



## **NIGERIAN ELECTRICITY REGULATORY COMMISSION**

**APPEAL BY NICON TOWN MANAGEMENT COMPANY PLC AGAINST THE DECISION OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION MADE THE 28<sup>TH</sup> DAY OF DECEMBER, 2009, IN RE: COMPLAINT (PETITION) ON THE ILLEGAL AND EXHORBITANT ELECTRICITY CHARGES IN NICON TOWN ESTATE, LEKKI, LAGOS.**

### **RULING**

This is an Appeal brought by Nicon Town Management Company (NTMC), (the Applicants in this Appeal) pursuant to Section 22 of the Commission's Business Rules/Regulations, 2006, asking for a review of the Commission's decision dated the 28<sup>th</sup> day of December, 2009, in respect of the above stated petition (Complaint).

By a letter (Petition) to the Commission dated March 30, 2009, Nicon Town Residents and Plot Owners Association (NTRPOA) (Respondent's in this Appeal) complained about the illegal and exorbitant electricity charges in Nicon Town Estate, Lekki, Lagos.

The Respondent further alleged in the petition as follows:

1. A small clique of usurpers had taken over control of Nicon Town Management Company Plc (NTMC) using it to extort monies from the residents and plot owners for different services.
2. There was an outrageous and illegal tariff charge of N9.50k per kilowatt hour of consumption, plus a monthly charge of N2000.00 for "facility replacement/admin charge".



3. There might be some collusion between PHCN Lekki and the Management Company to extort money from residents.
4. Nikon Town Management Company, Plc illegally demanded that all residents and plot owners of the estate should purchase electricity meters from its appointed agents (Ergon Utilities Ltd.) at a cost of N60,000.00 (including installation) and N67,000.00 each as share of connection fee to PHCN 33kv premium line.
5. The NTMC was sharing bills among tenants without considering various usage/consumptions.
6. NTMC's High handedness/lack of communication with plot owners and residents
7. EEDC's non-response to the Association's letter concerning meter supply/installation
8. The resolve of the Association to stop paying bills after March, 2009 and to deal directly with Eko Distribution.
9. Doubts as to the authenticity of the bulk meter reading.

On receipt of the petition (complaint), the Commission forwarded same to the appellant, Nikon Town Management Company (NTMC) and to the Eko Electricity Distribution Company (EEDC) which in turn responded to the petition.

The Commission then caused an investigation into the complaints by sending a fact finding team to investigate the allegations. The investigation involved meeting with the Petitioners, the NTMC, officials of the Eko Electricity Distribution Company (EEDC) and inspection of electrical installations in Nikon Estate.



Most of the issues raised in the petition were resolved except for issues bordering on non-compliance with the provision of the Electric Power Sector Reform (EPSR) Act, 2005, the licence terms and conditions and the Multi Year Tariff Order (MYTO).

Consequently, the Commission pursuant to Section 75 (2) EPSR Act 2005, issued a notice of intention to issue an Order dated 25<sup>th</sup> August 2005 to EEDC.

The notice gave grounds upon which the Order will be issued, and directed that the observed contravention be rectified within 30 working days from the date of the issuance of the notice. The notice also gave EEDC the option of making representations to the Commission in respect thereof as well as an option of regularizing its position in certain respects, by seeking the Commission's consent, which it refused and ignored to utilize.

The 30 days timeline expired on October 5, 2009. In its representation to the Commission by way of a letter dated 18<sup>th</sup> of September 2009, the EEDC failed and or neglected to comply with the issues raised in the Commission's notice of intention to issue orders.

Rather, EEDC defended itself by stating as follows:

- (i) That NTMC that is the Respondent, is not an agent of EEDC but a Customer.
- (ii) That the tariff charged NTMC for the period under review is N8.50kwh and that this is not against the approved tariff of the NERC for customers on R5.
- (iii) That they are not privy to the Agreement between NTMC and the residents for which NTMC demanded N67,000 and N60,000 as connection fees and meter fees respectively.



- (iv) That section 11(i) of the National Electric Power Authority Act, cap 256 Laws of the Federation of Nigeria (LFN) 1990 (Nepa Act), section 98(1), 98(2), 98(5) of the EPSR Act, 2005 gives EEDC powers to distribute or supply electricity in bulk or otherwise to any person.....”

After a review of the evidence before it, including submissions and representations made before it in the course of its investigations, the Commission decided as follows:

1. In accordance with the provisions of Sections 62, 67 and 69 of the EPSR Act 2005, condition 17 of the terms and conditions of the Licence issued EEDC and the Commission’s decision in the petition brought by Mrs Funke Adekoya (SAN) against VGC Management and Maintenance Company Ltd and EEDC (VGC case) in Case No. NERC/H/03/07, EEDC should immediately take over the electricity distribution activities in the estate including the sale, distribution, installation and maintenance of meters and billing from the Nicon Town Management Company (NTMC).

However, in the event that EEDC intends to regularize the current arrangement with NTMC in the distribution of electricity in the estate or engage the services of any other person(s) in carrying out these activities, it should within seven (7) days from the date of this Order, and in line with the provisions of Section 69(1) of the EPSR act 2005, and Condition 9 of the Distribution Licence, seek the Commission’s written consent to the arrangement.

2. The Commission found as a fact that NTMC directed residents/plot owners to purchase pre-paid meters at the cost of N60,000.00 from its Agents, Ergon Utilities Ltd. This is illegal and unauthorized. Installation of revenue meters and vending of cards for electricity purposes is the responsibility of Distribution Companies (Discos) and these are activities incidental to the



operation of electricity distribution licensees and are reserved for distribution licensees. Installation, maintenance and reading of meters, billing and collection are matters reserved for distribution licensees.

3. NTMC or its agent, Ergon Utilities Ltd. was then ORDERED to desist forthwith from collecting the said sums or any sum whatsoever as cost of pre-paid meters, installation and maintenance of the pre-paid meters. The Commission further ORDERED that NTMC or its agent desist from reading meters, billing and collection of tariff unless the Commission's consent in line with (1) above is sought and obtained. Under the National Pre-paid Metering Programme (NPPMP), the connection fee approved for single and 3-phase meter is N23,100.00 and N52,100.00 respectively. This includes connection and meter charges. In accordance with Section 1.13. of Part 3 (Distribution Metering Code) and Condition 41 (1) of the Licence conditions, only the distribution licensees are empowered to engage in distribution activities and installation, maintenance and reading of meters are thus categorized as distribution activities. EEDC cannot therefore legally transfer or delegate these obligation to NTMC or Ergon Utilities Ltd., without the consent of the Commission.
4. The Commission found as a fact that the tariff charged residents of Nikon Estate by NTMC within the period under consideration was an illegal and unauthorized sum of N9.50k/kwh (per kilowatt hour of consumption), N1.00k above the approved tariff rate of N8.50k. The Commission declared this to be illegal stating that the tariff to be charged the residents within the period under consideration up to and until there is a review in the tariff structure, should be N8.50k per kilowatt hour of consumption as provided for in the Multi Year Tariff Order (MYTO) released by the Commission and approved by the President of the Federal Republic of Nigeria.



5. The present billing format is illegal. Subject to the regularization of the arrangement between EEDC and NTMC in carrying out electricity distribution operations in the estate, the Commission shall advise on the procedure for calibration; provide a format bill that complies with the meter reading, billing, cash collection and credit management regulation.

The bill format shall clearly separate the electricity tariff from other charges.

Reacting to the Commission's decision, EEDC in a letter to the Commission dated 18<sup>th</sup> January, 2010 informed the Commission that it intends to regularize the arrangement with the appellant by seeking and obtaining the Commission's consent.

Similarly, in a letter to the EEDC which was copied the Commission, the respondents, in reaction to the Commission's decision, acknowledged the Commission's decision and sought for an urgent meeting with EEDC to fashion out modalities for complying with the Commission's decision.

However, dissatisfied with the Commission's decision, the appellants pursuant to section 22 of the Commission's Business Rules/Regulations 2006, brought an application before the Commission's Business Rules/Regulations 2006, brought an application before the Commission seeking a review of the Commission's decision in the matter. This application is also in accordance with the provisions of section 50(1) (i) of the Electric Power Sector Reform Act 2005, which requires any person aggrieved with a decision of the Commission to apply to the Commission for a review of the decision.

The appellant's grounds for seeking a review are clearly enunciated in the application as follows:



- (1) Each resident of Nikon Estate had an Agreement with the Respondents on facility built-up, usage and design, coupled with a Deed of restrictions, and that this concept helped to build the Estate knowing fully well that demand on government has been overwhelming. That the Commission did not take this into consideration in arriving at its decision.
- (2) That the Commission failed to appreciate that the respondent applied to Eko Electricity Distribution Company for electricity as a single customer and has been paying its bill as at when due.
- (3) That respondent solely funded the existing Network in the Estate which is worth over N250 million and that to the best of its knowledge, no one in Nikon Town had applied to EEDC for supply.
- (4) The proposed independent Network Operator policy muted by the Commission which would have taken care of the Bulk metered customer was yet to be implemented.
- (5) That a licensee cannot take over the internal reticulation of a customer and that a customer has a duty to maintain his internal Network.
- (6) That the Commission's decision has introduced inequality and discrimination in the Energy market since the decision is limited to the respondents as some Hospitals, Military Formations and Universities are on bulk Metering.
- (7) That the Commission defamed the appellants by its decision by stating that the respondents engaged in illegal activities.
- (8) That the Commission did not make ancillary orders that flows from the directive to EEDC to take over the internal Network, a Privately Funded Network, built by the respondent without addressing the issue of



investment and compensation, thereby occasioning a miscarriage of justice.

The Appellant further stated that it is prepared to co-operate with the Commission and EEDC to ensure smooth supply of electricity to the Estate by EEDC in any arrangement being proposed to run electricity in the Estate. The Appellant said it had submitted a letter of interest to the EEDC in this regard.

On receipt of the appellant's appeal, the Commission sought the respondent's and EEDC's reaction to the application by forwarding copies of the application to them.

In its reaction" EEDC in a letter to the Commission dated 20<sup>th</sup> February, 2010, stated that it had informed the appellant that while the Commission was locking into the appeal, the appellant should ensure the following:

1. The sharing of bill for electricity consumed should be in conformity with the Tarrif
2. No other charge/levy operative within the Estate should be lumped alongside with the payment for electricity.

On its part, the respondent reacted vide a letter to the Commission dated 25<sup>th</sup> February, 2010 as follows:

1. There are no agreements between Residents and the management Company, nor terms in any Deed of restrictions that would validate the unlawful and unauthorized acts of the management company.
2. That the requirement for licensing for the sale and distribution of electricity is statutory and therefore cannot be waived by the consent or agreement of defaulting parties.
3. That the application to EEDC for electricity supply was made by the appellant on behalf of the respondent and that all electricity bills paid by





the management company (appellant) to EEDC are monies collected by residents and Plot Owners of the Estate.

4. That the Residents and Plot owners had applied to EEDC for direct supply of electricity to each resident, metered through an EEDC supplied and installed meter.
5. That electricity infrastructure in the estate was funded by the Residents and Plot Owners and not by the appellant's as the management company was incorporated in 2004 and therefore not in existence when the infrastructure was built.
6. Consumers and Operators must operate within the ambit of the laws and regulations, and compliance with laid down regulations cannot be on the basis of the convenience of each player in the system.
7. What is important is the law as it stands in Nigeria and not what the law is in other climes. That in Nigeria, it is the responsibility of the distribution companies to distribute and sell electricity to consumers and that anyone who wishes to sell or distribute electricity must be licensed or authorized by the Commission.
8. That the Commission's decision in this case is not discriminatory as it follows the earlier decision and precedent laid in the Victoria Garden City case (VGC case). The examples of Hospitals, Military formations Universities are inappropriate because they are institutions that do not charge individuals for the use of electricity; the hospital does not give patients any electricity bills in their names, neither does the Universities send electricity bills to individual students in their names.
9. That the applicants breach is not limited to excess and unauthorized charges, but also operating without a licence.



10. That the appellant cannot claim to be defamed by the Commission's decision and the publication of the decision, because every finding of fact regarding the respondents illegal and unauthorized activities was established without any denials by the appellant. The Commission is statutorily bound to publish its findings and rulings.
11. That the Ruling has not occasioned any miscarriage of justice as any electricity infrastructure such as sub-station, conductors, etc that are hooked on to the National grid, or distributes electricity to consumers are deemed PHCN property or that of the Transmission company of Nigeria, irrespective of who paid for it. The respondent restated that the entire infrastructure in Nikon Town was paid for by the Residents and Plot Owners.

The Commission has looked at the grounds of appeal, the respondent's and EEDC's response to the grounds of appeal, and the entirety of the submissions, both oral and documentary, placed before the Commission by parties in the course of the Commission's investigation into the petition (complaint).

The Commission, being a creation of statute, and as the regulator of the Nigeria Electricity Supply Industry (NESI) is expected to comply strictly with the provisions of the law in carrying out its statutory responsibilities. The Commission therefore has to ensure that in accordance with section 32 (1) (f) of the Electric Power Sector Reform Act 2005, that regulation is fair and balanced for licensees, consumers, investors, and other stakeholders. One of the ways of doing this is to ensure that disputes between participants and or stakeholders in the industry which are brought before it are resolved without bias, fear or favour and in accordance with the provisions of the law and in such a way as to encourage and ensure the development of the electricity sector.



Having critically examined the grounds of appeal, the Commission deems it necessary and for the avoidance of doubt, to clarify or elucidate on some of the issues raised in the grounds of appeal. It is however, pertinent to point out that some of the issues raised in the grounds of appeal go to no issue as they were not canvassed in the course of investigation, and even if they were, there was no nexus between it and the issues before the Commission to have impacted on the Commission's decision.

1. Therefore, on the existence of an Agreement between the Appellant and each member of the respondent Association on facility build-up, usage and design as well as a Deed of restrictions, whilst the document referred to was not made available to the Commission in the course of its investigations into the complaint, it is the Commission's view that it is not within its purview to delve into arrangements between the appellant and the respondent in the management of the estate, unless such arrangement touches on the generation, transmission and distribution of electricity to the estate or the circumvention of the laws governing the electricity supply industry.

In its earlier decision, the Commission made reference to the provisions of section 62 of the Electric Power Sector Reform Act, 2005 which prohibits anyone from engaging in the business of electricity generation (unless below 1MW at a site) transmission, system operation, distribution (unless the capacity is below 100 KW in aggregate at a site) and trading without the issuance of a licence by the Commission.

The complaint received by the Commission stated that the Appellant was amongst other things, engaged in the distribution of electricity to the estate without a licence contrary to the provisions of the EPSR Act, 2005. The respondents in their complaint further alleged that the Appellant demanded the sum of N60,000.00 and N67,000.00 per plot owner respectively being payment of electricity meter and connection fee to EEDC



33kv premium line. The demand for payment for the pre-paid meters was made through the appellants agents, ERGON UTILITIES LTD. of which EDC claimed ignorance of.

In the course of its investigation, the Commission found that indeed, these various sums were demanded for by the appellant and indeed paid by the respective Plot owners.

It is instructive to note that the appellant did not rebut this evidence.

Perhaps, the payment of these sums by the respondents was part of the understanding reached between the appellant and the respondents for the maintenance and up-keep of the estate and which was referred to by the appellant as being embedded in an Agreement as well as in the Deed of restrictions. As earlier stated, this Agreement was not made available to the Commission in the course of investigation. Also the respondents in its response to the appellants application denied ever entering into such an agreement or into any Deed of restrictions with the appellant. However, assuming but not conceding that the Agreement or Deed of restrictions was made available to the Commission during investigations, there was nothing the Commission could have done as upholding such arrangement or Agreement would mean consenting to the illegality of such agreement or circumvention of the laws governing the electricity industry by parties.

Perhaps what the Appellant wanted the Commission to do was for it to gloss over its findings and accord the transaction its "blessings".

For the avoidance of doubt, section (67(1) of the EPSR Act 2005, provides that only a distribution licensee can in accordance with a licence issued by the Commission, construct, operate and maintain a distribution system and facilities which includes but not limited to:



- (a) The connection of customers for the purpose of receiving a supply of electricity
- (b) The installation, maintenance and reading of meters, billing and collection, and
- (c) Such other distribution service as may be prescribed by the Commission.

Similarly, section 1.13 of Part 3 of the Distribution Metering Code (DMC) clearly states that distribution activities like installation, maintenance and reading of meters are matters reserved for distribution companies of which the appellant is not neither is its agent Ergon Utilities Ltd.

2. The Commission's decision has not in any way introduced inequality and discrimination in the Energy market as its decision is clear and unambiguous. The Commission's decision to a large extent, particularly on issues on all fours with the Victoria Garden City Case (VGC Case), followed the precedent laid therein, and is therefore not limited to the instant case. The arrangement in Hospitals, Military formations and Universities also on bulk metering and referred to by the appellant, should be distinguished from the arrangement operated by the appellant.

Firstly, the arrangement in Nikon Estate is commercialized in that the tariff charged for electricity consumed is higher than the approved tariff under the Multi-Year Year Tariff Order (MYTO). This is not the situation in the establishments cited by the appellant where the tariff charged are as approved by the Commission in the MYTO.

Secondly, these establishments do not have agents who perform licensed electricity distributors functions as is the situation in the instant case.

In the cases mentioned by the appellant, licensed Distribution Companies perform electricity distribution functions as provided for in the EPSR Act 2005, and the Codes made pursuant thereto.



It is however, necessary to make it clear for the umpteenth time that a licensed Distribution Company can delegate it's functions, but this, as earlier stated has to be with the prior consent and approval of the Commission. Such a delegatee should also be licensed by the Commission.

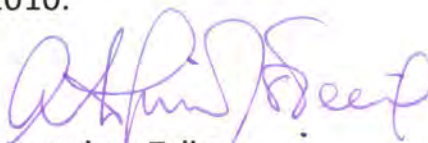
3. The distribution activities in the Estate is the sole responsibility of the EEDC to perform hence the directive by the Commission to EEDC to so do as the performance of electricity distribution functions by the appellant was illegal.
4. Although the respondent is also laying claim to ownership of the Network through its alleged contribution to its construction, the Commission reiterates that it's decision was based on the information before it that the appellant constructed the Network albeit illegally. This evidence was not controverted in the course of investigation.

It should however, be noted that in order to get around the problem of the assets, the Commission had in its decision given the parties the option of regularizing the arrangement by obtaining the Commission's approval.

Having carefully appraised the appeal, the Commission holds that the application lacks merit as all issues raised by the appellant had been addressed in its decision. There is therefore no convincing reason why the Commissions earlier decision should be set aside.

In the circumstance therefore, this appeal fails and is accordingly dismissed.

Dated this 25<sup>th</sup> day of May 2010.

  
Immamudeen Talba  
Administrator