Ibrahim Mahfs
07/08/15

NIGERIAN ELECTRICITY REGULATORY COMMISSION

Adamawa Plaza
Plot 1099, First Avenue, Off Shehu Shagari Way, CBD, P.M.B. 136, Garki-Abuja
Tel: 094621400, 094621410
Website: www.nercng.org e-mail: info@nercng.org

REF. NO: NERC/01/CH/SEC/787 **AUGUST 7, 2015**

Justice Ibrahim Auta.
Chief Judge of the Federal High Court
Abuja

My Lord,

A LIKELY JUDICIAL THREAT TO POWER SECTOR REFORM

1. On behalf of the Nigerian Electricity Regulatory Commission (NERC) let me thank my lord for your continued guidance of the Federal High Court in adjudicating complaints and protecting the fabric of justice and rule of law in Nigeria. We also thank My Lord for the support you have shown to the electricity industry in Nigeria especially with regards to NERC's Judges Conference.

2. My Lord, permit me to bring to your notice a subtle threat that can undermine the success of the power sector reform. This threat is in the form of an increasing spate of seemingly reckless and inconsiderate interim injunctions that have been issued against the Commission and electricity distribution companies at the instance of consumers who have not made out a clear case meriting such intervention by the court. Some of these interim injunctions have restrained these companies from fulfilling their statutory responsibility of providing electricity to customers or collecting duly approved tariffs from some categories of customers until the determination of the suit or after the determination of a motion on notice that has been adjourned for three months or more.

3. My Lord, in a particular case, the court granted an injunction against NERC in these terms: "An *ORDER OF EXPARTE INJUNCTION* restraining the Defendant, the distribution companies, their agents or servants from foisting further hardship and unjustifiable increase of Tariff pending *the determination of the substantive suit*" (italics supplied by me). In another instance, the court granted an "Order of Interim Injunction restraining NERC and the 11 distribution companies from "disconnecting electricity supply to the plaintiff/Applicants at their respective addresses in the schedule to the Motion or any other premises occupied by them provided they continue to pay for electricity consumed thereat at the rates in the Multi-Year Tariff Order 2012 (MYTO -2) dated the 31st day of May 2012 *pending*

the hearing and determination of the Motion on Notice filed in this suit". The court granted the order sought and adjourned the matter till September 2015.

4. Without challenging the powers and competence of the court to issue these injunctive reliefs, it would appear that the issuance of such injunctions against legitimate business operations of licensed electricity companies is not well considered. They do not seem to have fully considered the many principles that have been laid down by the courts on how to manage such delicate situations. For one, far-reaching injunction should not be granted against a party who has not been notified of the application pending the determination of the suit. When the court feels compelled to grant such orders, it should endeavor to make the return date early enough to allow the respondent be heard on time so as to avoid damaging its legitimate business. This is more so in a regulated business where every aspect of the operation of the business is regulated by law. As the court stated in **NIDB v Olalomi Ind. Ltd (1995) 9NWLR (Pt.419) 333 at 340 Paragraph I:**"Interim injunction and interlocutory injunction are not synonymous. An interim injunction is interim in nature in that it is more appropriate and generally applied for and granted on exparte application in an emergency situation. On the other hand, an interlocutory injunction is applied for pending the determination of a substantive suit or appeal". Therefore, in the first case, the order that the court could grant should be an interim order pending the hearing of the motion on notice, and not the hearing of the substantive suit. And in the second instance, it would serve justice in the case if the order was made to last for a few days when the respondent would be able to challenge it on its merit.

5. I am constrained to bring this situation to the attention of My Lord Chief Judge so that a possible judicial policy of restraint could be established to protect the right of electricity consumers to justice without undermining the viability of the nascent electricity market. This is without prejudice to the jurisdiction of the Federal High Court to entertain complaints from all classes of citizens and provide effective remedies for proven cases of violation of rights, entitlements and liberties of citizens. NERC believes that the power of judicial review by the Federal High Court properly exercised will help the creation of an efficient and accountable electricity market. But the present instances where distribution companies are damned by interim injunctions restraining them from charging validly approved tariffs from consumers without a valid case being laid before the courts and without NERC being asked to explain its exercise of regulatory powers could destroy investors' confidence and reverse the gains we have made through the creation of a private sector-led electricity market. We have been working hard to transit the electricity market from a public subsidized monopoly which was inefficient to a market driven one in which competition will eventually improve quality and quantity of electricity supplied as well as reduce price in the long term. However, for the desired policy objective to be realized, the legal framework for a competitive market must be firmly established. The tariff structure and other regulation from NERC, an independent regulator established

as part of the process, are aimed at the realization of those policy objectives. Simple administrative law requires deference by courts to regulators with specialized knowledge empowered by the legislature through statute to achieve a specific policy objective.

6. This fear of subversion of the policy objective is not just presumptive. It is real and pressing. Already, we have started receiving suits at the instance of consumers who have raised several complaints against the electricity providers and the regulator. Unfortunately, most of these are baseless in law and misconceived in facts but nevertheless are asking courts to stop the operators from exercising their license terms and conditions to collect duly approved tariffs. We fear that there could be an epidemic of interim injunctions of the sort mentioned above which may undermine the capability of operators to improve power supply.

The Basis of Tariff Regulation in the Nigerian Electricity Industry:

7. It is important to clarify the legal basis of tariff setting in the Nigerian electricity market. As My Lord knows, since the year 2000 the Federal Government of Nigeria has embarked on a comprehensive power sector reform. The major thrust of the reform as articulated in the Nigeria Electric Power Policy (NEPP), 2000 is to create a competitive and efficient electricity market regulated by an independent regulatory commission. Such a market will be built on a tariff regime which is reasonable, fair and just and recovers the prudent costs incurred by efficient operators. It is such a tariff regime that can continuously attract the required investment to ensure sustainable improvement in power supply. This policy thrust is now legalized in the Electric Power Sector Reform (EPSR) Act, 2005.

8. The EPSR Act in Section 76(2) mandates the Nigerian Electricity Regulatory Commission (NERC) to regulate tariffs by developing one or more methodologies. The Act further mandates the NERC to allow every operator to recover prudent costs incurred in the course of efficient operations. Pursuant to these provisions of the law, in 2008, NERC established a methodology for the determination of prices to be charged by generation, transmission and distribution companies. The methodology has been reviewed since then. Both the establishment of the methodology and its review have followed due process as provided by Section 76(7)(8)(9) and (10) of the Act. The fundamental features of the methodology are as follows: (1) it is set only after public hearing and consultation with licensees, customers and other publics; (2) it is set according to clearly established regulatory principles and based on evidence; (3) it is set to allow an efficient operator full recovery of prudent costs of generation and supply of electricity; and (4) it provides for clear processes for its review or amendment, (5) both the methodology and the consequent tariff order are subsequently gazetted and become subsidiary legislations.

9. Because of the long tenure of investment in electricity projects the fundamental principle of good tariff is that it must provide certainty and stable guarantee of cost recovery. It is in this wise that the Multi Year Tariff Order (MYTO), which is issued pursuant to the methodology, lays out a clear tariff path for 5 years and clearly provides for biannual review of macroeconomic variables like inflation, exchange rates, cost of gas and changes in generation capacity. It also allows for major reviews during its tenure in very restricted situations. In 2012 the Commission issued MYTO 2 to facilitate the privatization of the former PHCN companies. MYTO 2 provides that when the private sector takes over, it could conduct a review of the Aggregate Technical, Commercial and Collection (ATC&C) losses levels and once verified by the regulator the tariff will be re-indexed to the new ATC&C losses levels. The new owners conducted the review. NERC verified the study as provided by MYTO 2 and consequently amended the MYTO 2 to become MYTO 2.1.

10. As expected, MYTO 2.1 increased the tariff of some of the commercial and industrial customers who were not paying cost reflective tariffs. Some industrial customers based on inadequate understanding of the legal basis and processes for review of tariff went to court to challenge NERC's exercise of its regulatory function and procured injunctions stopping distribution companies from collecting revenue for electricity consumed by these customers. These cases are based on the grossly wrong understanding about how tariff orders are amended. If these customers had taken advantage of the right to appeal in the Business Rules of the Commission they would have understood the clear legal basis of MYTO 2.1. In fact, the Commission utilizing the provision of the Business Rules amended the tariff at the application of the Manufacturers Association of Nigeria (MAN). As an agency exercising quasi-judicial functions, the law provides for internal remedies which must be exhausted before resort to judicial review. In each of these cases where customers obtained interim injunctions against the Commission and the distribution companies the applicants did not utilize this due process safeguard.

The Need for Judicial Restraint:

11. My Lord, our concern is that granting such far-reaching injunctions against the distribution companies like in some of the cases under reference may trigger a rash of disruptive and distracting actions by myriad of consumers who may not have real cases for determination by the court. The problem will be that this may lead to unintended consequences of hampering efforts to improve power supply and sending the wrong message to investors that Nigeria is not a friendly environment for electricity business. Moreover, such rash actions by unhappy customers will undermine the integrity of the quasi-legislative and quasi-judicial power of the regulator as provided under the EPSR Act.

12. We clearly understand that utility regulation, especially electricity regulation, is new to Nigeria. Therefore, we have not developed a robust judicial opinion and corpus of legal theory about the extent of judicial review of regulatory actions and the degree of due deference that courts should accord regulatory agencies. It is important to note that regulatory agencies like the Nigerian Electricity Regulatory Commission (NERC) by virtue of the statutes establishing them are executive agencies that exercise executive powers under Section 5 of the Constitution on behalf of Mr. President. They also exercise legislative and judicial powers as delegated under their various statutes. The legislature has given them a clear legislative mandate to do so and has also circumscribed their exercise of such mandate. Therefore, they exercise delegated legislative power in their rulemaking. This legislative mandate and its circumscription apply especially to rate-setting regulators like the NERC. It is because the EPSR Act has clearly provided for the circumstances under which the regulator can approve tariffs to be paid by electricity consumers and also stipulated fundamental considerations which should guide the exercise of its quasi-legislative and judicial powers that NERC established a methodology for setting tariff which it follows rigorously.

13. Historically, regulatory agencies like NERC grew out of the recognition that the complicated business of public administration in an age of business and social complexities requires specialist agencies which would bring technical skills to solve complex social and economic problems. In recognition of their special status, the courts have been deferential to them in their judicial review. The courts have basically let them do what they are asked to do except they go outside their powers or act arbitrarily. In the classical case of *Council of civil Service Unions v. Minister for the Civil Service (1985) 1 AC 375*, the House of Lords opines that the basis of judicial intervention would be that the agency has acted illegally, irrationally or irregularly. Otherwise they should be accorded with the respect and allowed to carry on with their business.

14. How should Nigerian courts treat regulatory decisions of NERC and such agencies? Because they are established with clear legislative mandates to carry out clearly defined executive functions, the court should defer to their decisions except those decisions are blemished by clear illegality, irrationality and irregularity. The US Supreme Court in *Chevron, Inc. v. Natural Resources Defense Council 467 U.S. 837 (1984)* made it clear that courts must defer to agencies' interpretation as long as their interpretation of the statutory mandate is not clearly illegal, illogical or unreasonable. As the court puts it, "judges are not experts in the field, and not part of either political branch of the government... In contrast, an agency in which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments". Because Judges are not experts in the technical work of agencies, they usually defer to the agencies' decisions except they are manifestly illegal, illogical or unreasonable (*See also Michigan et al v. Environmental Protection Agency et al delivered on June 29,*

2015 where, although the Supreme Court overruled the EPA, it still restated the Chevron doctrine of due deference).

15. My Lord, the most important implication of the court's deference to agencies in their regulatory decisions is that when an interim injunction is sought to stop the agency from carrying out its mandated function, the court would be reluctant to intervene except where a compelling case of possible illegality or abuse of process has been established. Otherwise, the court should ask the applicants to first exhaust legally mandated internal processes. And where the applicants have exhausted such processes, the court should, as much as is possible, lean on hearing the case on its merit (or at least, on notice to the other parties) and refuse to disrupt the work of the agency by issuing interlocutory injunctions without hearing the regulator or the operator who is sought to be damned by the injunctions.

16. In Perzim v BC (Superindendent of Brokers) [1994] 2 SCR 557, the British Columbia Securities Commission [BCSC] found that the respondent failed to disclose 'material change' in a timely manner. The relevant law provided for statutory appeal but there was no private clause. The issue was interpretation of the Securities Act, the home statute of BCSC. It was held that deference was to be shown to discussions of specialized tribunals on matters which fall squarely within their areas of expertise, even statutory interpretation of questions. Also, in Canada v Southam [1997] 1 SCR 748, the Competition Tribunal ordered Southam to divest ownership of local newspapers as their holding of those newspapers was 'likely to lessen competition substantially' in real estate print advertising market in BC [British Columbia] lower mainland. Neither party in the case was happy with the order. The Federal Court of Appeal decision allowing an appeal from the decision of the Tribunal was upturned by Canada Supreme Court (SCC). The SCC characterized the question as one of mixed law and facts. Since the purpose of competition statute was more economic than strictly 'legal', the scheme of the statute being economic suggests deference. The court recognized the Tribunal's expertise and held that the issue in the case – definition of relevant product market – falls squarely within the Tribunal's economic or commercial expertise.

17. My Lord, we have confidence in the ability of the courts to ultimately vindicate the legality of our regulatory interventions. We also believe that the court should continue to adjudicate complaints from consumers of electricity. But we are afraid that the absence of due deference to the regulator as enjoined by the laws and unrestrained indulgence in interim injunction would defeat the purpose of the EPSR Act and unsettle the regulatory landscape of the Nigerian electricity market. We urge My Lord to establish a judicial policy that will ensure that in issuing interim or interlocutory injunctions, the Federal High Court will pay considered attention to the responsibility for rate fixing which the law bestows on NERC. Such judicial policy will ensure that electricity distribution companies

do not suffer irremediable losses in a situation where consumers of electricity or any other person precipitately rushes to court with ill-considered complaints and seeks an interim injunction. We think the correct approach for Nigerian courts is well stated by the Supreme of Nigeria in Onyekwuluje & Anor V. Benue State Government & ors LER [2015] SC.189/2005 dealing with arbitral tribunal award where, in affirming an arbitral award, said: A Tribunal [applied in this case to NERC as regulator who decides legal and economic matters relating to electricity] may commit a mistake or error of law in reaching its decision. However, so long as the mistake/error is committed within the confines of its jurisdiction, a superior court exercising supervisory jurisdiction cannot readily interfere with it. That is, a Tribunal may decide a point of law or fact wrongly whilst keeping well within its jurisdiction. Now applying the above decision and reasoning to regulation of electricity, it is apparent that the purpose of the EPSR statute was more economic than strictly 'legal' and the scheme of the statute being economic and dealing with policy suggests deference. Also the determination of electricity tariff is more economic than legal, suggesting deference.

18. My Lord, in order to build a clear and consistent Nigerian jurisprudence on this subject and prevent conflicting decisions, we respectfully request that consideration is given to the assignment of specified judges for the determination of all cases relating to electricity tariff.

Once again we thank My Lord for your continued support for the development of the power sector.

Yours sincerely,

Dr. Sam Amadi
Chairman/CEO

CC:

1. *The Vice President, Federal Republic of Nigeria*
   State House, Abuja
2. *The Permanent Secretary*
   Federal Ministry of Power
   Federal Secretariat, Shehu Shagari Way, Abuja