



Energy Regulators Regional Association



ECOWAS (Economic Community of West African States) Regional Electricity Regulatory Authority

# **Proposed Administrative Procedures for Regulation for ERERA**

Prepared by:

**William H. Smith Jr.**

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within the framework of ERRA Ad-Hoc  
Consultancy Project

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*As discussed with ERERA on May 2-4, 2016*

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## **PROPOSED ADMINISTRATIVE PROCEDURES FOR REGULATION (APR) FOR ERERA**

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**May, 2016**

In the frame of its 2015/16 Annual Workplan, the Energy Regulators Regional Association has offered small-scale ad hoc consultancy and ad hoc topical research projects to its member organizations funded entirely from ERRA's annual budget. The aim of the projects was to tackle one particular or specific regulatory issue of the member organization with the assistance of consultants preferably from the registered Pool of ERRA experts.

The ECOWAS Regional Electricity Regulatory Authority (ERERA) submitted an application in order to receive support in developing their Administrative Procedures for Regulation (APR). The purpose of APR is to formalize the process by which ERERA develops and issues regulations and other rule making processes and to address other actions of ERERA such as issuance of licenses, permit, approval notices and procedures for Public Hearings and Dispute settlement. The objective of the current consultancy project is to support ERERA with technical assistance/ expertise for adapting international best practices of APR to the specific case of ERERA.

From the proposals ERRA has received for the consultancy project, a US-based consultant, William H. Smith, Jr. was appointed to provide professional advice to ERERA. Mr. Smith has relevant experience in drafting and advising on the rules of several regulatory authorities of the US but he has also worked on international projects in Africa and Asia during his 40 years of experience in the field of energy regulation.

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## **1. Applicability**

- 1.1. These Administrative Procedures for Regulation (APR) shall govern all proceedings before the ECOWAS Regional Electricity Regulatory Authority (ERERA) in exercising its duties as regional regulator of cross-border trade of electricity in West Africa, in accordance with Regulation C/REG.27/12/07 of 15 December 2007, as amended by Regulation C/REG.24/11/08 of 29 November 2008.
- 1.2. In any proceeding, ERERA may issue directions on procedure to supplement the APR which will govern the conduct of that proceeding.
- 1.3. The following are examples of matters to be governed by the APR:
  - Applications for approval as market participant
  - Applications for the approval of general tariff changes or tariff adjustments
  - Applications for approval of new or amended tariff categories
  - Applications for reconsideration of ERERA Decisions
  - Complaints by market participants against other market participants or system-market operator
  - Periodic filing of regulatory reports
  - Motions for extension of deadlines regarding consultations, reconsideration, responses, etc.
  - Treatment of confidential information
  - Treatment of correspondence
  - Reporting of market information

## **2. Description and Operation of ERERA**

- 2.1. ERERA is the regional electricity regulator for the Economic Community of West African States (ECOWAS) region, authorized to act under Regulation C/REG.27/12/07 of 15 December 2007, as amended by Regulation C/REG.24/11/08 of 29 November 2008, which presents the missions, powers and functions of ERERA.
- 2.2. ERERA's decisions are made by its Regulatory Council. ERERA may delegate the conduct of individual proceedings to a Hearing Officer or a Rulemaking Officer.
- 2.3. ERERA prefers electronic communications, addressed to [info@erera.arrec.org](mailto:info@erera.arrec.org). Acceptable software formats are listed on the ERERA website.
- 2.4. ERERA's offices are located at the Energy Commission Building, Ghana Airways Avenue, Behind Alliance Française, Airport Residential Area, Accra, Ghana.
- 2.5. Postal address: PMB 76 Ministries Post Office, Accra, Ghana.

- 2.2. Website [www.erera.arrec.org](http://www.erera.arrec.org).
- 2.3. Telephone: Phone: +233 (0)302 817 047 – 049.
- 2.4. Fax: +233 (0)302 817 050.
- 2.5. All communications to EREERA that require regulatory action or that relate to a docket must be addressed to EREERA. Questions related to the application of these rules may be directed to [info@erera.arrec.org](mailto:info@erera.arrec.org).
- 2.6. EREERA's office is open to the public from Monday to Friday between the hours of 8:30 and 16:30 GMT except Public Holidays in Ghana. For the purpose of filing official documents and receipt of correspondence, business hours are from 9:00 to 15:30, Monday to Friday except Public Holidays in Ghana.
- 2.7. By policy, EREERA treats its records as public information. Access to its records will be granted except in cases of confidentiality, market-sensitive information, and personal privacy as more fully described in section 10.3.
- 2.8. EREERA shall maintain a docket system for every proceeding before EREERA, which may include electronic or physical documents. The docket shall be a public record that may be inspected in electronic form on EREERA's website and is available for inspection during business hours or may be obtained via facsimile. Charges for facsimile or hard copies will apply where applicable.
- 2.9. EREERA will communicate with the public through notices posted to its official website, [www.erera.arrec.org](http://www.erera.arrec.org), or by notices directed to the affected parties.
- 2.10. EREERA has all the powers granted by EREERA's Act and Regulations in respect of the attendance and examination of witnesses, the amendment of proceedings, the production and inspection of documents, the enforcements of its Orders and all other matters necessary or proper for the due exercise of its powers.
- 2.11. EREERA receives documents in any of the three official languages of ECOWAS. EREERA will designate one of the official languages for an Oral Hearing and will arrange for simultaneous interpretation of hearings upon reasonable prior request.

### **3. Reference to the Administrative Procedures for Regulation**

- 3.1. These administrative procedures may be cited as the APR.

### **4. Definitions**

- 4.1. In the APR:

□ ***“Advisory Opinion”*** means an order issued by EREERA which conclusively declares the pre-existing rights of contending parties without any coercive

decree. A formal statement intended to create, preserve, assert or testify to a right;

- **"Applicant"** means a party who has filed an application with ERETA under ERETA's Act and Regulations;
- **"Application"** means a written request to ERETA to exercise its power in respect of matters referred to in the application;
- **"Complaint"** means a written request to ERETA to exercise its statutory power in respect of matters referred to in the complaint;
- **"Complainant"** means any person who files a complaint with ERETA;
- **"Decision"** means a definitive opinion, conclusion, or determination of ERETA in a matter;
- **"Docket"** means a file containing all documents, materials and correspondence pertaining to a particular proceeding;
- **"Electronic Hearing"** means a hearing held by conference telephone, video conference, or some other form of electronic technology allowing persons to communicate with one another;
- **"ERETA's Act and Regulations"** means:
  - a) The ECOWAS Supplementary Act A/SA.2/1/08 of 18 January 2008 establishing ERETA;
  - b) The Regulation C/REG.27.12/07 of 15 December 2007, as amended by Regulation C/REG.24/11/08, on the composition, organisation, functions and operations of ERETA;
  - c) Any other regulations of ECOWAS and ERETA in application of the aforementioned Act.
- **"Exhibit"** means any material put in evidence to support a particular assertion;
- **"Hearing"** means a proceeding before ERETA wherein a party or parties provide submissions to ERETA which submissions may, in ERETA's discretion, be preceded by the provision of information and/or evidence to ERETA, and includes an Electronic Hearing, an Oral Hearing and a Written Hearing;
- **"Hearing Officer"** ERETA may appoint a Hearing Officer to conduct a hearing. The Hearing Officer shall be part of the staff or the Regulatory Council of ERETA,
- **"Information Request"** means any request made in writing by a party for information or particulars directed to a party in a proceeding;
- **"Intervener"** means a party other than the applicant who has formally requested and been granted the status of party to a proceeding and who intends to participate in the production and testing of evidence. Regulators of ECOWAS member states may participate in any proceeding;

- **"Market participant"** means any buyer or seller of electricity, generating capacity, or electric energy in wholesale markets regulated by ERECA in the ECOWAS region;
- **"Motion"** means an application for an order made in writing to ERECA or orally in a hearing;
- **"Order"** means a direction, command, or judgment of ERECA in a docket;
- **"Oral Hearing"** means a hearing at which the parties or their representatives attend before ERECA in person;
- **"Party"** means either an applicant, a respondent to a complaint, or an intervener;
- **"Person"** means any individual, partnership, corporation, association, governmental body, public or private organization;
- **"Presenter"** means any person who makes an unsworn or unaffirmed statement concerning an application to ERECA in respect of a proceeding;
- **"Pre-Hearing Conference"** means a meeting, which may be held before a Hearing, to set a timetable for the Proceeding, to finalize what matters may be discussed and to identify Intervenors;
- **"Proceeding"** means a process to decide a matter brought before ERECA, including a matter commenced by rulemaking, by application, or by complaint; [OR **"Proceeding"** means any matter that is before ERECA for a decision and for which a docket has been opened];
- **"Rulemaking Officer"** ERECA may appoint a Rulemaking Officer to manage the rulemaking proceeding. The Rulemaking Officer shall be part of the staff or the Regulatory Council of ERECA;
- **"Tariff"** means any publication containing rates, charges, rules, regulations, conditions, specifications or requirements relating in any way to the provision or movement of electricity in the regional electricity market;
- **"Written Hearing"** means a Hearing in which the proceeding before ERECA conducted entirely in writing.

## 5. Filings and Service

- 5.1. Filings must state the name of the applicant and provide a brief summary of the action requested.
- 5.2. Filings with ERECA should be made electronically to the Chairman of ERECA at [info@erera.arrec.org](mailto:info@erera.arrec.org).
- 5.3. Filings are deemed made on the date they are sent electronically if sent before 15:30 GMT. If sent later than 15:30, the filing is deemed made the following day.

- 5.4. Filings made on a day the EREERA office is not open to receive filings electronically, by reason of weather, emergency, or technical difficulties, are deemed timely made on the following business day.
- 5.5. Filings due on a day EREERA's office is not open for business or its website is not available to make filings, are due the following business day.
- 5.6. EREERA will promptly post filings to its website.
- 5.7. EREERA will maintain a service list of all parties to each docket.
- 5.8. The filing party must make service of a filing on all other parties in the docket if the matter is an application or a complaint docket. Service is not required in a rulemaking docket. Service should be made electronically to the electronic addresses on the service list. Any document required to be served on a party under these Rules may be served on the party's representative.
- 5.9. Notices issued by EREERA will be served by posting on the EREERA website and sent to parties by electronic means.
- 5.10. Parties unable to receive electronic service of documents should make arrangements with EREERA for alternate service by postal, fax, courier or other means.

## **6. Rulemaking and Public Consultation Initiated by EREERA**

- 6.1. Before issuing a proposed or final substantive rule, EREERA shall offer an opportunity for public comment and may consult with the parties most likely to be affected by the rule.
- 6.2. EREERA may begin formal consultation utilizing consultative documents such as a staff paper, a white paper, or a policy statement.
- 6.3. EREERA may initiate a Notice of Inquiry (NOI) for the purpose of gathering information about a subject matter or as a means of generating ideas on a specific issue. NOIs are initiated either by EREERA on its own initiative or after consideration of a third party request. An NOI may lead to a NPRM.
- 6.4. EREERA may issue a Notice of Proposed Rulemaking (NPRM) that contains proposed changes to EREERA's rules or that sets out EREERA's indicative position on a particular subject matter, and request public comment on the proposals contained therein.
- 6.5. The Regulatory Council will appoint a staff expert to serve as Rulemaking Officer to manage the rulemaking proceeding. The Rulemaking Officer will consult with and receive comments from EREERA's consultative committees and other stakeholders. After consultation, the Rulemaking Officer will make a recommendation to the Regulatory Council.

- 6.6. An NOI or a NPRM will state a date for submission of written comments, typically two to six weeks after issuance. It may also provide for a second round of comments, and state a date for their submission.
- 6.7. The Rulemaking Officer and the designated consultative committees may receive oral comments in addition to written comments.

## **7. Proceedings Initiated by Application or Complaint**

- 7.1. Any regulated entity may request ERECA to act or approve a proposal through an application.
- 7.2. Any person may request ERECA to make a finding that a regulated entity has committed a breach of regional electricity market regulation through a complaint. A complaint may seek specific damages or future relief resulting from the breach. The question of breach of regulation will be treated under the Enforcement Rules, Annex A hereto. The complaint for damages will be treated under the Dispute Settlement Rules, Annex B hereto.
- 7.3. Applications and complaints should clearly set forth the facts relied upon and the relief sought, the statutory authority, tariff provision, or regulation (if any) under which the request is filed and the interest of the person submitting the request.
- 7.4. A market participant claiming that market rules or a tariff provision is inefficient, uneconomic, unfair, or discriminatory, may file a complaint against the sponsor of the tariff. If ERECA so finds, it may prescribe remedial provisions.
- 7.5. ERECA will give notice of an application by posting on its website.
- 7.6. ERECA will give notice of a complaint by posting on its website and by directly notifying the concerned parties and national regulators.
- 7.7. The notice of application or complaint will state a date for responses or interventions.
- 7.8. Any person may file a response to the application or complaint, and may request to become an intervenor. A motion to intervene shall state the person's interest in the matter.
- 7.9. ERECA may recommend or order that intervenors with similar interests present a joint intervention.
- 7.10. Any party may be represented before ERECA by any representative it may designate.
- 7.11. If no material fact is in dispute, ERECA may rule on the application or the complaint without further proceedings.

7.12. If ERERA concludes that further proceedings are necessary to resolve an application or a complaint, it may set the matter for hearing or refer the matter for conciliation or arbitration following the Dispute Settlement Rules, Annex B hereto.

## **8. Hearing Process**

- 8.1. ERERA may designate a Hearing Officer to conduct further proceedings.
- 8.2. The hearing officer may hold a pre-hearing or technical conference with the parties. The conference may define issues to be resolved, schedule dates for filing testimony, dates for hearings, dates for written arguments, and other procedural matters.
- 8.3. Direct testimony should be filed in writing prior to the hearing.
- 8.4. Parties may submit information requests to other parties for the purpose of a satisfactory understanding of the matters to be considered in hearing.
- 8.5. Information requests shall be identified by the inquiring party's designated initials. They shall be:
  - a) addressed to the party from whom the response is sought;
  - b) numbered consecutively in respect of each item of information requested;
  - c) relevant to the proceeding; and
  - d) served within the time limit determined in the pre-hearing conference.
- 8.6. A copy of any information request directed to a party pursuant to 8.5 shall be filed with ERERA and served on all parties to the proceeding.
- 8.7. Responses to Information Requests shall:
  - a) provide a full and adequate response to each information request by electronic means; and
  - b) be filed with ERERA and be served on all parties to the proceeding.
- 8.8. Objections to information requests or disputes with respect to the adequacy of a response to an information request will be resolved by the hearing officer.
- 8.9. Besides information requests, parties may by motion request the hearing officer to allow deposition of witnesses, production of documents, interrogatories, or requests for admissions.
- 8.10. Testimony shall be under oath.
- 8.11. The hearing officer may admit or dismiss intervenors, administer oaths to witnesses, rule on admissibility of testimony, schedule witnesses and arguments, accept stipulations of evidence, determine if written argument will be received, and otherwise manage the hearing procedure.

- 8.12 The hearing officer shall determine when the hearing has been completed, close the record, [provide for any late-filed exhibits], and shall prepare a written proposed decision which shall be recommended to ERETA for final decision.
- 8.12. If the parties reach a settlement during the pendency of a hearing, the hearing officer shall certify the settlement to ERETA, indicating whether it comports with ERETA policy and legal requirements, and whether it is a complete or partial settlement of the matters being heard in the docket.

## **9. ERETA Decisions**

- 9.1. The Regulatory Council shall promptly consider reports and recommendations from rulemakings and hearings. Cases may be decided by a majority vote of participating members.
- 9.2. ERETA may reconsider a decision upon the request of a party or on its own motion. If reconsideration is requested, the request must be served on every party. Responses may be filed within 10 working days.
- 9.3. A party dissatisfied with a decision by the ERETA Regulatory Council may appeal before the ECOWAS Court of Justice in accordance with ERETA's Act and Regulations.

## **10. Confidential Information**

- 10.1. All information submitted to ERETA shall be placed in the public record unless the party marks such information as confidential and asserts a claim of confidentiality at the time of filing.
- 10.2. Any material submitted by a person that it claims is confidential or proprietary, shall be filed and identified in accordance with these rules.
- 10.3. A claim of confidentiality must be supported by reasons why the material should be accorded confidential treatment. Such reasons include:
- a) The information is protected by ERETA's Act and Regulations;
  - b) The information is market-sensitive and its disclosure could reasonably be expected to result in undue financial loss or gain to a person directly or indirectly affected by the proceeding, or could harm significantly a person's competitive position.
  - c) The information is personal, financial, commercial, scientific or technical in nature;
  - d) The information involves critical infrastructure;
  - e) The information has been consistently treated as confidential by a person directly affected by the proceeding.

- 10.4. ERERA will treat such information as confidential and maintain the information in a secure manner.
- 10.5. ERERA may allow limited access to confidential information as required for fairness in the hearing process. Such access may be by disclosure of an abridged version of the information or by conducting a portion of the hearing in non-public session or by access subject to a non-disclosure agreement.
- 10.6. A party may challenge the confidential treatment and move ERERA to find that the claim of confidentiality does not outweigh the public interest in the disclosure of the information.
- 10.7. If ERERA finds that confidential treatment of the information is not warranted, it shall not release the information for 15 working days to allow the party claiming confidentiality to assert to the ECOWAS Court of Justice its claim for judicial protection of the information.