



NIGERIAN ELECTRICITY REGULATORY COMMISSION

*Presentation of the Report of the Committee Set Up
To*
**"CONSIDER ISSUES RELATED TO THE VALUATION, SALE
AND TAKE-OVER OF THE ENUGU DISTRIBUTION
COMPANY"**

19th February, 2013

background

- A 12th Nov, 2012 letter to NERC by BPE requesting to be obliged “the valuation of the Aba Biz Unit & what is left of Enugu”
- NERCs reply to BPE pointed out that the regulators concerns over the matter “go beyond mere evaluation of assets”.

Inauguration/Committee members

- It is subsequent to these backgrounds and a possible attempt to reconcile the contending issues regarding the EDCL & the lease title of “Aba Island”, that the Commission via an Internal memorandum constituted a “Committee to Consider Issues Related to the Valuation, Sale and Take-Over of the Enugu Distribution Company” .

Constitution of the Cottee

- Mrs. Olufunke Dinneh (team leader)
- Engr. Emmanuel Ezekwere
- Mr. Shittu H. Shaibu
- Uche S. Okoro (secretary)
- Mr. Shaibu Abubakar
- Engr. A. I. Yusuf
- Kabiru Garkuwa

Tasks & responsibilities of the Cottee

- Consider the request made by APL to the BPE to excise Aba Business Unit from EDC,
- request by the BPE to NERC to oblige them with the valuation of Aba BU as well as what is left of EDC
- These should be considered in the context of the wider valuation exercise, in which EDC was seemingly valued and offered for sale as a whole in accordance with s.24 of the EPSR Act 2005

Tasks & responsibilities cont'd

- The Committee, was required to consider the legal, regulatory contractual and any other issues thrown up by the APL & BPE request in the light of the role of the Commission as a regulator to ensure fair regulation as provided by S.32, and also, its duty in ensuring a hitch free transition to the post-privatization phase of the market.
- Consider and advise on any processes the Commission may adopt in determining through possible public hearing, the conflicting rights of the potential bid winners and the lease license of GPAL.
- Consider the potential pitfalls of not properly addressing these issues before the conclusion of the privatization exercise
- Consider any other relevant issues impacting on this matter.

The Cottee considered the following...

- Gave due regard and streamlined deliberations to the initiating TOR.
- The Committee obtained, circulated and analyzed the documents relevant to the subject matter.
- In addition, the Committee considered expert opinions from members. E.g., legal opinions from members from the legal profession, Market analysis and implications from Market, Competition & Rates member, and Engineering and sundry Technical Issues from Members from the Engineering, Safety and Standards Division.

The facts of the matter

- 1.a. On 11th May, 2004, a Memorandum of Understanding (MOU) was drawn between the tripartite parties of
 - Federal Government of Nigeria (FGN)
 - National Electric Power Authority (NEPA)
 - Geometric Power Limited (GPL)
- The proposed project activity was for the building of Independent Power Plant (IPP) in Aba, Abia State.
- Geometric Power Limited is an Independent Power Developer

The spirit & intent of the originating MOU...

- There was a shortfall in generational capacity of electricity in the Aba geographic area, which is an industrial hub.
- FGN and NEPA were desirous of increasing capacity and closing the shortfall in power supply in this critical area.
- GPL wanted to build, generate & distribute power to the industrial cluster of Aba.
- GPL claimed to have a track record and capacity to execute the proposed venture. They cited a similar project in Abuja in 2001-2004.
- Under the agreement of the MOU, NEPA was to state the access charges & wheeling charges.

The originating agreement....

- GPL was to fund NEPA to build the distribution line.
- GPL was to construct 100mw dual fired power plant, and designated sub-stations for the ring fenced areas.
- In the event of GPL unable to supply, NEPA will step in & supply to GPL.
- The FGN was to grant approval for the project commencement.
- In the event of privatization, FGN was to, with the consent of the IPP developer (GPL), transfer NEPA's obligations under the "MOU".

Narratives from the facts

- This transaction entered b/w FGN, NEPA & GPL was prior to the enactment of the EPSRA 2005, and therefore, before the establishment of NERC
- NEPA, the FGN & GPL entered into and executed a MOU on the 11th of May 2004 under which GPL was granted the “exclusive right” to generate and distribute power to Industrial city of Aba, Abia State.
- In apparent reaction to the EPSRA enactment & unbundling of NEPA, APL was estbd as an SPV b/c of the material changes in the administering of power in the FRN, as was occasioned by the restructuring of NEPA, a key party to the “MOU”.

The supplemental reaffirms the MOU

- The “Supplemental Agreement” was necessitated by the vertical unbundling of NEPA, which caused a multiplicative/duplicatory change in the composition of the parties to the original MOU.
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- Thus, while the MOU was tripartite between FGN, NEPA & GPL, the Supplemental Agreement was between; FGN, EDC, TCN, GPL, APL & GPAL.
- **EFFECTIVE DATE AND DURATION OF THE SUPPLEMENTAL AGREEMENT:** The supplemental agreement dated 31/08/2006, shall be for a term of 20 years, commencing from the date of completion of the ‘Aba power plant’.

Issues thrown up

- The effect of the license issued by NERC;
- ✓ Post unbundling legitimacy, bankability
- ✓ **Aba Power Limited** was issued a Distribution Licence (NERC/LC/010) for the term of ten (10) years on December 7, 2006. The grant of the Licence was based on the legal, technical, and commercial evaluation and certification of evaluation team comprising of the Licensing Unit, ES&S and MC&R. The Licence will enable the Licensee to distribute power generated by Geometric Power Aba Limited, a generation licensee, within a ring-fenced area leased to the licensee

issues

- The milestones/ substantial progress
- As stipulated in NERC license conditions.
- On June 11, 2009, Aba Power Limited submitted an application for an extension of the tenure of their licence for another five (5) years, on the following grounds:
 - The tenure of the licence (10 years) is insufficient , when compared with the duration of the agreement to supply power generated by Geometric Power Aba Limited to the ring-fenced area (20 years) and
 - Problems encountered in concluding financial agreements with their international lenders.
- **Is the contract voidable?:** MoU timelines, NERC licensing timelines.

Solutions / options proffered by the Cottee

- The Cottee considered foremost the sanctity of contract & need to respect that.
- Pioneer investor status of GPL & need to look favorably upon a pioneer investor as is done elsewhere in the world.
- The capacity to contract: NEPA & FGN clearly has abundance ability to scrutinize the MoU then.

considerations

- The logic behind the nomenclature Island & the clear delineation,
- The IEGN, IEDN, licenses point to envisage of possible separation.
- The idea then by a forlorn FGN & NEPA was to carve out industrial areas to capable investors. others largely failed . SMEs points Kano, Lagos, Aba, P/H.

The lesser of the two devils: who has the stronger case

- **what will be reaction of the bid winners if GPL takes the ring fenced area. Will the bid winner back out?**
- highly unlikely. Especially as the BPE data room had notified bidders for EDCL of the encumbrance of this pre-existing lease and license on the island.

Can the bid winner claim ignorance of the lease?

- Although this may be a tempting move, however it is not a valid reason in conveyance cases. This is bc of the additional onus of responsibility which the law places on a buyer to take personal measures to ascertain the veracity of the claims being made by the seller. Buyer beware or the caveat emptor principle undermines any potential claim of ignorance of the encumbrance of the lease on the EDCL title

Other options considered

- Possibility of resolving this impasse by seeing the MOU from a purely contractual view: i.e., GAPL being 'leasehold' carved out of the 'freehold' entity known as EDCL. In this case, the lessee/tenant (GAPL) must negotiate some modified MOUs with the lessor/ landlord (FGN/BPE).
- If contentions are not ending, then, public hearing.
- It may also be necessary that the reviewing committee rather than make 'desktop judgments' on this very important issue, might make a tour of the island. This may enable a more grounded opinion/decision on the matter.
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considerations

- Should it be accepted that the regulator should make move to ensure the effectualization of the MOU, then, it becomes imperative to ascertain whether the generation plant has been built up to the point being claimed by GPL.
- In the same vein, the Committee has to ascertain whether the distribution sub-stations have been built, or if these components of the MOU are still mere 'works in progress'.

The solace:

- There are 3 other known industrial hubs in EDCL
Enugu/emene industrial layout
- Nnewi
- Onitsha
- The EDCL preferred bidders can and should concentrate in building up these commercial hubs.

Additional facts...

- The visit to GPL Power Village & Substations.
- Matters arising therefrom.
- Comm. Eyo was team Leader on the visit....