



# EVALUATION OF SELLER REFINANCING NOTICES

REVISED AND UPDATED REFINANCING  
PROTOCOL / GUIDELINE

January 2023



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**The Republic of South Africa**  
**Department of Electricity and Energy**

**IPP PROCUREMENT PROGRAMMES**

**EVALUATION OF SELLER REFINANCING NOTICES**

**REVISED AND UPDATED REFINANCING PROTOCOL/GUIDELINE**

**JANUARY 2023**

**GUIDANCE NOTE 1**

**NOVEMBER 2024**



**mineral resources  
& energy**

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Department:  
Mineral Resources and Energy  
**REPUBLIC OF SOUTH AFRICA**

## 1. Introduction

- 1.1. The Department of Mineral Resources and Energy issued the Refinancing Protocol, updated to include Guidance Notes 1-5 and a process on refinancing utilising capital market instruments, dated January 2023 (“**the Protocol**”).
- 1.2. This Guidance Note is issued to clarify certain provisions of the Protocol.
- 1.3. Unless otherwise expressly stated, or the context otherwise requires, words and expressions defined in the Protocol shall bear the same meanings in this Guidance Note.

## 2. Purpose of the Guidance Note

- 2.1. The purpose of this Guidance Note is to provide guidance on the treatment of changes in Law and the impact thereof on Refinancing Notices (“**Change in Law Provisions**”).

## 3. Change in Law Provisions

- 3.1. The Power Purchase Agreement (“PPA”) concluded with each seller contains provisions pertaining to changes in Law;
- 3.2. Changes in Law must be considered with reference to the PPA and not the Protocol, except those changes in Law specifically provided for in the Protocol;
- 3.3. The Protocol stipulates in clause 4.1.2(a)(i) (*Sharing the Refinancing Gain*):
  - (a) *“The Department’s agreed share of the Refinancing Gain shall be calculated:
    - (i) Without any consideration of adjustment for past operations or performance, or making whole of the project; and”*
- 3.4. The Protocol stipulates in clause 4.1.2(b)(i) (*Sharing Refinancing Gain*):
  - (b) *“In order to assess a Refinancing Notice, the Department will need the following information from the Seller:*

*(i) The FC Model with the projections that were originally used to calculate the Tariff, adjusted for any Department approved changes in the Project structure and financing (including any prior Refinancing consented to by the Department) which have taken place since the FC Date;”*

3.5. Given the principles extracted in clauses 3.3 and 3.4 above it follows that:

(a) the Protocol should not be used as a mechanism to make a project whole for past events by submitting a Refinancing Notice or including such past events in the calculation of the Refinancing Gain; and

(b) for changes that occurred before the Refinancing date, only those changes that have been approved by the Department and captured in the FC Model are allowed to impact the calculation of the Refinancing Gain.

3.6. The Protocol stipulates in clause 4.1.2(b)(v) (*Sharing Refinancing Gain*):

*“A pre-Refinancing Financial Model, based on the model in clause 4.1.2(b)(i) above, updated on a forward-looking basis with detailed projections of the cash flows of the Seller from the estimated Refinancing date to the end of the Project Term, taking into account of actual tariffs applicable at the proposed date of Refinancing, changes approved by the Department in line with the provisions of the IA and forecast project performance after the Refinancing date. Forecast project performance should be supported by historic records for the applicable performance measures. The pre-Refinancing Financial Model shall include projected Distributions before taking the relevant Refinancing into account;”*

3.7. The principle illustrated above in 3.6 is that certain changes are allowed to impact the calculation of the Refinancing Gain on a forward-looking basis. That is, from Refinancing date onwards.

4. The Department has resolved that the impact of changes in the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991 will be allowed to be incorporated in the pre-Refinancing Financial Model on a forward-looking basis from the Refinancing date onwards under the provision of clause 4.1.2(b)(v) of the Protocol. The incorporation of such changes can be made either by the Seller or at the request of the Department.

5. An example of a change envisaged in 4 above is the introduction of section 20(1)(a)(i) (*Set-off of assessed losses*) of the income Tax Act 58 of 1962 as amended (“**the 80/20 Rule**”). Following the provisions in the Protocol, the assessed loss prior to the Refinancing date should be the assessed loss as forecast in the FC Model. However, when preparing the pre-Refinancing Model in accordance with clause 4.1.2(b)(v) and following the guidance in 4 above, it is allowed for the 80/20 Rule to be applied from the Refinancing date onwards at either the election of the Seller or the Department. Given that the post-Refinancing model is based on the pre-Refinancing model as provided for in clause 4.1.2(b)(ix) the application of the 80/20 Rule from the Refinancing date onwards will automatically flow through to the post-Refinancing model.

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