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ARTICLE

## An Examination of the Legal Status of Consumers and Customers in Electricity Contracts in the Nigerian Electricity Supply Industry Value Chain

Ogugbara Chimezie JacobsPaschal\*

### Abstract

Electricity practice by nature brings entities; corporate and natural, together for defined purposes; consumable commodities for profits or satisfaction. It interfaces through several paths. The trajectory along the value chain creates various contractual relationships. The Electric Power Sector Reform Act as the current frontline regulatory legislative instrument for the regulation of Electricity business in Nigeria was designed to launch a competitive regime into the Nigerian Electricity market. Obviously the interfacing interactions birthed thereafter is another relationship. This no doubt assisted the consumers, enhanced productivity and promotes efficiency in the Nigerian electricity market. The real essence of this is for the tripod energy justice of: availability, accessibility and affordability. This writer employs a doctrinal legal approach to critically examine the legal intricacies of a consumer as an indispensable stakeholder in the entire essence of electricity. The research also dissected the customer from the consumer, while furthering discussions on the general electricity contracts and interactions with a view to enunciating the factors that underpin each legal position of either a consumer or a customer in the Nigerian Electricity value chain.



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**Keywords:** Consumers/Customer, Eligible Consumer, Value Chain, Contract, Electricity

### 1.0. 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.<sup>1</sup> 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

\* (LL.B, BL, ACIARB, LL.M, ACTI), Principal Partner, CJP Ogugbara & Co. (SUI GENERIS AVOCATS) E-mail us: [jpc4odili@yahoo.com](mailto:jpc4odili@yahoo.com); [jpc4odili@gmail.com](mailto:jpc4odili@gmail.com) and [cjpogugbara@nigerianbar.ng](mailto:cjpogugbara@nigerianbar.ng), Phone: 08032223723, 07038155959 and 08173358880.  
<sup>1</sup> I. E. Sagay, Nigerian Law of Contract, (Spectrum Law Series Reprint 2007) Pg 1.

intention.<sup>2</sup> This agreement between the parties creates a unique kind of relationship which is underpinned by rights, benefits, duties, obligations and liabilities. The relationship created by the law of contracts enables 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.<sup>3</sup> Every contract, be it simple or formal must necessarily satisfy certain basic requirements in order to be enforceable in law. For the purpose of this discussion, the three main requirements are: Offer, Acceptance and Consideration.

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.<sup>4</sup> Such an offer must necessarily be followed by an acceptance, which is the final expression of assent to the terms of an offer. Apart from formal contracts which are by deed, every contract shall not be enforceable except such is for a consideration; consisting of some right, interest, profit and benefit accruing to one party or some forbearance, detriment by the other party.<sup>5</sup>

### 1.0. Electricity Contracts

In a typical Electricity Market, a contract means a Vesting Contract or a Power Purchase Agreement.<sup>6</sup> 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 on 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 *Sui Generis*. 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.<sup>7</sup> 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,

<sup>2</sup> Orient Bank (Nig) Plc v Bilante International Ltd (1997) 8 NWLR (Pt 515) 37 at 76.

<sup>3</sup> R.K. Goel, in I. E. Sagay quoting, *The Nigerian Law of Contract: Cases and Materials* (unpublished work) Pg 1.

<sup>4</sup> M.C. Okany, *Nigerian Commercial Law*; (Africana-Feb Publishers Ltd 2001) 42 & 44.

<sup>5</sup> Lush J in *Currie v Misa* (1875) LR 10 EX 153.

<sup>6</sup> Rule 3.1 of the Market Rules for the Nigerian Electricity Supply Industry.

<sup>7</sup> See *supra* note 1 Pg 1.

which could be 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 the 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.

## 2.0. The Consumers and the 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.<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup>

The identification of "not an eligible customer" connotes a regime of three categories of end users (consumers). "Eligible customer" was defined to mean a customer that is eligible, pursuant to a directive or

<sup>8</sup> Section 100 of the Electric Power Sector Reform Act, 2005

<sup>9</sup> This Regulation is made pursuant to section 96(2)(c) & (d) of the Act.

<sup>10</sup> 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

directives issued by the Minister under section 27, to purchase power from a licensee other than a distribution licensee.<sup>11</sup> The Act created an atmosphere where the Eligible Customers shall contract with a party other than the Licensed Electricity Distribution Companies.

The definition of who a Consumer is and who a customer is has not received so much judicial attention. However, the judicial elucidation offered by Per NIKI TOBI, J.C.A. who delivered the Leading Judgment in *Amadi v Essein*,<sup>12</sup> 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.”<sup>13</sup>

The case of *The State ExParte Tunde Savage v E.C.N. Owerri*,<sup>14</sup> offered 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 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 business, Per Egbuna, J. of the Owerri High Court, held as follows:

<sup>11</sup> Section 100 of the Electric Power Sector Reform Act, 2005

<sup>12</sup> (1994) 7 NWLR (Pt 354) 91

<sup>13</sup> *Ibid* at 115 Paras E-F; 118 Para. D

<sup>14</sup> Suit No. HOW/12M/64, reported in (1964) VOL. VIII ENLR 55

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....<sup>15</sup>

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 definition 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."<sup>16</sup> Another illustration is found in the case of *Jos Electricity Distribution Company v. John*,<sup>17</sup> the Court while distinguishing and categorizing the inherent differences in the identity of the consumer and customer held:

On the argument that the relationship between the Appellant and Respondent is contractual, outside the fact that the Respondent pays for his light there is no other ingredient of contract that is present.....

What exists as in this case is an 'Utility Service Provider' and 'Consumer' relationship. In other words, it is a Provider Consumer relationship. From whichever way it is viewed, I will still come to the conclusion that the Appellant's Respondent's relationship is not contractual but one which the law enjoins a duty to be performed by the Appellant and which the Appellant neglected to carry out.<sup>18</sup>

Apparently there is a clear distinction between a consumer and a customer. Thus while there are many instances where an individual can assume the dual position, there is still the very important reason why the boundary that crisscrosses them should be identified and brought to the limelight. Consequently, by all instant legal frameworks, we can

<sup>15</sup> This judgment was delivered on the 18th July, 1964

<sup>16</sup> See supra note 11

<sup>17</sup> (2018) LPELR-46395(CA)

<sup>18</sup> Per Onyemenam, J. C. A.

have the customer-consumer, consumer simpliciter on the one hand, and the Eligible customer- consumer on 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 on 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.

## 2.1. The Eligible Customers

There is no definition of the terms. However under the Act, “eligible customer” means a customer that is eligible, pursuant to a directive or directives issued by the Minister under the Act, to purchase power from a licensee other than a distribution licensee.<sup>19</sup> 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.<sup>20</sup> This is no definition indeed and an extended look into other jurisdictions will afford us a better understating of the concept. The 2010 Nevada Code<sup>21</sup> defined “Eligible customer” in two ways. 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.<sup>22</sup>

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.<sup>23</sup> The Law on Electricity of Kosovo<sup>24</sup> further defines “eligible customers” as customers who are free

<sup>19</sup> Section 100 of the Electric Power Sector Reform Act, 2005

<sup>20</sup> Section 27

<sup>21</sup> 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>

<sup>22</sup> Ibid

<sup>23</sup> [http://eng.gruppohera.it/group/hera\\_ondemand/glossary/energy\\_glossary/page109.html](http://eng.gruppohera.it/group/hera_ondemand/glossary/energy_glossary/page109.html)

<sup>24</sup> 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.

to purchase electricity from the supplier of their choice.<sup>25</sup> 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.<sup>26</sup> The criteria shall include the extent of their electricity consumption and the proportion of energy costs to the prices of their products and services.<sup>27</sup> 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.<sup>28</sup>

Although the ESPR Act<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> Furthermore, the eligible customers shall purchase 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 and powers from generation licensees or from trading licensees.<sup>32</sup>

On the 19th May, 2017, the unexpected happened. The then 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. According to Dr. Usman Abba Arabi, "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."<sup>33</sup> NERC stated that under the regime, Fashola signed off four categories of eligible customers to become operative in the Nigerian Electricity

<sup>25</sup> Article 3 of the Government of Kosovo Law on Electricity No. 2004/10.

<sup>26</sup> Article 22 Subarticle 2 of the Government of Kosovo Law on Electricity No. 2004/10.

<sup>27</sup> Ibid

<sup>28</sup> Article 22 Subarticle 3

<sup>29</sup> The Electric Power Sector Reform Act, 2005

<sup>30</sup> Section 25(c)

<sup>31</sup> Section 25(e) (ii) and 26 (1)(e) (ii)

<sup>32</sup> Section 26 (1) (h)

<sup>33</sup> 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/>



Supply Industry (NESI). The first category of eligible customers comprises 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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 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.<sup>37</sup>

Justifying the decision of the government to accent to its request for a declaration of 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.”<sup>38</sup> 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.<sup>39</sup>

It is important to note that there is expectedly qualification and criteria which electricity end-users, consumers or customers must possess to qualify as an eligible consumer. This is no doubt major fallout of the Act. Notwithstanding, the absence of a clearly laid down manner and conditions for determining an eligible customer in the Act,<sup>40</sup> the

<sup>34</sup> 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>

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Section 25(c) of the Electric Power Sector Reform Act, 2005

Minister in charge of power enjoys wider discretionary power to determine who can qualify as an eligible customer. The declaration of the Minister<sup>41</sup> has been incorporated and codified into a legislation.<sup>42</sup> It is doubtful if such declarations as may be issued by the Minister with all of its flexibility cannot be abused. The flexibility therefore is a huge limitation to the framework for Eligible Customer status in Nigeria. One can express fear that it can open the possibility of sacrificing merit and common wealth on the altar of political patronage and fraternal inclination. The only available remedy lies on the fact the eligible customer status can be revoked upon certain conditions. The revocability whittles down the minister's power and serves as an automatic check on the powers. This is clearly unlike the pattern in the Government of Kosovo, where everything is collectively transparent and done all in the interest of all participants. Apart from setting the conditions for the requirement by the Law, there are also adequate provisions for the revocation of the eligibility status. First, where Korporata Energjetike e Kosoves (KEK) operation and business is negatively affected causing it to fail in its obligations to other customers (Public service Obligations).<sup>43</sup> Any unreasonable constraints are imposed on the current and planned structure of the industry, KEK or the wholesale or retail electricity markets.<sup>44</sup> Secondly where there exists any cross-subsidization of prices between the eligible and regulated customer sectors. Finally, where the KEK suffered aggregate or incremental losses over any rolling covering a period of twelve months and which losses impose a direct or indirect requirement for a subsidy from the KCB.<sup>45</sup>

### 3. Insights into the Nigerian Electricity Metering System and Practice

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.<sup>46</sup> 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.<sup>47</sup> This shows obviously that the

<sup>41</sup> See Supra note 34.

<sup>42</sup> Sections 4 and 5(1-4) of the Eligible Customer Regulations, Regulation No. NERC-R-111 of 2017.

<sup>43</sup> Ethem Ceku, "Consultation Paper of the Minister for Energy & Mining Government of Kosovo on Criteria and Conditions for Determining the Eligible Customers," The Provisional Institutions of Self-Government; Ministry of Energy and Mining of the Government of Kosovo, October 2006.

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Clause 1 Guidelines For Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013

<sup>47</sup> Clause 1

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 meters are used to achieve the necessary conversion. Typically, 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.<sup>48</sup> 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.<sup>49</sup> The major fall out of this routine is found 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 is 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.<sup>50</sup> Again where a new Customer has taken over but a meter reading was not obtained on the day the new Customer assumed responsibility, the total usage up to the point the meter reading is obtained shall be apportioned between the two Customers based on the average daily usage of the Customer who has vacated the premises, provided that for billing purposes, the date on which the Customer left the premises shall be used irrespective of the date of the reading.<sup>51</sup>

Just recently, it was on the news that “the Nigerian Electricity Regulatory Commission (NERC) has proposed to fine Electricity Distribution Companies (DisCos) for wrongfully disconnecting the customers from supply.”<sup>52</sup> This catchy headline no doubt has emanated

<sup>48</sup> Section 67 (1) (a – c) of the EPSRA Act 2005

<sup>49</sup> Section 1(1) of the Meter Reading, Billing, Cash Collocations and Credit Management for Electricity Supplies Regulations, 2007

<sup>50</sup> Section 2 (1) & (3)

<sup>51</sup> Section 2(6) (b)

<sup>52</sup> John Ofikhenua, “NERC to fine DisCos for wrongful disconnections” retrieved on the 28th July, 2021 from <https://thenationonlineng.net/nerc-to-fine-discos-for-wrongful-disconnections/>

from a consultation paper dated 16th July, 2021 and duly signed by the NERC Chairman for the deliberation of stakeholders on amendments to the Meter Reading, Billing, Cash Collocations and Credit Management for Electricity Supplies Regulations, 2007 and other consumer/customer based Regulations. The Consultation Paper tends to deliberate the unbecoming attitude of DisCos to punish innocent new tenants for the sins of out gone tenants. According to the paper, the challenge where a customer vacating premises has an obligation to notify the DisCo to enable them in deciding the cut-off date for the purpose of billing the old and new customers. Thus where outgoing customers with unpaid bills neglect to notify the DisCos before vacating properties springs serious challenge in the computation of the cut-off date for the outstanding debts of the old tenant.

Also the Consultation Paper considers for deliberation situations where a property is left unoccupied for a period of time following the exit of the occupant, the DisCo may unknowingly continue to bill the property for the period that the property is unoccupied and transfer the bill to the new customer who might just move into the building.<sup>53</sup> This may put a huge burden on the new occupant if the outstanding bill is to be apportioned between the old and the new occupant as currently provided in section.<sup>54</sup> In addressing quagmire this Regulation is being amended to make provisions where new tenant/occupant should be required to register their information with the DisCos on moving into a new property. The paper proposes an amendment that will incorporate provisions where a new occupant of premises shall contact the DisCo on their first day of moving into the premises which the DisCo shall take into consideration for billing of such customer. Where a new occupant fails to inform the DisCo of their commencement date, it shall be deemed to be a continuation of the old occupant regime and the new occupant shall take responsibility for the payment of any outstanding bills.<sup>55</sup> Finally the paper further contemplates a new provision that will have a clear-cut dissection of the two concepts. According to the proposal, for the purposes of billing and bill settlement, the only recognized customer of a distribution company shall be the registered owner of the property (Landlord) or any person or organization the landlord assigns responsibility to as indicated in the 'Application for Electricity Supply and Agreement Form' submitted to the distribution company. This means that there shall be a clear distinction between a

<sup>53</sup> Consultation Paper on the Review of Customer Protection Regulations in the Nigerian Electricity Supply Industry, July, 2021. Pp 5-6. Assessed through on the 28th July, 2021 through <https://nerc.gov.ng/index.php/component/repository/function/startdown/884/?Itemid=591>

<sup>54</sup> Ibid

<sup>55</sup> Ibid

property owner and the customer of electricity.<sup>56</sup> It need to be pointed out to the NERC Chairman that there seems to be a misplacement of concepts in the proposed amendment. It appears that the property owner who in the reasoning of this amendment is the same as the customer, may be in contract with the DisCo, while the consumer will still be the end user of electricity supplied to the property. This writer also believes that the proposal before implementation requires immediate review in this aspect.

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,<sup>57</sup> 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.<sup>58</sup> The Prepayment Mode means a mode of operation of an SMS whereby payment is generally made in advance of consumption.<sup>59</sup> This framework no doubt mitigated the situation, but the major ugly problem has not been solved. 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.<sup>60</sup> This is exactly the purport of section 67 (1) (a-c) of the EPSR Act 2005. Ownership still resides on the Distribution Company. Thus whether the consumer or the customer procured the said meter or not, he has no ownership or reversionary right over it. This does not in the opinion of this writer foster progress in the industry.

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 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.<sup>61</sup> 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.<sup>62</sup> 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

<sup>56</sup> Ibid

<sup>57</sup> Nigerian Electricity Smart Metering Regulation, Regulation No: NERC/REG/4/2017

<sup>58</sup> Rule 5.2.17 and Rule 3.6

<sup>59</sup> Rule 1.3

<sup>60</sup> Rule 7.3.4

<sup>61</sup> Clause 1 Guidelines For Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013

<sup>62</sup> Clause 2

specified manner under the Guideline.<sup>63</sup> Therefore any licensee intending to import metering systems for deployment in the Licensee's facilities shall obtain a certificate from the Commission.<sup>64</sup> And licensees requiring installers or vendors of the metering system shall only engage persons certified by the Commission as installers and or vendors.<sup>65</sup> In fact, the totality of this Guideline indicates that the NERC regulates directly the activities of Metering System Installers, Manufacturers and Vendors.<sup>66</sup>

The Former Minister of Power; now Minister of Works and Housing, Mr. Babatunde Fashola (SAN), had once said that nothing in the Electricity Power Sector Reform Act gives Electricity Distribution Companies (DISCos) the exclusivity of metering in the sector. In his words on Monday the 14th August, 2017 at the 18th Monthly Power Sector and Stakeholders' meeting in Kumboso, Kano State, the Minister said:

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.<sup>67</sup>

It is the opinion of this writer that in order to cure the anomaly and clearly solve the problem associated with the identities of the customer and consumer, 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,<sup>68</sup> since 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, it is suggested that such report should consider a separate entity, independent of the existing ones along the value chain, to take the sole responsibility of issuing and installing meters for Customers and consumers.

Adopting the Guidelines for Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013 as the ultimate framework to regulate final regulatory procedure on metering in the Nigerian Electricity Industry, will bring to an end the

<sup>63</sup> Clauses 4 (a-b) and 5 (1)

<sup>64</sup> Clause 10 (a)

<sup>65</sup> Clause 10 (b-c)

<sup>66</sup> Clauses 11 and 12

<sup>67</sup> Kolade Adeyemi and John Ofikhenua, "Metering of customers not exclusive right of DISCos" retrieved from <http://thenationonline.ng/metering-of-customers-not-exclusive-right-of-discos-fashola/>

<sup>68</sup> Section 24 (2) (c) of the EPSR Act 2005

long-existing dichotomy between the Customers and Consumers. By so doing, 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.

### 3. Conclusion

There is no doubt that the Guidelines for Certification of Metering Service Providers and Related Matters; Guidelines No: NERC G-0112, 2013 have solved this. It need be pointed out that in the hierarchy of laws in Nigeria; the Guideline is among the lowest. The Guideline derives its authority from Section 32 (2) of the EPSR Act 2005.<sup>69</sup> The dependence of subsidiary legislations on substantive laws for existence, therefore, creates a weakening disposition of the Guidelines. 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.<sup>70</sup> The simple meaning is that since the function of metering has been vested on the DisCos by the Act,<sup>71</sup> it translate to the implication that except there is an urgent and imminent amendment, there would be no success in that regard. This writer therefore, calls for the immediate amendment of the Act dethatching the function of metering from the Distribution Licensees and extending same to a new Stakeholder to be identified as the Metering Systems Providers Licensee.

<sup>69</sup> Cap E Laws of the Federation of Nigeria 2010

<sup>70</sup> Nigerian National Petroleum Corporation (NNPC) & Anr v Famfa Oil Limited (2012) ALLFWLR (Pt 635) 204 at 238 Para G-H Per Rhodes Vivour JSC

<sup>71</sup> See Supra note 48.