

BEFORE THE NIGERIAN ELECTRICITY REGULATORY COMMISSION HOLDEN IN ABUJA

CASE NO NERC.....

IN THE MATTER OF A PETITION AGAINST  
BREACH OF ELECTRICAL POWER SUPPLY OBLIGATIONS TO THE TERRITORY  
AND PEOPLE OF LAGOS STATE OF NIGERIA

AND

WRONGFUL INVOICING OF THE GOVERNMENT OF LAGOS STATE

BETWEEN

PETITIONER: LAGOS STATE GOVERNMENT OF NIGERIA

AND

- RESPONDENTS: 1. POWER HOLDING COMPANY OF NIGERIA PLC  
2. IKEJA ELECTRICITY DISTRIBUTION COMPANY PLC  
3. EKO ELECTRICITY DISTRIBUTION COMPANY PLC  
4. TRANSMISSION COMPANY OF NIGERIA PLC

ARGUMENT IN SUPPORT OF THE APPLICATION

INTRODUCTION

Following a Power Purchase Agreement (PPA) between the Petitioner and the Respondents in June 2000, wherein the Petitioner volunteered to support in tariff subsidy to the Respondents, both parties drew up an agreement which we have annexed as Exhi. R1. It is this transaction which was basically commercial in nature, not being an issue of licence or regulation, that the Petitioner has brought before this Honourable Commission. We therefore seek to object to the jurisdiction of this Court based on the subject matter of this Petition, and more importantly on the competency of the Commission in view of the Arbitration Clause in the Agreement between the Parties.

This Application, has therefore been brought pursuant to S. 251 (1) (r) of the 1999 Constitution of the Federal Republic of Nigeria and sections 1(2), 2, 4 and 5 of the Arbitration and

Conciliation Act (ACA) 1990. It is supported by an 8 paragraph Affidavit Sworn by one Godwin Tyoka'a, a Litigation Clerk in the Law firm of Wali-Uwais & Co.

#### ISSUE FOR DETERMINATION

Whether the Nigerian Electricity Regulatory Commission (NERC) has jurisdiction to entertain this Petition in view of the subject matter of the claims and more importantly the Arbitration Clause in the Agreement between the Parties.

In considering this issue we wish to break it into two phases, viz:

- (i) ***Whether this Honourable Commission has the jurisdiction to adjudicate over this matter?***

The Constitution of the Federal Republic of Nigeria, Cap C23 LFN

Section 251(1) of the Constitution of the Federal Republic of Nigeria 1999, Cap C23 Laws of the Federation of Nigeria 2004, provides thus:

*Notwithstanding anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-*

*(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies*

In the case of **AG. Federation v Abubakar, (2007) 8 NWLR (pt 1035) 117 at 155, paras A-B**, it held that:

*By the proviso to section 251(1) of the 1999 Constitution, a person shall not be prevented from seeking redress against the Federal Government or any of its agencies in action for damages, injunction, declarations or specific performance where the action is based on any enactment, law or equity. In the instant case, the claim of the Respondents was for declaration or injunction affecting the decision of the agencies of the Federal Government*



*and by the provisions of S. 251(1)(r) of the Constitution, it is only the Federal High Court that has jurisdiction to entertain such matters.*

Our position is that this Honourable Commission has no jurisdiction to entertain this matter, as the claims do not come within the purview of jurisdiction of the Commission i.e. sections 32 (1) (f), 32 (2) (d), (f) and (g) and 45 to 47 of the Electricity Power Sector Reform Act under which framework this Commission is being invited to intervene.

It is our contention that the subject matter of this case is not within the territorial jurisdiction of the Commission. We submit that for a Court to assume jurisdiction, it must carefully examine the facts and reliefs sought in a case to determine whether it is justified to exercise jurisdiction. A careful appraisal of the Petitioner's case shows that the subject matter of this petition is the contract of power purchase entered into between the parties, and the relief being sought is a declaration based upon breach of contract. This basically is a commercial transaction which does not in any way relate to regulatory issues concerning power generation and supply as falling under the adjudicatory power of the Commission.

A look at the relief sought by the Petitioner shows that in addition to a declaratory relief, it also seeks an Order of specific performance against the Respondents, viz:

- (a) A declaration that the Respondents and or the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are in breach of their electricity supply obligations to the Government and people of Lagos State and to all electricity consumers within the State.
- (b) An Order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to deliver to the Petitioner the contracted power in addition to the Petitioner the contracted power in addition to power to which the State was entitled prior to the execution of the BPPA.
- (c) A declaration that by virtue of the technical condition of the infrastructure available in the power sector in Nigeria, it was and is impossible to deliver said power to Lagos State in ----

We submit that the entire claims and reliefs being sought border basically on breach of contract and declaratory reliefs which are not within the bracket of the powers exercisable by this Commission.

We submit, further, that the Petitioner's claim could not be sustained under the provisions of sections 32(1)(f) and 32(2)(d)(f) and (g) of the Electric Power Sector Reform Act 2005, as these

provisions border on the control and regulation of electricity generally. Put succinctly Section 47 under which this Petition has also been anchored says that "the Commission may hold a hearing of any matter which under this Act or any other enactment is required or permitted to conduct or on which it is required or permitted to take---"

The emphasis on the above provision is the word "permitted" which in effect translates to this question of jurisdiction. Our contention therefore, is that this Commission is not permitted to adjudicate on this issue which is a commercial transaction bordering on breach of contract. We submit that the appropriate forum to adjudicate on this issue is the Federal High Court as enabled by section 251 (1)(r) of the Constitution of the Federal Republic of Nigeria. This is moreso when this is a dispute between a Federal Government Agency and the Government of Lagos State.

We submit that where the provisions of the law is clear, the Parties cannot confer or vest jurisdiction on the Commission in excess of its powers, as is being done in the present case. We refer the commission to the case of **Madukolu v. Nkemdili (1962) 2 SCNLR 341 at page 499** where the Supreme Court held that before a court can be said to be competent to entertain an action, the subject-matter of the action must inter alia be within the jurisdiction of the court and there must be no feature of the case which prevents the court from exercising jurisdiction.

See also the case of **TRADE BANK V. BELILUS NIG LTD (2003) 9 NWLR PT 825 Pg 432-433**

The Supreme Court also emphasized in the case of **Olutola v. Unilorin, (2004) 18 NWLR Pt 905, pg 416 @ 432-433** that "the issue of jurisdiction goes to the competence of the Court.

We urge the Commission to strike out this application for want of jurisdiction even more particularly as it affects a Federal Government Agency.

**(ii) *The second phase is whether this Honourable Commission ought to stay further proceedings in this Petition pending arbitration***

This pertinent objection borders on the reference to arbitration as per Clause 9 of the Agreement between the Parties, viz:

*All disputes arising out of or in connection with the Agreement shall be finally settled by binding arbitration conducted in accordance with the provisions of the*



*Arbitration and Conciliation Act (Cap 19) Laws of the Federation of Nigeria 1990".*

Section 1(2) of the ACA provides that any such reference in writing, is such as to make that clause part of the contract. Furthermore, section 2 provides that unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the Parties or by leave of the Court or Judge.

It follows that for the Petitioner to do away with these provisions of the Act, it must be by agreement of both parties or with the leave of the court, before it can seek for this Commission's intervention.

Assuming while not conceding that this Commission has jurisdiction over this Petition, the Arbitration Clause herein is a **CONDITION PRECEDENT** which must be fulfilled or properly waived before this Commission can be clothed with jurisdiction or competency if any, to adjudicate on the matter.

The Supreme Court, in the case of **Madukolu & Ors v. Nkemdilim supra** emphasized that a Court is said to be of competent jurisdiction with regard to a suit or other proceedings when among other factors, the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

We submit that this Petitioner has not fulfilled the binding condition of the Arbitration Clause in the Agreement, between the Parties which made reference to arbitration in accordance with the ACA 1990. We refer the Commission to the said Agreement which we have annexed as exhibit R1 to this objection. We submit, further, that the Arbitration Clause 9 must be sustained by this Commission, as any attempt to ignore such binding clause will be tantamount to assuming a defective jurisdiction as enunciated in the **Madukolu case supra** that any defect in competence is fatal for the proceedings are a nullity however, well conducted and decided, the defect is extrinsic to the adjudication.

The Supreme Court has held in **The Owners Of M.V. Lupex Vs. Nigerian Overseas Chartering And Shipping Limited (2003) 15 NWLR PART 844 PAGE 469** and in a long line of cases before it that:

*"Where parties have chosen to determine for themselves that they would refer any of their disputes to arbitration instead of resorting to courts, a prima facie duty is cast upon the courts to act upon their agreement".*

In the case of Kurubo v Zach-Motison (Nig.) Ltd (1992) 5 NWLR (part 239) 102 at 117 the Court of Appeal emphasized the bindingness of an arbitration clause in an agreement and held as follows:

*"...before a Court of law can refuse jurisdiction, the arbitration clause must be mandatory, precise and unequivocal. And in this respect, the arbitration clause should contain the mandatory "shall" and not the permissive and discretionary "may".*

We urge the Commission to hold that unless the Petitioner purged itself of the binding clause, it can not come properly before you; and any proceedings done in this regard will be a nullity. We therefore pray the Honourable Commission to stay further proceedings in this Petition pending referral and final determination of any disputes between the Petitioner and the Respondents by Arbitration.

We refer the Commission to Section 5(1) of the ACA which provides that:

*(1) "If any party to an arbitration agreement commences any action in any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may at any time after appearance and before delivering any pleadings or taking any further steps in the proceedings, apply to the Court to stay the proceedings"*

We therefore maintain that the Petitioner cannot sustain its claim before this Commission by ignoring the Arbitration Clause more particularly as the Respondents have not indicated the willingness to abandon the Arbitration Clause and process and the Honourable Commission is humbly urged to so hold.

Thank you.

DATED THIS 20<sup>th</sup> DAY OF

October

2008



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**FOR SERVICE ON**

THE PETITIONER  
LAGOS STATE GOVERNMENT  
C/O OLASUPO SHASORE (SAN)  
PETITIONER'S COUNSEL  
ATTORNEY GENERAL AND HONOURABLE COMMISSIONER FOR JUSTICE  
LAGOS STATE SECRETARIAT  
ALAUZA, IKEJA