

BEFORE THE NIGERIAN ELECTRICITY REGULATORY COMMISSION
HOLDEN IN ABUJA

CASE NO: NERC _____

IN THE MATTER OF A PETITION AGAINST

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

**PETITION BROUGHT PURSUANT TO SECTIONS 32(1)(f), 32(2)(d), 32(2)(f),
32(2)(g) AND 45 TO 47**

OF THE ELECTRICITY POWER SECTOR REFORM ACT

1. This Petition is presented by the Attorney-General of Lagos State of Nigeria, of Ministry of Justice, Lagos State Secretariat Complex, Alausa, Ikeja, Lagos, on behalf of the Government of Lagos State of Nigeria (the “Petitioner”), supported by PowerConsortium (“PowerCon”) of B39, Eko Court, Kofo Abayomi Street, Victoria Island,
2. The Petitioner, a state government established under the Constitution of the Federal Republic of Nigeria, Cap. C23, Laws of the Federation of Nigeria (“LFN”), 2004, acts on behalf of itself, all electricity consumers within the territory of its state and the entire people of the state.
3. The 1st Respondent, of No. 1 – 2, Zambezi Crescent, Maitama, Abuja FCT, was established, pursuant to the Electricity Power Sector Reform (“EPSR”) Act, Cap. E7, LFN, 2004, as a public limited liability company to assume the employees, assets, liabilities, rights and obligations of the defunct National Electricity Power Authority (“NEPA”) for the generation, transmission, distribution and supply of electricity in Nigeria.
4. The 2nd Respondent, of Secretariat Road, Alausa, Ikeja, Lagos was established, pursuant to the EPSR Act, as a public limited liability company to assume the undertakings, including employees, assets, liabilities, rights and obligations of the 1st Respondent, for the distribution of electricity in the Ikeja Electricity Distribution Zone, incorporating amongst other places, the entire area of Ikeja and Oshodi.
5. The 3rd Respondent, of 24/25, Marina, Lagos, was established, pursuant to the EPSR Act, as a public limited liability company to assume the undertakings, including employees, assets, liabilities, rights and obligations of the 1st Respondent, for the distribution of electricity in the Eko Electricity Distribution Zone, incorporating amongst other places, the entire area of Victoria Island, Marina; Lekki and Apapa.
6. The 4th Respondent, of No. 1 – 2, Zambezi Crescent, Maitama, Abuja FCT, was established, pursuant to the EPSR Act, as a public limited liability company to assume the undertakings, including employees, assets, liabilities, rights and obligations of the 1st Respondent, for the transmission of electricity in Nigeria, and for system and market operation for the Nigerian Electricity Supply Industry (“NESI”).
7. In 1999, the Petitioner mindful of the need to increase the quantum of electrical power supplied to consumers in its territory in order to ensure sustainable economic development and good quality of life, conceived the idea of an Independent Power Project (“IPP”) to supply power to consumers in that territory. The Petitioner subsequently invited the Enron Corporation of the United States of America (“USA”) to undertake the project. However, due to the legal and regulatory framework, as well as existing operational parameters of the NESI at the time, the Petitioner was precluded from undertaking the project directly, and the contracting parties eventually included the Federal Government of Nigeria (“FGN”) and the defunct NEPA, which

then had a near monopoly of electricity generation, transmission and distribution activities in Nigeria.

8. Thus, the parties to the Barge Power Purchase Agreement (“BPPA”), by which the power generated from the IPP was sold were:
 - (a) Enron Nigeria Power Holding Ltd. and Enron Nigeria Barge Ltd. (the “Enron Parties”), which were required to generate power, in return for specified Capacity and Energy Prices;
 - (b) the Petitioner, which, upon privatisation, would assume NEPA’s power purchase obligations under the BPPA;
 - (c) NEPA, which was required to purchase the power and devote the entire output to customers in specified areas in the territory of Lagos State; and
 - (d) FGN, which provided certain guarantees, concessions, and waivers to the Enron Parties under the BPPA.
9. The Enron Parties subsequently assigned their rights and obligations under the BPPA to parties related to AES Corporation of the United States (“AES”).
10. Clause 9.2 (vi) of the BPPA states that “NEPA shall ensure, whether by means of circuit breaker or otherwise, that ... an amount of capacity and electrical energy equal to or greater than the electrical energy associated with the entire output of each Barge is made available for off-take from the Grid by *Customers, in addition to, not in substitution for*, any electricity that is generated otherwise than by such Barge”.
11. The BPPA defines “Customer” as “*any person or entity within the geographical area specified in the Nineteenth Schedule (as modified from time to time by agreement between Purchaser, NEPA and Owner)*. Schedule 19 lists the geographical area of customers as *Ikeja and Oshodi (Phase I) and Victoria Island, Marina, Lekki and Apapa (Phase II)*.”
12. In view of the fact that the power generated by the IPP and sold under the BPPA was intended solely for customers within the territory of Lagos State, and anticipating increased revenue occasioned by the multiplier effect of supply of adequate, safe and stable power to the territory of Lagos State, the Petitioner further demonstrated its support for the IPP by entering into a Contribution Agreement, dated 30 June 2000, whereby the Petitioner agreed to pay to NEPA, 21.15% of the amount due from, or invoiced to NEPA as “capacity payments” under the BPPA in respect of any month.
13. Further to the Contribution Agreement, on 14th November, 2000, the Petitioner instructed the Federal Ministry of Finance (“FMoF”) to effect a direct debit of its statutory allocations from the Federation Account for the amount(s) due as its contribution, to the capacity payments. The instruction was however to serve only as further security for payment of the Petitioner’s obligations, under the BPPA and could

only be effected upon the Petitioner's failure to pay a valid invoice submitted for its contribution by NEPA.

14. In June 2001, the IPP began commercial operations and NEPA began to purchase capacity and energy under the BPPA. However, in clear breach of the BPPA and the spirit of the Contribution Agreement, NEPA failed and or refused to devote any or all of the electrical output of the IPP to customers in the areas designated in the BPPA.
15. Alternatively the power if any, devoted to the areas designated in the BPPA from the output of the IPP was delivered *in substitution for, and not in addition to*, power that should otherwise have been delivered to the designated areas, since the proportionate amount of the power delivered to these areas, in relation to the rest of the country, did not significantly increase.
16. In fact, it has subsequently transpired, through the Petitioner's research and investigations, interviews with experts in the sector and by admission of NEPA and or PHCN, that the facilities available for the transmission and distribution of electricity in Lagos State are not, and have not at any time since the IPP was procured, been sufficient to convey the electrical output of the IPP to customers in the designated areas of Lagos State, *in addition to* electrical power that NEPA/PHCN was already obliged to deliver and did deliver to the designated areas prior to the IPP arrangement.
17. The clear effect of the foregoing is that all consumers of electricity within the territory of Lagos State were clearly short-changed and were denied their rights to electricity from the IPP as well as the normal industry arrangements for the delivery and consumption of electrical power available to Lagos state prior to the IPP arrangement.
18. Despite the fact that power supplied to Lagos fell far short of the cumulative amount of power available under the BPPA and power supplied to Lagos prior to the execution of the BPPA, on 13th February 2003, NEPA wrote to the Petitioner claiming that, as at 31st January, 2003, the amount due to it from the Petitioner in respect of outstanding capacity contributions was about US\$14.6 million. Of course, the Petitioner, disputed the underlying assumptions that formed the basis for the Contribution Agreement, for several reasons, including NEPA's breach of its obligations under the BPPA.
19. Notwithstanding this fundamental breach of its obligations to the Government and people of Lagos State, NEPA and later the 1st Respondent, continued to invoice the Petitioner for contributions to capacity payments under the BPPA which the FMOF continued to pay in spite of the Petitioner's revocation of its instructions to FMOF under the Contribution agreement.
20. FMOF has continued to make such deductions upon invoicing by, and at the instance of the 1st Respondent, which continues to enjoy the benefit of the direct debits, despite its continued failure to fulfil its electricity supply obligations to electricity consumers in Lagos State thereby depriving the residents of Lagos State of both the power procured for their benefit by the Government under the BPPA and the NEPA/PHCN allocation

as well as the benefit of the statutory allocation for the development of the state as a result of the unauthorised deductions.

21. Whereupon, the Petitioner seeks from the Commission, the following reliefs:
- A. a declaration that the 1st Respondents, and or the 2nd, 3rd and 4th 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 1st, 2nd, 3rd, and 4th respondents to deliver to the Petitioner the contracted power in addition to power to which the state was entitled prior to the execution of the BPPA; or in alternative to (B) above
 - 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; and
 - D. all other Orders as the Commission may deem fit to make in the circumstances.

Olasupo Shasore (SAN)
Petitioner's Counsel
Attorney General and Honourable Commissioner for Justice
Lagos State Secretariat
Alausa Ikeja

For Service on:

1st Respondent
No. 1 – 2, Zambezi Crescent
Maitama, Abuja
Federal Capital Territory

2nd Respondent
Secretariat Road, Alausa,
Ikeja, Lagos

3rd Respondent
24/25, Marina
Lagos

4th Respondent
No. 1 – 2, Zambezi Crescent
Maitama, Abuja
Federal Capital Territory