

**TOPIC: A CRITICAL EVALUATION OF THE
REGULATED ELECTRICITY PRACTICES
IN NIGERIA.**

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SESSION: 2015/2016

**BEING AN ORIGINAL RESEARCH WORK IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE
AWARD OF MASTERS OF LAW (LLM).**

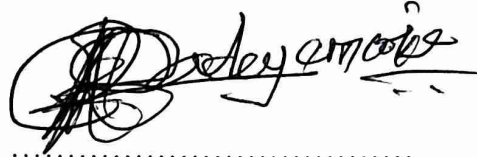
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CERTIFICATION

THIS is to certify that this research work on “a Critical Evaluation of the Regulated Electricity Practices in Nigeria,” is an Original Research work carried out by Chimezie JaobsPaschal Ogugbara with Candidate Number 149061066 of the Faculty of Law, Lagos State University, Akoka, Lagos State, under the supervision of Dr. Yemi Oke, in Partial fulfillment of the requirements for the grant of LLM degree 2015/2016.

A handwritten signature in black ink, appearing to read 'Dr. Yemi Oke', with a large, stylized initial 'D' on the left. The signature is written over a dotted line.

ASSOCIATE PROFESSOR YEMI OKE
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DEDICATION

This piece of research is dedicated to God Almighty for seeing me through the LL.M Program. And to my Beautiful and amiable wife; Promise Chisomaga Ogugbara, who by this period in 2011 was acknowledged in my LL.B Research Project as my inimitable girl friend, Promise Chisomaga Okere. I also dedicate this work to my Son Kamsiyochukwu Noah Dike and my children yet to come by Grace of GOD.

ACKNOWLEDGMENT

It is wisdom that the most important place for anybody to prosper is in his spiritual life. I acknowledge my Spiritual Father and mentor; Senior Prophet T.B. Joshua. It is him who taught me that as a student, “you must work as if it all depends on you and pray as if it all depends on God.” This principle has led me and saw me through this program.

I also acknowledge my Boss and Supervisor; Associate Professor Yemi Oke, for his awesome contribution in this field of study. His maiden text; *History of Electricity Governance in Nigeria: Nigerian Electricity Law and Regulation Law Lords Publications, 2013* is second to none in this sector.

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ABSTRACT

Electricity practice by nature brings entities; corporate and natural, together for a defined purposes. Electricity practice is different and unique. It undergoes series of levels before getting to the final consumers. The generation stage is different from transmission while distribution is different from the rest. This brings quite diverse areas into a spot called the Electricity Market. By this, contractual relationships are created. These relationships are subject to Rules which spell out rights, duties, obligations and liabilities as they apply to participants or contracting parties. Some of these rules may be the customs and traditions of the sector which were codified in the form of statutes and laws; others are indices of precepts which the practice allows while many others are drawn out by the participants themselves for their unique purposes. For instance, in the course of the market power, the rights of market participants are infringed, duties are breached, promises are broken and liabilities are incurred. For continued relationships therefore, compensations, recompense, remedies and reliefs must be meted out. Punitive exercises must be put in place to deter future occurrences. Apart from the above, investments and investors must necessarily be protected and assurances of profits must be guaranteed. All these are inevitable for a successful Electricity business in a promising environment like Nigeria. The above platforms therefore make the presence of Lawyers in the Regulation of electricity business and practice indispensable. Indeed, all about Sustainable Electricity has more to do with Lawyering than Engineering. This is why the candidate in this work; **“a Critical evaluation of the Regulated Electricity practices in Nigeria,”** has in the Chapters One to Five, synchronized, harmonized, and indeed evaluated the synergistic effect of these regulated relationships in achieving a sustainable electricity development particularly, as they apply fully to the Nigerian Jurisdiction.

CHAPTER ONE

HISTORICAL DEVELOPMENT OF ELECTRICITY REGULATION AND GOVERNANCE IN NIGERIA

1.1. Introduction

Electricity Regulation is primarily designed to address the practices and administration of the electricity markets, governance, activities in delivering and supplying the desired quantity and quality of electricity for economic, social or environmental advancement. The global explosions in technology and energy economic settings have made electricity one of the basic necessities of life. Every facets of human existence has become energy dependent. Thus there is a high correlation in increased supply of stable electricity and enhanced national productivity and economic development.¹

Considering the huge role electricity has to play in the economic and social wellbeing of the populace, and to achieve harmony, it becomes necessary to emphatically regulate this all embracing sector through mechanized legal regimes. Legal regimes therefore, imply the sets of historical interventions through the means of legislations and other tested proactive legal measures to ensure maximum compliance to the regulatory policies among the participating stakeholders.

1.2. Historical Legal Regimes of Electricity Regulation

1.2.1. The Colonial and Post Colonial Regimes

Owing to the history of the Nigerian State and the influence of the English people on her developmental process, it has therefore become a notorious fact that the Nigerian Legal system is partially if not completely comprised of the English laws which were voluntarily received and incorporated into the Nigerian Legal system. For instance, the received land law consists of the English case law establishing the common law of England and the

¹ See Yemi Oke, *Nigerian Electricity Law and Regulation*, (Law Lords Publications, 2013) at 1

doctrines of equity. It also includes all the Statutes of general application in England on January 1, 1900.²

By the authority of Section 274(1) of the 1979 Constitution now Section 315(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended, all existing laws shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution and shall be deemed to be Acts of the National Assembly or Laws of the Houses of Assembly depending on the legislative list in which such law falls on. This position has also been accepted by the Courts in Nigeria through plethora of cases. Thus in *Ude v Nwara*,³ the Supreme Court held that “where a local legislation does not go far enough on an issue, any gap that ought to be filled up should be from applicable English law.”⁴ Also in *Ibidapo v Lufthansa Airlines*,⁵ the Supreme Court held thus:

So from 1960 to date, all the received English Laws, multilateral and bilateral agreements concluded and extended to Nigeria, unless expressly repealed or declared invalid by a court of law or tribunal established by law, remain in force subject to the provisions of Section 274(1) of the 1979 Constitution.⁶

This therefore means that all applicable English laws that apply to the Nigerian Legal System will have similar applicability as far as they related to Electricity regulation in Nigeria. For the purpose of this discuss, rules of common law and principles of equity shall have limited or no contribution, since emphatic and critical attention will be focused more on the Statute of General Application in force before 1st January, 1900. If the argument that “the history of electricity in Nigeria dates back to 1896 under the colonial rule, when electricity was first produced in Ijora, Lagos by the British Colonial Government,⁷ it therefore accommodates the corresponding argument that before the enactment of Royal

² I.O. Smith, Practical Approach to Law of Real Property in Nigeria, (2nd Edition) (Ecowatch Publications Limited, 2007) at 6

³ (1993) 2 SCNJ 47

⁴ Ibid at 51

⁵ (1997) 4 NWLR (Pt. 498) 124

⁶ Ibid at 130 Wali JSC

⁷ Niger Power Review, “Development of Electricity Industry in Nigeria (1960-1985)” in Yemi Oke, Nigerian Electricity Law and Regulation, (Law Lords Publications, 2013) at 2.

Ordinances in the colony of Nigeria, all applicable Electricity laws in England applied to the regulation of the electricity produced in Nigeria. On this note, three of the numerous English Statutes enacted before 1st January, 1900 would be examined as they concern the subject matter. They are: the Electric (Supply) Act, also known as the Electric Lighting Act, 1882; the Electric Lighting Act, 1888 enacted on 28th June, 1888 and the Electric Lighting (Clauses) Act, 1899 enacted on 9th August, 1899.

The Electric (Supply) Act, also known as the Electric Lighting Act, 1882 under sections 2, 3, 4, 5, and 6, enabled such local authorities, companies or persons who obtained licenses or provisional orders from the Board of Trade or Special Acts, to generate and supply electricity for public or private purposes within defined areas. The function of supervising the exercise of the powers of the undertakers was conferred upon the Board of Trade. By sections 12, 13 and 14 of the Act, the Undertakers were given powers to execute works including power to lay cables in the public streets, but they could not break up private streets, railways and tramways without the consent of the owners, or of the Board of Trade. They were also restricted with respect to above ground works. Also under section 19 and 20 (repealed) the Undertakers were placed under an obligation to supply electricity without preference and were to be subject to limitations as to charges. Provisions were also made for the keeping of accounts and for the recovery of charges. The local authority undertakers were given special borrowing powers. The Act recognized the Board of Trade as the regulatory body. It would be noted that the Undertakers are the licensed electricity suppliers and distributors by the regulatory body.

The second Act is the Electric Lighting Act, 1888 of 28th June, 1888. This Act repealed the Electric Lighting Act, 1882. Principally, this Act establishes that where in any case, any electric line or other work may have been laid down or erected in, over, along, across or under any street for the purpose of supplying electricity, or may have been laid down or erected in any other position for such purpose in such a manner as not to be entirely enclosed within any building or buildings, or where any electric line or work so laid down or erected may be used for such purpose otherwise than under and subject to the provisions of a licence, order, or special Act, the Board of Trade, if they think fit may by notice in writing under the hand of one of the secretaries or assistant secretaries of the

Board of Trade, to be served upon the body or person owning or using or entitled to use such electric line or work, require that such electric line or work shall be continued and used for the protection of the public safety, and works of the PostMaster-General. Also upon such complaint being filed, the court making the order for penalty shall have power to order the removal of any line or work specified in such notice by such person upon such terms as he may deem fit. Under this circumstance, if anybody or person fails to comply with the requirements of any notice which may be served upon them or him under this section, such body or person shall be liable for a penalty not exceeding twenty pounds.⁸

Thirdly the Electric Lighting (Clauses) Act, 1899 of 9th August, 1899, introduced some fundamental reforms. It provides for the areas of which the undertakers can supply and prohibits the supply of some areas. Thus under this, it was clearly stated that the supply shall be to Central Authority, the whole of Great Britain except the North Scotland District. The Act also empowers local Authority to purchase lands and apply money for certain purposes. Furthermore, on the part of the Consumers, the Act guarantees the maximum power with which any consumer shall be entitled to be supplied and shall not exceed what shall be reasonably anticipated as the maximum consumption for his premises and to supply to every consumer such amount of power which he has applied for or paid for. There is also provision as to the penalty against the undertakers who make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this schedule. It further provided for the penalty against any person who fraudulently, willfully or negligently alters or damages or injures the meters, pipes or any such property belonging to the Undertakers. This therefore empowers the undertakers to recover any rent, sum or due which they are entitled and being withheld by any person. Undertakers were also held liable for damages, accidents, defaults, injuries caused by them or their employees against any person or victim.⁹

Although it is not certain that the governance and regulation of electricity in Nigeria as at 1896 was in the exclusive control of the Colonial rule, the absence of any legal instrument

⁸ See *Halsbury's Statutes of England*, 2nd ed., vol. 8, pp. 835-850

It is important to note that under this Act, there are provisions for the appointment of Electric Inspectors by the Minister of Fuel and Power and whose major job was to test the electric lines of undertakers periodically. The undertakers are to pay for the expenses of the Inspectors.

⁹ *Ibid* pp. 851-885.

for regulation of the electricity within this period suggests an argument that the aforelisted English Statutes applied in Nigeria. In addition, the COLONIAL REPORTS-ANNUAL, of February, 1926, has indicated the possibility of a Colonial Control of Electricity Supply prior 1900 through the Public Works Department. Thus the following reports as contained in the H.M.M. MOORE report of 22nd February, 1926 which provides as follows shows the control, management and regulation of electricity in the colony of Nigeria. Paragraph 124 of the report states that: **“the lights of the coast, including the coast of the British Cameroons, have been well maintained.”** Also in paragraph 140 of the report, the number of consumers served by the Lagos electric light and power undertaking shows a gratifying increase and the Electrical Department can hardly cope with demands for connections.¹⁰

The above report shows extensively how electricity business and governance was coordinated effectively in Nigeria by the colonial administrators.

1.2.2. Pre and Post Independence Statutory Regimes.

The presence of the Company Ordinance of 1917, Township Ordinance, 1917 and other similar legislations made it a necessity for a regulated electrification for the colony of Nigeria to be in place. The first indigenous legislation in the history of regulated regime of Electricity in Nigeria was enacted as the Electricity Supply Ordinance, No. 62 of 8th November, 1917.¹¹ This piece of legislation was short-lived as it was replaced by the Lights, Buoys and Beacons (colony) Ordinance No. 64 of 1917.

The third Legislation was the Electricity Ordinance Act which was enacted on 17th October, 1929 as an Ordinance for the Colony of Nigeria. It created the first indigenous Regulatory body in the Electricity Sector; the Nigerian Electricity Supply Company (NESCO). The NESCO commenced operations in 1929, pursuant to the Electricity Ordinance Act of 1929.¹² Its regulatory function aptly was captured in the Long title to the Ordinance Act thus; “An Act to provide for the regulation and control of electrical

10 See the Colonial Annual Reports No. 1315, of 22nd February, 1926, prepared by H.M.M. MOORE, Principal Assistant Secretary, Lagos, particularly in Paragraphs 124 and 140.

11 Ordinances 1917; Lagos (Government Printer, 1918).

12 Supra note 1 at 3

installations and of the generation, supply and use of electrical energy.”¹³ According to Yemi Oke (2013), the NESCO served some locations, mainly in the Northern part of the Country.¹⁴ This view is also apt in the light of the H.M.M MOORE report in paragraph 82 wherein it was stated that “In the southern parts of Nigeria there is little fall in the rivers, but on the Bauchi-Plateau there is a considerable amount of power available and there is at last some promise that use will be made of it for the production of electricity.”¹⁵ This no doubt is largely dependent on the hydro-electric power generated as at then.

The second indigenous regulatory body after NESCO was the ELECTRICITY CORPORATION OF NIGERIA (ECN) which was established by section 3(1) of the Electricity Corporation of Nigeria Ordinance of 1950 (Ordinance No. 15 of 1950), and later amended by the Electricity Corporation of Nigeria (Amendment) Act, of 1958. The basic reason for the Electricity Corporation of Nigeria Ordinance was for the establishment of an independent corporation that will take over the supply and management of the electricity industry in Nigeria. The ECN was created as a statutory public corporation. Pursuant to Section 3(2) of the said Act the Corporation had power to acquire, hold and dispose of lands for the purposes of its functions and Administration of the Act.

It need to be noted that before the commencement of the Ordinance which later became the Act of 1958, all undertakings and operations in the electricity sector were vested in the Ministry of Power and Steel of the Federal government. This therefore made the Minister/Commissioner in charge of the Ministry of Power and Steel the third regime of regulatory authorities. The Ordinance upon coming into existence divested the Ministry of its administrative functions and Pursuant to sections 20 and 21 of the Ordinance/Act, vested all such functions on the Electricity Corporation of Nigeria (ECN). Thus Section 21 provides that:

13 Preamble/Long Title of the *Electricity Ordinance Act 1929*

14 Supra note 1 at 3

15 Paragraph 82 of the Colonial Reports-Annual. The report went further to state that “up to the end of November the additions were: — Government, lighting—22, power—2, Non-Government, metered lighting supplies—138, non-metered lighting—107, metered power supplies—5. The introduction of the non-metered flat rate scale has successfully attracted many small consumers. The total consumption is still too small for profitable work and it must be some years before economical capacity of the plant is attained. Proposals for an electric light and power scheme at Port Harcourt have been submitted for the consideration of the Consulting Engineers and, in conjunction with water supply, preliminary investigation of a scheme for Kaduna is in progress.”

All deeds, bonds, agreement, instruments and working arrangements which are subsisting immediately before the appointed day and affects any of the transferred undertakings shall be of as full force and effect against or in favour of the corporation, and enforceable as fully and effectually as if, instead of the Government, the corporation had been named therein or had been a party thereto.¹⁶

Notwithstanding the stripping of the Powers from the Minister, there still exists the powers on the Minister of Power and steel to include wielding executive control over the corporation with respect to matters of general concern. However such control is subject to consultations with the Electricity Corporation of Nigeria or the Electricity Advisory Committee or both for matters which appear to the Minister to be requisite in the interest of Nigeria.¹⁷

The Electricity Corporation of Nigeria (ECN) did not exist alone. The Niger Dams Authority existed side by side with the ECN. It was established by the NIGER DAMS ACT, 1962 No. 23 of 13th September, 1962, amended by the NIGER DAMS (AMENDMENT) DECREE 1970 of 12th January, 1970. It is an Act to establish an authority to be responsible for the construction and maintenance of dams and other works on the river Niger and elsewhere; to provide for the use, in connection with the works of water and power for generating electricity and of water for the purpose of improving navigation and providing fisheries and irrigation; to establish a Niger dams advisory council; and for purposes connected with the matters aforesaid. The principal function of the Act was the supply in bulk to the Electricity Corporation of Nigeria (ECN) all electricity generated by the Authority.¹⁸ Under this arrangement, the energy produced by the Niger Dams Authority was sold to Electricity Corporation of Nigeria for distribution to end-users as utility voltages. This represents a classical regime of electricity governance in which power generation was separated from distribution.¹⁹

16 Section 21 *Electricity Corporation of Nigeria Act (Cap. 58 of the Laws of the Federation, 1958)*

17 Section 29

18 Section 2 of the *Niger Dams Act, 1962 No. 23. of 13th September, 1962*

19 Supra note 1 at 3

The fourth generation of the regulatory body was the National Electric Power Authority (NEPA). The National Electric Power Authority was established by the National Electric Power Authority Act of 1st April, 1972 initially as a Decree. The Act consolidated the Electricity Corporation of Nigeria and the Niger Dam Authority to form a single Federal Government agency with the name; National Electric Power Authority (NEPA).²⁰ Primarily the Act was created to develop and maintain an efficient, co-ordinated and economical system of electric supply for all parts of the Federation and other matters incidental thereto. It is also enacted to generate or acquire supply of electricity, provide bulk supply of electricity for distribution within or outside Nigeria and to supply electricity for consumers in Nigeria and as may, from time to time, be authorized by the Authority.²¹ The Act further stipulated the functions of the Authority to include managing, maintaining, supplying, establishing and working of the electricity undertakings which were vested in the Authority under the Act and such other electricity undertakings which are to be acquired by the Authority by or under the provisions of the Act. Pursuant to this section, the National Electric Power Authority was also charged with the duties of generation, transmission, transformation, distribution, and sale of electricity either in bulk or to individual consumers in any part of Nigeria.²²

Section 43 of the Act conferred on the Authority the power to make Regulations subject to the approval of the Minister. On the strength of the above provision, the Authority enacted the following regulations:

- a. Electricity Supply Regulations 1995;
- b. Electricity Wiring Regulations 11 of 1934 and L.N. 25 1958;
- c. Electricity (Private Licenses) Regulations L.N. 76 1965; and
- d. Electricity (Annual Returns) Regulations L.N. 15 1974.

The Electricity Supply Regulations (ESR) is divided into three parts. The first part deals with Regulations prescribing the conditions on which licenses may be issued and the fees

20 Section 44(a) and (b)

21 Preamble and section 1(1)(a) (b) and (c) of the *National Electric Power Authority Act 1972*

22 Section 7

payable thereon. The second part of the ESR regulates such matters as the use and management of any works or lines erected after the coming into operation of the Electricity Supply Regulations used for generating, transferring, converting or conveying Electrical energy, so as to secure the safety of consumers or employees and of the public from personal injury by reason of such use. The third part of the Regulation provides for penalties for breach of licenses and regulations.²³

Another subsidiary legislation is the Electricity Wiring Regulation. The Electricity Wiring Regulation consists majorly of three divisions which were further split into thirteen parts. The first part deals with application, modification and exemptions from the regulations while the second part deals with the permits in accordance with the regulation for wiring works. The third and fourth parts deal with electrical wiring equipment for generation, storage and transformations of electricity. The fifth part of the regulation focused on distribution which is also a distinct topic in electricity law while the sixth and the seventh parts continued with the necessary stipulated accessories and equipment to be used as electrical appliances. The eighth part regulates domestic appliances while the ninth part made regulation as to wiring of electrical apparatus in places of public amusement and the precautions to be taken.

The next subsidiary legislation is the Electricity (Private Licenses) Regulations which establishes the form and procedure for granting licenses to body corporate other than NEPA.²⁴ The regulation further gives NEPA the power of confirmation after due verification that an applicant company has the capability to undertake the roles which the license covers. The regulation also empowers the Minister of Power and Steel to revoke or suspend any license given under the regulation.

The National Electric Power Authority Act is not without a fall out. The initial Act provides that the Authority shall in no case be under any obligation to pay damages or compensation for loss, damage or inconvenience caused to any consumer through any suspension, failure, discontinuance or whole or partial interruption of the supply of

²³ Supra note 1 Pp. 6 - 7.

²⁴ The *National Electric Power Authority Act* Cap 256 LFN. 1990.

electricity howsoever caused.²⁵ The latest edition of the Law has an omission which can be attributed to printer error.²⁶

1.3. Ancillary Governance and Out Sourced Legislations.

Apart from the core electricity laws, there are other legislative instruments that contribute to the regulation, maintenance and administration of electricity in Nigeria. Thus aside the NEPA Act and the regulations made pursuant thereto, a number of statutes also provide ancillary governance in Nigeria's electricity sector during the NEPA era.²⁷ The following bodies formed part of the electricity governance in the Nigerian regulated Electricity development.

The first is the Energy Commission of Nigeria which was established by the Energy Commission of Nigeria Act, 1979. The Minister in charge of Power and Steel is mandatorily a member of the Energy Commission of Nigeria.²⁸ Under the Act, the primary responsibility of the Energy Commission of Nigeria was coordination and maintenance of a road map to sustainable development of the energy resources.²⁹

There is also the Utilities Charges Commission which was established by the Utilities Charges Commission Act, 1992. Under the Act, the major function of the Utilities Charges Commission is to evaluate, on a continuing basis, trends in tariffs charged by any of the public utilities with a view to providing the Federal Government with such information as would enable the Federal Government to determine permissible increases.³⁰

25 Section 12(2) of the *National Electric Power Authority Decree* No. 24 of 1st April, 1972; the *National Electric Power Authority (Amendment) Decree* 1975 of 10th February, 1975; the *National Electric Power Authority (Amendment) Decree* 1977 of 26th May, 1976; the *National Electric Power Authority Act* Cap 256 LFN. 1990.

26 Ibid. It is however important to point it out here for future correction, that the *National Electric Power Authority Act* Cap N33 LFN. 2004, which is the latest publication, omitted Section 12(2) of the Act. Whereas previous publications such as the *National Electric Power Authority Decree* No. 24 of 1st April, 1972; the *National Electric Power Authority (Amendment) Decree* 1975 of 10th February, 1975; the *National Electric Power Authority (Amendment) Decree* 1977 of 26th May, 1976; and the *National Electric Power Authority Act* Cap 256 LFN. 1990, all together have provisions for Section 12(2).

27 Supra note 1 at 7.

28 Sections 2(a)(i), 3(2)(b) of the *Energy Commission of Nigeria Act* Cap 109, *Laws of the Federation*, 1990

29 Section 5

30 Section 6(a) of the *Utilities Charges Commission Act*, 1992

The activities of the National Electric Power Authority (NEPA), however, formed part of the mandates of the Utilities Charges Commission.³¹

The Niger Dams Act, 1962 No. 23 of 13th September, 1962, amended by the Niger Dams (Amendment) Decree 1970 of 12th January, 1970, is another of such laws. Its roles and functions are simplified in the Preamble Paragraph of the Act. It is an Act to establish an authority to be responsible for the construction and maintenance of dams and other works on the river Niger and elsewhere; to provide for the use, in connection with the works of water and power for generating electricity and of water for the purpose of improving navigation and providing fisheries and irrigation; to establish a Niger dams advisory council; and for purposes connected with the matters aforesaid.³²

The principal functions of the Authority were primarily stated to include construction of a dam on the river Niger in the vicinity of the village of Kainji; using Kainji for purposes of generating electricity; acquiring and maintaining such electricity generating stations belonging to or controlled by the Electricity Corporation of Nigeria; constructing and maintaining either above or below ground, works including transmission line for purposes of distributing electricity generated by the authority; and supplying in bulk to the Corporation (ECN) electricity generated by the Authority (Niger Dam Authority).³³

1.4. The Constitutional Regime.

Nigeria as a country has had her fair share of Electricity regulation which had metamorphosed from one regulatory body to the other. Through the trends of the Constitutional Developments, Nigerian Constitutions particularly 1960, 1963, 1979 and 1999 have consistently maintained various constitutional provisions with respect to electricity regulation.

Consequently, Section 73(1) and (2) of the 1960 Constitution and Section 79 (1) & (2) of the 1963 Republican Constitution of the Federal Republic of Nigeria respectively provide that:

³¹ Item (a) of the Second Schedule pursuant to Section 6

³² See the *Niger Dams Act, 1962 No. 23. of 13th September, 1962*

³³ See Section 2

(1) Parliament may make laws for Nigeria or any part thereof with respect to electricity or gas:

Provided that nothing in this subsection shall preclude the legislature of a Region from making laws for that Region with respect to those matters.

(2) The powers conferred on Parliament by this section shall not include powers -

(a) to prohibit or restrict the establishment by or on behalf of the Government of a Region of an agency for the manufacture, distribution or supply of electricity or gas in that Region; or

(b) to regulate the production, distribution or supply of electricity or gas by the Government of a Region or any such agency.³⁴

In more advanced form, Section 4 (4) (a) of Part II of the Second Schedule Items 13 and 14 of both the 1979 and 1999 Constitution of Nigeria as amended provide thus:

“4. (4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:-

(a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule Items 13 and 14 which provides thus:

Item 13. The National Assembly may make laws for the Federation or any part thereof with respect to-

(a) electricity and the establishment of electric power stations;

³⁴ Section 73 of the 1960 Constitution and section 79 of the 1963 Republican Constitution of the Federal Republic of Nigeria.

(b) the generation and transmission of electricity in or to any part of the Federation and from one State to another State;

(c) the regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation;

(d) the participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation;

(e) the promotion and establishment of a national grid system; and

(f) the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy.

Item 14. A House of Assembly may make laws for the State with respect to –

(a) electricity and the establishment in that State of electric power stations;

(b) the generation, transmission and distribution of electricity to areas not covered by a national grid system within that State; and

(c) the establishment within that State of any authority for the promotion and management of electric power stations established by the State.³⁵

The purport of the above provision is to the effect that both the Federal Government and State Governments can independently manage, administer, supply, transmit, generate, and distribute electricity in Nigeria within their respective areas of competence.

³⁵ Section 4(4)(a) Part II of the Second Schedule Items 13 and 14 of both the 1979 and 1999 Constitution of Nigeria as amended.

According to Chief Olusegun Obasanjo GCFR in his presentation dated 11th May, 2008, and addressed to Hon. Ndudi Godwin Elumelu, Committee on Power and Steel, House of Representatives, in response to the INVITATION TO APPEAR AT THE PUBLIC HEARING ON THE POWER SECTOR, he stated that “In spite of power being on the concurrent list in our Constitution, only Rivers State paid serious and appreciable attention to power generation and transmission, Akwa-Ibom followed later with Federal Government support.”³⁶

This view was recently supported by the Minister of Power, Works and Housing, Babatunde Fashola (SAN), on Monday the 14th August, 2017 at the 18th Monthly Power Sector and Stakeholders’ meeting in Kumboso, Kano State, while receiving inquiries on whether state governments could produce their own power exclusively stated that:

Nothing in the Electric Sector Power Reform Act stops any state from doing so. What they need is to get the right license from the Nigerian Electricity Regulatory Commission (NERC).³⁷

From the Constitutional provision, it is obvious that both the Federal Government and State Governments; hitherto Regional Governments, have powers to legislate on the generation, distribution and transmission of electricity in Nigeria. This power does not include regulatory activities and administration by means of a regulatory body. By the above provision, only the Federal Government that has the power to exclusively regulate on the administration and regulation of Electricity in Nigeria.³⁸

However, it is arguable to state that the above provisions give both the Federal and State Governments the authorities to establish through Legislations, bodies and agencies with mandate to regulate on electricity affairs. This forms the basis for the establishment of the Lagos State Electricity Board (LSEB) created by law No. 15 of 5th July 1980 published

³⁶ Dare Babarinsa, “AKANDA EDA: The Story of Olusegun Obasanjo” (Gaskia Media Limited 2015) at 118.

³⁷ See the Speech of Mr. Babatunde Fashola the Nigerian Minister of Power on the point that “Metering of customers not exclusive right of DisCos” made at the 18th Monthly Power Sector and Stakeholders’ meeting in Kumboso, Kano State, culled online at: <http://thenationonlineng.net/metering-of-customers-not-exclusive-right-of-discos-fashola/>

³⁸ Section 4(4)(a) Part II of the Second Schedule Item 13 (c) & (f) of both the 1979 and 1999 Constitution of Nigeria as amended.

by the Lagos State House of Assembly Gazette No. 53 Vol. 13 of 24th July 1980. Also it is the authority behind the creation of NESCO, ECN, NEPA, and NERC by the Federal Government of Nigeria.

The Lagos State Electricity Board is created to perform the following functions: To establish in state electric power stations; To generate, transmit and distribute electricity to areas not covered by the national grid system within the State; To control and manage any electrical installation vested in the Board under the provision of this law; To establish, control, manage, extend and develop such new electrical network and to develop and extend such existing ones as the Board may consider necessary for the purpose of providing electricity supply to meet the requirement of the general public and industries in various parts of the State; and To supply electricity and promote economically efficient and uninterrupted electricity generation, distribution and supply of power.³⁹

However, it is a self imposed destruction for the Lagos State Electricity Board (LSEB) to be considered an “implementing agency under the Lagos State Ministry of Energy and Mineral Resources (MEMR). By the totality of its functions, there is no provision for any form of regulatory functions on Power generating companies within Lagos State. This is exclusively left within the competence of the National Electricity Regulatory Commission which a National Regulatory Agency.

1.5. The Current Regime.

THE ELECTRIC POWER SECTOR REFORM ACT, 2005

The need to finding the lasting solution necessitated the enactment of the Electric Power Sector Reform Act, 2005. The enactment which was passed by the National Assembly was to set the machinery in motion for the privatization of the electric power sector with a view to increasing market competition and consequent efficiency. This however indeed is a radical turnaround from the trend which the sector has almost become used to. The National Council on Privatization upon being constituted was mandated to ensure a thorough transition into this completely new and dimension of electricity approach. The

³⁹ See the statutory roles of the Lagos State Electricity Board <http://www.lagosstate.gov.ng/entities.php?k=133> culled up on Sunday 16th August, 2015.

Act was to provide for the formation of companies to take over the functions, assets, liabilities and staff of the National Electric Power Authority. It is also to develop competitive markets, establish the Nigerian Electricity Regulatory Commission; provide for the licensing and regulation of the generation, transmission, distribution, and supply of electricity; enforce such matters as performance standards, consumer rights and obligations; provide for the determination of tariffs; and to provide for related matters.⁴⁰

From the above, it can be seen that the Act was designed to launch the Nigerian Electricity market into a complete new world of its own and a competitive regime. This no doubt is for the interest of the consumers. It is also to enhance productivity and promote efficiency in the Nigerian electricity market. The Act provides for the initial holding company which was to be registered by the National Council on Privatization and also provided that the holding company will acquire the assets and liabilities of the National Electric Power Authority.⁴¹ This registration was to take effect not later than six months from the commencement of the Electric Power Sector Reform Act.⁴² The initial holding company; “the Power Holding Company of Nigeria” (PHCN) was subsequently incorporated under the Companies and Allied Matters Act. The shares of the initial holding company on its incorporation shall be held by the Ministry of Finance and the Bureau of Public Enterprises in the name of and on behalf of the Federal Government of Nigeria. This creates a Trust relationship. These shares were subsequently relinquished to the successor companies derived from PHCN which were basically classified as the generation, transmission, and distribution companies as well as the system operators. By the Act, the successor companies were to be formed eight months after the formation of the Initial Holding Company. The well known amongst the successor companies are ; Eko Distribution Company, Ibadan Distribution Company, Ikeja Distribution Company, Enugu Distribution Company and the Niger Delta Power Holding Company Limited among others which have already been sold to the new owners.

However, despite series of legislations and efforts to get it right in the Electricity sector, the industry has remained and continued ranking high in the cadre of failure and

40 long title to the *Electric Power Sector Reform Act, 2005*

41 Section 2

42 Section 1

unproductiveness. The supply of electricity has remained epileptic. The relationship between the suppliers and consumers has also remained unprogressive. Either on one hand, the consumers are employing deceit or the suppliers are shortchanging them. There is also the incessant activity of miscreants engaging in one form of theft or another form of sabotaged. These inadequacies no doubt have flourished, not necessarily because of lack of laws, but because of the ineffectiveness of the law implementers and regulatory activism.

It will be noted that basically, the evolution and historical developments of the legal regimes were actually orchestrated as a result of quest to maintain a flexible, amenable, adaptable, and adjustable legal precepts in the electricity sector. It will be recalled that each regime witnessed the best legislative output and granted the desired goals of their days but eventually betrayed by the hierarchy of ineptitude and inefficiency of the manpower and other human resources. In actual sense, there was absence of political will to achieve the desired goal. Hence it will be well said to say that each law contributed immensely to the advancement of the Nigerian electricity sector in its own way. A generic target and objective was maintained under each regime; promoting, regulating, and supervising the supply of electricity and practices in Nigeria and beyond where applicable.

CHAPTER TWO

REGULATORY AGENCIES AND ELECTRICITY INVESTMENT REGULATION IN NIGERIA

2.1. Introduction

As Nigeria joins the rest of the world in global technological advancement, sustainable energy and power becomes very crucial. Virtually every sphere of our global explosion revolves around Electricity. This makes energy an indispensable component of economic growth and development.⁴³ According to Adenikinju, substantial expansion in quantity, quality and access to infrastructure services, especially electricity, is fundamental to rapid and sustained economic growth, and poverty reduction.⁴⁴

However, in recent times, Electricity market has been a sensitive arena that continually attracts global attention and forms a top agenda on the to-do menu of virtually all governments globally. The threat it poses to a national economic sustainability, development and appreciable growth is conspicuously visible in the way each country of the world seek and exploit various alternative energy sources of generating electricity in the most economical and environmental friendly way.⁴⁵ Yet, for the past three decades, inadequate quantity and quality and access to electricity services have been a regular feature in Nigeria. Hitherto, the electricity industry was dominated by the state-owned National Electric Power Authority (NEPA), and later succeeded by the Power Holding Company of Nigeria (PHCN). This monotonous change notwithstanding has been unable to provide and maintain acceptable minimum standards of service reliability, accessibility and availability.⁴⁶

Predominantly, the effect of the unified and monotonous means of electricity supply has contributed mostly to the stagnated investment driven development in the sector.

43 See Yemi Oke, *Nigerian Electricity Law and Regulation*, (Law Lords Publications, 2013) at 1

44 Adenikinju, A, "Analysis of the cost of infrastructure failures in a developing economy the case of electricity sector in Nigeria." *African Economic Research Consortium AERC Research Paper 148, Nairobi*, February 2005.

45 Titus Koledoye Olugbenga, Abdul-Ganiyu A. Jumah and Phillips D. A., "The current and future challenges of electricity market in Nigeria in the face of deregulation process," *African Journal of Engineering Research* (March 2013 Review) Vol. 1 (2), pp. 33-39.

46 Akin Iwayemi, "Investment in Electricity Generation and Transmission in Nigeria: Issues and Options," *International Association for Energy Economics* (First Quarter 2008) at 37.

However, by the year 2000, the problem had sent Nigeria into electricity supply crisis. This caused the Federal Executive Council (FEC) in year 2001 to approve the National Electric Power Policy (NEPP). This policy introduced fundamental changes in the sector, ranging from ownership, control and regulation. The 2001 NEPP actually set the roadmap for Nigeria's power sector privatization, but due to the bureaucracy in government; the policy could not be signed into law until 2005. The signed document became the Electric Power Sector Reform (EPSR) Act of 2005 (EPSR, 2005). The reform is expected to generate some economic implications for the citizens and the prospective investors. By this Act, NEPA was translated into the newly incorporated Power Holding Company of Nigeria (PHCN) Plc, comprising of 18 separate successor companies that took over the assets, liabilities and employees of NEPA, and responsible for the generation (6 companies), transmission (a company) and distribution (11 companies).⁴⁷ These are viable and investable areas of interests for investors.

2.2. Rights and Modes of Electricity Investments in Nigeria

The right to investment is statutory. This right applies to the State, Citizens and Aliens. Thus the State just like individuals is free to participate in the economy of its sovereignty.⁴⁸ The implication of the above Constitutional Provision is that only the Nigerian state and its citizens are to participate in the economy. However, solace has been provided under the Nigerian Investment Promotion Commission Act, 1995 Act, 1995 and Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995.⁴⁹ Thus any person or body of persons who intends to establish Business has the right to undertake any form of business,⁵⁰ save the categories of business considered under the "negative list."⁵¹ Also any person or body of persons may invest in any business or security with foreign currency or capital imported into Nigeria through an authorized dealer either by telegraphic transfer, cheque or other negotiable instruments and converted into naira in the

47 Supra note 4.

48 Section 16 (1) (c & d) of the *Constitution of the Federal Republic of Nigeria*, 1999 as Amended

49 Cap N117, LFN, 2004 and Cap F34 LFN 2004.

50 Section 19 (1) of the *Nigerian Investment Promotion Commission Act*, 1995.

51 Section 17

market.⁵² And an extension to this right is the right of a person to export goods or services from Nigeria.⁵³

Under the extant legal regime, private investment in the power sector is permissible. Both indigenous and especially foreign investors are therefore free to invest in the power sector. Generally, foreign investments (especially in the power sector) are ineluctable towards the sustenance of any meaningful socio-economic development of any country, particularly developing countries like Nigeria. Ajomo (1989) rightly observed thus:

Foreign investment is inevitable from the point of view of any state, be it developed or developing. However, the odds are weighted more against the developing countries who [that] lack the technical know-how and the capital for economic development. In consequence, governments of developing countries have endeavoured to formulate laws, regulations and adopt policies that would attract foreign investment and technology in the face of competition from the developed countries.⁵⁴

Where funds were imported into Nigeria for any electricity investment, repatriation of such funds outside Nigeria shall be through Authorized Dealers subject to certain conditions. Foreign investors are free to bring in capital for investment, and they are free to repatriate both the income and capital proceeds on such capital. Such capital can be brought in or taken out either in kind or in hard currency through an “authorized dealer” especially any of the licensed banks. When funds are remitted through an authorized dealer, that dealer issues a Certificate of Capital Importation (CCI) to the investors, which provides evidence of the funds that have been brought into the country. The Certificate of Capital Importation (“CCI”) is evidence of capital inflow/investment/loan into a Nigerian company. It legitimizes and facilitates the repatriation of dividends, capital and repayment of external loan facilities. A company can also obtain a CCI for the importation of

⁵² Section 15 (1) of the *Foreign Exchange (Monitoring and Miscellaneous Provisions) Act*, 1995.

⁵³ Section 27

⁵⁴ M.A. Ajomo, “The Dimension and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model,” *NIALS La Series No.3* (1989).

equipment as a direct investment into a new company. The documentation requirement for obtaining a CCI depends on the nature of the transaction. There are Loan CCI and CAPITAL EQUIPMENT CCI.

Foreigners engaging in electricity business in Nigeria can participate through any of the following modes:

- a. Foreign Direct Investment (FDI);
- b. Portfolio Investment (PI); and
- c. Unregistered excepted Companies.

Under the Foreign Direct Investment, an investor wishing to construct, own or operate an undertaking or in any way engage in the business of: electricity generation, excluding captive generation; electricity transmission; system operation; electricity distribution; or trading in electricity,⁵⁵ may or may not have an already existing company in their home country. In either case, a Nigerian company must be registered by such investor either as a subsidiary of the parent company or as an independent company.⁵⁶ One of such companies is the Schneider Electric Nigeria; a France-based multinational corporation that specializes in electricity distribution, automation management and produces installation components for energy management in Nigeria.⁵⁷

The second mode of participation is through the means of Portfolio Investment, wherein an investor or body of persons acquires shares and equities of an existing company in electricity business. Except the shares and equities of the Initial Holding Company (PHCN) and successors companies held by the Ministry of Finance Incorporated and the Bureau of Public Enterprises in the name of and on behalf of the Federal Government of Nigeria,⁵⁸ all investors are free to take up shares in any companies engaging in Electricity business. These are usually through Stockbrokers purchasing shares of publically quoted companies or by private placement of share of private

⁵⁵ Section 62 (1) of the *Electric Power Sector Reform Act*, 2005.

⁵⁶ Sections 54 (1) of the *Companies and Allied Matters Act*, 1990.

⁵⁷ Company profile at <http://www.schneider-electric.com/ng/en/about-us/company-profile.jsp>.

⁵⁸ Sections 2, 8 and 9 of the *Electric Power Sector Reform Act*, 2005.

companies or direct application for allotment in which case Securities and Exchange Commission should be notified.⁵⁹

The third and final mode of participation in Nigerian Electricity business is by the Unregistered excepted Companies procedure. These are usually companies invited by the Governments of Nigeria or any of their agencies to execute specified electricity project in Nigeria.⁶⁰ In view of the arrangement between the Nigerian Government and the Manitoba Hydro International Ltd (MHI) for the management of Transmission Company of Nigeria (TCN), it is unclear whether the company is part of the exempted companies under section 56 of the Companies and Allied Matters Act, 1990.

2.3. Regulatory Agencies and Applicable Laws

Let it be clearly noted that the control and regulation of all aspects of the economy are within the exclusive control of the State; which it uses the instrumentalities of its agencies to administer.⁶¹ Regulatory agencies that conduct superintend and give regulatory directives under the old Electricity regulatory regimes are fully recognized by the 2005 Electricity Statute. Thus it is provides as follows:

Any license, certificate, authority or permit which was issued under the Electricity Act or the National Electric Power Authority Act and which had effect immediately before the initial transfer date shall continue to have effect, mutatis mutandis, for the remainder of its period of validity as if it had been issued under the appropriate provision of this Act.⁶²

The Act went further to stipulate that:

Subject to this Act, any permission granted, direction given or other thing whatsoever made, done or commenced which, immediately before the initial transfer date, had or was capable of acquiring force and effect pursuant to the Electricity Act or the

⁵⁹ Nelson C.S Ogbuanya, *Essentials of Corporate Law Practice in Nigeria*, (Bi-Fantancy Ltd Printing 2011) at 207.

⁶⁰ Sections 56 (1) (a - d) of the *Companies and Allied Matters Act*, 1990.

⁶¹ Section 16 (1) (a & b) of the *Constitution of the Federal Republic of Nigeria*, 1999 as Amended

⁶² Section 98(1) of the *Electric Power Sector Reform Act*, 2005

National Electric Power Authority Act, shall, on and after the initial transfer date, continue to have, or, as the case may be, to be capable of acquiring, force and effect as it had been granted, given, made, done or commenced, as the case may be, pursuant to the equivalent provision of this Act.⁶³

This shows that apart from the substantive NERC, all other regulatory agencies which or whose permits, licenses and other documentations are necessary to bring to life any aspect of electricity investment, deserve optimum attention.

Unfortunately, many Legal Practitioners and Electricity Stakeholders hardly believe that their practice has much to do with other Regulatory Agencies other than NIGERIAN ELECTRICITY REGULATORY COMMISSION (NERC). The following Agencies, contributed immensely to a successful electricity investment in Nigeria. They are Corporate Affairs Commission (CAC), Nigeria Investment Protection Commission (NIPC); Central Bank of Nigeria (CBN); Securities Exchange Commission (SEC); Nigerian Immigration Service (NIS); National Office for Technology Acquisition and Promotion (NOTAP); Utilities Charges Commission (UCC); Energy Commission of Nigeria (ECN); Consumers Protection Council (CPC); Hydroelectric Power Producing Areas Development Commission; Federal Environmental Protection Agency (FEPA); Nigerian Electricity Management Services Agency (NEMSA); National Environmental Standards And Regulations Enforcement Agency (NESREA); Nigerian Stock Exchange (NSE); Bureau of Public Enterprise (BPE); National Council of Privatization (NCP); Federal Inland Revenue (FIRS); Joint Tax Board (JTB) etc.

Indeed, it is not all about the unending cry of the Federal Government of Nigeria for investors and investments into the power sector, there is a very important and urgent need to allow for all inclusive sensitization and continued education training to enable stakeholders and practitioners to be acquainted with the new skills necessary to withstand the challenges of electricity investments. The power sector is technically-involving sector; its engineering, accounting, legal and other technical requirements could be sometimes overwhelming for a developing country like Nigeria. For example, drafting and

63 Section 98(2) and (5)

negotiating power sector agreements are too complex skills yet to be sufficiently internalized by Nigerian Lawyers, apparently due to the fact that the sector is just evolving. This challenge according to Yemi Oke, reared its ugly head in the Management Service Contract between Nigerian Government and Manitoba Hydro International (MHI) on the management of Transmission Company of Nigeria (TCN).⁶⁴ Transactional lawyers lack the exposure of Electricity litigation, as they erroneously regard electricity regulation and practice as practice area that does not involve Litigation, despite the fact that certain specialized Courts (Federal High Court, National Industrial Court), the NERC, Stakeholder Advisory Panel (The Initial Stakeholder Advisory Panel and Final Stakeholder Advisory Panel), Dispute Resolution Panel etc, are set up for dispute resolution of electricity transactions and industrial relations. It is therefore imperative to bring to bear some relevant Regulatory Agencies and Institutions with their regulatory ambit and Laws which can aid the Legal Practitioner and industry operators to achieve best practice in Electricity industry in Nigeria.

The provision of the Act that any regulations, by-laws or notices which, immediately before the initial transfer date, were in force under the Electricity Act or the National Electric Power Authority Act shall continue in force, *mutatis mutandis*, as if they had been made by the Commission under this Act, and may be amended or repealed upon the issuance of regulations by the Commission in accordance with the provisions of this Act,⁶⁵ shows that under the new regime of Electric Power Sector Reform Act, 2005, there appears to be tolerance and accommodation. Hence all applicable laws in existence before the commencement of the Electric Power Sector Reform Act regime are recognized and complied with. The above provisions therefore rejuvenate all laws, regulatory agencies and bodies whose mandates impacts on the environmental sustenance, developments, energy resources developments, product consumptions etc must be active in the field of electricity regulation.

2.3.1. Federal Ministry of Power

⁶⁴ Yemi Oke, *Essays on Nigerian Electricity Law*, (Princeton & Ass. Publishing Co. Ltd, 2016) pp. 117 & 118.

⁶⁵ Section 98(1) of the *Electric Power Sector Reform Act, 2005*

Under the current dispensation, the Federal Ministry of Power is fused with the Ministry of Works and Housing; under the Supervision of one Minister. In all cases, the Minister in charge of Power Ministry and by extension the Federal Ministry of Power acts as the link between the President of the Federal Republic of Nigeria, the National Council on Privatization and the National Assembly. Also it is the Minister who issues a declaration that a more competitive electricity market is to be initiated.⁶⁶

It is the Minister who recommends for approval by the President the market rules, to be developed by the system operator for the operation of the national grid and for the establishment and governance of markets related to electricity and ancillary services.⁶⁷ Furthermore, the Minister issues a directive to the Commission specifying the class or classes of end-use customers who constitutes eligible customers.⁶⁸ The Minister formulates Policies and sees to their implementations especially as they relate to overall system planning and co-ordination which do not conflict with the Act or the Constitution of the Federal Republic of Nigeria.⁶⁹ The Minister monitors and regulates the budgetary system of the NERC and determines the fiscal structure and calendar of the NERC.⁷⁰

Where the Federal Government makes available subsidies for consumers, it is the Minister that has the responsibility of determining the beneficiaries of the subsidized Electricity bearing in mind the underprivileged power consumers in the society at any given period.⁷¹ Related to this, the Minister administers the operations of the Rural Electrification Agency.

2.3.2. Nigerian Electricity Regulatory Commission (NERC)

According to the Act, there is established a commission to be known as the Nigerian Electricity Regulatory Commission, which shall be a body corporate with perpetual succession which can sue or be sued in its corporate name and subject to this Act, perform

66 Section 24 (3)

67 Section 26 (2) (a & b)

68 Section 27

69 Section 33 (1)

70 Sections 51 (1) and 54

71 Sections 86 and 83 (4)

all acts that bodies corporate may by law perform.⁷² In addition to its corporate powers, the Commission can delegate or authorize responsibilities. Thus any agreement, contract or instrument approved by the Commission may be entered into or executed on behalf of the Commission by any persons generally or specially authorized by the Commission for that purpose.⁷³ According to Oke 2016, the objectives of the NERC include:

- a. To create, promote and preserve efficient industry and market structures and to ensure the optimal utilization of resources for the provision of electricity services;
- b. To maximize access to electricity services by promoting and facilitating consumer connections to distribution systems in both rural and urban areas;
- c. To ensure that an adequate supply of electricity is available to consumers;
- d. License and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity;
- e. Approve amendments to the market rules;
- f. Monitor the operation of the electricity market; and
- g. Undertake such other activities which are necessary to carry out or give effect to the objects of NERC.⁷⁴

It is worthy of note that the primary regulatory function of the Commission is issuance of licenses to companies wishing to engage in generation, distribution, transmission etc. Thus no person, shall construct, own or operate an undertaking or in any way engage in the business of: electricity generation, excluding captive generation; electricity transmission; system operation; electricity distribution; or trading in electricity. Where there are violations by the licensees, the Commission shall have the authority to penalize such defaulter.⁷⁵ Furthermore, in Nigeria, the burden of ensuring a competitive electric power

⁷² Section 31(1).

⁷³ Section 58.

⁷⁴ See Yemi *supra* note 22 Pg 14.

⁷⁵ Section 62 (1 - 7) *EPSR Act*, 2005

sector through the enforcement of laid down regulations and laws is vested in the Nigerian Electricity Regulatory Commission (NERC) as sector regulator.⁷⁶

The Regulatory role of the Commission is also contractual in nature. Thus any company wishing to participate in the business of electricity either as generation, distribution or transmission shall apply for a license to the Commission in the form and manner prescribed and be accompanied by the prescribed fee and such information or documents as may be prescribed or as the Commission may require.⁷⁷ There is a presumption of contract between the Commission and any company operating in the Electricity sector; whether successor companies or independent companies. This contract is therefore regulated by the terms and condition stipulated in the Act.⁷⁸ These may include but not limited to entering into agreements on specified terms with other persons for the provision of or use of electric lines and associated equipment operated by the licensee, purchasing of power and other resources in an economical and transparent manner, referring disputes for arbitration, mediation, or determination by the Commission etc.⁷⁹ It also spells out the terms regarding the rights and obligations of the licensee, and procedures to be followed, at the end of its license term.⁸⁰ Furthermore such issues as the duration of each term of license granted is also spelt out, hence a license shall be valid for a period of up to, but not exceeding ten years, provided that the Commission may extend the period of a license taking into account the nature of the undertaking or business, for an additional period not exceeding five years at a time it determines that it is in the public interest to do so.⁸¹

The Commission has the capacity and power to minimize monopoly and increase a healthy competitive market in the electricity sector. Thus unless expressly indicated in the license, the grant of a license shall not hinder or restrict the grant of a license to another person for a like purpose and, in the absence of such an express indication, the licensee, shall not claim any exclusivity, provided that the Commission may allow a licensed activity to be exclusive for all or part of the period of the license, for a specific purpose;

76 See Oke *supra* note 22 Pg. 13

77 Section 70 (1) *EPSR Act*, 2005.

78 Section 71 (1).

79 Section 71 (2) (a-c)

80 Section 71 (9)

81 Section 71 (10)

for a geographical area, or for some combination of the foregoing.⁸² This provision no doubt has exception. This in developing mini-grid concessions, NERC shall select a company to exclusively serve a specific geographical location with obligation to serve all customers that request service.⁸³

During the pendency of this contract, the Commission is enabled by the Act to cancel any existing electricity license. The following are capable of warranting the cancellation of an electricity license: upon receiving a complaint from any consumer, eligible customer, consumer association, association of eligible customers or other licensee, or on its own initiative, the Commission may inquire into the conduct or functioning of any licensee in carrying out the licensee's obligations under this Act, rules or regulations, codes of conduct, or the terms and conditions of the license, the license was issued through fraud or the misrepresentation or nondisclosure of a material fact by the licensee; or the licensee has willfully or unreasonably contravened any provision of this Act that is applicable to the licensee; or the licensee has failed to comply with any term or condition of the license, the breach of which is expressly declared by such license to render it liable to cancellation; or the financial position of the licensee is such that he is unable to fully and efficiently discharge the duties and obligations imposed by the license.⁸⁴ However the case may be, before cancelling a license, the Commission shall notify the licensee in writing of its intention to cancel the license concerned and the reasons for doing so, and shall allow the licensee an opportunity to demonstrate, within 60 days following the delivery of such a notification, that circumstances have changed such that cancellation may no longer be warranted.⁸⁵

The following Laws, Rules and Regulations apply to NERC in its regulatory functions. They are:

- a. Electric Power Sector Reform Act, 2005;

82 Section 71 (6)

83 See Yemi *supra* note 22 at 98 – 99.

84 Section 74 (1)(a-b); (2)(a-d) of the *Electric Power Sector Reform Act, 2005*.

85 Section 74 (3)

- b. Nigerian Electricity Regulatory Commission (Business Rules of the Commission) Regulations, 2006;
- c. Renewable Electricity Policy Guidelines, 2006;
- d. Nigerian Electricity Regulatory Commission Application for Licenses (Generation, Transmission, System Operations, Distribution & Trading) Regulations, 2010;
- e. Regulations for the Granting Of Permits for Captive Power Generation, 2008;
- f. Nigerian Electricity Regulatory Commission (NERC) Reporting Compliance Regulations 2009;
- g. Electricity Industry Market Rules (EIMR), 2010;
- h. Meter Reading Billing Cash Collections and Credit Management for Electricity Supplies Regulations 2007;
- i. NERC Regulation for Independent Electricity Distribution Networks, 2012;
- j. NERC Regulation for Embedded Generation, 2012;
- k. NERC License and Operating Fees Regulation, 2010;
- l. NERC Connection and Disconnection Procedures for Electricity Services, 2007;
and
- m. NERC Customer Standards of Performance for Distribution Companies, 2007.

2.3.3. *Utilities Charges Commission*

There is also the Utilities Charges Commission which was established by the Utilities Charges Commission Act, 1992. Under the Act, the major function of the Utilities Charges Commission is to evaluate, on a continuing basis, trends in tariffs charged by any of the public utilities with a view to providing the Federal Government with such information as would enable the Federal Government to determine permissible increases.

⁸⁶ The activities of the National Electric Power Authority (NEPA), however, formed part of the mandates of the Utilities Charges Commission.⁸⁷ Unfortunately, the Utilities Charges Commission Act does not apply in the light of the Electric Power Sector Reform Act, 2005. It provides thus:

The provisions of the Utilities Charges Commission Act 1992, as amended, shall not apply to any person to whom a license has been issued under this Act, in respect of the licensed activities of that person.⁸⁸

This no doubt is a major fall out in the reforms. Thus a jurist lamented in the following words “the Legislation in Nigeria, which provides for public utilities, the Utilities Charges Commission Cap U 17 LFN 2004, incidentally has no application when it comes to the electric sector. Section 98(6) of the EPSR Act, 2005 makes sure of this in the following words:

The provisions of the Utilities Charges Commission Act 1992, as amended, shall not apply to any person to whom a license has been issued under this Act, in respect of the licensed activities of that person.’ Although utility regulation is essentially statutory and hence a legislative function, not just any business can be made utility by passing a statute. Regulation of utilities must be in harmony with the state’s power to protect health and general welfare of the citizens.⁸⁹

2.3.4. Energy Commission of Nigeria

The Energy Commission of Nigeria established by the Energy Commission of Nigeria Act, 1979. The Minister in charge of Power and Steel is mandatorily a member of the

⁸⁶ Section 6(a) of the *Utilities Charges Commission Act*, 1992.

⁸⁷ Item (a) of the Second Schedule pursuant to Section 6

⁸⁸ Section 98(6) of the *Electric Power Sector Reform Act*, 2005.

⁸⁹ Kanyip B.B. (J) “Protecting the rights and interests of consumers in the Electric Sector” Paper delivered at the seminar for Judges on Regulation in the Power Sector organized by the *Nigerian Electricity Regulatory Commission (NERC) in collaboration with the National Judicial Institute (NJI)*, held at Assa Pyramid Hotel, Kaduna, 12th – 14th July, 2010 at p 8 in Yemi Oke, *Nigerian Electricity Law and Regulation*, (Law Lords Publications, 2013) at 7 & 8 note 25.

Energy Commission of Nigeria.⁹⁰ Thus under the Act, the primary responsibility of the Energy Commission of Nigeria was coordinating, maintaining a road map to sustainable development of the energy resources.⁹¹ There must be full adherence to the terms and conditions of the Energy Commission of Nigeria in area of renewable energy generation of power from biomass and bio - fuels, coal, wind, dams and solar.

2.3.5. *Hydroelectric Power Producing Areas Development Commission*

The Hydroelectric Power Producing Areas Development Commission sees to the Physical development of Hydroelectric Power Projects. The Commission Prepare schemes designed to promote the physical developments of the hydroelectric power producing areas and estimate the cost of implementing such schemes.⁹² They tackle ecological problems that arise from overloading of dams in the hydroelectric power producing areas and advice Federal and State Governments on the prevention and control of floods. Finally they also implement all measures approved for development of hydroelectric power producing areas by the Federal Government, Identify factor inhibiting the development of the hydroelectric power producing areas and assist States in the formulation and implementation of policies to ensure sound and efficient management of the resources of the hydroelectric power producing areas.⁹³

The Nigerian electricity regime provides for an institutional framework to protect the host communities located around hydro-based power generation installations under the Hydro Electric Power Producing Areas Development Commission (HEPADC) Act.⁹⁴

According to Yemi (2016), a major inadequacy of the HEPADC Act, which Namibia should avoid, is that it focuses on communities within hydroelectric power generation environments. Electricity generation through hydro is becoming outdated, as power is now generated through gas, wind, solar and other renewable sources not captured in the HEPADC Act. It is for this reason that the HEPADC Act is adjudged to be grossly inadequate to regulate host community issues in the Nigerian electricity sector.

90 Sections 2(a)(i), 3(2)(b) of the *Energy Commission of Nigeria Act Cap 109, Laws of the Federation, 1990*

91 Section 5

92 Sections 8 (1) (d) of the *Hydroelectric Power Producing Areas Development Commission Act, 2010*

93 Sections 8 (1) (e - f)

94 See Yemi *supra* note 22 at 21.

Nevertheless, the imperative of a legal framework for ensuring community friendly and socially and environmentally sustainable generation and distribution of electricity cannot be ignored by both Namibia and Nigeria.⁹⁵

2.3.6. Federal Environmental Protection Agency

There must be due Environmental Impact Assessment Program for every Site or location where Electricity Installations are to be carried out. The Environment Impact Assessment (EIA) approval Certificate is required to be issued by the Ministry of Environment.⁹⁶ This Assessment is regulated by the Environmental Impact Assessment (EIA) Act.⁹⁷ The Environmental Impact Assessment (EIA) Act was promulgated by decree No. 86 of 1992, to protect and sustain the Nigerian ecosystem. The law makes the development of an EIA compulsory for any major project that may have adverse effects on the environment generally. It sought to assess the likely or potential environmental impacts of proposed activities, and identify measures available to mitigate adverse environmental impacts. The carrying out of EIAs are policed by the Ministries of Environment of both the Federal Government and respective States.

- a. In the Federal Ministry of Environment, the Federal Environmental Protection Agency (FEPA) established by the Federal Environmental Protection Agency Act regulates the EIAs monitored by the Federal Government.⁹⁸
- b. Whereas every State has the State Ministries of Environment. Thus through its State Environmental Protection Agency (SEPA), States monitor EIAs in their respective States.

2.3.7. Nigerian Electricity Management Services Agency (NEMSA)

The Nigerian Electricity Management Services Agency (NEMSA) is an Agency set up to carry out the Functions of Enforcement of Technical Standards and Regulations, Technical Inspection, Testing and Certification of all Categories of Electrical Installations,

⁹⁵ See Yemi *supra* note 22 at 22.

⁹⁶ Item 7 of Schedule 1A to the *NERC Application for Licenses (Generation, Transmission, System Operation, Distribution and Trading) Regulations* 2010.

⁹⁷ Long title to the *Federal Environmental Protection Agency Act, 1992*.

⁹⁸ Sections 61

Electricity Meters and Instruments to ensure the Efficient Production and Delivery of Safe, Reliable and Sustainable Electricity Power Supply and Guarantee safety of Lives and Property in the Nigerian Electricity Supply Industry; and for Related Matters.⁹⁹ This body is called Nigerian Electricity Management Services Agency (NEMSA) and it was established by the Nigerian Electricity Management Services Agency (NEMSA) Act, 2015.

2.3.8. *National Environmental Standards and Regulations Enforcement Agency (NESREA)*

This is the enforcement Agency for environmental standards, regulations, rules, laws, policies and guidelines.¹⁰⁰ The National Environmental Standards and Regulations Enforcement Agency is established by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act. The Agency has responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigerians natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.¹⁰¹

2.3.9. *Department of Petroleum Resources (DPR)*

DPR has the statutory responsibility of ensuring compliance to petroleum laws, regulations and guidelines in the Oil and Gas Industry.¹⁰²

Under the National Gas Master Plan, the DPR is mandated to implement a Gas Pricing Regulation framework of 2007, which provides the legal basis for gas supply to domestic market, particularly the power sector, to provide the energy required to power productive activities in the economy. In the light of this, the Finance and Economy sub-committee of the Ahmed Joda led Transition Committee set up by President Muhammadu Buhari administration, among its 800 page recommendation, recommended the creation of the

⁹⁹ Long to the *Nigerian Electricity Management Services Agency (NEMSA) Act, 2015*

¹⁰⁰ Citation to the *National Environmental Standards and Regulations Enforcement Agency (ESTABLISHMENT) Act 2007*.

¹⁰¹ Sections 7

¹⁰² See About Us Homepage of the Department of Petroleum Resources culled from <https://dpr.gov.ng/index/functions-of-dpr/>

committee that would merge and streamline decision making processes between the DPR and NERC and increase regulatory certainty and investor confidence in the power sector. According to them, by this, there would be increase in the gas/electricity value chain, to ensure uninterrupted supply of natural gas from the oil companies to the power plants in the country.¹⁰³ The roles of DPR in the Electricity sector are enormous and fundamental. According to Mr. Mordecai D. Ladan, Gas monetization also offers credible options in the current economic challenges, especially in the diversification of the local oil and gas industry. The prospects are bright for a vibrant domestic gas market now with the opportunities offered by the local electricity sector.¹⁰⁴

Electricity Generation Companies who are the direct beneficiaries of the Gas to power are bound to comply with all safety measures under the DPR. Thus all offshore operations/operators must indicate availability/possession of offshore safety permit (OSP) obtainable from DPR for staff.¹⁰⁵ This was the base for the motion moved by Joseph Edionwele (PDP, Edo), calling on the House of Representatives to “investigate the recurring electrical accidents in the power and need to investigate the non-compliance with due process in the issuance of off-shore safety permits by the Department of Petroleum Resources (DPR) in connivance with the limited liability companies.”¹⁰⁶

2.4. Other Statutory Regulatory Agencies

There are other Statutory Regulatory Agencies which are necessary and which an investor or a company wishing to invest in the Nigerian Electricity Sector must be conversant with. They are indispensable for a successful investment in the Nigerian Electricity Market.

2.4.1. Corporate Affairs Commission

103 Udo Bassey, “Gas-to-power: Joda committee proposes merger of DPR, NERC” July 3, 2015 retrieved from <http://www.premiumtimesng.com/business/business-interviews/186047-gas-to-power-joda-committee-proposes-merger-of-dpr-nerc.html>

104 Ladan Mordecai, “Remarks From Director of Petroleum Resources” *Department of Petroleum Resources 2015 Oil & Gas Annual Report* retrieved from (<https://dpr.gov.ng/index/wp-content/uploads/2015/01/2015-Oil-Gas-Industry-Annual-Report.pdf>)

105 *Item 14 of the Guidelines And Requirements for the Application of Oil And Gas Industry Service Permits (OGISP)*, Department of Petroleum Resources, 2017 ed. Retrieved from <https://dpr.gov.ng/index/wp-content/uploads/2017/02/LP-GUIDELINES-2017.pdf>

106 Emman Ovuakporie & Johnbosco Agbakwuru, “Reps to probe DPR, power firms over alleged malpractices” December 16, 2016, retrieved from <https://www.vanguardngr.com/2016/12/reps-probe-dpr-power-firms-alleged-malpractices/>

This is the apex of the regulatory bodies for companies wishing to engage in any form of business in Nigeria. The Corporate Affairs Commission was established under section 1 of the Companies and Allied Matters Act as a body with full legal capacity like incorporated companies. Thus, it has perpetual succession and a common seal, capable of suing and being sued in its corporate name, of acquiring, holding or disposing of any property, movable or immovable, for the purpose of carrying out its functions.¹⁰⁷

The Corporate Affairs Commission has the primary duty to administer the Act, including the regulation and supervision of the formation, incorporation, management and winding up of companies. It establishes and maintains companies' registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions under the Act or any law in respect of which it is charged with responsibility. The CAC arranges and conduct an investigation into the affairs of any company where the interests of the shareholders and the public so demand. Finally, it undertakes such other activities as are necessary or expedient for giving full effect to the provisions of the Act.¹⁰⁸

It need be pointed out that the Commission also registers Business Names and Incorporated Trustees as well as provides a wide range of ancillary services. It is therefore not clear in view of standing practice of companies limited by shares solely participating in Electricity Investment.¹⁰⁹ For instance, an enterprise in which foreign participation is permitted in Nigeria, shall not commence business, except it is incorporated or registered under the Companies and Allied Matters Act.¹¹⁰

The Electric Power Sector Reform Act has identified with the Corporate Affairs Commission in several regards. One of such is the transactional relationships which are carried out through body of persons. These persons can be either Natural or Artificial. Thus in section 62 of the Electric Power Sector Reform Act, 2005, no person, shall construct, own or operate any undertaking in electricity generation, electricity transmission, system operation, electricity distribution or trading in electricity.¹¹¹

107 Sections 1 (2) (a - b) of the *Companies and Allied Matters Act*.

108 Sections 7 (1) (a - e)

109 Sections 1 and 8 of the *Electric Power Sector Reform Act*, 2005.

110 Section 19 (1) of the *Nigerian Investment Promotion Commission Act*, 1995

111 Section 62 (1)

Similarly, a person may construct, own or operate an undertaking for generating electricity not exceeding 1 megawatt (MW) in aggregate at a site or an undertaking for distribution for electricity with a capacity not exceeding 100 kilowatts (KW) in aggregate at a site, or such other capacity as the Commission may determine from time to time, without a license.¹¹² It is well established, that, a Person includes anybody of persons corporate or un-incorporate.¹¹³ This definition of a person under the law must of necessity include Business Names and Incorporated Trustees. For it has been well settled by the Supreme Court in the following words:

But it is not only a corporation (aggregate or sole) apart from natural person that has the attribute to sue and be sued. There are bodies generally regarded as quasi or near corporation on whom statutes expressly or impliedly confer a right to sue or be sued though unincorporated. They are not legal personae strictu sensu but have a right to sue or be sued by a particular name.¹¹⁴

Be that as it may, it is recommended that a Company limited by shares be used in any Electricity Investment in view of its numerous advantages as established by *Salomon v Salomon*.¹¹⁵

2.4.2. Securities Exchange Commission

The Securities and Exchange Commission (SEC) is the apex regulatory body for Nigeria's capital market. It however, operates under the supervision of the Federal Ministry of Finance. The Securities and Exchange Commission, Nigeria, like other exchange commission elsewhere, regulates the operation of capital market transactions, ensuring that the relevant rules are complied with. The Securities and Exchange Commission is regulated by the Investments and Securities Act (ISA) No 45 of 1999.¹¹⁶

112 Section 62 (2)

113 Section 18 (1) of the *Interpretation Act, Cap. 192, Laws of the Federation, 1990.*

114 *Carlen v University Of Jos* (1994) 1 NWLR (Pt 323) 631 at Page 656 Para D-E Per Ogundare

115 (1896) UKHL 1; (1897) AC 22.

116 Section 1 of the *Investments and Securities Act, 1999.*

The business of capital formation and mobilization is at the root of economic development, which is why every economy wants to develop its capital market. Capital markets drive capital mobilization and allocation to businesses, in the push for economic growth. Through the capital market, companies and governments mobilize capital for investment, while offering opportunity to investors to seek profitable outlets for their funds. Because complex financial processes are often involved, and large numbers of investors participate, the need for guarding the mechanism for those transactions becomes apparent. Investors need to be protected, just as the process needs to be kept viable.

The Securities and Exchange Commission, Nigeria, broadly has a responsibility to regulate the capital market and ensure that investors are protected. That means ensuring that processes increasingly get transparent and that transaction rules are complied with. It scrutinizes parties that apply to operate in the capital market as market operators and licenses those considered suitable. Such operators include: issuing houses, securities dealers/stockbrokers, sub-brokers, registrars, trustees, capital market consultants, reporting accountants, solicitors and investment advisers etc. Securities for issue to the investing public are also scrutinized and registered by the Securities and Exchange Commission. A party intending an issue must apply to SEC for approval. These include: Equities/shares, debentures/industrial loans, government bonds and collective investment schemes. It is the Security and Exchange Commission's responsibility to license transaction floors and exchanges, including: Securities Exchanges (like stock exchanges), Commodities Exchanges and Capital Trade Points, Futures, Options and Derivatives Exchanges as well as Depository, Clearing and Settlement agencies like the CSCS. Also major financial transactions like mergers, acquisitions, takeovers and other forms of business combinations must also have the blessing of the Securities and Exchange Commission.¹¹⁷

The Nigerian Electricity Business and investment as well as the Privatization process would have been incomplete in the absence of a viable Securities and Exchange Commission. Thus successful privatization of the successor companies is dependent on

117 Section 8

the involvement of all stakeholders like SEC in mobilizing all technical and financial resources to ensure a closure of the transaction.¹¹⁸

2.4.3. *Nigerian Investment Promotion Commission (NIPC)*

This Commission was established in 1995 as a body corporate with perpetual succession under the NIPC Decree, 1995. The commission shall encourage, promote and coordinate investment in the Nigerian economy.¹¹⁹

The following are the primary Functions of the Nigerian Investment Promotion Commission, to wit: to Initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors; to Promote investments in and outside Nigeria through effective promotional means; to Provide and disseminate up-to-date information on incentives available to investors; to Assist incoming and existing investors by providing support services; to Evaluate the impact of the Commission in investments in Nigeria and recommend appropriate recommendations; and to Maintain liaison between investors and ministries, government departments and agencies, institutional lenders and other authorities concerned with investments.¹²⁰

The Nigerian Investment Promotion Commission, in order to maintain liaison between investors and ministries, government departments and agencies, institutional lenders and other authorities concerned with investments adopted the use of the mechanism known as One Stop Investment Commission (OSIC).

Nigeria like most African nations has set up statutory bodies to regulate foreign investment in the country. Therefore foreigners interested in carrying on business in the country are required to obtain investment approvals after incorporating their companies. The practice has been that company incorporation and foreign investment approvals are processed in different authorized government agencies. This process was characterized by delays usually caused by government bureaucracy which also stifled the smooth start up of foreign businesses in Nigeria. In a bid to ensure the timely incorporation of companies and

118 See Bolanle Onagoruwa, "Nigerian Power Sector Reforms and Privatisation" *Bureau of Public Enterprises*, June 14, 2011

119 Citation/Long title to the *Nigerian Investment Promotion Commission Act*, 1995.

120 Section 4

grant of investment approvals, the government established One Stop Investment Commission (OSIC) to serve as a one stop agency for all pre-investment approvals. The One Stop Investment Commission (OSIC) had the statutory responsibility to grant Business Permits, Approved Status-in-Principle, Expatriate Quota, approvals on fiscal concessions, vet licensing and transfer agreements and generally advise the Federal Government on policy matters designed to promote the industrialization of the country.

Under the NIGERIAN INVESTMENTS PROMOTION COMMISSION (NIPC) ACT, there is a friendly investment legal regime in Nigeria which allows 100% ownership of investments by Foreigners in Nigeria.¹²¹ However this is to the exclusion of arms and ammunitions investments and a limited holding to joint venture in the oil and gas investments.¹²²

There are Permits that are necessary for Foreign Owned companies in Nigeria to obtain before running Business.

1. BUSINESS PERMITS – If the Company is wholly owned by foreigners, there would be need to obtain Business Permit. But where there are Nigerians among the owners, there is no need for the Business Permit.¹²³ Note that the permit is now issued through the NIPC.
2. EXPATRIATE QUOTA – Foreign employees of the Company are employed under thee Expatriate Quota scheme. The Expatriate quota is the official permit to a company to employ non-Nigerian in the number and capacities in the respective quota allowed.¹²⁴ Companies with capitalization of N15 million and above has maximum automatic quota of two (2) positions while companies with capitalization of N30 million and above has maximum automatic quota of four (4) positions. All other employees who are non-Nigerians are considered on the merit. It should be noted that the quota position attaches to a particular post hence

121 Section 17

122 Section 18

123 Section 8 (1) of the *Immigration Act*, 1963.

124 Section 8 (1) (a - b)

different persons can be covered by the same quota. It is the duty of the company to apply for the quota and not that of the employee.¹²⁵

There are two types of expatriate quotas viz:

- (i) Permanent until Reviewed – This is usually granted to the Chairman of the Board of a company or the Managing Director. As the name implies, it is permanent until there is a supervening circumstance, which will necessitate its review.
 - (ii) Temporary Quota: This is usually granted to the directors or other employees of the company. The maximum number of years granted in the first instance is five (5) years renewable for a further period of two years.
3. RESIDENCE PERMIT: Every alien may enter Nigeria and stay therein for three months without a residence visa (Tourist Visa). However, any person who is not a citizen of Nigeria who desires to enter Nigeria for purpose of residence (that is, beyond three months) must obtain a residence permit.¹²⁶

2.4.4. National Office for Technology Acquisition and Promotion (NOTAP)

The National Office for Technology Acquisition and Promotion (NOTAP) was established under the National Office for Technology Acquisition and Promotion Act in 1979 with the main objective of monitoring, on a continuous basis, the transfer of foreign technology to Nigeria.¹²⁷ The administration of the Act was entrusted on the National Office for Technology Acquisition and Promotion (NOTAP). NOTAP concerns itself with examining the quality of imported technology with a view to determining its price and to check abuses and dumping of obsolete technology. Thus, the principal concern of NOTAP is to register contracts/agreements, which deal with the transfer and acquisition of foreign technology.¹²⁸ NOTAP ensures that there is proper registration of proposed technology to be transferred, as the obligation is both on the licensor and licensee of such technology. It

¹²⁵ *Oil Fields Supply Centre Ltd v Johnson* (1987) 18 NSCC 725

¹²⁶ Section 10 (1) of the *Immigration Act*, 1963.

¹²⁷ Citation/Long title to the *National Office for Technology Acquisition and Promotion Act* 1979.

¹²⁸ Section 4 (d)

also ensures that obsolete technologies are not dumped in Nigeria in guise of technology transfer.¹²⁹

The Nigerian Electricity sector and providers are fast towing the path of advanced technologies to meet the enormous demand for electricity by Nigerians. The Federal Government of Nigeria in partnership with Azuri Technologies recently unveiled a PayGo Solar Home System aimed at providing affordable power to rural households without access of electricity from the grid. The Solar Home System will replace those with energy efficient lamps and in addition provide USB port for charging mobile phones and power a radio.¹³⁰

Apart from Solar, other renewable electricity generation technology abounds. Simply put; this category of showcases a technological system of harnessing a naturally existing energy flux, such as wind, sun, heat, or tides, and converting that flux to electricity. However, to tap these sources of energy, renewable electricity generation technologies must be located where the natural energy flux occurs, unlike conventional fossil-fuel and nuclear electricity-generating facilities, which can be located at some distance from their fuel sources. This is because the Natural phenomena have varying time constants, cycles, and energy densities. Thus in order to achieve sustainability and stability, advanced technological investments must be put in place. These categories of sophisticated level of technologies must be registered and duly accorded the status it deserves under the law.

2.4.5. Central Bank of Nigeria (CBN)

The Central Bank of Nigeria (CBN) is the apex financial Institution and Regulator in Nigeria. The CBN was established by the Central Bank Act of 1958. CBN is responsible for overseeing the orderly operation of the Nigerian Financial system and overall growth of the economy. The current legal framework within which the CBN operates is the CBN Act of 2007 which repealed the CBN Act of 1991 and all its amendments. The Act provides that the CBN shall be a fully autonomous body in the discharge of its functions

¹²⁹ See *supra* note 17

¹³⁰ See Okafor Paschal, "Solar Home System Off-grid Power Solution by Azuri Tech" retrieved from <https://www.naijatechguide.com/2017/01/solar-home-system-azuri.html>.

under the Act and the Banks and Other Financial Institutions Act (BOFIA), with the objective of promoting stability and continuity in economic management.¹³¹

The Objects of the Bank are to ensure monetary and price stability; to issue legal tender currency in Nigeria; to maintain external reserves to safeguard the international value of the legal tender currency; to promote a sound financial system in Nigeria; and to act as banker and provide economic and financial advice to the Federal Government.¹³²

The Central Bank of Nigeria (“CBN”) empowers commercial banks in Nigeria to issue a CCI within 24 hours of receiving inflow of funds, having received the requisite application from the Nigerian company and the necessary documentation. Failure to apply for and/or issue the CCI within the specified period, the commercial bank must then obtain CBN’s approval before issuing the CCI.¹³³

The interventionary effect of the Central Bank of Nigeria in the electricity sector vis-a-viz regulatory role is not exhaustive. Part of the objectives of the NIGERIAN ELECTRICITY REGULATORY COMMISSION RULES FOR THE INTERIM PERIOD BETWEEN COMPLETION OF PRIVATISATION AND THE START OF THE TRANSITIONAL ELECTRICITY MARKET (TEM) 2013; Regulation No: NERC-0113 is to establish the sources of funds required to ameliorate the probable shortfall in revenues collected by the Discos during the Interim Period. These sources include Federal Government Subsidy provided under MYTO-2 for the 2013/2014 Tariff Year.¹³⁴ According to Odion Omonfoman the Central Bank of Nigeria (CBN) is instrumental in nudging commercial banks in assisting DISCOS and investors set up some minimum power sector lending guidelines for banks (which could stipulate minimum interest rates, tenor, moratorium, loan provisioning vis-a-viz prudential guidelines, special CRR provisions or other reliefs to banks, etc.) that would stimulate banks to lend to Discos and the power sector in general. Kudos must be given to the CBN on account of the CBN sponsored Nigerian Electricity Market Stabilization Facility, a 10-year intervention facility to the power

131 Section 1 (3) of the *Central Bank of Nigeria Act, 2007*.

132 Section 2

133 Section 15 (1) & (2) of the *Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995*.

134 Rule 6 (d) of the *NERC Rules for the Interim Period between Completion of Privatization and the Start of the Transitional Electricity Market (TEM) 2013*; Regulation No: Nerc-0113

sector, which has helped to provide low cost, long-term debt financing to Discos. Only recently, Kano Disco unveiled over 62,000 energy metres financed using the CBN facility.¹³⁵

The existing practice of deducting gas costs from Gencos' receivables by MO for onward payment to gas providers, shall cease from the start of the Interim Period and the Gencos shall thereafter be responsible for making payments to their respective gas providers.¹³⁶

The challenge created by the revenue shortfall and the problem of unpaid legacy invoices for gas supplied to PHCN (pre privatization) threatened to create a crisis of confidence in the Nigerian electricity market. Following a series of stakeholders' consultations, the Central Bank of Nigeria (CBN), working with NERC, decided to set up a framework for a stabilization facility to settle the revenue shortfall that accrued during the period of the Interim Rules as well as the legacy gas debts. The disbursement of the facility is conditional upon, among other things; a migration from the Multi Year Tariff Order 2 (MYTO2) which is the tariff currently applicable in the market to a new MYTO 2.1 that will be more cost reflective.¹³⁷ In February 2015, the CBN made available a N213 billion (approximately \$1.8 billion) Nigeria Electricity Market Stabilization Facility (CBN-NEMSF) at a concessionary interest rate of 10% per annum on a reducing balance basis to the sector. The purpose of the CBN-NEMSF, as stated in a CBN regulation, is to settle outstanding payment obligations due to Market Participants, Service Providers and gas suppliers that accrued during the Interim Rules Period (Interim Rules Debt or IRP Debt) as well as the Legacy Gas Debt of the PHCN generation companies owed to gas suppliers and the Nigerian Gas Company (NGC) which has been transferred to the Nigerian Electricity Liability Management Company (NELMCO).¹³⁸

135 Odion Omonfoman, "Electricity Distribution Companies – The Challenges and Way Forward," *Premium Times* January 4, 2016 retrieved from <https://opinion.premiumtimesng.com/2016/01/04/electricity-distribution-companies-the-challenges-and-way-forward-by-odion-omonfoman/>

136 Rule 24 (a - e) *NERC Rules for the Interim Period between Completion of Privatization and the Start of the Transitional Electricity Market (TEM)* 2013; Regulation No: Nerc-0113

137 Rule 25 (a - e)

138 Aniekan Ukpanah, Nicholas Okafor and Tega Agbosa, "The Nigerian power sector privatization and the declaration of a transitional electricity market," *The IFLR1000* 17 June 2015, retrieved from <https://www.iflr1000.com/NewsAndAnalysis/The-Nigerian-power-sector-privatisation-and-the-declaration-of-a-transitional-ele/Index/3242>. The IFLR1000 is the guide to the world's leading financial and corporate law firms and lawyers. Its first rankings were published in 1990 and their research base cuts across over 120 jurisdictions worldwide. Aniekan Ukpanah, et.al are Legal Practitioners at Udo Udoma & Belo-Osagie Lagos, Nigeria.

2.4.6. Federal Inland Revenue Service (FIRS)

The Finance (Miscellaneous Taxation Provisions) Act No 3 of 1993 established the Federal Inland Revenue Service (FIRS) as the operational arm of the Federal Board of Inland Revenue (FBIR). In 2007, the Federal Inland Revenue Service (Establishment) Act No.13 of 2007 granted autonomy to the FIRS, and allows the FBIR to provide general policy guidelines relating to the functions of the FIRS. The FIRS is in charge of collection and administration of federal and corporate taxes and laws in Nigeria. Indeed the primary object of FIRS is to control and administer the different taxes and laws relating to the Federal Government tax policies.¹³⁹

Under the Electric Power Sector Reform Act, 2005, the Stamp Duties Act was restricted in respect of any transfer made or transaction entered into during the incorporation of the initial holding company and the successor companies or any subsequent increase to their authorized share capital, prior to the transfer of a majority interest to one or more private investors.¹⁴⁰ Hence and except on this stage, the Stamp Duty shall be applicable generally.

The FIRS is empowered to administer and enforce the various Tax enactments set up under the first schedule as follows:

- a. Companies Income Tax Act cap.60 LFN;
- b. Petroleum Profits Tax Act caps. 354 LFN1990;
- c. Personal Income Tax Act No.104 1993;
- d. Capital Gains Tax Act cap 42 LFN1990;
- e. Value Added Tax Act 1993 NO.1021993;
- f. Stamp Duty Act cap 411 LFN 1990;
- g. Taxes and Levies (approved List for Collection) Act No.2, 1998;

¹³⁹ Section 2 of the *Federal Inland Revenue Service (Establishment) Act, 2007*.

¹⁴⁰ Section 4 of the *Electric Power Sector Reform Act, 2005*.

- h. All regulations, proclamation, government notices or rules issued in terms of these regulations;
- i. Any other Law for the assessment, collection and accounting of the National Assembly, from time to time or regulation incidental to those laws, conferring any power, duty or obligation on FIRS; and
- j. Enactment or Laws imposing Taxes and Levies within the Federal Capital Territory.¹⁴¹

For the purpose of clarity, there are three relevant tax authorities in Nigeria with capacity to collect various designated taxes, the Federal Inland Revenue Service (FIRS) collecting taxes on behalf of Federal government,¹⁴² the State Inland Revenue Services (SIRS) collecting State taxes and the Local Government Revenue Committee (LGRC).¹⁴³

All Electricity Companies are required to be registered with the relevant tax authorities for tax purposes. After incorporation, the company makes an application to the relevant tax office requesting the issuance of a Tax Identification Number (“TIN”), a Tax Clearance Certificate (“TCC”) and VAT registration.

The taxes payable by local companies include:

- a. Companies Income Tax levied at the rate of 30% on the profits of all Nigerian companies;
- b. Education Tax at the rate of 2%. This tax is regulated by the Tertiary Education Trust Fund (Establishment, ETC) Act, 2011. It is imposed on all assessable profits of all companies registered in Nigeria.
- c. Stamp Duties imposed or chargeable for various documents at various flat and valorem rates, depending on the nature of the instrument, up to a maximum of 3% of the value involved;

141 Section 25 of the *FIRS Act, 2007*.

142 Section 25

143 See Sections 86-93 of *Personal Income Tax Act 1993*

- d. Value Added Tax at a flat rate of 5% on the supply of a wide range of goods and services;
- e. Capital Gains Tax (CGT) levied at the rate of 10% on any gains from the disposal of assets. This tax is not payable where the money is used to acquire replacement assets within a twelve month period before or after the disposal;
- f. Withholding Tax ranging from 5% (for construction and agency arrangements) to 10% (for dividend, interest and rent).

Though various governments in Nigeria have been looking for ways of getting the nation out of the energy poverty, they have however not done enough at all levels to create enabling business environment to promote and encourage Wind Energy Technology development. It is well known that the initial capital cost for wind and other renewable energy technology is very high compared to other conventional energy sources. Yet if the governments (local, state and federal) would give tax incentives or holidays to willing investors, remove or reduce custom duties payable on importation of the technology, give subsidies to sales and purchases of the technology applications, provide low or interest free loans through banks primarily for wind energy investors and also restructure the energy framework of the nation to include wind energy, the awareness level of the public will be enhanced and invariably there would be rapid embracing of the technology of wind for power generation.¹⁴⁴

The Petroleum Profit Tax Act¹⁴⁵ also provides some tax incentives to companies engaged in gas utilization projects. The Act provides that in computing the adjusted profit of any company and of any accounting period from its petroleum operations, there shall be deducted all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations, including *inter alia* all royalties, the liability for which was incurred by the company during that period in respect of natural gas sold and actually delivered to the

144 Kingsley Okoro, Moshood Abiola, Buba Ardo Jamilah and Aka Oluwaseun, "Renewable Energy Options: The Case of Wind Energy" *Faculty of Law, School of Graduate Studies University of Lagos* 2014/2015. Okoro et.al were LLM Candidates during the 2014/2015 LLM set in the University of Lagos, Nigeria. The topic was their seminar paper presentation for the award of LLM.

145 Cap. P14 L.F.N. 2010.

Nigerian National Petroleum Corporation, or sold to any other buyer or customer or disposed of in any other commercial manner.¹⁴⁶ The Act also provides for incentives for companies engaged in the utilization of associated gas.¹⁴⁷

2.4.7. Nigeria Atomic Energy Commission

Conformity with the regulations of the Nigeria Atomic Energy Commission as mandated by the NAEC Act, in the sensitive area of nuclear power generation. Thus it is the responsibility of the Commission to promote the development of atomic energy and for all matters relating to the peaceful uses of atomic energy, and have power to prospect for and mine radioactive minerals as well as construct and maintain nuclear installations for the purpose of generating electricity.¹⁴⁸

2.4.8. Consumers Protection Council (CPC)

The Consumer Protection Council is established by the Consumer Protection Council Act 1992, Cap C32, LFN, 2004.¹⁴⁹ Under the Consumer Protection Council Act, a consumer or community that has suffered a loss, injury or damage as a result of the use or impact of any good, product or service may make a complaint in writing to or seek redress, and the Council is statutorily empowered to make inquiries into the causes and circumstances of injury, loss or damage suffered or caused by a company, firm, trade, association or individual.¹⁵⁰

There appears to be a conflict when the above provision is put side by side with the provisions of the Electric Power Sector Reform Act, 2005 wherein the NERC is empowered to develop, in consultation with the licensees, the customer service standards, customer complaint handling standards and procedures and standards for compensation to consumers who do not enjoy regular power supply.¹⁵¹ Furthermore, in accordance with the EPSR Act, NERC enacted the Customer Complaint Handling: Standard and Procedure, 2006 for complaint handling procedures, practices relating to payment of bills, connection

146 Section 10 *Petroleum Profit Tax Act*

147 Section 11

148 Section 2 (1) (a & b) *Nigerian Atomic Energy Commission Act 1976*.

149 Section 1 (1) of the *Consumer Protection Council Act 1992*

150 Sections 6 (1) and 5 (a)

151 Section 80 (1)(a & b) (3)

and disconnection procedures.¹⁵² Under the Regulations, the licensee is required to establish a customer complaint unit (CCU) with the responsibility of resolving complaints as provided for under section 2 (6) of the Regulations, and such Unit shall be headed by a Senior Officer of the Distribution Company.¹⁵³ The Regulation makes it clear that a complaint must be in writing and relate to defects or deficiencies in services, unfair or restricted trade practices, bills in excess of NERC's fixed prices, unsafe or hazardous electricity supply, recovery of excess bills or charges, or any breach of obligation whether in law or contract.¹⁵⁴

The above provisions of the EPSR Act, 2005 and the Customer Complaint Handling: Standard and Procedure, 2006 must not be considered as conflicting with the Consumer Protection Council Act, 1992, rather must be considered complementary provisions. Thus the Council combines and partners with other regulatory agencies in ensuring or enforcing standards of consumer goods or in assessing the quantum of loss or damage.¹⁵⁵ Similar to this procedure is the designation as an inspector, any person (whether or not a member of the public service of the Federation) who possesses such qualifications and fulfills such requirements, if any, as may be prescribed and shall furnish to every such person so designated a certificate of designation.¹⁵⁶

This seemingly symbiotic relationship was re-echoed by the Consumer Protection Council's Director-General; Mrs. Dupe Atoki who on the 3rd December, 2016 at a town hall meeting with electricity consumers and operators in Abuja said that:

The Consumers Protection Council (CPC) is determined to provide a credible platform of electricity stakeholders in the country to resolve the numerous complaints of consumers to ensure customer satisfaction in the delivery of electricity services by operators in the country.¹⁵⁷

152 Section 96 (2) (j) of the *Electric Power Sector Reform Act*, 2005

153 Sections 2 (6) and 8 of the *Customer Complaint Handling: Standard and Procedure*, 2006.

154 Sections 3 (1-3)

155 Sections 14

156 Sections 15 (1)

157 <http://sundiatapost.com/2016/12/03/cpc-to-resolve-complaints-by-electricity-consumers-nationwide/>

Also in the words of Yemi Oke (2013) “aside the protection under the EPSR Act and regulations made pursuant thereto, electricity consumers could also seek solace in the legal regime that generally provides consumers with statutory protection.”¹⁵⁸

It is important to state that the Complaint unit established by the Regulation as a branch of the Discos is a mockery to the intendment of Consumer Protection. This not only constitutes an abuse of the entire customer relief process, it is an affront to the whole essence. By implication, a close examination and literary interpretation of Section 3 subsections 1, 2 and 3 will show that the appointment is made by the DISCOS. This therefore put the Electricity Providers and the CCU in a master servant relationship, whereas the Complaint concerns the activities of the Electricity Providers. This means the CCU are sitting as Judges in their own causes. In *Ajibaiye v Ajibaiye*,¹⁵⁹ it was held as follows:

Where bias is alleged against a court or judge, it is not the real likelihood that the court or judge did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case that there was real likelihood of bias.¹⁶⁰

Also in *Garba v. University of Maiduguri*,¹⁶¹ it was held that:

“It is my opinion that when they (the Board) undertook to investigate the crimes, ... they were carrying out judicial junction. Having assumed judicial junction they were bound to pass the qualification test to assume the judicial junctions and were bound to act judicially and comply with the constitutional requirement of fair hearing.”¹⁶²

158 See Yemi *supra* note 1 at 110

159 (2007) FWLR (pt. 359) 1321

160 *Ibid* at 1345 - 1346.

161 (1986) 1 N.S.C.C. 245

162 *Ibid* at 269, 270 & 271 Per Obaseki JSC

The absence of an independently constituted body of persons who enjoys no Electricity Providers' patronage renders the whole proceedings a nullity.

More so, if a complaint is not resolved by the CCU or a complainant is not satisfied, appeal may be made to the Forum. However, the Regulation requires the licensee to provide office space and other facilities required by the members of the Forum for their efficient functioning.¹⁶³

There is no difference from the provisions of Section 3 (1-3) thereof. Allowing the DISCOS to provide facilities for adjudication, is enough to open space for bias. No findings of such body can be trusted since the piper is dictating the tune. This provision seems to be true of the submission of Oke (2013) that in the power sector, going by the experiences of consumers on the NEPA, and till date; consumers' interests or concerns are sacrificed for that of the producer.¹⁶⁴ In view of this continued injustice towards the hapless consumers, the legal regime of consumer protection in Nigeria is supposed to be supplemented with the United Nations Guidelines for Consumer Protection, UN General Assembly, Resolution 39/248, April 9, 1985, which guidelines document was unanimously adopted for implementation by member states of the UN.¹⁶⁵ Oke further made a case for the consumer by submitting that in addition to the rights of the consumers provided for by the provisions of the CONSUMER PROTECTION COUNCIL ACT 1992, is the right of the affected electricity and other consumers of goods and services to institute civil suit for compensation and restitution, which the Consumer Protection Council Act also guarantees.¹⁶⁶ Thus court by or before which a person is convicted of an offence may in addition to dealing with such person in any other way, make an order (in this Decree referred to "as compensation order") requiring the person to pay compensation for any personal injury, loss or damage resulting from that offence of such amount as it may deem fit or as assessed by competent professional authority.¹⁶⁷

2.4.9. Bureau of Public Enterprises (BPE)

¹⁶³ Section 4 (10) of the *Customer Complaint Handling: Standard And Procedure, 2006*.

¹⁶⁴ *Supra* note 1 at 100.

¹⁶⁵ *Ibid* at 101

¹⁶⁶ *Ibid* at 111

¹⁶⁷ Section 13 (1) of the *Consumer Protection Council Act 1992*

The Bureau of Public Enterprises (BPE) is charged with the overall responsibility of implementing the Nigerian policy on privatization and commercialization, which is aimed at revamping the decaying public enterprises and sell them off to private investors or commercialize them for profit making. The Olusegun Obasanjo administration set the privatization ball rolling shortly after assuming office in 1999. The government set up the Bureau for Public Enterprises to ensure the smooth sale of many government owned enterprises. The chief reason for government divesture was because many of the state owned companies were poorly managed and had become a drain pipe for government.

The Power Holding Company of Nigeria (PHCN) was set up by the Electric Power Sector Reform Act of 2005 to replace NEPA as part of the large scale reform of the Nigerian electricity sector which culminated in the unbundling of PHCN into eighteen (18) companies made up of one (1) transmission company, six (6) generating companies and eleven (11) distribution companies. The emergence of PHCN was meant only as a transitory, stop gap plan to crystallize in the emergence of the new companies. The PHCN was incorporated under the Companies and Allied Matters Act,¹⁶⁸ and limited by shares to act as an initial holding company for the assets and liabilities of NEPA. The shares of PHCN are held in trust by the Ministry of Finance and Bureau of Public Enterprises (BPE) in the name of Federal Government of Nigeria.¹⁶⁹ The BPE is in a position to leverage its shareholding in all eleven discos under a structured financing, to raise long-term debt capital on behalf of Discos.¹⁷⁰

2.4.10. National Council of Privatization (NCP)

The National Council on Privatization (NCP) performs the following functions:

- a. To approve policies on privatization and commercialization;
- b. To approve guidelines and criteria for valuation of public enterprises for privatization and choice of strategic investors;
- c. To approve the legal and regulatory framework for the public enterprises to be privatized;

168 *Companies and Allied Matters Act*, Cap 20, Laws of the Federation of Nigeria (LFN) 2004

169 Section 2 of *Electric Power Sector Reform Act of 2005*

170 See Odion *supra* note 93

- d. To determine the mode of sale of shares of a listed public enterprise and to advise the Federal Government in that respect;
- e. To approve the prices of shares or assets of the public enterprise to be offered for sale; and
- f. To appoint as and when necessary Committees comprising persons from both the public and private sectors with requisite technical competence to advise on the privatization or commercialization of specific public sector enterprises.¹⁷¹

The National Council on Privatization was statutorily mandated to incorporate under the Companies and Allied Matters Act, an initial holding company limited by shares for the assets and liabilities of the Old Authority under NEPA Act.¹⁷² It will be right to posit that the basement of a successful privatization in the Electricity Sector was the National Council on Privatization. Thus apart from the Initial Limited Liability Company, the National Council on Privatization incorporated the successor companies that assumed the assets and liabilities of the initial holding company including, but not limited to, companies with functions relating to the generation, transmission, trading distribution and bulk supply and resale of electricity.¹⁷³ Under the Privatization vehicle, the National Council on Privatization was mandated and or authorized to regulate with respect to: transfer of, employees, assets, liabilities, rights and obligations and prescribing contracts or classes of contracts.¹⁷⁴ The National Council on Privatization was statutorily authorized to opt for any process pleasing to it to actualize the privatization process of the successor generation licenses, distribution licenses or transmission licenses companies.¹⁷⁵ The Council opted for a concessionary bidding wherein Transnational Corporation of Nigeria Plc (Transcorp), Amperion Consortium, CMEC/Eurafric Energy Consortium, Mainstream Energy Solutions Limited and North-South Power Company Limited emerged as bid winners of the five Gencos out of six put up for sale by the federal government of Nigeria. The transaction is not an outright sale, but a 15-year concessionary arrangement.¹⁷⁶ The

171 Section 11 of the *Public Enterprises (Privatization and Commercialization) Act, 1999*

172 Section 1 of the *Electric Power Sector Reform Act, 2005*.

173 Section 8

174 Section 18 (1)

175 Section 24 (1)

176 See Oke, *supra* note 22 at 16

Public Enterprises (Privatization and Commercialization) Act, 1999 established the office of the National Council on Privatization.¹⁷⁷

It is however disappointing that despite the roles of the Council in the huge success of the Nigerian privatization process, there is no such thing in existence as the Board of National Council on Privatization several years after its creation, as the debate for its establishment is being sponsored by Ahmed Yerima (APC, Bauchi) Member of the Federal House of the Representatives.¹⁷⁸ One wonders why the Bureau of Public Enterprises (BPE) serves as the secretariat of the National Council on Privatization (NCP) and is charged with the overall responsibility of implementing the council's policies on privatization and commercialization.

2.4.11. Nigerian Federal Ministry of Solid Minerals

There must be absolute fulfillment of all condition precedent and consequent in obtaining mining lease, exploration or prospecting licenses from the Federal Ministry of Solid Minerals for the extraction of coal mines in the event of undertakings desirous of using coal to fuel power generation.

2.5. Over-Regulations of the Sector

Operating or investing in the Electricity Sector of the Nigerian Economy under the present legal regime clearly brings on board a concern due to heavy regulation involved. Investors planning to incorporate Electricity Companies in Nigeria may be easily dissuaded having been faced with multi-agency and over-regulatory requirements with respect to obtaining of certificate, licenses, permits, approvals, registration, among other things.

¹⁷⁷ Section 9 of the *Public Enterprises (Privatization and Commercialization) Act, 1999* and Section 100 of the *Electric Power Sector Reform Act, 2005*

¹⁷⁸ This was discussed extensively during the House Debate of the House of Representatives aired/rebroadcasted on 21st April, 2017 via NTA Parliamenta; Startimes Channels 306 and <http://thenationonlineng.net/rep-advise-buhari-constitute-ncp-board-now/>

CHAPTER THREE

RELATIONSHIPS IN ELECTRICITY BUSINESS IN NIGERIA

3.1. Introduction

Electricity by nature and practice brings entities; corporate and natural, together for a defined purposes. These Relationships upon creation, spell out rights, obligations, duties and liabilities as they apply to participants. Some of these rules may be the customs and traditions of the sector which were codified in the form of statutes and laws; others are indices of precepts which the practice allows while many others are drawn out by the participants themselves for their unique purposes.

Although, it is an established truth, that, there can be no contract between more than two parties at a time. Where it appears that there are more than two parties involved, what it means is that either group of the parties belongs to one side, or there is more than one contract involved. Electricity Law and practice is a “*Sui Generis*.” It is different and unique. It undergoes series of levels before getting to the final consumers. For instance, generation is different from transmission while distribution is different from the rest. This brings quite a diverse areas into a spot called the Electricity Market to achieve a common purpose; Electricity Supply.

3.2. The General Nature of Contract

A contract is defined as an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties.¹⁷⁹ A contract is also an agreement between two or more parties which creates reciprocal legal obligations to do or not to do particular things. For a contract to be valid there must be mutuality of purpose and intention.¹⁸⁰ This agreement between the parties creates a unique kind of relationship which is underpinned by rights, duties, obligations benefits and liabilities. The relationship created by the law of

¹⁷⁹ I. E. Sagay, *Nigerian Law of Contract*, (Spectrum Law Series Reprint 2007) Pg 1.

¹⁸⁰ *Orient Bank (Nig) Plc v Bilante International Ltd* (1997) 8 NWLR (Pt 515) 37 at 76.

contracts enable a person to whom money, goods, services, or some other benefits has been promised to enforce the promise or obtain a remedy for its breach.¹⁸¹

Every contract, be it simple or formal must necessarily satisfy certain basic requirements in order to be enforceable at law. For the purpose of this Project work, the three main requirements are: Offer, Acceptance and Consideration.

First, there must be an offer. An offer is a definite statement or proposition made by one party called the offeror to another party called the offeree, clearly and precisely indicating the terms under which the offeror is willing to enter into a contract with the offeree.¹⁸²

Secondly, this offer must necessarily be followed by an acceptance. Acceptance is the final expression of assent to the terms of an offer.

Thirdly, apart from formal contracts which are by deed, every contract shall not be enforceable except such is for a consideration. Consideration was defined by **Lush J** in *Currie v Misa*,¹⁸³ as consisting of some right, interest, profit, and benefit accruing to one party or some forbearance, detriment by the other party.

3.3. The Nature of Electricity Contracts

In a typical Electricity Market, contract means a Vesting Contract or a Power Purchase Agreement.¹⁸⁴ The Contracts of Electricity generally relates to the transactional commercial agreement for the demand and supply of electricity as between the Electricity Providers and their Customers or Consumers in one hand, as well as the Customers and the Consumers on the other hand.

The contract of electricity cannot successfully be enforceable except the fundamental rules and principles of enforceable contracts are well established. It must also be mentioned that the contract of Electricity is a *Sui Generis*. Before a contract can be validly entered into, there must be offeror and offeree. These are the major key players in any enforceable contract. As rightly suggested by Professor Sagay:

181 R.K. Goel, in I. E. Sagay quoting, *The Nigerian Law of Contract: Cases and Materials* (unpublished work) Pg 1.

182 M.C. Okany, *Nigerian Commercial Law*; (Africana-Feb Publishers Ltd 2001) 42 & 44.

183 (1875) LR 10 EX 153.

184 Rule 3.1 of the *Market Rules for the Nigerian Electricity Supply Industry*.

There can be no contract between more than two parties at a time. Where it appears that there are more than two parties involved, what it means is that either group of the parties belongs to one side, or there is more than one contract involved. For example, a contract of guarantee usually involves three parties and two contracts, namely, (i) the contract of guarantee between the lender and the guarantor and (ii) the loan contract between the lender and the debtor.¹⁸⁵

In the Electricity Practice under the current regulatory regime, a number of participants are involved in the industry and the market. They include: the Electricity Trading Companies; the Licensed Electricity Generating Companies; the Licensed Electricity transmission and System Operating Companies; the Licensed Electricity Distribution Companies; and the Electricity end users which could be either eligible customers or the consumers/customers etc. The industry is hydraheaded and involves too many participants. For the purpose of Contracts of Electricity, we shall concentrate on the Electricity Trading Companies, Licensed Electricity Distribution Companies and the end users (consumers/customers) as well as the Eligible Customers. The other participants are the System Operator, the Market Operator, Transmission Company etc.

The Electricity Act places reliance on novation contracts for the purpose of crystallization of assignment and/or transfer of rights and obligations. Novation is a tripartite contract involving parties - the obligor, the obligee and a third party. The principle of novation permits assignment or transfer of rights as well as liabilities among the parties to the agreement. It is a transfer agreement and connotes the assumption that, by a different party, of liabilities, originally residing in another party, and involves the substitution of a new contract for an existing one, either between the same parties, or between different parties. In contrast to an assignment, where debtor or obligor's consent is not required, a novation requires the consent of all the parties.¹⁸⁶

¹⁸⁵ See *supra* note 1 Pg 1.

¹⁸⁶ See K. Ajayi "The Paradox of Cinderella and the Beggar Man: Legal Aspects of Securitization" and O. Ajayi, (Ed.) *Legal Aspects of Finance in Emerging Markets* (Durban, LexisNexis, 2005), at 420 in in Yemi Oke, *Nigerian Electricity Law and Regulation*, (Law Lords Publications, 2013) at pp. 32 & 33.

3.3.1. *The Consumers/Customers*

Under the Electric Power Sector Reform Act, 2005, a “Consumer” means any end-user of electricity who is a customer of a distribution licensee that is **not an eligible customer** and, for purposes of filing a complaint with the Commission and for any other reason that the Commission may determine, a person who is temporarily disconnected or otherwise without service, provided that a person who has applied for, but has yet to receive, service shall also be deemed to be a consumer.¹⁸⁷

Similarly, a Customer under the NERC Regulation on Customer Complaints Handling Standards and Procedures, 2006 and the Meter Reading Billing Cash Collections and Credit Management for Electricity Supplies Regulations 2007,¹⁸⁸ means **any person or organization supplied with electricity for his own use** by a distribution licensee or by any other person engaged in the business of supplying electricity to the public under the Electricity Power Sector Reform Act or any other law for the time being in force and includes **any person whose premises are for the time being connected for the purpose of receiving electricity** from a distribution licensee or such other person as the case may be.¹⁸⁹

The definition of a consumer as given under the Act creates yet another category of customer. Thus the inclusion of the words “not an eligible customer” connotes a regime of three categories of end users (consumers). In further interpretation, the words “Eligible customer” was defined to mean a customer that is eligible, pursuant to a directive or directives issued by the Minister under section 27, to purchase power from a licensee other than a distribution licensee.¹⁹⁰ The Act created an atmosphere where the Eligible Customers shall contract with a party other than the Licensed Electricity Distribution Companies. This creates the third participant to be discussed in this heading.

¹⁸⁷ Section 100 of the *Electric Power Sector Reform Act, 2005*

¹⁸⁸ This Regulation is made pursuant to section 96 (2) (c) & (d) of the Act.

¹⁸⁹ See Section 2(8) of *NERC Regulation on Customer Complaints Handling Standards and Procedures, 2006*; see also Section 15 of the *Meter Reading Billing Cash Collections and Credit Management for Electricity Supplies Regulations 2007*

¹⁹⁰ Section 100 of the *Electric Power Sector Reform Act, 2005*

The definition of who a Consumer is and who a customer is has not received so much Judicial pronouncements. However, the judicial elucidation offered by Per NIKI TOBI, J.C.A. who delivered the Leading Judgment in *Amadi v Essein*,¹⁹¹ while deciding on the legal issue of the locus standi to commence or bring an action in the event of breach of contract or tort in an Electricity supply dispute described a consumer thus:

..... The respondent lives at No. 13 Obio Oko Street, Uyo. He is a tenant. Mr. Michael Abraham is the landlord. The respondent is a consumer of electricity supply from the 6th appellant. He directly pays his bills to the 6th appellant. The appellants deal with him directly. In one of their business relationships, the appellants disconnected the electricity supply of the respondent..... In my view, it is ridiculous to contend that a person who deals directly with NEPA, pays his bills and other charges arising from disconnection and all that, cannot commence an action against the Authority, on the pretext that he was not the registered consumer.¹⁹²

Also the case of *The State ExParte Tunde Savage v E.C.N. Owerri*,¹⁹³ will offer a better understanding of the terms. The fact of the case is as follows: Sometimes in November, 1963, Mr. Savage occupied the premises known as No. 14 Old Market Road, Owerri. He applied to the Electricity Corporation for the change of the consumer's name registered with the Corporation to his own name. However, on 24th February, 1964 the Corporation without any previous warning and without default in payment disconnected his electricity supply. The Corporation was warned to reconnect electricity but they did nothing until instructions arrived from their headquarters in Lagos, after which Mr. Savage was supplied with electricity temporarily. Thereafter it was again disconnected. It turned out that Mr. Osuji the caretaker of the premises had written the Electricity Corporation of Nigeria requesting them to disconnect the electricity and not to reconnect without his

191 (1994) 7 NWLR (Pt 354) 91

192 *Ibid* at 115 Paras E-F; 118 Para. D

193 Suit No. HOW/12M/64, reported in (1964) VOL. VIII ENLR 55

approval. Mr. Savage then applied for an Order of Mandamus praying the Court to compel the Electricity Corporation of Nigeria to supply electricity to his premises.

In describing whom a consumer, customer, provider and agent in an Electricity Practice, **Per EGBUNA, J.** of the Owerri High Court, held as follows:

In this form Mr. Osuji signed as consumer. In actual fact he was not the consumer but Mr. Savage. It was all paper work..... He is the one consuming the electricity in fact but the person known to the Electricity Corporation of Nigeria according to their books as consumer was one Osuji, and the person who applied for electricity was Abechetta and Sons. It is clear that Mr. Osuji was neither the applicant nor the consumer in fact..... I may mention that it is not the duty of the Electricity Corporation of Nigeria to start investigating title to property before connecting any prospective consumer. What is their concern is the occupier of the premises and his ability to pay. Electricity is consumed by the person who occupies the premises and uses the current, not by a caretaker or owner of premises who lives miles away, and does not occupy the premises.....¹⁹⁴

By the reckoning of the learned Jurists above, the consumer of electricity is the person who pays the bills and enjoys the electricity supply whereas the customer appears to be the actual owner whose name is on their register. This definitions of whom a consumer is akin to what was described by the Electric Power Sector Reform Act, 2005, as “any end-user of electricity,” whereas the customer as described by the learned jurists conforms with **any person whose premises are for the time being connected for the purpose of receiving electricity** from a distribution licensee or such other person as the case may be.¹⁹⁵

However, it is necessarily important that there be drawn some clear distinctions between the first two categories of Consumers. They are the customer-consumer, consumer-

¹⁹⁴ This judgment was delivered on the 18th July, 1964

¹⁹⁵ See *supra* note 11

consumer in one hand, and Eligible customer-Consumer in the other hand. The first two categories of end users are interchangeably used as one in various provisions of the Act. There is indeed a wide gap of difference between the two. Thus an end user of electricity may be the customer as well as a consumer in one hand, and may just be a consumer simpliciter. It is no doubt that, the affordability of housing and personal homes have almost made all customers the consumers of electricity.

3.3.2. *The Eligible Customers*

Under the Act, “eligible customer” means a customer that is eligible, pursuant to a directive or directives issued by the Minister under section 27, to purchase power from a licensee other than a distribution licensee.¹⁹⁶ In section 27 of the Act, the Minister may issue a directive to the Commission specifying the class or classes of end-use customers that, from time to time, shall constitute eligible customers under this Act.¹⁹⁷ This is no definition of the subject term, and at this stage, an extended look into other jurisdictions is indispensable.

The 2010 Nevada Code¹⁹⁸ defined “Eligible customer.” First, as an end-use customer who is a nongovernmental commercial or industrial end-use customer that has an average annual load of 1 megawatt or more in the service territory of an electric utility. Second, as a governmental entity, including, without limitation, a governmental entity providing educational or health care services, that: Performs its functions using one or more facilities which are operated under a common budget and common control; and has an average annual load of 1 megawatt or more in the service territory of an electric utility.¹⁹⁹

According to GRUPPO HERA; an Italian Multi-Utility leading corporation in environmental water and energy services, an Eligible customer is a physical or legal person, able to stipulate supply contracts with any producer, distributor or wholesaler.²⁰⁰

196 Section 100 of the *Electric Power Sector Reform Act, 2005*

197 Section 27

198 Title 58 Energy; Public Utilities and Similar Entities Chapter 704B Providers of New Electric Resources NRS 704B.080 retrieved from <http://law.justia.com/codes/nevada/2010/title58/chapter704b/nrs704b-080.html>

199 *Ibid*

200 http://eng.gruppohera.it/group/hera_ondemand/glossary/energy_glossary/page109.html

Kosovo's Law on Electricity further defines "eligible customers" as customers who are free to purchase electricity from the supplier of their choice.²⁰¹ The Law states that the Minister responsible for Energy shall prescribe the conditions for determining eligible customers in an implementing instruction to be adopted no later than January 31 for each year. The criteria shall include the extent of their electricity consumption and the proportion of energy costs to the prices of their products and services.²⁰²

The Law further states that a customer may obtain the status of eligible customer by responding to a public announcement that the Energy Regulatory Office must launch each year.²⁰³ While eligible customers are normally supplied by independent suppliers in many liberalized electricity markets, eligible customers in Kosovo will have the option to be supplied by the public supplier (KEK) under procedures established by the Energy Regulatory Office (ERO).²⁰⁴ It is unusual for the public electricity supplier to be allowed supply eligible customers with either negotiated or the normal regulated tariffs; however, this is the situation in Kosovo and is in operation since earlier this year with KEK.²⁰⁵

In Article 3 of the Law on Electricity No. 2004/10 of the GOVERNMENT OF KOSOVA, the following conditions were set for determining eligible customers for the year 2006:

- a. Final customers connected directly to the transmission network of high-voltage level at 110 KV and above; and
- b. Metering devices and the corresponding control and communication devices.²⁰⁶

201 Ethem Ceku, "Consultation Paper of the Minister for Energy & Mining Government of Kosova on Criteria and Conditions for Determining the Eligible Customers," *The Provisional Institutions of Self-Government; Ministry of Energy and Mining of the Government of Kosova*, October 2006.

Kosovo is one of the nine countries that have signed the "Treaty Establishing the Energy Community". The other countries are Albania, Bulgaria, Romania, Serbia, Montenegro, Bosnia, Herzegovina and Croatia. Under this Treaty each contracting party shall implement the EC Directives No. 2003/54 and 2003/55, and the EC Regulation No. 1228/2003 of 26 June 2003, within twelve months of the entry into force of the Treaty.

202 *Ibid*

203 *Ibid*

204 *Ibid*

205 *Ibid*

206 See Article 3 of the *Government of Kosova Law on Electricity No. 2004/10*. This Article stipulates the conditions for determining eligible customers for the year 2006 under the Government of Kosova.

The Law further threw light on the conditions for the revocations of an eligibility status of an electricity customer. Thus a customer may maintain its eligible customer status so long as none of the following conditions occur. Should any one of them occur it will result in the immediate revocation of eligible customer status. Eligible status will be revoked if:

- a. KEK's business is negatively affected causing it to fail in its obligations to other customers (Public service Obligations);
- b. Any unreasonable constraints are imposed on the current and planned structure of the industry, KEK or the wholesale or retail electricity markets;
- c. There are present any cross-subsidization of prices between the eligible and regulated customer sectors; or
- d. KEK suffers aggregate, incremental losses over any rolling twelve month period, which losses impose a direct or indirect requirement for a subsidy from the KCB.²⁰⁷

Although the ESPR Act²⁰⁸ has not provided for the criteria for the eligible customers, the Act however profoundly provides for an electricity contract between the successor generation companies and the eligible consumers, the distribution and the trading licensees. Thus the successor generation companies shall, in accordance with their licenses, sell electrical power to the trading licensee, distribution companies and eligible customers, pursuant to the terms of contracts formed with such distribution companies and eligible customers.²⁰⁹ Similarly, independent power producers shall, in accordance with their licenses, sell electrical power to the eligible customers, pursuant to the terms of any contracts formed with such eligible customers.²¹⁰ Furthermore, the eligible customers shall purchase power in accordance with their obligations to purchase and pursuant to those

²⁰⁷ *Ibid*

²⁰⁸ The *Electric Power Sector Reform Act*, 2005

²⁰⁹ Section 25(c)

²¹⁰ Section 25(e) (ii) and 26 (1) (e) (ii)

obligations that have been novated to them and may also purchase other supplies and powers from generation licensees or from trading licensees.²¹¹

On the 19th May, 2017, the unexpected happened. The Minister of Power, Works and Housing, Mr. Babatunde Fashola, declared that, effective May 15, 2017, eligible power consumers are now free to purchase electricity directly from power generation companies, GENCOs. The Head, Public Affairs Department at the Nigerian Electricity Regulatory Commission, NERC, Dr. Usman Abba Arabi, said:

The declaration was in line with provisions of Section 27 of the Electric Power Sector Reform Act 2005. The provisions permitted eligible customers to buy power from a licensee other than electricity distribution companies.²¹²

NERC stated that under the regime, Fashola signed off four categories of eligible customers to become operative in the Nigerian Electricity Supply Industry (NESI). The first category of eligible customers comprises of a group of end-users registered with the Commission whose consumption is no less than 2MWhr/h and connected to a metered 11kV or 33kV delivery point on the distribution network and subject to a distribution use of system agreement for the delivery of electrical energy. The next category of eligible customers are those connected to a metered 132kV or 330kV delivery point on the transmission network under a transmission use of system agreement for connection and delivery of energy. Other category of customers under the declaration consists of those with consumption in excess of 2MWhr/h on monthly basis and connected directly to a metered 33kV delivery point on the transmission network under a transmission use of system agreement. Eligible customers in this category must have entered into a bilateral agreement with the distribution licensee licensed to operate in the location, for the construction, installation and operation of a distribution system for connection to the 33kV

²¹¹ Section 26 (1) (h)

²¹² Chris Ochayi, "Consumers now free to buy electricity directly from Gencos" May 19, 2017, retrieved from <http://www.vanguardngr.com/2017/05/consumers-now-free-buy-electricity-directly-gencos-fashola/>; See also Chineme Okafor, "Finally, NERC Grants Power Gencos Right to Sell Electricity Directly to Consumers" 20th May, 2017, retrieved from via: <https://www.thisdaylive.com/index.php/2017/05/20/finally-nerc-grants-power-gencos-right-to-sell-electricity-directly-to-consumers/>

delivery point. The last category are eligible customers whose minimum consumption is more than 2MWhr/h over a period of one month and directly connected to the metering facility of a generation company, and has entered into a bilateral agreement for the construction and operation of a distribution line with the distribution licensee licensed to operate in the location.²¹³

Justifying the decision of the government to accent to its request for a declaration of an eligible consumers regime in the NESI, NERC said:

The declaration which permits electricity customers to buy power directly from the generation companies is in line with the provisions of Section 27 of the Electric Power Sector Reform Act 2005 whereby eligible customers are permitted to buy power from a licensee other than electricity distribution companies. In exercising the power conferred on him by the said Act, the Honourable Minister of Power Works and Housing, directed the Nigerian Electricity Regulatory Commission (the Commission) to permit four categories of customers to buy power directly from a licensee other than electricity distribution companies.²¹⁴

It is important to note that by the express definition of eligible customer under the Act,²¹⁵ there is expectedly qualification and criteria which electricity end-users, consumers or customers must possess to qualify as an eligible consumer. Thus this is major fallout of the Act. Notwithstanding, the absence of a clear laid down manner and conditions for determining an eligible customer in the Act,²¹⁶ the Minister in charge of power therefore enjoys wider discretionary power to determine who can qualify as an eligible customer. Meanwhile this discretionary power of the minister seems to be on the scale balance. Thus under the Act, the eligible customer status can be revoked upon certain conditions. This therefore seems to be an automatic check on the powers of the Minister who may wish to

213 *FG Declares Eligibility in the Power Sector*, (2017) NERC website retrieved from <http://nerc.gov.ng/index.php/media-library/press-releases/506-fg-declares-eligibility-in-the-power-sector>

214 *Ibid*

215 *Ibid* Section 25(c) of the *Electric Power Sector Reform Act*, 2005

216 *Ibid* Section 25(c)

select his cronies in the issuance of the eligibility status among customers. Thus if the Minister determines, following consultation with the President, that a directive given under section 27 will result in decreasing electricity prices to such an extent that a trading licensee or a distribution licensee would have inadequate revenue to enable payment for its committed expenditures or is unable to earn permitted rates of return on its assets, despite its efficient management, the Minister may issue further directives to the Commission on the collection of a competition transition charges from consumers and eligible customers, the distribution of the funds collected to the trading licensee described in section 25 (a) and to distribution licensees, and the duration of the competition transition charge.²¹⁷

3.3.3. *The Licensed Electricity Distributors*

Under the Act, a “Distribution” means the delivery of electricity over a distribution system, while the “Distribution system” means the system of facilities, as defined by the Commission, consisting wholly or mainly of low voltage (less than 32kv) electric lines used for the distribution of electricity from grid supply points to the point of delivery to consumers or eligible customers, and includes any electrical plant and meters operated in connection with the distribution of electricity, but shall not include any part of a transmission system.²¹⁸

The Electricity Distributors are the successor companies holding Electricity Distribution Licenses. Thus the National Council on Privatization shall, not later than eight months after the formation of the initial holding company under section 1 of this Act, take such steps as are necessary under the Companies and Allied Matters Act to incorporate such number of additional companies, limited by shares, as the National Council on Privatization may deem appropriate, which shall be the successor companies for assuming the assets and liabilities of the initial holding company including, but not limited to, companies with functions relating to the generation, transmission, trading distribution and bulk supply and resale of electricity.²¹⁹ A distribution License authorizes a

²¹⁷ Section 28 of the *Electric Power Sector Reform Act, 2005*

²¹⁸ Section 100

²¹⁹ Section 8

licensee to construct, operate and maintain a distribution system and facilities including connection of customers for the purpose of receiving a supply of electricity, the installation, maintenance and reading of meters, billing, collection and such other distribution services as may be prescribed in the license.²²⁰

The distribution companies or distribution licensees purchase electrical power in accordance with their obligations to purchase and pursuant to those obligations that have been novated to them, and may also purchase other supplies of power from generation licensees and trading licensees, all in accordance with the terms of their respective distribution licenses.²²¹ Similarly, a distribution licensee that has a trading license may purchase power for resale from another trading licensee and may, with the prior approval of the Commission, purchase power from other sources and all contracts for bulk purchase of power by a distribution licensee shall be awarded according to an open, transparent, and competitive manner, pursuant to a procedure established by the Commission, unless the circumstances require otherwise and the Commission allows or requires an alternative method.²²² This means therefore that the Electricity Distribution Companies (Discos) provide last mile services in the electricity supply value chain. Discos provide the connection between customers and the electricity grid and as such, are plagued with the “last mile problem” of high costs and quality of service similarly faced by last mile service providers in the telecoms industry.²²³ Discos are responsible for transforming or stepping down electricity from the high voltage of 132 kV at the transmission level, to the lower voltage levels of 33kV/11kV/0.415kV depending on the category of customer.²²⁴ Electricity in most residential homes is supplied at voltage level of 0.415kV. Discos are also responsible for the marketing and sale of electricity to customers. This is an extremely important function in the electricity value chain as Discos are the cash boxes of the entire electricity value chain. All the revenue needed to sustain the electricity industry

220 Section 67 (1)(a-c)

221 Section 26(1)(g)

222 Section 67(3)

223 Odion Omonfoman, “Electricity Distribution Companies – The Challenges and Way Forward,” *Premium Times* January 4, 2016 retrieved from <https://opinion.premiumtimesng.com/2016/01/04/electricity-distribution-companies-the-challenges-and-way-forward-by-odion-omonfoman/>

224 *Ibid*

is earned through the distribution sector.²²⁵ Under the current regime, the following are the successor Distribution companies in Nigeria:

1. Abuja Electricity Distribution Company covering FCT, Niger, Kogi , and Nassarawa;
2. Benin Electricity Distribution Company covering Edo, Delta, Ondo, and part of Ekiti;
3. Eko Electricity Distribution Company covering Lagos;
4. Enugu Electricity Distribution Company covering Enugu, Abia, Imo, Anambra and Ebonyi;
5. Ibadan Electricity Distribution Company covering Oyo, Ogun, Osun, Kwara and part of Ekiti;
6. Ikeja Electricity Distribution Company covering Lagos;
7. Jos Electricity Distribution Company covering Plateau, Bauchi, Benue and Gombe;
8. Kaduna Electricity Distribution Company covering Kaduna, Sokoto, Kebbi and Zamfara;
9. Kano Electricity Distribution Company covering Kano, Jigawa and Katsina;
10. Port Harcourt Electricity Distribution Company covering Rivers, Cross River, Bayelsa and Akwa Ibom; and
11. Yola Electricity Distribution Company covering Yola, Adamawa, Borno, Taraba and Yobe.²²⁶

3.3.4. The Electricity Trading Companies

²²⁵ *Ibid*

²²⁶ *There are 11 Electricity Distribution Companies (DisCos) in Nigeria*, NERC website retrieved from <http://nerc.gov.ng/index.php/contact/discos>

“Trading” means any form of marketing, brokering or intermediation in the sale of electricity, whether or not it entails the purchase of electricity for resale, or whether or not title is taken to the electricity sold while “Trading license” means a license issued pursuant to section 67.²²⁷ A trading license is the legal right of a trading licensee to engage in the purchasing, selling, and trading of electricity on the terms and conditions as determined by the Commission having due regard to the nature of the activities in which the licensee intends to engage.²²⁸ The trading licensee holding a bulk purchase and resale license or an interim license for this purpose, and to which the function of bulk procurement and bulk sale of power and ancillary services has been transferred, shall engage in the purchase and resale of electrical power and ancillary services from independent power producers and from the successor generation companies, in accordance with its license.²²⁹ The trading licensee shall be permitted to engage in the purchasing, selling, and trading of electricity and the Commission shall have the authority to determine the terms and conditions of trading licenses as may be appropriate in the circumstances, and having due regard to the nature of the activities in which the licensee intends to engage.²³⁰

A licensed trading entity in Nigeria is the NBET. The Nigerian Bulk Electricity Trading Plc (NBET) is a Federal Government of Nigeria (FGN) owned public liability company. The Bureau of Public Enterprises and Ministry of Finance Incorporated (20%) are its two shareholders of record with 80% and 20% stakes respectively. NBET (aka the Bulk Trader) was incorporated on July 29, 2010, in line with the “Roadmap to Power Sector Reform” and, in fulfillment of the requirements of Electric Power Sector Reform Act (EPSRA), 2005 for a trading licensee holding a bulk purchase and resale license to engage in the purchase and resale of electrical power and ancillary services from independent power producers and from the successor generation companies.²³¹ On August 23, 2011, the President, Dr. Goodluck Ebele Jonathan, GCFR, inaugurated a nine-person Board of Directors that included Mr. Rumundaka Wonodi as the Managing Director and

227 Section 100 of the *Electric Power Sector Reform Act, 2005*

228 Section 68 (1)

229 Section 25(a)

230 Section 68(1)

231 The Background, vision, mission, values and objectives of the Nigerian Bulk Electricity Trading PLC (NBET) retrieved from <http://iwin.org.ng/index.php/2014-10-11-16-33-00/2016-10-10-11-16-42/nigerian-bulk-electricity-training-nbet>.

Chief Executive Officer. NBET's power purchase agreements (PPAs) with independent power producers are backed by credit enhancement instruments offered by the Federal Government of Nigeria.²³²

The Nigerian Bulk Electricity Trading Company, NBET was created to provide the status of a credit-worthy offtaker with which the Gencos can confidently contract given that many investors within the power market were not willing to take on the credit risk of the Discos (which are presently not viewed as credit worthy).²³³ It was thus set up to purchase power from the Gencos under Power Purchase Agreements (PPAs) and, in turn, to sell to the Discos under Vesting Contracts (VCs). NBET was highly capitalized and in addition, there is the possibility of Gencos that meet the requirements, obtaining a partial risk guarantee from the World Bank and the African Development Bank securing the payment obligations of NBET to such Gencos.²³⁴ Independent power producers in the new Nigerian electricity market could not secure financing, because of the lack of creditworthiness of the Nigerian electricity market. The creation of the Nigerian Bulk Electricity Trading Company, NBET solved a major problem with bankability of electricity projects. Until the creation of NBET, project developers failed to convince investors and financial advisors to lend them money for project development.²³⁵

3.3.5. *The Electricity Transmission Companies*

Transmission means the conveyance of electric power and energy over a transmission system. Transmission license means a license issued under section 65 of the Act.²³⁶ Generally, a transmission system means a system, as defined by the Commission, consisting wholly or mainly of high voltage (greater than or equal to 132kV) electric lines for the conveyance of electricity within an undertaking or from one undertaking to another, including any transmission lines, transformers, switchgear and other works necessary for and used in connection with such electrical equipment, and the buildings as may be required to accommodate the transformers, switchgear and other works. A

232 Ibid

233 See Ajumogobia & Okeke, "Nigerian Energy Sector: Legal & Regulatory Overview" (2015) at 21

234 Ibid

235 Ibid

236 Section 100 of the *Electric Power Sector Reform Act, 2005*.

transmission license authorizes the licensee to carry on grid construction, operation, and maintenance of transmission system within Nigeria, or that connects Nigeria with a neighbouring country.²³⁷

The successor company that has been issued both a transmission license and a system operation license shall engage in the transmission of electricity and in system operation, including the procurement of ancillary services, in accordance with its license.²³⁸ The Transmission Company of Nigeria (TCN) is a successor company of PHCN, following the unbundling of the sector, and is currently being managed by a Management Contractor, Manitoba Hydro International (Canada). Manitoba is responsible for revamping TCN to achieve technical and financial adequacy in addition to providing stable transmission of power without system failure. Currently, the transmission capacity of the Nigerian Electricity Transmission system is made up of about 5,523.8 km of 330 KV lines and 6,801.49 km of 132 KV lines.²³⁹ The TCN is made up of two major departments: System Operator and Market Operator. The Market Operations (MO) is a department under TCN charged with the responsibility of administering the wholesale electricity market, promoting efficiency and where possible, competition. The system operator is focused on system planning, administration and grid discipline.²⁴⁰ The TCN handles the transmission of electricity across Nigeria.

Under the Act the Minister shall recommend to the President for approval of market rules, to be developed by the system operator for the operation of the national grid by the system operator.²⁴¹

3.3.6. *The Electricity Generating Companies*

Generation means the production at a generating station of electric power and other generation products such as, but not limited to, reactive power.²⁴² Generation license

237 Section 65(1)

238 Section 25(b)

239 Adewale Ajayi, "Nigeria: A Guide to the Nigerian Power Sector" *Mondaq* February 2014 retrieved from <http://www.mondaq.com/Nigeria/x/292662/Oil+Gas+Electricity/A+Guide+to>.

240 *Ibid*

241 Section 26(2)(a) of the *Electric Power Sector Reform Act, 2005*

242 Section 100

means a license issued under section 64.²⁴³ Subject to such terms and conditions as the Commission may fix in the license, a generation license shall, as the circumstances may require, authorize the licensee to construct, own, operate and maintain a generation station for purposes of generation and supply of electricity in accordance with this Act.²⁴⁴ Apart from the successor companies, the Commission may issue generation licenses to one or more entities that are described as “independent power producers.”²⁴⁵ And section 100 of the Act defined independent power producer to mean any entity granted a generation license under section 64 (3) (b).²⁴⁶

The generation sub-sector presently includes 23 grid-connected generating plants in operation with a total installed capacity of 10,396 MW (available capacity of 6,056 MW) with thermal based generation having an installed capacity of 8,457.6MW (available capacity of 4,996 MW) and hydropower having 1,938.4 MW of total installed capacity with an available capacity of 1,060 MW. This comprises of the privatized GenCos, the Independent Power Producers (IPPs) and the generating stations under the National Integrated Power Project (NIPP). The IPPs are power plants managed by the private sector prior to the privatization process. These include Shell operated – Afam VI (642MW), Agip operated – Okpai (480MW), Ibom Power, NESCO and AES Barges (270MW).²⁴⁷

The holder of a generation license may sell power or ancillary services to any of the classes of persons specified in the license. The successor generations companies shall, in accordance with their licenses, sell electricity power to the trading licensee, distribution companies and eligible customers, pursuant to the terms of any contracts formed with such distribution companies and eligible customers.²⁴⁸ Also the successor generation companies shall, in accordance with their licenses, sell ancillary services to the trading licensee or another successor company, pursuant to contracts that allow for the novation of the rights and obligations of the successor company to an independent system operator in the event

243 Section 100

244 Section 64(1)

245 Section 64(3)(b)

246 Section 100

247 The list of Gencos in Nigeria, their locations and generation output, NERC website retrieved from <http://nerc.gov.ng/index.php/home/nesi/403-generation>.

248 Section 25(c) of the *Electric Power Sector Reform Act, 2005*

of a transfer of the obligation of system operation by the successor company to an independent system operator.²⁴⁹

The successor company shall, in accordance with its license, purchase ancillary services pursuant to the terms of the contracts for ancillary services that it has entered into with successor generating companies and with the trading licensee and with independent power producers and it may also purchase ancillary services under the terms of contracts novated to it until all such contracts are novated to an independent system operator.²⁵⁰ Electricity generation contracts are usually not influenced or frustrated by external influences. Thus immediately following any declaration by the Minister that a more competitive market is to be initiated, successor generation companies shall, in accordance with their licenses, sell electrical power to distribution companies and eligible customers, under the terms of any contracts existing prior to the declaration by the Minister or under the terms of any new contracts with distribution companies and eligible customers.²⁵¹ In the present regulated Electricity Generation Companies, there are various categories. They are arranged in the following order:

1. There are 6 Successor Generation Companies (Gencos) pursuant to section 8 of the Act. They are: Afam Power Plc (Thermal with an installed capacity of 987.2 MW); Egbin Power Plc (Thermal with an installed capacity of 1,320 MW); Kainji/Jebba Hydro Electric Plc (Hydro with an installed capacity of 1,330 MW); Sapele Power Plc (Thermal with an installed capacity of 1,020 MW); Shiroro Hydro Hydro Electric Plc (Hydro with an installed capacity of 600 MW) and Ughelli Power Plc (Thermal with an installed capacity of 942 MW).²⁵²
2. Independent Power Producers (IPPs): IPPs are power plants owned and managed by the private sector. Although there are Independent Power Producers (IPPs) existing in Nigeria prior to the privatization process, the Nigerian Electricity Regulatory Commission (NERC) pursuant to its power,²⁵³ has recently issued

249 Section 25(d)

250 Section 26 (1) (f)

251 Section 26 (1) (b)

252 See *supra* note 69.

253 Section 64 (3) (b) of the *Electric Power Sector Reform Act, 2005*

about 70 licenses to Independent Power Producers in order to improve the power situation in the country. The existing IPPs include Shell – Afam VI (642MW), Agip – Okpai (480MW) and AES Barges (270MW) etc.

3. National Integrated Power Projects: The National Integrated Power Project (NIPP) is an integral part of Federal Government's efforts to combat the power shortages in the country. It was conceived in 2004 as a fast-track public sector funded initiative to add significant new generation capacity to Nigeria's electricity supply system along with the electricity transmission and distribution and natural gas supply infrastructure required to deliver the additional capacity to consumers throughout the country. There are 10 National Integrated Power Projects (NIPPs), with combined capacity of 5,455 MW, scheduled for completion (for ongoing projects) and privatization in 2014. The NIPPs are: Alaoji Generation Company Nigeria Limited (1,131 MW); Benin Generation Company Limited (508 MW); Calabar Generation Company Limited (634 MW); Egbema Generation Company Limited (381 MW); Gbarain Generation Company Limited (254 MW); Geregu Generation Company Limited (506 MW); Ogorode Generation Company Limited (508 MW); Olorunsogo Generation Company Limited (754 MW); Omoku Generation Company Limited (265 MW) and Omotosho Generation Company Limited (513 MW).²⁵⁴

3.3.7. *The Hybrid Electricity*

The Hybrid is rather a coinage which is foreign to the current Legal regime of Electricity practice in Nigeria. The Hybrid logically connotes a mixture of generating, transmission and distribution of electricity. The electricity generated under this arrangement is usually off-grid transmission. They are also private sector owned and managed. As stated above, the Independent Power Producers (IPPs) had been in existence in Nigeria before the privatization process. The Nigerian Electricity Regulatory Commission (NERC) pursuant to its power issued about 70 licenses to Independent Power Producers in order to improve

²⁵⁴ See Niger Delta Power Holding Company Limited, "NDPHC Delivers on NIPP Phase I" *Transaction Review Conference Completion Status of NDPHC Generation Companies* May 16th, 2016, retrieved from <http://ndphc.net/?p=1366>

the power situation in the country. The Aba IPP (Aba Phase I) owned by the Geometric Power Limited (GP) is a classical example of Hybrid electricity practice looks like.

The Geometric Power Limited (GP) is a pioneer power project developer in Nigeria. It has established a power generation facility in Aba, Nigeria, with the intention of providing high quality electric service to a limited number of large industrial and commercial clients. Initially, the project consisted of the installation of a 141 MW gas-fired power plant in Phase 1, over 110km of 33 kV and 11kV sub-transmission lines, four new substations and capacitor banks for distribution of power to the large industrial and commercial consumers that had been receiving power from the Power Holding Company of Nigeria (PHCN), ceded to the Enugu Electricity Distribution Company franchise under the privatization arrangement.

Geometric Power and Aba Power secured a 20-year concession from the Federal Government of Nigeria to supply power exclusively to the Aba industrial city and its surrounding communities and has constructed the Aba Integrated Power Project (“Aba IPP”). The Aba IPP is the first independent and integrated power utility in Nigeria, which comprises a 141 MW gas fired power plant, a 27km gas pipeline, and a distribution utility, within a ring-fenced distribution network. It is an embedded electricity facility designed to generate and distribute its own electricity. During the course of the discussions between the Federal Government of Nigeria (FGN), Geometric Power (GP), and PHCN, in order to avoid “cherry picking” of good customers in Aba a decision was reached to expand the project to include all electricity consumers on the distribution system of the PHCN Aba Business Unit which covered the Aba metropolis, including rural areas.

With this understanding, GP established separate corporate entities – Geometric Power Aba Limited (GPAL), to own and operate the new power generation station; and, Aba Power Limited Electric (APLE), to manage the electric power distribution system. The Nigerian Electricity Regulatory Commission (NERC) subsequently issued a power generation license to GPAL, and an electric distribution license to APLE.

The project’s generation company, GPAL has been licensed by the Nigerian Electricity Regulatory Commission (NERC) to generate electric power and sell power to non-

regulated consumers that are within the Aba ring-fence. The Operation and Maintenance contractor for Aba IPP's generation company, GPAL, is O & M Solutions (OMS). The OMS has extensive experience in the maintenance of similar plants around the world and is working with the EPC contractor G5 of South Africa to ensure completeness and technical soundness of the power plant. Also the project's distribution company, APLE has been licensed by NERC to distribute electricity to regulated customers within the Aba metropolis. APLE's mission is to build an efficient network to distribute power in Nigeria in line with the Electric Power Sector Reform Act. Its customers in Aba comprise of regulated small commercial and residential consumers who would receive power through rehabilitated existing distribution lines in the "ring-fenced" network leased by the project's distribution company from the Government owned utility, Power Holding Company of Nigeria, PHCN. The Operation and Maintenance contractor for Aba IPP's distribution company, APLE, is National Rural Electric Cooperative Association (NRECA), USA. NRECA is an experienced electricity distribution company based in Arlington, Virginia, United States of America. The NRECA represents more than 900 member cooperatives, serving over 42 million people in 47 states in the USA alone. NRECA International also provides services in several countries. NRECA will provide the management team for APLE that will be responsible for overseeing the daily operation of the distribution utility in Aba.

3.3.8. *The NERC*

According to the Act, there is established a commission to be known as the Nigerian Electricity Regulatory Commission, which shall be a body corporate with perpetual succession which can sue or be sued in its corporate name and subject to this Act, perform all acts that bodies corporate may by law perform.²⁵⁵ In addition to its corporate powers, the Commission can delegate or authorize responsibilities. Thus any agreement, contract or instrument approved by the Commission may be entered into or executed on behalf of the Commission by any persons generally or specially authorized by the Commission for that purpose.²⁵⁶ Authorization for contractual purposes is an indispensable requirement for

255 Section 31(1) of the *Electric Power Sector Reform Act, 2005*

256 Section 58

the validation of any contracts or contracts or contractual relationships entered into directly or on behalf of the Commission. However, where the authorized person is likely to be conflicted, such shall be disclosed to the Commission as required by section 43 of the Act.²⁵⁷

The Regulatory role of the Commission is also contractual in nature. Thus any company wishing to participate in the business of electricity either as generation, distribution or transmission shall apply for a license to the Commission in the form and manner prescribed and be accompanied by the prescribed fee and such information or documents as may be prescribed or as the Commission may require.²⁵⁸ There is a presumption of contract between the Commission and any company operating in the Electricity sector; whether successor companies or independent companies. This contract is therefore regulated by the terms and condition stipulated in the Act.²⁵⁹ These may include but not limited to entering into agreements on specified terms with other persons for the provision of or use of electric lines and associated equipment operated by the licensee, purchasing of power and other resources in an economical and transparent manner, referring disputes for arbitration, mediation, or determination by the Commission etc.²⁶⁰ It also spells out the terms regarding the rights and obligations of the licensee, and procedures to be followed, at the end of its license term.²⁶¹ Furthermore such issues as the duration of each term of license granted is also spelt out, hence a license shall be valid for a period of up to, but not exceeding ten years, provided that the Commission may extend the period of a license taking into account the nature of the undertaking or business, for an additional period not exceeding five years at a time it determines that it is in the public interest to do so.²⁶²

The Commission has the capacity and power to minimize monopoly and increase a healthy competitive market in the electricity sector. Thus unless expressly indicated in the license, the grant of a license shall not hinder or restrict the grant of a license to another

257 See Yemi Oke, *Nigerian Electricity Law and Regulation*, (Law Lords Publications, 2013) at 58;

258 Section 70 (1) of the *Electric Power Sector Reform Act*, 2005

259 Ibid Section 71 (1)

260 Section 71 (2) (a-c)

261 Section 71 (9)

262 Section 71 (10)

person for a like purpose and, in the absence of such an express indication, the licensee, shall not claim any exclusivity, provided that the Commission may allow a licensed activity to be exclusive for all or part of the period of the license, for a specific purpose; for a geographical area, or for some combination of the foregoing.²⁶³ This provision no doubt has exception. This in developing mini-grid concessions, NERC shall select a company to exclusively serve a specific geographical location with obligation to serve all customers that request service.²⁶⁴

The Commission is enabled by the Act to cancel any existing electricity license. Upon receiving a complaint from any consumer, eligible customer, consumer association, association of eligible customers or other licensee, or on its own initiative, the Commission may inquire into the conduct or functioning of any licensee in carrying out the licensee's obligations under the Act, rules or regulations, codes of conduct, or the terms and conditions of the license, the license was issued through fraud or the misrepresentation or nondisclosure of a material fact by the licensee; or the licensee has willfully or unreasonably contravened any provision of this Act that is applicable to the licensee; or the licensee has failed to comply with any term or condition of the license, the breach of which is expressly declared by such license to render it liable to cancellation; or the financial position of the licensee is such that he is unable to fully and efficiently discharge the duties and obligations imposed by the license.²⁶⁵

However the case may be, before cancelling a license, the Commission shall notify the licensee in writing of its intention to cancel the license concerned and the reasons for doing so, and shall allow the licensee an opportunity to demonstrate, within 60 days following the delivery of such a notification, that circumstances have changed such that cancellation may no longer be warranted.²⁶⁶

3.4. Electricity Industry Market

²⁶³ Section 71 (6)

²⁶⁴ Yemi Oke, *Essays on Nigerian Electricity Law*, (Princeton & Ass, Publishing Co. Ltd, 2016) pp 98 – 99.

²⁶⁵ Section 74 (1)(a-b); (2)(a-d) of the *Electric Power Sector Reform Act*, 2005

²⁶⁶ Section 74 (3)

Electricity by its nature is difficult to store and has to be available on demand. Consequently, unlike other products, it is not possible, under normal operating conditions, to keep it in stock, ration it or have customers queue for it, and its demand and supply vary continuously. There is therefore a physical requirement for a controlling agency, the transmission system operator, to coordinate the dispatch of generating units to meet the expected demand of the system across the transmission grid. In economic terms, electricity is a commodity capable of being bought, sold, and traded. An electricity market is a system enabling purchases, through bids to buy; sales, through offers to sell; and short-term trades, generally in the form of financial or obligation swaps. Bids and offers use supply and demand principles to set the price.²⁶⁷ Under the Nigerian Act, it is called “market power,” and it means the ability of a seller or group of sellers to maintain prices above competitive levels, or to maintain stable prices while reducing the quality of product or service provided, for a significant period of time.²⁶⁸

In Nigeria, the National Electricity Power Policy (NEPP) and the Electric Power Sector Reform Act 2005 (EPSR) provide for the development of Nigeria electricity market.²⁶⁹ The Electricity market is regulated and administered by the Market Rules and the Interim Regulations,²⁷⁰ made by the System Operator and recommended to the President by the Minister.²⁷¹ Accordingly, the MARKET RULES for Transitional and Medium Term Stages of the Nigerian Electricity Supply Industry, December 2014 was introduced. It was titled the Market Rules for the Nigerian Electricity Supply Industry, and was made by the Market Operator.²⁷² Also the Rules for the Interim Period between Completion of Privatization and the Start of the Transitional Electricity Market (TEM) 2013; Regulation No: NERC-0113 of the NERC regulated the Pre-transitional stage of the Electricity Market.²⁷³ Also by the enabling statute, the NERC in the Market operation shall have create, promote, and preserve efficient industry and market structures, and to

267 Wikipedia on Electricity market retrieved from https://en.wikipedia.org/wiki/Electricity_market#cite_ref-1.

268 Section 100 of the *Electric Power Sector Reform Act, 2005*

269 See *supra* note 55 at Pg 11.

270 Sections 100 & 96 (1)(2)(n) of the *Electric Power Sector Reform Act, 2005*

271 Section 26 (2)

272 Rule 1.2 of the *Market Rules for the Nigerian Electricity Supply Industry*.

273 Dolapo Kukoyi, “Transitional Electricity Market (TEM) and Investor and stakeholder expectations for the Nigerian Electricity Supply Industry (NESI),” *Policies and Best Practices for Africa*, DETAIL.

ensure the optimal utilization of resources for the provision of electricity services, approve amendments to the market rules and monitor the operation of the electricity market.²⁷⁴

For the purpose of development and flexibility, the Act makes no restriction as to the content of the Market Rules. Thus a Market Rule may be general or particular in its application.²⁷⁵ However, for the purpose of markets for electricity and ancillary services, a Market Rule must compulsorily include provisions as follows: governing the making and publication of market rules; settlement of payments among different participants; authorizing and governing the making of orders by the system operator, including such orders as imposing financial penalties on market participants; authorizing a person to participate in the markets; or terminating, suspending or restricting a person's rights to participate in the markets; and concerning the administration and enforcement of the market rules, including provisions for market rule amendments, dispute resolution, penalties and market surveillance.²⁷⁶

The Market Rule has been framed by the Market Operator in order to establish the electricity trading system for the Nigerian Electricity Supply Industry.²⁷⁷ It has also provided for the various stages in the operational processes which the Market Rules regulate.²⁷⁸ The Stages recognized by Oke,²⁷⁹ and emphasized by the Market Rules,²⁸⁰ are the Transitional Stage and the Medium Term. However, the Market Rules in a twist made a shift, extending the Electricity Market Development stages into three.²⁸¹ While in the view of AJUMOGOBIA & OKEKE and Dolapo Kukoyi, there are four stages, to wit Pre-Transition, Transition, Medium Term and Long Term.²⁸²

3.4.1. The Pre-Transitional Stage

274 Section 32 (1)(a) (2)(e)(f) of the *Electric Power Sector Reform Act*, 2005.

275 Section 26 (4)

276 Section 26 (3)(a-d)

277 Rule 1.2 of the *Market Rules for the Nigerian Electricity Supply Industry*.

278 See Yemi *supra* note 79 at 230.

279 *Ibid*

280 See Rule 1.2 Subrules (1.2.1) and (1.2.2) of the *Market Rules for the Nigerian Electricity Supply Industry*.

281 Rule 6.1

282 See Ajumogobia & Okeke *supra* note 55 at 15 and Dolapo Kukoyi *supra* note 95 at 75.

The Pre Transitional Stage involves basically preparation for physical unbundling and future privatization of PHCN. This stage provides and establishes performance incentives for distribution and generation activities and the Grid Code and testing of the Market Rules.²⁸³ This is the natural stage of the industry during early reform implementation.²⁸⁴ According to them, the Pre-Transition Stage kick started the end of the monopoly in the power sector and the commencement of the unbundling and privatization of the Power Holding Corporation of Nigeria (PHCN). November 2013 marked the end of the Pre-Transitional Stage, and the beginning of another. It was the end of the era of structural transition. Structurally, the template of a competitive private electricity market was set. The Pre-Transitional Stage had commenced with the sale of the successor companies, and having completed the privatization process, and the next stage is Transitional Stage. With the Minister of Power's Declaration, Nigeria moved to the Transitional Electricity Market (TEM) which is the stage of full bilateral trading in electricity, where market participants will transact on the basis of their contract. Trading by contract will mark the formal beginning of a competitive electricity market.²⁸⁵

3.4.2. Transitional Electricity Market (TEM) Stage

The Transitional Stage involves Energy procurement and contracting; Energy metering and settlement of contracts; and collection by the Market Operator of: TSP charges; Ancillary Service costs; and the System Operation and Market Administration Charge.²⁸⁶ This is the stage of development of the Nigerian power sector that would witness the transition from a government controlled and administered structure to a contract based, private sector driven competitive electricity market. The liberalization and privatization of electricity sector in Nigeria marks the end of a phase in the reform of the power sector. But, it also marks the beginning of another phase. It ends the phase of structural transformation of the sector, and marks the beginning of the phase of cultural and

283 Rule 6.1.1 of the *Market Rules for the Nigerian Electricity Supply Industry*

284 See Bolanle Onagoruwa, "Nigerian Power Sector Reforms and Privatisation" *Bureau of Public Enterprises*, June 14, 2011.

285 See AJUMOGOBIA & OKEKE and Dolapo Kukoyi *supra* note 104.

286 Rule 1.2.1 of the *Market Rules for the Nigerian Electricity Supply Industry*

technical transformation.²⁸⁷ TEM once effective would imply that the electricity market (especially its trading arrangements) will now be wholly contract governed.²⁸⁸

3.4.3. *The Medium Term*

The second stage involves trading in Imbalance Energy; settlement of charges and payments relating to Energy, Ancillary Services and Transmission Use of System; and collection by the Market Operator of the System Operation and Market Administration Charge and the Cost of Imbalance Energy.²⁸⁹ After the TEM, the market moves to the Medium Term, when hopefully there will be adequacy of supply in the market, and the generation component of the market will be fully deregulated, and prices will be on the basis of willing buyer willing seller.²⁹⁰

In the Medium Term Market, the Balancing Market will be a spot market, allowing efficient opportunity trading and efficient contracts to cover and or hedge price risk and while maintaining a security constrained economic merit order dispatch.²⁹¹ The Medium Term Market will, among other things, reflect flexibility in the design of bilateral contracting through the implementation of the Balancing Market where each Participant will be able to buy and sell the difference between Metered Quantities and contracted quantities at fair and efficient market-determined prices.²⁹² There are several features characterizing the design and structure of the Medium Term Market. First, there would be several Distributors, each with a monopoly over retail sales to customers within its franchise region. Secondly, each Distributor may enter into bilateral contracts for purchase and or sale of Energy. The Medium Term Market open entry to the Wholesale Electricity Market and, subject to technical and environmental obligations, and within the Energy policy defined by the Government, investors can decide the timing, location and type of new Generation Capacity to construct.²⁹³

287 See Ajumogobia & Okeke *supra* note 55 Pg 20.

288 See Yemi *supra* note 79 at 76

289 Rule 1.2.2 of the *Market Rules for the Nigerian Electricity Supply Industry*

290 See *supra* note 55 Pg 20.

291 Rule 6.5.1 of the *Market Rules for the Nigerian Electricity Supply Industry*

292 Rule 6.5.2

293 Rule 6.5.3

3.4.4. *The Long Term*

The end of structural reform is the beginning of cultural reform. The problems that crippled the electricity industry are not just technical. There are also adaptive. They are partly problems of values and governance.²⁹⁴ The Long Term is similar to the medium term stage but characterized by more competition and greater freedom by eligible consumers to choose their suppliers.²⁹⁵

3.4.5. *System Operator (SO)*

The System Operator means the company or entity licensed to provide system operation services under the Act, in so far as the company or entity is engaged in systems operation activities other than the administration of the Wholesale Electricity Market, pursuant to its License.²⁹⁶ The transmission licensee can carry on grid construction, operation, and maintenance of transmission system within Nigeria, or that connects Nigeria with a neighbouring jurisdiction.²⁹⁷ It is part of the statutory obligation of the transmission licensee to carry out system operation.²⁹⁸ The Act however defined system operation as the operation of one or more transmission systems while a system operator derives existence from the system operation.²⁹⁹ By implication, one of the successor companies is statutorily allowed under the Act to operate in a dual capacity; to hold a system operation license and a transmission license.³⁰⁰

A system operation licensee in its capacity as a system operator, may engage in generation scheduling, commitment and dispatch; transmission scheduling and generation outage coordination; transmission congestion management; international transmission coordination; procurement and scheduling of ancillary services and system planning for long term capacity; administration of the wholesale electricity market, including the activity of administration of settlement payments, in accordance with the market rules; and such

294 Ajumogobia & Okeke *supra* note 55 at 20.

295 See Onagoruwa *supra* note 106 at Pg 7

296 Rule 3.1 of the *Market Rules for the Nigerian Electricity Supply Industry*

297 Section 65 (1) of the *Electric Power Sector Reform Act, 2005*

298 Section 65 (2)

299 Section 100

300 Section 25 (b)

other activities as may be required for reliable and efficient system operation.³⁰¹ It is not doubtful therefore under the present legal framework that the system operation license is solely exercised by the Transmission Company of Nigeria (TCN); a Corporation of the Federal Government of Nigeria, being the only successor company with transmission license. Thus in Section 65 subsection (2) of the Act provides that the transmission licensee where being a successor company formed under section 8 may also have an obligation to carry out system operation, including the procurement of ancillary services, pursuant to the terms of a system operation license issued by the Commission to such licensee. This simply connotes that apart from “a successor company formed under section 8” other companies not being “a successor company formed under section 8” can qualify as System Operator. This is justified under the Act. Hence at any time following the declaration of a substantially privatized market under section 24, the successor company identified in section 25 (b) may transfer the function of system operation to an independent system operator on such terms and conditions as the Commission may direct and on such transfer, the independent system operator shall be subject to the same powers and duties as have been imposed on the transferring successor company under this Act in relation to system operation.³⁰²

The System Operator is the engine room and arrow head of the Electricity Market. Under the Act, the Minister in charge of Power recommends to the President for approval of market rules, to be developed by the system operator.³⁰³ These Rules as shall be made by the System Operator shall be for the operation of the national grid by the system operator and the establishment and governance of markets related to electricity and ancillary services.³⁰⁴ The ancillary services means those functions necessary for reliable operation of a power system, which may include, but are not limited to, services that would provide or permit facilities scheduling, control and dispatch, reactive power and voltage control, frequency regulation, operating reserves and black start.³⁰⁵

301 Section 66 (1)

302 Section 26 (7)

303 Section 26 (2)

304 Section 26 (2)(a-b)

305Section 100

In respect of markets for electricity and ancillary services, the market rules may include provisions governing the making and publication of market rules, settlement of payments among different participants, authorizing and governing the making of orders by the system operator and concerning the administration and enforcement of the market rules, including provisions for market rule amendments, dispute resolution, penalties and market surveillance.³⁰⁶ Such orders as may be made by the System Operator may include imposing financial penalties on market participants, authorizing a person to participate in the markets or terminating, suspending or restricting a person's rights to participate in the markets.³⁰⁷

Where need be, and owing to dynamic nature of the market, amendments to the market rules shall be developed by the system operator in accordance with the amendment provisions in the market rules, and all such amendments shall be approved by the NERC. Also the system operator shall, in accordance with the market rules, publish any proposed amendment to the market rules at least 22 days before the proposed amendment comes into force. They shall make the market rules available for public inspection during normal business hours at the offices of the system operator.³⁰⁸ The System Operator shall from time to time draft, adopt and implement, and where necessary, amend such detailed Operating Procedures as it may consider necessary for the implementation and application of the Grid Code; operation of the Power System, including planning, maintenance coordination and scheduling and dispatch of Generation and Ancillary Services; and clarifying interpretations and the methodologies connected with the Power System and the Grid Code.³⁰⁹ Also in the Medium Term Market, the System Operator prepares an Operation Procedure to manage shortages due to insufficient generation or transmission congestion. Such Operation Procedure shall be based upon the Market Procedure developed by the Market Operator.³¹⁰

3.4.6. Market Operator (MO)

306 Section 26 (3)(a-d)

307 Section 26 (3)(c)(i-iii)

308 Section 26 (6) and (5)

309 Rule 4.1(4.1.1 – 4.1.3) of the *Market Rules for the Nigerian Electricity Supply Industry*

310 Rule 6.4.1

The Market Operator means the company or entity licensed to carry on system operation under the Act, in so far as such company or entity is engaged in the administration of the Wholesale Electricity Market, including making, publishing, amending, administering and or enforcing these Rules and settlement of payments among Participants pursuant to its License.³¹¹ The MO is a division of the Transmission Company of Nigeria (TCN) that issues market settlements and invoices due to the market participants and service providers in the Nigerian Electricity Supply Industry (NESI).

TCN, which is currently under contract management of Manitoba Hydro of Canada, is a licensee of NERC. TCN license empowers it to manage the Market Operator (MO) and the System Operator (SO), which is responsible for the wheeling of electrons (electricity) from generation to electricity distribution companies. Market operation was established in April 2004 to achieve a sustainable electricity industry. The Market operations is responsible for the administration of the Electricity Market, promoting efficiency and where possible competition. This in the end ensures a governance mechanism and a market monitoring system.

It is also the primary duty of the Market Operator to provide a framework for an efficient, competitive, transparent and reliable wholesale electricity market. It sets out the responsibilities of participants, the TSP, the System Operator and the Market Operator in relation to trading, co-ordination, dispatch and contract nomination, pricing system of the Balancing Market, pricing of imbalances and ancillary services, metering, settlements and payments. It is also the role of the Market Operator in consultation with the Stakeholder Advisory Panel, to develop and publish the procedures for the determination of Energy prices in the Balancing Market, particularly during shortages or unexpected constraints, provided that the Commission shall give prior approval to the procedures.³¹² It further ensures an efficient, transparent and predictable settlement system and set out the payment obligations. It is the obligation of the Market Operator to provide an efficient and transparent process for amending the Market Rules and the Grid Code as well as providing a framework for resolution of disputes among participants on one hand and the System

311 Rule 3.1

312 Rule 6.4.3

Operator or the Market Operator on the other, on matters relating to the Market Rules and the Grid Code. The Market Operator shall from time to time draft, adopt and implement, and when necessary, amend such detailed Market Procedures as it may consider desirable for implementation and application of the Market Rules; administration of the Wholesale Electricity Market, including the Market Operator Administered Market; and clarification of interpretations and the methodologies to be adopted in the application of these Rules.³¹³ Also the Market Operator plays a key role during the Medium Term Market. Thus the Operator ensures that all necessary arrangements for proper functioning of the Medium Term Market are in place, including the necessary models, settlement software and data bases; and adequate metering and communication systems for all Connection Points.³¹⁴

It is noteworthy that the current regime is a great innovation, unlike under the National Electricity Power Authority regime. The Market Development and strategic stages offers great expectations. Thus a fundamental expectation of TEM for all stakeholders is that this phase will ensure strict accountability of the Market Participants. Under TEM, the Industry Agreements will become effective and Market Participants are obliged to commence full trading based on these agreements and will be sanctioned for failing to meet their contractual obligations to other participants. For instance, Gas Suppliers will be penalized or sanctioned in the event of a failure to deliver on their gas supply commitments to the power producers, in line with the Gas Supply Agreements they have signed. Similarly failure of the Gencos to meet their supply commitment obligations will also be met with consequences as provided for in their PPAs with NBET including non-payment for energy not supplied NBET. NBET would not be paid for power not supplied to the Discos, who will ultimately lose revenue for failing to supply improved electricity to the end users.³¹⁵

Secondly, in the present framework, the regulator is not a participant in the Electricity contracts and Markets. The inability of the NERC to participate as a company in the electricity market, gives it more effective opportunity as a regulator to achieve effective monitoring. A clear example is found in an Article titled “Market Operator, TCN Risk

313 Rule 4.2 (4.2.1 – 4.2.3)

314 Rule 6.4.2

315 See Kukoyi *supra* note 95 at 78

Regulator's Sanction,” and published by Dr. Usman Abba-Arabi - Head, Public Affairs NERC, on the NERC Webpage, the Regulatory roles of the NERC was clearly brought to limelight.

The Nigerian Electricity Regulatory Commission (NERC) issued Notices of Commencement of Enforcement Action on the Market Operator (MO) for operating a unilateral bank account. The notice gave the erring MO seven days ultimatum to take remedial actions by winding down operation of the unilateral bank account and report compliance, failure which it faces disciplinary action from the Commission. In separate notices signed by the Deputy General Manager, Enforcement Unit, NERC, Mr. Chijioke Obi, parties were told that their continued actions were in disobedience to Section 63(1) of the Electric Power Sector Reform (EPSR) Act 2005 which stipulates, “A licensee shall comply with the provisions of his license, regulation, codes, and other requirements issued by the Commission from time to time.” They were also reminded of the section 3(1) of the license conditions which stipulates, “Licensee shall comply with any orders, directions and determinations made by the Commission pursuant to the Act, any regulations made under Act or this license.” The Commission in the notices to parties said that their failures to comply with the relevant laws and conditions of TCN license would compel it to start Enforcement Proceeding against TCN and may invoke disciplinary measures as may be appropriate.³¹⁶

This makes the NERC very neutral and capable of enforcing rules of practice irrespective who is involved. This development eluded the old NEPA which was in one hand a regulator and in the other, a participant. This makes it completely impossible to enforce sector rules and code of conducts, since same NEPA that enforces is capable of defaulting.

3.4.7. Contract Market

The provisions of the contract market only apply during the Transitional Stage.³¹⁷ The contract market generally includes all bilateral trading arrangements between Participants

³¹⁶ Usman Abba-Arabi, “Disciplinary sanctions against the Market Operator” retrieved from <http://www.nercng.org/index.php/media-and-publicity/press-releases/304-market-operator-tcn-risk-regulator-s-sanction>.

³¹⁷ Rule 20.1.1 of the *Market Rules for the Nigerian Electricity Supply Industry*

in another electricity market Regional Pool which buy or sell energy from the Market.³¹⁸ For the purpose of a contract market, the Market Operator prepares a Contract Market Procedure describing the timetable, format and mechanisms for exchange of information and Contract Nomination in the Contract Market.³¹⁹ The Market Operator shall thereafter design an agreement, called the Contract Settlement Agreement, on the basis of information to be provided by the parties, to govern review of invoices and dispute resolution.³²⁰ Parties to the Vesting Contract shall sign the Contract Settlement Agreement with the Market Operator. The Contract Settlement Agreement shall end when one or both have been privatized.³²¹

What distinguishes the Contract Market from other structure is that all contracts executed in the Market during the Transitional Stage shall be designed in a manner which ensures that all energy traded in Market is bought or sold through bilateral contracts.³²² This is subject to the power of the Market Operator to agree with Participants to implement a balancing mechanism to settle differences, in which case the balancing mechanism shall be implemented after the Commission approves mechanism; and necessary consequential amendments are made to these Rules to incorporate a balancing mechanism for the Market during Transitional Stage.³²³

3.4.8. *Special Contracts*

Special Contracts are a group of individual contracts between a Generator or the Special Trader on the one hand and a Distributor on the other, under which each Distributor would agree to purchase Generation from the Generator or the Special Trader on the same conditions and prices as the other Distributors.³²⁴ Each Special Contract shall define the procedure for administration and settlement thereof. Special Contracts are designed to share Generation between all Distributors during the Transitional Stage and, for this

318 Rule 20.1.2

319 Rule 20.1.3

320 Rule 20.4.2

321 Rule 20.4.3

322 Rule 20.1.4

323 Rule 20.1.4 (a-b)

324 Rule 20.5.1

purpose, each Distributor will have its own contract with each Generator or the Special Trader.³²⁵

3.4.9. *New Contracts*

The quantities to be traded in new contracts between the Special Trader and Distributors shall be decided by the Commission on the basis of the Generation Adequacy Report on which basis the Commission shall evaluate the need for additional generation capacity and perform a tariff affordability test to, amongst other things, estimate the impact on tariffs of new power procurement.³²⁶ Before the end of each year, the Commission shall notify the Market Operator and the Special Trader of the quantity authorized for new power procurement by each Distributor. The notice shall, amongst other things, specify: (a) the annual quantity authorized for procurement in the Market; (b) the allocation of this annual quantity between each Distributor, which shall be proportional to the shortage or reserve calculated for each Distributor in the approved Generation Adequacy Report; and (c) any other special provision or conditions established by the Commission.³²⁷

3.4.10. *Contract Data*

Contract nomination for the Transitional Stage entails that the Market Operator shall, for each settlement period, use the contract information submitted by Participants and recorded in the Contract Register to calculate the energy bought and sold by each Participant in the related contract.³²⁸ Where a bilateral contract is involved, both parties, other than a contract for import or export of energy, shall make a Bilateral Contract Nomination to the Market Operator.³²⁹ In the event of an inconsistency, the Bilateral Contract Nomination submitted by the Purchaser shall prevail.³³⁰

3.5. Captive Electricity

325 Rule 20.5.2

326 Rule 22.1.1

327 Rule 22.1.2 (a-c)

328 Rule 24.1

329 Rule 24.2.1 (a)(i-iv) and (b)(i-iv)

330 Rule 24.2.2

The Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008, titled REGULATION NO: NERC-R-0108, made pursuant to 96 (1) of the Electric Power sector Reform Act, 2005 is the regulatory framework for granting electricity permits to an individual, a company, partnership or any association of individuals whether incorporated or not.³³¹ The phrase captive power “Captive Power Generation” means generation of electricity exceeding 1 MW for the purpose of consumption by the generator, and which is consumed by the generator itself, and not sold to a third-party.³³² The underlining objective of the regulation is to streamline the procedure for power generation by interested person(s), groups or corporate organization in excess of 1 MW, but without the intention of trading or engaging in the sale of electricity to a third party.³³³

In captive power, there is no limit to the quantity of electricity the bearer of the permit can generate. There is also no law preventing the supply of electricity to a third party on non-pecuniary basis. What the law forbids is a supply in excess of 1MW on a pecuniary basis. This regulates the activities of a bastardized and sharp electricity practices. Section 8(a & b) respectively provides that a Permit holder must apply for, and receives prior written consent of the Commission before supplying surplus power **not exceeding 1MW** to an off-taker.³³⁴ Also where there is an intention to supply excess of 1MW to an off-taker, a Permit holder must apply for a generation license in compliance with the provisions of the EPSR Act, 2005.³³⁵ Since an off-taker is a purchaser of a project’s output, in this instant, electricity, it therefore obvious that merchantability is far from the captive electricity regime. According to Oke, special permits are granted pursuant to the provisions of the Act to persons for the purpose of captive electricity generation for the **private, non-commercial use of the Applicant**.³³⁶

331 Section 2 of the *Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008*. The section defines 'person' to include an individual, a company, partnership or any association of individuals whether incorporated or not.

332 *Ibid*

333 See Yemi *supra* note 79 Pg 190

334 Section 8(a) of *Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008*

335 Section 8(b)

336 See Oke *supra* note 79 Pg. 190

The application for written consent and or license in any electricity supply to an off-taker either in less than 1 MW or excess of 1 MW respectively gives room for proper regulation of the captive power regime. This discourages any form of merchantability of any sort between the Permit holder and any potential purchaser. Under the Act, no person shall construct, own or operate an undertaking for the purpose of electricity generation, transmission, distribution, systems operation or electricity trading in excess of 1 megawatt without a license by the Commission.³³⁷

Another important aspect of the captive electrification is the furnishing of detailed information to the Commission by all Captive Power Plants owners or permit holders. The holders are mandatorily required to provide annual detailed information to the Commission on the operation of the plant. Such information and documents among other things must provide information on health and safety standards and procedures in the plant, environmental issues arising from operation of the plant and such other information as the Commission may from time to time request.³³⁸ Also while the contravention of any of the terms of the Permit, may lead to cancellation of the permit,³³⁹ failure to adhere to the regulatory provisions with respect to operation and application may be considered an offence punishable under the Regulation pursuant to Section 94(1) of the EPSR Act.³⁴⁰

The Electric Power Sector Reform Act, 2005, really does not have any clear or direct provision for Captive Electrification. However the Act gives a slight direction or insight into the captive power regulation. The Act provides that no person, except in accordance with a license issued pursuant to the Act or deemed to have been issued shall construct, own or operate an undertaking, or in any way engage in the business of electricity generation, excluding captive generation.³⁴¹ The Act further defined Captive generation to mean generation of electricity for the purpose of consumption by the generator and which is consumed by the generator itself and not sold to a third party.³⁴²

³³⁷ Section 62 of the *Electric Sector Reform Act, 2005*

³³⁸ Section 9(a) of *Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008*

³³⁹ Section 14(a & b)

³⁴⁰ Section 11(a-b)

³⁴¹ Section 62(1)(a) of the *Electric Sector Reform Act, 2005*

³⁴² Section 100

Furthermore, according to Oke, by virtue of section 32 (1)(a), 32(1)(e), and 32 (2)(d) of the Act, the NERC has a general but not specific statutory duty to regulate the operation of captive generating plants, among others.³⁴³ Also Sections 4(4)(a) Part II of the Second Schedule Item 13 (c) & (f) of both the 1979 and 1999 Constitution of Nigeria as amended is very instrumental in arriving at who regulates captive electrification. Item 13 (c & f) provides that the National Assembly may make laws for the Federation or any part thereof with respect to - (c) the regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation; and (f) the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy.³⁴⁴ Indeed a combination of the opinion of Oke, and the provisions of Sections 4(4)(a) Part II of the Second Schedule Item 13 (c) & (f) of both the 1979 and 1999 Constitution of Nigeria as amended, there is safe haven to submit that regulation of Captive Electrification just like other licenses are exclusively within the ambit of the NERC. This is the reason for the enactment of the Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008, titled REGULATION NO: NERC-R-0108, being made pursuant to 96 (1) of the Electric Power sector Reform Act, 2005. That having been said, it is important to note that there are quite a number of holders of this permit in Nigeria presently. As at 2012, there about 36 holders of the Captive electricity permit.³⁴⁵

The ASB VALIANT COMPANY LIMITED as an integrated energy and captive power plant engineering Solution Company in Nigeria was engaged in the construction in the following Captive electricity projects:

1. The Redeemed Christian Church of God (RCCG) with an Installed Capacity of 5.2 + 5.67 = 10.87MW (Dual Fuel Gas Turbine) Located at the RCCG Redemption Camp, Ogun State, Nigeria.

343 See Yemi *supra* note 79 Pp. 190-191

344 Section 4(4)(a) Part II of the Second Schedule Items 13 of both the *1979 and 1999 Constitution of Nigeria* as amended.

345 NERC, "The List of Permit Holders under the Captive Electrification regime" *NERC Library Webpage*, retrieved from <http://nerc.gov.ng/index.php/library/documents/Licensing/Captive-Permits/List-of-Permit-Holders/>

2. The Dangote Group (DANGOTE CEMENT TEMPORARY POWER PLANT, IBESE, OGUN) with an Installed Capacity of $5.5 + 7.52 = 13.02\text{MW}$ (Dual Fuel Gas Turbine) located at Ibese, Ogun State, Nigeria.
3. ONDO STATE GOVERNMENT OF NIGERIA (ORE POWER LIMITED) with an Installed Capacity of $15 + 15 = 30\text{MW}$ (Tri-Fuel Capacity Gas Turbine) located at Ore, Ondo State, Nigeria.
4. SHORELINE POWER LIMITED with an Installed Capacity of $3 \times 5.5\text{MW} = 16.5\text{MW}$ (Dual Fuel Gas Turbine) Located at West Africa/Lafarge Cement Plant, Shagamu, Ogun State, Nigeria.
5. Standard Metallurgical Company, Shagamu (STANDARD METALLURGICAL POWER PLANT) with an Installed Capacity of 15MW (Dual fuel capacity gas turbine) Located at Standard Metallurgical Factory, Shagamu, Ogun State, Nigeria.
6. First Power Limited, Ijora, Lagos State (IJORA POWER PLANT) with an Installed Capacity of $5.5 + 7.52 = 13.02\text{MW}$ (Dual Fuel Gas Turbine) located at Ijora, Lagos State, Nigeria.
7. Living Faith Church, Canaan Land, Ogun State (CANAAN LAND POWER PLANT) with an Installed Capacity of 5.67MW (Dual Fuel Gas Turbine) located at Canaan Land, Ota, Ogun State, Nigeria.³⁴⁶

3.6. Concessional Electrification

Concession means a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provision of any services.³⁴⁷ Although electricity concession is not provided for under the Electric Power Sector Reform Act, 2005, however, the definition of infrastructure to include development projects which were

³⁴⁶ The ASB Valiant Company Ltd, "Projects," *Projects and Development Webpage of the ASB Valiant Company Ltd* retrieved from <http://asbvaliant.com/projects-development/projects/>

³⁴⁷ Section 36 of the *Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005*

financed, constructed, operated or maintained by the Government and which may be wholly or partly implemented by the private sector under an agreement including **power plants**, highways, seaports, airports, canals, **dams, hydroelectric power projects**, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council,³⁴⁸ is an indication that electricity just like any other infrastructural projects is a subject of concession in Nigeria.

The Kainji Power Plant, Jebba Power Plant and Shiroro Power Plc all Hydro electricity with an installed capacity and an output of about 760MW, 578MW and 600MW respectively were all regimented under a Long Term Concession.³⁴⁹ The federal government plans to concession 6 small hydro power dams in the coming weeks, from which it would expect to get an additional 16.3 megawatts (MW) of embedded or off grid clean electricity, OGN reports. According to the ministry of power in Abuja there are plans consolidate plans with the water resources ministry to concession the small hydro power dams which include 6MW Ikere Gorge Dam in Oyo State; 3MW Bakolori Dam in Zamfara State; 2MW Omi-Kampe Dam in Kogi State; 1MW Doma Dam in Nasarawa State; 300kW Zone; and 4MW Jibiya Dams in Katsina State. The ministry's Acting Director, Renewable and Rural Power Access, Mr. Farouk Yusuf Yabo, said all qualified bidders for the concessioning plan would receive Request for Proposals (RFPs) from August 14, 2017, and that the projects were expected to reach financial close before December, 2017.³⁵⁰

Another important example is the concession of a ring-fenced area of the Aba metropolis by Geometric Power (GP). The arising controversy surrounding this concession and the post privatization process of the Nigerian Electricity Supply Industry (NESI) is very cardinal for examination.

By way of background, there is a Lease Agreement dated 28th April 2005 signed between the Federal Government of Nigeria (FGN), National Electric Power Authority (NEPA)

³⁴⁸ *Ibid*

³⁴⁹ The NERC, "Power Generation in Nigeria" *NERC Home: Generation Webpage*, retrieved from <http://nerc.gov.ng/index.php/home/nesi/403-generation>

³⁵⁰ The Nigeria Electricity Hub, "FG Set to Concession 6 Small Hydro Power Dams" August 15, 2017, retrieved from <http://www.nigeriaelectricityhub.com/2017/08/15/fg-set-to-concession-6-small-hydro-power-dams/>

and Aba Power Limited (APL). This agreement is for the generation, transmission and distribution of power to residential and commercial consumers in Aba, and Ariaria Districts that fall under Enugu Zone of NEPA in Abia State. The said agreement which relates to the ring-fenced area in Aba and Ariaria Districts was amended by another Supplemental Agreement dated 31st August, 2006. The agreement was pursuant to a Memorandum of Understanding dated the 11th May, 2004. Clause 3.1 of the agreement had created a lease of 15 years commencing from the date of the signing of the agreement to expire on the 15th anniversary of the signing, but the Supplemental Agreement extended the period to 20 years. In compliance with the EPSR Act 2005, NEPA was unbundled into eighteen successor companies. Enugu Zone became Enugu Distribution Company. Since Aba and Ariaria Districts fall under the Enugu Disco, the contracts between NEPA and APL were inherited by Enugu Disco in consonance with the principles of succession of title and Section 8 of the EPSRA 2005. The transition from NEPA to PHCN and then to Enugu Disco did not in any way affect the contract entered into by APL to generate, transmit and distribute power in Aba and Ariaria Districts of Enugu Disco for 20 years. When Enugu Disco was slated for privatization along with other successor companies of PHCN, the contract document was disclosed in the data room so that all potential investors were made aware of the subsisting contract for APL to generate, transmit and distribute power to the Aba and Ariaria Districts for 20 years. Every company that bid for Enugu Disco was aware of this. It is instructive to note that APL/Geometrics participated in the bid for Enugu Disco but lost.

In preparation for privatization of the PHCN assets and in recognition of the Aba Power's Agreement with the FGN, the BPE management in 2006 registered Aba Electricity Distribution Company Plc (Aba DisCo) at the Corporate Affairs Commission (CAC) as a 12th DisCo, in order to ensure compliance and full implementation of Aba Power's rights over the Aba ring-fence. Shareholders of Aba DisCo are the BPE and Ministry of Finance Incorporated (MoFI) represented by Mrs. Irene Chigbue and her colleague in MoFI. With these convictions, the investors relied on these to raise the funds used in bringing the distribution network to international standard. These include

constructing a 141MW Power Plant, over 105 kilometres of 33kV overhead lines, over 40 kilometres of 11kV lines, 4 new substations, and a 27km gas pipeline.³⁵¹

Summarily, the following authorities support the submission that concessionary electrification is part of the Nigerian Electricity Supply Industry (NESI). First, the BPE's Advertorial, wherein the Bureau held that APL has a subsisting contract to generate, transmit and distribute power in the Aba and Ariaria Districts of Enugu Disco for 20 years. This contract was inherited from NEPA and PHCN based on the powers conferred on NCP by EPSR Act to create successor companies to NEPA/PHCN. The Federal Government of Nigeria, in consonance with the declared principle to abide by the rule of law, has not varied or vitiated the contract.³⁵²

Secondly, the NERC in a letter to the CEO Enugu Disco aptly captured that in view of the pending transfer of ownership of the EEDC to Interstate Electrics, there was in existence a legally valid and binding lease agreement dated April 28, 2005 between the Federal Government of Nigeria, Geometric Power Aba Ltd (GPAL), Aba Power Ltd (APL) and PHCN. This means that the encumbrance on the property purchased by EEDC is unrelated to the issue ownership of EEDC, Interstate Electrics as the new owner is legally bound to respect the lease agreement which it is inheriting along with the purchase of EEDC. It is based on this lease agreement, the supplementary agreement executed between the FGN, EEDC, TCN and GPAL/APL for a twenty (20) year period and in fulfillment of all other requirements for the grant of license that GPAL and APL were granted an Embedded Generation license as well as a distribution License by the Commission to generate and distribute power within the ring-fenced area of Aba as described in the agreement between the parties while the excess is to be sold to the national grid.³⁵³

Thirdly, the Federal High Court has also validated the concession electricity in its judgment, which was based on its finding that the lease agreement was properly entered into by the FG. It is important to note that the concession agreement has two rights

351 Aba Power Limited, "Facts Not Fiction Re: Interstate Electrics' Advert on Geometric Power and Aba Power's Ring-fence Agreement with FGN" the Geometric Power Updates Webpage retrieved from <http://geometricpower.com/updates/>

352 See the BPE's Advertorial of June 10, 2014 retrieved from <http://geometricpower.com/updates/>

353 NERC's letter to CEO Enugu Disco on October 30, 2013 retrieved from <http://geometricpower.com/updates/>

conferred on Aba Power Ltd. The first is the right to lease the Aba Electricity ring fence network for a period of 20 years from the time of injection of electricity into the ring-fence. The second right is that should there be privatization of the distribution companies in Nigeria, that Aba Power Limited should be offered right of first refusal to purchase the ring-fence facilities. Furthermore, the Court held that:

The 2nd Defendant (Interstate Electrics Ltd.), in my view, cannot take benefit of the powers exercised by the 1st Defendant (BPE) as the statutory agent of the Federal Government of Nigeria. On the one hand, and on the other, seek to declare the (lease) Agreements which the FGN through the 1st Defendant (BPE), the Vice President, and the NERC recognized as valid, as illegal or as non-existence all in a bid to seek to have Enugu Distribution Zone handed over to it without any encumbrance

The Court went further to hold that:

The Defendants, the 2nd Defendant in particular (Interstate Electrics Ltd.) can be, and is hereby restrained from taking steps in any way obstructing, preventing or frustrating the 1st Plaintiff in the quiet enjoyment of its leasehold interests in respect of the ring fenced area of Aba and Ariaria Business Units³⁵⁴

3.7. Renewable Electrification in Nigeria

Currently in Nigeria, the method and approach of electricity generation and transmission is highly centralized. The generation is majorly thermal and hydro based. As at July 2016, the total installed power generation capacity in Nigeria, a country of over 187 million people was 12,522MW; 85% of which is gas-fired (thermal) and 15% is hydro-generated. The country achieved its highest peak generation output of 5,074MW in February 2016.³⁵⁵ Hydropower from three major plants accounts for 1,938.4 MW of total installed capacity (and an available capacity of 1,060 MW). The transmission is majorly grid based through

³⁵⁴ See the Federal High Court Judgment of May 8, 2015 in Suit No: FHC/ABJ/CS/106/2013

³⁵⁵ Detail Commercial Solicitors, "Prospects of Solar Power Generation in Diversifying Nigeria's Energy Mix," August 2016 *Newsletter*

the instrumentality of a lonely Transmission Company of Nigeria (TCN). The Transmission Company of Nigeria (TCN) is a successor company of PHCN, following the unbundling of the sector, and is currently being managed by a Management Contractor, Manitoba Hydro International (Canada). Manitoba is responsible for revamping TCN to achieve technical and financial adequacy in addition to providing stable transmission of power without system failure. Currently, the transmission capacity of the Nigerian Electricity Transmission system is made up of about 5,523.8 km of 330 KV lines and 6,801.49 km of 132 KV lines. The TCN is made up of two major departments: System Operator and Market Operator. The Market Operations (MO) is a department under TCN charged with the responsibility of administering the wholesale electricity market, promoting efficiency and where possible, competition. The system operator is focused on system planning, administration and grid discipline.³⁵⁶ It must be noted that this centralized approach for the Generation and Transmission is at present time generally unfavorable for renewable energy producers. This is mainly based on the fact that planning was developed on the centralized generation model, with large-scale power stations feeding into large high-voltage power grid systems basically operated by the Federal Government of Nigeria.

Renewable electricity came to the limelight in Nigeria due to electricity challenges in the country occasioned largely by epileptic supply of electricity to consumers and partly as a result of the global trend of reducing the emission of carbon dioxide and the increasing devastating effects of the use of fossil energy resources that are essentially inexhaustible, unlimited and naturally renewable and replenishable such as wind, water, sun, wave, refuse and bio-fuel, among others.³⁵⁷

The three major regulatory and legal frameworks for the Renewable electricity options in Nigeria are: the Federal Republic of Nigeria, “National Energy Policy,” the Presidency - Energy Commission of Nigeria, April, 2003, the Policy Guidelines on Renewable Electricity in Nigeria December, 2006 and National Energy Utilization Master Plan.³⁵⁸

³⁵⁶ See *supra* note 61

³⁵⁷ See *supra* note 79 at 312

³⁵⁸ *Ibid* at Pp 313, 314, 315, 316 and 317

The term ‘renewable energy’ has no official or commonly accepted definition. As an example, the Renewable Energy Working Party of the International Energy Agency defines renewable energy as energy that is derived from natural processes that are replenished constantly. According to the IEA, some typical sources of renewable energy are: Heat & Light from the Sun, Ocean Wave, Purposely-Growth Energy Crops, Potential Energy of Running water, Geothermal Energy and Wind Energy.³⁵⁹ The Renewable energy covers all forms of energy generated from natural resources such as sunlight, wind, water (or hydro power), tide, geothermal heat, biomass and biofuels. The Renewable energy exploits the off the grid opportunities. They are derived from natural processes that are constantly replenished and each of them has characteristics that determine where and how they are used. Renewable as the name suggest exists perpetually and in abundant quantity in the environment. Renewable energy is ready to be harnessed, inexhaustible, and more importantly, it is a clean alternative to fossil fuels.

3.7.1. Biomass

The Biomass includes energy crops and organic wastes. Energy crops comprise Oily crop (Palm, Jatropha, Vernicia Montana, Sun flower, Beans, coconut, etc), sugar and starch (sugarcane, Cassava, corn) and quick growing trees and aquatic cultures. Organic wastes include residues of agriculture-Forestry production, By-products of agro-forestry industry (sawdust, wood chips, rice husk, corn cobs, livestock manures) and municipal wastes (Households' wastes, communal wastes, food processing wastes).

Generally, biomass is resources generated from plant materials like wood that can be degraded (that can be converted, convertible materials). And principally it's the result of what is called photosynthesis. That is plant materials capturing energy from the sun and storing them. For example, if wood is dry and you put light it is ignited. The process is very simple, the sun shines so the plant keeps capturing the energy from the sun and then it dries up. So when you put light its ignited, so it's the energy that it has stored from the sun that it releases, that is what is called biomass in a very simple term, all these woods that we use to cook, the sawdust, even animal waste is also a source of biomass energy.

³⁵⁹ International Energy Agency (IEA), *World Energy Outlook*, 2011, Paris.

Nigeria is very rich in Biomass resources. If you are travelling between Lagos and Ibadan, you will see forests for kilometers, but if the rate at which we use these resources, although they are reliable, but we are depleting them at a faster rate than we are creating them, we cut woods today or one tree from the forest, nobody plants another one to replace them, but overall we have adequate biomass resources for biomass energy in Nigeria because there are waste like saw dust, wood chips which should not waste away. We can convert them into energy and at the same time also, biomass sources like waste. For example, Lagos generates so much waste every day, those waste can be converted into energy by simply putting them in a small device called “Bio-Digesters”, so it can digest those waste through bacteria and the rest, scientists know more about that, and you can even use it to cook in your house.³⁶⁰

While several technologies for generating bioenergy heat and power already exist, there is a need to extend the use of most efficient technologies available today and to complete the development and deployment of a number of new technology options. Biomass can be converted to energy, fuels and products through two main conversion pathways-thermochemical and biochemical conversion pathways. Biochemical conversion involves breaking down the hemicellulose fraction and making the remaining cellulose material more accessible for reaction. The two biochemical process options are - anaerobic digestion and fermentation. Whereas thermochemical conversion involves any of the following process options: combustion, pyrolysis, gasification and conversion to other energy products.³⁶¹

In all of these, the environmental, economic and social impacts of biomass technology cannot be overlooked. Burning biomass produces many of the same emissions as burning fossil fuels. However, growing biomass captures carbon dioxide out of the air, so that the net contribution to global atmospheric carbon dioxide levels is lessened. The process of growing biomass is subject to the same environmental concerns as any kind of agriculture.

360 Segun Adaju, “Access to Renewable Energy (AtRE) Project” *Bank of Industry (BOI)/United Nations Development Project (UNDP) Project* retrieved from <http://renewableenergy.gov.ng/nigeria-has-adequate-resources-for-biomass-energy-adaju/>

361 K. J. Simonyan and O. Fasina, “Biomass resources and bioenergy potentials in Nigeria” *8 African Journal of Agricultural Research* October, 2013 at pp. 4975-4989 retrieved from http://www.academicjournals.org/article/article1381916826_Simonyan%20and%20Fasina.pdf

It uses a large amount of land, fertilizers and pesticides for cost – effective growth. Biomass that is produced as a by- product of agriculture shows some promises, but most such biomass is currently being used for plowing back into the soil as fertilizer. Biomass production leads to social participation as communities learn waste management, and to economic growth in that biomass production creates employment and provides income to both the government and the general average populace whose standard of life is also significantly improved.³⁶²

3.7.2. *Solar Energy*

Solar energy is the energy from the sun. It is the sun's rays (solar radiation) that reach the earth. Solar energy is power from the sun's rays that reach Earth. Using photovoltaic cells made from silicon alloys, sunlight can be converted into other forms of energy, such as heat and electricity. Steam generators using thermal collectors to heat a fluid, such as water, sometimes convert even higher amounts of solar energy into electricity.³⁶³ Solar energy can be converted into other forms of energy, such as electricity (photovoltaic) and heat (photo-thermal). Most current technology photovoltaic modules are about 10 percent efficient in converting sunlight.³⁶⁴

Solar radiation represents the largest energy flow entering the terrestrial ecosystem. After reflection and absorption in the atmosphere, some 100,000TW usually hit the surface of the Earth and undergo conversion to all forms of energy used by humans, with the exception of nuclear, geothermal and tidal energy. This resource is enormous and corresponds to almost 6,000 folds, the current global consumption of primary energy (13.7TW). Thus, solar energy has the potential of becoming a major component of a sustainable energy portfolio, with constrained greenhouse gas emissions. Solar radiation being abundantly present in Nigeria is one areas of focus among the renewable energy

362 Jemima Ngozi Ogwo, Obed C. Dike, Samuel O. Mathew and Emmanuel U. Akabuogu, "Overview of Biomass Energy Production in Nigeria: Implications and Challenges" *I Asian Journal of Natural & Applied Sciences*, December 2012 retrieved from [http://www.ajsc.leena-luna.co.jp/AJSCPdfs/Vol.1\(4\)/AJSC2012\(1.4-06\).pdf](http://www.ajsc.leena-luna.co.jp/AJSCPdfs/Vol.1(4)/AJSC2012(1.4-06).pdf)

363 http://www.chevron.com/deliveringenergy/solar/?utm_campaign=Africa_-

364 Awogbemi, O. and Asaolu, J.I., "Overview of Renewable Energy Situation in Nigeria" *Faculty of Engineering, University of Ado-Ekiti, Nigeria*, 2008 16 – 25.

resources that can be harnessed to solve Nigeria's power crisis. According to Oke, solar energy is one of the veritable sources of renewable electricity in Nigeria.³⁶⁵

Nigeria receives an average solar radiation of about 7.0kWh/m² (25.2MJ/m² per-day) in the far north and about 3.5kWh/m² per day (12.6MJ/m² per day) in the costal latitudes. The estimate of potential solar energy in Nigeria, with 5% device conversion efficiency is 5.0×10¹⁴ KJ of useful energy annually. This is equivalent to about 258.62million barrels of oil produced annually and about 4.2×10⁵ GWh of electricity production annually, in the country. Effective harnessing and utilization of this abundant solar radiation, using solar energy technologies to augment energy supply from fossil fuel energy resources (using cleaner fossil fuel technologies), would enhance availability of energy for socio-economic activities and subsequently lead the nation to realize its 2020 Transformation Agenda. Nigeria lies within a high sunshine belt and thus has enormous solar energy potentials. The mean annual average of total solar radiation varies from about 3.5 KWh (m² per day) in the costal latitudes to about 7 KWh (m² per day) along the semi arid areas in the far North. On the average, the country receives 19.8MJ (m² per day). Average sunshine hours are estimated at 6hrs per day. Given an average solar radiation level of about 5.5KWh (m² per day) and the prevailing efficiencies of commercial solar-electric generators, then if solar collectors or modules were used to cover 1% of Nigeria's land area of 923,773km², it is possible to generate 1850x10³GWh of solar electricity per year, which is over one hundred times the current grid electricity consumption level in the country.³⁶⁶

Solar energy has been utilized in Nigeria in various forms: namely, solar PV for rural electrification, solar cooker, solar crop dryer, solar manure dryer, solar water pump, solar water heaters, solar chick brooders etc. A national survey by the Energy Commission reveals a total of 33 companies that were active in Solar PV by 1999. Most of them were established within the last ten years. There are over 200 solar PV installations, in the country as at 1998, with capacities ranging from 3.5 to 7.2 kwp.³⁶⁷ Jigawa State

365 See Yemi *supra* note 79 at 323.

366 Aliyu Musa Kofa, "Solar energy for sustainable power supply in Nigeria" *Nuhu Bamalli Polytechnic, Zaria, Kaduna State*, 2012 retrieved from <http://sweetcrudereports.com/2012/12/25/solar-energy-for-sustainable-power-supply-in-nigeria/>

367 P.A. Nwofe, "Utilization of Solar and Biomass Energy- A Panacea to Energy Sustainability in a Developing Economy" *International Journal of Energy and Environmental Research* Vol.2, No.3, Pp.10-19, September 2014.

Government initiated a proposal to bring solar-generated electricity (PV) to power essential services in 3 villages of Jigawa State.³⁶⁸

3.7.3. *Wind Energy*

Wind is a form of solar energy. Winds are caused by the uneven heating of the atmosphere by the sun, the irregularities of the earth's surface, and rotation of the earth. Wind flow patterns are modified by the earth's terrain, bodies of water, and vegetative cover. This wind flow, or motion energy, when “harvested” by modern wind turbines, can be used to generate electricity. The terms “wind energy” or “wind power” describe the process by which the wind is used to generate mechanical power or electricity. Wind turbines convert the kinetic energy in the wind into mechanical power. This mechanical power can be used for specific tasks (such as grinding grain or pumping water) or a generator can convert this mechanical power into electricity to power homes, businesses, schools, and the like. Wind turbines, like aircraft propeller blades, turn in the moving air and power an electric generator that supplies an electric current. Simply stated a wind turbine is the opposite of a fan. Instead of using electricity to make wind like a fan, wind turbines use wind to make electricity. The wind turns the blades, which spins a shaft which connects to a generator and makes electricity. Modern wind turbines fall into two basic groups, the horizontal-axis variety, like the traditional farm wind mills used for pumping water and the vertical-axis design like the eggbeater-style, Darrieus model named after its French inventor. Most large modern wind turbines are horizontal-axis turbines.³⁶⁹ Wind generation has been described to be one of the mature and cost effective resources among different renewable energy technologies.³⁷⁰ Wind is a natural phenomenon related to the movement of air masses caused primarily by the differential solar heating of the earth's surface.³⁷¹ Wind is a classical example of a stochastic variable; due to this stochastic nature, wind energy

368 Chendo, M.A.C., “Factors Militating Against the Growth of the Solar – PV Industry in Nigeria and their Removal.” *Nigeria Journal of Renewable Energy* 10 (1&2):151 – 158, 2002.

369 <http://windeis.anl.gov/guide/basics/>

370 J. Bhola, K. Ram, M. Rao “A novel Approach for fault detection and its analysis for grid connected DFIGs”, *International Journal of Electrical and Power Engineering* Pp.150-153 (Medwell Publishing 2009).

371 A.S. Sambo “Renewable Energy for rural development: The Nigerian perspective” *ISESCO Science and Technology Vision Volume 1* Pp.16-18 (May 2005).

cannot be controlled, but can be managed. This is because wind power is available only when the wind speed is above a certain threshold.³⁷²

The main advantages of electricity generation from wind are the absence of harmful emissions, very clean and the almost infinite availability of the wind that is converted into electricity. It is not just enough to say that the wind turbines should be connected to the grid because there are sufficient wind speeds to drive the wind turbine.³⁷³ The technologies for harnessing wind energy have, over the years, been tried in the northern parts of the country, mainly for water pumping from open wells in many secondary schools of old Sokoto and Kano States as well as in Katsina, Bauchi and Plateau States. Other areas of “potential application” of wind energy conversion systems in Nigeria are in Green electricity (which is the type of electricity produced from renewable source that is environmentally friendly and non-polluting) production for the rural community and for integration into the national grid system. In 1998, a 5-kW wind electricity conversion system for village electrification has been installed at Sayyan Gidan Gada, in Sokoto State.³⁷⁴

According to the report of Lahmeyer,³⁷⁵ wind energy reserve in Nigeria at 10m (or 40m) height based on data analyzed for ten wind stations cutting across North West, North East, North Central, South East and South West geopolitical zones shows that some sites have wind regime between 1.0 and 5.1m/s (1.0 and 6.3m/s) depending on the particular stations, and still confirms that Nigeria falls into the moderate wind regime.

3.8. Comparative Study on the Global Renewable Electrification

Despite the effort by concerned stakeholders, Nigeria’s energy resources potential still suffer from over dependence on hydro power, which is largely susceptible to seasonal

372 T. F Brady “A simulation solution of the integration of wind power into an electricity generating network” A paper presented at the proceedings of the 2009 winter Simulation Conference *Department of Engineering Technology Westville USA*, Pp. 1523-1529

373 Agbetuyi, Akinbulire, Abdulkareem, and Awosope, “Wind Energy Potential in Nigeria,” *International Electrical Engineering Journal (IEEJ)* Vol. 3 pp. 595-601, (2012).

374 O. S Mutlu “Evaluating the impacts of wind farms on power system operation” *Journal of Naval Science and Engineering*, Vol 6, No 2, Pp.166 -185 (2010).

375 Lahmeyer International, “Report on Nigeria wind power mapping projects,” *Federal Ministry of Science and Technology*, Pp. 37 -51, 2005, (Unpublished)

variations in the amount of water levels at dams. By relying on renewable energy that is naturally inexhaustible in nature, the country is able to develop renewable energy that resources for its economic development while also contributing in improvement of the global condition through the pursuit of greener energy devoid of the greenhouse gases that deplete the ozone layer.³⁷⁶

This is also the case in Ghana, Benin, Togo, Guinea and Mali. Electricity supplies have been less than satisfactory in these countries due to frequent outages. The situation is same in Senegal where electricity generation is mainly based on oil, as the country also experiences frequent power plant outages due to low reliability and difficulty of fuel procurement. The kind of reforms in the Nigerian power sector had taken place in other jurisdictions, and lessons from these countries provide further guides to electricity sector government in Nigeria under the current dispensation.³⁷⁷

3.8.1. China Energy and Renewable Energy Policy

The National Development and Reform Commission (NDRC) is the primary policymaking and regulatory authority in the energy sector, while four other ministries oversee various components of the country's oil policy. The government launched the National Energy Administration (NEA) in July 2008 to act as the key energy regulator. The NEA, linked with the NDRC, is charged with approving new energy projects in China, setting domestic wholesale energy prices, and implementing the central government's energy policies, among other duties. The NDRC is a department of China's State Council, the highest organ of executive power in the country.

China is now second only to the United States in total wind capacity. China's wind turbine manufacturing industry became the largest in the world in just four short years, with three Chinese producers now in the top 10 globally, according to the latest BTM report: Sinovel, Goldwind. More than 80 domestic manufacturing firms now exist and most Chinese turbines are now in the 1.5–2 MW class, in comparison with earlier years when sub-1 MW models still accounted for a large proportion of turbine production.

³⁷⁶ Renewable Energy and Electricity: "World Nuclear Association." Online <http://www.world-nuclear.org/info10.html>, accessed on 13th April, 2011, at p.3 in Oke, *supra* note 79 at 322

³⁷⁷ See Oke *supra* note 79 Pp. 15 - 16

China is now also the largest manufacturer of solar PV, supplying almost 40% of all solar PV worldwide in 2009. According to the report by Mr. Sridhar Samudrala,³⁷⁸ the future, the Chinese government's current draft plan calls for 300 GW of hydropower, 150 GW of wind power, 30 GW of biomass power, and 20 GW of solar PV, for a total of 500 GW of renewable power capacity by 2020. This would be almost one-third of China's expected total power capacity of 1600 GW by 2020.

Recent changes to renewables policy in China, including 2009 amendments to the 2005 Renewable Energy Law and a number of other new policies enacted during 2008–2009, are outlined below.

An update to the original 2005 renewable energy law was adopted by the National People's Congress in December 2009 and took effect 1 April, 2010. This update contained three main provisions:

1. More detailed planning and co-ordination is to be required, including co-ordination of renewables with overall electric power sector development and transmission planning, and co-ordination of local- (provincial-) level development with national development plans. In addition, the roles and responsibilities of electric power companies are to be further elaborated in relation to grid-interconnection of renewable energy generators and definition of different classes of renewable generators (including small-scale generators with positive net power production).
2. Provisions were strengthened to guarantee that electric utilities purchase all renewable power generated. Previously, utilities were only obligated if there was sufficient power demand on the grid. Now, utilities must buy the power in all circumstances, but can then transfer the power to the national grid company for use elsewhere. The revisions to the law also add deadlines and economic penalties for utilities failing to comply with this guaranteed-purchase requirement.

³⁷⁸ Sridhar Samudrala, "Report on a consultancy assignment from the Asian and Pacific Centre for Transfer of Technology (APCTT) of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)," *International Energy Consulting Co, USA* July, 2013.

3. A renewable energy fund under the Ministry of Finance as part of the 2005 law was strengthened and consolidated. Previously, the fund was collecting a 0.4 fen/kWh (0.06 US cents/kWh) surcharge on electric power sales nation-wide (with some customer classes exempt). The Ministry applies those funds to the costs of government-supported renewable energy projects and the costs of feed-in tariffs.³⁷⁹

China is also quickly realizing that coal will no longer be able to support the growth of its economy. Its reliance on fossil fuels in general and coal in particular, is unsustainable and will put pressure on its abilities to continue a rapid growth trajectory in the long run. Moreover, there is also the fact that China is recorded as the third consumer of coal and peat in the world, generating up to 77% of the total electricity in 2010, after Brazil and India. There is encouraging progress regarding the use of electricity in China: according to World Watch Institute, about 17% of China's electricity came from renewable sources in 2007, led by the world's largest hydroelectric generators. The China Renewable Energy Law of 2005 is still the key driver of renewable energy development in China. By prioritizing the renewable energy sector, it presents China with an opportunity for global leadership. China's driving policy doctrine, referred to as the "Five Year Plan", is in its 12th issuance for the period from 2011 – 2015 and has a distinct and new focus on adjusting the country's economic growth model with a specific focus on energy.³⁸⁰

In China, control over institutional arrangements in the electricity sector lies primarily in the hands of the central government, though overall governance responsibility in the sector is shared, in most cases with provincial governments, financial institutions and the electricity industry itself.³⁸¹

3.8.2. *The Government of India (GOI)*

India is the fourth largest energy consumer (United States, China, and Russia) and has one of the fastest economic growth rates (7% or higher since 2000). India along with China account for the largest share of Asian energy demand growth. Growth in the energy sector has been high due to foreign investment and the aggressive GOI policy. According to the

³⁷⁹ *Ibid*

³⁸⁰ *Ibid*

³⁸¹ See Yemi *supra* note 79 at 18

Central Electricity Authority (CEA), India has approximately 211,000 MW of installed electricity capacity, mostly in coal-powered plants. Because of insufficient fuel supply, the country suffers from a severe shortage of electricity generation, leading to rolling blackouts. India's largest energy source is coal, followed by petroleum and traditional biomass (e.g., burning firewood and waste). The industrial sector is the largest energy consumer, representing over 40 % of India's total primary energy demand in 2009, and is mostly fueled by traditional biomass. The power sector is the fastest growing area of energy demand, increasing from 23 percent to 38 percent of total energy consumption between 1990 and 2009.

India is the only country with dedicated ministry for renewable energy (Ministry of New and Renewable Energy (MNRE)) and every state has a coordinating department for advancing renewable energy. Over 327 GW of power is projected by 2020 and MNRE expects renewable capacity to double to 65 GW by 2020. MNRE had a capacity addition of 14,000 MW is targeted during the 11th Plan period that would take the renewable power generating capacity to nearly 25,000 MW by 2012. As of 2012, current installed renewable capacity was 24,503 MW. This momentum is likely to be sustained and it is envisaged that the renewable power capacity in the country will cross 87,000 MW by 2022.

The Indian electricity regulation is highly participatory. The Ministry of Power is the main organization responsible for planning and implementing all of India's power sector policy, with various departments handling different parts of the sector, including thermal, hydropower, and distribution. Generation, Transmission & Distribution: The major generators of energy are the National Thermal Power Corporation (NTPC), the National Hydroelectric Power Corporation (NHPC) and the Nuclear Power Corporation of India Limited (NPCIL). The largest transmission provider is the Power Grid Corporation of India (POWERGRID). The distribution is handled by the states (some have given it to the private sector).³⁸²

382 Indian Power Grid, "Transmission and Distribution in India: A report for Transmission & Distribution by POWERGRID, WEC-IMC and Power Grid Corporation of India Limited, July, 2013 retrieved from

The GOI has an incentive program named a Generation Based Incentive (GBI) Scheme. The incentives are as follows:

1. All grid integrated projects of capacity of more than 5 MW are eligible for this scheme. The project has to be synchronized with the grid and certified by the utility.
2. Wind site has to be validated by C-WET.
3. Electricity generated from the project should be sold to the grid.
4. The MNRE will provide the GBI of Rs. 0.50 per unit for a period of ten years to the eligible project promoters through IREDA. This scheme is currently valid for wind farms installed before March 31, 2012. This incentive shall be in addition to the tariff determined by the State Electricity Regulatory Commission (SERC).
5. IREDA will disburse the generation based incentive to the generator on half yearly basis through e-payment.
6. Not applicable for those who have set up capacities for captive consumption, third party sale, or merchant plants.
7. The component of the scheme will be reviewed when projects aggregating to 49 MW, which are estimated to generate around 0.9 billion units of electricity, will get registered by IREDA.³⁸³

3.8.3. *The Malaysia*

The Malaysia is a federal constitutional monarchy in Southeast Asia, consisting of thirteen states and three federal territories and borders with Thailand, Indonesia, and Brunei. Malaysia energy production is dependent on oil and natural gas. Power generation capacity for the Malaysian National Grid is approximately 27,000 MW.

<http://www.npti.in/Download/Transmission/World%20Energy%20Council%20Report%20on%20T&D%20in%20India.pdf>

³⁸³ Government of India Ministry of New and Renewable Energy (Wind/Biomass Group) culled vide <https://workspace.imperial.ac.uk/rajivgandhcentre/public/WPP.pdf>

Malaysia is estimated to only have 30 years of natural gas reserves, and 15 years of oil reserves. The Malaysian government is reviewing the energy policy and expanding its renewable energy sources for the future. The oil and gas industry in Malaysia is currently dominated by state owned Petronas and the energy sector as a whole is regulated by Suruhanjaya Tenaga (ST), a statutory body established under the Energy Commission Act 2001, is responsible for regulating the energy sector, specifically the electricity supply and piped gas supply industries in Peninsular Malaysia and Sabah.³⁸⁴

The electricity system covers the Malaysian Peninsula, connecting electricity generation stations owned TNB and Independent Power Producers (IPPs) to energy consumers. A small number of consumers, mainly steel mills and shopping malls also take power directly from the National Grid. The national grid: Tenaga Nasional Berhad (TNB) owns and operates the Transmission system.³⁸⁵

The Malaysia Government is encouraging the development of renewable energy in the economy through policy and various strategies. Malaysia had a Four Fuel policy, covering hydro, natural gas, coal and oil, for electric power generation from the 1980s when natural gas was discovered and exploited for electricity generation. This policy was changed to a Five Fuel policy, covering hydro, natural gas, coal, oil, and renewable energy and energy efficiency (RE/EE), following the DANCED (Danish Cooperation for Environment and Development) study on the “Strategy for the Development of Renewable Energy (RE) as the Fifth Fuel,” in the year 2000.³⁸⁶

The Tenth Malaysia Plan 2011-2015 has changed its focus on green technology including short term goals vested in National Green Technology Policy and new renewable energy feed-in tariff mechanisms. It details on the strategy to restructure the energy subsidies the country has been providing on natural gas and electricity used by the industry sector as well as the discounted energy pricing mechanism for selected industrial users. The 10th

384 <http://www.st.gov.my/index.php/en/about-us2/overview-of-the-energy-commission>

385 *Ibid*

386 Ir. G. Lalchand, “Renewable Energy as a Fifth Fuel Option for Power Generation in Malaysia” *Dip. Electrical Engineering-Brighton* retrieved from <http://dspace.unimap.edu.my/xmlui/bitstream/handle/123456789/15292/Featurerenewable.pdf?sequence=1>

MP also includes a plan to achieve 985 MW by 2015 contributing to 5.5% of Malaysia's total electricity generation mix.

The government is formulating various strategies to promote RE, including an action plan to assist RE project developers, especially Small Renewable Energy Plan (SREP) projects. The plan includes:

1. A review of the Renewable Energy Power Purchase Agreement (REPPA) to recommend how the terms and conditions can be simplified and differentiating between larger projects and smaller and rural projects;
2. New targets for RE utilization by the type of RE source and by region; and
3. Economic support through fiscal and financial incentives improvement.³⁸⁷

The main goals for setting up RE policies are to persuade societies and individuals to adopt RE as an alternative source of energy. Energy policies try to encourage RE in the country's energy mix by facilitating technological barriers, addressing market failures and decreasing associated costs. Energy policies in Malaysia are supervised by the Economic Planning Unit (EPU) and the Implementation and Coordination Unit (ICU). These policies are controlled directly by the country's prime minister. Various policies have been undertaken by the Malaysian government to ensure sustainable energy in the future. The main objectives of this policy have been production, utilization and environmental issues.

Generally in energy policies, the supply objectives target the full exploitation of RE sources. Utilization objectives target energy conservation and efficiency promotion as well as providing solutions to eliminate wasteful and non-productive energy applications. The environmental objectives try to lessen the environmental issues when taking advantage of energy sources. A year after introducing the National Energy policy, a new policy called the National Depletion Policy was launched. The purpose of the new policy was to conserve the main energy resources (mainly oil and gas) of the country. Subsequently, in

³⁸⁷ Azman Zainal Abidin, Ir. KS Kannan and Asfaazam Kasbani, "A Report by the UN Country Team Malaysia" *Malaysia Rapid Assessment and Gap Analysis For Sustainable Energy for All (SE4ALL) Initiative*, September 2012 retrieved from <http://www.se4all.org/sites/default/files/1/2015/05/Malaysia.pdf>

1981, the Four Fuel Diversification Policy was announced. The policy emphasizes the importance of utilizing and diversifying the usage of the four main resources (oil, gas, coal and hydro).³⁸⁸

3.8.4. *The Pakistan*

Pakistan, officially the Islamic Republic of Pakistan is a sovereign state in South Asia. Strategically, Pakistan is located in a position between the important regions of South Asia, Central Asia and the greater Middle East. With over 197 million people, it is the sixth most populous country in the world and has the second largest Muslim population after Indonesia.³⁸⁹

Iran has initiated discussions with Pakistan in November 2012 on an agreement that would see Iran export 1,000 MW of electricity. Pakistan's neighbour has further pledged to complete the gas pipeline by 2014, a move which could alleviate the fuel shortages faced by certain states as well as its neighbor India.

The government has allotted approximately 39,000 acres of land and increased the rate of return for investors in wind power projects to 17%, which implies a tariff rate of 14.6 cents per kilowatt-hour. Approximately half of these projects are projected to be completed by June 2013, and could potentially add 1.8GW of power in the summer, when electricity demand is at its highest. Although these incentives and guarantees could help bolster the success rate of these projects compared to previous attempts, there remains a possibility that global economic woes could delay financing from foreign companies and push back the completion dates.³⁹⁰

Government of Pakistan initiated structural reforms in the power sector under the Power Sector Reform Plan (2010) finalized by Cabinet Committee on Restructuring (CCOR). Implementation of Power Sector Reform Plan 2010 has been expedited and upgraded under the Power Sector Recovery Plan 2011. The plans are based on the following key

388 Saad Mekhilef and Meghdad Barimani, Azadeh Safari, Zainal Salam and Johor Bahru, "Malaysia's renewable energy policies and programs with green aspects" *Renewable and Sustainable Energy Reviews: journal homepage: www.elsevier.com/locate/rser* retrieved from https://umexpert.um.edu.my/file/publication/00005361_117292.pdf

389 <https://en.wikipedia.org/wiki/Pakistan>

390 <https://tribune.com.pk/story/418090/wind-power-the-whir-of-turbines-to-come/>

pillars: Improved governance structure; Supportive legal framework; Financial sustainability; Supply side management; Demand side management and Promote private sector participation in the sector.³⁹¹

The Government of Pakistan is also making the timely payment of tariff differential subsidy (TDS) and ensuring it along with subsidies for KESC and FATA on monthly basis. All subsidy claims till December 2011 (Rs.56 billion) have been disbursed. The Government started 2012 with no outstanding claims against any power sector company. For 2012, overall subsidy is estimated to be Rs.91– 125 billion. Monthly financial planning is being implemented for smooth financial flow. General Sales Tax (GST) exemption withdrawn for lifeline and agriculture consumers (Rs. 10 billion budgeted by the government for 2012). The government aims to phase out subsidies to power sector which have cost rupees one trillion in the last 4 years.³⁹²

391 Riazul Hassan, “Power sector reforms update,” *Business recorder* 25-03-2012 retrieved from <http://portal.riphah.edu.pk/wp-content/uploads/data/12/03/250312psru.pdf>

392 Unverified Book/Author, “Reforms of Present Government addressing Energy Crises” *Hydrocarbon Development Institute of Pakistan*, at 194 retrieved from http://www.finance.gov.pk/survey/chapter_12/14-Energy.pdf

CHAPTER FOUR

DISPUTE RESOLUTIONS AND ADJUDICATORY MECHANISMS IN THE NIGERIAN ELECTRICITY INDUSTRY

4.1. Introduction

In Nigeria, the Electricity industry has emancipated and progressed positively from the privity monopolistic background, to a competitive and disintegrated equal heads where everyone including the State is subject to the regulatory framework. This development is not without its anticipated and attendant rights, duties, liabilities, breaches, disputes and enforcement between and among parties. In *Monmouthshire County Council v Costelloe & Kemple Ltd*,³⁹³ Lord Denning MR expressed the opinion that there must be both a claim and a rejection of it in order to constitute a dispute or difference. Similarly, an actual dispute will not exist until a party asserts a claim and same is disputed by the other.³⁹⁴ These claims and the attendant rejections/disputations are the fundamental and necessary ingredients of commercial relationships built by the forces of demands and supplies of Electricity. This is however indispensable in the midst of varying conflicting interests in a commercialized privatized industry comprising the Generating Companies (Gencos), Distribution Companies (Discos), System Regulator, Market Operator and Transmission Service Provider (TSP). Indeed, disputes are inevitable basically because of the pivotal role being played in the day to day activities of humans. Dispute resolution measures, judicial and non-judicial alike; have become highly essential in order to ease out the friction that will often spring up between the obligations of the service providers to supply power and the rights of the consumers. These Disputes may arise from any of the electricity market participants such as the generation companies, transmission companies, distribution companies, suppliers, consumers, system operators, market operators etc. Also a critical look at the Nigerian Electricity Regulatory Commission (NERC) as the sector regulator will show that it is a body corporate with perpetual succession which can sue or

³⁹³ (1977) 5 BLR 83

³⁹⁴ Brown and Marriot, ADR Principles & Practice, 2nd Ed., (Sweet & Maxwell, 1999) at 2.

be sued in its corporate name,³⁹⁵ thereby exposes it as one of the potential disputants in the sector.

To enhance a successful privatized electricity regime, the Electric Power Sector Reform Act, 2005 and the relevant Nigerian *corpus juris* are not without solutions, and have indeed provided for options and mechanisms to cater for unavoidable disputes between contracting parties in the industry. These *corpus juris* and legal instruments may include the electricity law, private contract law, company law, tax law, common law, consumer protection law, property law, intellectual property law, environmental law, public procurement law or rules, acquisition or appropriation law, and various other laws both domestic and laws by international institutions. Although, oftentimes there are situations where the methods or mechanisms of dispute resolution between parties may be spelt out in contract instruments as allowed under the legal framework of dispute resolution in the country.

4.2. Nature of Electricity Disputes

Electricity Law and practice is a “*Sui Generis*.” It undergoes series of levels before getting to the final consumers. Generation is different from transmission while distribution is different from the rest. This brings quite diverse areas into a spot called the Electricity Market. An electricity market is a system enabling purchases, through bids to buy; sales, through offers to sell; and short-term trades, generally in the form of financial or obligation swaps.³⁹⁶ Bids and offers use supply and demand principles to set the price.³⁹⁷ These principles were recognized by the Act as and called the “market power.” This is the ability of a seller or group of sellers to maintain prices above competitive levels, or to maintain stable prices while reducing the quality of product or service provided, for a significant period of time.³⁹⁸ Thus in a well defined Electricity market, which is regulated and administered by the Market Rules³⁹⁹ and the Interim Regulations made by the

³⁹⁵ Section 31(1) of the *Electric Power Sector Reform Act, 2005*

³⁹⁶ See Farhat Ali, “Towards power trading” *Published by Business Recorder* (Date: 2015-09-04 printing date: 08-07-2017 21:12:13). See also Audiopedia; <https://www.youtube.com/watch?v=A0tQDNcUvoo> and https://en.wikipedia.org/wiki/Electricity_market.

³⁹⁷ *Ibid*

³⁹⁸ Section 100 of the *Electric Power Sector Reform Act, 2005*

³⁹⁹ *Ibid*

NERC,⁴⁰⁰ the rights of market participants are well protected, agreements and promises are enforced and respected. However, it is obvious that the Nigerian Electricity Market is experiencing explosive deregulation, liberalization, and massive technological transformation, and these have increased the challenges of the young market. There are the problems of limited investments, numerous unequal demands for supplies by consumers, global challenge to compete with the international best practices. Also as new companies enter the electricity markets, with new and competing services, new relationships arise among service providers, operators, and end users. In the rapid formation of these new relationships and deployment of new technologies, processes and systems, it is inevitable that some relationships and technologies will fail. The creation and evolution of competitive markets naturally increases the number and type of disputes among all players in those markets. These trends have contributed to an ever increasing number and variety of disputes that call for faster, more cost effective and better resolution. Competitive markets inevitably produce disputes. Such dispute will no doubt range from between generating companies, distributing companies, and consumers; particularly arising from the dissatisfaction of consumers or infringement of consumers' rights. There are also case of disputes arising from failure to fulfill contractual obligations, non-compliance with regulatory requirements, and a wide range of other issues. Furthermore, Procedures for the determination of Energy prices are developed and published for the Market Participants to achieve Market Balancing, particularly during shortages or unexpected constraints;⁴⁰¹ these procedures are readily breached. The NERC is empower to develop, in consultation with the licensees, the customer service standards, customer complaint handling standards and procedures and standards for compensation to consumers who do not enjoy regular power supply.⁴⁰² Furthermore, in accordance with the EPSR Act, the NERC enacted the Customer Complaint Handling: Standard and Procedure, 2006 for complaint handling procedures, practices relating to payment of bills, connection and disconnection procedures.⁴⁰³ Under the Regulations, the licensee is required to establish a customer complaint unit (CCU) with the responsibility of resolving complaints as provided for

⁴⁰⁰ Section 96 (1)(2)(n)

⁴⁰¹ Rule 6.4.3 of the *Market Rules for the Nigerian Electricity Supply Industry*

⁴⁰² Section 80 (1)(a & b) (3) of the *Electric Power Sector Reform Act, 2005*

⁴⁰³ Section 96 (2) (j)

under section 2 (6) of the Regulations, and such Unit shall be headed by a Senior Officer of the Distribution Company.⁴⁰⁴ The Regulation makes it clear that a complaint must relate to defects or deficiencies in services, unfair or restricted trade practices, bills in excess of NERC's fixed prices, unsafe or hazardous electricity supply, recovery of excess bills or charges, or any breach of obligation whether in law or contract.⁴⁰⁵ The Gas Suppliers will be penalized and or sanctioned in the event of a failure to deliver on their gas supply commitments to the power producers, in line with the Gas Supply Agreements they have signed. Similarly failure of the Gencos to meet their supply commitment obligations will also be met with consequences as provided for in their PPAs with NBET including non-payment for energy not supplied NBET. NBET would not be paid for power not supplied to the Discos, who will ultimately lose revenue for failing to supply improved electricity to the end users.⁴⁰⁶ These are various problematic and disputant areas of the electricity market.

The Market Rules for the Nigerian Electricity Supply Industry identifies a number of categories of Disputes in the electricity Market. The first dispute is the dispute between the System Operator or the Market Operator or the TSP and any Participant which arises under, in connection, or in relation or regarding the interpretation to the Rules or the Grid Code, including a Dispute relating to any alleged violation or breach thereof by the System Operator or the Market Operator or the TSP or a Participant.⁴⁰⁷ The second is any Disputes relating to an order of denial by the Market Operator of authorization to any person to participate in the Market Operator Administered Market.⁴⁰⁸ The thirdly arises as any Dispute between the System Operator or the TSP and a Participant, in connection with, in relation to or arising from the terms of any agreement, including an agreement between the TSP and such Participant for connection of the Facilities of such Participant

⁴⁰⁴ Sections 2 (6) and 8 of the *Customer Complaint Handling: Standard and Procedure, 2006*

⁴⁰⁵ Sections 3 (1-3)

⁴⁰⁶ Dolapo Kukoyi, "Transitional Electricity Market (TEM) and Investor and stakeholder expectations for the Nigerian Electricity Supply Industry (NESI)," *Policies and Best Practices for Africa*, DETAIL at 78.

⁴⁰⁷ Rule 43.2.1 (a) and (e) of the *Market Rules for the Nigerian Electricity Supply Industry*

⁴⁰⁸ Rule 43.2.1 (b)

to Transmission System, unless the applicable agreement or contract or the License of a party to the Dispute either provides for an alternative Dispute resolution mechanism.⁴⁰⁹

Similarly, Oluwatosin O. et al,⁴¹⁰ succinctly and clearly identified the Disputes to include:

- a. Disputes related to liberalization: Introducing competition often undermines the established financial and business interests of incumbent service providers. Many disputes arise from the incumbent's desire to protect its dominant position in the market. Reduction or termination of exclusive rights frequently has led to legal and regulatory disputes;
- b. Investment and trade disputes: Disputes often arise where regulatory reforms diminish the value of private-sector interests. These include complaints by investors, operators, and service providers about early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licenses. Other claims are contractual or based on alleged breaches of legal or policy commitments;
- c. Interconnection disputes: These are the most common type of dispute between service providers. Preventing and resolving technical, operational and pricing disputes are key to the development of competitive markets. Dominant operators often have greater market power than new competitors, making regulatory intervention necessary; and
- d. Consumer disputes: Disputes between service providers and consumers are common. Consumers often face problems stemming from their lack of bargaining power or the absence of competitive options to the incumbent operator. Regulators are using a variety of mechanisms to ensure effective resolution of consumer disputes. Many require the service providers themselves to resolve disputes initially. Appropriate supervision and appeal provisions are supplied, and informal

⁴⁰⁹ Rule 43.2.1 (d)

⁴¹⁰ Ipinmisho Oluwatosin O., Orojinmi Niran Stephen and Ariyo Adefunke Christianah, "Dispute Resolution Framework of the Nigerian Power Sector: An Appraisal," *Seminar Paper on Energy Resources 11 (JIL 804)* November 2014

mechanisms are sometimes used, such as ombudsmen schemes. Consumer protection agencies, as well as regulators, often address consumer disputes.

4.3. Mechanisms of Dispute Resolution

This Chapter critically appraises the legal framework of dispute resolutions and adjudication in the Nigerian Power Sector. The following common and internationally recognized methods and mechanisms for dispute resolutions are considered: Litigations, Negotiations, Conciliations, Mediations and Arbitrations. They are hereunder briefly discussed.

4.3.1. Litigations

Litigation in the Courts is one of the mechanisms of settling disputes between parties (between individuals/government) in the assertion of their respective rights. The access to court is a constitutional right. The Constitution of the Federal Republic of Nigeria, 1999, gives the Court the power to hear and determine any questions as to the civil rights and obligations of a person.⁴¹¹ Apart from the entrenchment of this right by the Constitution, the Litigation is the traditional system of settling disputes. It is a public law system available to all persons, and makes provisions for all levels of disputes. Thus there are the customary court, Area Courts, Magistrates Courts, the High Courts, the Court of Appeal and the Supreme Court as the final Court. Each court has its own set of rules which are usually made by the authorities proscribed by the statutes or law establishing the court. For instance Section 8(2) of the Court of Appeal Act confers power on the appropriate authority to make rules for itself.⁴¹²

Oke in his argument while making a case for the consumer submitted that in addition to the rights of the consumers provided for by the provisions of the Consumer Protection Council Act 1992, a consumer of the affected electricity has the right to institute civil suit for compensation and restitution, which the Consumer Protection Council Act also guarantees.⁴¹³ This means the court before whom a person is convicted of an offence may in addition to dealing with such person in any other way, make an order (in this Decree referred to “as compensation order”) requiring the person to pay compensation for any

⁴¹¹ Section 6 (6) (b) of the *1999 Constitution of the Federal Republic of Nigeria as Amended*

⁴¹² Cap C48 LFN, 2004

⁴¹³ Yemi Oke, *Nigerian Electricity Law and Regulation*, (Law Lords Publications, 2013) at 111

personal injury, loss or damage resulting from that offence of such amount as it may deem fit or as assessed by competent professional authority.⁴¹⁴

While litigation as a mechanism for dispute resolution is optional, occasions are found in the Act, where access to court or judicial resolution becomes inevitable. Thus if any question of law arises from an order or decision of the Commission, the Commission may, on its own initiative or at the request of any person directly affected by such order, reserve that question for the decision of the High Court, and where a question has been reserved to the Court, the Commission shall state the question in the form of a special case and file it with the Registrar of the High Court.⁴¹⁵

Furthermore, a licensee has enormous right to approach the court and challenge any orders, written notices, licenses, regulations, rules, codes, etc as may be issued by the Commission from time to time.⁴¹⁶ Similarly under the Market Rules, a Participant can also approach the Court to challenge or set aside an award made by an Arbitrator under the Rules, or even have its execution stayed.⁴¹⁷

However, oftentimes, Litigations are not encouraged as a viable means of dispute resolution in the light other available Alternatives. This is not far from the rigorous and rigid procedures associated with litigation. There is no doubt that time is of essence in most commercial and contractual relationships, and the solutions the litigation approach have for commercial dispute does more danger than favour to the relationship.

4.3.2. Arbitration

This is a private law system available only to those who agree to use it instead of litigation. Parties to an agreement may further agree that any dispute arising therefrom shall be settled through arbitration by one or more arbitrators. There are a few statutory arbitrations. The agreement must be in writing.⁴¹⁸ Where an action is the subject of an arbitration agreement, the court can enforce the arbitration agreement and direct the parties to go to arbitration.⁴¹⁹ An award in arbitration is enforceable as a judgment.⁴²⁰

⁴¹⁴ Section 13 (1) of the *Consumer Protection Council Act 1992*

⁴¹⁵ Section 49 (1) & (2) of the *Electric Power Sector Reform Act, 2005*

⁴¹⁶ Section 63 (2)

⁴¹⁷ Rule 45.3.1 (b) of the *Market Rules for the Nigerian Electricity Supply Industry*

⁴¹⁸ Section 1 of the *Arbitration and Conciliation Act, Cap A18, LFN 2004*

⁴¹⁹ Sections 4 and 5

⁴²⁰ Sections 31 and 51

Arbitration Process has variously been defined. The reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction.⁴²¹ It is also a mechanism for the resolution of disputes which takes place usually in private pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable in law.⁴²²

Arbitration relates only to a commercial relationship or transactions of commercial nature. It includes any trade transaction for the supply or exchange of goods or services, distribution agreement, agency, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation.⁴²³ Many contractual relationships common in the energy industry in general and the electric power industry in particular, lend themselves to the use of arbitration or other alternative dispute resolution (ADR) mechanisms in resolving conflict among the parties. Among them are contracts for: Long-term fuel supply, whether coal, natural gas, liquefied natural gas or other source, Long-term power supply, Operations and maintenance (O&M), Engineering, procurement and construction (EPC) of new facilities or repowering of existing facilities, Reservation of transmission capacity in an open access transmission rights regime.⁴²⁴

The Market Rules for the Nigerian Electricity Supply Industry is the cardinal procedural legislation employed in the settlement and resolution of disputes among parties in the electricity industry. The very essence of Arbitration proceedings is to preserve time, cost and expeditiousness. The Market Rules indeed did not waste time to make adequate provision to ensure expeditious determination of Disputes. Thus the Rules primarily secured the most expeditious, just and least expensive determination on its merits, of every proceeding conducted pursuant to it.⁴²⁵ Where the Rules fall short of provisions in certain arrears of dispute, an Arbitrator may do whatever is reasonably necessary and permitted

⁴²¹ *Halsbury's Statutes of England, 4th Ed. Vol.2, P.256, Para 501*

⁴²² Bernstein, *Handbook of Arbitration Practice*, 1988, p. 13 See also Orojo & Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, 1999.

⁴²³ Section 57 (1) of the *Arbitration and Conciliation Act, Cap A18, LFN 2004*

⁴²⁴ David J. Rosso & Carroll S. Dorgan, Jones, Day, Reavis & Pogue, "Arbitration and dispute resolution in the electricity industry" *Power Economics Dispute Resolution* June (Milan & Paris 2002).

⁴²⁵ Rule 43.1.1 of the *Market Rules for the Nigerian Electricity Supply Industry*

by the Arbitration and Conciliation Act, to enable the effective adjudication of any dispute.⁴²⁶ An Arbitrator may, if special circumstances or in the interest of justice, or with the consent of the parties to the Dispute, dispense with, supplement or vary the application of all or any part of the provisions of the Rules.⁴²⁷

Arbitration by nature is controlled by Disputing parties. The parties have exclusive power to appoint Arbitrators. The parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.⁴²⁸ But where no procedure is specified thereof, each party shall appoint one arbitrator and the two thus appointed shall appoint the third.⁴²⁹

However the Electricity Market Rules has a different approach to Arbitration in Nigeria. Thus each Dispute shall be referred to an Arbitration Tribunal consisting of three Arbitrators, or where the parties agree, to one Arbitrator, and where parties have not agreed for a Dispute to be resolved by a sole Arbitrator within 5 Business Days of the receipt of a notice from the Counsellor, each party to the Dispute shall appoint an Arbitrator from amongst the members of the Dispute Resolution Panel. In the event either party fails to appoint an Arbitrator in this regard, the Counsellor shall appoint an Arbitrator for such party. The Counsellor shall appoint the third Arbitrator from amongst the members of the Dispute Resolution Panel.⁴³⁰ This is more or less imposition thereby a sharp opposite of what traditional Arbitration Procedure requires. The primary essence of Arbitration is party autonomy which allows flexibility. According to Mutyab Mohmeded, Arbitration is a consensual process based the doctrine of party autonomy. It's a truism of arbitration law that arbitration is a creature of party choice. This feature reinforces the contractual basis of arbitration and is reflected in the vast majority of international conventions, national laws and institutional laws; therefore party autonomy is considered one of the most doctrines in international arbitration.⁴³¹ Although party autonomy is the bible in arbitral proceedings, it has limitations.

⁴²⁶ Rule 43.1.2.

⁴²⁷ Rule 43.1.3.

⁴²⁸ Section 7 (1) of the *Arbitration and Conciliation Act, Cap A18, LFN 2004*

⁴²⁹ Section 7

⁴³⁰ Rule 43.7.1 & 43.7.2 of the *Market Rules for the Nigerian Electricity Supply Industry*

⁴³¹ Shadat Ssemakula Mutyab Mohmeded, "Party Autonomy Doctrine is the Cornerstone of Arbitral Provisional Measures" *International Academic Journal of Law and Society, Volume 1, Issue 1*, pp. 28-43

The advantages of arbitration include: Confidentiality; The parties' control over the design of the process; Speed, compared with most regulatory or judicial procedures; Expertise and, neutrality.

In terms of Confidentiality, the Market Rules gives every disputing Party the opportunity to declare any document, or information contained in any document required to be produced during arbitration as Confidential Information and the party making such declaration shall provide written justification thereof to the Arbitrator.⁴³² In terms of expertise, the hallmark of the Counsellor centered Arbitrators as contained in the entire Rule 43.7.1 to 43.7.37 is to allow for expertise in dispute management. These Counsellors are experts already in the field of Electricity Practices. This constitutes a bar for quacks and people with no or little knowledge of the sector from making catastrophic decisions.

Another highly important attribute of the Arbitration considered by the Market Rules is the provision for auditing of the Dispute Resolution Panel.⁴³³ This is a welcomed innovation in the field of Arbitration Practice.

4.3.3. Forms of Arbitration

Arbitration may be domestic or international, ad hoc or institutional. Domestic Arbitration – between persons who, at the time of concluding the contract, are doing business in the same country and the contract is to be performed in the same country. Whereas an International Arbitration is such that occurs between persons having their place of business, or carrying on business, in different countries or where the parties agree that the dispute be treated as international.⁴³⁴

Furthermore, the Ad hoc Arbitration is simply based on the submission, the agreement of the parties and any applicable law and is not conducted under the rules of any Arbitration Institution.

Finally, there is the Institutional Arbitration. This is conducted by or under the auspices of an Arbitration Institution which promotes and administers the arbitral process. These institutions have their Rules of Procedure. The following are some of the Institutions:

- (i) Lagos Regional Centre for International Commercial Arbitration

⁴³² Rule 43.8.1. of the *Market Rules for the Nigerian Electricity Supply Industry*

⁴³³ Rule 43.10.

⁴³⁴ Section 57(2) of the *Arbitration and Conciliation Act*

- (ii) International Chamber of Commerce (I.C.C.) in Paris.
- (iii) The London Court of International Arbitration (L.C.I.A.).
- (iv) American Arbitration Association (A.A.A.).
- (v) Lagos Court of Arbitration (LCA).
- (vi) Dispute Resolution Panel, etc Practice.

4.3.4. Conciliation and Mediation

Conciliation and Mediation are processes of dispute resolution where both parties negotiate a settlement and are assisted by a third party to arrive at a consensus. Who does not make a binding decision but assists the parties to reach agreement. Although in some jurisdictions, the terms are used interchangeably and, in fact, the content and procedure will depend on the relevant law and practice. However, in Nigeria, the term recognized by law is Conciliation. Thus, “Notwithstanding the other provisions of this Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of Part II of this Act.”⁴³⁵

Under the Electricity sector, the Mediator and Conciliation body are interchangeably used. The Mediator/Conciliation body is enjoyed to do whatever is reasonably necessary and permitted by the Arbitration and Conciliation Act,⁴³⁶ to enable the effective adjudication of any dispute.⁴³⁷ Also, to enhance the effort towards restoring peace between the parties, the Mediator/Conciliation body, can dispense with, supplement or vary the application of all or any part of the provisions of Market Rules, including any stipulation as to prescribed time periods with the consent of the parties to the Dispute.⁴³⁸

4.4. Regulated Institutions for Electricity Dispute Resolution

Similarly, the following levels of dispute settlements are considered; the High Court, Magistrates Courts, The Consumer Protection Council, International Centre for Settlement of Investment Disputes (ICSID), CUSTOMER COMPLAINT UNIT (CCU), the FORUM, the Nigerian Electricity Regulatory Commission (NERC), the Dispute Resolution Counselor, Dispute Resolution Panel etc.

⁴³⁵ Section 37 of the of the *Arbitration and Conciliation Act*

⁴³⁶ Cap A18, LFN 2004

⁴³⁷ Rule 43.1.2 of the *Market Rules for the Nigerian Electricity Supply Industry*

⁴³⁸ Rule 43.1.3

The above institutions enhance dispute resolution in the Electricity Industry in Nigeria.

4.4.1. *The Consumer Protection Council*

In considering the Consumer Protection Council as one of the institutions for dispute resolution, the erudition of Associate Professor Yemi Oke in his text; *Nigerian Electricity Law and Regulation Law Lords Publications, 2013*, will be lifted “word for word.” According to him;

An electricity consumer who suffers loss that cannot be adequately remedied under the Nigerian Electricity regime may obtain protection under the framework of the CPA.⁴³⁹

He further submitted that:

an Electricity consumer could make recourse to section 12(b) (Consumer Protection Act), which makes it an offense if a person offers services or offers information that results in injury to the consumer. The CPA prescribes a fine of fifty thousand naira or imprisonment for five years or both, upon conviction. To crystallize the provision of section 12(b) of the CPA, an electricity consumer that suffers loss as a result of the defective service makes a complaint in writing to the Council who in turn informs the Attorney General of the default. Under this provision, a consumer cannot institute an independent criminal action for violation.⁴⁴⁰

Noteworthy to submit that apart from the court approach in settlement of disputes between consumers and providers, the Consumer Protection Act has provided avenues for speedy redress to consumers’ complaints through negotiations, mediation and conciliations.⁴⁴¹ In support of the above submission is the right granted by the Customer Complaint Handling: Standard and Procedure, 2006 to consumers to have recourse to the provisions of the Consumer Protection Act.⁴⁴²

⁴³⁹ See Yemi *supra* note 21 at 110

⁴⁴⁰ *Ibid*

⁴⁴¹ Section 2 (a) of the *Consumer Protection Council Act 1992*

⁴⁴² Section 13 of the *Customer Complaint Handling: Standard and Procedure, 2006*

4.4.2. *The Customer Complaint Unit (CCU)*

In accordance with the EPSR Act, NERC enacted the Customer Complaint Handling: Standard and Procedure, 2006 for complaint handling procedures, practices relating to payment of bills, connection and disconnection procedures.⁴⁴³ Under the Regulations, the licensee is required to establish a customer complaint unit (CCU) with the responsibility of resolving complaints as provided for under section 2 (6) of the Regulations, and such Unit shall be headed by a Senior Officer of the Distribution Company.⁴⁴⁴ The Regulation makes it clear that a complaint must be in writing and relate to defects or deficiencies in services, unfair or restricted trade practices, bills in excess of NERC's fixed prices, unsafe or hazardous electricity supply, recovery of excess bills or charges, or any breach of obligation whether in law or contract.⁴⁴⁵

It is important to state that the Complaint unit established by the Regulation as a branch of the Discos is a mockery to the intendment of Consumer Protection. This not only constitutes an abuse of the entire customer relief process, it is an affront to the whole essence. By implication, a close examination and literary interpretation of Section 3 subsections 1, 2 and 3 will show that the appointment is made by the DISCOS. This therefore put the Electricity Providers and the CCU in a master servant relationship, whereas the Complaint concerns the activities of the Electricity Providers. This means the CCU are sitting as Judges in their own causes. In *Ajibaiye v Ajibaiye*,⁴⁴⁶ it was held as follows:

Where bias is alleged against a court or judge, it is not the real likelihood that the court or judge did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case that there was real likelihood of bias.⁴⁴⁷

⁴⁴³ Section 96 (2) (j) of the *Electric Power Sector Reform Act, 2005*

⁴⁴⁴ Sections 2 (6) and 8 of the *Customer Complaint Handling: Standard and Procedure, 2006*

⁴⁴⁵ Sections 3 (1-3)

⁴⁴⁶ *Ibid*

⁴⁴⁷ *Ibid*

Also in *Garba v University Of Maiduguri*,⁴⁴⁸ it was held that:

It is my opinion that when they (the Board) undertook to investigate the crimes, identify those involved and who participated and their roles and apportion blame and recommend suitable disciplinary measures to be taken against them, they were carrying out judicial function. Having assumed judicial function they were bound to pass the qualification test to assume the judicial functions and were bound to act judicially and comply with the constitutional requirement of fair hearing.⁴⁴⁹

It is humbly submitted that the absence of an independently constituted body of persons who enjoys no Electricity Provider patronage renders the whole proceedings a doubtful object.

4.4.3. The FORUM

If a complaint is not resolved by the CCU or a complainant is not satisfied, appeal may be made to the Forum.⁴⁵⁰ Section 4 (1) of the Regulations provides that the Forum is to be established by NERC at a date set out in the Order of NERC for hearing and resolving of customer complaints in the licensee's operational area. However, the Regulation requires the licensee to provide office space and other facilities required by the members of the Forum for their efficient functioning.⁴⁵¹ There is no difference from the provisions of Section 3 (1-3) thereof, allowing the DISCOS to provide facilities for adjudication, is enough to open space for bias. No findings of such body can be trusted since the piper is dictating the tune.

A complaint may be heard or rejected by the Forum if same is considered by the Forum to be frivolous, vexatious or lacks merit.⁴⁵²

4.4.4. The Nigerian Electricity Regulatory Commission (NERC)

⁴⁴⁸ *Ibid*

⁴⁴⁹ *Ibid*

⁴⁵⁰ Section 3 (9) and (10) of the *Customer Complaint Handling: Standard and Procedure, 2006*

⁴⁵¹ Section 4 (10)

⁴⁵² Section 9 (4) and (7)

The NERC has enormous adjudicatory and appellate jurisdictions in dispute resolution under the Electricity industry. For instance, where a complaint of a consumer is rejected by the Forum, pursuant to section 9 of the Customer Complaint Handling: Standard and Procedure, 2006, the Forum is required to advise such consumer of his right to appeal the decision of the Forum to the Commission.⁴⁵³

Secondly, the provisions of the NERC Business Rules,⁴⁵⁴ Schedule I contains procedures for arbitration of disputes between licensees arising from the operations of the Market Rules or Grid Code. The Rules provides that such disputes shall be referred to the Dispute Resolution Panel (DRP) established by the Commission for resolution by way of arbitration.⁴⁵⁵ The presumption is that both the Market Rules and Grid Code operate as instruments or documents conferring jurisdiction in the DPR to arbitrate.⁴⁵⁶ Arbitration of all other disputes arising between licensees or in respect of matters arising from the provisions of the Act as it affects the licensee and consumers and third parties may be referred to the Commission for resolution by the party or parties.⁴⁵⁷ Similarly, other disputes between licensees or licensees and consumers or third parties referred to the Commission for arbitration shall follow the procedure set out under the Schedule.⁴⁵⁸

Schedules 2, 3 and 4 of the NERC Business Rules provide for the commencement, nomination of Arbitrators and arbitration procedure together with the Award.

Any party may commence arbitration by serving a Notice of Arbitration to the Commission and the other party to the dispute, and the Commission shall then issue a notice to the other parties concerned to show cause why the dispute should not be settled by arbitration. It may proceed to make an order directing that the dispute be referred for

⁴⁵³ Section 9 (8)

⁴⁵⁴ *(Business Rules of the Commission) Regulation 2006*

⁴⁵⁵ Arbitration as a form of dispute resolution mechanism pursuant to the Business Rules is mandatory. This is not in the spirit and main ideas behind Arbitration as a Dispute Resolution Mechanism. It must not be forgotten that parties entered into the contract voluntarily and made agreement to resolve issues among them exercising their party autonomy. Any legislative position or proposition which imposes Arbitration is contrary to the provisions of the Arbitration and Conciliation Act.

⁴⁵⁶ Schedule 1(2) of the (Business Rules of the Commission) Regulation 2006 provides that “the rules governing the establishment and procedure of the Dispute Resolution Panel shall be as provided in the Market Rules and shall govern such arbitrations.

⁴⁵⁷ Schedule 1(3)

⁴⁵⁸ Schedule 1(4)

settlement through arbitration by the Commission, unless after hearing the parties to whom notices have been issued it is of the opinion that sufficient reasons have been given to settle the dispute otherwise than through arbitration.⁴⁵⁹ Section 50 of the Act provides that the Commission may reconsider, vary or rescind its decisions before issuing a final decision, in accordance with such procedures as the Commission may establish; provided that such review or reconsideration shall be completed within 60 days of the date it is requested. It is submitted therefore that the finality of a decision by the Commission with respect to the issues covered in Section 50 of the Act cannot be interpreted in such a way as to bar an aggrieved individual from approaching the courts to seek redress, as that will be contrary to the express provision of Section 6 of the 1999 Constitution (as amended). The only bodies empowered to exercise adjudicatory function of resolution of disputes between persons in respect of their civil rights are the courts. This is pursuant to Section 6 of the Constitution. Thus, the decision of the Commission, not being a court cannot be final in respect of questions to which the section relates. It is further contended that any law which seeks to oust the jurisdiction of the court or its powers as conferred by Section 6(6)(b) of the 1999 Constitution and seeks to curtail an individual's right of access to Court is null and void to the extent of its inconsistency with the provision of the 1999 Constitution.⁴⁶⁰

It is further submitted that the decision of the Commission cannot be final in respect of an appeal or review of its earlier decision for the simple reason that a person cannot be a judge in his own cause or a court cannot sit on appeal over its decision renders the whole proceedings a nullity.

4.4.5. *The Dispute Resolution Counselor*

In the Electricity Industry Market Rules 2010, the Rules provide for the establishment of Dispute Resolution Counsellor.⁴⁶¹ A Market Surveillance Panel is also established under

⁴⁵⁹ Schedule 2 (1), (2) and (3)

⁴⁶⁰ In *Eyesan v. Sanusi (1984) 1 SCNLR 353 at 367*, the Supreme Court per Obaseki JSC put the nature of the right of action pungently thus, "*The right of action in court is also a constitutional right exercisable by a person who has complaints touching his civil rights and obligation against another person, government or authority*"

⁴⁶¹ Rule 42 of the *Electricity Industry Market Rules 2010*

the Rules with powers, functions and duties pertaining to electricity market surveillance.⁴⁶²

In furtherance of the powers conferred on the NERC to make regulations in giving effect to its functions, it came up with Market Rules for the Nigerian Electricity Power Sector. The Rule empowers the Commission to constitute a dispute resolution panel and also appoint a dispute resolution counsellor who shall exercise the following powers and duties:

- i. administer and ensure effective operation of the dispute resolution provisions of the Rules and the Grid Code;
- ii. specify the format for notices of dispute and the response thereto;
- iii. nominate of members of the Dispute Resolution Panel;
- iv. assign members of the Dispute Resolution Panel to arbitrate or otherwise resolve disputes in accordance with Rule 43; and
- v. facilitate the resolution of disputes governed by the dispute resolution provisions of the Rules and the Grid Code.⁴⁶³

The Counsellor plays vital roles in dispute resolutions. It is the role of the Counsellor to publish and notify the Participants of his address for service from time to time.⁴⁶⁴ Also, in the event that the parties have not agreed for a Dispute to be resolved by a sole Arbitrator within 5 Business Days of the receipt of a notice from the Counsellor, and in the event either party fails to appoint an Arbitrator in this regard, the Counsellor shall appoint an Arbitrator for such party, and the Counsellor shall appoint the third Arbitrator from amongst the members of the Dispute Resolution Panel.⁴⁶⁵

Furthermore, where the parties agree to the resolution of the Dispute by a sole Arbitrator, the parties shall appoint the sole Arbitrator from amongst the members of the Dispute Resolution Panel within 5 Business Days of receiving the notice from the Counsellor. However, if the parties to the Dispute fail to agree to an Arbitrator, the Counsellor shall

⁴⁶² Rule 42.1.4.

⁴⁶³ Rule 42.3.1

⁴⁶⁴ Rule 43.1.4

⁴⁶⁵ Rule 43.7.2

appoint the sole Arbitrator from amongst the members of the Dispute Resolution Panel within 3 Business Days.⁴⁶⁶

4.4.6. *The Dispute Resolution Panel*

The Electricity Industry Market Rules 2010 provide for the establishment of Dispute Resolution Panel.⁴⁶⁷ The Dispute Resolution Panel is responsible for arbitrating or otherwise in resolving disputes between: The System Operator or the Market Operator or a transmission licensee and any Participant; The Market Operator and any person who has been denied certification by the Market Operator as a Participant; and Participants to the extent that such Disputes are, in accordance with the provisions of these Rules or the Grid Code.⁴⁶⁸

The Dispute Resolution Panel serves as an Arbitration Institution where each party to the Dispute can appoint an Arbitrator, and where either party fails to appoint an Arbitrator, the Counsellor can also appoint an Arbitrator for such party. It is also the Counsellor that appoints the third Arbitrator from amongst the members of the Dispute Resolution Panel.⁴⁶⁹ Indeed the role of the Panel is enormous.

The Panel has power to impose penalties, make such other order or issue such directives as are specified in these Rules or the Grid Code.⁴⁷⁰

4.4.7. *The International Centre for Settlement of Investment Disputes (ICSID)*

The International Centre for Settlement of Investment Disputes (ICSID) is an international arbitration institution established in 1965 for legal dispute resolution and conciliation between international investors. The ICSID is part of and funded by the World Bank Group, headquartered in Washington, D.C., in the United States. It is an autonomous, multilateral specialized institution to encourage international flow of investment and mitigate non-commercial risks by a treaty drafted by the International Bank for

⁴⁶⁶ Rule 43.7.3

⁴⁶⁷ The Rule states that (a) the Commission shall constitute a Dispute Resolution Panel, which shall have the functions, powers and responsibilities specified in these Rules and the Grid Code and (b) the members of the Dispute Resolution Panel shall be appointed in accordance with Rule 42.3.

⁴⁶⁸ Rule 42.3.7

⁴⁶⁹ Rule 43.7.2

⁴⁷⁰ Rule 42.3.15

Reconstruction and Development's executive directors and signed by member countries.⁴⁷¹ As of May 2016, there were 153 contracting member states agree to enforce and uphold arbitral awards in accordance with the ICSID Convention. The center performs advisory activities and maintains several publications. Nigeria became a signatory in 1970. The ICSID provides facilities for [arbitration](#) of international investment disputes. The ICSID does not itself arbitrate disputes but provides the rules and procedures for independent arbitration tribunals to resolve disputes. The use of ICSID arbitration has increased rapidly over the past twenty years, as the number of bilateral investment treaties (BITs) has risen. Before a dispute can be referred to ICSID, the dispute must meet three conditions to qualify for arbitration through ICSID:

- a. The dispute must be between a “Contracting State” to the ICSID Convention and a national of another Contracting State (more than 150 nations have become Contracting States);
- b. The dispute must constitute a legal dispute arising directly from an “investment;” and
- c. The disputing parties must have agreed in writing to submit their dispute to ICSID arbitration or conciliation.⁴⁷²

In view of the provisions of the Market Rules, particularly the failure of mention of a particular tribunal thereof,⁴⁷³ it is submitted that while all other disputes involving multinational companies can be submitted to ICSID, it is unclear whether disputes arising from the operation of the Market Rules or any other Rules of the NERC can be arbitrated upon at the ICSID.

4.5. Regulatory Adjudication

Although judicial functions are traditionally the preserve of the ordinary courts, the development of a system of adjudication by regulatory bodies is an inevitable trend.

⁴⁷¹ International Centre for Settlement of Investment Disputes. "About ICSID". World Bank Group. Retrieved 25 July 2012

⁴⁷² International Centre for Settlement of Investment Disputes (2011) *ICSID 2011 Annual Report*.

⁴⁷³ Rule 43.7.1 of the *Electricity Industry Market Rules 2010*

Administrative adjudication defied the doctrine of separation of powers attributable to Montesquieu who writing in the 17th century maintains that in order to guarantee against a tyrannical government the three arms of government viz: the legislature, the executive and the judiciary must be separated from each other and one another. In the discharge of its functions, the administration will usually be exercising judicial or quasi-judicial powers for the finding of facts, application of law or facts, and the determination of the rights and obligation of persons. These processes are known as administrative adjudication, administrative justice, or administrative or administrative or judicial tribunals. Regulatory Adjudication has developed considerably and there have come into existence a good number of administrative tribunals, boards and other bodies which exercise judicial, quasi-judicial or adjudicatory functions conferred upon them by various statutes. According to Professor Oyewo,⁴⁷⁴ Administrative adjudication has been defined as the process by which an administrative agency issues an affirmative, negative, injunctive, or declaratory order. The formal proceedings before an administrative agency adopt the process of rulemaking or adjudication. Administrative adjudication is a name given to the administrative exercise of judicial functions. It is a name given to the various ways of deciding disputes outside the ordinary courts.⁴⁷⁵

Although in view of section 6 (1) & (2) of the 1999 Constitution (as amended), It appears, therefore, that the adjudicatory powers in the Country are primarily vested in the regular Courts. However, in view of the complexity of modern administration, it has become inevitable that great deals of adjudicatory powers are exercised by various administrative bodies or tribunals which perform judicial and quasi-judicial functions.⁴⁷⁶

Indeed, as observed by Professor Ben Nwabueze:

It is often necessary under modern practice of government to enable administrative

⁴⁷⁴ Oyewo Oyewo, Material On Administrative Adjudication, retrieved from <https://tosynmacaulay.wordpress.com/2014/01/15/prof-oyewos-pul222-material-on-administrative-adjudication/>

⁴⁷⁵ DURU Onyekachi, "Administrative Adjudication: An Overview" *Free Law Lecture Series*, No. 19

⁴⁷⁶ B.O. Iluyomade & B.U. Eka, *Cases and Materials on Administrative Law in Nigerian* (Ife, Obafemi Awolowo University Press 1980) p.129

authorities to decide matters of a judicial or quasi-judicial nature.⁴⁷⁷

Various reasons have been put forward to justify the increasing recourse to administrative adjudication in modern governance. According to Hood Phillips and Jackson,⁴⁷⁸

The reasons why Parliament increasingly confers powers of adjudication on special tribunals rather than on the ordinary courts may be stated positively as showing the greater suitability of such tribunals, or negatively as showing the inadequacy of the ordinary courts for the particular kind of work that has to be done.⁴⁷⁹

Some of the specific reasons include the expert knowledge required in respect of some matters which are outside the training of the lawyers who man the regular courts. The reasons also include the cheapness, the speed, the flexibility and the informality which are often required in respect of the various subjects covered by the tribunals.

Administrative adjudication is constitutionally recognized in section 36 of the 1999 Constitution (as amended), by the acknowledgement of the fact that judicial powers may be exercised by tribunals and other administrative adjudication bodies, which are all subjected to the requirement of fair hearing,⁴⁸⁰ this point was articulated by the court in *Obi v Mbakwe*,⁴⁸¹

That S.33(2) of the 1979 Constitution (which is identical to S.36(2) 1999 Constitution), was conceived to facilitate a smooth running of the administrative machinery by allowing agents of the executive to determine the rights of people in accordance with certain laws that might be made from time to time.⁴⁸²

Section 36 of the 1999 Constitution, provided in its subsection (1) that:

⁴⁷⁷ B.O. Nwabueze, *Constitutional Laws of the Nigerian Republic* (London, Butterworth, 1964) pp.390-391

⁴⁷⁸ O. Hood Phillips and Jackson, *Constitutional and Administrative Law*, 8th ed. (London, Sweet & Maxwell, 2001), para. 30-005 p. 686.

⁴⁷⁹ *Ibid*

⁴⁸⁰ See *Garba v University of Maiduguri* (1986) 1 N.S.C.C. 245

⁴⁸¹ (1985) 6 NCLR 783 at 793

⁴⁸² *Ibid*

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.” (2) “Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law.

Provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

Contains no provision making the determination of the administering authority final and conclusive.⁴⁸³

These tribunals are constituted by persons who may be experts in their own field but in most cases lack the requisite judicial or legal training for the adjudicatory function they perform.⁴⁸⁴ Nevertheless, they are increasingly required to determine matters involving legal/constitutional rights of individual citizens. This informal system of interim dispute resolution is common in construction disputes in the building industry. It is generally regarded as a form of expert determination. The Adjudicator is appointed by or on the agreement of the parties, and he acts on his expert knowledge. Adjudication was first introduced in the UK via the Housing Grant and Construction Regeneration Act (HGCRA) 1996 pursuant to Sir Michael Latham’s report “Constructing the Team” of 1994 which reported the woes of the UK’s construction industry. Lord Denning, in his famous judgment in the Court of Appeal in *Dawnay v Minter*,⁴⁸⁵ has this to say about construction disputes:

⁴⁸³ 1999 Constitution of the Federal Republic of Nigeria (as amended) Cap C48 LFN 2004

⁴⁸⁴ See Iluyomade et.al *supra* note 84 at 131

⁴⁸⁵ (1971) 2 All ER 1389

There must be cash flow in the building trades. It is the very lifeblood of the enterprise. One of the greatest threats to cash flow is the incidence of disputes. Resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction industry is often as bad or worse.⁴⁸⁶

The obvious attraction of the process of adjudication is that it is a fairly quick process in comparison to arbitration and the decision can be enforced summarily thus unblocking the cash flow problems in the interim.

Most regulatory bodies adjudicate disputes. They decide between the positions of disputing parties, typically after a formal process that involves the presentation of arguments by those parties. Adjudicated decisions are often subject to review within a regulatory agency and eventually by the courts or government officials. Regulatory adjudication can have the following advantages:

- a. There are well-structured channels for decision-making;
- b. It provides accountability on the part of official decision-makers,
- c. There are established mechanisms for coordinating decisions among agencies with related responsibilities, and
- d. It makes available the full force of the government's enforcement mechanisms.

A model and classical example of the regulatory adjudication is found in Nigeria during the revalidation era of the Central Bank of Nigeria. Thus in the wake of aggressive post-consolidation reforms to reposition the Nigerian Banking & Financial system, the CBN Governor towards the end of 2009, exercised the powers vested in him under Section 35 (1) (d) (2) (d) of the Banks & Other Financial Institutions Act (as amended) (BOFIA).⁴⁸⁷ The then Governor of the CBN Mallam Sanusi Lamido Sanusi removed the Managing

⁴⁸⁶ *Ibid*

⁴⁸⁷ Cap B3 Laws of the Federation of Nigeria 2004

Directors and some Executive Directors of 5 major Banks in Nigeria, following a Banking Examination exercise which portrayed ‘grave situation’ of the banks’ risk exposure.⁴⁸⁸

This means that under the enabling laws and legal framework, the NERC in exercising its can validly carry out sanctions against any of the Generation, Transmission and Distribution Companies in Nigeria. It is worthy of note that the primary regulatory function of the Commission is issuance of licenses to companies wishing to engage in generation, distribution, transmission etc. Thus no person, shall construct, own or operate an undertaking or in any way engage in the business of: electricity generation, excluding captive generation; electricity transmission; system operation; electricity distribution; or trading in electricity. Where there are violations by the licensees, the Commission shall have the authority to penalize such defaulter.⁴⁸⁹ This power to issue license goes also with the power to withdraw such licenses especially were in the exercise of the Regulatory Adjudication.

The Nigerian Electricity Regulatory Commission (NERC) is entitled to conduct its proceedings, consultations and hearings at its headquarters or at any other place in Nigeria, and on the strength of this is the power to make regulations for the discharge of its functions and for the conduct of its proceedings, consultations and hearings, including procedures for the participation of licensees, consumers, eligible customers and other persons.⁴⁹⁰ In conducting its hearings and proceedings, all decisions and orders contain the basis for the decision or order, are properly recorded in writing, and are accessible to the public at reasonable times and places.⁴⁹¹ Just like the regular court of law, the Commission may make interim orders pending the final disposition of a matter before it.⁴⁹²

The NERC is duty bound to observe the doctrine of fair hearing in its proceedings. Thus at any point in time, in which the Commission holds a hearing, all persons having an interest in such matter shall, as far as reasonably practicable, be notified of the questions at issue

⁴⁸⁸ Nelson C.S Ogbuanya, *Essentials of Corporate Law Practice in Nigeria*, (Bi-Fantancy Ltd Printing 2011) at 375

⁴⁸⁹ Section 62 (1 - 7) of the *Electric Power Sector Reform Act*, 2005

⁴⁹⁰ Section 45 (1) & (2)

⁴⁹¹ Section 46 (1) (a) (b) (c)

⁴⁹² Section 46 (5)

and given opportunities for making representations if they so wish.⁴⁹³ The NERC is compulsory required under the Act to seek expert opinions in the hearing of any matter. Thus when any matter arises which entails the consideration of any professional or technical question, the Commission may consult such persons as may be qualified to advise thereon.⁴⁹⁴

Upon the conclusion of any hearing, proceeding or matters, any person who is aggrieved by with the decisions, opinion, steps, actions of the NERC may apply to the Commission for review of the decision, order or such opinion or hearing.⁴⁹⁵ If the NERC deems it necessary, it may reconsider, vary or rescind its decisions before issuing a final decision, in accordance with such procedures as the Commission may establish; provided that such review or reconsideration shall be completed within sixty days of the date it is requested.⁴⁹⁶

There are terms and condition stipulated in the Act for the operation and issuance of the licenses,⁴⁹⁷ and one of such terms include the condition that every licensee must refer all disputes for arbitration, mediation, or determination by the Commission etc.⁴⁹⁸ During the pendency of this contract, the Commission is enabled by the Act to cancel any existing electricity license. The following are capable of warranting the cancellation of an electricity license: upon receiving a complaint from any consumer, eligible customer, consumer association, association of eligible customers or other licensee, or on its own initiative, the Commission may inquire into the conduct or functioning of any licensee in carrying out the licensee's obligations under this Act, rules or regulations, codes of conduct, or the terms and conditions of the license, the license was issued through fraud or the misrepresentation or nondisclosure of a material fact by the licensee; or the licensee has willfully or unreasonably contravened any provision of this Act that is applicable to the licensee; or the licensee has failed to comply with any term or condition of the license, the breach of which is expressly declared by such license to render it liable to cancellation;

⁴⁹³ Section 47 (2)

⁴⁹⁴ Section 48

⁴⁹⁵ Section 50 (1)

⁴⁹⁶ Section 50 (2)

⁴⁹⁷ Section 71 (1).

⁴⁹⁸ Section 71 (2) (c)

or the financial position of the licensee is such that he is unable to fully and efficiently discharge the duties and obligations imposed by the license.⁴⁹⁹

However the case may be, before cancelling a license, the Commission shall notify the licensee in writing of its intention to cancel the license concerned and the reasons for doing so, and shall allow the licensee an opportunity to demonstrate, within 60 days following the delivery of such a notification, that circumstances have changed such that cancellation may no longer be warranted.⁵⁰⁰

Furthermore, no person, except in accordance with a license issued shall construct, own or operate an undertaking or in any way engage in the business of: (a) electricity generation, excluding captive generation; (b) electricity transmission; (c) system operation; (d) electricity distribution; or (e) trading in electricity.⁵⁰¹ The Commission is empowered with the authority to order any person who contravenes subsection (1) of this section to cease his operations, and to make such other orders, including an order to another licensee to disconnect facilities, as may be necessary to prevent the continuation or reoccurrence of the contravention.⁵⁰² Similarly, the Commission also has the authority to penalize a licensee for violations of his license terms and conditions or to cancel such license in accordance with the provisions of this Act.⁵⁰³

Secondly, just like in the banking system/industry, in the present framework, the regulator is not a participant in the Electricity contracts and Markets. The inability of the NERC to participate as a company in the electricity market, gives it as a regulator better opportunities to achieve effective monitoring. A clear example is found in an Article titled “Market Operator, TCN Risk Regulator’s Sanction,” and published by Dr. Usman Abba-Arabi - Head, Public Affairs NERC, on the NERC Webpage, the Regulatory roles of the NERC was clearly brought to limelight. In the said Article, the Nigerian Electricity

⁴⁹⁹ Section 74 (1)(a-b); (2)(a-d)

⁵⁰⁰ Section 74 (3)

⁵⁰¹ Section 62(1)

⁵⁰² Section 62(6)

⁵⁰³ Section 62(7)

Regulatory Commission (NERC) issued Notices of Commencement of Enforcement Action on the Market Operator (MO) for operating a unilateral bank account. The notice gave the erring MO seven days ultimatum to take remedial actions by winding down operation of the unilateral bank account and report compliance, failure which it faces disciplinary action from the Commission. In separate notices signed by the Deputy General Manager, Enforcement Unit, NERC, Mr. Chijioke Obi, parties were told that their continued actions were in disobedience to Section 63(1) of the Electric Power Sector Reform (EPSR) Act 2005 which stipulates, “A licensee shall comply with the provisions of his license, regulation, codes, and other requirements issued by the Commission from time to time.” They were also reminded of the section 3(1) of the license conditions which stipulates, “Licensee shall comply with any orders, directions and determinations made by the Commission pursuant to the Act, any regulations made under Act or this license.” The Commission in the notices to parties said that their failures to comply with the relevant laws and conditions of TCN license would compel it to start Enforcement Proceeding against TCN and may invoke disciplinary measures as may be appropriate.⁵⁰⁴

However, the regulatory adjudication can bring the disadvantages of delays, abuse by competitors, and lack of necessary economic, legal and financial expertise to resolve disputes efficiently and finally.

⁵⁰⁴ Usman Abba-Arabi, “Disciplinary sanctions against the Market Operator” retrieved from <http://www.nercng.org/index.php/media-and-publicity/press-releases/304-market-operator-tcn-risk-regulator-s-sanction>.

4.6. Court Adjudication

It must necessarily be noted that all judicial powers and adjudicatory authorities in Nigeria, likewise other countries of the world, are exclusive to be questioned, entertained, tried and, or adjudicated upon by courts, particularly the High Courts.⁵⁰⁵ As the popular saying goes, judiciary is the last hope of the common man. Court adjudication remains an important final recourse for many types of disputes, particularly those that are less policy-related. It has the advantage of bringing finality and official finality and official enforcement mechanisms to bear upon a dispute. The strength of the court had been buttressed massively in the dictum of Oliver Wendell Holmes, Jr., who exalted the court of law in the following words: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁵⁰⁶ By this reckoning, it is the court that does it all. The Black’s Law Dictionary, 9th Ed, in describing what the court means stated thus:

A Court..... is a permanently organized body, with independent judicial powers, defined by law, meeting at a time and place fixed by law for the judicial public administration of justice.⁵⁰⁷

Under the Market Rules, the Court had been considered as one of the authorities competent in the administration of the Electricity Industry. Thus in describing what constitutes a competent authority, the Rules provides that a “Competent Authority” means any national, state or local agency, authority, department, inspectorate, minister, official, **court**, tribunal or public or statutory person (whether autonomous or not) of any Government in Nigeria or under the control of any Government in Nigeria, which has jurisdiction over a Participant or the subject matter of the Rule or the Grid Code.⁵⁰⁸

The courts as provided for, under the relevant Electricity legislations are the High Court and Magistrates Courts. The Electricity Reform Act recognizes the potential for disputes

⁵⁰⁵ See sections 6(6)(b) of 1999 Constitution as Amended. See the cases of *OLORIODE v. OYEGBI (1984) 1 SCNLR 309 at 400*; *Adesanya v. President of F.R.N (1981) 12 NSCC 146*;

⁵⁰⁶ Oliver Wendell Holmes, Jr., “the Path of the Law,” *10 Harvard Law Review* 460-61 (1897).

⁵⁰⁷ Black’s Law Dictionary, 9th Ed, Pp 405 quoted from William J. Hughes Federal Practice, Jurisdiction & Procedure Ss. 7 at 8 (1931)

⁵⁰⁸ Rule 3.1

in the power sector and makes provision for existing disputes, prior to the unbundling of the PHCN as well as new disputes that may arise between the different players in the sector. Section 13 of the Electricity Reform Act is to the effect that subject to section 10(7)(i), any cause of action or proceeding which existed or was pending by or against the initial holding company immediately before the subsequent transfer date shall be enforced or continued, as the case may be, on or after the subsequent transfer date by or against the designated successor company in the same way that it might have been enforced or continued by or against the initial holding company.

This section contemplates two scenarios. They are; the existence of a cause of action and the pendency of proceedings by or against the initial holding company.⁵⁰⁹ A cause of action is a set of facts sufficient to justify a right to obtain money, property or the enforcement of a right against another person.⁵¹⁰ Thus, where a cause of action existed against the initial holding company, a plaintiff may file an action in court against the successor company in respect thereof provided of course that the cause of action had not been extinguished by operation of law. In other words, a valid cause of action will not become inoperative only by reason of a change of the initial holding company to the successor company.

Proceedings are pending when an action is already filed in court.⁵¹¹ Thus, a proceeding will not abate simply by reason of a change from the initial holding company to the successor company. However, there must be compliance with the provisions of the rules of court relating to substitution of parties and consequential amendment of court processes. It should be noted that the operation of this section is subject to the provisions of section 10(7)(i) of the Act which provides that “a transfer order,⁵¹² may provide that any liability that is transferred by the order may be enforced against the initial holding company, the transferee, or both of them; and that any right that is transferred by the order may be enforced by the initial holding company, the transferee, or both of them”.

⁵⁰⁹ See Ipinmisho et.al *supra* note 18

⁵¹⁰ See *Egbe v. Adefarasin* (1987) 1 NWLR (pt.47) 20

⁵¹¹ See *Kankia v. Maigemeu* (2004) All FWLR (pt.206)460

⁵¹² Issued by the National Council on Privatisation.

The principle of limitation law which is in operative in Nigerian legal system is restated in section 14 of the Act.⁵¹³ For instance, the limitation period for contract and torts claims is 6 years and time starts to run from the date when the cause of action arose. However, where the tort claim is in respect of a claim for damages for negligence, nuisance or breach of duty, the action should be brought within 3 years from the accrual of the cause of action. The limitation period for an action to recover land is 12 years. The effect of the above provision is that where a cause of action is statute barred before a transfer order, a claimant is not permitted to file a suit against the transferee in respect of that cause of action after the effective date of the transfer order.

The court has enormous powers to adjudicate over matters relating to the provisions of his licenses, regulations, codes, notices, orders and other requirements issued by the Commission from time to time.⁵¹⁴

Furthermore, the Court has power to compel the disclosure of a Confidential Information of a Party kept by the Counsellor under sealed cover and in safe custody.⁵¹⁵

The Magistrate in charge of a certain Magisterial District may issue a warrant of search to individuals appointed as inspectors by the Commission to enter and search the premises of a licensee or of any other person whereon he has reasonable cause to suspect an offence against has been committed and shall have power to make such examination, inspection and inquiry and do such things as may appear to him necessary for ascertaining whether compliance has been made under the law.⁵¹⁶

Also in the words of Yemi Oke, “aside the protection under the EPSR Act and regulations made pursuant thereto, electricity consumers could also seek solace in the legal regime that generally provides consumers with statutory protection.”⁵¹⁷ In conclusion, he submitted that by section 13(1) of the Consumer Protection Act, the court may make a

⁵¹³ Under the Nigerian law, limitation is a matter of procedural law and provides a complete defence to a claim.

⁵¹⁴ Section 63 (1) and (2) of the *Electric Power Sector Reform Act, 2005*

⁵¹⁵ Rule 43.7.16 of the *Electricity Industry Market Rules 2010*

⁵¹⁶ Section 95 (3) and (6) of the *Electric Power Sector Reform Act*

⁵¹⁷ See Yemi *supra* note 21 at 110 -111

compensation order which compels the offender to pay compensation to the injured party based on an amount to be assessed by a competent professional body or authority.⁵¹⁸

It is our opinion that the Act, the Market Rules and other relevant legal framework have not established a viable and unshakeable means of meeting the grievances of the Consumers through the Commission. Thus in this regard, the Court as the popular cliché goes is the last hope of the common man; the consumer.

Finally, it must necessarily be stated that apart from the disputes between Consumers and electricity suppliers/providers, the Court must not be seen to have abdicated from its constitutional duty to try offenses under any Nigerian Law.

4.6.1. Court Jurisdiction

It is trite law that for a Court to assume jurisdiction in any matter or suit, the following requirements must be met:

First that the court is properly constituted as regards to members and qualifications of the members of the Bench, and no member is disqualified for one reason or another. Second, the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction. The third is that the case comes before the court initiated by due process of law upon fulfillment of any condition precedent to the exercise of jurisdiction.⁵¹⁹

⁵¹⁸ *Ibid*

⁵¹⁹ *Madukolu v. Nkemdilim* (1962) All NLR 581 at 589 – 590; *Bolaji v. State* (2010) All FWLR (Pt. 534) Pg. 100 and 122, Para C - D.; *Elelu-Habeeb v Attorney General of the Federation* (2012) 13 NWLR (Pt. 1318) Pg. 423; *NNPC vs. Orhiowasele* (2013) 13 NWLR (Pt. 1371) Pg. 211

It is also trite law that the jurisdiction of the Court is determined by the subject-matter of the suit, the parties before the Court and the claims of the parties particularly the Claimants.⁵²⁰

In the old law, there were a lot of contradictions from one regime of electricity regulation to another with respect to the jurisdictional powers of the court to entertain cases involving Electricity providers. In *Mbato v Ofor*, while reviewing Section 52 (1) of the Electricity Corporation of Nigeria Ordinance which provides that in the exercise of the powers conferred by section 49 the Corporation, its officers and servants shall do so little damage as may be and the Corporation shall pay compensation for any damage done to any buildings, crops, or economic trees, Per EGBUNA, J. held:

The moment the Corporation cut or damage crops or even trees they are bound to pay compensation. There is no argument about it.⁵²¹

However, under the NEPA regime, it provides for one of the duties of the NEPA was “to provide supply of electricity for consumers in Nigeria and as may, from time to time, be authorized by the Authority.”⁵²² Similarly, the Minister charged with responsibility for electricity may make regulations regulating the use and management of any works, apparatus, lines or installation erected after the carrying into operation of these Regulations and used for generating, transforming, converting, conveying, or supplying electrical energy, so as to secure the safety of consumers or employees and of the public from personal injury by reason of such use.⁵²³ Also in *N.E.P.A. v Akpata*,⁵²⁴ it was held that:

The general rule of liability for electricity, is that electricity is a dangerous thing and

⁵²⁰ *Mohammed v. Car Link Nig. Limited* (2013) ALL FWLR (PT. 704) Pg.166; *Otiki v Bajehson* (2006) ALL FWLR (PT. 307) Pg. 1012; *Kraus Thompson v NIPSS* (2004) 17 NWLR (PT. 901) Pg. 44; *Kakih v P.D.P.* (2014) 15 NWLR (PT. 1430) Pg. 374

⁵²¹ HOW/16/65 (1965) 9 ENLR 135 delivered on the 25th September, 1965 Owerri High Court

⁵²² Section 1 (1) (c) of the *National Electric Power Authority Act, Cap. 256, Laws of the Federation of Nigeria, 1990*

⁵²³ Section 4(b) of the *Electricity Act, Cap. 106, Laws of the Federation of Nigeria, 1990*

⁵²⁴ (1991) 2 NWLR (Pt. 175) 536

consequently the duty of those who own or control it, is that laid down in *Rylands v. Fletcher*. The burden of proving that there is no negligence is on the authority (in this case N.E.P. A.) and there is no obligation on the person who has suffered to prove negligence on their part. The standard of care required is a high one owing to the dangerous nature of electricity (Vide Arts 556 and 558 of Charlesworth on Negligence (Sixth Edition). In the case of *National Telephone Co. Ltd. v. Baker* (1893) 2 Ch. 186, the Head Notes has this to say: "A man who creates on his land an electric current for his own purpose, and discharges it into the earth beyond his control is on the principle of *Fletcher v. Rylands* is responsible for damage caused by that current as he would have been if, instead, he has discharged a stream of water...."⁵²⁵

Apparently, these provisions are safeguards to the consumers and persons who are likely to be affected by the actions of the Electricity investment, either by way of tortious injury or breach of contract. However these hopes were dashed at the altar of Section 12 of the National Electric Power Authority Act, 1990. The jurisdictional powers of the Court to entertain matters involving NEPA were strapped. Section 12 provides that the Authority shall maintain the continuity of supply of electricity as required by the Electricity Act, and any regulations made thereunder: Provided that the Authority shall have the right to suspend the supply of electricity for such periods as may be necessary for carrying out inspection, tests, or repairs and for the making of new connections. Again the Authority shall in no case be under any obligation to pay damages or compensation for loss, damage or inconvenience caused to any consumer through any suspension, failure, discontinuance or whole or partial interruption of the supply of electricity howsoever caused.⁵²⁶

⁵²⁵ Per Akintola Olufemi Ejiwunmi, J.C.A at 546

⁵²⁶ Section 12 (1) (2) of the *National Electric Power Authority Act, Cap. 256, Laws of the Federation of Nigeria, 1990*

The jurisdictional powers of the Court over NEPA were further weakened in *Amadi v Essien*,⁵²⁷ wherein the court stated that:

It is my view that the expression under Section 12(2) is inclusive; not exclusive. It is all embracive; and therefore including any conduct of the authority whether bona fide or mala fide. Contextually therefore, the authority cannot pay damages or compensation to any consumer in respect of loss, damage or inconvenience, through any suspension, failure, discontinuance, whole or partial interruption of the supply of electricity. From the point of view of the consumer, Section 12(2) is a complete blockade or embargo as far as the payment of damages or compensation is concerned.⁵²⁸

The jurist however did not wait to be judged, as he tried to wrestle with his conscience in the following words:

Let me say one last word on Section 12(2) of the National Electric Power Authority Act, 1990, a provision which has given rise to the judgment I have delivered. It is a most obnoxious and oppressive provision which is inimical to the advancement of the rule of law. No democracy worth its name should feel happy with such a provision. I am not happy, the Judge that I am in the enforcement of the rule of law in our cherished democracy. As I indicated above, I do hope the National Assembly will expunge the subsection from the Act. That will be good for persons who may feel aggrieved by the acts of the National Electric Power Authority; and therefore to the entire society.⁵²⁹

⁵²⁷ (1994) 7 NWLR (Pt 354) 91

⁵²⁸ *Ibid* NIKI TOBI, J.C.A at pg 120 Paras.F-G

⁵²⁹ *Ibid* Pp. 121 -122 Paras. H-A

Under the new EPSR Act, if any question of law arises from an order or decision of the Commission, the Commission may, on its own initiative or at the request of any person directly affected by such order, reserve that question for the decision of the High Court.⁵³⁰ The Act is however silent on whether reference to “High Court” in the section means the State High Court or Federal High Court. However, from the provision of Section 251(1)(p) and (r) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) it may be inferred that reference to High Court in Section 49 of the EPSR Act means the Federal High Court.

For the purpose of electricity, a generation licensee, transmission or distribution licensees may apply to the Commission (NERC) in a manner as may be prescribed for a declaration that the land is required for purposes of generation, transmission or distribution of Electricity.⁵³¹ The NERC may, subject to further conditions as it may specify, declare that the land identified by the licensee is required for the purpose of generation, transmission and distribution of electricity with such modifications to the boundaries as the commission may specify.⁵³² The commission shall not make the above declaration until a person having interest in the land under consideration shall have been given adequate opportunity to make representations against such declaration.⁵³³ The Commission shall not make such declaration howsoever, and for whatsoever purpose unless upon representations made by the licensee or proposed licensee concerned, that the electricity generation, transmission or distribution concerned is not otherwise practicable.⁵³⁴

Upon the President of the Federal Republic of Nigeria issuing a notice of intention in respect of the said land, the Governor of the State where the said land falls shall, in accordance with the provisions of section 28 (4) of the Land Use Act, revoke the existing right of occupancy respecting the land and grant a certificate of occupancy in favour of the concerned licensee in respect of the land identified by the Commission in such notice and the grant of such certificate, the right of occupancy over the land shall vest in such

⁵³⁰ Section 49 (1) of the *Electric Power Sector Reform Act, 2005*

⁵³¹ Section 77 (1)

⁵³² Section 77 (3)

⁵³³ Section 77 (4)

⁵³⁴ Section 77 (5)

licensee to the exclusion of the previous holder of the right of occupancy respecting the land, who shall be entitled to claim compensation in accordance with the provisions of the Land Use Act.⁵³⁵

Similarly, under the Constitution, and upon prompt payment of compensation for damage to buildings, economic trees or crops, Authorities, agencies or persons are authorized to enter, survey or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.⁵³⁶ Furthermore, apart from the land a generation licensee, transmission licensee and distribution licensee has been granted Certificate of Occupancy, the licensee shall be entitled to access rights over lands, buildings and streets for discharging its obligations under its license to the extent and in the manner prescribed in regulations issued by the Commission.⁵³⁷

It is a fact that in the enjoyment of these rights, disputes, grievances are bound to occur. For instance if a licensee, who has been given a right of occupancy over land, ceases to require the land for the purposes of the licensed activity, then the licensee shall offer the land to the previous holder of the right of occupancy, for repurchase at an amount equivalent to the amount of compensation paid to the previous holder and if the previous holder declines the offer to repurchase, the licensee may offer the right of occupancy to any other person on such terms and conditions as the Commission may direct.⁵³⁸

The ESPR Act also foresaw such a disputable situation; hence it provides that any person who is aggrieved by any decision of the Commission may appeal against such decision.⁵³⁹

The question now becomes which court is appropriate to approach by any aggrieved person to seek justice? It is the principle of law that Exclusive Jurisdiction of Federal High Court on Federal Government and its Agencies. Thus any dispute irrespective of nature of the claim involving the Federal Government or any of its agencies is solely within the

⁵³⁵ Section 77 (9)

⁵³⁶ Section 44 (2) (m) of the *1999 Constitution of the Federal Republic of Nigeria, as amended.*

⁵³⁷ Section 77 (10) of the *Electric Power Sector Reform Act, 2005*

⁵³⁸ Section 77 (11)

⁵³⁹ Section 77 (8)

exclusive jurisdiction of the Federal High Court.⁵⁴⁰ The NERC is an agency of the Federal Republic of Nigeria. Also the Transmission Company of Nigeria (TCN) is a corporation of the Federal Republic of Nigeria.

On the other hand, it is well established law that the Federal High Court lacks jurisdictional power under Section 251 (1) of the 1999 Constitution of Federal Republic of Nigeria as amended, to entertain any claim founded on contract.⁵⁴¹ Also the Federal High Court is not empowered with the jurisdiction to entertain action over land matters.⁵⁴² This means that the absolute venue or forum for any aggrieved person is the High Court of States. Apart from the Statutory to the fact that the High of Court of States can exercise jurisdiction, the Constitution is not left out in solving this problem.

Notwithstanding, it is my submission that the Federal High Court and the High Court of the States seem to have coordinate jurisdiction in matters of Electricity as presently constituted. It is not strange for the two courts to have coordinate jurisdiction over an area or subject matter. Thus in *Adetona v Igele General Enterprises Ltd*,⁵⁴³ the Supreme Court held:

There are areas where both the Federal High Court and High Court of a State enjoys concurrent jurisdiction.⁵⁴⁴

Electricity no doubt is such an area. The Constitution provides that the National Assembly has power to make laws with respect to any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule.⁵⁴⁵

The National Assembly may make laws for the Federation or any part thereof with respect to electricity and the establishment of electric power stations; the generation and transmission of electricity in or to any part of the Federation and from one State to another State; the regulation of the right of any person or authority to dam up or otherwise

⁵⁴⁰ *NEPA v. Edegero & Ors* (2002) 12 SCNJ 173 at 183-185, (2003) FWLR (PT.139) 1556 at 1571; *Oloruntoba-Oju & Ors v. Dopamu & Ors* (2008) ALL FWLR (PT.411) 810 SC at 833-834, Paas H-A & E-H

⁵⁴¹ *Njinkeonye v Mtn Nigeria Communications Ltd* (2008) ALL FWLR (Pt 413) 1343 at 1368 Para. B-F; Para. B-C

⁵⁴² *Omotesho v Abdullahi* (2008) ALL FWLR (Pt 402) 1114 at 1132 Paras D-E; *Achebe v Nwosu* (2003) FWLR (Pt 136) 891; (2003) 7 NWLR (Pt 818) 103 at 129

⁵⁴³ (2011) 7 NWLR (Pt.1247) 535

⁵⁴⁴ Per Muhammed, JSC at page 563, prg E-H

⁵⁴⁵ Section 4 (4) (a) Part II of the Second Schedule of both the 1979 and 1999 Constitution of Nigeria as amended.

interfere with the flow of water from sources in any part of the Federation; the participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation; the promotion and establishment of a national grid system; and the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy. On the other hand, a State House of Assembly may make laws for the State with respect to electricity and the establishment in that State of electric power stations; the generation, transmission and distribution of electricity to areas not covered by a national grid system within that State; and the establishment within that State of any authority for the promotion and management of electric power stations established by the State.⁵⁴⁶

The purport of the above provision is to the effect that both the Federal Government and State Governments can independently manage, administer, supply, transmit, generate, and distribute electricity in Nigeria.

From the Constitutional provision, it is obvious that both the Federal Government and State Governments; hitherto Regional Governments, have powers only to legislate on the generation, distribution and transmission of electricity in Nigeria. This power does not include regulatory activities and administration by means of a regulatory body. By the above provision, the Constitution is clear as to who has power over regulatory legislations, and not regulatory administration.

4.6.2. Offenses in the Sector

Under the Act, no person, except in accordance with a license issued shall construct, own or operate an undertaking or in any way engage in the business of:

- (a) electricity generation, excluding captive generation; (b) electricity transmission; (c) system operation; (d) electricity distribution; or (e) trading in electricity.⁵⁴⁷

⁵⁴⁶ *Ibid*

⁵⁴⁷ Section 62(1) of the *Electric Power Sector Reform Act, 2005*

Similarly where a person in Nigeria wishes to undertake any form of self electricity generation or distribution, same must not exceed 1 megawatt (MW) in aggregate at a site or an undertaking for distribution for electricity with a capacity not exceeding 100 kilowatts (KW) in aggregate at a site, or such other capacity as the Commission may determine from time to time, without a license.⁵⁴⁸

Electricity is serious business, and false declaration or statement could undermine the integrity of the reform process and operation of the electricity sector and business in Nigeria.⁵⁴⁹

Thus, any person who, in any declaration required to be made under the Act, makes any statement which he knows to be false or does not have reasonable grounds to believe to be true commits an offence, and on conviction shall be liable to a fine not exceeding one hundred thousand Naira or to imprisonment or a period not exceeding six months or to both such fine and imprisonment.⁵⁵⁰ Similarly, body or person who fails or refuses to furnish a return or to supply information in the manner and in the time prescribed or furnishes a false or incomplete return or supplies false or incomplete information commits an offence and is liable on conviction to a fine not exceeding one hundred thousand Naira or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.⁵⁵¹

Furthermore, any person who fails or refuses, without reasonable cause, to give information to an inspector or a police officer when required to do so or gives false or incomplete information commits an offence and is liable on conviction to a fine not exceeding one hundred thousand Naira or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.⁵⁵²

⁵⁴⁸ Section 62(2)

⁵⁴⁹ See Yemi *supra* note 21 at 140

⁵⁵⁰ Section 93 of the *Electric Power Sector Reform Act, 2005*

⁵⁵¹ Section 94 (2) (a)

⁵⁵² Section 94 (2) (c)

Moreso, any person who willfully delays or obstructs an inspector or police officer in the exercise of the powers or duties conferred or imposed upon him, commits an offence and is liable on conviction to a fine not exceeding one hundred thousand Naira or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.⁵⁵³

Finally, the Act provided for absolute protection of investments and equipments. This is Electricity business is such that requires the installation of apparatuses which are vulnerable to theft and vandalism, the Act tried in this regard to provide for stiffer punitive measures against persons who vandalize such equipments. Thus any person, who willfully destroys, injures or removes equipment or apparatus of a licensee commits an offence and is liable on conviction to imprisonment for a period of not less than five years and not more than seven years.⁵⁵⁴

According to Oke, the general offences provisions of the Act appear grossly inadequate to extent that they seek to provide penalties for offences created under the Act and those created under regulations made pursuant to the Act. This is absolutely correct. Looking at the impunities, stagnation and corruptions associated with the sector, the offenses provisions under the Act is not commensurate with the activities in the sector. Thus such general provision that any person who contravenes any provision of this Act or any regulations hereunder commits an offence and is liable on conviction, where no specific penalty is prescribed, the provision is that, as a first offender, the offender is liable to a fine not exceeding One Hundred Thousand Naira or to imprisonment for a period not exceeding one year or to both such fine and imprisonment; or where for subsequent convictions, to a fine not exceeding five hundred thousand Naira or to imprisonment for a period not exceeding three years or to both such fine and imprisonment.⁵⁵⁵

⁵⁵³ Section 94 (2) (b)

⁵⁵⁴ Section 94 (3)

⁵⁵⁵ Section 94 (1) (a-b)

4.6.3. *Critique of the Adjudicatory Processes in the Sector*

It is our opinion that the Act, the Market Rules and other relevant legal framework have not established a viable and unshakeable means of meeting the grievances of the Consumers. Also, apart from the disputes between Consumers and electricity suppliers/providers, there appears to be some fundamental lapses in the Act. Cases of offenses are robbed off the jurisdictions of the regular Court and transferred on the NERC.

Section 96 of the Act mandates the commission to make within its discretion regulations, in respect of fines and penalties not exceeding ten thousand Naira that may be payable by licensees or consumers for violations of those things for which they may be levied under this Act or, in default of payment, imprisonment for a period not exceeding six months for contravention of the regulations.⁵⁵⁶ The disturbing question would be; by what authorities is the NERC Commission making provisions for offenses its Regulations.

Under the Act, no person, except in accordance with a license issued shall construct, own or operate an undertaking or in any way engage in the business of: (a) electricity generation, excluding captive generation; (b) electricity transmission; (c) system operation; (d) electricity distribution; or (e) trading in electricity. Also where a person in Nigeria wishes to undertake any form of self electricity generation or distribution, same must not exceed 1 megawatt (MW) in aggregate at a site or an undertaking for distribution for electricity with a capacity not exceeding 100 kilowatts (KW) in aggregate at a site, or such other capacity as the Commission may determine from time to time, without a license. Alarming, the Act empowered the NERC instead of the regular Court with the jurisdictional powers to entertain such offenses. Thus it is stated that any person who engages in electricity, generation, transmission, distribution and trading without first obtaining licenses from the NERC commits an offence and is liable on conviction to a fine not exceeding Five Hundred Thousand Naira or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.⁵⁵⁷ One would have thought that since the Act is silent as to the Court with powers to try the offense as in the instant case, the regular court would have assumed jurisdiction without having recourse to any

⁵⁵⁶ Section 96 (1)(2) (p) (3)

⁵⁵⁷ Section 62(5)

other institution, but unfortunately, the Act however empowered the Commission with the power to try such offense. Thus the Commission shall have the power to resolve disputes as to whether a person is engaging, or is about to engage in a business for which a license is required under section 62 (1) of the Electric Power Sector Reform Act, 2005.⁵⁵⁸

These practices are indeed ugly trends. Without prejudice to the doctrines of Delegated Legislation and Administrative/Regulatory Adjudications, they are pure blanket affront to the Constitutional provisions of Sections 4 and 6 of the 1999 Constitution of the Federal Republic of Nigeria as Amended. In *Dr. O. G. Sofekun v Akinyemi & Ors*,⁵⁵⁹ the Western State Public Service Commission amended the state's public service regulations by which it acquired the power to 'try' public officers for acts of misconduct in the nature of criminal offence. Section 72 of the 1963 Constitution empowered the commission to make regulations, but gave the commission no express power to try criminal offences. Under the new regulations, the plaintiff was 'tried' on an accusation of committing "unlawful and indecent assault" on a female patient in conducting a "vaginal examination" on her without "securing the attendance of a nurse or some party at such examination." The plaintiff took out a writ seeking a declaration by the court that the amendment to the regulations and the subsequent 'trial' conducted under it were a usurpation of legislative and judicial powers. In its judgment, the Supreme Court upheld that contention and held that:

If the regulations such as those under attack were valid, the judicial power could be wholly absorbed by the commission (one of the organs of the executive branch of the state government) and taken out of the hands of the magistrates and judges. . . . That being the case, the amendment made to the regulations ... to dispense with the due process of law, is clearly ultra vires.⁵⁶⁰

⁵⁵⁸ Section 62(4)

⁵⁵⁹ (1980) 1 ANLR 153

⁵⁶⁰ Fatayi-Williams, C.J.N. at 155

Furthermore, there are lapses in the provisions of the Act with respect to corporate bodies. For God sakes, Electricity industry is dominated by corporate bodies more than individuals. Yemi Oke expressed his disappointment in the following words:

By necessary implications, the above paltry sums and trivial punishments also apply to bodies corporate and other companies in electricity business. It is obvious that the bodies corporate and their officers envisaged by the above provisions are officials of electricity companies, who may deserve serious punishment by way of imposition of heavy penalties to serve as deterrence due to the severity or consequences of their activities on a socially sensitive sector like electricity. It cannot be denied that in term of punishment, Nigerian criminal jurisprudence makes no distinction as to the criminal liability of a body corporate as distinct from that of an individual. It nevertheless recognizes that a company or firm may be criminally liable pursuant to the express provision of a particular statute provided the statute in question stipulates adequate or commensurate penalties for the offence committed.⁵⁶¹

He further argued that:

Unlike the EPSR Act, some statutes in Nigeria, mindful of the corporate nature of the sector, tend to specifically provide that where an offence is committed under the Act or regulation made pursuant to it by a body corporate, every director or officer and every partner in case of offence committed by a partnership shall be guilty of an offense under the Act and likewise punishable.” Citing section 126 (1) (a) & (b) of the Mineral and Mining Act, Cap M12 LFN 2004 as good examples.⁵⁶²

⁵⁶¹ See Oke *supra* note 21 at 140 & 141

⁵⁶² *Ibid*

He however concluded on these inadequacies by submitting that:

Under the EPSR Act, recourse is not had to the need to provide corporate punishment for directors and officials of electricity companies and other actors in the sector. This would have helped to send strong signals about the readiness of the regulators lift the veil of corporate actors and proceed against erring officials in order to avoid being bugged down by technicalities in establishing culpability due to the principle of corporate legal personality of electricity companies.⁵⁶³

The Appeal system is condemnable. Upon the conclusion of any hearing, proceeding or matters, any person who is aggrieved by with the decisions, opinion, steps, actions of the NERC may apply to the Commission for review of the decision, order or such opinion or hearing.⁵⁶⁴ If the NERC deems it necessary, it may reconsider, vary or rescind its decisions before issuing a final decision, in accordance with such procedures as the Commission may establish; provided that such review or reconsideration shall be completed within sixty days of the date it is requested.⁵⁶⁵ This is another affront to the right of Appeal Guaranteed under the 1999 Constitution of Nigeria as amended. It also stands against the doctrine of “functus officio.” Relying on the case of *Odigwe v JSC, Delta State*,⁵⁶⁶ wherein it was held that:

The phrase “functus officio” is a latin expression simply meaning task performed. In legal parlance, it means a Judge cannot give a decision or make an order on a matter twice..... it then ceases to be seized of the matter and thus cannot redecide, reopen, or rehear it for whatever reason. This is more so because a court cannot sit on appeal on its own decision r review its decision.⁵⁶⁷

⁵⁶³ *Ibid*

⁵⁶⁴ Section 50 (1) of the *Electric Power Sector Reform Act, 2005*

⁵⁶⁵ Section 50 (2)

⁵⁶⁶ (2011) 10 NWLR (Pt 1255) 254

⁵⁶⁷ *Ibid* at 287

It is therefore a mockery of the adjudicatory process for the NERC to seat on appeal over decisions given by it.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

It can be seen that the EPSR Act was designed to launch the Nigerian Electricity market into a complete new world of its own and a competitive regime. This no doubt is for the interest of the consumers. It is also to enhance productivity and promote efficiency in the Nigerian electricity market. The Act provides for the initial holding company which was to be registered by the National Council on Privatization and also provided that the holding company will acquire the assets and liabilities of the National Electric Power Authority. The well known amongst the successor companies are; Eko Distribution Company, Ibadan Distribution Company, Ikeja Distribution Company, Enugu Distribution Company and the Niger Delta Power Holding Company Limited among others which have already been sold to the new owners.

However, despite series of legislations and efforts to get it right in the Electricity sector, the industry has remained and continued ranking high in the cadre of failure and unproductiveness. The supply of electricity has remained epileptic. The relationship between the suppliers and consumers has also remained unprogressive. Either on one hand, the consumers are employing deceit or the suppliers are shortchanging them. There is also the incessant activity of miscreants engaging in one form of theft or another form of sabotaged. These inadequacies no doubt have flourished, not necessarily because of lack of laws, but because of the ineffectiveness of the law implementers and regulatory activism. Whatever the case maybe, it will be well said to say that each law contributed immensely to the advancement of the Nigerian electricity sector in its own way. A generic target and objective was maintained under each regime; promoting, regulating, and supervising the supply of electricity and practices in Nigeria and beyond where applicable.

Furthermore, as Nigeria joins the rest of the world in economic, information technological and global advancement, Electricity appears very crucial to achieve sustainable growth.

Electricity market has been a sensitive arena that continually attracts global attention and forms a top agenda on the to-do menu of virtually all governments globally. Predominantly, the effect of the unified and monotonous means of electricity supply has contributed mostly to the stagnated investment driven development in the sector. The 2001 NEPP actually set the roadmap for Nigeria's power sector privatization, but due to the bureaucracy in government; the policy could not be signed into law until 2005. The signed document became the Electric Power Sector Reform (EPSR) Act of 2005 (EPSR, 2005). The reform is expected to generate some economic implications for the citizens and the prospective investors. By this Act, NEPA was translated into the newly incorporated Power Holding Company of Nigeria (PHCN) Plc, comprising of 18 separate successor companies that took over the assets, liabilities and employees of NEPA, and responsible for the generation (6 companies), transmission (a company) and distribution (11 companies). These are viable and investable areas of interests for investors. However, operating or investing in the Electricity Sector of the Nigerian Economy under the present legal regime clearly brings on board a concern due to heavy regulations involved. Investors planning to incorporate Electricity Companies in Nigeria may be easily dissuaded having been faced with multi-agency and over-regulatory requirements with respect to obtaining of certificate, licenses, permits, approvals, registration, among other things.

Moreover, in a typical Electricity Market, contract means a Vesting Contract or a Power Purchase Agreement. The Contracts of Electricity generally relates to the transactional commercial agreement for the demand and supply of electricity as between the Electricity Providers and their Customers or Consumers in one hand, as well as the Customers and the Consumers on the other hand. In the Electricity Practice under the current regulatory regime, a number of participants are involved in the industry and the market. They include: the Electricity Trading Companies; the Licensed Electricity Generating Companies; the Licensed Electricity transmission and System Operating Companies; the Licensed Electricity Distribution Companies; and the Electricity end users which could be either eligible customers or the consumers/customers etc. The industry is hydraheaded and involves too many participants. The Electricity Act places reliance on novation contracts for the purpose of crystallization of assignment and/or transfer of rights and obligations.

Novation is a tripartite contract involving parties - the obligor, the obligee and a third party. The principle of novation permits assignment or transfer of rights as well as liabilities among the parties to the agreement. It is a transfer agreement and connotes the assumption that, by a different party, of liabilities, originally residing in another party, and involves the substitution of a new contract for an existing one, either between the same parties, or between different parties. In contrast to an assignment, where debtor or obligor's consent is not required, a novation requires the consent of all the parties.

The role of the judiciary in the Nigerian power sector cannot be overemphasized. It is the duty of the courts to interpret the provisions of the law enacted by the National Assembly. In carrying out this task, the judge is expected to interpret the law as it is and not as it ought to be. It is therefore necessary for judges to understand the provisions of the law with a view to applying a proper interpretation of the provisions of the law. The dispute resolution framework for the Nigerian electricity sector is provided for by the various rules and regulations of the Nigerian Electricity Regulatory Commission pursuant to the power vested on it by the Electric Power Sector Reform Act. However, where no specific procedures are provided, the various Rules allow an Arbitrator to do whatever is reasonably necessary and permitted by applicable law to enable the effective adjudication of any matter.

Also, it is imperative that in arbitration procedure, any arbitrator(s) nominated or appointed must be knowledgeable in electricity law and market, maintain credibility and the world best practice and to give a very strategic decision that would help in protecting the market from harmful activities and perhaps litigations that may arise from operators' intolerance for each other. If the aforementioned are duly observed, any final decisions by the alternative dispute resolution would gain the respect of the market participants and the regulator, who would often rely on them to make the hard decisions needed to keep the industry up and going.

Finally, the lessons from other jurisdictions are crucial. The visible interventions of the government actively to save the day in all countries' electricity sectors are applaudable. These ranged from subsidy, efficiently managed Rural Electrification, Regulatory and

statutory frameworks and other financial interventions to boost the Renewable Electricity options is emulatory for the Nigerian efforts.

5.2. Identified Problems and Recommendable Reforms in the Sector

The metering system in the NESI deserves attention. Meter means a device that measure and registers the integral active Energy or Reactive Energy over a metering interval and may include a data recorder, but shall be deemed to exclude instrument transformers.⁵⁶⁸ Whereas, the Metering System itself means a Meter and the associated current transformers, voltage transformers, metering protection equipment including alarms, low voltage electrical circuitry, associated data collectors, data transmitters related to the measurement and recording and transmitting to the Data Collection System the active energy and/or reactive energy, as the case may be.⁵⁶⁹ This shows obviously that the chain of electricity practice ends with the Consumer. The Metering System is the direct connector of the consumers to the electricity usage. The electricity distributed remains docile until the activities or instrumentality of the Metering System is introduced. It is the Metering System that converts the electricity into a utility for the consumer.

Unfortunately however, by the extant laws and regulations, as well as statutory provisions the Distribution Licensees are left with the exclusive function of metering the consumers and customers. The Distribution License authorizes the Licensee to construct, operate and maintain a distribution system and facilities, including but not limited to the activities as may be specified in the license covering the connection of customers for the purpose of receiving a supply of electricity; **the installation, maintenance and reading of meters**, billing and collection; and such other distribution service.⁵⁷⁰ Consequently, every Distribution Company obtains, through its authorized representatives an actual reading of all meters in all electricity supply addresses within its areas of operations every month but not later than once in every three months.⁵⁷¹ The major fall out of this routine is found

⁵⁶⁸ Clause 1 *Guidelines For Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013*

⁵⁶⁹ Clause 1

⁵⁷⁰ Section 67 (1) (a – c) of the *EPSR Act 2005*

⁵⁷¹ Section 1(1) of the *Meter Reading, Billing, Cash Collocations and Credit Management for Electricity Supplies Regulations, 2007*

where a customer wants to vacate his apartment. In such situation, “a Customer shall request his Distribution Company to undertake a final reading of his meter when he vacates his premises and the reading shall be used to calculate his final electricity usage in those premises. And where the Distribution Company makes it to the premises but unable to carry out the meter reading due to the fault of the Customer, the Customer shall continue to be liable for the usages accruing on the meter up to the point when the Distribution Company is able to obtain the meter reading or up to the date a new Customer occupies the premises.”⁵⁷² This provision and practice no doubt posed a great injustice and hardship for a customer/consumer.

Although the new regime has made a systemic technological improvement on the status quo, but the rot has not been cured. The Electricity Smart Metering System (SMS) provided for by the NIGERIAN ELECTRICITY SMART METERING REGULATION, 2017,⁵⁷³ portends a relief. The current mode of operation is the Prepayment Mode or Credit Mode whereby a SMS shall be capable of operating in Credit Mode and Prepayment Mode and of being remotely switched from one mode to the other with the consent of the consumer.⁵⁷⁴ The Prepayment Mode means a mode of operation of a SMS whereby payment is generally made in advance of Consumption.⁵⁷⁵ This framework no doubt mitigated the situation, but the major ugly situation has not been salvaged. Ownership and control of the SMS has not been properly addressed. The regulation provision on stages of ownership of the metering and installations is not entirely commendable. It provides that the DISCOs shall own, fund and manage the SMS from the TSP/DISCO Trading point to the consumer IHD interface.⁵⁷⁶ This is exactly purport of section 67 (1) (a–c) of the EPSR Act 2005. Ownership still resides on the Distribution Company.

The innovation introduced by the GUIDELINES FOR CERTIFICATION OF METERING SERVICE PROVIDERS AND RELATED MATTERS; GUIDELINES NO: NERC G-0112 deserves commendation. The Guidelines defined “Metering Services

⁵⁷² Section 2 (1) & (3)

⁵⁷³ *Nigerian Electricity Smart Metering Regulation, Regulation No: NERC/REG/4/2017*

⁵⁷⁴ Rule 5.2.17 and Rule 3.6

⁵⁷⁵ Rule 1.3

⁵⁷⁶ Rule 7.3.4

Provider” or “MSP” as a person certified by the Commission as a manufacturer, supplier, vendor, or installer of Electric Energy Meters and/or Metering Systems.⁵⁷⁷ The objective of this Guideline is to ensure that only qualified persons are certified by the Commission to perform the functions required of Metering Service Providers in the Nigerian Electricity Supply Industry.⁵⁷⁸ This leaves leverage for competition for interested stakeholders. Thus any desiring person can apply to the commission for a Certificate as a Metering Service Provider (MSP) in a specified manner under the Guideline.⁵⁷⁹ This Guideline also went further to create room for these opportunities for Licensees. Thus a licensee intending to import metering systems for deployment in the Licensee’s facilities shall obtain a certificate from the Commission.⁵⁸⁰ And licensees requiring installers or vendors of metering system shall only engage persons certified by the Commission as installers and or vendors.⁵⁸¹ In fact, the totality of this Guideline indicates that the NERC regulates directly the activities of Metering System Installers, Manufacturers and Vendors.⁵⁸²

In other to cure this anomaly, it is recommended that there should be a further harmonization and decentralized privatization process particularly on the area of metering system. In line with the Act,⁵⁸³ the Commission is empowered to prepare in each year, for the Minister, a report containing analysis and recommendations with respect to the potential for competition in the Nigerian Electricity Supply Industry for the existence of other preconditions, including the necessary **metering** and information technology infrastructures, required for the operation of a more competitive electricity market, a separate entity independent of any of the Generation, Transmission and Distribution companies should be provided for by the NERC, to issue and install the meters for Customers and consumers. There is no doubt that the Guidelines for Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013 seems to have solved this, but such is a mere Guideline, not even a Regulation. It is

⁵⁷⁷ Clause 1 *Guidelines For Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013*

⁵⁷⁸ Clause 2

⁵⁷⁹ Clauses 4 (a-b) and 5 (1)

⁵⁸⁰ Clause 10 (a)

⁵⁸¹ Clause 10 (b-c)

⁵⁸² Clauses 11 and 12

⁵⁸³ Section 24 (2) (c) of the *EPSR Act 2005*

common knowledge that the flavour and authority of the Guideline derives from Section 32 (2) of the EPSR Act 2005.⁵⁸⁴ Thus it is the principal law that provides subsidiary legislation the source of its existence. Without Principal Law there can be no subsidiary legislation, and so subsidiary legislation must conform to the principal law. If any provisions of the Subsidiary regulation are inconsistent with the provisions of the Act/Statute, the provisions of the regulation shall to the extent of the inconsistency be declared void.⁵⁸⁵ It therefore calls for the amendment of the Act detaching the function of metering from the Distribution Licensees and extending same to a new Stakeholder to be identified as the Metering Systems Providers Licensee.

This framework if adopted will bring to an end the long existing dichotomy between the Customers and Consumers. Thus every holder/bearer/owner/recipient of each meter will exclusively be associated with such meter. It will allow mobility, encourage accountability and responsibility and as well reduce the incidence of geographic restrictions. By this arrangement, a customer will at the same time be the consumer and shall only be identified with one meter. He can move it from one building to another either within a particular locality controlled by a Distribution company or to another geographic location controlled by another Distribution company. If the meter was obtained directly from the NERC accredited Meter Issuing Company, same can be useful in any location controlled by any Distribution Company, be it Eko, Ikeja, Ibadan, Enugu, Kaduna, Yola, Port Harcourt etc.

This view was recently supported by the Minister of Power, Works and Housing, Babatunde Fashola (SAN), who exclusively stated on Monday the 14th August, 2017 that nothing in the Electricity Power Sector Reform Act gives Electricity Distribution Companies (DISCOs) the exclusivity of metering in the sector. He said the Federal Government has commenced the disbursement of N701 billion electricity intervention funds to beneficiaries. According to him, the Federal Executive Council (FEC) has approved the release of N31 billion to Discos for metering in the power sector. He spoke

⁵⁸⁴ Cap E Laws of the Federation of Nigeria 2010

⁵⁸⁵ *Nigerian National Petroleum Corporation (NNPC) & Anr v Famfa Oil Limited* (2012) ALL FWLR (Pt 635) 204 at 238 Para G-H Per Rhodes Vivour JSC

at the 18th Monthly Power Sector and Stakeholders' meeting in Kumboso, Kano State, that:

While it is true that Discos have the obligation to meter customers, the law does not vest the monopoly of meter supply to the DISCos. Anybody who qualifies under the safety regulation by NEMSA and under the licenses issued by NERC can supply meters to customers under conditions approved by law. In other words, meter supply is an open but regulated business. You need the license from NERC to undertake it.⁵⁸⁶

Secondly, the Public Enterprises (Privatization and Commercialization) Act, 1999 established the office of the National Council on Privatization.⁵⁸⁷ It is however disappointing that despite the roles of the Council in the huge success of the Nigerian privatization process, there is no such thing in existence as the Board of National Council on Privatization several years after its creation. One wonders why the Bureau of Public Enterprises (BPE) serves as the secretariat of the National Council on Privatization (NCP) and is charged with the overall responsibility of implementing the council's policies on privatization and commercialization.⁵⁸⁸ Thus the Bill for the establishment of Board being sponsored by Ahmed Yerima (APC, Bauchi) Member of the Federal House of the Representatives,⁵⁸⁹ should be applauded and given the maximum attention it deserves.

It is important to state that the Complaint unit established by the Regulation as a branch of the Discos is a mockery to the intendment of Consumer Protection. This not only constitutes an abuse of the entire customer relief process, it is an affront to the whole essence. By implication, a close examination and literary interpretation of Section 3 subsections 1, 2 and 3 will show that the appointment is made by the DISCOS. This therefore put the Electricity Providers and the CCU in a master servant relationship,

⁵⁸⁶ Kolade and Adeyemi and John Ofikhenua, "Metering of customers not exclusive right of DisCos" retrieved from <http://thenationonlineng.net/metering-of-customers-not-exclusive-right-of-discos-fashola/>

⁵⁸⁷ Section 9 of the *Public Enterprises (Privatization and Commercialization) Act, 1999* and Section 100 of the *Electric Power Sector Reform Act, 2005*

⁵⁸⁸ https://en.wikipedia.org/wiki/Bureau_of_Public_Enterprises

⁵⁸⁹ House Debate of the House of Representatives aired/rebroadcasted on 21st April, 2017 via NTA Parliament; Startimes Channels 306 and <http://thenationonlineng.net/rep-advise-buhari-constitute-ncp-board-now/>

whereas the Complaint concerns the activities of the Electricity Providers. This means the CCU are sitting as Judges in their own causes. Similarly, under the Regulation, the DISCOS are required to provide office space and other facilities required by the members of the Forum for their efficient functioning. There is no difference from the provisions of Section 3 (1-3) thereof, allowing the DISCOS to provide facilities for adjudication, is enough to open space for bias. No findings of such body can be trusted since the piper is dictating the tune. Also a complaint may be heard or rejected by the Forum if same is considered by the Forum to be frivolous, vexatious or lacks merit. The ultimate goal of every utility sector is to satisfy the consumer. The consumers' interest must necessarily be protected by all means. Thus the Consumer Protection Council or an independent body akin to it should be put in place to check the excesses of electricity providers.

Also, Section 50 of the ESPR Act which provides that the Commission may reconsider, vary or rescind its decisions before issuing a final decision should be expunged. This is as a result of its inconsistency with Section 6(6)(b) of the 1999 Constitution; it seeks to curtail an individual's right of access to Court. It also empowers the Commission to be a judge in its own case. In the final analysis, since electricity is globally considered an unusual commodity that cannot be traded without recognized contractual obligations, the possibility of trade disputes arising from contract breaches or disregard for extant rules and codes employed in the running of the market operations cannot be ruled out.

The Captive Electrification is regulated under the Nigerian Electricity Regulatory Commission (NERC) Regulations for the Granting of Permits for Captive Power Generation, 2008, made pursuant to 96 (1) of the Electric Power Sector Reform Act, 2005. In the case of *Nigerian National Petroleum Corporation (NNPC) & Anr v Famfa Oil Limited*,⁵⁹⁰ the Apex Court stated that:

It is the principal law that provides subsidiary legislation the source of its existence. Without Principal Law there can be no subsidiary legislation, and so subsidiary legislation must conform with the principal law. If any provisions of the Subsidiary

⁵⁹⁰ See *supra* note 20

regulation are inconsistent with the provisions of the Act/Statute, the provisions of the regulation shall to the extent of the inconsistency be declared void.⁵⁹¹

This indeed shows that it is not model for a promising electricity sector to have such major area of interest regulated under the Regulation instead of the Act. Captive electrification should be regulated or provided for in the Act or any other substantive legislation of the National Assembly.

The Renewable Electricity options should as a matter of necessity be made a subject of substantive legislative consideration. Apparently there is no foundation for the renewables. This move will go a long way in ensuring and fostering the agitation for a sustainable renewable electricity option.

Finally, the various laws in the Federating States on the Acquisition of Land by Aliens contradict the spirits and targets of various provisions in our Laws on foreign investments. I have indeed taken time to study the Supreme Court Judgment on *Gerhard Huebner v Aeronautical Industries Engineering And Project Management Co. Ltd.*⁵⁹² and also that of *Ogunmola & Ors v Eiyekole & Ors*,⁵⁹³ delivered before it by the same court. Indeed by these Laws and decisions, Section 1 of the Land Use Act, 1978 specifically limits its benefits to Nigerians, and that non-Nigerians cannot apply for a Customary or Statutory right of Occupancy, because Section 36(1) which provides for any person, does not include aliens who are not Nigerians.

In a bid by the Appellant in *Gerhard Huebner* to persuade the Supreme Court to depart from its earlier stand in the former case, the Apex Court has this to say:

The law under which the decision referenced was reached has not been repealed or altered; it is still the extant law which regulates Land Administration in Nigeria. Hence the call for

⁵⁹¹ *Ibid*

⁵⁹² delivered on the 7th April, 2017

⁵⁹³ (1994) 4 NWLR (Pt 146) 632

the Supreme Court to depart from its earlier decision is baseless.⁵⁹⁴

It is no exaggeration to say that Sustainable Electricity Practice in Nigeria cannot do without land ownership and acquisition. Renewable Electricity depends of land to thrive; whether wind, solar, biomass etc, all require the instrumentality of land. It is therefore imperative to hold that the Acquisition of Land by Aliens Laws of various States negates the true meaning and purport Foreign Direct Investments in Nigerian Electricity sector particularly as it involves foreigners. It is therefore recommended that this Law be repealed or amended.

⁵⁹⁴ *Ibid* Per Galinje JSC