

GAZETTE NOTICE NO. 9852

THE ENERGY ACT

(No. 12 of 2006)

PROPOSED REGULATIONS IN RESPECT OF THE PETROLEUM CONTRACTS AND TARIFF APPROVAL

INVITATION OF PUBLIC COMMENTS

Part I

1. PURSUANT to section 110 (3) of the Energy Act, 2006, the Energy Regulatory Commission hereby invites members of the public to submit written comments within forty (40) days from the date of publication of this notice to the Director General, the Energy Regulatory Commission, on the proposed Regulations in respect of the Petroleum Contracts and Tariff Approval which are set out in Part II hereunder.
2. Comments may be hand-delivered, posted, and facsimiled or e-mailed to the Energy Regulatory Commission.
3. Physical address: The Energy Regulatory Commission, First Floor, Integrity Centre, Milimani Road, Nairobi.
4. Postal address: P.O. Box 42681 -00100 GPO, Nairobi. Facsimile Number: +254 20 2717603. E-mail address: info@erc.go.ke

Part II

THE ENERGY (PETROLEUM CONTRACTS AND TARIFF APPROVAL) REGULATIONS, 2009

1. These Regulations may be cited as the Energy (Petroleum Contracts and Tariff Approval) Regulations 2009.
2. In these regulations unless the context otherwise requires—

“The Act” means the Energy Act No. 12 of 2006;

“Commission” means the Energy Regulatory Commission as established pursuant to section 4 of the Act;

“Contract” means any agreement, arrangement, bond, commitment, franchise, indemnity, indenture, concession, licence, permit or understanding made in writing;

“Licensee” has the meaning assigned to it under the Act; “Minister” means the minister for the time being responsible for energy;

“Oil marketer” means any person engaged in either the importation, refining, exportation, landing, loading, shipping, transportation, storage, distribution or sale of petroleum or petroleum products licensed under the Act;

“Petroleum” has the meaning assigned to it under section 2 of the Act;

“Petroleum Business” means a concern carrying on the importation, refining, storage and transportation or sale of petroleum and includes activities in importation, refining, landing, loading, shipping, storage, transportation, wholesale and retail sale of petroleum and petroleum based products including services directly related to or supporting such activities;

“Refinery” means the Kenya Petroleum Refineries Limited, a limited liability company which accepts for refining crude oil and related products in such quantities of feedstock from any oil marketer and any such other person engaged in petroleum business as shall be determined in the relevant agreement between the parties, which term shall include its successors or any other person performing similar functions as the minister may from time to time by gazette notice prescribe;

“Regulated contracts” are contracts providing for the importation, refining, storage, transportation of petroleum and petroleum products

as set out in the Schedule hereto or such other contracts that the minister may by gazette notice prescribe;

“Tariff” means any charges, costs, levies, rates, or impost raised in the regulated contract or provided for under the terms of the relevant contract;

“Transportation and Storage Company” means the Kenya Pipeline Company, a limited liability company owning, operating and managing a system of pipeline storage and ancillary facilities which it allows oil marketers and any such other person engaged in petroleum business to use for receipt, storage, transportation and delivery of various grades of petroleum and petroleum products which term shall include its successors or any other company the minister may by gazette notice prescribe.

3. Contract Negotiations and Approval.

(1) The Commission shall have the powers to approve the regulated contracts under these regulations.

(2) All contracts regulated under these regulations shall be negotiated expeditiously and in good faith between the parties involved and each party shall use reasonable endeavours to resolve disagreements as to the form and terms of such contract.

(3) The Commission may play an adjudicatory and or mediatory role in contract negotiations and subject to the provisions of this part in order to ensure that parties reach mutually acceptable agreement as to their contracts as soon as possible to ensure the continued smooth operation of any refinery, transportation and storage company or any person engaged in petroleum business.

(4) The Commission may—

(a) on application of either party or on its own initiative intervene in negotiations on agreements and contracts provided for under these regulations where no agreement is reached between the negotiating parties within ten weeks after commencement of the negotiations;

(b) if requested by either party, set time limits within which negotiations for such contracts or agreements are to be completed, which time limits shall not exceed ten weeks unless the Commission in its reasonable discretion considers a longer period justified;

(c) where parties are unable to conclude contract negotiation as provided for under these regulations within such time as has been prescribed, the Commission may on the application of either party and within a period of not more than sixty days adjudicate on the disagreement and render a decision which shall be binding upon the parties until otherwise reviewed or set aside by a competent authority.

(5) The Commission may from time to time issue technical, costing and other relevant guidelines to guide licensees in negotiating contracts and agreements under these regulations.

(6) All contracts, agreements and arrangements provided for by these regulations shall be filed with the Commission within twenty one days after execution.

(7) The Commission shall maintain a register of regulated contracts and shall ensure that any person engaged in petroleum business is fully compliant with terms and conditions of all regulated contracts to which it is party to before renewing or issuing any new licence to the person.

(8) The Commission may request for any information from the parties contracting under these regulations that it deems necessary to evaluate the terms and conditions and the charges set forth in the agreement and may subsequently request the parties to modify the agreement as specified and within such time as it may prescribe.

(9) The provisions of this regulation 3 shall apply in all respects to renewals, extensions and modification of any existing contract, agreement or arrangements that are regulated by these regulations.

4. Contractual Terms (1) The term of a regulated contract under these regulations entered into after the date of commencement of these regulations shall not exceed twenty five years, or such other term as the Commission may at its discretion prescribe. (2) The term of a regulated contract may be extended, on agreement by both parties therein and subject to the approval of the Commission in accordance with these regulations.

5. Rates and tariffs approval.

(1) The Commission shall have powers to set, review, adjust tariffs and tariff structures, and investigate tariff charges whether or not a specific application has been made for a tariff adjustment.

(2) Any party to a regulated contract under these regulations proposing an adjustment of rates or tariffs shall file an application with the Commission for approval at least ninety days before the proposed adjustment is intended to come into effect.

(3) The decision of the Commission regarding an application made for a tariff review or adjustment shall be communicated to the applicant within ninety days of filing that application.

(4) The Commission shall—

- (a) ensure that the tariffs established in any regulated contract are just and reasonable;
- (b) satisfy itself that the tariffs are in compliance with the Act, the Government relevant energy policy and any other directives of the Commission; and
- (c) take into account any other relevant considerations which may have a bearing on the continued operations of the person engaged in petroleum business.

(5) In this section, "just and reasonable tariffs" shall mean such rate, charge, cost or levy that enables a person engaged in petroleum business to, *inter alia*—

- (a) maintain its financial integrity;
- (b) attract capital and provide for infrastructure development;
- (c) operate efficiently; and
- (d) fully compensate investors for the risks assumed.

6. Decision on tariffs.

(1) Any application for approval of tariffs under Regulation 5 shall be deemed approved if the Commission does not communicate its disapproval of the same to the applicant within ninety days after receipt of the application or within an additional thirty days after the applicant has furnished the Commission with any additional information sought and the Commission has not indicated its approval of the proposed tariffs. Provided that the Commission shall ensure that it completes the consideration of an application within the prescribed time.

(2) A decision of the Commission rejecting proposed rates shall—

- (a) be in writing;
- (b) state the reasons for the rejection; and
- (c) be made available to the parties therein.

(3) Upon approval of any new tariffs, the Commission shall publish the new rate in the Kenya Gazette and shall in such notice provide for a grace period of not less than fourteen days before the new rate becomes effective. Notwithstanding the rights of any affected person to appeal the decision of the Commission, a tariff approved by the Commission shall be the applicable rate until otherwise reviewed or set aside on appeal.

7. Disputes.

(1) A person aggrieved by the decision of the Commission under these regulations may appeal to the Energy Tribunal established under section 108 of the Act within thirty days of the decision.

(2) A person who fails to lodge an appeal against the decision of the Commission within thirty days of the said decision shall be deemed to have accepted the decision.

8. Enforcement.

(1) The Refinery and the Transport and Storage Company shall not, except for reasons beyond their control, discontinue or refuse to offer the services under the regulated contracts to any licenced oil marketer unless the oil marketer has failed to pay the tariff for the services rendered.

(2) Where the Commission is of the opinion that any person party to a regulated contract under these regulations, or on the receipt of any

written complaint from a person adversely affected by failure of any licensee to meet its contractual obligations or to comply with these regulations, it may—

- (a) set out to the infringing licensee in a written notice the matters which constitute a breach, the actions which it proposes to take and reasons for such action;
- (b) require the infringing licensee to remedy the breach; and may include a direction to cease the conduct in question; (c) revoke, suspend or cancel any licence issued to the infringing licensee under the Act;
- (d) take any other action as it may deem necessary and proper in the circumstances.

(3) The provisions of this regulation 8 shall not affect the right of any aggrieved person to take any other action against an infringing licensee under all applicable laws or contract.

9. Offences. Any person who contravenes any of these regulations commits an offence and where no penalty is provided for, shall be liable upon conviction to a fine not exceeding Kenya shillings two million or to a maximum term of imprisonment of two years or both.

10. Transitional provisions.

(1) Notwithstanding these regulations, all contracts and agreements to which the refinery or the transport and storage company are party to and currently in force shall continue in force under their terms but shall be submitted to the Commission at the expiry of three months after the publication of these regulations for registration under section 3 (6) of these regulations.

(2) Any party wishing to modify tariffs charged under any existing contract or in any way seeking to modify any term may apply to the Commission for approval of such review, modification or amendment as provided under regulation 5 after the expiry of three months after publication of these regulations by the Minister.

(3) All existing contracts that are provided for by these regulations under the Schedule hereto shall be renegotiated by the parties in good faith in order to ensure that they are in compliance with these regulations within six months after publication of these regulations. The provisions of regulation 3 of these regulations shall be applicable where parties are unable to reach agreement as to the modifications or review necessary to ensure compliance.

SCHEDULE (R 10)

Regulated Contracts

1. All Transportation and Storage (T & S) Agreements between Kenya Pipeline Company Limited and Oil Marketers or any other person engaged in Petroleum business;
2. All Processing Agreements between Kenya Petroleum Refineries Limited and Oil marketers or any other person engaged in Petroleum business;
3. Tender Terms and Conditions for the Kenya Petroleum Oil Industry Open Tender System for the Delivery of Crude Oil.

Dated the 7th September, 2009.

KABURU MWIRICHIA,
Director General,
Energy Regulatory Commission.