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TENTH PARLIAMENT – FOURTH SESSION

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REPORT OF JOINT COMMITTEES  
ON THE SCRUTINY OF THE ENERGY (IMPORTATION OF PETROLEUM  
PRODUCTS) (QUOTA ALLOCATIONS) REGULATIONS, 2010

By

Committee on Delegated Legislation  
Departmental Committee on Energy, Information & Communication

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Clerks Chambers,  
Parliament Buildings,  
NAIROBI.

February, 2011



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## PREFACE

Mr. Speaker,

On Tuesday, 19<sup>th</sup> August, 2010, the Select Committee on Delegated Legislation received a complaint with respect to the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 which were *gazetted* by the Minister for Energy on 11<sup>th</sup> June, 2010 as Legal Notice No. 96 to the effect that the said regulations are in breach of Section 116 of the Energy Act in so far as they confer upon the National Oil Corporation of Kenya (NOCK) unfair advantage over other players in the Industry.

The Committee thereafter requested the Minister for Energy to fill-in an Explanatory Memorandum (annex 1) developed by the Committee for this purpose which the Minister accordingly filled. On 7/12/2010, the Committee heard an opportunity of meeting with the Minister for Energy and five Oil Marketing Companies who through Libya Oil Limited, made their presentation to the Committee. The Minister for Energy requested for more time to prepare his response to the oil marketer's submission. In the course of the hearings, the Committee noted that the impugned regulations also involved questions of policy *which under the Standing Orders of the Kenya National Assembly are the exclusive mandate of the Departmental Committee on Energy and therefore decided to invite the Departmental Committee on Energy, Information and Communication to join in the scrutiny.*

Mr. Speaker,

The Committee on Delegated Legislation is established under Standing Order 197 to, among other functions;

- i) ensure that statutory instruments are laid before the House as may be provided under any written law and **scrutinize such instruments** to ensure that they are consistent with parent statutes;

- ii) Unless otherwise provided for either expressly or by implication under any written law, all subsidiary legislation shall be tabled before the House upon publication in the Kenya Gazette; and
- iii) The Committee may recommend that the House resolves that any particular subsidiary legislation be annulled.

The Departmental Committee on Energy, Information and Communication was constituted at the commencement of the tenth Parliament and executes its mandate in accordance with the provisions of Standing Order 198 (3), which is:-

- a) to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and Departments;
- b) to study the programme and policy objectives on Ministries and Departments and the effectiveness of the implementation;
- c) to study and review all legislation referred to it;
- d) to study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e) to investigate and enquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House or a Minister; and
- f) To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

The Committee, according to Schedule II of the Standing Orders, deals with the following subjects:

- Development, production, maintenance and regulation of Energy.
- Communication.
- Information.
- Broadcasting, and Information Communications Technology (ICT) development.

Mr. Speaker,

The membership of the Joint Committees was as follows:-

- i. The Hon. Amina Abdalla, M.P. ----- Co- Chairperson
- ii. The Hon. (Eng.) James Rege, M.P. ----- Co- Chairperson
- iii. The Hon. Maina Kamau, M.P.
- iv. The Hon. Ababu Namwamba, M.P.
- v. Hon. Gitobu Imanyara, M.P.
- vi. The Hon. (Dr). Julius Kones, M.P.
- vii. The Hon. John Olago, M.P.
- viii. The Hon. Barnabas M. Mwangi, M.P.
- ix. The Hon. Njoroge Baiya, M.P.
- x. The Hon. Kiema Kilonzo, M.P
- xi. The Hon. Fahim Twaha, M.P.
- xii. The Hon. Danson Mwazo Mwakulegwa, M.P
- xiii. The Hon. Joshua Kutuny, M.P
- xiv. The Hon. Adan Keynan, M.P
- xv. The Hon. (Eng.) Nicholas Gumbo, M.P
- xvi. The Hon. Edwin O. Yinda, M.P
- xvii. The Hon. Emilio Kathuri, M.P
- xviii. The Hon. Ekwere Ethuro, M.P
- xix. The Hon. (Prof) Phillip Kaloki, M.P
- xx. The Hon. Cyprian Omolo, M.P

Mr. Speaker,

In its examination of the matter, the joint Committee sought to answer the following issues:-

1. *“Whether the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are consistent with the Provisions of the Energy Act, Act No. 12 of 2006.”*

2. *Whether the impugned Regulations are discriminative and therefore contrary to Section 112 of the Energy Act.*
3. *Whether there is a provision under the Energy Act permitting the Minister to Allocate Quotas?*
4. *Was there sound policy considerations that informed the enactment of the impugned regulations*

The Committee held a meeting with both five key Oil Marketers (Total Kenya, Libya Oil Kenya, Kenya Shell Ltd and Gulf Energy) and the Minister for Energy and also examined additional information submitted before it. The findings of the joint Committee are contained in this report.

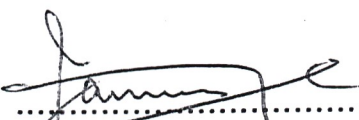
The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

Mr. Speaker,

It is our pleasant duty, on behalf of the Committees to present and commend this report to the House for adoption.

Signed:  .....

Hon. Amina Abdalla, MP, Co-Chairperson.

Signed:  .....

The Hon. (Eng) James Rege, M.P, Co-Chairperson

Date: *Feb. 24, 11* .....

## INTRODUCTION

1. On 18<sup>th</sup> June 2010 the Minister for Energy vide legal notice number 96 of 2010 enacted the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 (hereafter referred to as the Regulations) purporting to exercise powers conferred by section 102 of the Energy Act, Act No. 12 of 2006.

2. The said regulations provide at rule 3 that;

*(1) There is established a portion of the import requirements to be known (as) the petroleum products quota allocation.*

*(2) The petroleum products quota allocation shall be import by the National Oil Corporation of Kenya*

*(3) The petroleum products quota allocation shall be set out in the Schedule hereto.*

3. Whereas Section 116 of the Energy Act, Act No. 12 of 2006 (hereafter referred to as the Act) provides that:

*While discharging its functions and exercising its powers under the Act, the Commission shall ensure that no particular person is given undue preference or subjected to any undue disadvantage.*

It was the contention of the Oil Marketers that the said regulation had the effect of reserving a 30% quota of oil imports of Crude Oil, Jet Fuel and Automotive Gasoil to the National Oil Corporation of Kenya and therefore was in breach of Section 116 of the Energy Act in so far as they confer upon the National Oil Corporation of Kenya (NOCK) unfair advantage over other players in the Industry.

4. Pursuant thereto, the Committee on Delegated Legislation held a first meeting with the five key oil players together with the Minister for Energy and decided to invite the Departmental Committee on Energy, Information and Communications at the next meeting when the Minister was making his submissions.

### Meetings of the Committee

5. The Committees held a total of four meetings, the first one being on November 22, 2010, where upon scrutinizing the Explanatory Memorandum forwarded by the Minister, the Committee framed the following three issues to guide its inquiry at the upcoming meeting with the oil marketers:
  1. *“Whether the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are consistent with the Provisions of the Energy Act, Act No. 12 of 2006.”*
  2. *Whether the impugned Regulations are compatible with Section 112 of the Energy Act i.e. whether they are discriminative.*
  3. *Is there a provision under the Energy Act permitting the Minister to Allocate Quotas?*
6. Thereafter, the Committee on Delegated Legislation held a meeting with five Oil Marketing Companies (hereafter referred to as OMC) who had submitted their Explanatory Memorandum together with the Minister on December 7, 2010. At this meeting, the Oil Marketers’ made a common submission through Oil Libya Limited. The Minister at this point requested for more time to prepare his submissions.
7. Arising from the policy issues raised in the submissions made to the Committee, and owing to the limited mandate of the Committee on Delegated Legislation under Standing Order 197, the Committee decided to invite the Departmental Committee on Energy, Information and Communications to join in the inquiry in light of their mandate to deal with policy issues within the energy sector.
8. Thereafter, the joint Committee held a meeting with the Minister together with the five Oil Marketing Companies (OMCs) who were in-attendance on February 10, 2011. The Committee met on February 17<sup>th</sup> and analyzed the evidence of the Minister and OMCs

## EVIDENCE AND ADDITIONAL INFORMATION

### Evidence by the Oil Marketers

9. Appearing before the Committee on Delegated legislation on December 7, 2010, Oil Marketing Companies (Total Kenya, Libya Oil Kenya, Kenya Shell Ltd and Gulf Energy) made the following submission to the Committee:-

#### i. Issues

##### A. Legal Issues

- (a) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are discriminatory and contrary to section 116 of the Energy Act.
- (b) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are ultra vires the Energy Act insofar as they provide for a system of importation of petroleum that is not through an open tendering system (OTS).
- (c) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 2, 4, 5, and 74 of the Public Procurement and Disposal Act.
- (d) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 30 of the Public Procurement and Disposal Act insofar as it structures procurement of petroleum products in Kenya as two or more procurements for the purpose of avoiding the use of the OTS.
- (e) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 39 of the Public Procurement and Disposal Act insofar as it limits participation of eligible companies in the procurement for the importation of the petroleum products in Kenya.

##### B. Supply related practical Issues

- (a) Compulsion to purchase from NOCK even though they may be uncompetitive in their pricing.
- (b) NOCK cannot give any guarantee that they obtain lower prices than those in the OTS.

ii. A discussion of the legal issues

- (a) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are discriminatory and contrary to section 116 of the Energy Act.

The National Oil Corporation of Kenya (NOCK) is a limited liability company incorporated under the Companies Act, Chapter 481 of the laws of Kenya whose principal shareholder is the Government of Kenya.

It is was their contention that insofar as the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 confer upon the National Oil Corporation of Kenya an exclusive 30% quota for the importation of crude oil, jet fuel and automotive gasoil it is discriminatory against other oil marketing companies by not only conferring against NOCK an undue preference but also subjecting other oil marketing companies to an undue disadvantage.

It is also noteworthy that section 116 of the Energy Act specifically provides that:

116 *While discharging its functions and exercising its powers under the Act, the Commission shall ensure that no particular person is given undue preference or subjected to any undue disadvantage.*

As to whether NOCK falls within the definition of "person" in section 116 of the Energy Act, it is instructive that the Interpretations and General Provisions Act, Chapter 2 of the Laws of Kenya defines a person at section 3(1) as:

3 (1) "person" includes a company or association or body of persons, corporate or unincorporated;

The same Interpretations and General Provisions Act also provides at section 76 that:

76 This Act shall bind the Government.

- (b) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are ultra vires the Energy Act insofar as they provide for a system of importation of petroleum that is not through an open tendering system.

It was their further contention that the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are ultra vires the Energy Act insofar as they provide for a system of importation of petroleum that is not through an open tendering system.

The Energy Act is clear in its requirements that the Minister of Energy makes regulations “providing for importation of petroleum through open tendering system and the manner in which such system shall operate.”

The powers of the minister to make regulations regarding importation of petroleum into Kenya are found in section 102(d) of the Energy Act, Act No. 12 of 2006 provides that:

102 Without limiting the generality of section 6 and in accordance with section 110, the Minister may, on the recommendation of the Commission, make regulations

(...) (d) Providing for importation of petroleum through open tendering system and the manner in which such system shall operate;

Section 6 deals with the powers of the Energy Regulatory Commission (ERC) and has no specific mention of the power to regulate the importation of petroleum through the open tender system.

Section 110 on the other hand deals with the procedure of enacting regulations under the Act.

The Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, derogate from the strictures of an open tender system. It provides for a two tier system of procurement of petroleum imports where 70% of crude oil, jet fuel and automotive diesel through an open tendering system and 30% through a direct procurement system by NOCK.

- (c) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 2, 4, 5, and 74 of the Public Procurement and Disposal Act.

It was also their contention that the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 insofar as they reserve a 30% quota to NOCK are contrary to the Public Procurement and Disposal Act, particularly:-

- (a) They are not intended to and will not maximize economy and/or efficiency in procurement contrary to section 2(a) of the Act;
- (b) They do not promote competition and treat competitors unfairly contrary to section 2(b) of the Act
- (c) They do not promote integrity and fairness to procurement procedures contrary to section 2(c) of the Act
- (d) They do not increase transparency and accountability to procurement procedures contrary to section 2(d) of the Act
- (e) They do not increase public confidence in the procurement procedures contrary to section 2(e) of the Act

The Public Procurement and Disposal Act is by virtue of section 4 of the said Act, indeed applicable to the procurement of petroleum imports in Kenya because:-

- (a) It is procurement by the Ministry of Energy, which is a public entity;
- (b) It is a form of contract management by the Ministry of Energy;
- (c) It is a supply chain management system that includes inventory management and distribution of petroleum products in Kenya

It is noteworthy that the Public Procurement and Disposal Act, Act No. 3 of 2005 is the supreme law in matters relating to procurement and disposal. It at section 5(1) provides that:

- 5 (1) If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail.

Further they contended that insofar as the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, provides for a method of procurement that can only be described as direct procurement it goes against the Public Procurement and Disposal Act, Act No. 3 of 2005 which provides at section 74 that:

74 (1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied –

(a) There is only one person who can supply the goods, works or services being procured; and

(b) There is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied -

(a) There is an urgent need for the goods, works or services being procured;

(b) Because of the urgency the other available methods of procurement are impractical; and

(c) The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

(d) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 30 of the Public Procurement and Disposal Act in so far as it structures procurement of petroleum products in Kenya as two or more procurements for the purpose of avoiding the use of the open tender system.

It was also their contention that the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 insofar as they reserve a 30% quota of the open tender for the importation of petroleum into Kenya to NOCK is contrary to the Public Procurement and Disposal Act, particularly section 30(1) because it splits a single procurement of petroleum into a direct procurement (30%) and a competitive open tender (70%).

Section 30 provides as follows:-

30 (1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence.

(3) Standard goods, services and works with known market prices shall be procured at the prevailing real market price.

(4) Public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the regulations, be required to pay the procuring entity for the loss resulting from their actions.

- (e) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 39 of the Public Procurement and Disposal Act insofar as it limits participation of eligible companies from participating in the procurement for the importation of the petroleum products in Kenya.

As regards the discrimination in the participation in procurement, the Public Procurement and Disposal Act, Act No. 3 of 2005 provides at section 39 that:

39 (1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.

(3) The preferences and reservations referred to in subsection (2) shall –

(a) be non-discriminatory in respect of the targeted groups;

(b) allow competition amongst the eligible;

(c) be monitored and evaluated.

iii. A discussion of the Supply related practical Issues

- (a) Compulsion to purchase from NOCK even though they may be uncompetitive in their pricing.

It is our contention that by taking up ullage of the KPC pipeline, the regulations will compel oil companies to participate in the NOCK tender whether they are competitive or not. It is to be noted that the first tender submitted by NOCK is higher than the OTS by 15.00 per metric tonne leading ultimately to higher not lower fuel pump prices and costs to the economy.

If an oil company desires to retain its market share it has no option but to buy petroleum from NOCK

- (b) NOCK cannot give any guarantee that they obtain lower prices than those in the OTS.

From the analysis attached hereto it is evident that NOCK cannot source for petroleum products cheaper than what currently prevails in the oil industry.

Though the oil marketers were appreciative of the objective of the regulations which was to cushion the consumer through reduced fuel prices, they however cited several challenges experienced in the industry which needed to be addressed in order to reduce the cost factor of fuel in the country. These include inefficiencies at the Kenya Petroleum Refineries Ltd. (KPRL), Kenya Pipeline Company (KPC) and congestion at the Kipevu Oil Terminal.

Evidence by the Minister for Energy

10. Appearing before the Committee on February 10, 2011, the Minister for Energy made the following submission to the Committee:-

1.0 Background

- a) The Minister for Energy, vide a Legal Notice No. 96 of 2010 dated 18<sup>th</sup> June, 2010, enacted the *Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010* (hereinafter, "the Regulations"), in exercise of the power conferred on the Minister by section 102 of the Energy Act, No. 12 of 2006.
- b) Regulation 3 of the Regulations allocated 30% of all Crude Oil, Diesel and Jet Kerosene imported for consumption in Kenya for importation by NOCK.

- c) The Minister was aware that the major oil marketers, namely, Total Kenya Limited, Kenya Shell Limited, Gulf Energy, Kenol Kobil and Oil Libya petitioned the legality and propriety of the Regulations and have since been heard by the Committee on Delegated Legislation on the legality and propriety of the Regulations.

11. The Minister gave the following response to the allegations by the OMCs:

- i) The Regulations are not undue, and are informed by public interest objectives of cushioning consumers against predatory fuel prices and secure supply of petroleum, thus are sanctioned by section 116 of the Energy Act.
- ii) The Regulations are necessary and expedient in achieving the objects and purposes of the Act thus sanctioned by section 6(b) of the Act.
- iii) The Regulations are in the category of regulations providing for conditions for importation of petroleum thus sanctioned by section 102(b) of the Energy Act.
- iv) The Minister for Energy has power under section 102(b) of the Act to make any Regulations providing for any matter incidental to importation of petroleum, thus the provision sanctions the Regulations.
- v) The power of the Minister of the Minister to make Regulations under section 102 of the Energy *is not* limited to making Regulations for importation of petroleum under Open Tender System (OTS).
- vi) The Regulations are not an act of procurement capable of breaching the Public Procurement and Disposal Act No. 3 of 2005. It is the procurement entities that are regulated by the Procurement Act, which in this case, are NOCK (procuring 30% quota) and OTS (procuring 70% quota) and the Procurement laws enjoins those entities procuring to observe the procurement laws.
- vii) In procuring the 30% inaugural quota in November, 2010, NOCK demonstrated competitive tendering, costs efficiency, fairness and public confidence in the sector as envisaged by the Public Procurement and Disposal Act.
- viii) Petroleum products quota allocation under the Regulations is not unique to Kenya:
  - a) In India, all Oil Marketing Companies, including Indian Oil Corporation (IOC), Hindustan Petroleum Corporation Limited (HPCL), Bharat Petroleum Corporation (BPCL) and Oil and Natural Gas Company

- (ONGC), are government owned. Effectively, the Government imports 100% of the entire petroleum imports.
- b) In Indonesia, under the *Petroleum and Natural Gas Act*, No. 22 of 2001, the government owned corporation, PERTAMINA, imports 100% of the entire petroleum imports.
  - c) In South Korea, the state owned Korea National Oil Company (KNOC) imports 10% of petroleum imports.
  - d) In the United States of America, on November 30, 1962, President John F. Kennedy, vide *Presidential Proclamation No. 3509- Modifying Adjusting Imports of Petroleum and Petroleum Products*, allocated the maximum level of petroleum imports that could be undertaken by each District to secure national supply of the product.
- ix) Under the Open Tender System (OTS), private importers were unable to import more than 70% of the Petroleum imports. As a result, private individuals not authorized by the Commission to import petroleum into Kenya disguised themselves behind participants in the OTS to illegally import the 30% petroleum deficit into Kenya.
  - x) The Regulations were published by the Minister for Energy in draft in January 2009 where all stakeholders were given a chance to comment on the draft before the final Regulations could be published. None of the Oil Marketing Companies commented on the draft Regulations and it is therefore not right for them to claim that the Regulations disfavours them.
  - xi) To oppose these Regulations is to do so much for the benefit of so few at such a great cost of so many.

## 2.0 ANALYSIS

- a) On the allegation that the Regulations confer undue preference to NOCK contrary to section 116 of the Energy Act

### 2.1 *The Allegation is not true for the reasons that:*

#### 2.1.1 Section 116 of the Energy Act provides as follows:

*“While discharging its functions and exercising its powers under the Act, the Commission shall ensure that no person is subjected to undue preference or subjected to undue disadvantage”*

- 2.1.2 It is therefore not correct to argue, as the OMCs have purported to argue, that section 116 of the Act debars the Commission from preferring or disadvantaging a party in the energy sector. The correct position is that by dint of section 116 of the Energy Act, Parliament has permitted the Commission to prefer or disadvantage a

party within the energy sector, so long as the preference or disadvantage is not *undue*; that is, so long as the preference or disadvantage is not *unwarranted*.<sup>1</sup> A justified preference or disadvantage is permitted by section 116 of the Act. In any event, NOCK has not been preferred under the Regulations but are only a vehicle through which the government achieves the greater public interest objective of protecting consumer interests.

2.1.3 *The Regulations are not undue* as the gist of the Regulations is informed by:

- i. The need to ensure adequate, reliable and secure supply of competitively priced petroleum fuels to achieve meaningful economic growth in line with section 4.2.1 (B) paragraph 14 of the Sessional Paper No. 4 of 2004 on Energy;
- ii. The fact that while on 10<sup>th</sup> April, 2008, the Minister gazetted the *Energy (Minimum Operational Stock) Regulations, 2008*, requiring all OMCs in Kenya to maintain 21 day operational stocks, the requirement has not substantially been met. The OMCs have inadequate petroleum storage and distribution infrastructure and the Regulations are therefore necessary to secure petroleum supply in the country;
- iii. The fact that petroleum products quota allocation divides imports into OTS (70%) and NOCK (30%). This effectively manages the existing infrastructural constraints that can neither handle 100% of the country's import requirements in one import nor can it handle many vessels, common with private imports, in a single jetty;
- iv. NOCK is 100% state company through which the Commission can effectively ensure competitive pump prices and mitigate against potential threats to security of supply of petroleum products. All these efforts are geared towards passing the advantage of lower priced products directly to the consumer through competitive pump prices;
- v. The need to stomp out the predatory and unpredictable pricing currently exercised by large OMCs; and
- vi. The need to eliminate line up of vessels awaiting to load or offload, common with private imports, thereby significantly reducing demurrage costs to the country currently in excess of US \$ 100 Million per annum.

2.1.4 The Regulations are therefore sanctioned by section 116 of the Energy Act.

b) On the Allegation that the Regulations are inconsistent with section 102 of the Act

3.1 *The allegation is not true for the reasons that:*

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<sup>1</sup> Bryan A. Garner (2007). Black's Law Dictionary, 8<sup>th</sup> Edition, Thomson West Publishing Company, p. 1563.

#### FIRSTLY:

- 3.1.1 Parliament has conferred upon the Energy Regulatory Commission, in section 6 of the Act *all powers necessary or expedient* to perform the Commission's functions under the Act. The Commission can issue, *modify, suspend or revoke licences and permits for all undertakings* and activities in the energy sector.<sup>2</sup>
- 3.1.2 In recognition of the scope of powers of the Commission under section 6 of the Energy Act, the introduction of section 102 of the Energy Act, is couched to read as follows:  
"Without limiting the generality of section 6 and in accordance with section 110, the Minister may, on the recommendation of the Commission, make regulations..."
- 3.1.3 The overriding power conferred on the Commission by Parliament in section 6 of the Energy Act, enables the Commission to take any measure that is *necessary and expedient* for the exercise of the Commission's mandate within the energy sector.
- 3.1.4 Section 102 of the Energy Act therefore authorizes the Minister to make any Regulations *necessary and expedient* to achieve the objectives of the Energy Act.

#### SECONDLY:

- 3.1.5 Section 102(b) of the Energy Act authorises the Minister to make regulations providing for *importation of petroleum, conditions of licence to import and any other matter incidental thereto*. The power of the Minister to make Regulations relating to importation of Petroleum is, by dint of section 102(b) of the Energy Act, open ended and it is deliberately so meant by Parliament to be open ended, not pedantic.
- 3.1.6 Such that, the proposition by Oil Marketing Companies that under section 102 of the Energy Act, the Minister may only make Regulations for importation of petroleum through open tendering system is not true.
- 3.1.7 Section 102(b) of the Energy Act is explicit that the Minister may make any Regulations on *conditions of licence to import or any matter incidental to importation of petroleum*. Petroleum products quota allocation is both a sanctioned condition for importing petroleum in Kenya and a matter incidental to importing petroleum in Kenya.
- 3.1.8 The objective of the Regulations being to safeguard both the consumer interest, particularly predatory fuel pricing, and to guarantee security of supply of petroleum in Kenya, both of which are mandates of the Commission in section 5 of the Energy Act.
- 3.1.9 In any event, even the OMCs appreciate that the Regulations are necessary and expedient in safeguarding consumer interests. For instance, in paragraph 1.3 of the

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<sup>2</sup> Energy Act No. 12 of 2006, s. 6(a).

submissions by Gulf Energy dated November 11, 2010, the OMC “appreciates the Commission’s rationale” but is only ‘skeptical’ as to the prospects of imposing petroleum products quota allocation to NOCK.

- c) On the allegation that the Regulations are inconsistent with the Public Procurement and Disposal Act No. 3 of 2005 (“Procurement law”)

**FIRSTLY:**

4.1 The argument that the Regulations flout the objectives of Procurement Laws such as cost efficiency, transparency and competition is fallacious for the reasons that:

- i. The Regulations are not procurement by the Ministry of Energy capable of flouting procurement laws. The Regulations are an instrument for facilitating procurement. Procurement is done by NOCK at which point it is incumbent upon NOCK to abide by procurement laws. Towards this end, NOCK, in November, 2010, procured the 30% quota through a transparent and competitive tendering where six of the leading petroleum traders in the World were invited to tender for the supply of the quota, with the lowest bidder being selected.
- ii. To demonstrate that the pricing of the inaugural 30% quota cargo for delivery in the month of November, 2010 was competitive and cost effective, participation to the quota by the OMCs was voluntarily received for the following OMCs for the quantities shown and the contracts between the OMCs and NOCK signed:
  - a) Kenol- 9,000 MT;
  - b) Shell- 5,000 MT;
  - c) TOTAL- 7,000 MT;
  - d) MGS- 3,000 MT;
  - e) Fossil- 1,500 MT;
  - f) Hass- 3,500 MT; and
  - g) Riva- 800 MT.

**SECONDLY:**

4.2 The Allegation that the Regulations split procurement by the Ministry of Energy contrary to section 30 of the Procurement Law is fallacious because:

- i. Ministry of Energy is not a procuring entity, and so the Regulations by the Minister are not an act of procurement capable of flouting section 30 of the Procurement Act. It is for NOCK and the OTS to abide by section 30 of the Procurement Law in procuring petroleum product in Kenya.

### THIRDLY

4.3 The allegation that the Regulations limit competition contrary to section 39 of the Procurement Law is fallacious because:

- i. As indicated in paragraph 4.1 herein, NOCK has in the past competitively identified suppliers for the 30% quota cargo;
- ii. Under the OTS, several players in the oil industry have for a long time been unable to get long term supply contracts because, OTS, being run on the basis of spot purchases, has been a preserve of 3 to 5 players in the industry backed by their multinational mother companies or affiliates.
- iii. The Regulations therefore create an environment for competitive tendering, efficiency, fairness, promotion of local industry and public confidence in the sector as envisaged by the Public Procurement and Disposal Act.

### CONCLUSION

5.1 Petroleum products quota allocation under the Regulations is not unique to Kenya and has worked in other countries as demonstrated in India, Indonesia, South Korea and the United States.

5.2 A strong National Oil Corporation is good for the economy. It is such oil companies that immensely contribute to the economies of their countries. Just to mention a few:

- i) The Malaysian PETRONAS contributes over 40% of the revenue of Malaysian Government.
- ii) Brazilian PETROBRAS accounts for 5% of the Brazilian GDP.
- iii) Indian IOCL, South African PETROSA account for a huge chunk of the Countries' GDP.

5.3 In fact, it is through such strengthening of the national oil companies that such companies have managed to outgrow some of the traditional multinational oil companies and are currently challenging their dominance in the world petroleum operations.

## COMMITTEE OBSERVATIONS

11. The oil industry is facing many challenges including congestion at the port and inefficiencies of Kenya Petroleum Refineries' Limited and Kenya Pipeline Company which are translated to high prices for the consumer and this issue need to be urgently addressed by the Minister in order to ultimately lower the fuel prices and realize economic growth.
12. The Committee noted the importance of the policy framework for the Energy sector as set out in Sessional paper No.4 of 2004 on Energy which recognized that "petroleum fuels are key prime movers of the modern sector of the economy" and that without adequate, reliable and secure supply of competitively priced petroleum fuels, no meaningful level of economic growth can be realized" and which informed the Minister's action in publishing the regulations.
13. The Committee observed that the Minister in gazetting the impugned regulations, aimed at strengthening NOCK which is a 100% State owned in order for it to be able to offer petroleum products at competitive prices compared to OMC's whose main aim was profit making. The impugned Regulations would also strengthen the role of NOCK in its ability to moderate pump prices and mitigate against potential threats to security of supply of petroleum products.
14. The Committee therefore recognized that the promulgation of the said Regulations was founded upon government policy of advancing public interest geared towards regulating the prices of fuel and therefore the Minister did not breach the law.
15. The Committee further noted that the concept of petroleum products quota allocation through Regulations is not unique in the world and has worked in many other countries such as India, Indonesia, South Korea and the United States where the key state corporation have been granted a monopoly to import petroleum products and to provide price leadership through competition.

16. In its inquiry, the Committee sought to answer the following questions whose answers are appended thereunder:-

1. *Whether Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are contrary to Section 116 of the Energy Act i.e. whether they are discriminative.*

With respect to this question, the fundamental question, the Committee finds observed that the impugned regulations were not in breach of the Section 116 of the Energy Act in so far as the Regulation are not discriminative to any person.

Whereas Section 116 of the Energy Act provides as follows:

*“While discharging its functions and exercising its powers under the Act, the Commission shall ensure that no person is subjected to undue preference or subjected to undue disadvantage”*

The committee observes that the Section has employed the following two key words “undue preference or subjected to undue disadvantage”. The Committee further observes that it was clear from the above Section that Parliament has permitted the Commission to prefer or disadvantage a party within the energy sector, so long as the preference or disadvantage is not undue.

The Committee therefore notes that the section permits a degree of preference or disadvantage against a person and going by the stated intention of the Minister to achieve the public interest objective of protecting consumer interests, the Committee finds that NOCK was not given undue advantage over the other players.

The Committee further observes that during the hearings, the attention of the committee was drawn to an analysis of the OTS cost versus NOCK import brought in under the 30% quota where it was shown that the NOCK price was US\$ 782.23 USD/mt whereas the one for Galana Oil brought in through OTS was US\$ 755.45 USD/mt all the consignment having landed in the country on 8<sup>th</sup> November, 2010. This therefore shows that even if NOCK was given undue preference against the other OMC's, they did not derive any benefit or value since their Oil was ultimately retailed at a loss price.

that even if NOCK was given undue preference against the other OMC's, they did not derive any benefit or value since their Oil was ultimately retailed at a loss.

2. *Whether there is a provision under the Energy Act permitting the Minister to Allocate Quotas?*

With regards to this question, the Committee finds that the impugned Regulation were made under Section 102(b) of the Energy Act which authorizes the Minister to make regulations providing for *importation of petroleum, Conditions of licence to import and any other matter incidental thereto*. The Committee further notes that the provisions of this sub section are open ended and as such it cannot be argued that Parliament only intended the Minister to make Regulations for importation of petroleum through open tendering system to the exclusion of any other alternative method.

3. *“Whether the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are consistent with the Provisions of the Energy Act, Act No. 12 of 2006.”*

Having found as above, the Committee finds that the Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, does NOT breach the provisions of the Energy Act in as far as the Regulations are not discriminative and that the same were made by the Minister while exercising his powers under Section 102(b) of the Energy Act.

4. Whether Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 2, 4, 5, and 74 of the Public Procurement and Disposal Act.

The Committee noted that strong submissions were made by the OMC's that the impugned Regulations are contrary to the provisions of the Public Procurement and Disposal Act. At the outset, the Committee wishes to point out that the mandate of the Committee on Delegated legislation is limited by Standing Order 197(2) that provides that:-

- (2) *The Committee shall ensure that statutory instruments are laid before the House as may be provided under any written law and scrutinize such instruments to ensure that they are consistent with parent statutes.*

The Committee therefore observes that the parent statute in this case is the Energy Act of 2006 and as such the Committee of Delegated Legislation lacks the mandate to scrutinize the Regulations *vis-a-vis* the provisions of the Public Procurement Act which in this case it is not the parent statute.

Although the inquiry was initially conducted by the Committee on Delegate Legislation, the Departmental Committee on Energy, Information and Communication was later on invited to join the inquiry considering its broad mandate to inquire into the policy considerations informing the impugned Regulations and the Committee finds that, *prima facie*, the Regulations are not an act of procurement by the Ministry of Energy capable of flouting procurement laws given that the Regulations by their very nature are an instrument for facilitating procurement which is done by NOCK.

*5. Were there so und policy considerations that informed the enactment of the impugned regulations?*

Upon considering both the written and oral submissions made before it, the Committee observes that the Regulations are not undue, and are informed by public interest objectives of cushioning consumers against the ever rising fuel prices and secure supply of petroleum, and are therefore permissible by section 116 of the Energy Act which gives the Minister an element of discretion in discriminating against any person.

The Committee further observes that the Regulations are necessary and expedient in achieving the objects and purposes stated laid out in section 6(b) of the Act.

Finally, the Committee observes that the Regulations were published by the Minister for Energy in draft in January 2009 where all stakeholders were given a chance to comment on the draft before the final Regulations could be published. None of the Oil Marketing Companies commented on the draft Regulations a fact which was admitted by all the OMC's that appeared before the Committee.

## CONCLUSION

13. The joint Committee finds that;

- (i) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are not discriminatory and therefore not contrary to section 116 of the Energy Act.
- (ii) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 were enacted pursuant to the provisions of Section 102 (b) of the Energy Act.
- (iii) The Committee has got no mandate to scrutinize Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 *vis-a-vis* the provisions of the Public Procurement and Disposal Act. Nevertheless, the Committee acknowledges that NOCK being a public entity, needs to be transparent in its procurement.
- (iv) The enactment of Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 was founded upon sound government policy consideration geared at achieving public interest objectives of cushioning consumers against ever increasing fuel prices.

## RECOMMENDATIONS

14. The Committee recommends that the House resolves:-

- I. That Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are not contrary to f the Energy Act, No. 12 of 2006.
- II. That in light of the 30% Quota given to NOCK by the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, there be established by the Minister for Energy, a transparent, real time public scrutiny tool to monitor the pricing mechanism and public benefit of the quota allocations.

MINUTES OF THE THIRTIETH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON THURSDAY, 7<sup>TH</sup> DECEMBER, 2010 AT 10.00AM IN THE COMMITTEE ROOM, 5<sup>TH</sup> FLOOR, CONTINENTAL PARLIAMENT BUILDING.

PRESENT

Hon. Amina Abdalla, M.P.  
Hon. Ababu Namwamba, M.P.  
Hon. Gitobu Imanyara, MP  
Hon. Baiya Njoroge, M.P.  
Hon. Kiema Kilonzo, M.P.  
Hon. (Dr.) Julius Kones, M.P.

–Chairperson

ABSENT WITH APOLOGIES

Hon. Olago Aluoch, M.P.  
Hon. B.C. Muturi Mwangi, MP

ABSENT

Hon. Fahim Twaha, MP

IN ATTENDANCE

Mr. Jacob Ngwele  
Ms. Leah Wanjiru

NATIONAL ASSEMBLY

- Third Clerk Assistant  
- Third Clerk Assistant

IN ATTENDANCE:

1. Hon. Kiratu Murungi
2. Peter Nduru
3. Eng. Kaburu Mwirichia
4. Paul G. matia
5. Mwendia Nyaga
6. Sumayya Hassan –Athman
7. Ken Mugambi
8. Eunice Arwa
9. Jane Njoroge
10. Maimuna Said
11. Kamau Mugenda
12. Ken Mugambi
13. David Wainaina
14. Alison Kariuki
15. Andrew Waititu
16. Omollo Owocho
17. Stephen Kiiyuru

ORGANIZATION

Minister for Energy  
Director of Petroleum- ERC  
Director General- ERC  
MOE- Petroleum Consultant  
Consultant Ministry of Energy  
Ag. MD -National Oil  
Strategic Planning –National Oil  
Company Secretary- National Oil  
Sales & Marketing Manager-NOCK  
Supply Manager -National Oil  
Finance Manager -National Oil  
Strategic Planning –National Oil  
Operations Manager- National Oil  
Counsel- Kenya Shell Ltd  
Kenya Shell Ltd.  
Kenya Shell Ltd.  
General Counsel –Libya Oil Kenya

18. Francis Njogu	MD Gulf Energy
19. Paul Limoh	Gulf Energy
20. Wanjiku Manyara	Petroleum Institute of E.A
21. Rida Hassan Elamir	MD - Libya Oil Kenya
22. Thomas Abade	Supply Manager -Libya Oil Kenya
23. Alexis Vovk	MD - Total Kenya
24. Boniface Abala	Legal Manager – Legal Manager

MIN.NO 131/2011 PRELIMINARIES

The Chairperson called the meeting to order at 11.40 a.m with a word of prayer.

MIN.NO 132/2010 MEETING WITH THE MINISTER FOR ENERGY AND OIL MARKETERS

Stephen Kiiyiru, General Counsel Oil Libya gave the following submission on behalf of all the Oil Marketers:

Explanatory Memorandum on LN No. 96 of 2010 - The Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010

1. Introduction

On 18<sup>th</sup> June 2010 the Minister for Energy vide legal notice number 96 of 2010 enacted the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 purporting to exercise powers conferred by section 102 of the Energy Act, Act No. 12 of 2006.

The said regulations provide at rule 3 that;

- 3 (1) There is established a portion of the import requirements to be known (as) the petroleum products quota allocation.
- (2) The petroleum products quota allocation shall be import by the National Oil Corporation of Kenya
- (3) The petroleum products quota allocation shall be set out in the Schedule hereto.

The said regulation had the effect of reserving a 30% quota of oil imports of Crude Oil, Jet Fuel and Automotive Gasoil to the National Oil Corporation of Kenya.

Before the said enactment importation of Crude Oil, Jet Fuel and Automotive Gasoil and by virtue of legal notice number 197 of 2003, the Minister of Energy promulgated the Petroleum (Amendment) Rules 2003 pursuant to which oil companies are obligated, to import petroleum products through an open tender system centrally coordinated by the Ministry of Energy.

On 22<sup>nd</sup> October 2010 the Ministry of Energy wrote to the Kenya Pipeline Company Limited directing the KPC deducts from the total ullage<sup>1</sup> 25,000 MT of automotive gasoline and 18,000 MT of kerosene and reserve it to NOCK.

The effect of this directive is to compel an oil company to purchase the two products from NOCK if an oil company intends to use the KPC system to transport its products and service its market share.

It should be noted that the pricing of petroleum imports into Kenya is determined by applying three parameters:

- (a) **FOB Component** – this is based on the international price of petroleum it is derived by making reference to the published prices by plats market scan. This is a fixed predetermined cost.
- (b) **Freight and Premium Component** – this is based on the cost of shipment and the premium/margin/profit the winning bidder is to make. This is a variable cost.
- (c) **Local Currency Component** – this is based on statutory charges that an importer incurs that would be passed on to the buyers. This is a fixed predetermined cost.

The competitive nature of a bid is determined by the Freight and Premium Component in (b) above. It is on this basis that a person wins a tender.

## 2. Relevant Statutes and Regulations

1. The Interpretations and General Provisions Act, Chapter 2 of the Laws of Kenya
2. Energy Act, Act No. 12 of 2006
3. Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010
4. Legal Notice No. 139 of 2001, the Petroleum (Amendment) Rules, 2001
5. Legal Notice No. 197 of 2003, the Petroleum (Amendment) Rules, 2003
6. The Public Procurement and Disposal Act, Act No. 3 of 2005

## 3. Relevant Documents and Communication

1. Copy of a Letter dated 13<sup>th</sup> July 2010 from the Oil Industry Supply Coordinator to the Permanent Secretary Ministry of Energy regarding the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010.
2. Copy of minutes of a meeting held on 19<sup>th</sup> August 2010 at the Ministry of Energy

3. Copy of a Letter dated 22<sup>nd</sup> October 2010 from the PS Ministry of Energy to the Managing Director Kenya Pipeline Company Limited the 30% ullage allocation to NOCK.
4. Copy email communication from NOCK to the oil industry offering to sell automotive gasoline at a premium of \$35.00 per metric tonne
5. Copy email communication from NOCK to the oil industry regarding the implementation of their 30% quota allocation
6. Copy email communication from the oil industry supply coordinator to the PS ministry of energy raising concerns over NOCK uncompetitive offer of selling automotive gasoline at a premium of \$35.00 per metric tonne
7. An analysis indicating the uncompetitive nature of NOCK's offer to supply the November cargo of automotive gasoline.

#### 4. Issues

##### A. Legal Issues

- (a) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are discriminatory and contrary to section 116 of the Energy Act.
- (b) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are ultra vires the Energy Act insofar as they provide for a system of importation of petroleum that is not through an open tendering system.
- (c) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 2, 4, 5, and 74 of the Public Procurement and Disposal Act.
- (d) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 30 of the Public Procurement and Disposal Act insofar as it structures procurement of petroleum products in Kenya as two or more procurements for the purpose of avoiding the use of the open tender system.
- (e) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 39 of the Public Procurement and Disposal Act insofar as it limits participation of eligible companies from the procurement for the importation of the petroleum products in Kenya.

##### B. Supply related practical Issues

- (a) Compulsion to purchase from NOCK even though they may be uncompetitive in their pricing.

- (b) NOCK cannot give any guarantee that they obtain lower prices than those in the OTS.

A. A discussion of the legal issues

- (a) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are discriminatory and contrary to section 116 of the Energy Act.

It is our contention that insofar as the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 confer upon the National Oil Corporation of Kenya an exclusive 30% quota for the importation of crude oil, jet fuel and automotive gasoil it is discriminatory against other oil marketing companies by not only conferring against NOCK an undue preference but also subjecting other oil marketing companies to an undue disadvantage.

The National Oil Corporation of Kenya is a limited liability company incorporated under the Companies Act, Chapter 481 of the laws of Kenya whose principal shareholder is the Government of Kenya.

It is also noteworthy that section 116 of the Energy Act specifically provides that:

116 While discharging its functions and exercising its powers under the Act, the Commission shall ensure that no particular person is given undue preference or subjected to any undue disadvantage.

As to whether NOCK falls within the definition of "person" in section 116 of the Energy Act, it is instructive that the Interpretations and General Provisions Act, Chapter 2 of the Laws of Kenya defines a person at section 3(1) as:

3 (1) "person" includes a company or association or body of persons, corporate or unincorporate;

The same the Interpretations and General Provisions Act also provides at section 76 that:

76 This Act shall bind the Government.

- (b) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are ultra vires the Energy Act insofar as they provide for a system of importation of petroleum that is not through an open tendering system.

It is our further contention that the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are ultra vires the Energy Act insofar as they

provide for a system of importation of petroleum that is not through an open tendering system.

The Energy Act is clear in its requirements that the Minister of Energy makes regulations “providing for importation of petroleum through open tendering system and the manner in which such system shall operate.”

The powers of the minister to make regulations regarding importation of petroleum into Kenya are found in section 102(d) of the Energy Act, Act No. 12 of 2006 provides that:

102 Without limiting the generality of section 6 and in accordance with section 110, the Minister may, on the recommendation of the Commission, make regulations.

(...) (d) providing for importation of petroleum through open tendering system and the manner in which such system shall operate;

Section 6 deals with the powers of the Energy Regulatory Commission and has no specific mention of the power to regulate the importation of petroleum through the open tender system.

Section 110 on the other hand deals with the procedure of enacting regulations under the Act.

The Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, derogate from the strictures of an open tender system. It provides for a two tier system of procurement of petroleum imports where 70% of crude oil, jet fuel and automotive diesel through an open tendering system and 30% through a direct procurement system by NOCK.

(c) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 2, 4, 5, and 74 of the Public Procurement and Disposal Act.

It is also our contention that the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 insofar as they reserve a 30% quota to NOCK are contrary to the Public Procurement and Disposal Act, particularly:-

- (a) They are not intended to and will not maximize economy and/or efficiency in procurement contrary to section 2(a) of the Act;
- (b) They do not promote competition and treat competitors unfairly contrary to section 2(b) of the Act
- (c) They do not promote integrity and fairness to procurement procedures contrary to section 2(c) of the Act

(d) They do not increase transparency and accountability to procurement procedures contrary to section 2(d) of the Act

(e) They do not increase public confidence in the procurement procedures contrary to section 2(e) of the Act

The Public Procurement and Disposal Act is by virtue of section 4 of the said Act, indeed applicable to the procurement of petroleum imports in Kenya because:-

(a) It is procurement by the Ministry of Energy, which is a public entity;

(b) It is a form of contract management by the Ministry of Energy;

(c) It is a supply chain management system that includes inventory management and distribution of petroleum products in Kenya

It is noteworthy that the Public Procurement and Disposal Act, Act No. 3 of 2005 is the supreme law in matters relating to procurement and disposal. It at section 5(1) provides that:

5 (1) If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail.

Further we contend that insofar as the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, provides for a method of procurement that can only be described as direct procurement it goes against the Public Procurement and Disposal Act, Act No. 3 of 2005 which provides at section 74 that:

74 (1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied –

(a) there is only one person who can supply the goods, works or services being procured; and

(b) there is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied -

(a) there is an urgent need for the goods, works or services being procured;

(b) because of the urgency the other available methods of procurement are impractical; and

(c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

- (d) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 30 of the Public Procurement and Disposal Act in so far as it structures procurement of petroleum products in Kenya as two or more procurements for the purpose of avoiding the use of the open tender system.

It is also our contention that the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 insofar as they reserve a 30% quota of the open tender for the importation of petroleum into Kenya to NOCK is contrary to the Public Procurement and Disposal Act, particularly section 30(1) because it splits a single procurement of petroleum into a direct procurement (30%) and a competitive open tender (70%).

Section 30 provides as follows:-

30 (1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence.

(3) Standard goods, services and works with known market prices shall be procured at the prevailing real market price.

(4) Public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the regulations, be required to pay the procuring entity for the loss resulting from their actions.

- (e) Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are *contra statute, to wit*, section 39 of the Public Procurement and Disposal Act insofar as it limits participation of eligible companies from participating in the procurement for the importation of the petroleum products in Kenya.

As regards the discrimination in the participation in procurement, the Public Procurement and Disposal Act, Act No. 3 of 2005 provides at section 39 that;

39 (1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.

(3) The preferences and reservations referred to in subsection (2) shall –

(a) be non-discriminatory in respect of the targeted groups;

(b) allow competition amongst the eligible;

(c) be monitored and evaluated.

**B. A discussion of the Supply related practical Issues**

(a) Compulsion to purchase from NOCK even though they may be uncompetitive in their pricing.

It is our contention that by taking up ullage of the KPC pipeline, the regulations will compel oil companies to participate in the NOCK tender whether they are competitive or not. It is to be noted that the first tender submitted by NOCK is higher than the OTS by 15.00 per metric tonne leading ultimately to higher not lower fuel pump prices and costs to the economy.

If an oil company desires to retain its market share it has no option but to buy petroleum from NOCK

(b) NOCK cannot give any guarantee that they obtain lower prices than those in the OTS.

From the analysis attached hereto it is evident that NOCK cannot source for petroleum product cheaper than what currently prevails in the oil industry.

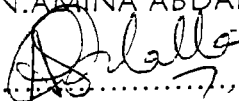
**MIN.NO 133/2010 ANY OTHER BUSINESS**

Following the submissions and deliberations on the Matter the Committee resolved to hold a joint sitting with the Departmental Committee on Energy Information and Communication to enable the Committee on Delegated legislation to focus on legal matters while Energy focuses on policy issues.

**MIN.NO 134/2010 ADJOURNMENT**

And there being no other business, the Chairperson adjourned the sitting at 1. 00 pm until 10<sup>th</sup> February, 2011 at 10.00am.

HON. AMINA ABDALLA, MP

Signed..........

Date:.....24/2/2011.....

MINUTES OF THE 1<sup>ST</sup> JOINT SITTING OF THE JOINT COMMITTEES ON DELEGATED LEGISLATION AND ENERGY, INFORMATION AND COMMUNICATIONS HELD ON THURSDAY, FEBRUARY 10<sup>TH</sup> 2011 IN CONTINENTAL HOUSE 2<sup>ND</sup> FLOOR, PARLIAMENT BUILDINGS AT 10.00 A.M

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PRESENT

1. The Hon. Amina Abdalla, M.P. ----- Co- Chairperson
2. The Hon. (Eng.) James Rege, M.P. ----- Co- Chairperson
3. The Hon. Olago Oluoch, M.P
4. The Hon. Ekwere Ethuro, M.P
5. The Hon. Cyprian Omolo, M.P
6. The Hon. (Eng.) Nicholas Gumbo, M.P
7. The Hon. Danson Mwazo Mwakulegwa, M.P
8. The Hon. Emilio Kathuri, M.P
9. The Hon. Joshua Kutuny, M.P
10. The Hon. Barnabas M. Mwangi, M.P
11. The Hon. Gitobu Imanyara, M.P
12. The Hon. Ababu Namwamba, M.P
13. The Hon. (Dr.) Julius Kones, M.P
14. The Hon. Njoroge Baiya, M.P
15. The Hon. Edwin O. Yinda, M.P

ABSENT WITH APOLOGY

1. The Hon. (Prof) Phillip Kaloki, M.P
2. The Hon. Maina Kamau, M.P
3. The Hon. Adan Keynan M.P
4. The Hon. Kiema Kilonzo, M.P
5. The Hon. Fahim Twaha, M.P.

IN ATTENDANCE:

1. Emmy Chepkwony
2. Jacob Nqwele
3. Veronicah Kibati

IN ATTENDANCE:

1. Hon. Kiratu Murungi
2. Patrick Nyoike
3. Sumatta Athnani
4. Mwendia Nyaga

NATIONAL ASSEMBLY

Third Clerk Assistant  
Third Clerk Assistant  
Research Officer

ORGANIZATION

Minister for Energy  
Permanent Secretary  
AG. MD. NOCK  
Consultant Ministry of Energy

5. Mohamed Nyadga	Legal Counsel– Ministry of Energy
6. Ken Mugambi	Strategic Planning –National Oil
7. Eunice Arwa	Company Secretary- National Oil
8. Mathews Okoth	Counsel- National Oil
9. Martha Mbugua	Counsel- National Oil
10. Wanjiru Ngige	Counsel- National Oil
11. Ken Mugambi	Strategic Planning –National Oil
12. Jimmy D. Mugecwa	Chairman- Kenya Shell Ltd.
13. Catherine Musakali	Head of Oil- Kenya Shell Ltd.
14. Stephen Kiiyuru	General Counsel –Libya Oil Kenya
15. Rida Hassan Elamir	MD - Libya Oil Kenya
16. Alexis Vovk	MD - Total Kenya
17. Amie Hatego	Legal Manager– Gulf Energy L.T.D
18. Boniface Abala	Legal Manager – Legal Manager

#### MIN.01/2011 PRELIMINARIES

The proceedings commenced with a word of prayer. The Chair invited Members present and stated that it was a joint sitting between the Committees on Delegated legislation and Energy, Information and Communications.

The Chairperson explained that the Committee on Delegated legislation would focus on legal matters while Energy would focus on policy issues. She then invited the Minister for Energy to make his presentation.

#### MIN.02/2011: DELIBERATIONS ON THE PETROLEUM (QUOTA ALLOCATION) REGULATIONS, 2010.

##### SUBMISSIONS FROM THE MINISTRY OF ENERGY

The Minister thanked the Members for the invitation and invited the Ministry lawyer to make a presentation on behalf of the Ministry. The highlights of the Ministry presentation were as follows:

- (i) The Minister for Energy, vide a Legal Notice No. 96 of 2010 dated 18<sup>th</sup> June, 2010, enacted the *Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010* (hereinafter, “the Regulations”), in exercise of the power conferred to him by section 102 of the Energy Act, No. 12 of 2006 (“the Energy Act”).
- (ii) Regulation 3 of the Regulations allocated 30% of all Crude Oil, Diesel and Jet Kerosene imported for consumption in Kenya for importation by NOCK.

- (iii) The Regulations are informed by public interest objectives of cushioning consumers against predatory fuel prices and secure supply of petroleum, thus are sanctioned by section 116 of the Energy Act.
- (iv) The power of the Minister to make Regulations under section 102 of the Energy *is not* limited to making Regulations for importation of petroleum under Open Tender System (OTS).
- (v) The Regulations are not an act of procurement capable of breaching the Public Procurement and Disposal Act No. 3 of 2005. It is the procurement entities that are regulated by the Procurement Act, which in this case, are NOCK (procuring 30% quota) and OTS (procuring 70% quota) and the Procurement laws enjoins those entities procuring to observe the procurement laws.
- (vi) In procuring the 30% inaugural quota in November, 2010, NOCK demonstrated competitive tendering, costs efficiency, fairness and public confidence in the sector as envisaged by the Public Procurement and Disposal Act.
- (vii) Petroleum products quota allocation is not unique to Kenya and has been practiced in India, Indonesia, South Korea and the United States of America
- (viii) Under the Open Tender System (OTS), private importers were unable to import more than 70% of the Petroleum imports. As a result, private individuals not authorized by the Commission to import petroleum into Kenya disguised themselves behind participants in the OTS to illegally import the 30% petroleum deficit into Kenya.
- (ix) The allegation that the Regulations confer undue preference to NOCK contrary to section 116 of the Energy Act is not true as by dint of section 116 of the Energy Act, Parliament has permitted the Commission to prefer or disadvantage a party within the energy sector, so long as the preference or disadvantage is not *undue*; that is, so long as the preference or disadvantage is not *unwarranted*. NOCK has not been preferred under the Regulations but is only a vehicle through which the government achieves the greater public interest objective of protecting consumer interests.
- (x) On 10<sup>th</sup> April, 2008, the Minister gazetted the *Energy (Minimum Operational Stock) Regulations, 2008*, requiring all Oil marketers to maintain 21 day operational stocks; the requirement has not substantially been met. The OMCs have inadequate petroleum storage and distribution infrastructure in the country. The Regulations are therefore necessary to secure petroleum supply in the country.

- (xi) The Regulations are therefore sanctioned by section 116 of the Energy Act.
- (xii) The allegation that the Regulations are inconsistent with section 102 of the Act is not true. The ERC in section 6 of the Act is granted all powers necessary or expedient to perform the Commission's functions under the Act. The Commission can issue, modify, suspend or revoke licenses and permits for all undertakings and activities in the energy sector.
- (xiii) Section 102(b) of the Energy Act authorises the Minister to make regulations providing for importation of petroleum, conditions of license to import and any other matter incidental thereto. The power of the Minister is therefore open ended.
- (xiv) The objective of the Regulations are to safeguard both the consumer interest, particularly predatory fuel pricing, and to guarantee security of supply of petroleum in Kenya, both of which are mandates of the Commission in section 5 of the Energy Act.
- (xv) Even the OMCs appreciate that the Regulations are necessary and expedient in safeguarding consumer interests. In paragraph 1.3 of the submissions by Gulf Energy dated November 11, 2010, the OMC "appreciates the Commission's rationale" but is only 'skeptical' as to the prospects of imposing petroleum products quota allocation to NOCK.
- (xvi) The argument that the Regulations flout the objectives of Procurement Laws such as cost efficiency, transparency and competition is fallacious because Regulations are not procurement by the Ministry of Energy capable of flouting procurement laws but are an instrument for facilitating procurement. The Ministry of Energy is not a procurement agency. Procurement is done by NOCK at which point it is incumbent upon NOCK to abide by procurement laws.
- (xvii) Towards this end, NOCK, in November, 2010, procured the 30% quota through a transparent and competitive tendering where six of the leading petroleum traders in the World were invited to tender for the supply of the quota, with the lowest bidder being selected.
- (xviii) To demonstrate that the pricing of the inaugural 30% quota cargo for delivery in the month of November, 2010 was competitive and cost effective, participation to the quota by the OMCs was voluntarily received for the following OMCs for the quantities shown and the contracts between the OMCs and NOCK signed.

- (xix) The allegation that the Regulations limit competition contrary to section 39 of the Procurement Law is fallacious because NOCK has in the past competitively identified suppliers for the 30% quota cargo.
- (xx) Under the OTS, several players in the oil industry have for a long time been unable to get long term supply contracts because, OTS, being run on the basis of spot purchases, has been a preserve of 3 to 5 players in the industry backed by their multinational mother companies or affiliates.
- (xxi) The Regulations therefore create an environment for competitive tendering, efficiency, fairness, promotion of local industry and public confidence in the sector as envisaged by the Public Procurement and Disposal Act.
- (xxii) A strong National Oil Corporation is good for the economy. It is such oil companies that immensely contribute to the economies of their countries such as the Malaysian PETRONAS which contributes over 40% of the revenue of Malaysian.

#### DELIBERATIONS BETWEEN THE JOINT COMMITTEE MEMBERS AND THE MINISTRY OFFICIALS

The Members sought to understand which section of the Energy Act empowered the Minister and heard that Section 102 (b) gives the Minister powers to make regulations under importation, licensing and any other matters.

The Committee sought confirmation on whether the quota allocated to NOCK had translated to cheaper fuel prices for the benefit of the consumers. In response The Ministry of Energy informed the Members that only one cargo had been brought in by NOCK since the regulations were effected and therefore too early to assess the impact on the prices.

The Committee expressed concern on how the consumer was going to benefit yet NOCK had invoiced at a higher price. The Ministry responded by saying that the oil prices fluctuated daily and that the particular cargo was more expensive due to economies of scale and further that the cargo that had been received immediately after was much cheaper. They argued that the first cargo was a trial and that prices would be significantly lowered with time. The Ministry further added that high fuel prices were caused by major congestion at the port and delay of vessels at the high seas and the Ministry was trying to mitigate this by introducing the 30% quota to NOCK.

The Ministry further informed the Committee that with the 1st cargo, NOCK had immediately reduced the prices which have remained consistent since December 2010. The Ministry expressed concern that since fuel storage figures were public, other oil marketers may wait for NOCK's stock to run out to sell their fuel at higher prices.

The Ministry further observed that the small independent players purchased fuel at very high wholesale prices and that with the quota, NOCK will be able to sell to these independent players at competitive prices and this will translate to cheaper prices for consumers.

The Committee Members expressed concern that one cargo had no major impact and suggested that in order to deal with the issue of oil marketers waiting for the NOCK stock to run out, NOCK should consider working with independent players. Members sought to understand why the Minister did not opt for price reduction instead of price regulation to avoid scaring off investors.

The Members expressed concern over the Minister's claim in the local media that he had no powers to control the oil sector yet he later passed price regulations citing he derived the powers from Energy Act 2006. The Minister informed the Members that he had no powers at that time as he had consulted with National Economic and Social Council (NESC) who had advised him to be careful so as not to send the wrong signals to the investors. He had then held discussions with the oil marketers to reduce their prices but with no success and it was then that NESC gave him the go ahead to publish the price regulations.

The Minister stated that the oil marketers were in business and were not concerned with high consumer prices and that despite the outcry over price regulations, the Ministry was in place to cushion the consumers. He added that the 30% quota to NOCK would further protect consumers if prices go unjustifiably high and that he was determined to strengthen NOCK despite the protests.

The Ministry further expressed that the 30% quota was very significant as earlier discussions with refiners and producers were unsuccessful due to limited stock but with the allocation there was sufficient stock for more positive consultations.

The Members sought to know what plans had been put in place for expansion of NOCK outlets countrywide and what was the justification of allocation 30% to NOCK and not 50% or more as the main concern was consumer protection. The Minister responded by

saying that NOCK had previously been neglected as it had only 6 stations for almost 20 years since its creation in 1981. He stated that there were currently 70 stations and there was a target of expanding to 150 stations. He added that the main challenge facing NOCK was financial constraints as it was no longer receiving funding from the Government. He however added that he had urged NOCK to create partnerships to supply to independent partners especially those in remote areas having only one pump.

The Committees supported the Ministry's plan to partner with independent players but was concerned with whether safety measures were put in place. They further expressed concern on the negative effect of the 30% quota on oil marketers. The Minister assured the Members that safety measures were in place and that the Ministry was not against the oil marketers as 70% was enough for them.

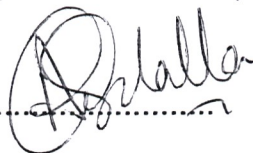
The Committee while concluding said that the Ministry should increase or decrease the 30% allocation by conducting a review as the main concern was to benefit the consumer.

Thanking the Minister for attending, the Committees asked the oil marketers present to send written memoranda in response to the Ministers presentation after which a meeting may be held between the joint committees and oil marketers to consider the memoranda.

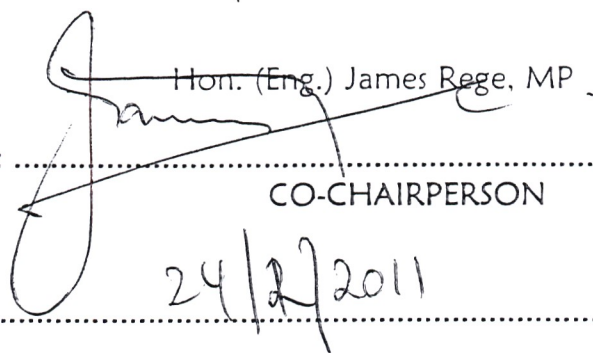
MIN.03/2011: ADJOURNMENT

There being no other business, the meeting was adjourned at 12.00pm.

Hon. Amina Abdallah, MP  
SIGNED: .....  
CO-CHAIRPERSON



Hon. (Eng.) James Rege, MP  
SIGNED: .....  
CO-CHAIRPERSON



DATE: .....  
24/2/2011

MINUTES OF 2<sup>ND</sup> JOINT SITTING OF THE JOINT COMMITTEES ON DELEGATED LEGISLATION AND ENERGY, INFORMATION AND COMMUNICATIONS HELD ON THURSDAY, FEBRUARY 17<sup>TH</sup> 2011 IN THE SMALL DINING, MAIN, PARLIAMENT BUILDINGS AT 10.00 A.M

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PRESENT

1. The Hon. Amina Abdalla, M.P. ----- Co- Chairperson
2. The Hon. (Eng.) James Rege, M.P. ----- Co- Chairperson
3. The Hon. Olago Oluoch, M.P
4. The Hon. Cyprian Omolo, M.P
5. The Hon. (Eng.) Nicholas Gumbo, M.P
6. The Hon. Danson Mwazo Mwakulegwa, M.P
7. The Hon. Joshua Kutuny, M.P
8. The Hon. Edwin O. Yinda, M.P
9. The Hon. Maina Kamau, M.P
10. The Hon. (Prof) Phillip Kaloki, M.P

ABSENT WITH APOLOGY

1. The Hon. Adan Keynan M.P
2. The Hon. Kiema Kilonzo, M.P
3. The Hon. Ekwere Ethuro, M.P
4. The Hon. Fahim Twaha, M.P.
5. The Hon. Emilio Kathuri, M.P
6. The Hon. Gitöbu Imanyara, M.P
7. The Hon. Ababu Namwamba, M.P
8. The Hon. Barnabas M. Mwangi, M.P
9. The Hon. (Dr.) Julius Kones, M.P
10. The Hon. Njoroge Baiya, M.P

IN ATTENDANCE:

1. Emmy Chepkwony
2. Jacob Nqwele
3. Veronicah Kibati

NATIONAL ASSEMBLY

Third Clerk Assistant  
Third Clerk Assistant  
Research Officer

MIN.04/2011

PRELIMINARIES

The proceedings commenced with a word of prayer. The Chair invited Members present and stated that it was a joint sitting between the Committees on Delegated legislation and Energy, Information and Communications.

MIN. 05/2010: CONSIDERATION OF THE DRAFT REPORT ON THE SCRUTINY OF THE PETROLEUM (QUOTA ALLOCATION) REGULATIONS, 2010.

During its deliberations the joint Committees made the following observations that;

1. Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are not *contrary to Section 116 and therefore do not confer undue preference or disadvantage to any person.*
2. Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 were enacted pursuant to the provisions of Section 102 (b) of the Energy Act.
3. The Committee has got no mandate to scrutinize Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 vis-à-vis the provisions of the Public Procurement and Disposal Act.
4. The enactment of Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, was founded upon sound government policy consideration geared at achieving public interest objectives of cushioning consumers against ever increasing fuel prices.

The Committee therefore recommended that Legal Notice No. 96 of 2010, dated 18<sup>th</sup> June, 2010, enacted as the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are not contrary to the Energy Act, No. 12 of 2006

The Committee further agreed to draw conclusion on the fact that fuel storage figures were public, and other oil marketers may wait for NOCK's stock to run out to sell their fuel at higher prices. They although proposed that NOCK should consider working with independent players.

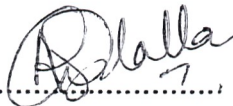
The Committee proposed that the Ministry should install NOCK outlets countrywide and put safety measures in place.

MIN. 06/2011: ADJOURNMENT

There being no other business, the meeting was adjourned at 12.00pm.

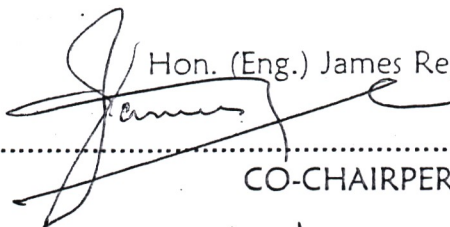
SIGNED: .....  
CO-CHAIRPERSON

Hon. Amina Abdallah, MP



SIGNED: .....  
CO-CHAIRPERSON

Hon. (Eng.) James Rege, MP



DATE: .....  
24/2/2011

MINUTES OF 3<sup>RD</sup> JOINT SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION AND ENERGY, INFORMATION AND COMMUNICATIONS HELD ON THURSDAY, FEBRUARY 24<sup>TH</sup> 2011 IN THE MEDIA CENTER, MAIN, PARLIAMENT BUILDINGS AT 10.00 A.M

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PRESENT

1. The Hon. Amina Abdalla, M.P. ----- Co- Chairperson
2. The Hon. (Eng.) James Rege, M.P. ----- Co- Chairperson
3. The Hon. Olago Oluoch, M.P
4. The Hon. (Eng.) Nicholas Gumbo, M.P
5. The Hon. Joshua Kutuny, M.P
6. The Hon. Edwin O. Yinda, M.P
7. The Hon. Maina Kamau, M.P
8. The Hon. Emilio Kathuri, M.P
9. The Hon. (Dr.) Julius Kones, M.P
10. The Hon. Kiema Kilonzo, M.P
11. The Hon. Gitobu Imanyara, M.P

ABSENT WITH APOLOGY

1. The Hon. Adan Keynan M.P
2. The Hon. Ekwee Ethuro, M.P
3. The Hon. Fahim Twaha, M.P.
4. The Hon. Ababu Namwamba, M.P
5. The Hon. Barnabas M. Mwangi, M.P
6. The Hon. Njoroge Baiya, M.P
7. The Hon. (Prof) Phillip Kaloki, M.P
8. The Hon. Danson Mwazo Mwakulegwa, M.P
9. The Hon. Cyprian Omolo, M.P

IN ATTENDANCE:

1. Jacob Nqwele
2. Emmy Chepkwony

NATIONAL ASSEMBLY

Third Clerk Assistant  
Third Clerk Assistant

MIN.07/2011

PRELIMINARIES

The proceedings commenced with a word of prayer. The Chair invited Members present and stated that it was a joint sitting between the Committees on Delegated Legislation and Energy, Information and Communications.

MIN. 08/2011

CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS

a) Minutes of the following Joint sittings were read and confirmed by the Members present as a true record of the sittings' proceedings and signed by the Co-Chairpersons;

- i. Minutes of the First Joint Sitting held on 10<sup>th</sup> February, 2011;
- ii. Minutes of the Second Joint Sitting held on 17<sup>th</sup> February, 2011;

b) Minutes of 30<sup>th</sup> Sitting of the Committee on Delegated Legislation held on 7<sup>th</sup> December 2010 were read by the Members of the Committee on Delegated Legislation present and signed by the Chairperson;

MIN. 09/2011: CONSIDERATION OF THE DRAFT REPORT ON THE SCRUTINY OF THE PETROLEUM (QUOTA ALLOCATION) REGULATIONS, 2010.

The joint Committees reaffirmed its earlier observations as follows and made recommendations;

1. Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are not *contrary to Section 116 and therefore do not confer undue preference or disadvantage to any person.*
2. Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 were enacted pursuant to the provisions of Section 102 (b) of the Energy Act.
3. The Committee has got no mandate to scrutinize Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 vis-à-vis the provisions of the Public Procurement and Disposal Act although the Committee acknowledges that NOCK being a public entity, needs to be transparent in its procurement.
4. The enactment of Legal Notice No. 96 of 2010, the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, was founded upon sound government policy consideration geared at achieving public interest objectives of cushioning consumers against ever increasing fuel prices.

The Committee therefore recommended that Legal Notice No. 96 of 2010, dated 18<sup>th</sup> June, 2010, enacted as the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010 are not contrary to the Energy Act, No. 12 of 2006

The in the light of the monopoly given to NOCK by the Energy (Importation of Petroleum Products) (Quota Allocation) Regulations, 2010, the Committee recommends that there be established by the Ministry of Energy, a transparent, real time public

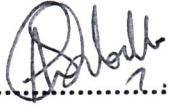
scrutiny tool to monitor the pricing mechanism and public benefit of the quota allocations.

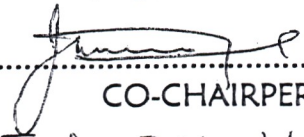
MIN. 11/2011: ADOPTION OF THE JOINT COMMITTEE REPORT


The Committee adopted its report on The Scrutiny of the Petroleum (Quota Allocation) Regulations, 2010.

MIN. 12/2011: ADJOURNMENT

There being no other business, the meeting was adjourned at 11.40pm.

Hon. Amina Abdallah, MP  
SIGNED: .....   
CO-CHAIRPERSON

Hon. (Eng.) James Rege, MP  
SIGNED: .....   
CO-CHAIRPERSON

DATE: .....  .....

