

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**

**STATEMENT OF WITNESS STATING THE FACTS UPON WHICH THE  
PETITIONER RELIES**

**1. NAME AND DESCRIPTION OF PETITIONER AND WITNESS**

- 1.1 The Government of Lagos State of Nigeria (the “Petitioner”), a state government established and existing under the Constitution of the Federal Republic of Nigeria, 1999, of Lagos State Secretariat Complex, Alausa, Ikeja.
- 1.2 My name is Mr. Biodun Ogunleye of PowerCap Limited, B39, Eko Court Kofo Abayomi Street, Victoria Island, Lagos.
- 1.3 I am the Managing Director of PowerCap Limited, a member of Power Consortium (“PowerCon”), consultants to the Petitioner, and by virtue of my position I am conversant with all the facts of the matter.
- 1.4 I have the authority of the Petitioner to make this statement on behalf of the Petitioner.

**2. GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT**

- 2.1. 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 and the people of Lagos State of Nigeria.
- 2.2. The 1<sup>st</sup> 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.
- 2.3. The 2<sup>nd</sup> 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 1<sup>st</sup> Respondent, for the distribution of electricity in the Ikeja Electricity Distribution Zone, incorporating amongst other places, the entire area of Ikeja and Oshodi.
- 2.4. The 3<sup>rd</sup> 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 1<sup>st</sup> 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.
- 2.5. The 4<sup>th</sup> 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 1<sup>st</sup> Respondent, for the transmission of electricity in Nigeria, and for system and market operation for the Nigerian Electricity Supply Industry (“NESI”).

- 2.6. 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.
- 2.7. 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.
- 2.8. Under the BPPA, the Enron Parties were required to generate power, in return for specified Capacity and Energy Prices. NEPA (now PHCN and its successor entities), would purchase the power, and supply same to customers in specified areas of Lagos State.
- 2.9. In view of the reform of the NESI that was then under contemplation, the BPPA provided that upon Privatization of NEPA (or the part thereof responsible for electricity transmission and distribution in Lagos State), the Petitioner would assume NEPA’s obligations under the BPPA. FGN provided certain guarantees, concessions, and waivers to the Enron Parties under the BPPA. The Enron Parties subsequently assigned their rights and obligations under the BPPA to AES Corporation (“AES”).
- 2.10. 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”.

- 2.11. 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)***.”
- 2.12. 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.
- 2.13. Further to the Contribution Agreement, on 14<sup>th</sup> 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.
- 2.14. 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.
- 2.15. 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.
- 2.16. To demonstrate NEPA/PHCN’s non-compliance with its supply obligations under the BPPA, the Petitioner and its consultants, PowerCon have:
- ascertained the amount of energy generated by the Barge mounted facilities comprised in the IPP;
  - ascertained the portion of the available energy on the grid that would have been supplied to the two distribution zones comprising the Lagos territory; and
  - ascertained whether PHCN fulfilled its obligation by delivering to the territory of Lagos, the entire electrical output from the Project, ***in addition to*** energy that would otherwise have been due for the territory.
- 2.17. Hereto attached and marked “Exhibit LASG 1” is a schedule showing the total amount of energy generated by all the power plants supplying power to the Grid, and the proportion thereof supplied to the territory of Lagos State in the five-month period from January to May 2001.
- 2.18. For the purposes of extrapolation and analysis, it would have been ideal to have data spanning at least 12 months before the IPP commenced commercial operations.

Unfortunately, such data is in the exclusive possession of the Respondents who have failed to or have refused to supply same.

- 2.19. A schedule showing the quantum of energy delivered by the IPP to the Grid from commencement of its operations in June 2001 to December 2007 is hereto attached and marked "Exhibit LASG 2".
- 2.20. Based upon our extrapolation from Exhibits LASG 1 and 2, the territory of Lagos should have received, in addition to the 24.44% of energy ordinarily due to it from power supplied otherwise than under the BPPA, an average of an additional 146,557,050KWh of energy on a monthly basis in the period June 2001 to December 2007.
- 2.21. Alternatively, The 1<sup>st</sup> Respondent, by invoicing and continuing to invoice LASG for the sum of ₦225 million on a monthly basis, represents that it has tested the plants comprised in the IPP and that the available capacity of those plants has been the same from commencement to date. This may not be technically feasible.
- 2.22. Lagos State has suffered deficit in the quantum of energy due to it from the energy generated by AES under Clause 9.2 (vi) of the BPPA. Attached and marked "Exhibit LASG 3", is a schedule showing the deficit in the energy that should have been delivered to Lagos State if the Respondents had complied with the provisions of the BPPA.
- 2.23. In the said Exhibit LASG 3, Column A shows the total energy available on the Grid excluding the energy supplied by AES, Column B shows the the energy supplied by AES, , Columns C and D show the energy actually delivered to Ikeja and Eko Distribution Zones, respectively, the Respondents, while Column E, totals the figures for Columns C and D to determine the total energy delivered to Lagos State. Column F shows the energy delivered that ought to have been delivered if the Respondents had performed their obligations under the BPPA. Column G clearly shows very significant shortfalls and or deficits in the energy actually delivered.
- 2.24. 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.
- 2.25. Despite this clear breach of the BPPA, on 13<sup>th</sup> February 2003, NEPA wrote to the Petitioner claiming that, as at 31<sup>st</sup> January, 2003, the amount due to it from the Petitioner in respect of outstanding capacity contributions was about US\$14.6 million.
- 2.26. In any case, even if the entire electrical output of the IPP was devoted to the Lagos territory, a contribution should not, and is not required of LASG for various reasons. Firstly, the Respondents' end-user tariffs, for the period in which the IPP was in commercial operations, had risen almost 200% beyond the level it was before the BPPA was signed. Thus, the tariffs were fully recoverable within existing end-user tariffs which were collected, and spent by the Respondents. Secondly, the electrical

output sold to end-users at a tariff which (but for the Respondent's inefficiencies) ensured a substantial profit. For the operational life of the IPP, the Respondent's end-user tariffs have been at levels that are double the sum of the energy and capacity charges under the BPPA. Meanwhile, the cost of conveying the power to the designated end-users should not be expensive, given that the IPP is located within the relatively small territory of Lagos State, where the designated end-use customers are located. .

- 2.27. The Petitioner, by this time, had 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. NEPA, and later the 1<sup>st</sup> to 4<sup>th</sup> respondents had, jointly and or severally failed and persistently refused to supply the power generated by the IPP and supplied under the BPPA, to consumers located within Lagos State, as required by the express provisions of the BPPA.
- 2.28. Notwithstanding this fundamental breach of the express provisions of the BPPA and the spirit of the Contribution Agreement, NEPA, and later the 1<sup>st</sup> Respondent, continued to invoice the Petitioner for contributions to capacity payments under the BPPA.
- 2.29. The Petitioner, relying upon the Respondents' breach of the BPPA, refused to pay those unfair invoices.
- 2.30. In further reliance upon the Respondents' breach, the Petitioner took steps to revoke the authority of the FMoF to make direct debits on its statutory allocations on 5<sup>th</sup> March 2003 and notified NEPA of the revocation before any direct debits were effected on the Petitioner's statutory allocations by FMoF.
- 2.31. Irrespective of the revocation however, NEPA, and later, the Respondents caused, and continue to cause the FMoF to execute direct debits of the Petitioner's statutory allocation.
- 2.32. FMoF has continued to make such deductions upon invoicing by, and at the instance of the 1<sup>st</sup> Respondent, which continues to enjoy the benefit of the direct debits, despite its continued failure to provide any benefit to the Petitioner and the people of Lagos State under the BPPA.
- 2.33. Whereupon, the Petitioner claims the reliefs outlined below from the Commission:

### **3. RELIEFS SOUGHT**

- 3.1. A declaration that the 1<sup>st</sup> Respondents, and or the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are in breach of their electricity supply obligations to the Government and People of Lagos State and to all electricity consumers within the state.
- 3.2. an Order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to deliver to the Petitioner the contracted power in addition to power to which the state was entitled prior to the execution of the BPPA.
- 3.3. In alternative to 3.2 above, 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.

- 3.4. All other orders as to the Nigerian Electricity Regulatory Commission (the “Commission”) may seem fit in the circumstances.

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**Biodun Ogunleye**  
PowerCap Limited  
B39, Eko Court  
Kofo Abayomi Street  
Victoria Island, Lagos

**For Service on:**

1<sup>st</sup> Respondent  
No. 1 – 2, Zambezi Crescent  
Maitama, Abuja  
Federal Capital Territory

2<sup>nd</sup> Respondent  
Secretariat Road, Alausa,  
Ikeja, Lagos

3<sup>rd</sup> Respondent  
24/25, Marina  
Lagos

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

**LASG – 1**

**ENERGY GENERATED BY ALL THE POWER PLANTS SUPPLYING POWER TO THE GRID, AND THE PROPORTION THEREOF SUPPLIED TO THE TERRITORY OF LAGOS STATE BETWEEN JANUARY AND MAY 2001**

<b>Period</b>	<b>Total Energy Delivered to the Grid (MWh)</b>	<b>Total Energy Delivered to Ikeja Disco (MWh)</b>	<b>Total Energy Delivered to Eko Disco (MWh)</b>	<b>Total Energy Delivered to Lagos (MWh) (B+C)</b>	<b>Proportion of Total Grid Energy Delivered to Lagos (D/A)%</b>
	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>
January 2001	1609,773.00	192,004.00	188,301.00	380,305.00	24
February 2001	1,207,755.00	130,065.00	151,857.00	281,922.00	23
March 2001	1,339,731.00	165,642.56	186,624.86	352,267.42	26
April 2001	1,292,783.00	172,385.00	143,327.00	315,712.00	24
May 2001	1,443,074.00	174,111.00	173,727.00	347,838.00	24
<b>Totals</b>	<b>6,893,116.00</b>	<b>834,207.56</b>	<b>843,836.86</b>	<b>1,678,044.42</b>	<b>-</b>
<b>Average</b>					<b>24.44</b>



LASG – 2

**ENERGY GENERATED DELIVERED TO THE GRID BY AES FROM 2001 TO 2007**

<b>Period</b>	<b>Total Energy Delivered to the Grid BY AES (MWh)</b>
2001 (June – Dec.)	549,205.21
2002	1,742,136.03
2003	1,520,092.37
2004	1,953,276.39
2005	2,018,363.57
2006	1,916,129.08
2007	1,585,690.00
<b>Totals</b>	<b>11,284,892.65</b>
<b>Monthly average for 77 month period</b>	<b>146,557.05</b>

LASG – 3

**SHORTFALLS IN ENERGY GENERATED DELIVERED TO THE TERRITORY OF LAGOS STATE FROM 2001 TO 2007**

Period	Energy delivered to the grid otherwise than by AES (KWh)	Energy delivered to the grid by AES (KWh)	Energy delivered to Ikeja Disco (KWh)	Energy delivered to Eko Disco (KWh)	Energy delivered to Lagos (KWh) (C+D)	Energy that ought to be delivered to Lagos (KWh) [(24.44%*A)+B]	Shortfalls in energy delivered to Lagos (KWh) (F-E)
	A	B	C	D	E	F	G
Post AES 2001	10,191,571.15	549,205.21	1,230,659.23	859,598.57	2,090,257.80	3,043,348.83	(953,091.03)
2002	20,983,637.31	1,742,136.03	3,538,430.00	2,788,876.00	6,327,306.00	6,877,380.08	(550,074.08)
2003	22,383,040.67	1,520,092.37	3,818,211.00	2,590,558.00	6,408,769.00	6,997,806.97	(589,037.97)
2004	24,436,196.93	1,953,276.39	3,296,276.55	2,763,917.87	6,060,194.42	7,933,451.95	(1,873,257.53)
2005	23,535,260.34	2,018,363.57	3,520,324.31	2,100,969.60	5,621,293.91	7,778,056.42	(2,156,762.51)
2006	21,122,919.62	1,916,129.08	3,352,490.65	2,678,666.55	6,031,157.20	7,085,459.15	(1,054,301.95)
2007	18,224,780.27	1,585,690.00	2,835,480.95	2,117,656.80	4,953,137.75	6,045,768.69	(1,092,631.94)
<b>Totals</b>	<b>140,877,406.29</b>	<b>11,284,892.65</b>	<b>21,591,872.69</b>	<b>15,900,243.39</b>	<b>37,492,116.08</b>	<b>45,761,273.08</b>	<b>(8,269,157.00)</b>