

**BEFORE THE NIGERIAN ELECTRICITY REGULATORY
COMMISSION**

HOLDEN IN LAGOS ON THE 7TH DAY OF JANUARY 2009

CASE No: NERC/03/000004/2008

IN THE MATTER OF:

A PETITION ON BREACH OF ELECTRIC 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

BEFORE

- | | | | |
|----|----------------------|---|--------------|
| 1. | DR. RANSOME OWAN | - | CHAIRMAN |
| 2. | DR. ALIM ABDUL-RAZAQ | - | COMMISSIONER |
| 3. | DR. GRACE EYOMA | - | COMMISSIONER |

APPEARANCES

AKEEM BELLO holding brief for **MR SUPO SHASORE SAN**, Hon. Attorney General of Lagos State for the Petitioner.

JULIA UTULU (MRS.) with **ALIYU IBRAHIM** for 1st to 4th Respondents

RULING

INTRODUCTION

1 The Respondents/Applicants filed a Respondent's Objection dated 20th October 2008 to the
2 Petition of the Petitioner/Respondent seeking for:

3

4 *"an Order striking out the Petition against the Respondents for lack of jurisdiction of this Honourable*
5 *Commission to adjudicate over this matter or IN THE ALTERNATIVE for an Order of this*
6 *Honourable Commission staying further proceedings in the present Petition pending referral of the dispute*
7 *between the Petitioner and the Respondents to arbitration."*

8

9 The grounds on which the application was brought are as follows:

10

11 1. That the subject matter of this Petition is a breach of contract and does not fall
12 within the contemplations and purview of the provisions of Section 32 of the
13 Electric Power Sector Reform Act, 2005 (Cap E7, Laws of the Federation of
14 Nigeria 2004).

15 2. This Petition involves a dispute between a Federal Government Agency and a
16 State government, as such, this Commission is not the appropriate forum for the
17 adjudication of the dispute involving them.

18 3. There is an arbitration clause contained in the Agreement dated 30th June 2000
19 between the Petitioner and the Respondents.

20

21 The Respondent's Objection was supported by an 8 paragraph affidavit sworn to by one
22 Godwin Tyoka'a. Attached to the affidavit in support and marked Exhibit R1 is a copy of
23 Contribution Agreement dated 30th June 2000 which in Clause 9 contained an arbitration
24 clause. The Respondent/Applicant also filed written Argument in Support of Application.

25

26 The Petitioner/Respondent filed a 5 paragraph Counter Affidavit to
27 Respondents/Applicants' Affidavit in Support of Application dated 20th October 2008 as
28 well as Written Reply to Respondents/Applicants' Argument in Support of their Application
29 to strike out the Petitioner's Petition. The Respondents/ Applicants filed a Reply on Points
30 of Law. The parties adopted their written addresses and made further oral submissions on
31 the 16th day of December 2008.

32

33 **BACKGROUND FACTS**

34

35 The Petitioner filed a Petition dated 23rd June 2008 by which the following reliefs were
36 claimed:

37

38 1. A DECLARATION THAT THE 1st Respondents, and or the 2nd, 3rd and 4th
39 Respondents are in breach of their electricity supply obligations to the Government
40 and people of Lagos State and to all electricity consumers within the State.

41 2. AN ORDER directing the 1st, 2nd, 3rd and 4th Respondents to deliver to the Petitioner
42 the contracted power in addition to power to which the state was entitled prior to
43 the execution of the Barge Power Purchase Agreement (BPPA).

44 3. IN ALTERNATIVE to 2 above, a declaration that by virtue of the technical
45 condition of the infrastructure available in Nigeria, it was and is impossible to deliver
46 said power to Lagos State.

47 4. All other orders as the Nigerian Electricity Regulatory Commission may seem fit in
48 the circumstances.

49 A summary of the facts as gleaned from the Petition is as follows:

50 In 1999, the Lagos State Government in an attempt at providing uninterrupted power supply
51 to Residents of Lagos State conceived the idea of an Independent Power Project (IPP) and

52 invited Enron Corporation of the United States of America to undertake the project. Due to
53 the legal and regulatory framework, as well as existing operational parameters of the Nigeria
54 Electricity Supply Industry at the time, the contracting parties to the BPPA by which the
55 power was to be produced by the IPP and sold were:

- 56 i. Lagos State Government "LASG"(the Petitioner/Respondent);
- 57 ii. The defunct National Electric Power Authority now represented by the
58 Respondents/Applicants herein as a result of the breaking up of the
59 monopoly of NEPA and unbundling of its business under the provisions of
60 the Electric Power Sector Reform Act and the establishment of a
61 competitive electricity market;
- 62 iii. Federal Government of Nigeria; and
- 63 iv. Enron Nigeria Holding Ltd and Enron Nigeria Barge Ltd (Enron Parties)
64 later replaced by AES by way of assignment of interest of Enron Parties.

65
66 Under the BPPA, the Enron Parties were required to generate power for sale to NEPA, in
67 return for specified capacity and energy prices. NEPA would purchase the power, and
68 supply same to customers in specified areas of Lagos State in addition to, and not in
69 substitution for electricity that is generated otherwise than by such Barge. Under the
70 amended BPPA dated 30th June 2000 LASG that is the Petitioner/Respondent herein was
71 stated to also be the purchaser of the power and was made jointly liable with NEPA for
72 paying for the capacity charges under Clause 9 thereof.

73
74 Lagos State Government demonstrated support for the IPP by entering into a
75 Contribution Agreement dated 30th June 2000 with NEPA, whereby Lagos State
76 Government agreed to pay NEPA 21.15% of the amount due from or invoiced to NEPA,
77 as 'capacity payment' under the BPPA.

78
79 Consequent upon the Contribution Agreement, on 14th November 2000, the Lagos State
80 Government instructed the Federal Ministry of Finance to effect a direct debit of its
81 statutory allocation from the Federation Account for the amount due as its contribution,

82 to capacity payment. The instruction was however to serve only as further security for
83 payment of Lagos State Government's obligations, under the BPPA.

84

85 In June 2001, the IPP began commercial operations and NEPA began to purchase
86 capacity and energy under the BPPA. It is now being alleged by the Petitioner that,
87 NEPA (whose functions have been taken over by the Respondents/Applicants following
88 the reform of the power sector) breached the express provisions of the BPPA and the
89 spirit of the Contribution Agreement by failing and/or refusing to devote any or all of the
90 electrical output of the IPP to customers in the areas designated in the BPPA.

91

92 The Petitioner also alleges that despite the breach, NEPA sought to obtain from the Lagos
93 State Government, contributions to the BPPA capacity tariffs in line with the
94 Contribution Agreement. Lagos State Government disputed the invoices and cancelled
95 the authorizations for the direct debits. This notwithstanding, NEPA and its successor-in-
96 interest PHCN continued to invoice Lagos State Government for contribution to the
97 capacity payments, while the Federal Ministry of Finance, in reliance on NEPA/PHCN's
98 invoices continued to make deduction at source from Lagos State Government statutory
99 allocation.

100

101

102 Lagos State Government has now filed the instant Petition before the Nigerian Electricity
103 Regulatory Commission (the Commission), seeking redress against the alleged breach of the
104 Respondents' obligations under the Barge Power Purchase Agreement and the stoppage of
105 alleged wrongful deductions and reimbursement of all amounts wrongly deducted under the
106 Contribution Agreement. The Respondents have raised objection to the jurisdiction of the
107 Commission to hear and determine the Petition on the ground that the reliefs sought in the
108 Petition do not fall within the regulatory functions of the Commission and that the matter
109 must first be referred to arbitration in view of the arbitration clause in the Contribution
110 Agreement.

111

112 Both counsel submitted and exchanged written arguments and made oral submissions before
113 us. In her written submission, counsel to the Respondents/Applicants Mrs. Julia Utulu of
114 Wali-Uwais & Co formulated the following issue for determination: *Whether the Nigerian*

115 *Electricity Regulatory Commission (NERC) has jurisdiction to entertain this Petition in view of the subject*
116 *matter of the claims and more importantly the Arbitration Clause in the Agreements between the parties.*
117 However in her oral argument before us she submitted that the issue of jurisdiction should
118 be considered separately from the issue of stay pending arbitration.

119

120 Counsel adopted her written argument in support of the Objection dated 20th October 2008
121 as well as her Reply on Points of Law dated 28th day of November 2008 and submitted that
122 by virtue of the provision of section 251(1) CFRN 1999, only the Federal High Court has
123 jurisdiction to entertain any matter which relates to any declaration or injunction affecting
124 the decision of the agencies of the Federal Government. She said that insofar as the claims
125 of the Petitioner are declaratory reliefs, such are not within the powers exercisable by the
126 Commission under Section 32 EPSR Act 2005. She cited and relied on ***A.G Federation v***
127 ***Abubakar*** [2007] 8 NWLR (pt. 1035) 117; ***Madukolu v Nkemdilim*** (1962) 2 SCNLR 341,
128 499. In her oral submission she stated that the transaction was not a simple contract with
129 which NERC should be involved because there are other parties to the contract who were
130 not brought before the Commission such as the Enron Parties and the Federal Government
131 of Nigeria. She said the matter in question was a high profile transaction involving many
132 parties and not just a license or regulatory issue. She said that Respondents/Applicants were
133 forced into the BPPA transaction by the Petitioner/Respondent who on voluntarily
134 engaging in power production project realized it could not proceed with the transaction
135 without the Respondents/Applicants. She concluded that having voluntarily assumed the
136 risk (including making voluntary contribution by virtue of the Contribution Agreement) they
137 could not be heard to now complain on the basis of *voluntia non fit injuria*. She said that the
138 power purchased under the BPPA from the Enron Parties now AES was for the entire
139 country and that nowhere in the BPPA was power reserved for the people of Lagos State so
140 no issue of supply or failure to supply power arose at the time of the agreement. She said
141 that there was no supply obligation that arose from the agreements to entitle the Petitioner
142 to complain.

143

144 Finally, learned counsel submitted that the supervisory and regulatory power conferred by
145 the Act did not extend to the grant of declaratory relief as such powers were deliberately
146 excluded by the legislature i.e. the mention of one or more things of a particular class may be
147 regarded as excluding all other members of the class (*Expressio unius est exclusio alterius*- a

148 canon of construction holding that to express or include one thing implies the exclusion of
149 the other, or of the alternative). Counsel relied on *Onuorah v KPRC* [2005] 6 NWLR (pt.
150 921) 393 to the effect that jurisdiction is determined by the Plaintiff's claim and urged the
151 Commission to decline jurisdiction. She referred to section 32 of EPSRA and submitted that
152 by literal interpretation, the powers of the Commission under that section did not cover the
153 reliefs claimed in the Petition.

154

155 On the issue of stay pending arbitration, counsel submitted that the arbitration clause in the
156 agreement has divested the Commission of its jurisdiction, if any, as it is a condition
157 precedent which must be fulfilled or properly waived before the Commission can assume
158 jurisdiction. Counsel cited and relied on *M. V Lupex v NOC&S Ltd* [2003] 15 NWLR (pt.
159 844) 469 and Section 5(1) of the Arbitration and Conciliation Act 1990. Reference was also
160 made to Clause 9 of the Contribution Agreement and Clauses 23 and 24 of the BPPA and it
161 was submitted that under sub clauses 2 and 3 of Clause 23 of the BPPA except for dispute
162 resolved through negotiation, arbitration shall be the exclusive method of resolving disputes
163 and that all such disputes shall be finally settled by arbitration. She said that Clause 9 of
164 Contribution Agreement provides that all disputes arising out of or in connection with the
165 agreement shall be finally settled by binding arbitration. She submitted that the Petitioner
166 could not ignore the provisions of the agreement on arbitration because they were
167 mandatory clauses and condition precedent. She referred to *Madukolu V Nkemdilim* and
168 *Kurubo V Zac-Mortison Nigeria Limited* [1992] 5 NWLR 106 and submitted that where
169 an agreement makes provision for arbitration, before an action can be instituted in a court of
170 law, any aggrieved party must first seek the remedy available in the arbitration. In rounding
171 up, she submitted that the Petition was not properly before the Commission and ought to be
172 struck out. In response to a question from the Commission she submitted that the EPSRA
173 which came into force in 2005 did not make a distinction between Federal agencies and
174 other power sector participants in vesting regulatory power over the sector in the
175 Commission.

176

177 On his part, learned counsel for the Petitioner Mr. Akeem Bello holding the brief of Mr.
178 Supo Shasore SAN the Hon. Attorney General of Lagos State in opposing the Objection,
179 relied on the Petition dated 23rd June 2008, Counter Affidavit dated 11th November 2008 and

180 Written Reply. In their Written Reply the Petitioner/Respondent raised two issues for
181 determination as follows:

182 a) *Whether section 251 of the CFRN 1999 precludes the Commission from assuming jurisdiction to*
183 *entertain the petition before it.*

184 b) *Whether the respondent's (sic) objection on stay of proceedings based on the arbitration clause can be*
185 *sustained on point of law.*

186

187 In adopting his Written Reply during oral argument learned counsel for the Petitioner
188 /Respondent on his Issue One submitted that the EPSRA 2005 vests in the Commission
189 very wide powers of regulation coupled with extensive dispute resolution powers which
190 extends to and covers every person insofar as such person/entity deals with or is involved in
191 electricity generation, supply, distribution etc. He cited Sections 32 and 63(1) of the Act and
192 submitted that the Commission has a wide platitude of powers to intervene to regulate the
193 electricity sector and that that is the ground on which their Petition is hinged. He referred to
194 the reliefs claimed in the Petition and submitted that for the purpose of arguing the
195 Objection to jurisdiction it must be assumed that the facts and content of the Petition are
196 true and deemed to be admitted by the Respondents/Applicants. He said that they can
197 therefore not at this stage challenge the factual basis of the petition. He submitted that the
198 reliefs raised the issue of breach of an obligation to supply electricity to the government and
199 people of Lagos State. He said it is an issue of breach of contractual obligation. He
200 submitted that the Commission is empowered to hold a hearing on any matter which under
201 the Act or any other enactment it is required or permitted to take action and the
202 Commission shall hold public hearings on matters which it determines to be of significant
203 interest to the general public. He submitted that supply of electricity to Lagos State in the
204 face of existing scarcity of power was of public interest. He said that the BPPA and
205 Contribution Agreement were for the benefit of the people of Lagos State and contractual
206 supply obligation to Lagos State assumed by the Respondents/Applicants under those
207 agreements were in addition to those already enjoyed by Lagos State prior to output of
208 Enron/AES Parties IPP. He said that the Petitioner/Respondent could not undertake
209 financial obligations on behalf of the entire nation.

210

211 Counsel submitted further that Section 251(1) (r) CFRN 1999 confers exclusive
212 jurisdiction on the Federal High Court on matters relating to executive or administrative

213 action of the Federal Government or its agencies and same does not confer on the Court
214 exclusive jurisdiction in relation to matters that is contractual or commercial in nature.
215 He referred to *Onuorah v KPRC* (supra), *FMBN v Uwadiale* [2004]10 NWLR (pt.882)
216 632, *Ministry of Works v Thomas Nig. Ltd* [2002] 2 NWLR (pt.752) 752.

217
218 He submitted that the Commission was set up by law to perform certain regulatory
219 functions and that any dispute arising from regulatory functions of the Commission is what
220 should go to the Federal High Court since that is what would constitute executive or
221 administrative action of a Federal Government agency. However if the Commission should
222 enter into a supply contract for purchase of goods say a generator and there is a dispute with
223 the contractor, that transaction is not an executive or administrative action that should go
224 to the Federal High Court. He submitted that the Federal high court has limited exclusive
225 jurisdiction. He submitted that by the proviso to Section 251 of CFRN 1999 nothing
226 prevents a person from seeking redress against the Federal Government or any of its
227 agencies in an action for damages, injunction or specific performance where an action is
228 based on any enactment, law or equity. He submitted that it is a misconception to state that
229 once a Federal agency was involved the Federal High Court is the only court for
230 determination of the case. Rather, he submitted, that once the action is based on contract,
231 that is pure contract, it is not within the exclusive jurisdiction of the court. He referred to
232 paragraph 10 of the Petition. He also referred to Clause 9.2 of the BPPA which provides as
233 follows: “NEPA shall ensure, whether by means of circuit breakers or otherwise, that an amount of
234 capacity and electrical energy equal to or greater than the electrical energy associated with the entire output of
235 each Barge is made available for off-take from Grid by customers, in addition to, not in substitution for, any
236 electricity that is generated otherwise than by such Barge.” He further submitted that Clause 11 of the
237 BPPA defines “customer” as any person or entity living within a geographical area specified
238 in the Ninth Schedule (as modified from time to time by agreement between the Purchasers.
239 He submitted that Ninth Schedule defines geographical area as **Ikeja and Oshodi as Phase**
240 **1 and Victoria Island, Marina, Lekki and Apapa as Phase 2.** He submitted that from
241 those provisions the entire output from each Barge was to be channeled to consumers in
242 Lagos. He further submitted that the Respondents are limited liability companies and cannot
243 claim to be agencies of the Federal government by the mere fact that the entirety of their
244 shareholding is held on behalf of the Federal government.

245

246 He submitted that the entire process under the Electric Power Sector Reform Act (EPRSA)
247 2005 was to completely unbundle NEPA and turn its successor companies into limited
248 liability companies. These subsidiaries can sue and be sued in their names and should take
249 liability to that extent and not as agencies of the Federal government he submitted. He
250 further submitted, upon a question from the Commission that as at the time of the
251 agreement NEPA was a Federal agency but the position has changed since the unbundling.
252 However, even then since the transaction was contractual and not an executive or
253 administrative action of a Federal agency the Federal High Court would still not have
254 exclusive jurisdiction. On the submission of the Respondents/Applicants that all necessary
255 parties were not before the Commission, he submitted that not all parties to the agreement
256 may owe the Petitioner an obligation which they feel has been breached warranting a
257 complaint and they have only brought before the Commission those they feel breached their
258 obligation.

259

260 On the second issue for determination formulated by the Petitioner/Respondent, counsel
261 submitted that the arbitration clause in the agreements cannot divest the Commission of
262 jurisdiction as the Commission is not a court of law when holding a hearing. Counsel quoted
263 Section 5 of the Arbitration and Conciliation Act (ACA) and submitted that the Commission
264 is a regulator of a sector of the economy and not a court within the contemplation of the
265 ACA. Counsel submitted further that even if the Commission was construed to be a court
266 which he did not concede, the grant of stay is not automatic as the grant is at the discretion
267 of the Commission and the burden lies on the party asking the court to refer parties to
268 arbitration to show that dispute is within the contemplation of Arbitration Agreement. He
269 referred to the cases of *M.V Lupex v NOC&S (supra)* and *OSHC v Ogunsola* [2000] 14
270 NWLR (pt. 687) and submitted that it is not automatic that once there is an arbitration
271 clause any prayer for stay of proceedings is granted as a matter of course. He said that the
272 grant of stay depends on the facts and circumstances of each particular case.

273

274 Finally, counsel submitted that the subject matter of the petition is of overwhelming interest
275 to the general public which will one way or another affect the lives of the populace and
276 urged the Commission to assume jurisdiction and entertain the petition.

277

278

279

280

281

282 **ISSUES FOR DETERMINATION**

283

284 We have considered the arguments presented before us, particularly the issues for
285 determination as formulated by the parties. We note that during oral submission both
286 counsel agreed that the issue of jurisdiction ought to be considered separately from the issue
287 of the arbitration clause. We therefore hold that the following issues arise for determination:

288

289 a) Whether the Nigerian Electricity Regulatory Commission “the Commission” or
290 “NERC” has the jurisdiction, power or authority to hear the Petition of Lagos State
291 Government against the Respondents having regard to the reliefs claimed.

292 b) Whether the arbitration clauses in the BPPA and Contribution Agreement precludes
293 the Commission from hearing the Petition and if not whether in the circumstance
294 stay pending arbitration ought to be granted.

295

296 **DECISION ON ISSUE a)**

297

298 It is trite law that in considering an objection to jurisdiction the facts contained in the
299 Petition is to be assumed to be true and unchallenged. We would therefore in
300 considering the Respondents /Applicants Objection assume the facts contained in the
301 Petition to be true. Also, it is well established that jurisdiction is determined upon the
302 reliefs claimed. The reliefs claimed in paragraph 3 of the Petition are reproduced as
303 follows:

304

305 *3.1 A DECLARATION THAT THE 1st Respondents, and or the 2nd, 3rd and 4th Respondents*
306 *are in breach of their electricity supply obligations to the Government and people of Lagos State and*
307 *to all electricity consumers within the State.*

308 *3.2 AN ORDER directing the 1st, 2nd, 3rd and 4th Respondents to deliver to the Petitioner the*
309 *contracted power in addition to power to which the state was entitled prior to the execution of the*
310 *BPPA.*

311 3.3 *IN ALTERNATIVE to 2 above, a declaration that by virtue of the technical condition of the*
312 *infrastructure available in Nigeria, it was and is impossible to deliver said power to Lagos State.*
313 3.4 *All other orders as the Nigerian Electricity Regulatory Commission may seem fit in the*
314 *circumstances.*

315

316 We are of the view that the crux of the Petition as shown by the reliefs sought was the
317 claim that the Respondents/Applicants failed to supply additional electricity to the grid
318 for the benefit of consumers in the designated areas under the BPPA and continued to
319 impose wrong invoices on the Petitioner by way of capacity payment for power duly
320 produced but which it was apparently alleged not to be in a position to supply contrary to
321 the Barge Power Purchase Agreement and the Contribution Agreement respectively. We
322 are of the view that to determine whether these reliefs sought fall within the regulatory
323 functions of the Commission, it is pertinent to examine the objectives of the National
324 Electric Power Policy which informed the reform of the electric power sector by
325 enactment of the Electric Power Sector Reform Act (EPSRA) 2005. We would also
326 examine the functions of the Commission under the Act. It is also important to consider
327 whether the parties are subject to regulation by the Commission.

328

329 The National Electric Power Policy as developed by the Electric Power Sector
330 Implementation Committee set up by the National Council of Privatisation (NCP) and
331 Bureau of Public Enterprises (BPE) expresses the determination of the Federal Government
332 to modernize and expand the Electricity Supply Industry (ESI) in Nigeria through private
333 sector funding. The main priorities of the policy were:

- 334 - licensing of private electricity generation and distribution companies;
- 335 - creation of efficient market structures for the ESI within a clear regulatory
336 framework;
- 337 - the setting-up of a transparent and an independent regulatory agency to
338 monitor and enforce technical and economic regulation of the sector;
- 339 - to put in place a regime that will set out pricing for the electricity market, so
340 as to give more certainty to the allowable costs and likely tariffs for the
341 various sectors of the electric power market;

342 - the reform of the power generation and sales/marketing process and to
343 develop a new market structure based on bilateral contracts between
344 generating and distribution companies.

345

346 It was in the spirit of the above objectives that NERC was established under Section 31 of the
347 EPSR Act with the following primary functions in Section 32. The section provides as follows:

348

349 *“32. - (1) Subject to this Act, the Commission shall have the following principal objects:*

350

351 *(a) To create, promote and preserve efficient industry and market structures, and to ensure optimal*
352 *utilization of resources for the provision of electricity services;*

353 *(b) To maximize access to electricity services, by promoting and facilitating consumer connections to*
354 *distribution systems in both rural and urban areas;*

355 *(c) Ensure that adequate supply of electricity is available to consumers;*

356 *(d) To ensure that prices charged by licensees are fair to consumers and are sufficient to allow the*
357 *licensees to finance their activities and to allow for reasonable earnings for efficient operation;*

358 *(e) To ensure the safety, security, reliability and quality of service in the production and delivery of*
359 *electricity to consumers;*

360 *(f) To ensure that regulation is fair and balanced for licensees, consumers, investors and other*
361 *stakeholders.*

362 *(2) for the furtherance of the objects referred to in subsection (1) above, the Commission shall*
363 *perform the following functions:*

364

365 *(a) promote competition and private sector participation, when and where feasible;*

366 *(c) establish appropriate consumer rights and obligations regarding the provision and use of*
367 *electricity services;*

368 *(d) license and regulate persons engaged in the generation, transmission, system operation,*
369 *distribution and trading of electricity;*

370 *(f) monitor the operation of the electricity market; and*

371 *(g) undertake such other activities which are necessary or convenient for the better carrying out of or*
372 *giving effect to the objects of the Commission.”*

373

374 The EPSRA 2005 gives the Commission power and authority to carry out its functions under
375 the Act or under any other enactment through public hearings when it provided in Section 47
376 as follows:

377

378 *“47. - (1) The Commission may hold a hearing of any matter, which under this Act or any other*
379 *enactment is required or permitted to conduct or on which is required or permitted to take any action*
380 *and the Commission shall hold public hearing on matters which the Commission determine to be of*
381 *significant interest to the general public.*

382 *(2) Where the Commission is required to, or otherwise decides to, hold a hearing, all persons having*
383 *an interest in such matter shall, as far as reasonably practicable, be notified of the questions at issue*
384 *and given an opportunity for making representation if they so wish.”*

385

386 Under Section 49 the Commission can refer any question of law to the Federal High Court
387 for determination either on its own initiative or on request of a party. The EPSRA 2005
388 made elaborate grievance procedure in Section 50 for persons dissatisfied by decisions of the
389 Commission by which an aggrieved person can ask for review of a decision of the
390 Commission or a rehearing. It provides *inter alia*,

391

392 *“50. - (1) Subject to this section, any person aggrieved by;.....*

393 *(g) The outcome of any arbitration or mediation by the Commission of a dispute between licensees;*

394 *(h) Any other decision of the Commission; may apply to the Commission for review of the decision,*
395 *order or refusal.”*

396 The EPSRA 2005 also established a licensing regime for all participants in power sector.
397 Sections 62 (1) and 63(1) and (2) provide as follows:

398

399 *“62. - (1) No person, except in accordance with a license issued pursuant to this Act or deemed to have*
400 *been issued under section 98(2), shall construct, own or operate an undertaking other than an undertaking*
401 *specified in subsection (2) of this section, or in any way engage in the business of;*

402 *(a) Electricity generation, excluding captive generation;*

403 *(b) Electricity transmission;*

404 *(c) System operation;*

405 *(d) Electricity distribution; or*

406 (e) *Trading in electricity.*”

407 “63. - (1) *A licensee shall comply with the provisions of his license, regulations, codes, and other*
408 *requirements issued by the Commission from time to time.*

409 (2) *Unless stayed by a court of competent jurisdiction, each licensee shall duly implement or follow,*
410 *as the case may be, Commission orders and written notices, notwithstanding that the licensee has or may*
411 *intend to take legal action challenging any such order or notice.*”

412

413 Each licensee was required to render its services in accordance with the terms of the license.
414 For instance Section 67 (2) provides that “*a distribution licensee may also have the obligation to*
415 *provide electricity to its distribution customers, pursuant to the terms of a trading licensee issued by the*
416 *Commission to the distribution licensee.*”

417

418 Under Section 80 of EPSRA 2005 the Commission can develop customer service standards,
419 complaint procedures, codes and procedures for handling electricity supply, disconnections,
420 etc and all licensees are to comply with these standards and the Commission under
421 subsection 3 of Section 80 shall establish standards for compensation to customers who do
422 not enjoy regular power supply.

423

424 Section 76 of EPSRA 2005 provides for tariff regulation by the Commission. All generation
425 and trading in power and all transmission, distribution and system operation are subject to
426 tariff regulation including regulation of prices to prevent market abuse.

427

428 The power of the Commission to make regulations under Section 96 of EPSRA 2005
429 include among others power to make regulation in respect of (j) handling customer related
430 matters such as complaint handling, non -payment of bills, connections and disconnection,
431 (n) procedure for market power monitoring, mitigation and enforcement, (p) fines and
432 penalties that may be payable by licensees or customers for violations of provisions of the
433 Act.

434

435 Section 98 makes elaborate consequential and transitional provisions with respect to existing
436 transactions at the time the Act came into force. In summary it repeals the Electricity Act
437 and NEPA Act but preserves all regulations and transactions made under those laws so far

438 as they are consistent with the EPSRA 2005 and subject to further regulation by the
439 Commission.

440

441 To fully implement the new national power policy which seeks to transfer funding of power
442 generation and distribution from public to private sector, the Act in Section 1 provides for
443 formation of initial holding company and successor companies to whom the assets of the
444 monopoly NEPA is to be unbundled. The Commission is to advise the Minister on the
445 progress towards establishment of a fully competitive electricity market which is the
446 objective of the Act and the national policy behind it. The Commission under Section 82 has
447 on-going responsibility of ensuring that the market remains competitive. It provides:

448

449 “82. - (5) *The Commission shall also have an ongoing responsibility to consider, in respect of services in*
450 *competitive market, the prevention or mitigation of abuses of market power, in its decisions and orders*
451 *regarding matters such as, but not limited to, license application and the grant of license; license terms and*
452 *conditions; the setting of prices and tariffs; and whether or not to approve a merger, acquisition or affiliation.”*

453 Emphasis supplied.

454

455 By relief 3.1 of the Petition, to wit: “*A declaration that the Respondents are in breach of*
456 *their electricity supply obligations to the Government and People of Lagos State and to*
457 *all electricity consumers within the state”*, the Petitioner calls on the Commission to
458 exercise its power to ensure adequate supply of electricity and protection of consumers in
459 Lagos State by way of declaration of supply obligations of the Respondent under the
460 BPPA and Contribution Agreement. We hold that both agreements though pre 2005 the
461 date of commencement of EPSRA 2005, being agreements as at that date were
462 preserved subject the Commission’s regulations under the provisions
463 of Section 98 of the Act. We hold further that grant of declaration on supply obligation of a
464 licensee is within the regulatory functions of the Commission as contained in sections 32(1)
465 (b),(c) (e), 32(2)(c), 67 and 80 of the Act. Also, failure to supply additional power for
466 consumers in the designated areas as agreed under the Power Purchase Agreement could
467 potentially amount to an abuse of market power if it is shown that the Respondents had
468 dominant position in the market and the Commission has a duty to prevent such abuse if
469 proven under section 80(5) of the Act. In *United Brands V Commission* [1978] ECR 207
470 in considering allegation of abuse of dominant position by a major player in the European

471 banana market, the European Court of Justice (ECJ) *inter alia* described four types of market
472 abuse that can occur. First, is preventing distributors from selling the product. Second, is
473 refusing to supply the product to a particular distributor or consumer. Thirdly, is imposing
474 different selling prices for different distributors or consumer markets, that is, price
475 discrimination. Lastly, is charging unfair pricing that is, prices that were too high in relation
476 to the economic value of the product. We therefore hold that having regard to relief 3.1
477 sought in the Petition, the Commission is well vested with power and authority to consider
478 the Petition.

479

480 In relief 3.2 of the Petition the claim was for:

481

482 *3.2 AN ORDER directing the 1st, 2nd, 3rd and 4th Respondents to deliver to the Petitioner the*
483 *contracted power in addition to power to which the state was entitled prior to the execution of the*
484 *BPPA.*

485 We hold that relief 3.2 is a consequential relief to relief 3.1. It seems to us that if the
486 declaration sought as to the alleged supply obligation of the Respondents were to succeed,
487 then a direction for delivery of the power the subject of the supply obligation could follow.
488 We hold that the various sections of EPSRA 2005 reproduced above empower the
489 Commission to give directions on delivery of power and enforcement of procedures for
490 supply, connection and disconnection of consumers and potential consumers.

491

492 Relief 3.3 of the Petition is an alternative claim to relief 3.2 and seeks as follows:

493 *3.3 IN ALTERNATIVE to 2 above, a declaration that by virtue of the technical condition of the*
494 *infrastructure available in Nigeria, it was and is impossible to deliver said power to Lagos State.*

495 We hold that the Commission is mandated to ensure market efficiency and competitiveness
496 of the electric power market sector of the economy. That function requires that the
497 Commission ensures that consumers pay only a reasonable price for what is consumed and
498 suppliers recover their cost and reasonable profit. To achieve this the Commission is to
499 ensure that there are no abuses of the market by any participant as for instance receiving
500 payment for power which a supplier is incapable of providing or a customer paying for
501 power which is unavailable. Such actions could lead to market distortion and inefficiencies.
502 We therefore hold that determination of whether a licensee is capable of providing or

503 distributing the power obligated to under a contract would fall within the jurisdiction or
504 functions of the Commission.

505

506 Relief 3.3 of the Petition is an omnibus ground and seeks as follows:

507 *3.4 All other orders as the Nigerian Electricity Regulatory Commission may seem fit in the*
508 *circumstances.*

509 We hold that this relief would enable the Commission make such orders as may seem
510 necessary in the circumstances. See *Peter Obi V. INEC* [2007] 11 NWLR (pt. 1046) 565

511 We are unable to agree with the Respondents/Applicants submission that the
512 jurisdiction of the Commission was restricted to licensing and regulatory
513 matters and as such could not consider a petition based on “*high profile*
514 *contractual transaction between the parties to the BPPA and the Contribution*
515 *Agreement.*” As pointed out earlier those agreements by virtue of the
516 provisions of Section 98 of EPSRA 2005 were subject to the new regime
517 under the Act. In so far as the Act makes provisions that affect the
518 agreements or the Commission makes regulations or sets standards or inserts
519 trading terms in licenses or deemed interim licenses, the agreements are to be
520 construed as amended to that extent. The question whether any such changes
521 in the law applicable to the agreement have occurred in this Petition is to be
522 left to the hearing of the Petition itself. Suffice to say that the BPPA in the
523 Interpretation Clause at page 4 as well as Clause 28 ii anticipated that there
524 could be a change in law and then makes elaborate provisions to save those
525 parts of the agreement not inconsistent with the new law by stating that the
526 invalidity or unenforceability of any provision shall not affect the rest of the
527 agreement. It provides as follows:

528 Interpretation Clause

529

530 **“Change in Law”** means (i) any Applicable Laws coming into effect after the date
531 hereof, (ii) any such Applicable Laws in force at the date hereof being amended, modified or
532 repealed, (iii) any change in the interpretation or application of any Applicable Law after
533 the date hereof, (iv) any requirement to obtain a Governmental Approval coming into effect
534 after the date hereof, (v) any requirement to extend, reissue, or replace a Governmental

535 *Approval obtained by Owner and/or its Project related Affiliates being made subject to*
536 *new terms or conditions or otherwise becoming unable to be obtained, and which (in each*
537 *case) has a material impact on the Project and/or Owners or such Affiliates performance of*
538 *its obligations or enjoyment of its rights hereunder, including (for the avoidance of doubt)*
539 *any of the foregoing which cause Owner or its Affiliates to incur additional cost or expense*
540 *or that cause Owner or its Affiliates to operate the Project in a less efficient or less*
541 *profitable manner or that cause Owner to be obligated to pay to the Lenders any additional*
542 *amount or to withhold any amount from amounts due from Owners or its Affiliates to the*
543 *Lenders.*

544

545 Clause 28:

546

547 “(28) ***Entire Agreement and Severability***

548 *(ii) The invalidity or unenforceability of any provision of this Agreement shall not*
549 *result in invalidation of the entire Agreement. Instead, this Agreement shall be construed,*
550 *if possible, in a manner to give effect by means of valid provisions to the intent of the Parties*
551 *to the particular provision or provisions held to be invalid, and, in any event, all other*
552 *terms shall remain in full force and effect.”*

553

554 We hold that the enactment of EPSRA 2005 is change of law and that PHCN and all its
555 limited liability successor companies are subject to direct oversight function of NERC,
556 without prejudices to Federal Government of Nigeria (FGN) share holding. It is in the light
557 of such change in law that the impact of the EPSRA 2005 on the agreement ought to be
558 considered. As shown from provisions of the Act reproduced above, the licensing terms,
559 procedures, standards and codes of the Commission have a direct impact on all contracts
560 entered into by any participant in the power sector and the Commission has sufficient
561 executive powers to monitor the market and ensure that all electricity suppliers and the
562 associated contracts comply with its standards and procedures.

563 Indeed the Commission was set up as a special regulatory authority in the mould of the
564 Securities and Exchange Commission (SEC) and Nigeria Communication Commission
565 (NCC) and like them is vested with executive, legislative and quasi judicial powers. It is
566 therefore not correct that the Commission cannot adjudicate over dispute that are

567 commercial or contractual in nature. Section 47 gives the Commission power to conduct
568 hearing. Section 80(1)(b) authorizes the development of a Customer Complaint Handling;
569 Standards and Procedure. The Commission pursuant to this section has issued its regulation
570 on Customer Complaint Handling; Standards and Procedure. Further, Section 50 of EPSRA
571 2005 provides for a grievance procedure which consists of rehearing or review of decision of
572 the Commission or its internal organs such as Compliant Officer or Forum under the
573 Customer Compliant Procedure. We hold that the above provisions and the Act, read as a
574 whole directly gives the Commission power to resolve disputes. More importantly however,
575 is that, in so far as commercial and contractual relationships affect the power sector in any
576 way listed in S. 32 of EPSRA, the Commission can intervene. It follows that the
577 Respondents/Applicants submission that NERC has no power to resolve dispute by
578 application of *expressio unius est exclusio alterius* principle to section 32 of EPSRA is
579 misconceived. This is because Section 32 ought to be read together with Sections 47, 50, 76
580 and 80 of the Act. The better principle is that which says that legislation should be read as a
581 whole in order to discover the intention of the law maker. Applying this principle, there is
582 no dispute that the Commission has powers under Sections 47, 50 and 80 of EPSRA to
583 resolve disputes in addition to its regulatory functions under Sections 32 and 76 and even in
584 respect of its regulatory functions under Section 32, it has the power to conduct hearings
585 under Section 47 that can arise as a result of complaint, petition or its own direct
586 investigation of market conduct of industry participants in order to enable it hear all parties
587 before taking a decision whether judicial i.e. order, executive i.e. directive or legislative i.e.
588 regulation.

589

590 The current international best practice in regulation is consultative regulation. This
591 practice is now seen as part of the requirement of fair hearing imposed by Section 36 of
592 the 1999 Constitution. It is expected that the Commission should give hearing to parties
593 likely to be affected by its decision before the Commission takes any executive or
594 legislative action under S. 32 of EPSRA, even where the proposed action is
595 occasioned by the Commission's own independent investigation. If the Commission is
596 required by EPSRA to conduct public hearing for executive or legislative action, then talk
597 less of its dispute resolution function. We therefore hold that in its dispute resolution
598 function hearing a complaint or petition is imperative to enable the Commission fulfill its
599 constitutional duty under Section 36 of the 1999 Constitution. We are therefore satisfied

600 that having regard to the reliefs sought in the Petition, the Commission has authority to
601 hear the complaint even if it is to determine whether the Respondents are worthy of
602 retaining their licenses or are keeping best practices in power business on which the
603 Commission after hearing can give directives in the overall interest of the power sector and
604 the protection of the public interest. It is significant that relief 3.4 in the Petition
605 seeks *“All other orders as the Nigerian Electricity Regulatory Commission (the Commission) may*
606 *seem fit in the circumstances.”*

607

608 Our view is that even if this omnibus relief was not sought, the Commission still had
609 powers under Section 32 to act to protect the integrity of the market, encourage
610 competition, protect consumers and eliminate market inefficiencies.

611

612 Again, the relief sought by the Petitioner to compel the Respondents to deliver the
613 contracted power to the Petitioner, is in the realm of specific performance and in line with
614 the spirit of the National Electric Power Policy. So also is the alternative relief for
615 declaration that the Respondent was incapable of providing the electricity for which the
616 Respondent was being paid. In our opinion, The Commission has not only the power and
617 authority under section 32 but also the duty to compel efficiency in performance in the
618 sector and can therefore make such Orders or alternative declaration sought provided
619 sufficient evidence is led at hearing to warrant grant of those reliefs.

620

621 As regards the question as to whether the parties to the Petition are subject to regulation by
622 the Commission, it is clear that qualified persons engaged in electricity business in Nigeria
623 are subject to regulation by the Commission. Under the Act, the Commission is empowered
624 to license **all industry participants** involved in the following activities: electricity generation
625 in excess of 1 MW, electricity distribution in excess of 100KW, electricity transmission,
626 system operation and trading (See Section 62). The Act also makes it an offence punishable
627 by a term of imprisonment or imposition of fine for any person to undertake these activities
628 without a license. Even the state owned PHCN and its successor companies are subject to
629 the Commission’s regulation hence, the Act conferred on the Commission the power to
630 issue interim and formal licenses to them. It therefore follows that the
631 Respondents/Applicants argument that being Federal government agencies, they are not
632 subject to regulation by the Commission cannot be supported.

633

634 We hold that the alleged breach of the Respondents/Applicants obligations under the Barge
635 Power Purchase Agreement does not amount to an administrative or executive action of a
636 Federal Government agency as contemplated by section 251 (1) (t) of the 1999 Constitution
637 for which exclusive jurisdiction is reserved for the Federal High Court. The Respondents to
638 the Petition would seem to have conceded this point in their Reply on Points of Law when
639 they said at page 2 thereof as follows:- ***“Our contention is not that whenever Federal
640 Government or any of its agencies is involved in a case the only Court for the
641 determination of the case is the Federal High Court”.***

642

643 Even if it were, we are of the view that an administrative or executive action of a
644 government agency would still be subject to regulation by the Commission, so long as it
645 relates to the power sector and regulated electricity supply business. For instance, a
646 government agency cannot engage in electricity generation above 1MW without obtaining a
647 license from the Commission. The Commission itself is subject to the supervisory
648 jurisdiction of the Federal High Court as with every inferior administrative or quasi judicial
649 body created under Section 6 (6) of the 1999 Constitution which allows the National
650 Assembly to create other inferior dispute resolution framework and the Federal High Court
651 would normally respect the domestic forum for dispute resolution in the power sector as
652 provided in EPRSA 2005. In ***Garba v. University of Maiduguri*** [1986] 1NWLR (Pt. 18)
653 550 the court recognized the power of administrative bodies or tribunals to hear witnesses in
654 an administrative inquiry even though such bodies are not vested with judicial powers. Thus,
655 while an administrative body may not hear criminal matters, it can hear matters in respect of
656 civil conducts.

657

658 Having regard to holding above that the Commission is subject to the supervisory
659 jurisdiction of the Federal High Court, we have found it unnecessary to deal with the
660 extensive argument of both the Petitioner/Respondent and the Respondents/Applicants on
661 the jurisdiction of the Federal High Court. There is no competition between the two
662 institutions. They play different roles and should indeed complement each other. The point
663 really is that in the area of competence of the Commission, the Courts would not normally
664 substitute their views except the Commission exceeds its power or breaches the rules as to
665 natural justice. Furthermore, Section 32(1) of the Act gives the Commission power to deal

666 with efficiency of the electricity market, access to electricity, adequate supply of electricity,
667 fair pricing of electricity, safety, security and quality of electricity, and balancing between
668 interests of stakeholders in the sector. Section 32(2)(f) and (g) of the Act gives the
669 Commission the power to “*monitor the operation of the electricity market*” and “*to*
670 *undertake such other activities which are necessary or convenient for the better*
671 *carrying out of or giving effect to the objects of the Commission*”. It is our view that
672 the Commission is empowered under these provisions to monitor and approve electricity
673 contracts for supply of power to customers (including captive customers without alternative
674 suppliers) as well as market participants including considering whether parties are in breach
675 of their supply obligation or whether consumers or potential consumers are getting what
676 they are paying for. In this regard, the Commission is empowered to determine and approve
677 the content of power purchase agreements and other transactions in the market to ensure
678 compliance with the existing regulatory framework. For instance, since it is imperative that
679 the gains of power sector unbundling are preserved, the Commission has a duty to
680 constantly monitor the market, its different segments and participants in order to maintain
681 competition and prevent restraint of trade in power. One method of monitoring the market
682 and maintaining the desired competition is through hearing complaints like the present
683 Petition and the issuance of such directives as are now being sought if proved at the hearing.
684 It follows that notwithstanding the claims or reliefs sought by a Petitioner, the Commission
685 may conduct hearing on a dispute not only with intention of resolving the dispute but also to
686 enable it monitor the market and propose executive or legislative action to curb any
687 observed market abuses or inefficiencies found as a result of the hearing.

688

689 In the same vein, the Commission has the power under section 80(1) (f) of the Act to
690 prevent self help by a party to an electricity contract in case of default by another party. The
691 section provides that; “*The Commission shall develop, in consultation with the licensees, the following*
692 *materials: procedures for disconnecting non-paying customers or for those in breach of other terms and*
693 *conditions of an applicable tariff or contract*”. In other words, the Commission can under this
694 section, prevent the arbitrary right of a party to a power contract to cut off power supply to
695 a buyer for non -payment without a process regulated by the Commission so as to minimize
696 inconvenience to consumers buying in turn from the distributor who had a contract with the
697 generation company. This is similar to the objectives and powers of the National
698 Communications Commission (NCC) to protect licensees and the public from unfair

699 conduct of other providers of telecommunications services, with regard to the quality of
700 service and payment of tariffs and to protect consumers from unfair practices of licensees
701 and other persons in the supply of telecommunications services and facilities. See sections
702 2(d) and 4(o) of the NCC Act Cap N97, Laws of the Federation of Nigeria 2004.

703

704 The power of the Commission to monitor market participants is further strengthened by the
705 provisions of the NERC Application for Licenses, Generation, Transmission, System
706 Operations, Distribution and Trading Regulations 2006. Section 15 thereof provides that:

707 *“(a) The Commission may on its own initiative or upon receiving a complaint or*
708 *information from any consumer, eligible customer, consumer association,*
709 *association of eligible customers or other licensees, initiate an inquiry into the*
710 *conduct or activities of any licensee.*

711 *(b) The Commission may if satisfied in its own opinion that enough grounds exist which may*
712 *warrant the suspension of a license, suspend a license in the manner specified hereunder”.*

713 The instant Petition is a complaint to the Commission contemplated by the above
714 provisions. In addition, the Commission has adopted Regulations on Customer Complaint
715 Procedure issued pursuant to section 80(1) (b) of the EPSRA and referred to earlier in this
716 ruling. Nothing precludes a consumer from making direct complaints to the Commission by
717 way of the instant Petition and the power of the Commission to review the conduct of a
718 licensee which is statutory cannot be taken away by private contract of market participants
719 because it is statutory.

720

721 Again, since the Barge Power Purchase Agreement was executed before 2005 when the
722 EPSRA was passed, it is necessary to consider the impact of the EPSRA on prior existing
723 power contracts. We hold that by the combined provisions of section 62(1) and 98(1) and (2)
724 of the Act, power contracts existing pursuant to a license issued under the erstwhile
725 Electricity Act or NEPA Act would be valid as if they had been issued under the EPSRA.
726 For the avoidance of doubt, section 62(1) provides that except for a license issued under
727 section 98(2) no person shall engage in electricity generation, transmission, distribution, and
728 trading or system operation without a license issued under the Act. Section 98(1) and (2)
729 provide that any license, certificate, authority, or permit issued under the Electricity Act or
730 NEPA Act which had effect immediately before the initial transfer date shall continue to
731 have effect for the remaining period of its validity as if it had been issued under the EPSRA.

732 Therefore, the Barge Power Purchase Agreement remained valid under the EPSRA and by
733 implication, the Commission has the power to regulate it including if appropriate declaring
734 that it is incompatible with the new regulatory framework and requiring that it be either
735 restructured or terminated. The BPPA in its Interpretation Clause at page 4 of the agreement
736 anticipated that there could be change of law. This is reinforced by Clause 28 ii referred to
737 earlier.

738

739 On the submission that all necessary parties are not before the Commission, we hold that
740 the issue does not arise from the Objection filed. Further from the Petition there is no
741 complaint against Enron Parties. The complaint seems clearly on the conduct of the
742 Respondents/Applicants as shown in the reliefs sought. We therefore hold that we cannot
743 decline jurisdiction on that basis.

744

745 One last parting issue that arises is whether the creation of super regulators such as NERC,
746 SEC and NCC is valid and fair under the 1999 Constitution. The basis of consideration of
747 this issue lies in the contention that the doctrine of separation of powers under the
748 Constitution prohibits the vesting of executive, legislative and judicial powers in one
749 institution. It is therefore argued that the law maker is wrong in vesting dispute resolution
750 power (judicial), investigation and enforcement (executive) and rule making (legislative) in
751 one institution like NERC. The Respondents/Applicants have therefore, argued that dispute
752 resolution must be totally insulated in the Federal High Court and the Commission has no
753 power to adjudicate in a dispute involving commercial contracts or involving a Federal
754 agency.

755

756 Unfortunately, the same argument has been rejected in the United States and by our Courts.
757 In *Withrow v Jarkin* 421 U.S (1975), it was held that mere combination of prosecuting
758 (executive) and adjudicating (judicial) function in a single agency alone without proof of
759 some particular bias was insufficient to ground claim of lack of due process. The Court
760 further observed that in criminal trials a judge is required to make a variety of determinations
761 some of which are executive, like issuance of warrants and then presiding over proceeding
762 which is judicial. According to Gellhorn & Levin,

763 *“... the price of total insulation of the adjudicators could often be high, especially*
764 *where issues are technically complex or there is need for coherent national regulatory*

765 *policy in a particular field. The cost of creating equal expertise in two separate*
766 *institutions could be high or even prohibitive. Just as troublesome is the likelihood*
767 *that separate bureaucracies would work at cross purposes; the possibilities for policy*
768 *stalemate or confusion could increase markedly”*

769 Based on the above, we are of the view that current international best practice justify the
770 decision of the legislature (National Assembly) to set up institutions which would work 24/7
771 (twenty hours seven days a week) to monitor particular fields, make rules, enforce the law
772 and adjudicate between the regulated persons and bodies because events move fast in those
773 markets or fields and the National Assembly or even the Court do not seat every day and do
774 not have the capacity to give the close marking that super regulators are required to give to
775 market participants. Furthermore, licensees are engaged in commercial business of
776 procuring, transmitting and distributing a regulated product in the form of electricity to
777 customers including those without alternative suppliers. Therefore, the mere existence of a
778 commercial instrument in the form of a contract does not automatically make NERC remote
779 to supply disputes that arise from such contracts or performance obligations.

780

781

782 Based on the foregoing, we hold that the Commission has the power to hear the Petition of
783 a consumer/power purchaser at any level of the market as a consumer complaint which is
784 adjudicative and or in exercise of its executive and legislative powers which is regulatory and
785 to make necessary directives in keeping with the spirit of efficiency in the system including
786 efficient and effective dispute resolution and prevention of potential abuse of market power
787 as contemplated by the National Electric Reform Policy as well as the Act.

788

789

790 **DECISION ON ISSUE b)**

791

792

793 In considering this issue, two contracts are involved: the Barge Power Purchase Agreement
794 and the Contribution Agreement. Interestingly, it appears that the Respondents/Applicants

¹ Gellhorn & Levin, Administrative Law and Process in a Nutshell, West Publishing (1990) 3rd Edition, page 287 to 288.

795 only relied on the Contribution Agreement in their formal Objection but in their
796 submissions and oral arguments both parties made extensive reference to the BPPA.

797

798 The Respondents/Applicants contend that the Commission lacks jurisdiction to hear the
799 Petition in view of the arbitration clause in the BPPA and Contribution Agreement and as
800 such the Petition ought to be struck out. They argued that alternatively the proceedings
801 should be stayed pending reference to arbitration. In other words, the Respondents interpret
802 the arbitration clause to mean that arbitration must be the first and only point of call as far
803 as any dispute relating to the BPPA and Contribution Agreement are concerned and there
804 can be no resort to the Commission because it is a commercial contract between private
805 parties. It was argued that the arbitration clause was mandatory and jurisdiction ought to be
806 declined. Reference was also made to the Arbitration and Conciliation Act 1990 and it was
807 argued that the Commission was a court within the meaning of the Act and ought to stay
808 proceedings pending arbitration as provided for in the Act.

809

810 The Petitioner/Respondent argued that the Commission was not a court as contemplated by
811 the Arbitration and Conciliation Act and even if it were, stay was not a matter of course and
812 the Commission has discretion whether or not to grant stay. They argued that in the
813 circumstances stay ought not to be granted and that having regard to the statutory functions
814 of the Commission stay ought not to be granted.

815

816 Clause 23 of the BPPA provides for dispute resolution as follows:

817

818 “23. **Dispute Resolution**

819

820 *23.1 Throughout the Contract Term, representatives of Purchaser, NEPA and Owner*
821 *shall meet regularly at not less than yearly intervals and whenever one of such parties deems*
822 *it necessary to discuss the progress and status of the Project and the performance of this*
823 *Agreement.*

824

825 *23.2 The Parties hereto agree that in the event that there is any disputed or claim or*
826 *controversy between them arising out of or in connection with this Agreement or in*
827 *connection with the interpretation of any of the provisions hereof or its breach, termination*

828 or validity (a "Dispute") representatives of the relevant Parties (including, in the case of
829 Purchaser and Owner the representatives of Purchaser and Owner appointed under Clause
830 6) shall meet together within five (5) days of one Party notifying the relevant Parties of a
831 Dispute in an effort to resolve such dispute by discussion between them, but failing
832 resolution of such Dispute within a further five (5) day period, the Chief Executive of
833 Owner and the Executive or the designated representative thereof of Purchaser, NEPA
834 and/or the Guarantor (as the case may be) shall then meet to resolve such Dispute and the
835 joint decision of such persons shall be set forth in a writing signed by each of them and
836 thereafter shall be binding upon the Parties hereto; provided, that in the event that a
837 settlement of any such Dispute is not reached pursuant to this Clause 23.2 within thirty
838 (30) days of one Party notifying the other relevant Parties of a Dispute then either Party
839 shall have the right to have such Dispute determined by arbitration in accordance with the
840 provisions of this Clause 23, Except for Disputes resolved through negotiation, arbitration
841 shall be the exclusive method of resolving Disputes.

842

843 23.3 Any Dispute not resolved as provided for in Clauses 23.1 and 23.2 shall be
844 finally settled by arbitration as provided in this Article 23.3.

845

846 23.3.1 All Disputes shall be finally settled by binding arbitration under the Rules of
847 Arbitration of the International Chamber of Commerce (the "ICC Rules") then in effect.

848

849 23.3.2 The Place of arbitration shall be London, England. The arbitral proceedings
850 shall be conducted in the English Language.

851

852 23.3.3 The arbitral panel shall be composed of three (3) arbitrators appointed in
853 accordance with the ICC Rules, provided that, following their confirmation by the ICC
854 International Court of Arbitration (the "ICC Court"), the arbitrators so nominated on
855 behalf of each of the claimant(s) (jointly if more than one) and the respondent(s) (jointly if
856 more than one) shall agree on a nomination for the third arbitrator, who shall chair the
857 arbitral panel. If such nomination is not made within twenty (20) days from the date on
858 which the appointment of both of them have been confirmed, then the third arbitrator shall
859 be appointed by the ICC Court.

860

861 23.3.4 The arbitrators are not empowered to award damages in excess of compensatory
862 damages, and each Party hereby irrevocably waives any right to recover such excess damages
863 with respect to any disputed resolved by arbitration.

864

865 23.3.5 Any determination or award rendered in an arbitration conducted hereunder:

866

867 (a) shall be final and binding on all parties

868

869 (b) shall be implemented in accordance with its terms;

870

871 (c) may be entered as a judgement by any court of competent
872 jurisdiction; and

873

874 (d) if a monetary award, shall be made and promptly payable in
875 U.S. Dollars free of any tax deduction, or offset, and the
876 arbitral panel may grant pre-award and post-award interest at
877 commercial rates. Any costs, fees, or taxes incident to enforcing
878 the award shall be charged against the Party resisting
879 enforcement.

880

881 The parties further expressly waive, to the fullest extent
882 permitted by applicable law, any right to challenge an award by
883 the arbitrators anywhere outside the place of arbitration agreed
884 herein.

885 23.4 Except as provided in Clauses 12.4 and 18.12, during the pendency of any
886 Dispute pursuant hereto, the Parties shall continue to perform their obligations hereunder,
887 including in the case of Owner its obligations to produce and deliver electrical capacity and
888 energy to Purchaser and to conduct required tests of the Barges, and including in the case of
889 Purchaser its obligations to pay all amounts due hereunder (including the disputed
890 amount), without setoff".

891

892

893 Also Clause 9.2 of the Contribution Agreement provides as follows:

894

895 “*All disputes arising out of or in connection with the Agreement shall be finally settled by binding*
896 *arbitration conducted in accordance with the provisions of the Arbitration and Conciliation act (Cap 19)*
897 *Laws of the Federation of Nigeria 1990*” [emphasis supplied]

898

899 The position of the law is that an arbitration clause does not deprive a court or tribunal
900 properly vested with jurisdiction of jurisdiction. Issue a) above has dealt with the question of
901 jurisdiction of the Commission viz a viz the Federal High Court and the relief sought in this
902 Petition. We adopt our reasoning there as foundation for dealing with Issue b) under
903 consideration here. It follows that what happens is that both the Court or Commission and
904 arbitral tribunal retain their jurisdiction and rules have been developed to ensure that conflict
905 is avoided. We would now restate those rules.

906

907 Where the issue before the Court is whether or not it should exercise jurisdiction because of
908 prior agreement by parties on arbitration, the onus is on the party urging the Court to
909 decline jurisdiction to provide sufficient evidence to justify such grant. While Courts will lean
910 towards ordering a stay of proceeding pending arbitration, the exercise of such power is
911 discretionary. A Court would normally stay proceedings if no step has been taken in the
912 proceeding by the party wishing to refer to arbitration. If that party has taken any step in the
913 proceedings, the Court would refuse stay of proceeding pending arbitration. Nowadays the
914 Court requires more effort such as issuance of Notice of Arbitration or appointment of
915 arbitrators before stay is granted. **Put differently, a party urging the Court to decline**
916 **jurisdiction must not say it by words of mouth alone but must prove that at the**
917 **commencement of proceeding he was ready and willing to do everything to conduct**
918 **proper arbitration.** This he must do by filing an affidavit to this effect in support of his
919 application for stay of proceedings; otherwise, the application for stay of proceeding pending
920 arbitration must be dismissed.²

921

² Halsbury's Laws of England, 3rd Edition at page 26; please see also NPA v COGEFA [1971] 2 NCLR 443 at 50-51

922 Further, statutory bodies performing regulatory functions would normally not succumb to
923 the private contract of parties subject to regulation by which they (private parties) seek to
924 resolve their dispute of sensitive public impact by arbitration.

925

926 Notwithstanding the arbitration clause in the BPPA and Contribution Agreement, it is not
927 all disputes between industry participants under the provisions of EPSRA that are arbitrable.

928 It is not every dispute that is arbitrable. Some disputes involve sensitive areas of public
929 domain that national law directly or impliedly removes them from the domain of arbitration³
930 and places them on regulatory institutions as supervised by national courts, such as, NERC
931 and the Federal High Court. The question whether a particular dispute is 'arbitrable' is a
932 matter of public policy which varies from country to country.

933

934 Some of the areas which are not arbitrable include, criminal matters, status of individuals like
935 marriage or company like insolvency, trade mark and patent, securities law or antitrust and
936 anti-competition. We hold that the framework of EPSRA 2005 in Decision on Issue a)
937 above indicates that the intention of the lawmaker was to transform the power market from
938 a monopoly to a free competitive market albeit in carefully mid-wifed stages by the
939 Commission and the Hon Minister of Power. It follows that EPSRA 2005 enforced by the
940 Commission contains many antitrust and pro competition provisions. According to Adam
941 Smith,

942

943 *“People of the same trade seldom meet together, even for merriment*
944 *and diversion, but the conversation ends in a conspiracy against the*
945 *public or in some contrivance to raise prices.”⁴*

946

947 It is a known fact that arbitration is a private and confidential proceeding. The question is
948 whether public policy would allow disputes over contracts likely to be used to manipulate the
949 power market and distort efficiency and competition to be decided privately again through
950 arbitration? International best practice disclose that some countries used to hold that

³ Redfern & Hunter, Law and Practice of International Arbitration, (Student Edition, 2003)
Thomson Sweet & Maxwell pages 142 to 152

⁴ Adam Smith, The Wealth of Nations (1776) Book I Chap 10, Part 2

951 antitrust laws were not matters of a private nature as the consequence affects millions and as
952 such cannot be resolved privately say by arbitration.⁵ Although United States Supreme Court
953 now says arbitration can at least look at validity of contract.⁶ Courts in other countries have
954 held that an arbitral tribunal can look at a contract even if it may be void for illegality on
955 ground that it violates antitrust and competition law. This is done on the basis of separability
956 of arbitration clause from rest of the agreement.⁷

957

958 In answering the question posed, first, we observe that the role of the Commission is
959 essentially different from that of a court of law. A court of law is primarily concerned with
960 dispute resolution. The Commission on the other hand although it performs the role of
961 dispute resolution performs a much wider role of regulation of the power sector as
962 enumerated in Decision on Issue a) above. It follows that if reference to arbitration and stay
963 of proceedings could jeopardize the smooth operation of market structure, adversely affect
964 market confidence or result in market failure or inefficiencies or unmitigated systemic risks
965 then it would be shying from its statutory responsibility if it grants a stay.

966

967 Secondly, usually arbitration would merely award damages. It is a very limited relief. Certain
968 issues are not arbitrable as a matter of public policy as discussed above. For instance,
969 declaration of tariff regime is vested in the Commission and cannot be the subject of
970 arbitration by virtue of the provisions of EPSRA. But once the regime is declared by the
971 Commission the details of calculation can be done by experts or by way of arbitration.

972

973 Thirdly, it seems that the BPPA itself anticipated that certain issues arising from it may not
974 be arbitrable. Consequently it made extensive provisions in Clause 24 for how to deal with
975 disputes which are not arbitrable. Clause 24.2 is reproduced as follows:

976

977 *"24.2 Without prejudice to the provisions of Clause 23 and for the exclusive benefit of*
978 *the other Parties hereto, each Party to this Agreement irrevocable agrees that the courts of*
979 *England shall have jurisdiction for any action or proceeding brought to enforce any award*

⁵ American Safety Equipment Corp. v J.B. Maguire & Co. 391 F. 2d 821 (2d. Cir. 1968)

⁶ Mitsubishi Motor Corp. v Soler Chrysler Plymouth Inc. 473 US 614 105 S. Ct 3346 (1985)

⁷ Ibid, Redfern & Hunter supra.

980 *or decision of any arbitrators appointed under this Agreement to resolve any dispute*
981 *between the Parties or in relation to any matter that cannot, in accordance*
982 *with this Agreement, be the subject of arbitration.*"

983

984 In summary, it provided for English Courts to deal with any matter which is not arbitrable
985 under the agreement in addition to issues that may arise from arbitration. The clear
986 implication is that the parties to the agreement knew and conceded that some matters are
987 not arbitrable. From analysis above, issues of abuse of market power for instance would not
988 be arbitrable as a matter of public policy.

989

990 Fourthly, the BPPA as shown earlier also anticipates that change of law may impact the
991 agreements. The agreements were entered into between December 1999 and June 2000 but
992 in 2005 the EPSRA was passed making substantial changes in the structure of the market by
993 eliminating the monopoly of NEPA through unbundling, creating a competitive framework
994 for the industry, introducing a licensing regime and creation of the Commission as the sole
995 regulator. This new regime made extensive provision for dispute resolution by the
996 Commission and for market monitoring and regulatory functions for the Commission. By
997 virtue of Section 98 of the Act this law impacted the dispute resolution clauses agreed to by
998 the parties to the agreement prior to the coming into force of the Act. It is a matter of public
999 policy and public interest whether the objectives of the Act is to be frustrated by the private
1000 contract of the parties. The same logic applies to the choice of English courts for resolution
1001 of non arbitrable issues. We hold that these cannot take away the power of the Commission
1002 to perform its statutory functions within Nigeria.

1003

1004 The lesson seems to be that whilst modern practice is for national courts to now accept that
1005 arbitration can consider an otherwise void agreement, the existence of the arbitral clause
1006 alone may not be sufficient to prevent the regulatory body charged with responsibilities
1007 which include prevention of creation of anti-trusts and other anti-competition activities from
1008 performing its function.

1009

1010 Best practice dictates that in the course of regulation a statutory body may indeed find that
1011 certain aspects of the complaint may be better handled by third parties such as experts or
1012 arbitrators. In addition, the Commission is empowered under Sections 48 and 49 of the

1013 EPSRA to refer a question of law in any dispute brought before it to the Federal High Court
1014 for determination. This means that the Commission has the right to first entertain a
1015 complaint laid before it and then refer any question of law to court or arbitration as the case
1016 may be. The Commission also has the right to rehear appeals from an aggrieved party against
1017 its decisions and to review its decision if necessary under Section 50 of the Act. This
1018 procedure, we believe, is in line with the objective of speed and efficiency by the
1019 Commission in decision making as an independent regulator as conceived by the National
1020 Electric Power Policy and the Act. Applying the above position of the law to the facts of the
1021 matter we hold that having regard to the views we have expressed on Decision on Issue a)
1022 above the Commission has jurisdiction to determine the Petition by Lagos State
1023 Government notwithstanding the provisions for arbitration in the BPPA and Contribution
1024 Agreement between the parties. It follows that the only issue left is whether this is an
1025 appropriate case for exercise of power to grant stay pending arbitration.

1026

1027 In addition to the foregoing, we wish to draw attention to the position of the Supreme Court
1028 on this matter, as expressed in the *M.V. Lupex* case, cited by both parties. The Supreme
1029 Court stated the matters to be considered by a court or tribunal being asked to stay action
1030 pending arbitration, as follows:

1031

1032 (a) in what country is the evidence on issue of fact situated or more readily available, and
1033 the effect of that on the relative convenience and expense of trial as between the local
1034 and foreign courts;

1035

1036 (b) whether the law of the foreign court applies and, if so, whether it differs from the local
1037 law in any material respect;

1038

1039 (c) what country either party is connected and how closely;

1040

1041 (d) whether the Defendant genuinely desires trial in the foreign country, or is seeking
1042 procedural advantages;

1043

1044 (e) whether the Plaintiff would be prejudiced by having to sue in the foreign court; and

1045

1046 (f) whether the Defendant was, and is still willing to go to arbitration.

1047

1048

1049 It is our view that the word “action” as used in section 5(1) of the Arbitration and
1050 Conciliation Act is wide enough to refer to proceedings on a petition before the
1051 Commission. We have held in Decision on Issue a) above that the Commission is a quasi
1052 judicial body saddled with responsibility of investigating facts, evaluating evidence and

1053 drawing conclusions from the evidence and taking actions of a quasi judicial nature. It
1054 follows that proceeding on a petition before the Commission would be a quasi judicial
1055 action. In *M.H.W.U.N v Minister of Labour and Productivity* [2005] 17 NWLR (Pt. 953)
1056 120 at 149 it was held that: “*A quasi judicial action has been defined in the Black’s Law Dictionary,*
1057 *Sixth Edition at page 847 as a term applied to the action, discretion of public administrative officers or*
1058 *bodies who are required to investigate facts or ascertain the evidence of facts or ascertain the evidence and draw*
1059 *conclusions from them as a basis for their official action and to exercise discretion of a judicial nature.*” We
1060 therefore reject the argument of the Petitioner/Respondent that the proceedings of the
1061 Commission were not within the contemplation of the Arbitration and Conciliation Act.

1062
1063 However, we are of the opinion that, in the particular circumstances of this matter, the
1064 Commission should exercise the discretion granted in section 5 of the Arbitration and
1065 Conciliation Act in favour of a refusal to grant a stay pending arbitration.

1066
1067 In considering whether to grant or refuse stay of proceedings pending arbitration, we have
1068 considered amongst other things, the nature of the subject matter of the dispute, the
1069 applicable law, the law/jurisdiction most closely connected with the matter and in which the
1070 parties/evidence is located and the intentions of the parties, as demonstrated by the
1071 documents filed. Whilst the Petition discloses weighty issues that require trial and
1072 resolution, the Respondents/Applicants have not demonstrated any intention to refer this
1073 dispute to arbitration. The Respondents’/Applicants’ affidavit in support of the Objection
1074 did not contain any material indicating any Notice of Reference to Arbitration or
1075 appointment of arbitrators. Also, not even evidence of prior negotiation as provided for
1076 under the BPPA was established to show intention to utilize dispute procedure under BPPA.

1077
1078 In our opinion, the ends of justice and proper development of the Nigerian electricity
1079 market would not be well served if the Commission abdicates its statutory responsibility by
1080 granting stay rather than proceeding with the hearing in this matter. It is our decision
1081 therefore to dismiss the Respondents/Applicants’ Objection and to proceed with the
1082 hearing. If the Commission deems it necessary, it may, at the hearing of the Petition, refer
1083 any aspect of the Petition it may deem fit to the appropriate judicial or arbitral panel.

1084 For the above reasons we hold that this is not an appropriate case for the Commission to
1085 abdicate jurisdiction or grant stay of proceedings pending arbitration because of an
1086 arbitration clause.

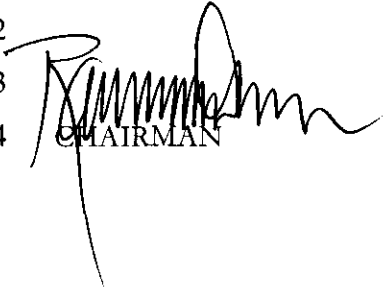
1087

1088 On the foregoing basis, the Objection of the Respondents/Applicants challenging the
1089 jurisdiction of the Commission to consider the Petition of the Petitioner/Respondent or in
1090 the alternative seeking stay of proceedings pending arbitration is hereby dismissed and
1091 denied.

1092

1093

1094



CHAIRMAN



COMMISSIONER



COMMISSIONER