

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 016402

In the matter between:

The Competition Commission

Applicant

and

Egoli Gas (Pty) Ltd

Respondent

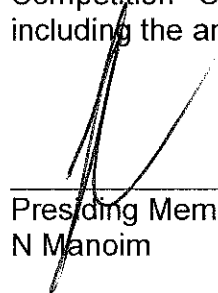
Panel : N Manoim (Presiding Member), M Mokuena (Tribunal Member) and M Holden (Tribunal Member)

Heard on : 27 March 2013

Decided on : 28 March 2013

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent annexed hereto marked "A" including the amended version of the agreement annexed hereto marked "B".



Presiding Member
N Manoim

Concurring: M Mokuena and M Holden

BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

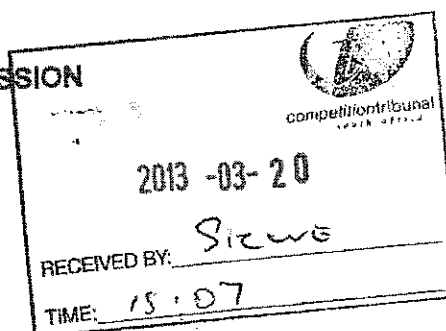
CC CASE NO: 2009Jan4212

In the matter between:

THE COMPETITION COMMISSION

and

EGOLI GAS (PTY) LTD



Applicant

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
EGOLI GAS (PTY) LTD IN RESPECT OF CONTRAVENTION OF SECTION
4(1)(b)(ii) OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED

The Competition Commission and Egoli Gas (Pty) Ltd hereby agree that application be made to the Competition Tribunal for confirmation of this Consent Agreement as an Order of the Tribunal in terms of sections 49D as read with sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act No.89 of 1998, as amended, on the terms set out below:

1. Definitions

In this Consent Agreement, unless the context indicates otherwise:

1.1. "Act" means the Competition Act No. 89 of 1998, as amended;

- 1.2. "**CLP**" means the Corporate Leniency Policy issued by the *Commission* in terms of the *Act* to clarify the *Commission's* policy approach on matters falling within its jurisdiction in terms of the *Act*;
- 1.3. "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the *Act* as a juristic person, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;
- 1.4. "**Commissioner**" means the Commissioner of the *Commission* appointed in terms of section 22 of the *Act*;
- 1.5. "**Complaint**" means the complaint initiated on 22 December 2008 by the *Commissioner* in terms of section 49B(1) of the *Act* under case number 2009Jan4212 against, *inter alia*, *Egoli Gas* and *Sasol Gas*;
- 1.6. "**Consent Agreement**" means this consent agreement duly signed and concluded between the *Commission* and *Egoli Gas*;
- 1.7. "**Distribution**" means the distribution of bulk gas supplies and the transportation thereof by pipelines with a general operating pressure of more than 2 bar gauge and less than 15 bar gauge or by pipelines with such other operating pressure as the gas operator may permit according to criteria prescribed by regulation to points of ultimate consumption and reticulation systems, and any other activity incidental thereto;
- 1.8. "**Gas Bill**" means the Gas Bill of 2001 which was subsequently enacted and promulgated into law as the *Gas Act*;
- 1.9. "**Gas Act**" means the Gas Act No. 48 of 2001, as amended;
- 1.10. "**Gas Licence By-Laws**" means the Gas Licence By-Laws contained in Notice No. 3326 of 2000, published in the Provincial Gazette No. 57, dated 31 May 2000;

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- 1.11. "**Gas Regulator**" means the National Gas Regulator established by section 3 of the Gas Act;
- 1.12. "**GJPMC**" means the Greater Johannesburg Transitional Metropolitan Council, the predecessor to the Greater Johannesburg Metropolitan Council;
- 1.13. "**Mozambique Agreement**" means the Mozambique Gas Pipeline Agreement concluded on 26 September 2001 between the Minister of Minerals and Energy Affairs and the Minister of Trade and Industry and Sasol concerning the construction of a gas transmission pipeline which would enable Sasol to transport natural gas from the Pande and Tamane gas fields in Mozambique into South Africa;
- 1.14. "**NERSA**" means the National Energy Regulator of South Africa, a regulatory authority established in terms of the National Energy Regulator Act No. 40 of 2004, as amended, with the mandate to undertake functions of, *inter alia*, the Gas Regulator as set out in the Gas Act;
- 1.15. "**Sasol Gas**" refers to Sasol Gas Limited, a company duly incorporated and registered in accordance with the laws of the Republic of South Africa, with its registered office alternatively principal place of business at 272 Kent Avenue, Ferndale, Johannesburg, South Africa. Sasol Gas is a subsidiary of Sasol;
- 1.16. "**Sasol**" means Sasol Limited, a company duly incorporated and registered in accordance with the laws of the Republic of South Africa, with its registered office alternatively principal place of business at 22 Kent Avenue, Ferndale, Johannesburg, South Africa
- 1.17. "**Supply Area**" means the geographic area depicted on the map contained in Annexure D to the Gas Supply Agreement dated 14 August

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2000 concluded between *Egoli Gas* and *Sasol Gas*. The *Supply Area* conforms to the municipal boundaries of the *GJTMC*;

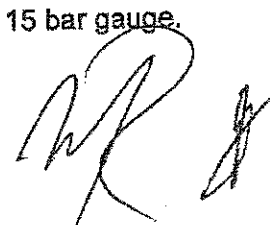
- 1.18. **"Suite of agreements"** refers collectively to agreements entered into between *Egoli Gas* and *Sasol Gas* set out in clause 4 of this *Consent Agreement*;
- 1.19. **"Piped gas"** means all hydrocarbon gases transported by pipeline, including natural gas, artificial gas, hydrogen rich gas, methane rich gas, synthetic gas, coal bed methane gas, liquefied natural gas, compressed natural gas, re-gasified liquefied natural gas, liquefied petroleum gas or any combination thereof;
- 1.20. **"Reticulation"** means the division of bulk gas supplies and the transportation of bulk gas by pipelines with a general operating pressure of no more than 2 bar gauge to points of ultimate consumption, and any other activity incidental thereto;
- 1.21. **"Trading"** means the purchase and sale of gas as a commodity by any person and any services associated therewith, excluding the construction and operation of transmission, storage and distribution systems;
- 1.22. **"Transmission"** means the bulk transportation of gas by pipelines supplied between a source of supply and a distributor, reticulator, storage company or eligible customer, or any other activity incidental thereto; and
- 1.23. **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act as a Tribunal of record, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

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2. Background

The Piped Gas Regulatory Landscape

- 2.1. In South Africa, the piped gas market operated without any national regulatory framework until the *Mozambique Agreement* was concluded. The *Mozambique Agreement* was concluded in 2001 prior to the enactment of the *Gas Act*, but at a stage when the *Gas Bill* had already been published in the Government Gazette for public comment. To this end, the preamble to the *Mozambique Agreement* recorded that in the absence of specific gas legislation, Sasol has requested a dispensation from envisaged future legislation that will be binding on the future *Gas Regulator*, and, that such gas projects involve significant investment and risks and the government of the Republic of South Africa and the Government of Mozambique and Sasol will be required to provide guarantees and undertakings in order to enable the project.
- 2.2. From 1 November 2005, the main and primary piece of legislation regulating the piped gas market in South Africa is the *Gas Act*. The *Gas Act* was assented to on 12 February 2002 and its date of commencement was 1 November 2005. Section 36 of the *Gas Act* accords the *Mozambique Agreement* statutory recognition. Section 36(2) of the *Gas Act* states that the *Mozambique Agreement* binds the *Gas Regulator* until 10 years after natural gas is first received from Mozambique. This period expires in 2014.
- 2.3. The *Gas Act* distinguishes between *transmission*, *distribution*, *reticulation* and *trading* in piped gas with reference to the general operating pressure of a pipeline to points of ultimate consumption. The general operating pressure of pipelines used for gas *reticulation* is no more than 2 bar gauge; the general operating pressure for gas *distribution* is more than 2 bar gauge but less than 15 bar gauge; and the general operating pressure for gas *transmission* is above 15 bar gauge.



Pressure stations are used to control the operating pressure of a gas pipeline. End customers can be supplied with equipment at a cost that can be used to reduce gas supplied at above 2 bar gauge to below 2 bar gauge and vice versa.

- 2.4. Presently, there is a bifurcated regulatory system for piped gas in South Africa – gas *reticulation* falls under the jurisdiction of municipalities whilst gas *distribution* and *transmission* fall under the jurisdiction of NERSA. Municipalities regulate gas *reticulation* in terms of municipal By-Laws. However, both gas *reticulation* and *distribution* involves the same economic activity – the supply of piped gas to end user consumers. The difference between gas *reticulation* and *distribution* lie in the operating pressure at which piped gas is supplied to end user consumers.
- 2.5. In the period between 2000 and 2004, at the time when the *suite of agreements* forming the subject-matter of this *Consent Agreement* were concluded between *Egoli Gas* and *Sasol Gas*, the *Gas Act* had not yet come into operation and there was no legislative restriction on the operating pressure for gas *reticulation*.

Background to the suite of agreements between Sasol Gas and Egoli Gas

- 2.6. On 18 August 2000, the *GJTMC*, following a bidding process aimed at privatising Metro Gas - its gas distribution and supply business- sold the business and assets of Metro Gas as a going concern to a consortium comprising Cinergy Limited, a global energy company, and other entities. The name Metro Gas was changed to *Egoli Gas*. Cinergy Limited later disposed its stake in *Egoli Gas*. Historically, *Sasol Gas* supplied gas to Metro Gas.

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- 2.7. Simultaneous with the sale and privatisation of Metro Gas, on 18 August 2000, the GJTMC granted a licence to *Egoli Gas* to, *inter alia*, engage in the supply of piped gas to consumers in the municipal boundary of the GJTMC in terms of the *Gas Licence By-Laws*. Prior to this licence Metro Gas was limited to boundaries of the Old Johannesburg municipality which excluded *inter alia*, Roodepoort, Randburg and Santon. These boundaries were enlarged in terms of the GJTMC licence granted to *Egoli Gas*. The licence is valid for an initial period of thirty (30) years. The licence gave *Egoli Gas* the right to engage in the supply of gas to consumers in the municipal boundary of the GJTMC on an exclusive basis for a period of twenty (20) years. The licence granted to *Egoli Gas* by the GJTMC did not contain any restriction on the operating pressure of the pipeline to points of ultimate consumption because at the time of the granting of the licence the *Gas Act* had not yet come into operation.
- 2.8. At the time of the granting of the licence, *Sasol Gas* had pre-existing customers in the municipal boundary of the GJTMC to whom it was already supplying gas. To this end, the *Gas Licence By-Laws* contained a "preservation of rights" dispensation due to the change in licensed municipal boundaries of *Egoli Gas* which allowed *Sasol Gas* to continue to supply gas to its pre-existing customers in the municipal boundary of the GJTMC.
- 2.9. Following the acquisition of the business and assets of Metro Gas, *Egoli Gas* entered into a *suite of agreements* with *Sasol Gas*. *Sasol Gas* is the sole supplier of natural gas in Gauteng with rights to import natural gas into South Africa from Mozambique. The *suite of agreements* formed the subject-matter of the *Commission's* investigation and findings in the *complaint*.
- 2.10. According to *Egoli Gas*, the *suite of agreements* between *Egoli Gas* and *Sasol Gas* came into existence against the following backdrop:

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- 2.10.1. legally uncertainty and flux in the regulatory framework for piped gas obtaining at the time of conclusion of the suite of agreements;
 - 2.10.2. *Sasol Gas* and *Egoli Gas* are in both in a horizontal and vertical relationship;
 - 2.10.3. the exclusive licence granted by the *GJTM*C to *Egoli Gas*; and
 - 2.10.4. changes in the municipal boundaries of the *GJTM*C.
- 2.11. On 27 October 2008, *NERSA* granted *Sasol Gas* twenty nine (29) licences for the operation of gas *distribution* facilities, as well as twenty nine (29) licences for the *trading* in gas in various areas of the Gauteng, Free State and Mpumalanga provinces in terms of the Gas Act. Certain of the areas in respect of which *Sasol Gas* was granted *distribution* and *trading* licences by *NERSA* are located within the area of the exclusive licence granted to *Egoli Gas* by the *GJTM*C. These areas include Longdale, Technikon and Robertville.
- 2.12. *NERSA* granted the above-mentioned licences to *Sasol Gas* notwithstanding objections from *Egoli Gas* that the granting of *distribution/ trading* rights to *Sasol Gas* in the above-mentioned areas will be in conflict with *Egoli Gas*' existing rights in terms of the Gas Licence By-Laws. In its reasons for decision granting aforementioned licences, *NERSA* expressly recorded that the commercial agreement (the *suite of agreements*), precluding competition between *Sasol Gas* and *Egoli Gas*, may be in conflict with existing competition legislation.

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3. Complaint investigation and findings

3.1. On 19 December 2008, the *Commission* received an application for corporate leniency in terms of the *CLP* from *Sasol Gas* for contravention of section 4(1)(b)(ii) of the *Act* arising from its participation in the conclusion and implementation of a *suite of agreements* with *Egoli Gas*. On 22 December 2008, following *Sasol Gas*' application for corporate leniency, the *Commissioner*, acting in terms of section 49B(1) of the *Act*, initiated a complaint against, *inter alia*, *Egoli Gas* and *Sasol Gas* for contravention of section 4(1)(b)(ii) of the *Act*.

3.2. The *Commission* duly investigated the *complaint* and after concluding its investigation found that *Egoli Gas* and *Sasol Gas* have concluded and implemented a *suite of agreements* containing customer and territorial restraints which contravene section 4(1)(b)(ii) of the *Act*.

4. The suite of agreements

4.1. The *suite of agreements* concluded between *Egoli Gas* and *Sasol Gas* containing customer and territorial restraints are the following:

4.1.1. the Gas Supply Agreement dated 14 August 2000;

4.1.2. Agreement concluded in 2002 in respect of Universal Fibres and HC Heat Exchanges;

4.1.3. Letter agreement dated 1 October 2003 in respect of Profal (2nd Factory);

4.1.4. Amendment to the Gas Supply Agreement dated 29 March 2004;

4.1.5. Agreement concluded on 19 April 2004 in respect of Corobrick;
and

4.1.6. Customer allocation arrangements in respect of Venter Trailers;



Almar Packaging, Boart Longyear and Armcoil Africa.

4.2. In terms of the *suite of agreements* referred to above —

- 4.2.1. A designated class of customers referred to as "the Purchaser's Customer's" (defined as any person occupying property or land located within the *Supply Area*) and a geographic area termed the *Supply Area* (depicted on the map contained in Annexure D to the Gas Supply Agreement dated 14 August 2000) were allocated to *Egoli Gas*;
- 4.2.2. *Egoli Gas* was restrained from supplying gas purchased from *Sasol Gas* to any other customer other than the designated class of customers allocated to it;
- 4.2.3. *Egoli Gas* was restrained from supplying piped gas supplied to it by *Sasol Gas* to any of its allocated customers who, to the knowledge of *Egoli Gas*, on sold such gas for consumption outside the allocated *Supply Area*;
- 4.2.4. *Sasol Gas* and its affiliates were restrained from supplying gas or entering into an agreement to supply gas to any of *Egoli Gas*' allocated customers within the *Supply Area*;
- 4.2.5. *Sasol Gas* and its affiliates were restrained from constructing, owning, operating or entering into any agreement to construct, own or operate any gas pipeline, or any related plant and equipment by means of which any of *Egoli Gas*' allocated customers (as defined) purchased gas from *Sasol Gas* in contravention of the agreement;

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4.2.6. *Egoli Gas and Sasol Gas agreed to two exceptions to the restraints preventing Sasol Gas from supplying piped gas to the designated class of customers allocated to Egoli Gas within the Supply Area;*

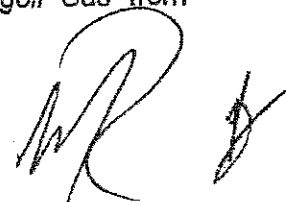
4.2.6. The first exception allocated to Sasol Gas sixteen (16) "Purchaser's Customers" located within the Supply Area and which are listed in Schedule 1 to the Amendment to Gas Supply Agreement dated 29 March 2004. These sixteen customers were pre-existing customers of Sasol Gas at the time the Gas Supply Agreement dated 14 August 2000 was concluded; and

4.2.7. The second exception allowed Sasol Gas, by agreement between the parties on a project by project basis, to supply piped gas to certain of the customers allocated to Egoli Gas in terms of the Gas Supply Agreement dated 14 August 2000 ("the Purchaser's Customers") located within the Supply Area if Egoli Gas decides not to supply such customers.

4.2.7. On an *ad hoc* basis, Egoli Gas and Sasol Gas agreed to allocate specific customers with the Supply Area.

4.3. The Commission's investigation is predicated on two main findings:

4.3.1. Firstly, the piped gas regulatory framework including the Gas Licence By-Laws do not prevent Egoli Gas from

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supplying piped gas outside of the *Supply Area* in competition with *Sasol Gas*, subject to *Egoli Gas* obtaining the necessary regulatory approval; and

- 4.3.2. Secondly, the piped gas regulatory framework including the *Gas Licence By-Laws* do not sanction market allocation in contravention of section 4(1)(b)(ii) of the *Act*. The licence granted by the *GJMT* to *Egoli Gas* is a *reticulation* licence. The piped gas regulatory framework does not preclude competition between a gas *reticulator* and a gas *distributor*. End user customers can switch between the services provided by a gas *reticulator* and the services provided by a gas *distributor* provided that the equipment referred to in 2.3 above is installed. The customer and territorial restraints between *Egoli Gas* and *Sasol Gas* prevent such switching from taking place.

5. Admission

Egoli Gas admits that it has entered into a *suite of agreements* with *Sasol Gas*, against the backdrop of the exclusive *reticulation* licence granted to it by the *GJMT*, which resulted in a contravention of section 4(1)(b)(ii) of the *Act*.

6. Agreement concerning future conduct

- 6.1. *Egoli Gas* confirms that the previous supply agreement dated 14 August 2000 concluded between *Egoli Gas* and *Sasol Gas* has been cancelled and that a new supply agreement is being negotiated. To this end, *Egoli Gas* agrees and undertakes to provide the *Commission* with a copy of:

- 6.1.1. the new supply agreement within thirty (30) days of the date of conclusion of the agreement; and

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6.1.2. any subsequent amendment to the new supply agreement within thirty (30) days of the date of conclusion of such amendment.

6.2. In addition, *Egoli Gas* agrees and undertakes:

6.2.1. to prepare and circulate a statement summarising the content of this *Consent Agreement* to its directors and shareholders within 30 days of the date of confirmation of this *Consent Agreement* as an order of the *Tribunal*;

6.2.2. refrain from engaging in market allocation in contravention of sections 4(1)(b)(ii) of the Act; and

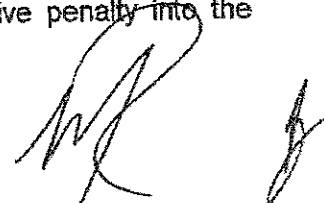
6.2.3. develop and implement a compliance programme designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a prohibited practice in terms of the Act, a copy of which programme shall be submitted to the *Commission* within 60 days of the date of confirmation of this *Consent Agreement* as an order of the *Tribunal*.

7. Administrative Penalty

7.1. *Egoli Gas* is liable for an administrative penalty in terms of sections 58(1)(a)(iii), 59(2) and (3) of the Act in the amount of R1, 627 910.76. The administrative penalty represents [REDACTED] of *Egoli Gas*' annual turnover for business customers for the financial year ended 31 December 2008.

7.2. *Egoli Gas* will pay the administrative penalty to the *Commission* within thirty (30) after the date of confirmation of this *Consent Agreement* as an Order of the *Tribunal*.

7.3. *Egoli Gas* shall remit payment of the administrative penalty into the



following bank account:

Name of account holder: COMPETITION COMMISSION

Bank name: ABSA BANK PRETORIA

Account number: 4050778576

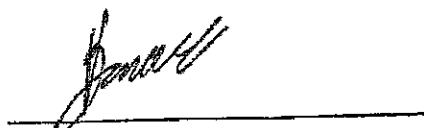
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7.4. The penalty will be paid over by the *Commission* to the National Revenue Fund in accordance with the provisions of section 59(4) of the *Act*.

8. Full and final settlement

This *Consent Agreement*, upon confirmation thereof as an Order of the *Tribunal*, concludes all proceedings between the *Commission* and *Egoli Gas* in relation to the contravention of section 4(1)(b)(ii) of the *Act*, investigated under the *Commission's* case number: 2009Jan 4212.

DATED at Sandton on this the 19th day of March 2013:



Duly authorised signatory of Egoli Gas (Pty) Ltd



DATED at Pretoria on this the 20 day of March 2013.



Shan Ramburuth
Commissioner, Competition Commission

BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA

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THE COMPETITION COMMISSION

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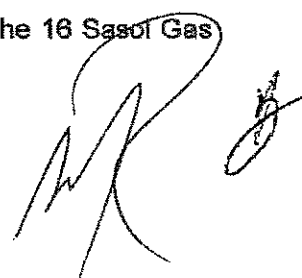
**ADDENDUM TO THE CONSENT AGREEMENT BETWEEN THE COMPETITION
COMMISSION AND EGOLI GAS (PTY) LTD IN RESPECT OF CONTRAVENTION
OF SECTION 4(1)(b)(II) OF THE COMPETITION ACT NO 89 OF 1998**

The consent agreement between Competition Commission and Egoli Gas (Pty) Ltd dated 20 March 2013 ("the consent agreement") is hereby amended as follows:

Insertion of sub-paragraphs 6.2.4 and 6.2.5 in the consent agreement.

1. Sub-paragraphs 6.2.4 and 6.2.5 are hereby inserted in the consent agreement.
2. The inserted sub-paragraphs 6.2.4. and 6.2.5 shall read as follows:

"6.2.4. Egoli Gas agrees and undertakes to give notification to its existing business customers and other potential business customers of piped gas, including, to the extent possible to the 16 Sasol Gas



customers as per paragraph 4.2.6 of the Consent Agreement, informing such customers that they are free to make use of any gas supplier of piped gas should they wish to do so; and

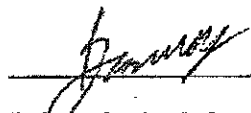
6.2.5. The notification in 6.2.4. shall:

6.2.5.1 be made by Egoli Gas within 30 (thirty) days after the date of confirmation of the consent agreement as an order of the Tribunal;

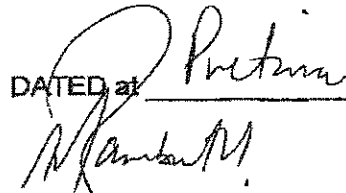
6.2.5.2. take the form of letters and a public notice; and

6.2.5.3. a copy of the notification will be provided to the Commission as well as a list of specific firms that will receive the notification.

DATED at Johannesburg on this 28th day of March 2013.



Duly authorised signatory of Egoli Gas (Pty) Ltd



DATED at Pretoria on this 28 day of March 2013.



Shan Ramburuth
Commissioner, Competition Commission