and Seriti will post merger have to comply with this. Furthermore, the conditions imposed provide¹⁷⁰ that the merging parties' undertakings in relation to the public interest include that Seriti will continue to provide opportunities to HDP suppliers to continue to supply to it in terms of the Mining Charter.

Compliance with social and labour plans

267. Among the concerns raised by the Intervenors, was the merging parties' compliance with their respective social and labour plans (SLPs).

268. Although the Commission enquired from the DMRE whether there has been any non-compliance from 2017 to date by Seriti or SAEC with regards to their respective SLP obligations, it received no response from the DMRE.

269. Seriti submitted that it "*... is not aware of any finding by the Department of Minerals, Resources and Energy (the "DMRE") that it has defaulted on any of its obligations in terms of the Social and Labour Plans ("SLPs") pertaining to each of its New Vaal, Kriel or New Denmark mines.*" It further reiterated that it is committed to honouring the terms of SAEC's existing SLPs and the various plans and initiatives.

270. The merging parties also submitted that any concerns relating to their compliance with their respective SLP obligations are not merger-specific and fall within the jurisdiction of and should properly be addressed by the DMRE in terms of the MPRDA, which specifically provides for the policing and sanctioning (by the

¹⁷⁰ See the recordal section of the imposed conditions.

DMRE) of any instances of non-compliance thereto. This includes the obligation to consult in respect of the adoption of such SLPs.

271. With regards to SAEC's compliance with its SLPs, the Commission noted that SAEC had submitted revised SLPs to the DMRE during 2019 to extend the timelines of some of the projects and to change/replace existing projects as they faced challenges and had not been able to execute the projects. The merging parties submitted that each of SAEC's SLPs for each of its mines which incorporate the revisions are now in place and have been approved at the regional level of the DMRE, pending final Ministerial approval. The merging parties further submitted that the relevant Regional Officers of the DMRE have requested that SAEC act in accordance with the revised SLPs as they currently stand and that SAEC has acted accordingly.

272. The conditions imposed provide¹⁷¹ that the merging parties' undertakings in relation to the public interest include that Seriti intends that SAEC will comply with its statutory duties in terms of the relevant provisions of the MPRDA relating to social and labour plans.

Other issues raised

273. Other issues raised by third parties with the Commission included the SAEC's buyer selection process, the alleged illegal (mining) licence of SAEC, Seriti's rehabilitation guarantees and the purchase price of the SAEC assets. The Commission concluded that these issues are not merger-specific but nevertheless outlined its findings in this regard. We do not deal with these issues in our reasons since they do alter our decision.

Effects on the sector/supply security

274. Given *inter alia* the increase in concentration as a result of the proposed transaction and concerns about Eskom's drastic escalation of its coal costs, the

¹⁷¹ See the recordal section of the imposed conditions.

Tribunal requested Eskom to respond to potential concerns that the proposed transaction could negatively affect the energy sector and security of supply.

275. The merging parties, though their expert, Smith, argued that an increase in the proportion of Eskom's coal requirements supplied by Seriti post merger will (only) represent a risk to Eskom's security of supply if, post merger, Seriti is likely to face financial difficulties that will inhibit its ability to continue supplying coal to Eskom in terms of its existing coal supply agreements.¹⁷² Based on his assessment, Smith argued that pre-merger Seriti is in a sustainable financial position. Smith further submitted that the proposed transaction is unlikely to give rise to security of supply risk to Eskom given *inter alia* (i) that the merger will result in some diversification of revenue sources for Seriti since it post merger will have access to export-focussed revenue; and (ii) the merger reduces the risk of financial difficulties relative to the counterfactual (see paragraph 276 below).¹⁷³ The merging parties further argued that SAEC took risk into account in the selection process of the buyer and that Seriti was approved as the purchaser because the assessment in relation to Seriti gave "*a large level of comfort as to ... [Seriti's] ability to sustainably operate going forward*".¹⁷⁴

276. In relation to the relevant counterfactual, the merging parties alleged that SAEC is currently financially challenged and that its cashflows are under significant pressure. They also stated that a significant portion of the losses being sustained at SAEC arise as a result of the loss-making long-term fixed price coal supply agreement between SAEC and Eskom in respect of Eskom's Duvha power station. The merging parties further submitted that at present, and for the previous few years, SAEC has been supported and funded by South32 group affiliate companies. They said that it is only as a consequence of financial support that SAEC receives from these other South32 group affiliates that it continues to operate. They further argued that absent the proposed transaction, it is highly

¹⁷² Smith's presentation, Slide 26.

¹⁷³ Smith, Transcript pages 883 and 884; also see Smith's Slides 26 and 27.

¹⁷⁴ Falconer, Transcript page 720.

unlikely that the South32 group affiliates will continue to provide funding for SAEC's current activities (let alone any capital investment to sustain operations, expand and potentially provide more coal to Eskom in future).

277. Nagar's evidence on behalf of Eskom was that Eskom's degree of dependence on Seriti after the proposed transaction is not a significant concern.¹⁷⁵ From a future investment perspective, Eskom opined that the merged entity would have scale to open additional mines at a time when the coal sector is not the most favoured sector from an investment perspective. It added that it might be easier for a (merged) entity with scale to raise finance to develop new mines in order to supply and meet Eskom's coal demand.¹⁷⁶

278. Nagar further indicated that Eskom's post-merger risk exposure would be limited since four of the relevant CSAs are cost-plus agreements in respect of which *"Eskom carries the majority of the financial and operating risks related to those collieries"*;¹⁷⁷ *"... the merged entity has now [post merger] four cost-plus mines that are supplying Eskom, and ... Eskom is directly exposed to the mining and, call it, the risks underneath those contracts"*;¹⁷⁸ *"So, four of those six entities are directly linked to, call it, Eskom sustainability. If Eskom is sustainable and if Eskom can – is alive, those four entities are typically and potentially, in theory, should be alive as well"*;¹⁷⁹ and *"the current exposure to Seriti that we have is largely Eskom driven in anyway and the adding in two more collieries, one [Khutala - Kendal] which is going to be Eskom driven in anyway. And it's the other one [Duvha] which is capped from an Eskom perspective, depending on the outcome of the solution to fix the financial sustainability of the distress of Duvha – of the Ifalethu Wolvekrans Complex"*.¹⁸⁰

¹⁷⁵ *Inter alia* Nagar witness statement, paragraphs 9 and 10.

¹⁷⁶ Nagar witness statement, paragraph 9.1.

¹⁷⁷ Nagar witness statement, paragraph 9.1. Transcript *inter alia* pages 476 and 477.

¹⁷⁸ Nagar, Transcript page 652.

¹⁷⁹ Nagar, Transcript page 655.

¹⁸⁰ Nagar, Transcript pages 653 and 654.

279. In relation to the Duvha CSA Nagar's view was that the financial risk to Eskom is "*capped from an Eskom perspective*" given that Eskom has an effective veto right over the proposed transaction - a sustainable solution must be found for the Ifalethu Wolwekrans Complex to address the losses being incurred by SAEC in respect of the Duvha supply contract.¹⁸¹

280. We conclude that the concentration levels in the supply of coal to Eskom are high and that Seriti after the proposed transaction will be responsible for a very significant share of Eskom's overall coal needs which poses an overall risk to energy security. We note that the proposed transaction will enhance Eskom's degree of dependence on Seriti for the supply of thermal coal. Recall that Seriti pre-merger is the [REDACTED] volume of thermal coal supplier to Eskom and SAEC is the [REDACTED]. Furthermore, the concentration delta is significant since SAEC also holds significant market share in terms of its coal supply to Eskom. Eskom confirmed that it will post merger depend on the merging parties for approximately [REDACTED]% of its coal supply based on its coal burn requirements. Nagar also confirmed that any company-wide operation issues post merger, for example labour unrest, would threaten approximately [REDACTED]% of Eskom's coal requirements.¹⁸² These figures exclude any new CSA negotiations (for example New Largo supplying the Kusile power station and other undeveloped resources)¹⁸³ and thus the concentration in terms of the merging parties' supply to Eskom could increase to significantly more than [REDACTED]%.¹⁸⁴ One however also must have regard to the divestiture of SAEC's Leandra Project which, as explained, is a condition to the transaction's approval.

281. However, the post-merger risk is to an extent mitigated by the fact that Eskom carries a large portion of the financial and operating risks related to the cost-plus collieries (of which one additional cost-plus mine is acquired by Seriti through this transaction). The further consideration, as highlighted above, is the particular

¹⁸¹ Transcript *inter alia* pages 653 and 654.

¹⁸² Nagar witness statement, paragraph 8.1.3.

¹⁸³ Witness statement of Nagar, paragraph 6.2.

¹⁸⁴ Nagar witness statement, paragraph 10.1.1.

circumstances surrounding the Duvha CSA – i.e., SAEC has declared hardship and Eskom effectively has a veto right over the proposed transaction in terms of the Duvha CSA and is conducting a detailed financial due diligence assessment.

282. Given the high concentration levels in coal supply to Eskom, should there be any further concentration in the supply of coal to Eskom in the future, we suggest the Commission's investigation and analysis specifically consider potential energy sector effects and security of supply concerns.

Conclusion on public interest

283. We are satisfied that the imposed conditions (as explained above) adequately address any public interest issues associated with the proposed transaction.

CONCLUSION

284. For all the above reasons, we have approved the proposed transaction subject to the set of conditions attached hereto.



A W Wessels

05 February 2024

Date

Ms Mondo Mazwai and Mr Enver Daniels concurring

Tribunal Case Managers	: Kgothatso Kgobe Busisiwe Masina
Tribunal Economists	: Karissa Moothoo Padayachie Lumkisa Jordaan
For the Commission	: N Sakata and G Mutizwa
For the Merging Parties	: J Wilson SC and TN Ngcukaitobi SC instructed by Nortons Inc and ENS
For the Intervenors:	: K Maponya