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COMMENTARY ON THE DRAFT ENERGY (ENERGY MANAGEMENT) REGULATIONS, 2020

The Draft Regulations seek to entrench EPRA's mandate to coordinate the development and implementation of a prudent national energy efficiency and conservation programme as stipulated under Part VIII of the Energy Act.

Background:

The Cabinet Secretary for Energy in exercise of his powers conferred by Section 93 (2) (r) of the Energy Act, 2019 prepared the Draft Energy (Energy Management) Regulations 2020 (the "Draft Regulations") which were gazetted on September 18th, 2020. On September 28th, 2020, EPRA called for written comments to the Draft Regulations together with the associated draft Regulatory Impact Statement dated September 2020 (the RIA"). Written comments on the Draft Regulations and the RIA are due for submission to EPRA no later than November 7th, 2020 and thereafter, consultative meetings shall be held with stakeholders.

If implemented, the Draft regulations will repeal the existing Energy (Energy Management) Regulations, 2012 (the "2012 Regulations").

Salient features of the Draft Regulations:

Classification of facilities: Like the 2012 Regulations, the Draft Regulations require EPRA to classify facilities by energy consumption into high energy users, medium energy users and low energy users. While the current regulations defined facilities to include factories, commercial buildings, institutional buildings and local authorities, the Draft Regulations seek to broaden this definition to include power utilities, municipalities, pipelines, water companies and street lighting.

Energy Management Policy: Unlike the 2012 Regulations which required the EMP to comply with the requirements in the First Schedule thereof, an EMP prepared under the new regime be required to comply with Kenya Standard KS ISO 5000 for the implementation, maintenance and improvement of an energy management system. This ensures that the owners of the facilities are held to a higher standard, and there is consistency in the quality of policies prepared.

Energy audits and Financing Mechanisms: The Draft Regulations reduce the frequency of submission of energy audits from four to three years in the hope that the expansion of the cycle will give facilities time to measure, verify, document, report and appreciate the importance of carrying out audits. While the 2012 Regulations outline the general requirements for the conduct of Energy Audits, the Draft Regulations now make it mandatory for these to be undertaken in accordance with Kenya Standard KS ISO 50002 which outlines the requirements for Energy Audits.

The Draft Regulations also introduce a higher standard for the persons permitted to undertake energy audits as these should be either an accredited energy auditor, energy audit firm or energy service company (ESCO). ESCOs will be corporate entities engaged in the business of undertaking energy audits and the development, design, financing and building of energy conservation projects and whose compensation is directly linked to actual energy savings.

The introduction of ESCOs is in recognition of the findings that one of the major impediments to compliance with the 2012 Regulations was the high costs associated with the conduct of energy audits. It is therefore hoped that these will introduce financing mechanisms for the conduct of energy audits and implementation of energy management policies. Owners of designated facilities will therefore be able to enter into an energy service contract with the ESCOs to govern their relationship including matters related to profit sharing, mode and term of payments. Parties will be obliged to lodge these contracts with EPRA within 30 days of execution.

Energy performance indicators: Another new feature of the Draft Regulations is the introduction of energy performance indicators which EPRA is required to publish on its website within three years of the new regulations coming into effect. These should be allowable benchmark and performance indicators for each sector of the economy based on best practices for energy performance indicators. Every designated facility will then be required during each energy audit to establish its energy performance indicators in accordance with Kenya Standard KS ISO 5006 or other subsequent or replacement standard.

Energy savings certificates: As envisaged under section 191 of the Energy Act, EPRA may, upon application, issue an energy savings certificate. Such certificates demonstrate that the designated facility's consumption is less than the prescribed norms and standards. An application for an energy savings certificate should be accompanied by various other documents including an energy management policy approved by the EPRA, previous 5-year records of data relating to energy consumption, a letter of appointment of a facility energy manager as well as the latest energy audit report approved by the EPRA. Other supporting documents will include the energy investment plan with proof of receipt from the EPRA; (f) Annual reports on the implementation of the energy investment plan and a report from an accredited energy manager or energy auditor, that includes proof that the applicant's energy performance indicators are equal or better than the prescribed benchmark indices.

The issuance of white certificates where the facility's energy performance indictor is better than the published best indicator for the sector or green certificates when the facility's energy performance indictor meets the published allowable benchmark for the sector will enhance a designated facility ability to access tax reliefs, subsidies or green financing from various institutions that are keen to support green growth and climate change and sustainability initiatives.

The Draft Regulations are a welcome step in the right direction for the Kenyan energy sector and although the obligations imposed will likely increase the cost of compliance, the recognition and regulation of ESCOs will go a long way in alleviating the economic burden of compliance.

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