

SPECIAL ISSUE

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SENATE BILLS, 2023

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CONTENT

Bill for Introduction into the Senate—

PAGE

The Energy (Amendment) Bill, 2023

909

THE ENERGY (AMENDMENT) BILL, 2023**A Bill for****AN ACT of Parliament to amend the Energy Act to make provision for energy purchase agreements; and for connected purposes.**

ENACTED by the Parliament of Kenya, as follows —

1. This Act may be cited as the Energy (Amendment) Act, 2023.

Short title.

2. The Energy Act is hereby amended by inserting the following new section immediately after section 134—

Insertion of section 134A in Act No. 1 of 2019

Energy Purchase Agreements

134A. (1) A generating entity may enter into an energy purchase agreement to sell electrical energy to a licensed entity specified in the Third Schedule.

(2) An Energy purchase agreement shall comply with the principles of public finance enshrined in Article 201 of the Constitution which include—

- (a) openness and accountability;
- (b) public participation in financial matters;
- (c) good governance to ensure that public funds are used in a prudent and responsible way; and
- (d) sustainability.

(3) The purchasing entity shall—

- (a) prior to procurement of electrical power, conduct a feasibility study to identify whether there is enough demand for electricity purchase which cannot be met by the existing production;
- (b) ensure the process of procurement of electrical energy complies with the procedures set out in the Public Procurement and Asset Disposal Act;
- (c) ensure that priority is given to dispatchable generation with a

Act No. 33 of 2015

sustainable base load at point of dispatch;

- (d) give priority to a generating entity generating electrical energy through renewable technology.

Act No. 17 of
2015

(4) An energy purchase agreement referred to in subsection (1) shall only be entered into with a generating entity which has disclosed and registered full beneficial ownership in accordance with the Companies Act.

(5) A purchasing entity shall prepare and maintain a register of generating entities it has entered into energy purchase agreements with and the entity's beneficial ownership and publish the names of the same—

- (a) on its website; and
- (b) in the annual audit report.

(6) The register in subsection (5) shall be—

Act No. 31 of 2016

- (a) prepared within ninety days from the date of operation of this section; and
- (b) open for inspection by members of the public in accordance with section 5 (1) (e) of the Access to Information Act.

(7) The Authority shall not approve an energy purchase agreement which fail to comply with this section.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of the Bill is to amend the Energy Act, 2019 to provide for transparency in energy purchase agreements. The rationale for disclosure of beneficial ownership information is to create an accurate public disclosure regime that provides transparency in the beneficial ownership and control structures of companies. This aids in not only promoting investor confidence and good corporate governance practices but also in uncovering tax evasion schemes, money laundering practices, corruption schemes, and other illegal activity involving either one or more companies.

The purchase of power from private energy generators by Kenya Power is subject to principles of public finance as envisaged under Article 201 of the Constitution, which include openness and accountability. The disclosure of beneficial ownership of energy generators is compulsory to a procuring entity when the company participates in public procurement and assets disposal and to a contracting authority when the company participates in a public private partnership.

This Bill seeks to create transparency in purchase of electric energy from private generators, ensure the contracts entered into are financially sound to protect the end user of electricity from inflated electricity costs.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill neither delegates legislative powers to the Cabinet Secretary nor limits fundamental rights and freedoms.

Statement of how the Bill concerns county governments

Energy plays a critical role in enabling social, economic and environmental sustainability. Access to affordable energy is important in achieving sustainable development goals in health, education and agriculture to improve living standards. Health, education and agriculture are devolved functions whose viability is directly impacted by the high energy costs. Additionally, pursuant to paragraph 8 (e) of the Fourth Schedule to the Constitution, electricity, gas reticulation and energy regulation is a county function. This therefore is a Bill concerning county governments.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution.

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 4th August, 2023.

SIFUNA EDWIN WATENYA,
Senator.

Section 134 of Act No. 1 of 2019 which it is proposed to amend

134. Direction to operate a generating plant

(1) The Cabinet Secretary may direct that any generating plant shall, in extraordinary circumstances, be operated and maintained in accordance with such directions as he may prescribe.

(2) For the purposes of this section, the expression “extraordinary circumstances” means circumstances arising out of threat to security of the state, public order or a natural calamity or such other circumstances arising in the public interest.