

SPECIAL ISSUE

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LEGAL NOTICE NO. 42

THE ENERGY ACT

(No. 12 of 2006)

IN EXERCISE of the powers conferred by sections 63 and 110 of the Energy Act, 2006, the Minister for Energy, makes the following Regulations:—

THE ENERGY (COMPLAINTS AND DISPUTES RESOLUTION)
REGULATIONS, 2012

1. These Regulations may be cited as the Energy (Complaints and Disputes Resolution) Regulations, 2012.

Citation.

2. These Regulations shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party of any matter regulated under the Act.

Application.

3. (1) In these Regulations, unless the context otherwise requires—

Interpretation.

“complaint” includes a dissatisfaction with the service rendered by, or a practice of, any person carrying out any undertaking pursuant to a licence, permit or registration issued or granted by the Commission, under the Act;

“complainant” means any person affected by a respondent’s undertaking, activity or practice regulated under the Act;

“day” means calendar day;

“dispute” means a disagreement that exists, the parties acting in good faith have failed to reach an amicable resolution of a complaint after all due efforts have been made to resolve it;

“licensee” means a public entity, company, person or body of persons to whom a licence or permit is granted;

“plaintiff” means any person referring a dispute to the Commission for determination;

“respondent” means any person against whom another person has a complaint or a dispute relating to a matter regulated under the Act;

“website” means www.erc.go.ke, the official website of the Commission.

4. These regulations shall apply to complaints and disputes in the following areas—

Complaints and disputes to which these regulations apply.

- (a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
- (b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and
- (c) any other activity and/or matter regulated under the Act.

Complaints handling procedures of licensees and permit holders

5. (1) A person carrying out any undertaking under the Act shall establish procedures that shall be approved by the Commission for handling complaints relating to the undertaking.

(2) The procedures contemplated in paragraph (1) shall conform to the guidelines set out in the First Schedule.

Reports to the Commission on handling of complaints

6. A person carrying out any undertaking under a licence or permit issued or granted under the Act shall, at the end of every month, submit a report to the Commission, regarding the complaints received and resolved in Form S-1 set out in the Second Schedule.

Declaration of a dispute and reference to the Commission

7. (1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.

(2) A party to a dispute may refer the dispute to the Commission in form S-2 as set out in the Second Schedule.

(3) Where a dispute has been referred to the Commission, the Commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.

(4) Where the dispute—

- (a) is resolved through mediation in accordance with paragraph (3), the parties shall file their settlement agreement with the Commission within five days, and the agreement shall be final and binding on both parties.
- (b) is not resolved through mediation in accordance with paragraph (3), the procedures set out in regulations 8 to 16 shall apply.

Authority to represent.

8. (1) A party to a dispute may authorize an advocate to represent him and to act and plead on his behalf before the Commission.

(2) A party to a dispute may appear in person or authorize any of the party's employees or agents to appear before the Commission and to act and plead on the party's behalf.

(3) A party shall authorize the party's employees or agents to appear before the Commission and to act and plead on the party's behalf in form S-3 as set out in the Second Schedule.

9. (1) A person who wishes to refer a dispute with the Commission ("the plaintiff") shall—

Filing a dispute

- (a) inform the respondent in writing of his intention to refer the dispute; and
- (b) furnish the respondent with copies of all supporting documents that are to be filed with the Commission.

(2) The plaintiff shall file four copies of the dispute reference form before the Commission and each copy shall be typewritten, photocopied or printed neatly and legibly on one side of white paper and every page shall be consecutively numbered.

(3) The Commission may accept documents filed under paragraph (1) together with a computer disk or through electronic media on such terms and conditions as the Commission may specify.

(4) The dispute reference form shall be divided into separate paragraphs, which shall be numbered serially.

(5) The dispute reference form shall be accompanied by such documents, supporting data and statements as the Commission may specify.

10. The dispute reference form filed with the Commission shall contain the following information—

Information to be provided by plaintiff

- (a) plaintiff's address;
- (b) plaintiff's or respondent's account number (where applicable);
- (c) copies of relevant correspondence between the plaintiff and respondent,
- (d) reasons, from the plaintiff's viewpoint, why the complaint was not resolved; and
- (e) relief sought.

11. (1) The respondent shall file with the Commission a reply and the documents relied upon within fourteen days from the date of service of a copy of the dispute to him by the plaintiff.

Filing of reply, opposition, objections, etc

(2) In the reply filed, the respondent shall specifically admit, deny or explain the facts stated in the dispute reference form and may also state such additional facts as he considers necessary for the just decision of the dispute.

(3) Where the respondent states that additional facts may be necessary for the just decision of the dispute, the Commission may allow the plaintiff to file a rejoinder to the reply filed by the respondent.

(4) The manner, process, timeframes and number of copies prescribed for the filing of a dispute reference form and provision of

additional information by the plaintiff in regulations 9 and 10 shall apply, *mutatis mutandis*, to the filing of the reply, rejoinder or additional information by the respondent.

Acknowledgement
of a dispute or reply

12. The Commission shall acknowledge receipt of the pleadings and may require additional information from either party or both parties within fourteen days from the date of such receipt:

Provided that in either case, the Commission shall forward copies of the acknowledgement and may request for further information, comments or rejoinder from the respondent or plaintiff.

Request for further
information

13. (1) The Commission may seek additional information from the plaintiff or respondent at any time.

(2) The party submitting further information to the Commission shall furnish copies of the information to the other party.

(3) The party from whom additional information is sought under paragraph (1) shall respond within thirty days from the date of such request, failing which, in the case of the plaintiff, the dispute shall be deemed to have been withdrawn, and in the case of the respondent, the Commission shall give such orders against the respondent as it may deem fit.

(4) If the Commission is satisfied that there is sufficient information relating to the dispute, the Commission shall determine the dispute in accordance with the procedures set out in regulations 15 to 18.

Withdrawal of
dispute.

14. The plaintiff may, at any time before the Commission takes action, withdraw the reference of dispute by notice in writing to the Commission:

Provided that the plaintiff shall forward a copy of the notice of withdrawal of the dispute to the respondent.

Database of experts.

15. The Commission shall identify and maintain a database of persons who are skilled in alternative dispute resolution techniques and who are experts in various fields relevant to energy matters, from among whom the Commission may from time to time select an expert or constitute a Dispute Resolution Panel on such terms and conditions as the Commission may determine, to assist it in the resolution of disputes.

Dispute resolution
by experts.

16. (1) The Commission may refer the dispute filed with it to an expert or to a Dispute Resolution Panel, appointed from among persons in the database maintained pursuant to regulation 15, in the manner described in paragraph (2).

(2) Depending on the complexity of the dispute referred to the Commission, the Commission may appoint an expert or constitute a Dispute Resolution Panel in the following manner—

- (a) if one expert is required, the parties may appoint one expert acceptable to both of them, and where the parties fail to agree on the expert, the Commission shall appoint the expert;

(b) if a Dispute Resolution Panel is required, each party shall appoint one expert, and the experts appointed shall appoint another expert who shall be the chairperson of the panel;

(3) The costs of the dispute resolution process shall, unless the Commission decides otherwise, be borne equally by the parties.

(4) The Expert or Dispute Resolution Panel and the parties shall—

(a) agree on the manner, process and place of conduct of the dispute resolution; and

(b) use their best endeavours to hear and determine the dispute resolution within thirty days from the date of commencement of the process or such extension as the Commission may grant.

(5) The expert or the Dispute Resolution Panel, within fifteen days from the end of the dispute resolution process, make a finding and communicate the finding and the basis of the finding, in writing, together with the records of all the proceedings, to the Commission.

(6) The Commission shall review the information communicated under paragraph (5) and make the determination which shall be adopted as a decision of the Commission within thirty days from the date of submission of the communication.

(7) The Commission shall communicate the decision, in writing, to the parties within thirty days from the end of the dispute resolution process, and the decision shall be binding on the parties and publish a summary of the decision in the Gazette.

(8) The records of the proceedings shall, except the parts which, for reasons specified by the Commission, upon advice of the Expert or Dispute Resolution Panel, are confidential or privileged, be open for inspection after conclusion of the dispute resolution.

(9) A person who wishes to inspect the proceedings shall comply with such terms as the Commission may prescribe from time to time, in regard to place and manner of inspection and payment of fees.

17. To the extent permitted by law, the Commission, the mediators and experts, shall not be liable for any loss or damage suffered or incurred by a party to a dispute or any other person as a consequence of any act or omission of the Commission, the mediators or experts which was done in good faith.

Limitation of liability.

18. The Commission shall keep and maintain a record of all the correspondence regarding every dispute and the decisions and settlements, together with the dates, in the Commission's register of disputes.

Record of disputes

19. Any person who—

(a) fails to submit to the Commission for approval procedures for handling complaints relating to his undertaking or activity;

Offences and penalties.

- (b) fails to submit to the Commission reports required by regulation 6;
- (c) wilfully gives false or misleading information in relation to a complaint or dispute; or
- (d) fails to comply with a mediation agreement or an order, direction or decision by the Commission,

commits an offence and shall upon conviction be liable to a fine not exceeding one hundred thousand shillings or a term of imprisonment not exceeding three months or both.

(2) Any person who contravenes or fails to comply with any of these Regulations or who fails to comply with any prohibition or order of the Commission under any of these Regulations, where no specific punishment is prescribed under paragraph (1) hereof, commits an offence and shall upon conviction be liable to a fine not exceeding one hundred thousand shillings or a term of imprisonment not exceeding three months or both.

Offences by
corporate bodies

20. Where an offence under these Regulations committed by a company, co-operative society or other corporate body is proved to have been committed with the consent or connivance of, or to have been facilitated by any director, chairman, manager, secretary or other officer as well as the company, co-operative society or other corporate body commits an offence and shall upon conviction be liable to a fine not exceeding five hundred thousand shillings or a term of imprisonment not exceeding three months or both.

Appeals

21. Any party aggrieved by a decision or order of the Commission may, within thirty days from the date of the order or decision appeal to the Energy Tribunal established under section 107 of the Act.

Revocation.

22. The Electric Power (Complaints and Dispute Resolution) Rules, 2006 are revoked.

FIRST SCHEDULE

(r. 5)

GUIDELINES FOR COMPLAINTS HANDLING PROCEDURES

1. Procedures for dealing with complaints relating to any undertaking or activity performed pursuant to a licence or permit under the Act shall explain—

- (a) how other persons can gain access to the procedures;
- (b) how the procedures work;
- (c) the timeframes within which the procedures may be carried out;
- (d) the complainant's right to access the Commission if dissatisfied with the respondent's decision or the way it has been reached; and
- (e) any other matter of relevant importance.

2. Every person carrying out any undertaking or activity pursuant to a licence or permit under the Act shall—

- (a) promptly, fully, and fairly deal with every complaint with the objective of ensuring satisfaction of the complainant, and

- (b) ensure that their staff, representatives, agents, sales people or independent contractors are aware of the approved procedures and their obligations under them.

3. In the event that any complaint is not resolved to the complainant's satisfaction, person carrying out any undertaking or activity pursuant to a licence or permit shall inform the complainant of their right to have their complaint referred to the Commission as a dispute between the two parties.

4. In preparing the procedures contemplated in paragraph 1, the guiding principles are that those procedures shall to the extent possible—

- (a) be simple, quick and inexpensive;
- (b) preserve or enhance the relationship between the parties;
- (c) take account of the skills and knowledge that are required for the relevant procedures;
- (d) observe the rules of natural justice;
- (e) place emphasis on conflict avoidance; and
- (f) encourage resolution of complaints without formal legal representation or reliance on legal procedures.

SECOND SCHEDULE

(r. 6)

FORM S-1

REPORTING OF COMPLAINTS RECEIVED AND PROCESSED

From

NAME AND ADDRESS OF PERSON REPORTING

To the

ENERGY REGULATORY COMMISSION
NAIROBI, KENYA

Monthly/Quarterly/Annual* Report of Complaints Received and Processed up to period ending (insert date)

(*Choose applicable reporting period)

<i>Number of Complaints</i>	<i>Licence No.</i>	<i>Licence No.</i>
Brought forward from previous reporting period		
Received during reporting period		
Total (Line 1 + Line 2)		
Resolved during reporting period		
Declared Disputes		
Processed (Line 4 + Line 5)		
Carried forward to next reporting period (Line 3 - Line 6)		

Signed by

Name of Person Reporting

FORM S-2

(r.7)

REFERENCE OF DISPUTE TO THE COMMISSION FOR
MEDIATION

ENERGY REGULATORY COMMISSION		
ERC DISPUTE NUMBER		
	<i>Names of the Parties to the Dispute</i>	<i>Represented by (Optional)</i>
<p>We, the above named, declare that we have failed to agree on the issues listed herebelow and request intervention of the Commission to assist us resolve our dispute by Mediation.</p>		

Rules Governing the Mediation

Each party ("Party") hereby agrees to submit the above dispute for nonbinding mediation ("Mediation") to the Energy Regulatory Commission, (the "Commission"). The Commission shall designate one member of staff who shall be the Mediator.

Confidentiality Agreement

- (a) Mediation is a facilitated negotiation. All offers, promises, conduct and statements, whether oral or written, made in the course of the Mediation, including those made in pre-Mediation and post-Mediation submissions to the Mediator (collectively, "Mediation Communication") by any Party, witness and/or the Mediator—
 - (i) shall be considered confidential and privileged settlement communications that may only be disclosed to persons associated with the Parties;
 - (ii) shall be deemed inadmissible and may not be used for any purpose, in any dispute resolution process, arbitration, judicial, administrative or regulatory proceedings; and
 - (iii) may not be disclosed to non-participants in the Mediation (including any expert, hearing officer or court).
- (b) The Parties shall not subpoena or otherwise seek to compel any of the participants, including any Party, the Mediator, an employee of the Commission or any other person who participated in the Mediation, to testify about, respond to any request to admit, or respond to any discovery request regarding any Mediation Communication or any other aspect of the Mediation.

- (c) The Mediator will be disqualified as a witness, consultant or expert for any Party in connection with any matter relating whatsoever to this dispute or the Mediation. The Mediator will treat any Mediation Communication as confidential and will refrain from disclosing any Mediation Communication except to the Parties.

Effect of a Settlement Agreement

Notwithstanding anything to the contrary in this Agreement, an executed written settlement agreement shall be considered binding upon the Parties and may be enforced by any Party to the settlement agreement, and provided further that information disclosed to or known by a Party through a source other than the Mediation, or that is otherwise discoverable or admissible, shall not be rendered confidential, privileged, inadmissible, or not discoverable solely as a result of its use in the Mediation.

Pre-Mediation Submission

- (a) The Parties agree that a submission of each Party's understanding of the facts and theory of liability and damages ("Submissions") presented to the Mediator prior to the Mediation would facilitate the Mediator's ability to conduct a more expeditious and effective Mediation.
- (b) The Submission should be delivered to the Mediator and may be exchanged between the Parties not less than 14 (fourteen) days prior to the Mediation. If a Party deems a Submission to be confidential and to be read by the Mediator only, that Party must indicate as such in the Submission. The Submission may include the following (to the extent applicable)—
- (i) statement of facts, including a description of the injury and a list of special damages and expenses incurred and expected to be incurred;
 - (ii) theory of liability and damages and authorities in support thereof;
 - (iii) summary of opinion witnesses (including "expert witnesses") and non-opinion fact witnesses;
 - (iv) status of the case, and if in suit, expected trial date;
 - (v) last demand and offer, if any;
 - (vi) photographs;
 - (vii) police reports;
 - (viii) any other document not specifically referenced by any of the foregoing provisions that would assist the Mediator in understanding any claim and/or defence.

Signature and Designation of Plaintiff and/or Respondent
Address for correspondence

FORM S-3

(r. 9)

AUTHORITY FOR REPRESENTATION BEFORE THE
COMMISSION

Before the
Energy Regulatory Commission
Nairobi, Kenya

Dispute No.....

IN THE MATTER OF:

..... Plaintiff(s)

v/s

..... Respondent(s)

Memo of Authorization

I,.....,practising/working as,
having been authorized by,
(Furnish the particulars of the person authorizing), hereby enter
appearance on behalf of and undertake to
plead and act for him/it in all matters in the aforesaid dispute.

Place: _____

Date: _____

Signature & Designation
Address for correspondence

Made on the 4th April, 2012.

KIRAITU MURUNGI,
Minister for Energy.