IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 7 OF 2011

BETWEEN

1. **BP TANZANIA LIMITED)**
2. **ENGEN PETROLEUM TANZANIA LIMITED)**
3. **CAMEL OIL TANZANIA LIMITED)**
4. **OILCOM TANZANIA LIMITED)**
5. **TOTAL TANZANIA LIMITED)**
6. **GAPCO TANZANIT LIMITED)**
7. **HASS PETROLEUM TANZANIA LIMITED)**
8. **ORYX OIL COMPANY LIMITED)**
9. **MGS INTERNATIONAL TANZANIA LIMITED)**
10. **GBP TANZANIA LIMITED)**
11. **LAKE OIL LIMITED)**
12. **MOIL TANZANIA LIMITED)**
13. **ACER PETROLEUM TANZANIA LIMITED).....APPELLANTS**

VERSUS

ENERGY AND WATER UTILITIES REGULATORY

AUTHORITY (EWURA).....RESPONDENT

(APPEAL ARISING FROM THE DECISION OF EWURA IN PUBLIC NOTICE REF. PPR/08-1/11 GIVEN ON 2/08/2011 AS AMENDED BY PUBLIC NOTICE OF 6/08/2011, AND COMPLIANCE ORDERS ISSUED BY EWURA ON 9/08/2011)

JUDGEMENT

This appeal arises from a decision of the Energy and Water Utilities Regulatory Authority (EWURA) (also referred to in the establishment Act as the "Authority") given in Public Notice on cap prices for petroleum products effective 3/08/2011 with Ref. PPR/08-1/11 published on 2/08/2011 as amended by Public Notice issued on 6/08/2011, and EWURA's decision in the Compliance Orders No. 01-08-2011, 02-08-2011, 03-08-2011 and 04-08-2011 issued by EWURA (the respondent herein) on 9/08/2011 to BP Tanzania Ltd, Camel Oil (T) Ltd, Engen Petroleum (T) Ltd and Oilcom (T) Ltd respectively.

In order to appreciate the nature of the respondent's functions in the context of the dispute we have deemed it necessary to reproduce herein the relevant statutory provisions.

EWURA (the respondent), a regulatory authority, is a body corporate established under section 4 of the Energy and Water Utilities Regulatory Authority (EWURA) Act No. 11 of 2001, Cap. 414, R.E 2002 charged under section 6 of the Act with the duty, in carrying out its functions, to strive to enhance the welfare of Tanzania society by:

(a) promoting effective competition and economic efficiency;
(b) protecting the interests of consumers;
(c) protecting the financial viability of efficient suppliers;

(d) promoting the availability of regulated services to all consumers including low income, rural and disadvantaged consumers;
(e) enhancing public knowledge, awareness and understanding of the regulated sectors including:
(i) the rights and obligations of consumers and regulated suppliers;
(ii) the ways in which complaints and disputes may be initiated and resolved; and
(iii) the duties, functions and activities of the Authority;
(f) taking into account the need to protect and preserve the environment.

The functions of EWURA are set out in section 7 (1) of the EWURA Act, which are as follows:

"(a) to perform the functions conferred on the Authority by sector legislation;
(b) subject to sector legislation –
(i) to issue, renew and cancel licences;
(ii) to establish standards for goods and services;
(iii) to establish standards for the terms and conditions of supply of goods and services;
(iv) to regulate rates and charges;
(c) to make rules;
(d) to monitor the performance of the regulated sectors in relation to –
(i) levels of investment;

(ii) availability, quantity and standard of services;

(iii) the cost of services;

(iv) the efficiency of production and distribution of services; and

(v) other matters relevant to the Authority;

(e) in the case of petroleum and natural gas, to regulate transmission and natural gas distribution;

(f) to facilitate the resolution of complaints and disputes;

(g) to disseminate information about matters relevant to its functions;

(h) to consult with other Regulatory Authorities;

(h) to perform such other functions as are conferred on the Authority;

(i) to administer this Act."

Section 7(4) of the Act reads as follows:

> "Section 7(4) – In addition to the preceding provisions of this section, the Minister may, from time to time as occasion necessitates it, give to the Authority directions of a specific or general character on specific issues, other than in relation to the discharge of the regulatory functions, arising in relation to any sector, for the purposes of securing the effective performance by the Authority of its policy, functions and compliance with the code of conduct".

Under section 17 of the Act the respondent has powers to regulate rates and charges. The relevant parts of sections 17, 19 and 20 read as follows:

"Section 17-(1) - Subject to the provisions of sector legislation and licences granted under the legislation, the Authority shall carry out regular reviews of rates and charges.

(2) In making any determination, setting rates and charges or establishing the method for regulating such rates and charges, the Authority shall take into account-

(a) **the costs of making, producing and supplying the goods or services;**

(b) the return on assets in the regulated sector;

(c) any relevant benchmarks including international benchmarks for prices; costs and return on assets in comparable industries;

(d) the financial implications of the determination;

(e) the desirability of establishing maximum rates and charges, and in carrying out regular reviews of rates and charges;

(f) any other factors specified in the relevant sector legislation;

(g) the consumer and investor interest; and

(h) the desire to promote competitive rates and attract market;

(i) any other factors the Authority considers relevant.

(3) The Authority shall publish in the Government Gazette all the rates, tariffs and charges regulated by the Board.

Sections 19 and 20 of the EWURA Act read:-

"19-(1) The Authority may conduct an inquiry where it considers it necessary or desirable for the purpose of carrying out its functions.

(2) The Authority shall conduct an inquiry before exercising a power to –

(a) grant, renew or cancel a licence other than a class licence;

(b) regulate any rate or charge;

(c) adopt a code of conduct.

(3) The Minister may specify in a direction under subsection (2) a time within which the Authority shall submit its report on the inquiry and if so the Authority must submit its report to the Minister within that time.

(4) The authority shall give notice of an inquiry by-

(a) publishing a notice in the Gazette and in a daily newspaper circulating generally in Tanzania specifying the purpose of the inquiry, the time within which submissions may be made to the

Authority, the form in which submissions should be made, the matters the Authority would like submissions to deal with and in the case of an inquiry conducted at the direction of the Minster, the Minister's terms of references;

(b) sending written notice of the inquiry, including the information in paragraph (a) to-

(i) service providers known to the Authority whose interests the Authority considers are likely to be affected by the outcome of the inquiry

(ii) the Consumer Consultative Council;

(iii) industry and consumer organizations which the Authority considers may have an interest in the matter;

(iv) The Minister and sector Ministers having responsibilities for utilities and transport sectors.

20-(1) In carrying out its functions and exercising its powers under this Act, and under sector legislation in relation to particular markets for regulated services, the Authority shall take into account –

(a) whether the conditions for effective competition exist in the market;

(b) whether any exercise by the Authority is likely to cause any lessening of competition or additional

costs in the market and is likely to be detrimental to the public;

(c) whether any such detriments to the public are likely to outweigh any benefits to the public resulting from the exercise of the powers.

(2) The Authority shall deal with all competition issues which may arise in the course of the discharge of its functions, and may investigate and report on those issues, making appropriate recommendations to the Tanzania Bureau of Standards, the Commission or any other relevant authority in relation to-

(a) any contravention of the Fair Competition Act, "the Standards Act" or any written law;

(b) actual or potential competition in any market or regulated services; and

(c) any detriment likely to result to the members of the public.

(3) Subject to the provisions of subsections (1) and (2), the Authority shall place on the Public Register a copy of any recommendation.

The appellants are all limited liability companies engaged in and carrying on the business of supplying and selling of petroleum products within the United Republic of Tanzania.

The brief undisputed background to this matter is that by a letter ref. EWURA/40/2/VOL.IV/147 dated 4/07/2011 the respondent

gave notice to the oil marketing companies of its intention to review the petroleum pricing template (formula). Attached to the letter aforesaid there was a discussion paper on the subject matter which the oil marketing companies were invited to read. In the discussion paper EWURA was recommending, *inter alia,* the following:

(a) The pegging of the exchange rate to the Bank of Tanzania (BOT) exchange rates;

(b) The removal of the 7.5% buffer zone which oil marketing companies were allowed formerly that is in the 2009 pricing formula for the purpose of taking care of uncertainities in the said formula;

(c) The decrease of financing charges from 1.75% CIF value to 0.25% CIF value; and

(d) The decrease of transit/ocean losses from 0.5% for petrol to 0.25%, and from 0.30% for diesel and kerosene to 0.15% of CIF value.

The oil marketing companies (OMCs) were invited to read the discussion paper and submit their comments thereon on or before 9/07/2011. The letter also informed the appellants of the respondent's intention to hold a meeting (inquiry) to deliberate the new petroleum pricing formula

and pricing rules on the 22/07/2011 at Karimjee Hall at 10.00am. The inquiry was duly held.

On 2/08/2011 the respondent issued a Public Notice reference PPR/08-1/11 setting out cap prices, both retail and wholesale, for petroleum products effective from 3/08/2011. Upon heated objection being made by the OMCs to the new cap prices the respondent published a public notice amending the cap prices effective 3/08/2011 and issued a new pricing formula effective 6/08/2011 amidst wide media coverage and widespread outcries among some of the OMCs. In this new formula, EWURA agreed to use the Platts quotations for FOB prices instead of the highest conversion factor used previously until the commencement of the Bulk Procurement System (BPS) which was intended to be introduced to replace the then existing system of separate importation of petroleum products by individual OMCs. By separate Compliance Orders Nos. 01-08-2011, 02-08-2011, 03-08-2011 and 04-08-2011 issued on 9/08/2011, the respondent ordered BP Tanzania Ltd, Camel Oil (T) Ltd, Engen Petroleum (T) Ltd and Oilcom (T) Ltd respectively to:

> *"(a) immediately resume operations in its depots and supply other retail outlets including those operated under COCO arrangement;*

(b) immediately stop any action or inaction that results in the creation of artificial shortage of petroleum products in the country; and

(c) give explanations in writing within twenty four (24) hours from the date hereof as to why the Authority should not take legal action against Camel Oil (T) for contravening section 24 of the Petroleum Act, Cap. 392 and Rule 4(3) o the Pricing Rules."

The appellants were aggrieved with the decision of the respondent giving the new cap prices of petroleum products which effectively decreased the prices aforesaid. The 1st, 2nd, 3rd and 4th appellants were also aggrieved by the Compliance Orders issued to them on 9/08/2011. On 11/08/2011 the 13 appellants filed in this Tribunal notice of appeal from the decision of the respondent (EWURA) set out in the Public Notice of 2/08/2011 Ref. PPR/08-1/11 as amended by another Public Notice on Cap prices published on 6/08/2011 to take effect on the same day and the Compliance Orders issued by the respondent to the 1st, 2nd, 3rd and 4th appellants.

The Public Notice complained about reads as follows:

"REF: PPR/08-1/11

PUBLIC NOTICE ON CAP PRICES FOR PETROLEUM PRODUCTS EFFECTIVE 3RD AUGUST 2011

Following the completion of a public inquiry process that was aimed at coming up with a new price computation formula EWURA hereby publishes bi-weekly cap prices for petroleum products in the Tanzania MAINLAND LOCAL MARKET. These retail and wholesale prices are applicable effective Wednesday 3rd August 2011. Kindly take note of the following.

(a) *Retail and wholesale prices for all petroleum products, in the Tanzanian Mainland local market have gone down compared with the last prices publication of 1st July 2011. Retail prices for various products have decreased (per litre) as follows: Petrol TZS 202.37 (or 9.17%), Diesel TZS 173.49 (or 8.32%) and Kerosene TZS 181.37 (or 8.70%). The price decreases have been caused by a revision of the Petroleum Prices formula. The decrease would have been higher had it not been for a rise in petroleum prices in the world market prices and depreciation of the Tanzanian Shilling compared to the US dollar (the currency in which purchases or products in the international oil market are made). The*

wholesale prices for the same period have also decreased as follows: Petrol TZS 201.61 (or 9.43%), Diesel TZS 172.73 (or 8.57%) and Kerosene TZS 180.63 (or 8.95%).

(b) In line with the prevailing sector legislation, prices of petroleum products are governed by rules of supply and demand. EWURA shall continue to encourage competition in the sector by making available petroleum products pricing information including price cap. This information on prices is intended to enable stakeholders to make informed decisions and petroleum prices at any particular time.

(c)** Oil marketing companies are free to sell their products at a price that give them competitive advantage, provided that such **price does not exceed the price cap for the relevant products. The approved formula was gazette through Government Notice No. 5 of

9th January 2009 and amendments made in July 2011.

(d) *All petrol stations should publish petroleum products prices on clearly visible boards. The price boards should be clearly visible and should clearly show prices charged, discounts offered as well as any trade incentives or promotions on offer. Consumers are advised to purchase from those that sell products at the most competitive prices.* ***It is an offence not to have prices published on boards located in clearly visible places in front of petrol stations and it will attract punitive measures from EWURA.***

(e) Retailers must issue receipts with respect to all sales that they make and consumers are advised to ***demand and keep receipts*** *that clearly show the name of petrol station, date on which such purchase was made as well as the type of fuel and price per litre for every purchase they make. This can be used as an*

exhibit in case of a complaint lodged in the event that the selling price is above the cap price or in case the products sold are off the approved specifications".

In the Memorandum of Appeal lodged in this Tribunal on 11/08/2011 the appellants have raised the following grounds of appeal:

1. The Respondent erred in law and in fact by failing to take into account the cost of supplying petroleum products in Tanzania Mainland;
2. The Respondent erred in law and in fact by failing to take into account the consumer and investor interests;
3. The Respondent erred in law and in fact by failing to take into account the return on assets invested by the Appellants;
4. The Respondent erred in law and in fact by failing to take into account relevant and international benchmarks for prices, costs and return on assets in comparable industries;
5. The Respondent erred in law and in fact by failing to take into account the financial implications of its determination;
6. The Respondent erred in law and in fact by failing to protect the financial viability of the Appellants;
7. The Respondent erred in law and in fact by failing to promote effective competition and economic efficiency;

8. The Respondent erred in law and in fact by failing to balance between the rights and obligations of the consumers and those of the Appellants as regulated suppliers;
9. The Respondent erred in law and in fact by ordering the 1st, 2nd, 3rd and 4th Appellants by virtue of issuing them with Compliance Orders to sell petroleum fuel at a loss;
10. The Respondent erred in law and in fact by issuing a price formula that is so low that it leaves no room for competition between the Appellants thus amounting to forcing the Appellants into an arrangement tantamount to price fixing.

The respondent has resisted the appeal.

In the Reply to the Memorandum of Appeal filed by the respondent, the respondent has maintained that the decision complained about cannot be faulted, that in arriving at the new pricing formula the respondent had taken into consideration the views collected/availed from/by all the stakeholders in the country including the appellants and other members of the public. The respondent further maintained that adequate opportunity to be heard was given to all the appellants and other stakeholders, and that an inquiry was duly held wherein all the stakeholders including the appellants and other members of the public submitted their views. It is the respondent's assertion that the views received from the appellants were not uniform, that the

appellants did not submit detailed financial analysis on how they arrived at the figures on their respective overhead costs and investment(s) and their respective expected rates of return, that when regulating prices it is the duty of the respondent to balance the interests of the consumers and the service providers/appellants, that in determining the petroleum products pricing formula the respondent had fully complied with all the relevant statutory provisions and further that the respondent had taken into account all the factors required by the law which were exhaustively discussed during the inquiry together with the views/comments submitted by the stakeholders including the appellants at the public inquiry. Regarding the Compliance Orders the respondent maintained that it had not ordered any OMC to sell at a loss, that it had merely ordered the 1st, 2nd, 3rd and 4th appellants to desist from their unlawful conduct of refusing to sell/supply petroleum products in accordance with the new cap prices and to resume operations in their depots and the supply of petroleum products to other retail outlets.

At the hearing the appellants were represented by Ms Fatma Karume of IMMMA Advocates, assisted by Ms Madina Chenge, while the respondent was represented by Mr. Galeba and Mr. Kabakama both of G.R.K. Advocates.

On 21/09/2011 upon application by learned counsel for the appellants the appeal was marked withdrawn in respect of BP

Tanzania Ltd (1st appellant) and Moil Tanzania Ltd (12th appellant) respectively.

During the hearing of the appeal both parties brought witnesses in terms of rule 30 of the Fair Competition Tribunal Rules 2006. The appellants brought three witnesses.

In his oral evidence ABDULKADIR AHMED HUSSEIN (AW1) a director of Hass Petroleum Tanzania Ltd (7th appellant) basically testified by giving a background to the events leading to the decisions complained about and stated that Hass started carrying petroleum business in Tanzania in 1999 at the time when Tanzania had started implementing the liberalization of the petroleum sector as part of the liberalization of its National Economic Policy. According to AW1 liberalization had brought competition due to the entry of new players in the industry which in time resulted in an increase in the supply of petroleum products. The removal of the structural shortages that had existed in the industry during the pre-liberalization period generally resulted in lower prices of petroleum products. In 2007 the prices of petroleum products in the international market rose significantly to over 100 USD per barrel which led to higher prices of petroleum products in the Tanzania market. In 2009 after the enactment of the Petroleum Act the respondent started regulating the petroleum industry and issuing price templates by taking the price per litre that is the average world market prices of oil on a

given day and adding the freight, the premium and insurance plus local costs and thereby leading to the introduction by EWURA of indicative cap prices for petroleum products. According to AW1 in computing and fixing the indicative prices the respondent used to take into account certain costs/overheads incurred by oil marketing companies including freight, premium and insurance and other local costs payable to local authorities including wharfage, destination inspection and others (exhibit A1) whereby the oil marketing companies were allowed a wholesale gross margin of shs. 111.11 per litre. AW1 further testified that in a budget speech read by the Minister for Finance on 8/06/2011 during the proceedings of the Tanzania Parliament (Bunge) the Minister for Finance apparently reacting to a rise in the prices of petroleum products in the world market announced the government's intention to introduce certain changes in the levying of taxes by reducing charges of customs excise on diesel and petrol and reducing certain charges levied by EWURA, SUMATRA, TBS, TRA and TIBA (exhibit A5). According to this witness the Minister also stated that the government had in addition directed EWURA to take steps to reduce the prices of petroleum products by regulating the exchange rates, removal/reduction of the 7.5% margin which the companies were allowed to compensate them for overheads and by reducing the financial costs and inspection fee. According to AW1 soon thereafter the oil marketing companies were served with a letter

dated 4/07/2011 (exhibit A6) from the respondent notifying them about the respondent's intention to review the petroleum pricing template and inviting the oil marketing companies to a meeting to be held on 22/07/2011 at Karimjee Hall at 10.00 am for the purpose of deliberating the new petroleum pricing formula and pricing rules. Annexed to the letter aforesaid was a discussion paper which set out certain recommendations of the respondent in respect of the review of the petroleum pricing template, and which also recommended reductions of certain costs recoverable by the oil marketing companies. AW1 further testified that in the discussion paper it was recommended, among other things, that the financing costs be reduced from 1.75% CIF to 0.25% CIF until such time that "the Bulk Procurement System commences" and that the transit/ocean loss costs, which before the review the companies were allowed to recover at the rate of between 0.25% and 0.50% CIF, be reduced to actual average loss levels for the year 2010. By a letter dated 15/07/2011 (exhibit A7) the oil marketing companies were invited to an inquiry to be held at Karimjee Hall on 22/07/2011 at 10.30 am in respect of the review of petroleum pricing rules and the formula.

According to AW1, he did go to the venue of the inquiry at the appointed time but found that there was another function taking place at the venue and at 12.15 he had to leave for his Friday prayers. He was not present at the meeting for this reason. On 2/08/2011 the oil marketing companies were served with/notified

of a new pricing template (price list) by Public Notice on cap prices for petroleum products effective 3/08/2011 (exhibit A8).

AW1 stated that he was not satisfied with the new pricing formula because firstly, the wholesale prices that the oil companies were directed to sell at were lower than their actual costs. According to AW1 firstly, the price applied in the Platts quotations was that of the wrong grade of diesel (exhibit A8) which is now no longer imported having been banned by TBS and EWURA and secondly, the introduction of fixed prices and the removal of the 7.5% margin allowed against the indicative/cap prices had an adverse effect on competition. AW1 claimed that the removal of the 7.5% margin meant that the companies could not compete any longer. And thirdly, the exchange rates applied in the formula were the Bank of Tanzania (B.O.T) published exchange rates instead of the commercial rates and therefore the formula was not realist commercially and for this reason not feasible. The financing costs, that is, the costs of obtaining financing facilities, a letter of credit and overdraft facilities, were brought down from 9.75% to 1.00%. According to AW1 this had a serious adverse impact as a letter of credit has normally to be repaid within 90 days, while the sea voyage of a ship from a given loading port to Dar es Salaam takes not less than 20 days and then upon arrival the ship has to queue in line for up to 40 days in the port before it berths, meaning that 60 days are taken/lost in receiving the product, leaving an oil importing company with only 30 days in which to

sell the product. The allowance for ocean costs was also reduced and the recovery of demurrage was reduced to 3 days out of the previous 40 days. According to AW1 under the old pricing formula OMCs were allowed recovery of overhead margin of Tshs. 111.11/= per litre while in the new cap petroleum prices effective 3/08/2011 (exhibit A8) the oil companies are allowed to recover overheads/margin amounting to Tshs. 108.69/= per litre. Upon receiving the new cap prices the oil marketing companies immediately and separately objected to it on the ground that it would force them to sell at a loss. On 6/08/2011 the respondent introduced revised prices for petroleum products effective 6/08/2011. According to AW1 there was no significant change in the wholesale prices. The only major change was that the wharfage was lowered from shs. 18 to 12.05 per litre, the destination inspection fees were reduced to shs. 4.7 per litre and the demurrage was increased from 3 days to 15 days, while the OMC's margins for petrol were raised from shs. 108.69 to 110.58 per litre and for diesel from shs. 108.69 to 110.25 per litre, and the financing costs remained at 1.00% CIF as they were in the first template effective 3/08/2011; and in addition the new template allowed a recovery of wharfage at a rate of shs. 12/= when the appellants had paid shs. 18/=. AW1 complained that the OMCs incurred losses on account of the introduction of the new template due to the fact that they had significant stocks which were already taxed at the old rates, and they were not

allowed to recover what they had paid under the previous tax regime and further that the gain that was in kerosene of shs. 400/= in the excise area was not enough to compensate them for the loss made on diesel (exhibit A9). AW1 asserted that the 7.5% margin taken away was important as it allowed both the recovery of costs and competition among the oil marketing companies.

On cross-examination, AW1 admitted that he had not bought any volume of fuel by using the pricing formula released on 3/08/2011. He also admitted that he had no figures for his old stocks of fuel before the introduction of the new formula. On the issue of the Minister for Finance giving directions to EWURA, AW1 said he just quoted from the Minister's presentation in Parliament and went on to say that he did not know whether or not the Minister for Finance has statutory powers to give any directions to EWURA.

LOUIS CHARBONNEAU (AW2), a french national and shipping agent working with STURROCQ FLEX SHIPPING COMPANY LIMITED told the Tribunal that in 2011 the company represented 100% of the oil tankers bringing petroleum products into Tanzania and that as a shipping agent his duties are to represent the shippers to customs, port and other authorities and to take care of the ships right from the moment a vessel arrives in Dar es Salaam until it sails away on behalf of the ship-owner. He

basically testified that on average it takes about 3-4 days to discharge petroleum from an oil tanker. According to AW2 generally oil tankers coming into Tanzania have to discharge at the same berth and have to queue up in line in the outer harbour and for that reason incur demurrage costs for each day spent in Dar es Salaam port effective from 6 hours after the ship arrives in Dar es Salaam to the time it sails out, and that the average number of demurrage days in respect of all oil tankers had increased from 5.9 days in 2008, to 15.7 days in 2009, and 23.5 days and 46.2 days in 2010 and 2011 respectively, (exhibit A11).

KETAN SHAH (AW3) a partner at KPMG Tanzania, a firm of chartered accountants providing audit, tax and advisory services told the Tribunal that as a partner in the firm he deals with audit, corporate finance and other transactions/services. According to this witness, financing costs are those costs that would be incurred in importing a product up to/including the point of taking delivery up to the sale of the product and that letter of credit (L/C) charges are the costs incurred by a company in opening a letter of credit at a bank. According to AW3 the financing cost of 1% C.I.F allowed by the respondent in the new template to cover both the L/C and overdraft costs is on the lower side in comparison with the rate published by B.O.T and due to the lowering of the financing cost the rate of return of oil companies in Tanzania is less than 6%. According to AW3 while the treasury bond rate of return in Tanzania for the first 2 quarters of 2011

was at 14.1%, the rate of return, that is, the profit margin resulting from the new prices before overheads and corporate tax was less than 6%. However, he could not say whether or not an oil company operating in Tanzania would be able to reach a 14% rate of return which is the minimum 10 years' treasury bond rate of return (benchmark) that an investor who invests in Tanzania expects to earn as profit that would be risk free.

The respondent also brought three witnesses:

GODWIN SAMWEL (RW1) an engineer in the respondent's Directorate of Petroleum and also the acting Director of Petroleum testified that on 4/7/2011 the respondent initiated an inquiry that was intended to review the petroleum pricing template or formula. Referring to exhibit A6 the witness said that as required by the law, all the stakeholders including oil marketing companies and government institutions were invited to the inquiry and asked to submit their comments/submissions on the issues raised in a discussion paper and the proposed draft formula of petroleum prices attached to the letter of invitation (exhibit A6) by 9/7/2011. He testified that comments were received from the stakeholders including several marketing companies, government institutions, the consumer consultative council and the government consultative council, and that prior to the public inquiry, the respondent formed a technical review team for purposes of consolidating comments received from the

stakeholders in order to come up with recommendations for submission to the Board of Directors of the respondent. By a letter dated 15/07/2011 the respondent invited all stakeholders to an inquiry to be held on 22/07/2011 and also invited their comments on the matrix which is a compilation of the stakeholders' views and EWURA's recommendations that was prepared by the technical team comprising Members from the Ministry of Energy, the Ministry of Finance, TPDC and EWURA and other interested parties. Invitations to the public inquiry were also made through announcements in newspapers and on radio and television. RW1 testified that a public inquiry was duly held at Karimjee Hall on 22/07/2011 where the stakeholders including the oil marketing companies and general public were asked to submit comments and make submissions on the proposed review of the petroleum pricing formula. This witness also testified that subsequent to the public inquiry the respondent invited a smaller group of stakeholders including OMCs to a meeting held on 23/07/2011 for purposes of going through the respondent's revised recommendations before they were submitted to the Board of Directors, and that the meeting was attended by representatives of the 2nd, 5th and 6th appellants among others.

On 2/08/2011 the respondent's management by public notice issued revised prices of petroleum products that were computed on the basis of the new formula which was approved by the Board of Directors on 26/07/2011. RW1 further testified that after

publishing the revised prices the respondent received different opinions from oil marketing companies to the effect that they were not satisfied with the new petroleum prices. On 3/08/2011 after receiving complaints from some oil marketing companies the respondent convened a meeting, which was attended by 15 out of the 60 licenced oil marketing companies, to hear the grounds of the complaints. According to this witness only 15 companies had complained and about 4 meetings were subsequently held on 3rd and 4th August 2011 for the purpose of giving the OMCs the opportunity to air their views and grounds of complaint. RW1 said that the appellants were given the opportunity to be heard and that some of the complaints/views which the respondent found reasonable were taken into account in their decision and acted upon. On 5/08/2011 the respondent issued a revised pricing template effective 6/08/2011 (exhibit A8) that took into consideration some of the oil companies' views. According to RW1 the revised pricing template effective from 6/08/2011 had a more favourable demurrage allowance, that is the number of demurrage days was revised from 3 to 15 days and the allowance for overheads per litre was increased in favour of the oil marketing companies. This witness added that after issuing the template effective from 6/08/2011, the majority of the oil marketing companies save for BP Tanzania Ltd, resumed business, including the 13 companies which appealed against the decision on the revised pricing formula and template.

RW1 testified that at the meeting held on 4/08/2011 the oil marketing companies proposed and the respondent agreed to apply the average conversion factor instead of the highest conversion factor that the respondent was applying previously until such time that the bulk procurement system commenced. According to this witness the respondent's analysis of the past year based on volume readings taken by SGS, an independent marine surveyor contracted by the respondent, on the average there were no ocean losses shown by a vessel during a given voyage from a loading port to the destination port and yet an importer is still allowed recovery for ocean losses. RW1 told this Tribunal that the respondent only sets cap or ceiling prices, and as such conditions are still favourable for the companies to compete.

Upon cross examination, this witness denied that the respondent had acted upon the direction of the then Minister of Finance and added that the Minister's speech in Parliament does not constitute directions to EWURA to take action. He explained that EWURA has a statutory obligation while discharging its duties to ensure that the views of all stakeholders namely; service providers, consumers and the government are taken on board when reviewing prices of petroleum products, and that, the Minister's speech may be treated as the government views for addressing its interests in the matter. With regard to the correctness of the pricing formula, RW1 said that the margins used were obtained

by taking the averages of the three companies that had a substantial market share in the year 2009 namely; Total, Oryx and BP.

RW1 further testified that during the inquiry held on 22 and 23 July 2011 the appellants were fully represented and were given the opportunity to present their comments but none of them had complained that their comments were not reflected in the matrix and further that after the public inquiry the respondent prepared a report with its revised recommendations which were submitted to the Board of Directors of the respondent for consideration based on the analysis that was made after taking into consideration different submissions presented by the various stakeholders and information received from the Tanzania Ports Authority. This witness was firm that there is no justification for including the 7.5% correction margin in the formula after applying Platts quotations. He admitted that the complaining oil companies represent more than 60% of the market share and that the demurrage of 15 days was picked as an interim measure before obtaining a more realistic figure through the Bulk Procurement System.

On re-examination, RW1 maintained that issues of investment risks are considered by the investors themselves and not the respondent. With regard to the figures on ocean losses of 0.5 CIF cited by the appellant's counsel in the case of Kenya and India,

which is more favourable to OMCs RW1 said that he was not convinced about the reliability of the figures or sure of either their authenticity or source.

FELIX NGAMLAGOSI (RW2) the Director of Regulatory Economics of the respondent told this Tribunal that an inquiry was conducted in July 2011 for the purpose of reviewing the petroleum pricing formula, that an inquiry is a consultative process and that all stakeholders are called to present their views on the proposed review of the formula. According to this witness the inquiry was initiated by the issuance of a discussion paper, inviting comments from the stakeholders. Subsequent to that the stakeholders were invited to a public meeting where the stakeholders were called to present their submissions on the proposed pricing formula, and thereafter the comments were compiled. RW2 testified that the details of the analysis of the pricing formula set out in the stakeholders' comments and the evaluation of the stakeholders' comments by the respondent's experts (the technical team) formed the basis of the recommendations submitted to the Board of Directors of the respondent for approval of a review of the pricing formula.

According to this witness the 1% C.I.F financing cost, and the demurrage of 15 days allowed to the oil marketing companies for the delay in off-loading the imported product were arrived at in the formula after a detailed and thorough analysis of the various

comments presented by the stakeholders, some of whom were of the view that 1% C.I.F was too high and some of whom agreed that the rate of 1% C.I.F was adequate, while others were of the view that it was not adequate. RW2 further testified that the respondent did not use either the Bank of Tanzania indicative exchange rates or the money markets and commercial bank exchange rates in preparing the pricing formula. According to RW2 EWURA used the methodology which was discussed in the inquiry process and the comments and information received from the stakeholders to the effect that the exchange rate would be determined by taking the weighted average of actual exchange rates used by oil marketing companies in the procurement of foreign exchange from various commercial banks and that the source of information for the actual rates used and the total volume of foreign exchange bought by oil marketing companies would be the Bank of Tanzania, which information would thereafter be forwarded to the oil marketing companies for comments/verification/clarification. According to RW2 this methodology is supported by many stakeholders including oil marketing companies such as Gapco and Oil Com who had confirmed their support in writing. The witness told the Tribunal that in the pricing formula EWURA has not used interbank commercial bank exchange rates and that the pricing formula is merely indicative.

RW2 testified that Total, BP and Gapco had provided detailed comments on the proposed formula and why they arrived at the rates they recommended. On the financing cost RW2 stated that the 1% C.I.F arrived at in the formula was made after taking into account EWURA's initial proposal of 0.25% to cover for L/C, and the recommendations by Gapco, BP, Total, Engen and the Consumer Consultative Council of 2% upwards, 2.22% of C.I.F, 1.85%, maintaining the current rate of 1.75% and 0.25% respectively.

According to RW2 the discussion paper was issued in order to provoke comments and up-to-date information from the oil marketing companies and stakeholders on the proposed pricing formula. He added that the information received from the stakeholders' comments enabled the respondent to determine the costs recoverable by the oil marketing companies, and that the process was initiated by a discussion paper which was followed by collection of stakeholders' comments, the matrix of analysis, the stakeholders' meeting (public inquiry) and more comments, an analysis and updating of the matrix, an exit meeting with key stakeholders, an update of the matrix to check if there was any error, and finally the respondent's board meeting to approve the recommendations.

RW2 further asserted that both the discussion paper which initiated the review of prices and the matrix were not binding on the stakeholders or the respondent. It was intended to seek comments from the stakeholders. In the recommendations in the matrix attached to the letter of 15/7/2011 EWURA/the respondent recommended that the average selling rates of foreign exchange published by B.O.T be applied, while in the final decision the respondent ruled that the exchange rate would be the weighted average of actual exchange rates used by oil marketing companies in purchasing foreign currencies from various commercial banks supplied or published by B.O.T on a daily basis and that the source of this information would be the B.O.T.

RW2 added that the 1% of C.I.F financing cost applied in the pricing formula covers all the financing costs of the product including 0.25% for letter of credit costs and 0.75% for overdraft costs.

Captain TUMAINI PHILLIPO MASSERO (RW3) the Oil Technical Manager in the Tanzania Ports Authority Dar es Salaam who has been undisputedly working at the Dar es Salaam Terminal for about 30 years, told this Tribunal that as the Oil Terminal Manager his duties are to supervise the discharge of oil from three jetties namely the Kurasini Oil Jetty one (KOJ 1), the Kurasini Oil Jetty Two (KOJ 2) and the Single Point Mooring

(SPM), to generally ensure the security and maintenance of the jetties and to give reports about the unloading of cargo for purposes of revenue collection. In his testimony, this witness testified that for a ship that has complied with the required procedure including payment of wharfage to the Tanzania Ports Authority (TPA) 24 hours before berthing and depending on the size of the queue, from the time of the ship's arrival (anchorage) in Dar es Salaam port up to the discharging of the load would normally take from about seven to fifteen days, and that while a ship is awaiting the discharge of the load generally (for about 7 to 15 days) if the ship is one which is on charter party it would be required to pay demurrage to the owner of the ship in respect of the time of the delay in excess of the allowed time. RW 3 further testified that apart from handling the discharge of petroleum products and vegetable oil imported for the Tanzanian market, the Dar es Salaam port also operates as a port of discharge of transit goods including petroleum products destined for Malawi, Zambia, the Democratic Republic of Congo, Rwanda, Burundi and Uganda. According to this witness since the commencement of the Bulk Procurement System in December, 2011 there has been a substantial improvement in the berthing system resulting in lessening of the delay in the berthing prospect and vessels have to wait in the outer anchorage for not more than 5 days on average.

In her skeleton closing submissions filed in support of the appeal Ms Karume learned counsel for the appellant submitted that under the provisions of section 5 read together with sections 6, 7 and 8 of the EWURA Act, the respondent is required to be an independent regulatory body which must discharge its regulatory functions without political intervention. It is her argument that in setting out the August 2011 Pricing Formula EWURA had failed to remain politically independent and that by reviewing the petroleum pricing and the exchange control rates and the removal of the 7.5% buffer zone which OMCs were allowed for the purpose of recovery of certain costs (kufidia baadhi ya gharama), and by decreasing the financing charges and transit/ocean losses EWURA had acted in accordance with the directions of the Minister for Finance issued on 21/06/2011 contrary to its duties as a regulator.

Ms Karume further asserted that in arriving at the new pricing formula the respondent had not only failed to adhere to its statutory duties but had also clearly acted upon the orders of the Minister for Finance thereby contravening the requirement of remaining completely independent from government influence in relation to the discharge of the respondent's regulatory functions provided in section 7(4) of the Act. It is Ms Karume's argument that the sequence of events leading to the issue of the new price list commencing with the speech of the Minister of Finance directing EWURA to review the prices immediately followed by the

letters dated 4/7/2011 and 15/7/2011 initiating the review process and culminating with the publication of the new pricing formula/template effective from 3/08/2011 and a revised one effective from 6/08/2011 is sufficient to show that EWURA had acted on the orders of the Minister. Learned counsel added that the respondent had neither taken into account the return on assets invested nor prepared a consultation report prior to the review of the pricing formula and further that the fact that the technical review team which was set up to analyse the comments of the stakeholders comprised members from the Ministry of Finance, Ministry of Energy and TPDC gives further evidence that EWURA in reviewing the pricing formula did not act independently.

In response, Mr. Galeba learned counsel for the respondent strongly maintained that the decision for reviewing the pricing formula and lowering the rates charged in the pricing formula published/issued in August 2011 cannot be faulted and that the appeal is devoid of merit. It is Mr. Galeba's contention that the respondent had, in the exercise of its powers to review rates and charges, complied with the provisions of sections 7 and 17 of the Act and had under the provisions of section 19(2)(b) of the Act initiated an inquiry for the review of petroleum product prices and in doing so it had acted independently. He further argued that the exchange rate used in the formula is computed on the basis of the weighted average of foreign currency bought by oil

marketing companies and not the exchange rate charged by the BOT as alleged by the appellants and, therefore, the complaints by the appellants about losses incurred by them are baseless. He added that in the past before Tanzania had subscribed to Platts for Freight and Premium quotations there was uncertainty on actual prices in the world market and therefore it was necessary for the respondent to make a provision in the formula of 7.5% buffer for margin of error and uncertainties in the prices. With subscription by Tanzania to Platts these uncertainties are no longer there hence the removal of the 7.5% margin in the formula and the introduction of the specific margin/price of Tshs. 110 per litre and further that the cap prices being the ceiling prices allow the OMCs to sell at prices below the cap prices and thereby permitting competition. Regarding ocean losses Mr. Galeba contended that the percentage allowed in the formula that is 0.25% for petrol and 0.15% for diesel and kerosene for alteration of volumes of products during the voyage of the vessel from the loading port to Dar es Salaam is adequate and has taken into account the report of a study conducted by the port authority (RW1) which has shown that in fact on an average there are gains as opposed to losses during any given voyage and that the delay was often due to late payment by shippers of wharfage and submission of claim papers. Mr. Galeba asserted that the appellants were not justified to demand a higher percentage for ocean losses to the detriment of the ultimate

consumers. Mr. Galeba has further asserted that there is no evidence about what the appellants' investment level is, what the investment return should be and also that there is no evidence at all to show that the appellants were adversely affected by the reduction of the rates or removal of the margins to the extent that the return of investment was not adequately covered. Mr. Galeba submitted that the 15 days provided for the demurrage are more than enough as testified by Capt. Massero (RW3) and that there is no evidence to justify demurrage of 40 days claimed by the appellants and in particular no evidence was brought to prove how much demurrage costs were incurred by each appellant in a given period of time. It is Mr. Galeba's further assertion that the respondent's evidence shows that in arriving at the new formula the respondent had taken into consideration all factors required by the law including the level of investment, availability, quantity and standard of services, the costs of services, the efficiency of production and distribution of services (section 7(1) (c) of the Act) and the need to promote the availability of regulated services to all consumers including low income, rural and disadvantaged consumers. Mr. Galeba basically was of the strong view that the appellants' complaints are baseless since only 13 out of 60 OMCs who are licenced in the sector appealed against the new formula published in August 2011, two of whom withdrew their respective appeals and still continued doing business using the same formula.

We have carefully evaluated the evidence brought by the parties and the respective arguments advanced by learned counsel within the context of the relevant statutory framework reproduced herein.

It is on evidence that in mid-2008, the respondent commenced consultations with the applicants (OMCs) in order to collect their views for the purpose of aiding the respondent in regulating the petroleum industry by using a pricing formula for setting "indicative" petroleum prices. In January 2009, the Respondent gazetted a pricing formula in GN No. 5 of 2009, known as the "2009 Pricing Formula". By virtue of the GN, the respondent issued Public Notices every 2 weeks in which it set out the wholesale indicative prices for petroleum products and the retail prices. The 2009 Pricing Formula was used by the respondent until 3 August 2011, when it issued a new pricing formula, hereinafter referred to as the "2011 Pricing Formula".

In order to set the Indicative Petroleum Prices, the respondent used the 2009 Pricing formula to calculate the wholesale and retail indicative allowable cost of petroleum fuel per litre which OMCs could charge in Tanzania. To arrive at the indicative wholesale and retail allowable cost, EWURA considered the following matters in the 2009 pricing formula:

(a) Cost of Fuel per litre in USD
(b) Cost of Fuel per litre in TZS

(c) Wharfage Fee
(d) Demurrage Costs
(e) Sumatra Charges
(f) Financing Costs
(g) Weights and Measures
(h) EWURA Petroleum Levy
(i) Petroleum marking Costs
(j) Government Taxes
(k) Company Margins and Overhead Recoveries
(l) Dealers Margins
(m) Delivery Charges
(n) 7.5% margin above the final price for OMCs and Dealers

The 2009 Pricing Formula was used as the basis for setting "indicative" petroleum prices, both wholesale and retail in Tanzania until 3 August 2011, when the respondent published the new pricing formula, this pricing formula was amended on 6 August 2011 as stated earlier resulting in the pricing formula referred to herein as the 2011 pricing formula which is the subject matter of the present appeal.

In principle the OMCs are complaining and contending that EWURA's 2011 pricing formula was arrived at as a result of political manipulation and pressure and consequently, the respondent failed to discharge its duties as an independent

regulator and that the following matters in the pricing formula were not correctly calculated/considered:

"

- The USD to TZS exchange rate when calculating the price of fuel in Tanzanian shillings;
- Financing Costs;
- The removal of the 7.5% leeway above the allowable EWURA set price for fuel as an additional overhead;
- The Transit/Ocean Losses
- Demurrage Costs;
- OMC margins and overheads."

The OMCs, as argued by Ms Karume, contend that in making the review, EWURA contravened its duties and obligations under the Ewura Act by failing to:

(a) take into account the cost of supplying petroleum products in Tanzania Mainland;

(b) take into account the consumer and investor interests;

(c) take into account the return on assets invested by the Appellants;

(d) take into account relevant and international benchmarks for prices costs and return on asset in comparable industries to take into

account the financial implications of its determination;

(e) protect the financial viability of the Appellants;

(f) promote effective competition and economic efficiency.

It is also contended that in order to force the OMCs to comply with a Pricing Formula which was unlawful, on 9th August 2011 EWURA proceeded to issue Compliance Orders to the 1st, 2nd, 3rd and 4th Appellants in relation to the decision of the respondent given on 2nd August 2011 by Public Notice REF: PPR/08-1/11 as amended by Notice to take effect on 6 August 2011 by implementing a New Pricing Formula.

The OMCs' complaint is that in setting out the 2011 Pricing Formula and thereby regulating petroleum prices thereunder, EWURA failed to adhere to its duty to remain independent from political influence under section 7(4) of the EWURA Act read together with sections 5 and 8 of the EWURA Act. In addition EWURA failed to adhere to its obligations under sections 6 and 17(2) of the EWURA Act.

It is not disputed that in the year 2000, the downstream petroleum market in Tanzania was liberalized. This meant that OMCs were permitted to engage in the importation of petroleum fuel as well as selling petroleum fuel to consumers. There was

no price regulation of the market. In 2007 petroleum prices on the world market skyrocketed and reached USD 147 per barrel in July 2007. This had an adverse impact on the prices of petroleum fuel in Tanzania. As a result of the July 2007 surge in petroleum prices on the world market "there was much discussion on whether EWURA should undertake to "set" prices in this relatively competitive sub-sector" (See "Exhibit A2" paragraph 1.2).

In a report produced by EWURA in or about 2008 called "Economic Regulation in the Petroleum Downstream Sub-Sector in Tanzania", EWURA concluded that:

"

- Ideally, EWURA should not regulate prices. This would be contrary to both the National Energy Policy as well as the policy on competition and utility regulation. This specifically states that prices of goods and services will be set only where competition is unavailable – e.g. natural monopoly situations" "Exhibit A2" page 31;
- "Non-conclusive evidence has been adduced that there was a **coordinated** effort on the part of OMCs to set petroleum prices."

The process leading to the 2009 Formula began in mid-2008 when EWURA commenced consultations with the OMCs and other stakeholders.

On 21 June 2011, the Minister of Finance announced in Parliament that the government was taking steps to look into petroleum pricing by reviewing the following matters:

- Exchange control rates;
- Removal of the 7.5% buffer zone which OMCs were allowed for the purpose of "**kufidia baadhi ya gharama";**
- Decreasing financing charges;
- Decreasing transit/ocean Losses.

The respondent regulates a total of sixty eight Oil Marketing Companies (OMCs) who are licenced in the sector. When the challenged formula was published it is only thirteen of them who appealed against it. The rest continued with operations as usual. Again out of the 13, two of them, BP Tanzania Limited and Moil Tanzania Limited withdrew their respective appeals and continued with business using the same formula.

It is an evidence that subsequent to the formula announced on 2/08/2011 and amended on 6/08/2011, on 4th January 2012 the respondent issued another pricing formula under the Bulk Procurement System (BPS). It is not disputed that in this new pricing formula the rates objected to (exchange rate, financing

costs, ocean losses, removal of the 7.5% buffer, margins and overheads, 15 days demurrage) remained the same as in the formula complained about. Yet we have noted that no complaint or appeal was lodged against the BPS formula aforesaid.

Under sections 6 and 17 of the EWURA Act the respondent is empowered to regulate rates and to carry out regular reviews of rates and charges and it is lawful for the respondent as a regulator to determine price based rates on the basis of the best information available and other relevant benchmarks including international benchmarks for prices, costs of supplying the goods or services and the return on assets, financial implications of the determination, the consumer and investors interest and the desire to promote competition in the market as provided in sections 6 and 17(2) of the EWURA Act.

To begin with we would like to say, with respect, that Ms Karume's contention that in carrying out the review of the prices the respondent had acted under political pressure is not a ground of appeal and therefore the arguments on this point are misconceived and ought to be disregarded. However in the instant case while we have addressed the issue for reasons to be given herein we find no evidence to support the allegation of government pressure over the respondent's decision to review the pricing formula. Admittedly it is not disputed that the Minister for Finance had in June 2011 in a speech made before

parliament announced the government's intention to effect major changes in taxes charged on petroleum products including the lowering of excise duties and it is not disputed that shortly thereafter the respondent had initiated the process for reviewing the price template then existing. But this in itself, in our opinion, cannot establish on a balance of probabilities that the review was carried out upon the orders of the Minister for Finance in contravention of section 7(4) of the EWURA Act requiring the respondent to remain completely independent of government influence in discharging its regulatory function. Indeed AW1 did not in his testimony bring any evidence to prove that the Minister had in fact directed the respondent to lower the rates of the items in the pricing formula. The information quoted from the Minister's speech is neither binding nor in our view sufficient proof of a directive issued to EWURA especially considering the fact that the Minister for Finance is not the sector Minister for EWURA. Similarly the involvement of experts of the Ministry of Energy, the Ministry of Finance and TPDC in the technical team that prepared the matrix deliberated at the inquiry is not, in our view, sufficient evidence that the respondent acted under political influence. Even assuming that EWURA had initiated the review after hearing the Minister's views presented in parliament, the issue would be whether or not the respondent had acted without complying with the relevant statutory requirements, in particular sections 6, 17 and 19 of the Act, and this is the issue to

be addressed in this appeal in the context of the grounds of appeal.

As regards grounds 1, 2,3,4,5,6,7 and 8 no evidence was brought by the appellants to support their allegations, in particular there is no evidence to establish the appellants' costs for supplying petroleum products. In the present case it is not disputed that the inquiry process was initiated by a letter dated 4/07/2011 (Exhibit A6) addressed to the OMCs in which the respondent gave notice to the OMCs about its intention to conduct a review of the petroleum pricing template and the letter which was undisputedly received by the appellants which reads as follows:

> ***"RE: REVIEW OF THE PETROLEUM PRICING TEMPLATE***
>
> *Refer the captioned subject.*
>
> *The Energy and Water utilities Regulatory Authority (EWURA) Act CAP 414 of the Law of Tanzania empowers the authority to carry out regular reviews of rates and charges. In accordance with Rule 5(5) of the EWURA (Petroleum Products Price Setting Rules) GN no. 5 of 2009, the Authority may amend the petroleum pricing formula on its own motion or upon request by regulated suppliers.*

As a result of comments received from various stakeholders, the Authority has found that there is a need to review the current petroleum pricing formula. EWURA has prepared a discussion paper that is intended to spearhead discussions of stakeholders on the matter.

We have here with attached a discussion paper on the subject matter. Please go through the documents and make you may your written submission of comments to EWURA on or before the 9th July 2011. You are also invited to the meeting to deliberate on the new petroleum pricing formula and pricing rules that will be held on the 22nd July 2011 at Karimjee Hall from 10.00 am.

Yours Sincerely

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY

Signed

Haruna Masebu

DIRECTOR GENERAL"

This was followed by a letter dated 15/07/2011 (Exhibit A7) notifying the OMCs about a meeting to be held at Karimjee Hall

on 22/07/2011 as part of the review process. The letter aforesaid read as follows:

"Dear Sir,

RE: REVIEW OF PETROLEUM PRICING RULES AND FORMULA

Reference is made to our letter with Ref. No. EWURA/42/2/Vol.IV/147 dated 4th July 2011 regarding review of the petroleum pricing formula.

You will recall that on 4th July 2011, EWURA launched an Inquiry to seek stakeholders' comments on the Review of the Petroleum Pricing Formula. We wish to inform you that we have received many comments and we have consolidated the same in the form of analytical matrix (attached hereto) with respective recommendations. The authority lhereby circulates the matrix for your information and further comments and as part of preparation for a stakeholders' meeting scheduled on 22nd July 2011 at Karimjee Hall, starting at 10.30am.

Yours sincerely,

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY

Signed

Eng. Anastas P. Mbawala

For DIRECTOR GENERAL

Attachment: 1. Matrix of Comments

2. Draft of pricing formula".

At the public hearing conducted on 22/07/2011 the stakeholders' presented submissions on the proposed review and the matrix of analysis of the stakeholders' comments prepared by EWURA after receiving the stakeholders' comments on the discussion paper and the respondent's comments and recommendations thereon. Thereafter the stakeholders' comments and submissions received in the public inquiry were analysed by a technical team setup by the respondent after which the revised recommendations were tabled before the Board of Directors of the respondents for approval.

Accordingly regarding grounds 1 to 8 we are satisfied that in carrying out the review of the pricing formula the respondent did involve the stakeholders in the industry and in addition after seeking the comments of the stakeholders the respondent held a public inquiry as required under section 19(2) of the Act to which all the appellants were invited and further that the respondent

had taken into consideration the factors provided in sections 6 and 17(2) of the EWURA Act. Indeed under the provisions of section 6 of the EWURA Act other than protecting the financial viability of efficient suppliers it is the duty of the respondent in carrying out its functions and exercising its powers as a regulator to promote effective competition and economic efficiency and to protect the interests of consumers, to promote the availability of regulated services to all consumers including low income, rural and disadvantaged consumers and other objectives provided in section 6 aforesaid.

The matrix submitted in the inquiry shows that the recommendations for the proposed review had taken into consideration Platts quotations for freight and premium and the views and submissions of the service providers (MOCs) consumers and other stakeholders in the industry. It is undisputed that Platts is an internationally recognized provider or publisher of specialized information on energy and other commodities. It is a worldwide acceptable source of benchmark price assessments in the physical energy markets. It is not disputed that Platts has built an undisputable credibility on tracking and analyzing data on energy industry prices. In order to get information from Platts one has to subscribe and having so subscribed the person is supplied with the data from the Platts networks. EWURA is one of Platts subscribers and receives data on a daily basis.

The complaint about the respondent not having taken into account factors provided in section 17 has no merit. It is not disputed that the appellants were given adequate opportunity to be heard during the inquiry process. The process of the inquiry leading to the revised petroleum pricing formula clearly commenced with the issue of the letter dated 4/07/2011 notifying the stakeholders about the intended review of the pricing template and as stated earlier all the stakeholders including the appellants were notified and were almost fully represented at the inquiry. It is undisputed that the objective of the public inquiry was to give to the stakeholders the opportunity to avail their views/comments and recommendations to the respondent on the proposed review of the pricing formula and it is also undisputed that the appellants like other stakeholders were given a discussion paper inviting their comments on the proposed changes and that all the appellants were given the opportunity to present their views and recommendations and that in fact all the appellants did submit the comments on the new cap prices though the comments received were not uniform. The stakeholders' comments to this proposal varied as evidenced by the matrix of stakeholders' comments attached to the letter dated 15/07/2011 (exhibit A7). For example regarding the FOB price the current as of July 2011 for the FOB cost in the pricing formula was based on 14 days average of the Mean Platts quotations with an allowance of 14 sailing days to Tanzania. EWURA's initial

proposal for discussion was that the average low Platts quotations be used in determination of the FOB prices and the actual invoiced amount be used upon the commencement of the Bulk Procurement System (BPS). The stakeholders' comments clearly varied as shown by the relevant part of the matrix which is reproduced hereunder:

"STAKEHOLDERS' COMMENTS:

GAPCO:	*Apply average of 15 mean of Platts' quotes instead of 15 days.*
BP:	*EWURA should maintain the use of mean of Platts' quotations as Tanzania cannot separate itself from the rest of the world practice.*
TOTAL	*Mean of Platts' as practiced to be maintained*
ENGEN	*Recommends use of current mean of Platts'*
CCC	*They are in agreement with the use of average law Platts' quotations*
CAMEL	*Recommends that average mean of Platts' quotations be used".*

On freight the situation in July 2011 was estimated based on 14 days Platts quotations with an allowance of 14 sailing days to Dar es Salaam while EWURA's initial proposal for discussion was that the same methodology be maintained and actual invoiced figures

be used when the BPS commenced. The following were the stakeholders' comments:

"STAKEHOLDERS' COMMENTS:

GAPCO	*Recommends replacement of 15 days average with average of 15 quotes.*
TOTAL	*The current practice be maintained.*
ENGEN	*They are in agreement with EWURA's proposed position.*
CCC	*They are in agreement with the proposed method of assessing freight.*
CAMEL	*They are in agreement with the proposed method of assessing freight".*

The exchange rate in the pricing formula as at July 2011 was based on the average of the selling rates of 3 working days before the pricing week for three banks (NBC, Stanbic Bank and Standard Chartered Bank) while EWURA's initial proposal for discussion was that Bank of Tanzania average selling exchange rates be used. Again the stakeholders' views were varied as shown in the matrix the relevant part of which is herein reproduced:

"STAKEHOLDERS' COMMENTS:

GAPCO	*Existing system should be continued, with additional of CITI Bank*
BP	*The existing practice should be maintained*
TOTAL	*Recommends use of commercial banks exchange rates.*
ENGEN	*The existing practice should be maintained.*
CCC	*Supports the proposal to use BOT selling exchange rate.*
CAMEL	*Support the existing practice to be maintained".*

In the pricing formula in use as at July 2011 the OMCs were allowed to recover ocean loss at 0.3% CIF for diesel and kerosene and 0.5% CIF for petrol from the point of origin to the port of delivery. EWURA's initial proposal was that actual average loss levels for the year 2010 pricing formula be adopted and that this should cover all losses or gains. The stakeholders' comments are as follows:

"STAKEHOLDERS' COMMENTS:

GAPCO	*Recommends that the ocean loss be revised upwards.*

TOTAL *Recommends 0.5% of CIF to be charged to all products.*

ENGEN *The current threshold 0.5% of CIF be maintained.*

TPDC *The cost item should be abolished*

CCC *In agreement with EWURA's proposal.*

CAMEL *The existing practice be maintained".*

For demurrage costs the formula as at July 2011 allowed recovery of demurrage for a maximum of 3 days per vessel at a rate of USD 1.5/MT to pay for demurrage costs that are caused by factors which are beyond control. EWURA's initial proposal for discussion was that the current position be maintained until the commencement of BPS and thereafter the actual and justifiable demurrage costs be allowed in the pricing formula. The stakeholders' comments as shown in the matrix are as follows:

"STAKEHOLDERS' COMMENTS:

GAPCO *Recommends demurrage charge of USD 15/MT.*

BP *Recommends TZS 45.71 per litre to be provided in the pricing formula.*

TOTAL *Recommends a charge of USD 30/MT.*

ENGEN *Requests the adjustment, of demurrage charges (at the same rate) to reflect 45 days as an average waiting time.*

TPDC *Recommends BPS to be expedited.*

CCC *In agreement with existing practice of 3 days, but thereafter parties causing delays should be responsible for compensation.*

CAMEL *Recommends that the charges be reviewed upwards".*

The pricing formula as at July 2011 allowed the recovery of Tshs. 111.11 per litre to cover for the companies' overhead costs, operating costs and margins. EWURA's initial proposal said that the existing margin levels for OMCs be maintained pending a thorough study to determine the company margins. The stakeholders' comments were as follows:

"STAKEHOLDERS' COMMENTS:

GAPCO *Recommends revised margins of TZS 121.33 per litre.*

BP *Recommends an increase of up to TZS 125 per litre.*

TOTAL *Recommends an increase of up to TZS 125/litre.*

CCC *Supports ERURA's proposal and recommends consolidation of two margins to be "business margin".*

ENGEN *Agrees with EWURA's proposal.*

TPDC *Recommends that the margin be reviewed downward.*

CAMEL *Recommends that this margin should be charged in USD".*

In the pricing formula existing as at July 2011 the companies were allowed to recover 0.25% of CIF for opening of LC and 1.5% of CIF to cover for financing costs totaling 1.75%. EWURA proposed only 0.25% to cover for the opening of LC. The stakeholders' comments are as follows:

"STAKEHOLDERS' COMMENTS:

GAPCO *Recommends that the existing financing cost be revised upwards to 2%.*

BP *Recommends 2.22% of CIF cost to be included in the pricing formula.*

TOTAL *Proposes a review of financing cost to 1.85%.*

ENGEN *Recommends that the current practice be stayed.*

CCC *Recommends that a rate of 0.25% be charged".*

Going by the undisputed evidence we are satisfied that the appellants were afforded adequate opportunity to be heard during the whole inquiry process and indeed their objections to the cap prices effective 3/08/2011 were taken into account resulting in the amended notice of the cap prices effective 6/08/2011. In the premises we find that the respondent had properly exercised its powers as a regulator when setting the new pricing formula in relation to petroleum fuel sold by the appellants.

Moreover the appellants have not shown by figures what the financial implications of the new formula are. The argument about financial viability is vague, misleading and misconceived since the appellants have not shown how the respondent could have taken this into account and we fail to see how EWURA can consider the viability of the investors without taking into account the consumer interests and the country's economic efficiency (see section 6 of the Act). The appellants ought to have brought evidence to prove how they were adversely affected by the new formula in spite of being efficient to the extent that their financial viability would be adversely affected. There is no evidence at all to substantiate loss suffered/incurred by the appellants as a result of the new pricing formula. Indeed it is evident that the majority of OMCs continued doing business and supplying petroleum products. Since the cap prices cover the whole industry we cannot agree with the appellants' contention that the new prices adversely affected competition. As is evident in the

pricing template, since the respondent only set the cap prices, there is room for price variation and competition in the industry. Needless to say if there was differential pricing formula(s) to different players in the industry, that could perhaps lead to unfair competition but in the instant case the cap prices covered the whole industry. The regulator sets the cap prices and the suppliers are at liberty to sell at any price favourable to them so long as it is not above the cap price. As a matter of fact the suppliers sell at the cap prices in order to maximize prices. They are not forced to do so. Indeed they are free to sell at lower prices or different prices in order to be more competitive.

We also find that there is no evidence to establish on a balance of probabilities how the appellants' investment levels suffered, the costs incurred and/or what the return of investments should be and/or besides Platts what other international or local benchmarks there are. It is our finding that there is no evidence of any prejudice to/or loss suffered or likely to be suffered by the appellants as a result of the new pricing formula or to show that the appellants were adversely affected by the reduction of the rates or removal of the margins to the extent that the return of investment was not adequately covered or to justify the appellants' claim for demurrage of 40 days since no evidence was brought to prove how much demurrage costs were incurred by each appellant in a given time and the reasons for the aforesaid demurrage costs.

We are satisfied that in arriving at the new pricing formula the respondent had considered all the factors including the consumer and investor interest, the costs of supplying petroleum products and the relevant benchmarks including Platts quotations as well as other factors provided in sections 6 and 17 of the Act. The fact that the cap prices are different in different locations is in our view a clear indicator that the regulator had taken into account both consumer and investor interests. Needless to say a return on investment is a long term process and it does not accrue within a short time. The very fact that a margin was set in the formula is an indicator that the issue of return on assets was considered. Whether or not it was adequate is a question of evidence which, as stated earlier, is not before us. That evidence was not provided by the appellants. Again we are not told which are the comparable industries or what are the other relevant international benchmarks which ought to have been taken into account apart from Platts which is the undisputed benchmark generally used in setting prices for petroleum products worldwide.

Indeed in the instant case the regulator has given the OMCs sufficient opportunity to give their views on the proposed review of the cap prices (formula) and in arriving in its decision it had to balance the interests of OMCs with that of all the rest of the stakeholders including the consumers as well as the interests of the government such as the promotion of economic efficiency, the protection of interests of consumers and efficient suppliers

and the promotion of the availability of regulated services to all consumers, *inter alia*, (see s.6 of the Act). The fact that the appellants are not in favour of the reviewed formula does not mean that the respondent acted without taking into account the appellants' interests. Indeed a regulator is not required and in fact cannot in practice when discharging its duties as a regulator please all the stakeholders in a given industry. All the regulator has to do is to comply with the law and procedures and balance the interests/concerns of the various stakeholders in the industry. In the present case it is our considered view that the respondent had in reviewing the pricing formula complied with the law and procedures.

In the circumstances, for the above reasons, we are satisfied that the respondent cannot be faulted for issuing the compliance orders complained about in terms of the provisions of section 39 of the EWURA Act since it is undisputed that the four appellants had refused to comply with EWURA's decision and to sell/supply petroleum products at the new cap prices set by the respondent/regulator. Grounds 8 and 9, therefore, have no merit.

In the event, the appeal being devoid of any merit is hereby dismissed in its entirety with costs.

Signed

Razia Sheikh – Chairman/Judge

Signed

Dr. M.M.P Bundara – Member

Signed

Mr. Ali K. Juma – Member

24/09/2012

Judgement delivered this 24th day of September, 2012 in the presence of Ms Madina Chenge, Advocate for the Appellants, Mr. Galeba, Advocate for the Respondent and Beda Kyanyari Tribunal Clerk.

Signed

Razia Sheikh – Chairman/Judge

Signed

Dr. M.M.P Bundara – Member

Signed

Mr. Ali K. Juma – Member

24/09/2012