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REPUBLIC OF KENYA

HARAMBEE

TWELFTH PARLIAMENT

NATIONAL ASSEMBLY – SIXTH SESSION

THE PUBLIC INVESTMENTS COMMITTEE

THE REPORT ON CONSIDERATION OF THE SPECIAL AUDIT REPORT ON THE LAKE TURKANA WIND POWER PROJECT

THE DIRECTORATE OF COMMITTEE SERVICES
THE NATIONAL ASSEMBLY,
PARLIAMENT BUILDINGS,
NAIROBI

JUNE, 2022

Contents

LIST OF ABBREVIATIONS/ACRONYMS

Ag.	-	Acting
CEO	-	Chief Executive Officer
CS	-	Cabinet Secretary
DGE	-	Deemed Generated Energy
EPRA	-	Energy & Petroleum Regulatory Authority
KPLC	-	Kenya Power & Lighting Company
KETRACO	-	Kenya Electricity Transmission Company
KV	-	KiloVolt
LTWP	-	Lake Turkana Wind Power
MoE	-	Ministry of Energy
OAG	-	Office of the Auditor General
PFMA	-	Public Finance Management Act,2012
PFMR	-	Public Finance Management Regulations
PIC	-	Public Investments Committee
PPAD	-	Public Procurement and Asset Disposal Act, 2015
PPP	-	Public Private Partnership
PS	-	Principal Secretary
TI	-	Transmission Interconnector

TI Delay DGE	-	Transmission Interconnector Delayed Deemed Generated Energy

CHAIRPERSON'S FOREWORD

The Public Investments Committee is mandated by Standing Order 206 of the National Assembly to examine the working of public investments, with a particular focus on financial oversight on use of appropriated public funds.

The Committee examines the annual audited accounts of State Corporations as well as special audit reports by the Office of the Auditor General that are submitted to the National Assembly.

The special audit report on the Lake Turkana Wind Power Project (LTWP) was submitted to the House by the Office of the Auditor General on 5th August 2021. The special audit was requested by the then Principal Secretary in the Ministry of Energy and Petroleum, and focused on Deemed Generated Energy costs incurred by the Government of Kenya due to delays in completing the transmission line to evacuate energy generated from the LTWP Project.

The LTWP Project was identified as a key flagship project of the Kenya Vision 2030 under the Energy Sector. The Project sought to address power supply capacity deficit and lack of adequate reserve capacity to take care of emergencies that occasioned importation of auto diesel fired emergency power to stabilize supply against rising demand.

At conceptualization, the LTWP Project was meant to enhance Kenya's power generation capacity and diversify the energy mix in the country by providing a reliable, complementary electricity supply source to hydropower generation that was impacted adversely by droughts.

In conducting the inquiry, the Committee sought to establish the circumstances under which a project meant to alleviate energy costs in the country ended up incurring an additional, avoidable financial burden to the government and Kenyan taxpayers. During the inquiry, the Committee received evidence from various government entities including the Ministry of Energy and Petroleum, The National Treasury, Kenya Power, Kenya Electricity Transmission Company and the Energy & Petroleum Regulatory Authority. The Committee also received evidence from Lake Turkana Wind Power Limited and The Consortium of NARI Group Corporation & POWERCHINA GUIZHOU Engineering Co. Ltd; two private entities that were involved in the implementation of the Project.

The Committee observed that this Public Private Partnership (PPP) Project lacked competitiveness and was poorly managed. The omissions and commissions by the relevant government entities involved in the Project led to incurred additional cost in the form of Deemed Generated Energy (DGE), totalling to Kshs.18,499,082,672 paid by the Government and Kenyan tax payers. Further, interest on the delayed payments continue to accrue to date. The recommendations of the Committee are to provide remedy for the mismanagement in the Project conceptualization and implementation for projects of this magnitude, sealing technical loopholes in the management of PPPs in the Country to avoid a repeat of the failures that occasioned avoidable loss to the Kenyan taxpayers and immediate settlement of any outstanding payments including interest to avoid further accumulation of interest or any potential claims.

On behalf of the Committee, I would like to take this opportunity to thank the various government agencies and private entities that provided information to the Committee during its inquiry. I also take this opportunity to commend the Members of the Committee for their commitment and diligence in undertaking this complex inquiry which involved detailed review of a highly technical report as they sought to unearth the crux of the matters. Finally, I wish to record the Committee's appreciation to the Office of the Speaker and the Clerk of the National Assembly for facilitating the work of the Committee in fulfilment of its mandate.

It is my pleasant duty, pursuant to Standing Order 199 (6) to present the Report of the Public Investments Committee on the inquiry into the Lake Turkana Wind Power project for consideration by the House.

THE HON. ABDULLSWAMAD SHARRIF NASSIR, MP

CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE

EXECUTIVE SUMMARY

The Public Investments Committee is mandated to examine the reports and accounts of the public investments to ascertain whether the affairs of the public investments are being managed in accordance with sound financial or business principles and prudent commercial practices.

In undertaking this mandate, the Committee examined the Special Audit Report on the Lake Turkana Wind Power Project that was submitted to the House by the Office of the Auditor General on 5th August 2021. The said report's Terms of Reference were generally based on:

a) Historical background of the project;
b) Budgeting for Deemed Generated Energy and construction of the transmission line;
c) Project implementation and Power Purchase Agreements (PPA);
d) Deemed Generated Energy Expenditure, and;
e) Construction of the Transmission Line.

This report has five sections; the executive summary, the preface, background, the committee observations and recommendations by the Committee.

In its consideration of the Special Audit Report, the Committee found that the Ministry of Energy, through Kenya Power and Kenya Electricity Transmission Company (KETRACO), engaged in a public private partnership with Lake Turkana Wind Power Ltd who were involved in the Financing, Designing, Procuring, Constructing, Installing, Testing, Commissioning, Operation and Maintenance of the Lake Turkana wind plant. Despite the project being one of Kenya's least cost power projects and having a medium to long term beneficial value for electricity production in Marsabit, the LTWP Project was not subjected to any competitive bidding as per the applicable legal frameworks (Public Procurement and Disposal Act, 2005 and Regulations, 2006 (Repealed), the Public Procurement and Assets Disposal Act, 2015 and its Regulations and the Public Private Partnership Act, 2013.

The Committee also established that the Spanish Government offered the Government of Kenya (GOK) a concessionary loan in October 2009 to construct the Transmission Interconnector (TI) with a condition that a Spanish company is awarded the contract to build the transmission line. This decision led to cancellation of an earlier approval for LTWP Ltd to build the transmission line under the Build, Own, Operate and Transfer framework of the PPP model. A steering committee comprising of Kenya Power and KETRACO officials assisted by LTWP Ltd undertook a process where M/s Isolux of the Kingdom of Spain was identified as the preferred bidder due to a higher technical and financial evaluation score based on concessionary funding.

The inquiry further noted that the implementation of the TI project faced delays as the negotiation for financing arrangement between the GOK and the Kingdom of Spain was completed in 2014. M/s Isolux was given the Final Notice to Proceed (FNTP) with the project on 13th August 2014 despite having signed the contract in December 2011. In addition, KETRACO failed to meet its contractual obligations by failing to provide access to the wayleave for construction of the transmission line. KETRACO entered into a contract with M/s Isolux on 30th December 2011 for a period of 24 months from the date of the FNTP. The wayleaves along the 428 kilometer-stretch were required to be availed to M/s. Isolux within 210 days from FNTP but documents availed before the Committee show that the process of wayleave acquisition was still ongoing up until February 2018; way beyond the agreed timelines for provision of wayleave access as per KETRACO's obligations.

The Committee noted with concern that due to delays in completion of the TI, the GOK accrued Deemed Generated Energy (DGE) penalties claims amounting to Kshs.18,499,082,672 (EURO 167,261,145) for the period from 27th January, 2017 to 10th September, 2018. The LTWP plant was ready by 27th January 2017 but the Transmission Interconnector (TI) was not completed until 10th September 2018; almost 19-months later. In accordance with the terms of the Power Purchase Agreement (PPA) and the GOK Letter of Support (issued by the GOK on 28th February 2013), LTWP Ltd was entitled to GOK Transmission Interconnector Delay DGE Payments from the date of the plant completion until the TI was operational.

The Committee also established that The Consortium of NARI Group Corporation & POWERCHINA GUIZHOU Engineering Co. Ltd which emerged as the most responsive out of the five (5) bidders, was recommended for the award. The process was undertaken through a specially permitted procurement procedure that was approved by Dr. Kamau Thugge, then PS at the National Treasury. The company was contracted on 30th January 2018, and completed the transmission line on 10th September, 2018. A total of Kshs.9,510,758,935 had been paid to NARI

Group Corporation, leaving an outstanding balance of Kshs.1,786,853,615. The consortium was still owed the amount of Kshs.1,786,853,615 plus any accrued penalties which is approximately amounting to Kshs.1.1 Billion as at the time of the inquiry. It was not clear why the Government has not settled to amounts due to NARI group that continue to accrue hefty interest.

The Committee further noted that after the termination of the contract agreement between KETRACO and M/s. Isolux, whom had already by paid Kshs.10,827,050,072 for works done, a further cost of Kshs.11,061,698,560 was incurred to complete the Transmission Interconnector. This resulted in an additional cost of Kshs.3,179,062,348 and a 17 per cent variation over the original contract sum agreed with M/s. Isolux Ingenieria SA of Kshs.18,920,339,899, which was within the threshold of 25 percent as per the Public Procurement Laws.

The Committee noted with concern that the Lake Turkana Wind Power Plant sits on disputed land which is the subject of a court case between Marsabit residents and the Lake Turkana Wind Power Plant Company. LTWP Limited was granted a lease of 99 years with effect from 2009. The High Court in Meru nullified title deeds for the land saying it was acquired irregularly and gave the Marsabit County government, the Attorney-General, the Chief Land Registrar and the National Land Commission one year to regularise the process. Despite the Lake Turkana Wind Power Project being granted the lease for 150,000 acres, the Project was only occupying 40,000 acres of land, denying the local community land for their rightful use.

The Committee recommends, amongst other recommendations that the Government of Kenya, through the National Treasury, should urgently all pending the payments due to The Consortium of NARI Group Corporation & POWERCHINA GUIZHOU Engineering Co. Ltd that has been accruing interest since they fell due; revision of the lease agreement in which LTWP project occupies to comply with a court order *Mohamud IItarakwa Kochale & 5 others V Lake Turkana Wind Power Ltd & 9 Others (2021) eKLR;* the Attorney General should be involded in drafiting and or reviewing Power Purchase Agreement and investigation of various public officers that mismanaged the procurement and implementation of the project among others.

CHAPTER ONE

1.0 PREFACE

1.1 COMMITTEE MANDATE

1. The Public Investments Committee is one among three watchdog/investigatory committees of the House established under National Assembly Standing Order (S.O.) 206 and is responsible for the examination of the working of public investments based on their audited reports and accounts.

2. It is mandated to-

   (i) examine the reports and accounts of the public investments;
   (ii) examine the reports, if any, of the Auditor-General on the public investments; and
   (iii) examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices;

3. The Committee is guided by the following pieces of legislations and codes in carrying out its mandate: -

   a) the National Assembly Standing Orders;
   b) the Constitution of Kenya;
   c) the National Assembly (Powers and Privileges) Act, 2017;
   d) the State Corporations Act (Cap. 446);
   e) the repealed Public Procurement and Disposal Act, 2005;
   f) the repealed Public Procurement and Disposal Regulations, 2006;
   g) the Public Procurement and Assets Disposal Act, 2015
   h) the Public Finance Management Act, 2012;
   i) the repealed Public Audit Act 2003, and
   j) the Public Audit Act, 2015, among others.

1.2 COMMITTEE MEMBERSHIP

4. The Committee on Public Investments constituted by the House in December 2017 comprises of the following Members: -

Name of Member	Constituency	Party
The Hon. Abdullswamad Sharrif Nassir, MP **Chairperson**	Mvita	ODM
The Hon. Ahmed Abdisalan Ibrahim, MP **Vice- Chairperson**	Wajir North	ODM
The Hon. Raphael Bitta Sauti Wanjala, MP	Budalangi	ODM
The Hon. Thomas Joseph Kajwang', MP	Ruaraka	ODM
The Hon. Omar Mohamed Maalim Hassan, MP	Mandera East	EFP
The Hon. Mishi Mboko, MP	Likoni	ODM
The Hon. Julius Kibiwott Melly, MP	Tinderet	JP
The Hon. Joshua Kandie, MP	Baringo Central	MCCP
Hon. Babu Owino Paul Ongili, MP	Embakasi East	ODM
Hon. James Githua Kamau Wamacukuru, MP	Kabete	JP
The Hon. Mathias Nyamabe Robi, MP	Kuria West	JP
Hon. Mary Wamaua Njoroge, MP	Maragwa	JP
Hon. Mohamed Hire Garane, MP	Lagdera	KANU
The Hon. Rahab Mukami Wachira, MP	Nyeri County	JP
Hon. Paul Kahindi Katana, MP	Kaloleni	ODM
Hon. Rashid Kassim Amin, MP	Wajir East	WDM-K
Hon. Teddy Mwabire, MP	Ganze	ODM
Hon. Zachary Kwenya Thuku, MP	Kinangop	JP

1.3 COMMITTEE SECRETARIAT

5. The secretariat facilitating the Committee comprises -

Evans Oanda - Principal Clerk Assistant II

Mohamed Boru - Clerk Assistant II

Marlene Ayiro - Principal Legal Counsel II

Joash Kosiba	**-**	Principal Fiscal Analyst II
Cyril Mutali	-	Fiscal Analyst
Deborah Mupusi	**-**	Media Relations Officer III
Euridice Nzioka	**-**	Audio Recording Officer

1.4 COMMITTEE PROCEEDINGS

6. In its consideration of the Special Audit Report on the Lake Turkana Wind Power project, the Committee held fifteen sittings in which it received both oral and written evidence from the current and immediate former Principal Secretaries, State Department of Energy, the Principal Secretary, National Treasury, the Acting CEO, National Lands Commission, the Acting Managing Director, KETRACO, the Acting Managing Director, Kenya Power and the Director-General of Energy and Petroleum Regulatory Authority (EPRA). The Committee also received submissions from private entities involved in the implementation of the LTWP project including the Chief Executive Officer of Lake Turkana Wind Power Limited and the Project Manager of the NARI Group consortium.

7. The records of evidence adduced, documents and notes received by the Committee formed the basis of the observations and recommendations as outlined in the Report and can be obtained in the Minutes of the Committee proceedings hereto annexed.[1]

8. The recommendations in this report provide a recourse against individuals and entities that occasioned such actions as well as suggestions for improving the management of public private partnerships.

[1] Committee Minutes

CHAPTER TWO

2.0 INTRODUCTION AND BACKGROUND

2.1 INTRODUCTION

9. Lake Turkana Wind Power (LTWP) Project is an energy generating project located in Marsabit County. The wind farm provides 310 MW of renewable energy to Kenya's national grid to be bought at a fixed price by Kenya Power and Lighting Company Ltd (Kenya Power) over a 20-year period, in accordance with the Power Purchase Agreement (PPA).

10. The project is owned by a consortium of six entities comprising of:
    i. Anergi Turkana Investments Limited,
    ii. KP&P Africa B.V,
    iii. Danish Climate Investment Fund I K/S,
    iv. Vestas Eastern Africa Limited,
    v. Finnfund – the Finnish Fund for Industrial Cooperation; and
    vi. Sandpiper Ltd.

11. The LTWP project is comprised of 365 wind turbines, each with a capacity of 850KW, and a high voltage substation.

12. The Project location was not serviced by any transmission line network, and in order to supply the power to the National Grid through Kenya Power with which LTWP had entered into a Power Purchase Agreement (PPA), there was need for the development of a transmission line from Loiyangalani to Suswa where the wind farm was to interconnect to the national high voltage network.

13. In this regard, the Government of Kenya was to construct a new 400 KV sub-station near Loyangalani (initially operated at 220Kv), and a 220Kv substation near Suswa and all associated works. This is in accordance to the Power Purchase Agreement (PPA) on definition of "Transmission Interconnector" or "TI".

2.2 SPECIAL AUDIT BY THE OFFICE OF THE AUDITOR GENERAL

14. The National Assembly passed a resolution on 13th June, 2019 in respect of the Supplementary Appropriation Bill (National Assembly Bill No. 4 of 2019). The House requested the Auditor-General to carry out a special audit on the LTWP Ltd and on the payment of GOK TI Delay DGE and other outstanding payment obligations for the project following additional payment claims by LTWP Ltd.

15. Following the House resolution, the Principal Secretary to the Ministry of Energy vide letter reference ME/CONF/3/2/73A, requested the Auditor-General to conduct a Special Audit on the Lake Turkana Wind Power (LTWP) regarding payments of Government of Kenya (GOK) Transmission Interconnector Delay Deemed Generated Energy (GOK TI DELAY DGE).

16. The special audit reviewed transactions covering the financial years 2010/2011 to 2018/2019 in regard to agreed Terms of References. The scope of work was limited to transactions at Ministry of Energy (MOE) Headquarter Offices, Kenya Electricity Transmission Company Ltd (KETRACO) and the Lake Turkana Wind Plant in Loiyangalani and Suswa Sub-Station.

17. The special audit identified the following as key stakeholders involved in the project:

	Entity	**Role**
1	Ministry of Energy	Provided GoK letter of support to LTWP
2	Kenya Electricity Transmission Company Ltd (KETRACO)	To construct transmission inter-connector (TI) from Loiyangalani at Lake Turkana Wind Power Plant (LTWP) to Suswa Sub-station. The scope entailed 434.6 kms of transmission line and associated Sub-stations at Loiyangalani and Suswa.
3	KPLC	Purchase, transmit and distribute electricity from Lake Turkana wind power
4	Energy & Petroleum Regulation Authority (EPRA) formerly Energy Regulation commission (ERC)	Offer oversight and Regulate electricity Tarrif setting and approving the changes in energy tariff.
5	Lake Turkana Wind power Project (Private Entity)	Generate wind power and sell to KPLC exclusively

CHAPTER THREE

3.0 EVIDENCE AND SUBMISSIONS FROM WITNESSES

Introduction

18. This Section contains evidence submitted both orally and in writing by key witnesses invited to adduce evidence before the Committee. Committee Observations on each of the witness submission is also recorded.

19. The Public Investments Committee as mandated by Standing Order 206 commenced its consideration of the Special Audit Report on the Lake Turkana Wind Power project on 8th December, 2021 and has since received oral and written submissions from the following –

    i. Principal Secretary, State Department of Energy,
    ii. Principal Secretary, National Treasury,
    iii. Principal Secretary, State Department of Petroleum and immediate former Principal Secretary in the State Department of Energy;
    iv. Ag. CEO, National Lands Commission;
    v. Acting Managing Director, KETRACO;
    vi. the Acting Managing Director, KPLC;
    vii. Director General, EPRA.
    viii. Chief Executive Officer of Lake Turkana Wind Power Limited and
    ix. Project Manager of the NARI Group consortium.

3.1 EVIDENCE BY PRIVATE ENTITIES INVOLVED IN THE PROJECT

3.1.1 LAKE TURKANA WIND POWER LIMITED

Mr. Phylip Leferink, the Chief Executive Officer of Lake Turkana Wind Power Limited accompanied by Mr. Rizwan Fazal (Advisor) appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project. He informed the Committee thus:

20. Lake Turkana Wind Power Limited (LTWP) was a private company limited by shares which was incorporated under the Companies Act (Chapter 486, Laws of Kenya) on 01st October 2007.

21. In addition to the above, the Lake Turkana Wind Power Project was financed by various multilateral and bilateral development finance institutions such as (European Investment Bank; African Development Bank; The Trade and Development Banks (TDB), formerly the PTA Bank; East African Development Bank (EADB); PROPARCO; Netherlands Development Finance Company (FMO); Deutsche Investitions- und Entwicklungsgesellschaft (DEG); Eksport Kredit Fonden of Denmark (EKF); and EU Africa Infrastructure Fund (EU-AITF)) and LTWP was therefore subjected to intense scrutiny on matters of corporate governance and compliance pursuant to the financing agreements it has entered into with the aforesaid institutions.

22. Renewable energy resources assessment was one of the key stages in renewable energy resources development. Before a decision is made to develop the resource, an assessment was done to determine commercial viability of a project. This is critical in securing project financing.

23. At the early development stage of the Project, and as Kenya did not have an existing wind atlas, there was no reliable information available regarding the wind regime in the wider geographical area around the identified potential wind farm location. There were, most certainly, general expectations that the winds were more than adequate to successfully build and operate a wind farm but to ensure an accurate/exact reflection of the prevailing wind

regime and the subsequent business case, it was necessary to go through a wind measurement campaign with a reputable wind measurement company or institute.

24. LTWP appointed one of the world's most renowned wind energy institutes, DEWI (Deutsche Windenergie Institut), to run its wind measurement study. DEWI assisted Lake Turkana Wind Power in setting up 9 met masts (in 2007/2008). LTWP collected wind data throughout which resulted in a refined and bankable understanding of the prevailing annual wind conditions on the designated project site.

25. Bearing in mind that substantial amount of risk capital was going to be expended on wind data acquisition and analysis to ascertain the areas suitability and viability for wind power development, GOK did not object to the study being done by LTWP. If the studies had indicated an inadequacy of wind resource, the project proposers would have taken the loss in terms of money and time spent and government would not have compensated them for this effort. All development related work was undertaken at the sole risk and cost of LTWP and its shareholders. The onus was on LTWP and its shareholders to carry out the relevant supply side investigations in order to demonstrate to GOK (and other stakeholders) that it was viable to develop a large-scale wind farm facility on the proposed site.

26. The LTWP Project involved the construction of a power generation facility. The obligation to develop the high voltage transmission interconnection infrastructure required to offtake power from any power generation facility would ordinarily be a public sector obligation. However, based on extensive discussions with GOK, it was initially concluded that packaging the wind farm and transmission works together would be a more efficient course of action and would enable LTWP to manage the inherent project on project risk and may also have benefits in terms of procuring a more attractive rate of financing for all the infrastructure works required.

27. Upon expiry of the power purchase agreement, the transmission infrastructure would be transferred to GOK or any governmental authority nominated by GOK. Consequently and given that the power generation project could not be implemented without certainty as to the power evacuation infrastructure, LTWP approached the GOK with a view to having GOK award a concession to LTWP (or an affiliate of LTWP) to undertake the development

of the 400kV, circa 428km double circuit transmission line together with the relevant substations in Loiyangalani and Suswa (the Transmission Interconnector). This way, the entire power generation and transmission line project would be undertaken and financed by the private sector thereby insulating GOK / KPLC / public sector from any project-on-project risk which would result in the delay of either the generation project of the transmission project.

28. To this end, and with respect to the Transmission Interconnector, an ad hoc steering committee was created which comprised of members of the Kenya Electricity Transmission Company (KETRACO), KPLC and GOK and LTWP. It was through this ad hoc steering committee that the procurement process for a contractor to build the Transmission Line was to be implemented (including tender evaluation). KEMA (Later acquired by DNV GL) and KPMG, a private consulting firm were also introduced as part of this steering committee as independent advisors to ensure that an open and transparent procurement process was followed. (Appendix 1)

29. Following the issuance of the relevant request for proposals and subsequent evaluation of bids, but before any contractual award was made by LTWP, the Kingdom of Spain made available certain concessional financing and grants to GOK to be utilized by GOK in the financing for that portion of the Transmission Works comprising the circa 428km transmission line from Loiyangalani to Suswa. (Appendix 2)

30. Following bilateral discussions between GOK and the Spanish Government, LTWP were subsequently informed by GOK that the new part of the Transmission Interconnector would be carried out on a concessional basis by LTWP but would be undertaken solely by the public sector as one of the first legacy projects to be implemented by KETRACO (which at the time was newly created following the unbundling of the energy sector). At this point, LTWP ceased to be involved in the further evaluation of any technical or financial bids for the Transmission Works.

31. LTWP were informed by GOK that financing of the Transmission Interconnector would be provided through concession loans and grants from the Spanish Government and budgetary allocations to be made by GOK and to this end it was LTWP’s understanding that GOK

took the requisite steps under the Public Finance Management Act to procure the external funding required by KETRACO in connection with the construction of the Transmission Interconnector.

32. However, given that successful implementation of the Transmission Interconnector was intrinsically linked to the bankability of the generation project, LTWP expressed its willingness to provide support to KETRACO (given it was newly incorporated and did not initially have the requisite capacity), as and when required by KETRACO, in order to assist KETRACO with the implementation of the Transmission Works. To this end, KETRACO and LTWP entered into a co-ordination and interface agreement largely focused on resettlement and land acquisition issues, so as to ensure that as far as commercially possible, LTWP could ensure that KETRACO was complying with its contractual obligations under the contracts relating to the Transmission Interconnector and was able to deliver the relevant rights of way / wayleaves to KETRACO's contractor so as to ensure the timely completion of the Transmission Works.

33. KETRACO (and by extension GOK through the Ministry of Energy and the National Treasury) undertook the review of, and approved, all contracts entered into by the State Corporation in connection with the Transmission Interconnector (including analyzing the risks allocated to and assumed by KETRACO under these contracts). In LTWP's understanding, the approval process included procuring the requisite KETRACO's board approvals as well as clearance through all GOK internal approval processes (as a result of budgetary support being required to make contractual payments). KETRACO was the entity which had to satisfy itself as to the satisfaction of conditions precedent required for the issuance of the Full Notice To Proceed (FNTP) under the relevant construction contracts.

34. LTWP was not responsible for contract management of the construction contracts for the Transmission Works. The completed Transmission Interconnector were to be owned by KETRACO and managed by KETRACO and KPLC with no involvement from LTWP. In accordance with the provisions of the Kenyan Grid Code, LTWP had entered into a grid connection agreement with KETRACO pursuant to which it had the right to evacuate

power from the LTWP Plant through the Transmission Interconnector.

35. Pursuant to the PPA, the LTWP plant was ready by 27th January 2017, but the Transmission Interconnector (TI) was delayed until 10th September 2018.

36. In accordance with the terms of the PPA and the GOK Letter of Support (issued by the GOK on 28th February 2013), LTWP was entitled to GOK TI Delay DGE Payments from the date – 27th January 2017 until the TI was Operational - in this case, 10th September 2018.

37. Following a series of meetings, LTWP, GOK and KPLC reached an agreement in which:

    i. LTWP agreed to write-off any GOK TI Delay DGE from 27th January 2017 – 15th May 2017 (an amount of EUR 17.72 Million);

    ii. For the period 15th May 2017 – 31st May 2018, the GOK TI Delay DGE amounted to EUR 127Million;

    iii. Although LTWP was entitled to the EUR 127M, the GOK could not pay the full amount and requested a payment structure with LTWP that was mutually beneficial.

38. To record the above-mentioned agreement, the Parties entered into the Second Variation Agreement whereby LTWP agreed to the start date of GOK TI Delay DGE Payments to be 15th May 2017 instead of 27th January 2017 (in this case LTWP gave GOK a discount of EUR 17.72 Million);

39. With respect to GOK TI Delay DGE for the period 15th May 2017 to 31st May 2018 ("Initial TI Delay DGE Period"), GOK agreed to pay LTWP a lumpsum of EUR 46,000,000 before 31st August 2017, which was to cover debt obligation to Lenders;

40. To compensate for the difference between the lumpsum payment of EURO 46,000,000 and the actual GOK Initial TI Delay DGE for the period from 15th May 2017 to 31st May 2018 (i.e. EUR 127M), LTWP agreed to receive a tariff increase of EURO 0.00845 per kWh ("DGE Recovery Period Tariff"), which was to be paid by KPLC /GOK during the period

from 1st June, 2018 to 31st May 2024 ("DGE Recovery Period"); and

41. Any TI Delay beyond 1st June 2018 would result in LTWP being paid GOK TI Delay DGE in the normal manner.

42. From June 1st 2018 until the TI Operation Date, additional TI Delay DGEs which were incurred and paid by GOK amounted to EURO 45,190,003

43. Further discussions were held with GOK on the above amounts, and it was agreed that LTWP would waive a further amount of EUR 5,512,986, for the DGE's incurred for the period between 11 – 23 September, 2018.

44. As per LTWP obligations under the PPA, LTWP undertook a reconciliation of all amounts paid to LTWP as TI Delay DGEs.

45. The GOK TI Delay DGE was purely based on the estimates and the parties agreed that, upon TI operation date to the expiry of 381 days from the TI operation date (the calculation date), if the actual revenue generated over that period is less than EUR 127,577,128.32 paid out as GOK TI Delay Payment to LTWP, then LTWP would refund the excess to GOK.

46. At the calculation date, LTWP did the calculation and established that there was an excess of €6,173,296 refundable to GOK.

47. LTWP notified GOK of the excess and requested GOK to provide bank details to facilitate the refund.

Transmission Interconnector Roles and Timelines

48. LTWP proposed to erect a 300MW Wind Farm (the Project) to be located near Loiyangalani in Laisamis District, Marsabit on land leased by LTWP from the County Council of Marsabit for this purpose. The studies carried out by LTWP and verified by independent wind energy consultants since 2005 proved the viability of the Project. Following through on this, and with the support of the Ministry of Energy, LTWP commenced the negotiations for a Power Purchase Agreement (PPA) with Kenya Power and Lighting Corporation (KPLC) to sell/purchase the energy which would be generated by the Project.

49. The negotiations of the PPA and tariff were strictly for power produced and only delivered to KPLC at the wind farm "gate" as is customary for any Independent Power Producer (IPP) in the Country. The negotiations with KPLC proceeded and the PPA finalization (including tariff) and Project were subject to approval and clearance from the Cabinet Sub-Committee on Infrastructure (which approval was received on 03rd June 2009).
50. In the absence of any TI infrastructure, LTWP commissioned a route feasibility study to establish how it could connect to the national grid via the point of national interconnect at Suswa – approximately 428KM from the proposed wind farm site. This, along with technical studies by VTT International and KEMA (now DNV GL) was a requirement for the detailed technical schedules of the PPA whereby the plant characteristics, grid-code requirements and (grid) system details were all required to ensure the safe integration of (intermittent) wind power into the Kenyan grid and to ensure compliance by both parties to the PPA.
51. In various discussions with KPLC and GOK, the question of how much the TI would cost was raised and given that KEMA was already working on the technical specifications of the TI, they were asked by LTWP to establish for information purposes, what the indicative bill of quantities be and a plan for how such a TI implementation could be procured.
52. Given the foregoing, and to ensure that project-on-project risk was mitigated, the Ministry of Energy, KPLC and LTWP held extensive meetings on the matter and GOK / KPLC were of the view that to the extent possible, the TI should be built under a Build Own Operate and Transfer (BOOT) basis given that KETRACO was a nascent entity whilst KPLC, under the Energy Act and unbundled sectoral policies, could not develop the TI.

53. LTWP was requested by MOE (vide their letter Ref: ME/CONF/3/2/73A dated 16 January 2009) to lead the initial phase of the TI implementation starting with the design elements to construction. By the same authority, MOE instructed LTWP to work under the supervision of KPLC who was to evaluate and endorse every stage of the route, technical design, tender and construction process also on behalf of MOE. It is crucial to note that KETRACO was a fledgling entity incorporated just a month earlier on 2nd December 2008 and had one employee seconded from KPLC.

54. In response, LTWP approached the KPLC on 28th January 2009 requesting that to ensure

compliance with the MOE directive and that the TI and the Wind Power Project were developed in tandem with each other, that a Steering Committee comprising the various stakeholders be established.

55. On 10th February 2009, KPLC responded (Ref: KPLC1/7/6C/JMK/enm) to the LTWP letter and appointed 5 KPLC staff (including the seconded KPLC staff member the new KETRACO staff) to a Steering Committee and invited parties to the first meeting of the Steering Committee on 16th February 2009 at KPLC offices. Terms of Reference for the KPLC / LTWP Steering Committee were agreed between the parties whose scope was first included to review, confirm and approve the work thus far carried out on the TI by Schicon B.V and KEMA of the Netherlands namely:
    i. Route survey;
    ii. Route selection;
    iii. Transmission Line design;
    iv. Transmission Line BQ; e. Proposed sub-stations as designed by KEMA;
    v. Proposed Switching stations; g. Invitation for Expression of Interest; and;
    vi. Draft tender documents as proposed by KEMA for both Transmission Line and substations. (Appendix 3)

56. LTWP was informed by KPLC on 04th June 2009 (Ref: KPLC1/2/4/1K) that the Government has approved development of the plant. Further the Government had decided that Lake Turkana Wind develops the 400kV 428 km transmission lines from Laisamis District to Suswa, Naivasha District which is necessary to evacuate the power from the plant on a BOOT basis. [Appendix 4]

57. The tender package that had been compiled by KEMA with input at every stage from involved stakeholders, was approved for issuance by the Steering Committee meeting No. 9 of 3rd July 2009 comprising MOE, KPLC, KETRACO and LTWP.

58. Seven bidders were prequalified by KEMA and invited to participate in the tender with a closing date of 19th October 2009. However, before conclusion of the process by KEMA, on 9th October 2009, the GOK received a letter from the Spanish Ministry of Industry, Tourism and Trade and addressed to the Kenyan Ministry of Finance offering concessional

tied financing from the Government of Spain under a Bilateral Financial Cooperation Agreement provided a Spanish company was awarded the contract. The Government of Spain provided the Spanish contractors with letters confirming the same

59. LTWP was made aware of the developments in mid-October 2009 and the Steering Committee requested KEMA and KPMG to continue with the technical and financial evaluation and to consider the two variants of financing solutions for the GOK's information and evaluation. It was abundantly clear that no decision on which option i.e. public sector (i.e. GOK via KETRACO) or private sector (i.e. LTWP BOOT) implementation would be taken until after completion of the tender evaluation process "to ensure that the integrity of the procurement process was maintained".

60. KEMA presented its Technical Evaluation Report dated 06th January 2010 and KPMG presented the Financial Evaluation Report dated 07th January 2010. LTWP led the process, and it is for this reason that the reports were addressed to it – given that KEMA could not contract with a noncorporate entity. This did not mean that "LTWP would in itself select the successful bidder" – this had been and would have continued to be the realm of the Steering Committee – which included the GOK. [Appendix 5]

61. In line with the tacit understanding with GOK that the final decision on which option i.e. public or private sector implementation would be undertaken by GOK, LTWP wrote to MOE on 11 January 2010 to: (i) provide an update on the tender evaluation process; (ii) request the Government's formal decision on the implementation structure (i.e. public or private); (iii) seek the Government's undertakings towards the take-or-pay obligations contained in the PPA; and (iv) understand how the GOK / KETRACO wished the remainder of the tender process i.e. contract negotiations and award, to be undertaken. [Appendix 6]

62. Full disclosure and unequivocal clarity that each step and process thus far had been sanctioned by the Steering Committee was evident in this communication and there was no hint whatsoever that LTWP had selected any preferred bidder. MOE sought clarification from LTWP in regard to project implementation timelines and LTWP responded on 14 January 2010 on the same

63. MOE wrote to the Economics and Commercial Counsellor, Embassy of Spain in Nairobi on 14 January 2010 attaching the KEMA and KPMG Evaluation Reports, the Environmental Impact Assessment (EIA) License and letters of reliance from VTT International and KEMA (to MOE and KPLC) dated August 2009 and requested an additional contribution towards the cost of the TI based on Isolux's base offer of EUR136,970,018 which was the lowest offer. [Appendix 7] The Spanish Government responded on 19 January 2010 confirming the increase in financial support to EUR 110 Million and this was communicated to LTWP by MOE (Ref: ME/CONF/3/2/8) on 20 January 2010. [Appendix 8]

64. LTWP, following receipt of the letter wrote to MOE again on 21st January 2010 requesting that: (i) GOK confirm that the TI would be implemented through the public-sector; and (ii) authorise the Steering Committee to proceed to discussing with the successful bidder their tender proposal and commence contractual negotiations. [Appendix 9]

65. The GOK formally communicated its decision to undertake a public-sector implementation of the TI project through KETRACO vide a letter referenced ME/CONF/3/2/8 and dated 30th January 2010. [Appendix 10] This was followed by KETRACO taking over all communication and discussions whereby KETRACO invited M/s. Isolux to negotiations prior to contract award at KETRACO's offices on 01 and 02 March 2010 vide a letter addressed to Isolux dated 17 February 2010 and copied to LTWP. [Appendix 11]

66. Following this meeting, the parties signed minutes dated 18th March 2010 – which incidentally included the current Ag. MD of KETRACO.

67. Following conclusions of the negotiation phase between KETRACO and M/s. Isolux, and once the final price had been reached, LTWP sought a confirmation from MOE on 28th May 2010 that there was no funding gap that could delay the TI project and its implementation. MOE, vide a letter dated the same date responded and confirmed that the funding for the total TI project - including for wayleaves acquisition was in place. [Appendix 12]

68. KETRACO was the party negotiating with M/s. Isolux and discussing contractual terms

and that LTWP never appointed Isolux nor entered into the EPC Contract with it. It is therefore a matter of fact that it is solely KETRACO who must take full responsibility for entering into the EPC Contract and all subsequent addendums. [Appendix 13]

69. As had been correctly captured in the OAG Report, KETRACO entered into the Contract on 30th December 2011 but then issued the Final Notice To Proceed (FNTP) to M/s. Isolux on 13th August 2014 - a period of 32 months later. During this interluding period, the financing arrangements and satisfaction of all the covenants and conditions were being undertaken between GOK, Government of Spain, the (Spanish) Commercial Banks providing the export credit facility and other stakeholders.

70. The EPC Contract that was signed on 30th December 2011 had a Time for Completion of 22 months (i.e. a Completion Date of October / November 2013).

71. The TI delay had been largely blamed on Isolux's financial woes and as a result, the focus had primarily been on why a "bankrupt" company was involved in the original tender process. It was a matter of public record that at the time of the tendering in 2009, the Isolux group revenue was over EUR 3 billion with EBITDA of EUR 255 million. Their business portfolio increased by 66% to EUR 25.8 billion of which 79% was attributable to international markets and orders. It employed more than 7,800 employees globally. In 2010, their revenues grew by 7% to EUR 3.24 billion and EBITDA of EUR 311 million. It had consolidated its position in the energy business as a reference world-wide in power transmission and distribution with thousands of kilometres of transmission lines and infrastructure built to their credit. Isolux was technically and financially capable at the time of its procurement and contract award.

72. M/s. Isolux's financial problems started in 2016 and on 31st March 2017, M/s. Isolux Corsán filed for protection from creditors under the Spanish Insolvency Act to negotiate a fresh injection of funds to reactivate operations.

73. With a Notice to Proceed of 13th August 2014, Completion should have occurred by 13th June 2016 (Time for Completion was extended subsequently by 2 months between Isolux and KETRACO). With the various buffers in place, and with LTWP only able to claim

GOK TI Delay DGE from 27th January 2017, Isolux and KETRACO had 29 months to complete the TI.

74. M/s. Isolux's financial woes therefore emerged after KETRACO had issued the NTP. Had the payment and wayleave access obligations been adhered to, M/s. Isolux would have been able to complete the construction before its financial woes. It should also be noted that funding for Isolux's payments were provided through Spanish Concessionary financing from the Government of Spain and hence, funding was ring-fenced for this project.

75. Very little attention had been given to understanding the delays occasioned in KETRACO awarding M/s. Isolux with the Final Notice to Proceed and thereafter ensuring that KETRACO's two primary obligations in the EPC Contract were fulfilled: (A) providing wayleaves access; and (B) making payments in accordance with the employer obligations in the EPC Contract signed on 30th December 2011.

76. The KETRACO – Isolux contract was based on the Conditions of Contract for EPC/Turnkey Project First Edition 1999 published by the Federation Internationale des Ingenieurs-Conseils (FIDIC). This FIDIC Silver Book form of EPC Contract is one of the most rigid forms of contract and represents a turnkey, fixed price, lump sum arrangement, whereby the contractor assumes the majority of key construction risks. It is recognisable to the vast majority of the international contracting community and has gained a foothold as a useful template on which to base an EPC contract.

77. The contractor assumes the majority of risk on key matters such as design, specifications, time, price, site conditions and certain unforeseen risks. This sets it apart from previous EPC Contracts in use by the public sector in Kenya, where the Employer retains a number of these key risks and has often been the reason for large price escalations and delays in project implementation.

78. This form of Contract that KETRACO entered into with Isolux, had provisions for an Employer's Requirement which, if properly overseen and managed by the Owner's Representative under the Contract who was DNV GL (formerly KEMA and procured directly by KETRACO on 21 December 2011), was a very effective form of EPC Contract.

79. The multiple addendums – and more specifically to the Employer's Obligations with respect to the Access Schedule along with KETRACO's seeming unwillingness to either appreciate the role of its own Owner's Representative (DNV GL) and / or failure to appreciate the consequences of acting as Employer under the EPC Contract when it had an Owner's Representative who was, per the EPC Contract, to be the key interface with the Employer (KETRACO), was a harbinger of failures to come right from the onset.

80. A key learning for KETRACO ought to be the more prudent oversight and management of the construction interfaces and the legal ramifications of non-compliance with Employer obligations in contracts of this nature.

81. Finally, in respect of the biggest challenge that KETRACO faced – that of wayleave acquisition and provision of Access to Isolux, whilst access for all wayleaves along the entire 428 kilometres stretch were required to be availed to M/s. Isolux within 210 days from FNTP i.e. by approximately 13th March 2015. However, KETRACO issued Notice to Proceed (NTP) for various sections such as AP19-21 (18KM) on 31st July 2015, AP21-23 (57KM) on 21st October 2015 and AP29-45 (70KM) on 18th January 2016 – dates that were way overdue as per KETRACO's obligations.

82. As late as May 2017, the Resettlement Action Plan by KETRACO shows the delays, challenges and variances from its original wayleave acquisition plan. KETRACO on 02 June 2016, committed to the African Development Bank to have the compensation of PAPs completed by end of June 2016, however minutes of the Wayleave Coordination Progress Meetings of 08 June2017, 20 June 2017, 14 July 2017, 13th October 2017 and 12th February 2018 – all of which show that the wayleave acquisition process was incomplete. (Appendix 14)

Conclusion

83. LTWP's background role in the Transmission Interconnector (TI) project was premised under the auspices of a GOK / KPLC Steering Committee put in place in February 2009 - barely two months after KETRACO was established and following a GOK decision communicated to LTWP that it should develop the TI under a Build, Own, Operate and

Transfer (BOOT) structure;

84. The procurement process of the TI contractor was started by LTWP as instructed by GOK, but with involvement and approval at each stage by the Steering Committee / MOE. This is confirmed in Clauses 1.5.62 and 1.5.65 on Page 22 of the OAG Report;

85. LTWP's responsibility for the TI implementation ended mid-stream during the procurement / tendering phase when the Government received a financing offer from the Government of Spain for a public-sector implementation and as a result, the GOK revoked the BOOT structure implementation by LTWP. Accordingly, KETRACO which was now more established and had been fully involved in the Steering Committee, took-over the remaining procurement/ contracting and negotiation process and consequently, full responsibility for the timely completion of the TI project was transferred to KETRACO;

86. LTWP neither appointed M/s. Isolux Corsan S.A. (Isolux) as the TI Contractor, nor did it set-out the construction timeframe. The former was done by KETRACO and the latter was provided by Isolux in their tender submission (18 months) and negotiated by KETRACO to consider the additional time KETRACO required to provide wayleave access to the Contractor (a total of 22 months). KETRACO obtained the approval and mandate from its Board to negotiate and enter into a contract with Isolux in July 2011 – almost one and a half years after LTWP was stripped of the responsibility to implement the TI project. Contrary to the allegation made in the OAG Report (Clause 1.5.61 on Page 21), LTWP is not and has never been affiliated with Isolux;

87. Whilst the TI delay had been largely blamed on Isolux's financial woes, seemingly less analysis seems to have been undertaken as to the reason(s) for the actual delays emanating largely from delays in awarding (Isolux) Final Notice to Proceed (issued on 13 August 2014, whereas KETRACO signed the contract with Isolux on 30 December 2011 – almost 32 months earlier), and thereafter in ensuring that KETRACO's two primary obligations - wayleave access provision and timely payments in the EPC Contract were adhered to; and

88. It is LTWP's view, that has been shared with key stakeholders and forums at various stages, that the combination of the following factors (as highlighted) were largely

responsible for the delay in completion of the TI and consequently of GOK TI Delay DGE Payments crystalising and being paid to LTWP:

89. Delay in issuing FNTP to Isolux and thereby delaying the start of construction due to protracted matters pertaining with getting the financing from the Government of Spain (GOS) and the Commercial Banks under the buyer credit arrangements. Whilst the GOK received the GOS's first indication of its willingness to finance the TI project on 09 October 2009, the commercial banks provided a term sheet for the export credit portion of the facility on 25 July 2012 and the resolution of their interpretation of Clause 3(c) of the Public Finance Management Act, 2014 ("PFMA 2014") and specifically, the definition of what constitutes, under clause 3(c), a "Government to Government loan" was only resolved in June 2014.

90. Non fulfilment by KETRACO of some of its contractual obligations under the EPC Contract to provide Isolux with access as per the Access Schedule. KETRACO's original wayleave access obligation (to Isolux), as per the 30 December 2011 EPC contract, was changed pursuant to the first addendum dated 02 August 2013 exposing KETRACO to open-ended claims for extension of time (EoT). As an illustration, whilst access for ALL wayleaves along the entire 428 kilometres stretch were required to be availed to Isolux within 210 days i.e. by approximately 13 March 2015.

91. KETRACO issued Notice to Proceed (NTP) for various sections such as AP19-21 (18KM) on 31 July 2015, AP21-23 (57KM) on 21 October 2015 and AP29-45 (70KM) on 18 January 2016 – dates that were way overdue as per KETRACO's obligations. This lack of appreciation or understanding of the very complex interface obligations and resultant contractual ramifications (the role of the Owner's Representative) under the EPC Contract (including other technical interface and coordination aspects that were evidenced throughout the TI Construction period e.g. delays by KETRACO in identifying and procuring shunt reactors until 2017 when the TI ought to have been completed) was the difference of how LTWP and KETRACO managed and oversaw the implementation of the two projects to achieve timely completion.

3.1.2 EVIDENCE BY NARI CONSORTIUM

Mr. Chen Chao, the Project Manager for NARI Group Consortium appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

He briefed the Committee as follows:

92. The Consortium of NARI Group Corporation and Powerchina Guizhou Engineering Co. Ltd was invited to a competitive tender on 30th November, 2017 for the completion of the transmission interconnector for Lake Turkana Wind Power project. The tender was then awarded to the consortium on 26th January, 2018.

93. The Consortium won the tender with a contract value of USD 94,541,188.42 and completed the project within six months.

94. The final account of works done was USD 109,224,308.48. The Consortium was paid USD 99,712,246.19 with an outstanding balance of USD 9,744,623.50.

95. The Loiyangalani-Suswa 400KV transmission line is the only power evacuation line for Lake Turkana Wind Power project. The Consortium came on board at a critical moment and completed the project within six months which saved tens of millions of Euros for the Kenyan taxpayer.

96. The pending bills have not been completed by KETRACO more than three years after completion of the project.

97. Interest on delayed payment was about KES 1.1 billion as at February 2022. The Consortium of NARI Group Corporation and Powerchina Guizhou Engineering Co. Ltd was willing to negotiate and discount on the interest component if the Government of Kenya is to pay the principal amount which has been due for almost four years.

3.2 EVIDENCE BY STATE CORPORATIONS INVOLVED IN THE LAKE TURKANA WIND POWER PROJECT

The Committee received evidence from the Kenya Electricity Transmission Company (KETRACO), Kenya Power & Lighting Company and the Energy and Petroleum Regulatory Authority on the Special Audit on the Lake Turkana Wind Power project.

3.2.1 EVIDENCE FROM KENYA ELECTRICITY TRANSMISSION COMPANY

Eng. Anthony Wamukota, the Ag. Managing Director of Kenya Electricity Transmission Company accompanied by CPA Henry Choge (Manager, Project Accounts) appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

He briefed the Committee as follows:

98. KETRACO was not involved in the conceptualization of the LTWP project.

99. M/s Isolux Ingenieria SA was awarded the contract for the transmission line on the recommendation of the Consultant, KEMA, who had been hired by LTWP Ltd.

100. When M/s Isolux Ingenieria SA failed to deliver on their mandate, KETRACO, with approval of the Attorney General terminated their contract. KETRACO then sought the approval of the National Treasury to use the Specially Permitted Procedure to procure a new contractor. Using this procurement method, KETRACO entered into a contract with the Consortium of NARI Group Corporation and Power China Guizhou Engineering Co. Ltd to complete the project.

101. M/s Isolux Ingenieria SA faced two major challenges. When the '*Full Notice to Proceed*' was issued, way leaves for the construction corridor had not been acquired. During execution of the project, there were intermittent stoppages by landowners who demanded huge sums in compensation. The Contractor also experienced cash flow challenges which impacted on project implementation. This was ultimately manifested when they were declared bankrupt.

102. M/s Isolux was procured by Lake Turkana Wind Power Ltd. through an evaluation carried out by their consultant, KEMA and not KETRACO.

103. The three Addenda were done on the contract with M/s Isolux Ingenieria SA prior to the company filing for bankruptcy.

104. Addendum No. 3 changed the scope of the contract due to re-alignment of the southern part of the line due to way leave acquisition issue that had pending court cases leading to an increase in contract price by Euro 3,265,049. The addendum also extended time for completion of the works by two and a half months to 30th December 2016.

105. Addendum 4 provided a change in scope due to re-alignment of the northern part of the line to avoid 'the flash flood prone area' leading to an increase in the contract price by Euro 687,076.

106. Addendum 5 extended the time of completion by twelve months to 31st December 2017 to allow for completion of the works and disbursement of the funds from the financier.

107. Termination of the contract with M/s Isolux Ingenieria SA was in accordance with contract provisions under Clause 15.2 (h) that allowed termination when the contractor becomes bankrupt. The consortium of NARI Group Corporation and PowerChina Guizhou Engineering Company was competitively procured on 30th January 2018 and completed the construction of the transmission interconnector by 31st August 2018.

108. He denied being part of a KETRACO group that participated in the award of a contract to M/s Isolux Ingenieria SA.

3.2.2 EVIDENCE FROM KENYA POWER AND LIGHTING COMPANY

Eng. Rosemary Oduor, the Ag. Managing Director of Kenya Power & Lighting Company appeared before the Committee on 3rd February and 16th February, 2022 to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

She briefed the Committee as follows:

109. In 2005 during conceptualization of the project, the Country was going through power supply capacity deficit. Demand was growing and there was an increased lack of adequate reserve capacity to take care of emergencies. In 2008, the 300MW Lake Turkana Wind Power Plant (LTWP) was identified as a key flagship project of the Kenya Vision 2030 under the Energy Sector as one of the many power generations identified to address the above concerns. Other projects conceptualized at the same period included; KenGen Olkaria I&IV (280 MW), Orpower 4 (52 MW), and KenGen Ngong Wind (20 MW.)

110. Normally, the Attorney-General did not approve PPAs between KPLC and other Parties before execution. The role of AG was confined to review and approval of the GoK letter of support and issuance of legal opinion in respect of all GOK obligations (in this case the obligation to pay GOK TI Delay DGE Payments in the event the TI was delayed). The Attorney-General's legal opinion on the validity of the Letter of Support iwa a Condition Precedent to the PPA Effectiveness under the PPA which opinion is sought by the National Treasury prior to the issuance of the Letter of Support as the case may be. In addition, the PPA was approved by the Regulator (EPRA) before execution.

111. LTWP project was not procured under the Feed-in Tariff Policy. It was a Privately Initiated Project and the tariff negotiated based on project Costs and projected output from the wind farm.

112. Ordinarily transmission lines and power stations are constructed at the same time unless a power station is to be constructed in an area adequately served by an existing transmission line. The twenty-six (26) months line construction period included in the PPA was negotiated based on the eighteen months that LTWP had put in the tender as one of the conditions for bidders for the line construction to be pre-qualified.

113. Therefore the wind power plant and the line had to be completed at the same time in order to avoid having costly idle power generation capacity. In addition, there was the need to keep the validity of the tender prices of various components of the wind farm contract and subcontracts.

114. Deemed Energy Generated (DEG) arises where the power plant is available to generate but unable to deliver to the Offtaker's system electrical energy in the following events:

i. a Power System Interruption;

ii. a stoppage or curtailment of the Plant arising out of a specific dispatch instruction

iii. a breach by the Buyer of its obligations under the PPA; or

iv. Unavailability of the grid other than during maintenance

115. This was a common industry practice worldwide especially for the variable renewable power plants (Solar and Wind) to improve the bankability of these projects given the variable nature of the resource.

116. Therefore, a decision having been made for development of the line by the Government through KETRACO, the developer's financiers requested for a security underwriting in the event of a delay in the completion and commissioning of the construction of the 428Km, 400kV line; this was in form of payment for deemed generated energy.

117. The request for risk underwriting was made because the developer no longer had any control over the construction of the line and any delay could lead to a stranded asset - the wind power plant – for which debt repayments would be due. The developer and their financiers therefore required a provision to protect the project against the risk of delay in construction of the transmission line connecting the power plant to the grid resulting in stranded investment.

118. The developer demonstrated to the GOK (and this was ascertained by AFDB, EIB and various other international financers) that its bi-annual debt service repayment was EUR 37M i.e. EUR 74M per annum and without the DGE assurance, the project was simply un-bankable. It should also be noted that LTWP gave the GOK discounts on the DGE claimed of EUR 17.72 Million.

119. The PPA between Kenya Power and Lake Turkana Wind Power provided conditions for DGE to include the electrical energy that was not generated and/ or delivered at the Delivery Points.

120. The PPA provided an on-demand performance bond in the amount of Euro 10 Million drawn by an internationally recognized bank or a recognized bank in Kenya acceptable to KPLC and in a form acceptable to the Parties. This was to protect KPLC against the risk of delays in construction of the power plant or failure to commence construction by the required Construction Start Date.

121. LTWP invited tenders on behalf of KETRACO in accordance with the agreement of the Special Task Force (comprising MoE, KPLC, KETRACO and LTWP) that was established between the Parties to facilitate this process. KETRACO was newly incorporated in 2008 and participated in the Task Force with KPLC, MOE and LTWP. KETRACO was the contracting party.

122. The procurement of the Escrow Agent and LC Bank by KPLC for collecting and remitting into an escrow account the security support facility according to clause 10.9.5(a)of the PPA was concluded pending GoK approval. The GoK had since approved an alternative arrangement through a Partial Risk Guarantee (PRG) by AfDB.

123. Regarding the account details that was to receive a refund from KETRACO, it was provided to LTWP and refund made accordingly. Delays in provision correct bank details were occasioned through bureaucracies in government (Central Bank of Kenya, Ministry of Energy and the National Treasury).

124. There was a tariff increase of EUR 0.00845 passed to consumers to cater for part of the DGE that would lapse in 2024.

3.2.3 EVIDENCE FROM ENERGY AND PETROLEUM REGULATORY AUTHORITY

Mr. Daniel Bargoria, the Director General of the Energy and Petroleum Regulatory Authority accompanied by Dr. John Mutua (Ag. Director, Economic Regulation &

Strategy) appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

125. Section 6 (j) of the Energy Act, 2006 gave powers to the Commission (now EPRA) to approve electric power purchase and network service contracts for all persons engaging in electric power undertakings.

126. Kenya Power and LTWP jointly submitted an initialed Power Purchase Agreement on 9th November 2009. The Authority (Commission then) approved the initialed PPA at its 24th Meeting held on the 11th December 2009. The approval process took 32 days from the time of submission of the PPA which was within the stipulated requirement of 90 days. The approval process was in accordance with the Energy Act, 2006.

127. Among the Conditions Precedent in the PPA between Kenya Power and LTWP is the requirement for a generation license having been issued to the LTWP. This therefore meant that for the PPA to become effective, then LTWP ought to have been issued with a generation license after approval of the PPA by the Authority. The PPA is normally approved before issuance of the license for purposes of unlocking finances for the developer and to enable the developer attain financial close.

128. LTWP entered into a PPA with KPLC on 29th January 2010. The PPA was amended through agreements dated 29th September 2011, 14th September 2012 and 13th May 2013, Variation Agreement dated 31st July 2014 and Variation Agreement dated 19th September 2017 to address various issues as tabulated below:

129. Summary of PPA Variations:

Item	Variation	Justification for Variation	Correspondences

1	Dated 29th September 2011	Change in security package being provided to Lake Turkana Wind Power (LTWP) by Kenya Power and Lighting Company (KPLC) and Government of Kenya (GOK). Recognition that the Transmission Interconnector (TI) is being developed, owned and operated by Kenya Electricity Transmission Company (KETRACO). To increase the energy charge rate and review the energy threshold set out in the original PPA, in view of the increase in total costs for the project since the execution of the original Power Purchase Agreement (PPA).	Instrument of Approval issued on 2nd September 20111
2	Agreement dated 14th September 2012	Addition of a Condition Precedent that 90 days will have expired from the issuance by KETRACO of Notice to Proceed for the Transmission Interconnector Change the Target Effective Date from 31st December 2011 to 31st December 2012 Correction of an error in the formula for Calculation of Energy Charges when the cumulative aggregate of the Net Electrical Output and the KPLC, Deemed Generated Energy (DGE), GOK Transmission Interconnector (TI) Delay DGE and TI Interruption DGE in the Operating Year is greater than Discounted Energy Threshold.	Instrument of Approval issued on 4th September 2012
3	Amended and Restated PPA dated 13th May,2013	The original PPA was amended and restated to incorporate the contents of the agreements dated 29th September 2011 and 14th September 2012	Instrument of Approval issued on 6th May 2013
4	Variation Agreement dated 31st July 2014	Through Agreement dated 31st July 2014 (Variation Agreement in respect to PPA dated 13th May 2013), the Parties amended the PPA to vary the definition of Long Stop Effective Date and provide for Conditions Precedent.	ERC approval letter dated

5	Variation Agreement dated 19th September 2017	Through agreement dated 19th September 2017 (Second Variation Agreement in respect of the PPA dated 13th May 2013 and as amended on 31st July 2014), Parties agreed to amend the PPA to address the Transmission Interconnector Delay for the period 15th May 2017 to 31st May 2018. The financial impact of the TI delay was addressed through a combination of a lump sum payment and a change in tariff	Instrument of Approval issued on 6th September 2017.

3.3 EVIDENCE BY STATE DEPARTMENTS INVOLVED IN THE LTWP PROJECT

3.3.1 EVIDENCE BY THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF ENERGY

Major Gen. (Rtd.) Gordon Kihalangwa, the Principal Secretary for Energy appeared before the Committee on 9th December, 2021 and 24th March, 2022 to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

He briefed the Committee that:

130. Between 2005 and 2009 during conceptualization of the Project, the Republic of Kenya was going through power supply capacity deficit, the growing demand and lack of adequate reserve capacity to take care of emergencies. This undesirable situation resulted in importation by GOK of up to 230 MW of auto diesel fired emergency power to stabilize supply against rising demand.

131. In 2008, the 300MW Lake Turkana Wind Power Plant (LTWP) was identified as a key flagship project of the Kenya Vision 2030 under the Energy Sector as one of the many power generations identified to address the above concerns. Other projects conceptualized at the same period included; KenGen Olkaria I&IV (280 MW), Orpower 4 (52 MW), and KenGen Ngong Wind (20 MW).

132. In terms of financial viability LTWP, with a tariff of Euro cents 7.52 for the twenty-year PPA term was at the time of the proposal competitive and comparable to the KENGEN geothermal energy power generation projects which were and still are subsidized by the

government through provision of funds for geothermal drilling and exploration costs. The ability of KenGen to obtain concessional financing thus lowers the financing costs, which helps them to achieve lower tariffs.

133. Electricity production in Marsabit, which had a very big unexploited wind power potential, would command a lower tariff because the substation infrastructure was already in place together with a 220/400kV double circuit line for its evacuation and the dynamic reactive power compensators (DRPCs) at the LTWP sub-station which offers grid stability to the national grid. This line had a capacity to evacuate up to 900MW.

134. LTWP project was properly developed, within the LCPDP, and remained one of Kenya's least cost power projects, to date. It was a strategic investment, in line with Kenya's policy on exploiting the potential of our natural resources and remained a critical asset in the energy sector.

135. The Attorney-General did not approve PPAs between KPLC and other Parties before execution. As per the Energy Act, the role of approving the PPA was vested with EPRA. The role of AG was confined to review and approval of the GoK Letter of Support and issuance of Legal Opinion in respect of all GOK obligations (in this case the obligation to pay GOK TI Delay DGE Payments in the event the TI was delayed).

136. The Attorney-General's Legal Opinion on the validity of the Letter of Support was a Condition Precedent to the PPA Effectiveness under the PPA which opinion is sought by the National Treasury prior to the issuance of the Letter of Support as the case may be. In addition, the PPA is approved by the Regulator (EPRA) before execution.

137. There were several procurement methods that were used to procure power generation projects in the Country. These are:

   i. Competitive Bidding and Public Private Partnerships (PPPs); Taken either through a competitive bidding process guided by the applicable Laws (Public Procurement and Disposal Act, 2005 and Regulations, 2006 (Repealed), the Public Procurement and Assets Disposal Act, 2015 and its Regulations and the Public Private Partnership Act, 2013.

ii. Projects proposed through Feed-in-Tariff Policy;

iii. Geothermal Concession Blocks pursuant to the Energy Act, 2019;

iv. Capacity development by Government entities such as KenGen, GDC, REREC, KVDA, KTPC and TARDA; and

v. Regional power trade with neighboring countries

138. The LTWP was initiated by the investor who proposed to undertake and finance their own wind data collection and studies on wind power at Loyangalani in Marsabit that would culminate if proven viable with construction of a power plant. The developer undertook all the technical studies and proved to the Ministry that the wind resource available on site was adequate to develop the 300MW power plant.

139. The project was considered viable and the developer put together a group of equity investors and lending institutions to fund the project to construction and commissioning. The Project would therefore qualify for a Private Initiated Investment Project.

140. There was in place a Feed-In-Tariff policy of 2008 which provided maximum tariffs for respective renewable energies technologies. LTWP's tariff was significantly lower than the one provided for under FiT. The FiT policy was developed to spur growth of renewable energy sources by providing for a prescribed rate for the renewables. Technologies included in the policy are wind, solar PV, biomass and small hydro plants.

141. Not significant amount of wind regime data had previously been collected and analyzed to ascertain commercial viability of the proposed wind power project in Marsabit or any other part of Kenya to facilitate private sector participation in wind power development to warrant floatation of a public tender for development of wind power plants. LTWP took all upstream wind energy risk whilst installing grid stability equipment that has been beneficial to Kenya's national grid in addition to socio-economic-political benefits that the project brought to the region and the communities.

142. MOE was of the view that the project was good for Kenya as it was going to generate electricity at substantially lower tariff than oil based thermal power plant including the private sector developed geothermal power plant that existed at that time;

143. Despite the government commitment to undertake wind resources assessment in the Country as stipulated in Session No. 4 on Energy, this was yet to be done due to competing government priorities.

144. Sections 2 (b) and 74 of the repealed Public Procurement and Disposal Act, 2005 and Section 3 (2) of the Public Procurement and Disposal (Public Private Partnerships) Regulations, 2009 were not applicable herein.

145. The original Power Purchase Agreement (PPA) dated 29th January 2010 between Lake Turkana Wind Power (LTWP) and Kenya Power and Lighting Company (KPLC) had an energy charge rate of 7.22 Euro¢/kWh of which 6.206 Euro¢/kWh was non escalable while 1.014 Euro¢/kWh was escalable. This charge rate was to be applied for all units delivered and deemed generated energy up to a ceiling of 55% annual load factor amounting to 1,445.4GWh annually. Any energy supplied above the 55% load factor would attract reduced tariff of 3.61 Euro ¢/kWh equivalents to a 50% of the full tariff.

146. In September 2010, the LTWP requested the Ministry of Energy and KPLC to consider increasing the Energy Charge by 0.30 Euro¢/kWh to 7.52 Euro¢/kWh due to increase of the total project cost by 37% from Euro 451 Million in 2008 when the tariff was agreed to Euro 617 Million. The increase in the project was attributed to: (a) increase in engineering procurement and contract prices; (b) cost of funding; and (c) cost of Dynamic Reactive Power Compensator (DRPC) to enhance voltage stability of the plant and the national grid.

147. The Ministry of Energy was agreeable to LTWP's request subject to approval by the Energy & Petroleum Regulatory Authority (then Energy Regulatory Commission).

148. On the 15th August 2011, LTWP jointly with KPLC submitted an amended and restated power purchase agreement for the 300MW power generating plant at Loyangalani in Marsabit County for approval by EPRA pursuant to the provisions of the Energy Act, 2006 (now Repealed by the Energy Act,2019). The application also provided that the transmission

interconnector was to be done by the Kenya Electricity Transmission Company (KETRACO). In the initial agreement, the transmission line cost was to be borne by LTWP.

149. Deemed Energy Generated (DEG) arises where the power plant is available to generate but unable to deliver to the Offtaker's system electrical energy in the following Events:

i. a Power System Interruption;

ii. a stoppage or curtailment of the Plant arising out of a specific dispatch instruction;

iii. a breach by the Buyer of its obligations under the PPA; or

iv. Unavailability of the grid other than during maintenance

150. This was a common industry practice worldwide especially for the variable renewable power plants (Solar and Wind) to improve the bankability of these projects given the intermittent nature of the resource.

151. Therefore, a decision having been made for development of the transmission line by the Government through KETRACO, the developer's financiers requested for a security underwriting in the event of a delay in the completion and commissioning of the construction of the 428Km, 400kV line; this was in form of payment for deemed generated energy. This was to have a bankable project and to ensure that the Financier's debt service requirements were met by the LTWP.

152. The request for risk underwriting was made on the basis of the fact that the developer no longer had any control over the construction of the line including wayleaves acquisition and any delay could lead to a stranded asset - the wind power plant – for which debt repayments would be due. The developer and their financiers therefore required a provision to protect the project against the risk of delay in construction of the transmission line connecting the power plant to the grid resulting in stranded investment.

153. The developer demonstrated to the GOK (and this was ascertained by AFDB, EIB and various other international financers) that its bi-annual debt service repayment was EUR

37M i.e. EUR 74M per annum and without the DGE assurance, the project was simply un-bankable.

154. The PPA between Kenya Power and Lake Turkana Wind Power provided conditions for DGE to include the electrical energy that is not generated and/ or delivered at the Delivery Points as result of transmission line delay or transmission line interruption-when the DGE amount in an operating year exceed Euros 600,000

155. A Sovereign guarantee was not given for the LTWP project. Instead, a Government Letter of Support (GLoS) was given to the project lenders. Issuance of this type of letter had been done to all IPPs previously. These IPPs included Tsavo Power, OrPower 4, Rabai Power, Thika Power, Gulf Power and Triumph Power.

156. The Letter of Support (LoS) covered political risks including but not limited to acts of war, foreign invasion, insurrection, change in law and/or change in tax, riots civil disturbances, failure by GoK to meet its obligations under the LoS and Force Majeure affecting KPLC. Under the LoS the government is also required to pay claims by LTWP for GoK TI Delay DGE and GoK TI Interruption DGE.

157. LTWP entered into a PPA with KPLC on 29th January 2010. The PPA was amended through agreements dated 29th September 2011, 14th September 2012 and 13th May 2013 to address various issues.

158. The first PPA variation dated 29th September 2011 factored in the change in security package being provided to LTWP by KPLC and recognition that the Transmission Interconnector (TI) is being developed, owned and operated by KETRACO.

159. Further the first variation approved the increase of the energy charge rate and reviewed the energy threshold, set out in the original PPA, in view of the increase in total costs for the project since the execution of the original PPA.

160. The second variation of the Agreement dated 14th September 2012 was for addition of a Condition Precedent that 90 days will have expired from the issuance by KETRACO of

Notice to Proceed for the Transmission Interconnector. The variation also changed the Target Effective Date from 31st December 2011 to 31st December 2012

161. The second PPA variation also provided for correction of an error in the formula for Calculation of Energy Charges when the cumulative aggregate of the Net Electrical Output and the KPLC DGE, GOK TI Delay DGE and TI Interruption DGE in the Operating Year is greater than Discounted Energy Threshold.

162. The third PPA variation was dated 13th May 2013 where the original PPA was amended and restated to incorporate the contents of the agreements dated 29th September 2011 and 14th September 2012.

163. The fourth variation agreement dated 31st July 2014 (Variation Agreement in respect to PPA dated 13th May 2013), the Parties amended the PPA to vary the definition of Long Stop Effective Date and provide for Conditions Precedent.

164. In the fifth PPA variation dated 19th September 2017 (Second Variation Agreement in respect of the PPA dated 13th May 2013 and as amended on 31st July 2014), Parties agreed to amend the PPA to address the Transmission Interconnector Delay for the period 15th May 2017 to 31st May 2018. The financial impact of the TI delay was addressed through a combination of a lump sum payment and a change in tariff.

165. The World Bank withdrew from negotiations on funding of the project due to a number of reasons detailed in a letter to the Ministry of Finance and Ministry of Energy dated 6th October, 2012. The World Bank raised concern that the large size of the plant could impact on the reliability of systems supply and advised that the power plant should be developed gradually in smaller lots of (50-100MW).

166. The lender further warned that the take or pay obligations in the PPA exposed KPLC to unacceptable high financial risk and that the timeline of the 26-month for construction of the transmission line from Loiyangalani was very short.

167. The Ministry had been vindicated as injection into the national grid of the entire 300 megawatt of wind power daily by LTWP did not have any negative impact on the power

system stability and reliability. If anything, it had helped to substantially reduce the amount of Heavy Fuel Oil (HFO) used daily to fire Medium Speed Diesel (MSD) power plants in the Nairobi Metropolitan.

168. Energy projects took long periods to implement, potentially 20 to 30 years, and usually required loans to finance them. These clauses were effectively designed to protect the generator in this case LTWP by providing a guaranteed income even if the purchaser (KPLC) does not use electricity; giving them the assurance that electricity generated will be sold and making the energy generation project commercially viable.

169. Pursuant to the PPA, the LTWP plant was ready by 27th January 2017, but the Transmission Interconnector (TI) was delayed until 10th September 2018. In accordance with the terms of the PPA and the GOK Letter of Support (issued by the GOK on 28th February 2013), LTWP was entitled to GOK TI Delay DGE Payments from the date – 27th January 2017 until the TI was Operational - in this case, 10th September 2018.

170. Following a series of meetings, LTWP, GOK and KPLC reached an agreement in which:

i. LTWP agreed to write-off any GOK TI Delay DGE from 27th January 2017 – 15th May 2017 (an amount of EUR 17.72 Million);

ii. For the period 15th May 2017 – 31st May 2018, the GOK TI Delay DGE amounted to EUR 127M;

iii. Although LTWP was entitled to the EUR 127M, the GOK could not pay the full amount and requested a payment structure with LTWP that was mutually beneficial.

171. To record the above-mentioned agreement, the Parties entered into the Second Variation Agreement. LTWP agreed to the start date of GOK TI Delay DGE Payments to be 15th May 2017 instead of 27th January 2017 (in this case LTWP gave GOK a discount of EUR 17.72 Million).

172. With respect to GOK TI Delay DGE for the period 15th May 2017 to 31st May 2018 ("Initial TI Delay DGE Period"), GOK agreed to pay LTWP a lumpsum of EURO 46,000,000 (Euro Forty-Six Million) before 31st August 2017, which was to cover debt obligation to Lenders;

173. To compensate for the difference between the lumpsum payment of EURO 46,000,000 and the actual GOK Initial TI Delay DGE for the period from 15th May 2017 to 31st May 2018 (i.e. EUR 127M), LTWP agreed to receive a tariff increase of EURO 0.00845 per kWh ("DGE Recovery Period Tariff"), which was to be paid by KPLC /GOK during the period from 1st June, 2018 to 31st May 2024 ("DGE Recovery Period"); and

174. Any TI Delay beyond 1st June 2018 would result in LTWP being paid GOK TI Delay DGE in the normal manner.

175. In view of the foregoing, during the period between 15th May 2017 up to the time the TI Operation occurred (in this case 10th September 2018), a total of Kshs. ***10,298,690,000*** which were due and payable to LTWP, were transferred to KPLC by Ministry of Energy for onward remission to LTWP - being GOK TI Delay DGE Payments as per the PPA.

176. A Special Task Force/Steering Committee comprising MoE, KPLC, KETRACO and LTWP was established between the Parties to facilitate the process of construction of the transmission interconnection infrastructure. KETRACO was newly incorporated in 2008 and participated in the task force with KPLC, MOE and LTWP.

177. LTWP invited tenders on behalf of Kenya Light & Power Co (KPLC) in accordance with the agreement of the Special Task Force/Adhoc Steering Committee. The Ministry was a participant in the Taskforce but no decision was made by MOE directly or individually. Ultimately, KETRACO was the contracting party.

3.3.2 EVIDENCE BY THE PRINCIPAL SECRETARY, NATIONAL TREASURY

Dr. Julius Muia, the Principal Secretary at the National Treasury accompanied by Eng. Stanley Kamau (Director of Investments) and Ms. Isabella Kogei (Parliamentary Liaison Officer) appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

The Committee was briefed as follows:

178. On 12th July, 2010, the Office of the Deputy Prime Minister and Minister of Finance and the Ministry of Energy submitted a cabinet memorandum seeking (a) to appraise Cabinet on the proposed programmes to expand the country's power generation capacity to 3000 MW by 2013 and (b) to obtain cabinet approval of the programme and measures that the Kenyan Government will need to take to ensure effective implementation of this programme. The investments were to help mitigate pending power rationing at the time.

179. Documents from KPLC indicate that LTWP and KPLC entered into a power purchase agreement (PPA) on 29th January 2010. The parties subsequently amended and restated the PPA on 29th September, 2011, 14th September, 2012 and 13th May, 2013.

180. Through a variation agreement dated 31st July, 2014, the parties amended the PPA (dated 13th May, 2013) to address definition of Long Stop Effective date and provide for Conditions Precedent. Further, a second variation agreement dated 19th September, 2017 amended the PPA to address the Transmission Interconnector Delay for the period 15th May, 2017 to 31st May, 2018.

181. The Ministry of Energy requested the then Office of the Deputy Prime Minister and Ministry of Finance to provide Government support to Independent Power Producers. The support requested from GoK by IPPs was creation of an Escrow account where government would deposit money to be drawn incase KPLC failed to meet its payment obligations under the PPAs.

182. This was later addressed when the government made a policy decision to instead use Partial Risk Guarantee from the Development Finance institutions such as World Bank, Multilateral Investment Guarantee Agency (MIGA) and Africa Development Bank (AfDB). The purpose of the PRG was to backstop the commercial risks of KPLC. The Lake Turkana Wind Power project benefited from a PRG from AfDB.

183. In addition, the government was required to issue a Letter of Support (LoS) with respect to political risks and compensation payable to LTWP upon termination of the PPA. It is

instructive that LoS were not explicit guarantees and were cleared by the Attorney General before they are issued.

184. The LTWP Power Purchase Agreement had provided for exceptions which were to be factored in the determination of the tarrif. The financing model had therefore taken into consideration the exceptions contained in the PPA. The exceptions were aimed at lowering the cost of production and making energy affordable to the consumers.

185. The taxes to be paid by GoK were in respect to items that were not covered by the law but had been agreed to be exempted during the PPA negotiations between KPLC and LTWP Ltd.

Government agreed to tariff increase through the Second Variation Agreement to shoulder the additional obligation on DGE payments amounting to Euro 127 Million.

186. To cater for deferred amount, a tariff increase of Euro 0.00845 Kw/h was agreed to offset the amount owed to LTWP for a period of six years (2018-2024). The increase in tariffs was in lieu of payments that would have been made by Government to LTWP.

187. The National Treasury did not undertake due diligence on banks owned/or recommended by foreign governments. This was in regard to the loan agreement between Instituto Credito Official of the Kingdom of Spain, Deutsche Bank and the Kenya Ministry of Finance for construction of the Transmission Interconnector by M/s Isolux.

188. The National Treasury did not issue a sovereign guarantee on the LTWP project but issued a Letter of Support. Payments made to LTWP emanated from the Vote of the Ministry of Energy in line with the PPA between KPLC and LTWP and not the Consolidated Fund.

189. TI delay DGE for the period 15th May 2017 to 31st May 2018 (381 days) was estimated at 1,652,764,752 kw/h based on an assumed capacity factor of 0.62. This translated to TI DGE amount of Euro 127,577,128.32 of which GoK paid Euro 46,000,000 to LTWP and the balance was to be factored into tariff under the Second Variation agreement. (Euro 81.5 million).

190. Following further delays to the TI operationalization, LTWP invoiced GoK an additional Euro 39,684,035 for the months of June, July, August and September 2018. The Ministry of Energy through KPLC settled the amount. This addition increased the total GoK TI DGE delay liability to Euro 167,261,163.32 comprising of the initial DGE Euro 127,577,128.32 and the additional DGE of Euro 39,684,035.00.

191. The Capacity factor obtained for the period of 381 days from the TI operation date (10th September 2018 to 25th September 2019) is 0.54. The second variation agreement had provision for the correction of capacity factor from estimated 0.62 to actual 0.54 obtained during actual production, yielded a GoK TI delay DGE payment refund of Euro 6,173,293. Therefore the total GoK Ti delay DGE obligation as per the PPA is Euri 161,087,870.32.

192. As per the signed PPA, the government was required to issue a Letter of Support with respect to political risks and compensation payable to LTWP upon termination of the PPAs. LoS are not explicit guarantees. All LoS are cleared by the Attorney General before signature.

193. On 26th March, 2011 the LoS for the LTWP project was jointly signed by the Permanent Secretaries in the Ministry of Finance and Energy, the MD, KPLC and an authorized representative of LTWP Ltd.

194. To ensure transparency, the government had consistently disclosed the signed LoS with IPPs in Annual Public Debt Report and Budget Policy Statement submitted to Parliament every 30th September and 15th February respectively.

195. As per the terms of the PPA, Government was exposed to pay DGE in the event that there was TI disruptions and KPLC was not able to evacuate generated power and the payment liability in any given year in respect of interruptions exceeds Euro 600,000.

196. The interest clauses for the LTWP PPA were contained in clause 10.4 and LoS clause 10.2.5 and 11.10 for the amended LoS. The clauses generally provided that "Any amount (PPA termination or DGE payments) agreed or determined pursuant to the agreements shall bear an interest at the default rate from due date until payment. So far, no interest payment has been made.

197. The validation process of the Kshs. 2,785,429,737 VAT payable to LTWP was undertaken and payments were made by the Ministry of Energy through KPLC.

198. Regarding the delay in provision of the correct bank details to receive a refund from LTWP, this was caused by government bureaucracies to ensure that the details were correct.

3.3.3 EVIDENCE BY THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF PETROLEUM

Dr. Eng. Joseph K. Njoroge, the former Principal Secretary at the State Department of Energy accompanied by Eng. Stanley Kamau (Director of Investments) appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

He briefed the Committee as follows:

199. The terms and conditions of the PPAs were standard terms because they defined the respective obligations of the generator (LTWP) and the off-taker (KPLC). The terms were also based on international best practices of such project financed investments. Additionally, the project was approved by KPLC's Board, the Energy Regulatory Commission (ERC) now Energy & Petroleum Regulatory Authority (EPRA) and subjected to legal opinion/clearance by the Attorney General on several occasions

200. Normally, the Attorney-General did not approve PPAs between KPLC and other Parties before execution. As per the Energy Act, the role of approving the PPA is vested with EPRA. The role of AG was confined to review and approval of the GoK Letter of Support and issuance of Legal Opinion in respect of all GOK obligations (in this case the obligation to pay GOK TI Delay DGE Payments in the event the TI was delayed).

201. The Attorney-General's Legal Opinion on the validity of the Letter of Support was a Condition Precedent to the PPA Effectiveness under the PPA which opinion is sought by the National Treasury prior to the issuance of the Letter of Support as the case may be. In addition, the PPA is approved by the Regulator (EPRA) before execution.

202. Ordinarily transmission lines and power stations were constructed concurrently unless a power station was to be constructed in an area adequately served by existing transmission line.

203. The twenty-six (26) months line construction period included in the PPA was negotiated based on the eighteen months that LTWP had put in the tender as one of the conditions for bidders for the line construction to be pre-qualified. Therefore, the wind power plant and the line had to be completed at the same time to avoid having costly idle power generation capacity. In addition, there was the need to keep the validity of the tender prices of various components of the wind farm contract and subcontracts.

204. Renewable energy resources assessment was one of the key stages in renewable energy resources development. Before a decision was made to develop the resource, an assessment was done to determine commercial viability of the project. This was critical in securing project financing.

205. As stipulated in the Sessional Paper No. 4 on Energy, the government committed to promote renewable energy resources assessment among them Wind. Whereas the government prioritized geothermal resource assessment that culminated in creation of GDC, a detailed Wind resources assessment was yet to be undertaken due to lack of funds. Renewable resource assessment was a highly technical field requiring both specialized equipment and human resources. In the Feed-In-Tariff Policy it was therefore envisaged that the Private Investors would undertake search for land and carry out feasibility study for their projects. This is in contrast with more mature markets where private sector access reliable data to set up wind farms.

206. The private firm then approached the Ministry with a view of undertaking a detailed wind resource assessment at their own cost to determine the viability of the project. This involved installation of wind masts and data loggers at their own cost to collect data at Loyangalani, Marsabit. This would culminate, if proven viable, with construction of a power plant.

207. Bearing in mind that substantial amount of risk capital was going to be expended on wind data acquisition and analysis to ascertain the sites suitability and viability for wind power

development, the Ministry did not object to the study being done by LTWP Ltd. LTWP Ltd was the only company which had come forward with the proposal for wind power development in Marsabit. If the studies had indicated that there was no enough resource, the project proposers would have taken the loss in terms of money and time spent and government would not have compensated them for this effort. The project remains the single largest private investment in Kenya's history at EUR 685M (KES 85B)

208. Other factors which informed MOE decision not to object were that the country was experiencing devastating power supply deficits which were mitigated through importation of expensive diesel fired generators between 2006 and 2009 as shown in the figure 1 above, whose cost per kWh ranged between 17 and 20 US cts/kWh, even with tax exemption subsidy. Those generators were highly subsidized by GoK through budget support in order to protect consumers from an increase in power tariffs. Additionally, in Sessional Paper Number 4 of 2004 and in the ensuing Energy Act of 2006, GoK had committed to promote development of renewable energy sources for electricity generation, amongst social economic activities.

209. Therefore, the Ministry gave the project proposers the rights to undertake surveys and the studies at their own risk while the Council of Marsabit leased land to LTWP in 2009 and were issued with a Leasehold Certificate.

210. All major power generation projects undertaken by IPP developers floated open tenders for transmission line construction on behalf of KPLC. The construction costs were to be reimbursed to IPPs through consumer tariff increases as part of the total project implementation costs. To ensure that their construction was costs effective and at least cost, KPLC participated in the development of the tender documents and evaluation of bids for the award of contracts. With the creation of KETRACO by GOK this process became a joint responsibility for both KPLC and KETRACO, due to the inclusion of power evacuation terms in PPAs.

211. There were several procurement methods that are used to procure power generation projects in the Country. These are:

a. Competitive Bidding and Public Private Partnerships (PPPs); Taken either through a competitive bidding process guided by the applicable Laws (Public Procurement and Disposal Act, 2005 and Regulations, 2006 (Repealed), the Public Procurement and Assets Disposal Act, 2015 and its Regulations and the Public Private Partnership Act, 2013.

b. Projects proposed through Feed-in-Tariff Policy;

c. Geothermal Concession Blocks pursuant to the Energy Act, 2019;

d. Capacity development by Government entities such as KenGen, GDC, REREC, KVDA, KTPC and TARDA; and

e. Regional power trade with neighboring countries.

212. The LTWP was initiated by the Investor who proposed to undertake and finance their own wind data collection and studies on wind power at Loyangalani in Marsabit that would culminate if proven viable with construction of a power plant. The developer undertook all the technical studies and proved to the Ministry that the wind resource available on site was adequate to develop the 300MW power plant.

213. The project was viable and the developer put together a group of equity investors and lending institutions to fund the project to construction and commissioning. The Project would therefore qualify for a Private Initiated Investment Project.

214. The reasons why competitive bidding was not used are:

a. There was in place a Feed-In-Tariff policy of 2008 which provided maximum tariffs for respective renewable energies technologies. LTWP’s tariff was significantly lower than the one provided for under FiT. The FiT policy was developed to spur growth of renewable energy sources by providing for a prescribed rate for the renewables. Technologies included in the policy are wind, solar PV, biomass and small hydro

b. Not significant amount of wind regime data had previously been collected and analyzed to ascertain commercial viability of the proposed wind power project in Marsabit or any other part of Kenya to facilitate private sector participation in wind power development to warrant floatation of a public tender for development of wind power plants. LTWP took all upstream wind energy risk whilst installing grid stability equipment that had been beneficial to Kenya's national grid in addition to socio-economic-political benefits that the project brought to the region and the communities.

c. MOE was of the view that the project was good for Kenya as it was going to generate electricity at substantially lower tariff than oil based thermal power plant including the private sector developed geothermal power plant that existed at that time;

d. Despite the government commitment to undertake wind resources assessment in the Country as stipulated in Session No. 4 on Energy, this was yet to be done due to competing government priorities. It should be noted however that the government had prioritized geothermal resource assessment that culminated in creation of GDC and thus detailed wind resource assessment development was yet to be undertaken at that time.

215. Sections 2 (b) and 74 of the repealed Public Procurement and Disposal Act, 2005 and Section 3 (2) of the Public Procurement and Disposal (Public Private Partnerships) Regulations, 2009 were not applicable herein.

216. Deemed Energy Generated (DEG) arises where the power plant is available to generate but unable to deliver to the Offtaker's system electrical energy in the following Events:

i. a Power System Interruption;

ii. a stoppage or curtailment of the Plant arising out of a specific dispatch instruction

iii. a breach by the Buyer of its obligations under the PPA; or

iv. Unavailability of the grid other than during maintenance

217. This was a common industry practice worldwide especially for the variable renewable power plants (Solar and Wind) to improve the bankability of these projects given the intermittent nature of the resource.

218. Therefore, a decision having been made for development of the transmission line by the Government through KETRACO, the developer's financiers requested for a security underwriting in the event of a delay in the completion and commissioning of the construction of the 428Km, 400kV line; this was in form of payment for deemed generated energy. This was to have a bankable project and to ensure that the Financier's debt service requirements were met by the LTWP.

219. The request for risk underwriting was made on the basis of the fact that the developer no longer had any control over the construction of the line including wayleaves acquisition and any delay could lead to a stranded asset - the wind power plant – for which debt repayments would be due. The developer and their financiers therefore required a provision to protect the project against the risk of delay in construction of the transmission line connecting the power plant to the grid resulting in stranded investment.

220. The developer demonstrated to the GOK (and this was ascertained by AFDB, EIB and various other international financers) that its bi-annual debt service repayment was EUR 37M i.e. EUR 74M per annum and without the DGE assurance, the project was simply un-bankable.

221. The PPA between Kenya Power and Lake Turkana Wind Power provides conditions for DGE to include the electrical energy that is not generated and/ or delivered at the Delivery Points as result of Transmission line Delay or Transmission line Interruption-when the DGE amount in an operating year exceed Euros 600,000

222. Having ascertained that the project area had a huge potential for power generation and the generation tariff was lower than the maximum set in the Feed-In-Tariff Policy, the Ministry decided to support the project.

223. The Sovereign guarantee was not given; instead, a Government Letter of Support (GLoS) was given to the project lenders. Issuance of this type of letter had been done to all IPPs previously. These IPPs included Tsavo Power, OrPower 4, Rabai Power, Thika Power, Gulf Power and Triumph Power.

224. The Letter of Support (LoS) covered political risks including but not limited to acts of war, foreign invasion, insurrection, change in law and/or change in tax, riots civil disturbances, failure by GoK to meet its obligations under the LoS and Force Majeure affecting KPLC. Under the LoS the government was also required to pay claims by LTWP for GoK TI Delay DGE and GoK TI Interruption DGE.

225. LTWP entered into a PPA with KPLC on 29th January 2010. The PPA was amended through agreements dated 29th September 2011, 14th September 2012 and 13th May 2013 to address various issues as tabulated below:

Item	Variation	Justification for Variation	Correspondences
1	Dated 29th September 2011	Change in security package being provided to Lake Turkana Wind Power (LTWP) by Kenya Power and Lighting Company (KPLC) and Government of Kenya (GOK). Recognition that the Transmission Interconnector (TI) is being developed, owned and operated by Kenya Electricity Transmission Company (KETRACO). To increase the energy charge rate and review the energy threshold set out in the original PPA, in view of the increase in total costs for the project since the execution of the original Power Purchase Agreement (PPA).	Instrument of Approval issued on 2nd September 20111

2	Agreement dated 14th September 2012	Addition of a Condition Precedent that 90 days will have expired from the issuance by KETRACO of Notice to Proceed for the Transmission Interconnector Change the Target Effective Date from 31st December 2011 to 31st December 2012 Correction of an error in the formula for Calculation of Energy Charges when the cumulative aggregate of the Net Electrical Output and the KPLC, Deemed Generated Energy (DGE), GOK Transmission Interconnector (TI) Delay DGE and TI Interruption DGE in the Operating Year is greater than Discounted Energy Threshold.	Instrument of Approval issued on 4th September 2012
3	Amended and Restated PPA dated 13th May,2013	The original PPA was amended and restated to incorporate the contents of the agreements dated 29th September 2011 and 14th September 2012	Instrument of Approval issued on 6th May 2013
4	Variation Agreement dated 31st July 2014	Through Agreement dated 31st July 2014 (Variation Agreement in respect to PPA dated 13th May 2013), the Parties amended the PPA to vary the definition of Long Stop Effective Date and provide for Conditions Precedent.	ERC approval letter dated
5	Variation Agreement dated 19th September 2017	Through agreement dated 19th September 2017 (Second Variation Agreement in respect of the PPA dated 13th May 2013 and as amended on 31st July 2014), Parties agreed to amend the PPA to address the Transmission Interconnector Delay for the period 15th May 2017 to 31st May 2018. The financial impact of the TI delay was addressed through a combination of a lump sum payment and a change in tariff	Instrument of Approval issued on 6th September 2017.

226. Pursuant to the PPA, it is important to note that the LTWP plant was ready by 27th January 2017, but the Transmission Interconnector (TI) was delayed until 10th September 2018. In accordance with the terms of the PPA and the GOK Letter of Support (issued by the GOK on 28th February 2013), LTWP was entitled to GOK TI Delay DGE Payments from the date – 27th January 2017 until the TI was Operational - in this case, 10th September 2018.

227. Following a series of meetings, LTWP, GOK and KPLC reached an agreement in which:

a. LTWP agreed to write-off any GOK TI Delay DGE from 27th January 2017 – 15th May 2017 (an amount of EUR 17.72 Million);

b. For the period 15th May 2017 – 31st May 2018, the GOK TI Delay DGE amounted to EUR 127M;

228. Although LTWP was entitled to the EUR 127M, the GOK could not pay the full amount and requested a payment structure with LTWP that was mutually beneficial.

229. To record the above-mentioned agreement, the Parties entered into the Second Variation Agreement. LTWP agreed to the start date of GOK TI Delay DGE Payments to be 15th May 2017 instead of 27th January 2017 (in this case LTWP gave GOK a discount of EUR 17.72 Million).

230. With respect to GOK TI Delay DGE for the period 15th May 2017 to 31st May 2018 ("Initial TI Delay DGE Period"), GOK agreed to pay LTWP a lumpsum of EURO 46,000,000 (Euro Forty-Six Million) before 31st August 2017, which was to cover debt obligation to Lenders;

231. To compensate for the difference between the lumpsum payment of EURO 46,000,000 and the actual GOK Initial TI Delay DGE for the period from 15th May 2017 to 31st May 2018 (i.e. EUR 127M), LTWP agreed to receive a tariff increase of EURO 0.00845 per kWh ("DGE Recovery Period Tariff"), which was to be paid by KPLC /GOK during the period from 1st June, 2018 to 31st May 2024 ("DGE Recovery Period"); and

232. Any TI Delay beyond 1st June 2018 would result in LTWP being paid GOK TI Delay DGE in the normal manner.

233. In view of the foregoing, during the period between 15th May 2017 up to the time the TI Operation occurred (in this case 10th September 2018), a total of Kshs. 10,298,690,000 which were due and payable to LTWP, were transferred to KPLC by Ministry of Energy for onward remission to LTWP - being GOK TI Delay DGE Payments as per the PPA.

3.3.4 SUBMISSION BY THE NATIONAL LANDS COMMISSION

Ms. Kabale Tache, the Ag. Chief Executive Officer of the National Lands Commission accompanied by Mr. Brian Ikol (Deputy Director, Legal Services) and Mr. Joseph Ngaruthi (Principal Land Administration Officer) appeared before the Committee to adduce evidence on the Special Audit Report on Lake Turkana Wind Power Project.

The Committee was briefed as follows:

234. The land in question was subject of a court case No. 163 of 2014 filed in Environment and Land Court in Meru.
235. The Court issued a judgment on 19th October, 202and the titles issued to Lake Turkana Wind Power Limited were declared irregular and unlawful. The parties in the suit (Marsabit County Government, Attorney General, Chief Land Registrar and the National Land Commission) who were enjoined in the case were given one year to strictly comply with the existing law on setting apart, failing which the impugned titles would stand cancelled and the suit land shall revert to the community.

CHAPTER FOUR

4.0 COMMITTEE OBSERVATIONS AND FINDINGS

The Committee made the following observations and findings:

Historical Background of the Project

236. Lake Turkana Wind Power (LTWP) project is an energy generating plant located in Marsabit County. The wind farm provides 310 MW of renewable energy to Kenya's national grid to be bought at a fixed price by Kenya Power and Lighting Company PLC (Kenya Power) over a 20-year period, in accordance with the Power Purchase Agreement (PPA).

237. The Project was identified as a key flagship project of the Kenya Vision 2030 under the Energy Sector in 2008. The wind plant was identified to address the over-reliance on hydro-generated power, power supply capacity deficit as energy supply could not meet the growing demand and lack of adequate reserve capacity to take care of emergencies.

238. LTWP project was developed within the *Least Cost Power Development Plan*, and is one of Kenya's least cost power projects to date. It was a strategic investment, in line with Kenya's policy on exploiting the potential of our natural resources and remains a critical asset in the energy sector.

239. The project has medium to long term beneficial value for electricity production in Marsabit, which has big wind power potential. Wind power production would command a lower tariff because the substation infrastructure is already in place together with a 220/400kV double circuit line for its evacuation and the dynamic reactive power compensators (DRPCs) at the LTWP sub-station which offers grid stability to the national grid. This line has a capacity to evacuate up to 900MW.

240. Lake Turkana Wind Power Limited (LTWP) is a private company limited by shares which was incorporated under the Companies Act (Chapter 486, Laws of Kenya) on 1st October 2007.

241. The Lake Turkana Wind Power Project is financed by various multilateral and bilateral development finance institutions including (European Investment Bank; African Development Bank; The Trade and Development Banks (TDB), formerly the PTA Bank; East African Development Bank (EADB); PROPARCO; Netherlands Development Finance Company (FMO); Deutsche Investitions- und Entwicklungsgesellschaft (DEG); Eksport Kredit Fonden of Denmark (EKF); and EU Africa Infrastructure Fund (EU-AITF).

242. The company conducted wind tests in Marsabit and submitted a proposal to Government to Finance, Design, Procure, Construct, Install, Test, Commission, Operate and Maintain the plant in accordance with Prudent Operating Practice, and sell the net electrical output exclusively to KPLC.

243. The LTWP project was initiated by the investor who proposed to undertake and finance wind data collection and studies on wind power at Loyangalani in Marsabit that would culminate if proven viable with construction of a power plant. The developer privately undertook all the technical studies and proved to the Ministry that the wind resource available on site was adequate to develop the power plant.

244. The Ministry of Energy and Kenya Power engaged in a public private partnership with LTWP Ltd who were involved with in the Financing, Designing, Procuring, Constructing, Installing, Testing, Commissioning, Operation and Maintenance of the Lake Turkana wind plant. The project was not subjected to competitive bidding as per the applicable Laws (Public Procurement and Disposal Act, 2005 and Regulations, 2006 (Repealed), the Public Procurement and Assets Disposal Act, 2015 and its Regulations and the Public Private Partnership Act, 2013.

245. LTWP Limited was granted a lease of 99 years with effect from 2009. The land upon which the power plant is located was the subject of a court case in Meru (Mohamud IItarakwa Kochale & 5 others V Lake Turkana Wind Power Ltd & 9 Others (2021) eKLR determined on 19th October 2021 that nullified title deeds for the land on which the Lake Turkana Wind Power project sat.

246. The Court held that the Constitution was not followed when 150,000 acres of community land was allocated to Lake Turkana Wind Power Ltd and that the impugned land belonged to the Marsabit Community by dint of Section 29 of the Community land Act. It however declined to cancel the title deeds, but it instead gave the Marsabit County government, the Attorney-General, the Chief Land Registrar and the National Land Commission one year to regularise the process.

247. The Committee condemns the conduct of the Acting CEO for the National Land Commission for her failure to submit historical background information (when the lease was given out, to which company, a copy of the title and lease agreement) of the impugned land when she appeared before the Committee and subsequent failure to honour committee invitations to address the same.

248. Despite the Lake Turkana Wind Power project being granted a lease for 150,000 acres, the plant was only occupying 40,000 acres of land, needlessly denying the local community land for their use.

249. The court ruled that if the process is not completed by the end of the 12 months, the title deeds for the power producer will automatically be cancelled and the land will revert to the community.

250. As at the time of compiling this report, the Committee established the Commission is engaging with the relevant stakeholders as part of the process of regularization of the land issue.

Construction of Transmission Line

251. The Committee established that it was the initial government intention to have LTWP develop the transmission line alongside the power plant. This however changed in the middle of negotiations after contracting LTWP to build a power plant with the construction of a Transmission Line given to M/s. Isolux SA as demonstrated below. The genesis of major challenges affecting the project can be traced to construction of the transmission interconnector.

252. LTWP commissioned a route feasibility study for construction of a transmission line to link the wind power plant at Loiyangalani to the national grid at Suswa sub-station, approximately 428 kilometres from the proposed wind farm site. The feasibility and technical studies by VTT International and KEMA (now DNV GL) was required for technical schedules of the PPA to ensure the safe integration of (intermittent) wind power into the Kenyan grid and to ensure compliance to contractual timelines and obligations by both parties to the PPA.

253. The Ministry of Energy requested Lake Turkana Wind Power Limited to lead the initial phase of the TI implementation including the design elements to construction. MOE further instructed LTWP to work under the supervision of KPLC who was to evaluate and endorse every stage of the route, technical design, tender and construction process also on behalf of MOE.

254. KPLC appointed members to a steering committee on 10th February 2009, to work on the Transmission Interconnector and ensure it was constructed in tandem with the wind power plant as per the Ministry of Energy directive. The Steering Committee comprised of 5 KPLC staff members, the acting KETRACO MD and a LTWP representative.

255. KPLC via a letter on 4th June 2009 (Ref: KPLC1/2/4/1K) informed LTWP that the *"Government has approved development of the plant. Further the Government has decided that Lake Turkana Wind develops the 400kV 428 km transmission lines from Laisamis to Suswa, which is necessary to evacuate the power from the plant on a BOOT basis"*

256. The tender package for construction of the transmission line was compiled by KEMA which was consulting for the Steering Committee, and was approved for issuance by the Steering Committee meeting.

257. The Government of Spain offered concessional tied financing under a Bilateral Financial Cooperation Agreement on 9th October, 2009 with the condition that a Spanish company was awarded the contract for construction of the transmission interconnector. The Government of Spain provided the Spanish contractors with letters confirming the same.

258. With the concessional financing by the Spanish Government and the strategic need to own the transmission line, the Government of Kenya delinked the construction of the power plant to the transmission interconnector. It should further be noted that this decision informed inclusion of a DGE clause in the contract with LTWP to cushion it from any loss that could occur in case of a delay in completion of a transmission interconnector.

259. The Steering Committee invited seven bidders who were prequalified by KEMA to participate in the tender with a closing date of 19th October 2009. KEMA and KPMG presented the technical and financial evaluation to the Steering Committee on 6th and 7th January, 2010 respectively.

260. The technical and financial evaluation reports concluded that Elecnor (a Spanish company) would be the preferred bidder for the project under a BOOT model with KEC International placing second in the ranking and Isolux SA third. In normal procurement processes, Elcnor should have been awarded the contract for the transmission interconnector.

261. The Committee notes that there was a further evaluation not known in law where the bidders underwent financial evaluation on the basis that government taking over the implementation of the transmission line project would avail concessionary funding. In such a scenario, only the Spanish companies would be eligible for further evaluation.

262. With GoK taking over the transmission line, the two Spanish companies would be eligible with M/s Isolux being the preferred bidder ahead of M/s. Elecnor supposedly based on concessionary funding.

Project implementation

263. The Ministry of Energy wrote to Embassy of Spain in Nairobi on 14th January 2010 attaching the technical and financial evaluation reports by KEMA and KPMG, the Environmental Impact Assessment (EIA) License and letters of reliance from VTT International and KEMA (to MOE and KPLC) dated August 2009 and requested an additional contribution towards the cost of the TI of EUR 136,970,018 based on the bid by M/s. Isolux that had been identified as the preferred bidder. The Spanish Government responded on 19th January 2010 confirming the increase in financial support to EUR 110

Million. This confirms that the procurement was done by the Government of Kenya through KETRACO and not the LTWP.

264. The GOK formally communicated its decision to undertake a public-sector implementation of the TI project through KETRACO vide a letter referenced ME/CONF/3/2/8 dated 30th January 2010.

265. KETRACO took charge on construction of the transmission line and invited M/s. Isolux to negotiations prior to contract award on 1st and 2nd March 2010 vide a letter addressed to M/s. Isolux dated 17th February 2010 and copied to LTWP.

266. KETRACO entered into the Contract on 30th December 2011 for a period of 24 months from the date of the Final Notice to Proceed. The date was extended the first time to 30th June, 2014, and further extended a second time for 2.5 years to 30 December, 2016. The contract was delayed by a 32-month period between the contract signing and issuing of the final notice to proceed (FNTP) to Isolux on 13th August 2014.

267. The delay was occasioned by the financing arrangements and satisfaction of all the covenants and conditions being undertaken between GOK, Government of Spain, the (Spanish) Commercial Banks providing the export credit facility and other stakeholders.

268. Despite several extensions, the transmission line was not completed in time, resulting in a further third extension to 31st December, 2017.

269. Following the issuance of the Final Notice To Proceed, the M/S Isolux had a timeline of 13th June, 2016 to complete the transmission interconnector which was before the company started facing financial challenges.

270. The Project faced further delays due to wayleave acquisition challenges encountered by KETRACO. The wayleaves along the 428-kilometer stretch was required to be availed to Isolux within 210 days from FNTP i.e. by approximately 13th March 2015. However, there were delays in acquisition of wayleave along the stretch of the transmission line. KETRACO issued Notice to Proceed (NTP) for various sections beyond the 210-day timeline. Such sections include AP19-21 (18KM) on 31st July 2015, AP21-23 (57KM) on

21st October 2015 and AP29-45 (70KM) on 18th January 2016 – dates that were beyond the agreed timelines for provision of wayleave access as per KETRACO's obligations.

271. The KETRACO Chairperson wrote a letter to the Cabinet Secretary for Energy on 14th September, 2016 informing him on the delay in completion of the Transmission Interconnector and requesting for permission to negotiate with LTWP Ltd. to avoid incurring Deemed Generated Energy from January 2017. No response was provided to indicate if this permission was granted. Further, the Committee invited the then Cabinet Secretary for Energy to provide information on this matter but he failed to honour the Committee's invitation.

272. The Resettlement Action Plan of May 2017 by KETRACO indicated that the delays, challenges and variances from its original wayleave acquisition plan and meetings of the wayleave Coordination Progress Meetings held in February 2018 confirmed that the wayleave acqusition was still incomplete. This was significantly beyond the DGE TI delay timeline of 27th January, 2017.

273. KETRACO therefore failed to meet its contractual obligation in construction of the transmission line by failing to secure wayleave access within the agreed contractual timeline. This may not have been solely KETRACO's blame; the government through the parent Ministry in charge of Energy should have foreseen this and secure all the necessary wayleaves before entering into contracts with the LTWP and M/s. Isolux SA.

274. M/s. Isolux faced financial challenges in 2016 and filed for insolvency on 31st March 2017. This timeline coincided with the period when the transmission interconnector would have been completed. It also coincided with the period when KETRACO had challenges in wayleave acquisition. The failure of Isolux SA to complete the transmission line within the relevant timelines to avoid TI DGE Delay payments by GoK can be attributed to the delay in wayleave acquisition as well as the financial challenges faced by the company.

275. KETRACO invoked, Clause 15.2(h) of the PPA, terminated the contract with M/s Isolux and recalled the performance security of Kshs.1,576,200,000 (EUR14,200,000) on 14th August, 2017. At the time of termination of the contract, out of the varied contract sum of

Kshs.17,406,159,818 (EUR145,990,227), a total of Kshs.10,827,050,072 (EUR83,542,053) had been paid to M/s. Isolux Ingeniers SA by KETRACO.

276. The Consortium of NARI Group Corporation and Powerchina Guizhou Engineering Co. Ltd was invited on 30th November, 2017 for the completion of the transmission interconnector for Lake Turkana Wind Power project.

277. The Consortium was procured through a specially permitted procurement procedure approved by Dr. Kamau Thugge, then PS at the National Treasury on 10th January, 2018 was declared the most responsive and recommended for the award.

278. The consortium was contracted on 30th January 2018, and completed the transmission line on 10th September, 2018. The Consortium had agreed to a special contractual condition where they committed to pay the 'Deemed Generated Energy' of 10 million euros per month if they failed to complete the project within the stipulated contractual timeline.

279. As at 1st March 2022, a total of USD 99,712, 246.19 had been paid to the Consortium of NARI Group Corporation and Powerchina Guizhou Engineering Co. Ltd, leaving an outstanding balance of USD 9,774,623.48 plus accrued penalties.

280. After the termination of the contract agreement between KETRACO and M/s. Isolux, a total of Kshs.11,061,698,560 was incurred to complete the transmission interconnector, an additional cost of Kshs.3,179,062,348 and a 17% variation over the original cost, which was within the threshold of 25 percent as per the Public Procurement Laws.

281. It was curious to the Committee that the NARI Group had agreed to negotiate on the demand of Kshs1.1 billion interest and penalty charges from the Government of Kenya. However, this option has not been exercised by the Ministry of Energy to date.

Deemed Generated Energy (GOK TI DELAY DGE) Expenditure and Budgeting for Deemed Generated Energy (DGE)

282. The Committee noted that LTWP Ltd completed the power generation plant on 27th January, 2017 but the transmission line was completed on 24th September, 2018, leading to a 21-month delay that led to payment of DGE penalties by the Government of Kenya.

283. The delay in completion of the transmission line by M/s. Isolux SA, energy was not evacuated from the LTWP plant resulting in accrued penalties to GOK arising from Deemed Generated Energy (DGE) claims amounting to Kshs.18,499,082,672 (Euro 167,261,145) for the period 27th January, 2017 to 10th September, 2018.

284. Following a series of meetings, LTWP, GOK and KPLC reached an agreement in which:

a. LTWP agreed to write-off any DGE claims from 27th January 2017 – 15th May 2017 (an amount of EUR 17.72 Million);

b. For the period 15th May 2017 – 31st May 2018, the DGE amounted to EUR 127M;

285. Although LTWP was entitled to the EUR 127M, the GOK could not pay the full amount and requested a payment structure with LTWP that was mutually beneficial. To record the above-mentioned agreement, the Parties entered into the Second Variation Agreement in which TI Delay DGE Payments to be 15th May 2017 instead of 27th January 2017. LTWP gave GOK a discount of EUR 17.72 Million.

	Payment period	No of days	Amount (Euro)	Exchange Rate	Amount (Kshs)
1	15th May 2017- 31st May 2018	381	127,577,128	110.60	14,110,030,392
2	1st June 2018-10 September 2018	101	39,684,017	110.60	4,389,052,280
			167,261,145		18,499,082,672

286. With respect to DGE claim for the period 15th May 2017 to 31st May 2018 ("Initial TI Delay DGE Period"), GOK agreed to pay LTWP a lumpsum of Euro 46,000,000 (Euro Forty-Six Million) before 31st August 2017, which was to cover debt obligation to Lenders.

287. To compensate for the difference between the lumpsum payment of EURO 46,000,000 and the actual DGE amount for the period from 15th May 2017 to 31st May 2018 (i.e. EUR 127M), LTWP agreed to receive a tariff increase of EURO 0.00845 per kWh ("DGE Recovery Period Tariff"), which was to be paid by KPLC /GOK during the period from 1st June, 2018 to 31st May 2024 ("DGE Recovery Period"); and any TI Delay beyond 1st June 2018 would result in LTWP being paid GOK TI Delay DGE in the initially agreed manner.

288. The increase in tariff by EURO 0.00845 kw/h arising from poor execution of the contract is being borne by the power consumers through increased power charges.

289. The agreement on Deemed Energy Generated provided that if the actual revenue generated over the DGE period is less than EUR 127,577,128.32 paid out as GOK TI Delay Payment to LTWP, then LTWP shall refund the excess to GOK. At the calculation date, it was established that there was an excess of €6,173,296 refundable to GOK.

290. LTWP wrote to Kenya Power on several occasions from 30th September, 2019 seeking for details of remittance details for refund of the excess of €6,173,296. Vide a letter ref.MOE/3/1(44) dated 3rd February, 2022, the Ministry of Energy wrote to the National Treasury indicating that the details of the bank account for refund of excess DGE payment made to LTWP Ltd. that had been provided to the company were insufficient and the amounts remitted had been bounced back. The correct account has since been provided and the National Treasury has confirmed receipt of the same.

291. The Committee noted with concern that this back and forth between the government departments lasting over 32 months and the failure to submit the correct bank details to the LTWP unnecessarily denied taxpayers resources that could have been utilized in different sectors of the economy or even settle pending bills due to the Consortium of NARI Group Corporation and Powerchina Guizhou Engineering Co. Ltd. Further, it was inconceivable that provision of a correct bank details can take more than two years. It was not lost on the

Committee that had this money been owing to the LTWP or any other party, the said amount could have attracted interest on delayed payment.

Purchase Power Agreement

292. Purchase Power Agreements were negotiated by the parties and approved by the Energy Regulatory Commission (ERC) on 11th December, 2009 and executed on 29 January, 2010 between KPLC and LTWP Ltd. Among the Conditions Precedent in the PPA between Kenya Power and LTWP is the requirement for a generation license having been issued to the LTWP. This therefore meant that for the PPA to become effective, then LTWP ought to have been issued with a generation license after approval of the PPA by the Energy and Petroleum Regulatory Authority (then Energy Regulatory Commission). The PPA is normally approved before issuance of the license for purposes of unlocking finances for the developer and to enable the developer attain financial close.

293. The Power Purchase Agreements had a total of three amendments dated 29th September, 2011, 14th September, 2012 and 13th May, 2013 and a further two variations

294. The first amendment to the PPA between LTWP Ltd and KPLC dated 29th September, 2011 was to incorporate a change in the security support that was being provided to LTWP Ltd by the Government of Kenya and amend the fact that the Transmission Interconnector was now to be developed and owned by KETRACO and not LTWP Ltd. The Committee notes that this was the genesis of the DGE; had LTWP been responsible to do the TI, such a clause could not have been included in the Agreement.

295. Under clauses 10.9 and 14.6(c) of the PPA, the Government of Kenya was to provide a Sovereign Guarantee to LTWP Ltd for a commercial default if KPLC was unable to fulfil its payment obligations under the agreement. However, in May 2010 the government resolved that the Sovereign Guarantee could not be provided, and instead attempted to structure an alternative security package with the World Bank and the Multilateral Investment Guarantee Agency (MIGA) to cover payments in the event of a termination of PPA (political risk mitigation). This alternate also comprised a letter of credit guaranteed by the International Development Association (IDA) to cover payment default (KPLC credit risk mitigation).

Further the first amendment approved the increase of the energy charge rate and reviewed the energy threshold, set out in the original PPA, in view of the increase in total costs for the project since the execution of the original PPA.

296. The Committee noted that the World Bank withdrew from the agreement basing its decision on among other factors high political risks, perceived inability of the country to utilize the capacity being generated and that the 26 months proposed for construction of the TI being adequate. It was however noted that the fears of the World Bank were disapproved as the concluded TI was able to evacuate all the generated energy, political environment was stable and that the TI could be concluded within 26 months going by the evidence that NARI group was able to conclude majority of the TI within six months.

297. The government made a policy decision to instead use Partial Risk Guarantee from the Development Finance institutions such as World Bank, Multilateral Investment Guarantee Agency (MIGA) and Africa Development Bank (AfDB). The purpose of the PRG was to backstop the commercial risks of KPLC. The Lake Turkana Wind Power project benefited from a PRG from AfDB.

298. In addition, the government was required to issue a Letter of Support (LoS) with respect to political risks and compensation payable to LTWP upon termination of the PPA. The LoS are not explicit guarantees and are cleared by the Attorney General before they are issued. The Committee noted with concern that the Attorney General does not draft Letters of Support and that that they are only presented to the Attorney General's office for clearance. It was not clear the kind of clearance the Office of the Attorney General does considering that the contract they seek to clear are already signed.

299. It was further noted with concern that the office of the Attorney General did not draft the PPA between LTWP and KPLC considering that such contracts bind the government.

300. Payments made to LTWP emanated from the Vote of the Ministry of Energy in line with the PPA between KPLC and LTWP and not the Consolidated Fund.

CHAPTER FIVE

5.0 COMMITTEE RECOMMENDATIONS

The Committee made the following recommendations:

1. The Accounting Officer at the Ministry of Energy and The National Treasury should be guided by the provisions of Article 226 of the Constitution and ensure competition whenever contracting for goods and services. The same applies to Accounting Officers for both the Kenya Power and the Kenya Electricity Transmission Company.

2. The then Accounting Officers at the Ministry of Energy and KETRACO should be held accountable for not conducting an independent legal risk assessment prior to execution of contracts for a capital project of this magnitude. The project was the single largest public private partnership in Kenya and no risk analysis was carried out to establish potential challenges to the project such as delayed construction of transmission line. These infractions exposed the Government, taxpayers and other partners to value for money and litigation risks for delayed payments to contractors.

3. The then Accounting Officers (between 2019 to 2022) for the Ministry of Energy and The National Treasury should be reprimanded for their inordinate procrastination (for more than 30 months) in providing correct bank details to the LTWP in which a refund of €6,173,296 was to be deposited.

4. The EACC should investigate the KETRACO management on the contract management and implementation for the transmission interconnector including the failure to secure wayleaves and signing addenda to the TI contract that led to delay in the completion of the line and exposed Kenyan taxpayers to GOK TI DGE Delay payments amounting to Kshs.18,499,082,672 and higher energy bills.

5. The Government of Kenya should build technical and financial capacity of Public Finance Management Officers in implementing projects through Public Private Partnerships (PPP). This will enhance efficiency and effectiveness in executing such projects.

6. The Office of the Attorney General should be involved in drafting and or reviewin[g] provisions of Purchase Power Agreements before they are signed to ensure term[s] included in such agreements are competitive and do not disadvantage the Kenya[n] taxpayers.

7. The Cabinet Secretary for the Ministry of Energy should urgently convene a stakeholders' meeting to reconcile all the outstanding payments due to the Consortium of NARI Group Corporation & POWERCHINA GUIZHOU Engineering Co. Ltd and settle them.

8. The Cabinet Secretary for The National Treasury should urgently avail funds for settlement of claims due to The Consortium of NARI Group Corporation & POWERCHINA GUIZHOU Engineering Co. Ltd. Part of the said funds should be drawn from the €6,173,296 refunded by LTWP to GoK in March 2022.

9. The management of the Lake Turkana Wind Power land, the Governor of Marsabit County government, the Attorney-General, the Chief Land Registrar and the National Land Commission should expedite orders issued in *Mohamud IItarakwa Kochale & 5 others V Lake Turkana Wind Power Ltd & 9 Others (2021) eKLR*. As the team regularizes the title, it should be guided by the provisions of the Community Land Act, 2016 on Marsabit Community interests and exploitation of the 110,000 of idle land for their economic interests.

10. The Cabinet Secretary for the Ministry of Lands and the Chairperson of the National Land Commission should always adhere to the Land Community Land Act 201[6] whenever community land is converted to other categories of land tenure.

Signed .... **Date**...31/05/202[.]

The Hon. Abdullswamad Sharrif Nassir, MP
(Chairperson)

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