



BEFORE THE NIGERIAN ELECTRICITY REGULATORY
COMMISSION

HOLDEN AT ABUJA

CASE NO: NERC/14/0001

IN THE MATTER OF ALLEGED UNLAWFUL POWER PURCHASE
AGREEMENT FOR THE GENERATION AND SUPPLY OF
ELECTRICITY OVER A TEN YEAR PERIOD

BETWEEN:

A & P FOODS LIMITED PETITIONER

AND

EXUSIA POWER & GAS LTD.....RESPONDENT

BEFORE

1. DR. STEVEN ANDZENGE, MON------(CHAIRMAN)
2. PATRICK UMEH------(MEMBER)
3. ENGR. (MRS.) MARY AWOLOKUN------(MEMBER)

APPEARANCES:

1. KENNETH IRABOR..... For the Petitioner
2. MARY AKIN-AJAYI.....For the Respondents

RULING

This is a ruling on the Petition brought by A&P Foods Ltd dated 13th December, 2013 against Exusia Power and Gas challenging the validity of a Power Purchase

Agreement (PPA) executed on 5th April, 2013 between the parties for the generation and supply of 52,650,000kWh (7.3MW) aggregate over a period of Ten (10) years.

SUMMARY OF FACTS

1. The Petitioner, A&P Foods Limited, is a limited liability company engaged in the business of production of biscuits and other confectionaries.
2. The Respondent, Exusia Power and Gas Ltd, is a limited liability company engaged in the business of power generation and distribution.
3. The parties entered into a Power Purchase Agreement (PPA) dated 5th April, 2013 for a period of ten (10) years for the generation and sale of electricity by the Respondent to the Petitioner. The capacity of the single generator engine to be used by the Respondent to generate electricity for the Petitioner has a nameplate capacity of 975kW. The annual take or pay quantity to be generated by the Respondents and sold to the Petitioner is 5,265,000kWh per annum.
4. The Petitioner terminated the PPA on the grounds that the Respondent did not have a licence issued pursuant to the Electric Power Sector Reform (EPSR) Act 2005 by the Regulator, the Nigerian Electricity Regulatory Commission (The Commission) to generate, distribute or trade in electricity prior to executing the PPA.
5. The Petitioner has filed a Petition before the Commission dated 13th December, 2013 against the Respondent challenging the validity of the Power Purchase Agreement (PPA) executed between the parties, and praying the Commission to declare as follows:
 - i. That the Respondent requires a licence from Nigerian Electricity Regulatory Commission to legally carry out or execute the Power Purchase

- Agreement dated the 5th of April, 2013 between the Respondent and the Petitioner.
- ii. That the Power Purchase Agreement (PPA) dated the 5th of April, 2013 between the Respondent and the Petitioner is contrary to the Electric Power Sector Reform Act, 2005 and therefore illegal.
 - iii. Any other orders which the Commission may deem fit to make in the circumstance.
6. In its response dated 27th January, 2014, the Respondent contended as follows:
- i) That in accordance with Clauses 6.2 and 9 of the PPA, the Petitioner contracted the Respondent to generate power by installing and commissioning a generating plant of 975kW, which is less than 1MW at the site of the Petitioner.
 - ii) That in line with S. 62 of the EPSR Act, the Respondent will only require a Licence if the generating capacity of the Power Plant to be installed and commissioned on the site of the Petitioner exceeds 1MW.
 - iii) The Respondent states further that based on the provisions of Section 62 of the Act, Licences are granted to companies based on the generation capacity of the Power Plant or undertaking or the aggregate capacity of the Power Plant to be installed for a specific project, and not based on the quantity of amount of electricity to be generated during the contract period.
 - iv) The Respondent states that to interpret the provisions of S. 62 of the Act referring to the aggregate volume of the electricity to be generated over a contract period renders the exception provided for in S. 62(2) impracticable and superfluous, and that is not the intention of the Act.
 - v) Further to the above, the Respondent states that the PPA executed between the Petitioner and the Respondent is a legal document and an enforceable contract.
 - vi) The Respondent avers that the Petition is malicious, vexatious, frivolous, lacks merit and should be dismissed.

7. At the hearing of the Petition on 3rd April, 2014, the Petitioner relied on all facts as stated in the Petition but admitted that his pleadings did not aver to several relevant facts such as the intention to expand the generation capacity, misrepresentation of excess capacity of 2MW which according to him was the basis for entering into the agreement, etc.
8. In view of the above, the Petitioner made an oral application to the Commission requesting for an adjournment to enable him amend the Petition, and incorporate all relevant facts.
9. The Respondent objected to the application and asked for ₦100,000.00 (Hundred Thousand Naira) as cost.
10. The Commission having considered arguments from both parties ruled as follows:
 - i) The application for amendment was granted and Petitioner was to re-submit the petition on or before April 7, 2014.
 - ii) The request for cost was granted, but the Respondent was awarded a total sum of ₦50,000 (Fifty Thousand Naira Only) as reimbursement for air transportation and accommodation.
 - iii) The matter was adjourned to April 24, 2014.
11. Consequently, the Petitioner filed an Amended Petition dated 22nd April, 2014 which was received at the Commission on 31st July, 2014. In the amended Petition, the Petitioner included additional facts which he felt were relevant to the matter, but the prayers remained the same as stated in Paragraph 6.
12. The Respondent in its Response dated 18th August, 2014 addressed all the fresh issues raised by the Petitioner, and contended that the Petitioner's request to the Commission to pronounce the PPA as being illegal is a desperate attempt to unjustly deny the Respondent compensation due to it

for breach under the PPA, which is currently a subject matter of litigation in Suit No. ID/817/2013 filed at the High Court of Lagos State

13. It is critical to state that this Petition took longer than necessary to dispose due to parties' inability to attend hearings on two adjourned dates. The Commission had fixed this petition for continuation of hearing on the 14th October and the 8th December, 2014, but hearing did not take place, and was adjourned on both dates at the instance of the parties.
14. Further, the Respondent vide a letter dated 4th December, 2014 requested that all processes and documents filed be deemed as adopted. The implication of this is that the Respondent does not wish to argue the case further before the Panel and thus, requesting the Panel to deliver a ruling on the Petition based on the submissions and documents before it.
15. However, the Petitioner vide a letter dated 7th April, 2014 requested the Commission for an opportunity to make oral submissions in order to amplify the points already made in the written submissions.

Rule 17(5) (a) of the Business Rules provides that, ***“the Commission may decide the matter on the pleadings of the parties or may call for the parties to produce further evidence as the Commission may consider appropriate.”***

16. At the hearing of the matter on 23rd June, 2015, the Petitioner informed the Panel that they wish to adopt their written address dated the 30th day of July 2014 where they submitted as follows:
 - i) That the Commission should rule that by virtue of the overwhelming express provisions of the Electric Power Sector Reform Act 2005, the Respondent, who engages in the business of trading in electricity as exemplified by the PPA ought to have obtained licence from the Commission before going into that trade;

- ii) The Honourable Panel Should also hold that by virtue of the quantum of electricity to be generated by the Respondent in the course of its proposed business with the Petitioner, which is in excess of 1MW in aggregate, prior licence is mandatory. Particularly having regards to Clause 4 of the PPA which clearly shows that the quantity of electricity which the Respondent contracted to generate exceeds 1MW.
 - iii) That the Respondent having failed to obtain the requisite licence, their operations is in contravention of the letter and the spirit of the law as encapsulated in the Electric Power Sector Reform Act.
17. Conversely, the Respondent, relied on its written address in support of the answer to the amended petition dated 18th August, 2014, and then submitted that it concedes the fact that the issue of PPA and its inability to obtain a Licence prior to the PPA is within the jurisdiction of the Commission in line with the combination of Sections 32 and 47 of the EPSR Act. However, they submitted that other matters raised by the Petitioner such as misrepresentation; fraud and inducement as well as illegality of the PPA are extraneous matters arising from an action for enforcement of contract presently before the High Court of Lagos State for determination in Suit No. ID/817/2013.

ISSUES FOR DETERMINATION

The issues for determination by the Commission from the Petitioners are as follows:

- i) Whether a company can trade in electricity without licence irrespective of the quantum of electricity to be traded in view of S. 62(1)(e) of the Electric Power Sector Reform Act, 2005;
- ii) Whether the aggregate quantum of electricity sought to be generated under the PPA dated 5th April, 2013 at the Petitioner's site by the Respondent exceeds 1MW; and

- iii) Whether by virtue of Clause 4 of the PPA dated 5th of April, 2013 (with the sub-head) “Sale and Purchase of Energy and Capacity,” the Respondent would require a licence to enter into and execute the PPA.

On its part, the Respondent submitted the following issues for determination:

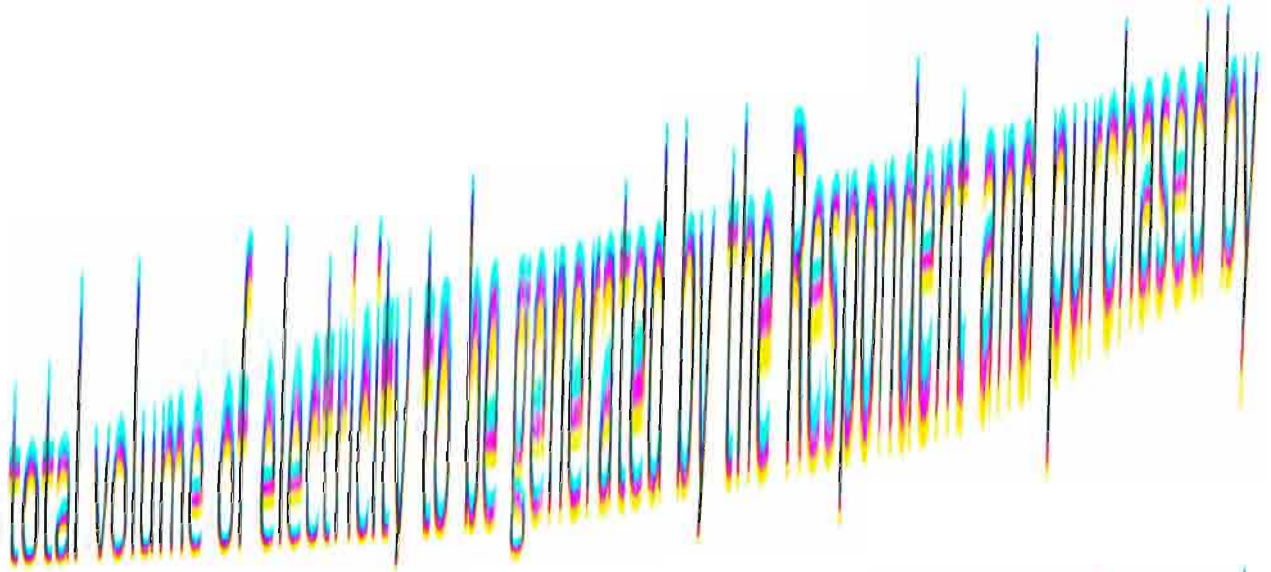
- i) Whether the Respondent requires a Licence for generation of power under the Power Purchase Agreement (PPA) dated 5th of April, 2013 executed by the parties to this proceedings; and
- ii) Whether the PPA executed by the parties and dated 5th of April, 2013 is illegal.

THE COMMISSION’S FINDINGS

The Commission has distilled three issues from the submissions of both parties for determination. Issues 1 and 2 submitted by the Petitioner and the Respondent are similar but more properly couched by the Respondent. This will be consolidated and will form issue one for determination. The second issue will be on trading in electricity, as submitted for determination by the Petitioner. Issues 3 and 2 submitted for determination by the Petitioner and Respondent respectively, will be consolidated and treated as Issue three for this purpose.

Issue 1 - Whether a company can trade in electricity without licence irrespective of the quantum of electricity to be traded in view of S. 62(1)(e) of the Electric Power Sector Reform (EPSR) Act, 2005.

The Petitioner in its argument, agreed that s. 62 (2) of the EPSR Act requires that a person must be issued with a licence to construct, own or operate a power plant, but grants an exemption if a person intends to generate electricity not exceeding 1 MW, in aggregate, at a site. He however contends that in determining the aggregate quantum of electricity sought to be generated under the PPA, it is the



the Petitioner over the ten (10) year period of the PPA. The Petitioner's Counsel predicated his submission on the meaning ascribed to "aggregate" in the Black's Law Dictionary (6th Edition, page 65) as follows:

"Entire number, sum, mass, or quantity of something; total amount; complete whole. One provision under which may be the aggregate if there are no more units to fall into that class. Composed of several; consisting of many persons united together; a combined whole."

Relying on the above definition, the Petitioner submitted that the Respondent is obligated to obtain a licence as it intends to produce a total or aggregate amount of 52,650,000kWh which is equivalent of 7.3MW over the term of the PPA, and not the maximum capacity of the generating plant, which is less than 1MW in this case. Based on this premise, he considered the Respondent's submission that it does not require a licence to generate the agreed amount of power as erroneous and called on the Commission to apply the ordinary or literal rule of interpretation in interpreting S. 62 (1) and (2) of the EPSR Act.

On the contrary, the argument of the Respondent is that it does not require a licence as the generating capacity of the generating plant to be installed for the PPA is less than 1MW, and falls under the exception in S. 62(2) of the EPSR Act.

The Respondent further submitted that the Petitioner's interpretation of S. 62(2) was misconceived. The Respondent's Counsel submitted that licences are issued based on the generation capacity of the power plant or undertaking, and not the quantity or amount of electricity to be generated during the term of the PPA.

It was also the Respondent's contention that the use of the word "aggregate" in the provision of S. 62(2) of the Act, envisages a situation where there are multiple generating units at a site or undertakings. The Respondent then gave an interpretation of "undertaking" as provided for under the Act by citing previous decisions of the Commission in **PETADIS ENTERPRISES vs. HFP PROPERTIES Ltd. Case No.: NERC/10/0011/08** and **Mrs. Funke Adekoya SAN vs. VGC**

MANAGEMENT and MAINTENANCE COMPANY Ltd Case No.:
NERC/03/000001/2007, where the Commission painstakingly put to rest the issue of when a licence is required to generate electricity.

The submissions of both parties are interesting but a critical appraisal of same vis-à-vis the provisions of the Act and other regulatory instruments of the Commission will assist in arriving at a just and right decision.

The issue of regulated activities under S. 62(1) that require a licence is not in dispute. What is, however, in dispute in the instant case is the interpretation accorded S. 62(2) which exempts certain activities from requiring a licence, of which generation below 1MW falls under such category.

Having critically considered the arguments proffered by both parties, as well as the cases cited, we have come to a firm conclusion that the Respondent's argument is more reflective of the Commission's previous decisions on this issue.

S. 62(2) of the Act provides:

“Notwithstanding subsection (1) of this section, a person may construct, own or operate an undertaking for generating electricity not exceeding 1 Megawatt (MW) in aggregate at a site or an undertaking for distributing electricity with a capacity not exceeding 100 kilowatts (KW) in aggregate at a site, or such other capacity as the Commission may determine from time to time, without a license.”

The words used in this sub-section are clear and unambiguous. Licences and permits are site-specific. The generating plant intended to be installed by the Respondent at the Petitioner's site has an installed maximum capacity of 975 kW, which is less than 1MW. Thus the generating plant of the Respondent for the performance of its obligations in the PPA falls outside the regulated activities covered by the EPSR Act.

On Issue Number 1, the Commission holds that the aggregate capacity of the proposed plant to be considered is 975KW which represents the aggregate installed capacity at the site, and not 7.3MW which is the cumulative capacity to

be generated over the term of the PPA. Therefore, the Respondent requires no licence to operate the said plant.

Issue 2 - Whether a company can trade in electricity without licence irrespective of the quantum of electricity to be traded in view of S. 62(1) (e) of the Electric Power Sector Reform Act, 2015.

On this issue, the Petitioner submitted that in order to trade in electricity or enter into an agreement to sell electricity to the Petitioner, it is mandatory for the Respondent to obtain a Licence from the Commission irrespective of the volume or quantum of electricity that the Respondent seeks to sell to the Petitioner. Petitioner's Counsel contended that the exception created in S. 62(2) only relates to persons engaged in generation and distribution of a certain aggregate quantum of electricity, but does not extend to persons or undertaking engaged in the business of trading in electricity.

Petitioner's Counsel further submitted that in order to trade in electricity or enter into an agreement to sell electricity to the Petitioner, it is mandatory for the Respondent to obtain a licence from the Commission irrespective of the volume or quantum of electricity that the Respondent seeks to sell to the Petitioner. To buttress his position, Counsel relied on S. 68(1) of the Act which he said when read together with S. 62(1) and (2) will lead to the conclusion that a licence is required to trade in electricity. It provides:

“A trading licensee shall be permitted to engage in the purchasing, selling, and trading of electricity and the Commission shall have the authority to determine the terms and conditions of trading licences as may be appropriate in the circumstances, and having due regard to the nature of the activities in which the licensee intends to engage.”

Submitting further, Counsel applied the rule of interpretation: ***expression unius est exclusio alterius*** (express mention of one thing excludes all others) to emphasis his interpretation of S. 62(2). He also relied on the case of **A.G. BENDEL Vs. AIDEYAN (1989) 4 N.W.L.R. (Pt. 188) 646 at 672**, and urged the Commission

to activate its powers under S. 62(3) and (6) of the Act and penalise the Respondent accordingly.

Reacting, the Respondent Counsel argued that section 62 (2) of the EPSR Act provides a general exception to all the provision of section 62 (1), and makes no distinction whether the undertaking is for the purpose of trading or not. Relying on S. 62(1) and (2), he enjoined the Commission to rule that the Respondent does not require a licence for its activities in the PPA.

Respondent's Counsel further argued that where a generation licence is required, it may include the licence to sell the electricity because the holder of such a license may decide to sell the electricity so generated. He argued that since the Respondent does not require a license due to the fact that the capacity of the power plant is less than 1MW, therefore a licence is also not required to distribute or sell same to the Petitioner. According to him, S.62 (2) provides a general exception for all the regulated activities, and does not intend to specifically exclude trading in the listed item.

He submitted further that, assuming but not conceding that the Respondent requires a license to sell electricity to the Petitioner, the industry practice of the Commission is to issue a license based on the individual agreements. He stated that the Commission does not issue a trading license in perpetuity but can only do so when there is something to form the basis to issue license, i.e., a contract showing the quantum of electricity or the purchaser of the electricity. He argued that to say that it is illegal to sell electricity when the trading has not occurred is presumptuous.

Though arguments proffered by both parties are interesting, to answer the question raised in issues 2, we will juxtapose the activity regarding trading as provided in the PPA between parties against the definition of the term "*trading*" as used in the Act.

S. 100 of the Act defines "*Trading*" to mean:

“any form of marketing, brokering or intermediation in the sale of electricity, whether or not it entails the purchase of electricity for resale, or whether or not title is taken to the electricity sold.”

A perfunctory analysis of the definition assigned to trading will presuppose that the Respondent is not engaged in trading. It is however, trite to state that provisions of the law are not read in isolation but in conjunction with others. To arrive at the proper definition of trading, recourse would be had to S.68(1) of the Act which lists the activities that a trading licensee is permitted to engage in.

S. 68 (1) provides:

“A trading licensee shall be permitted to engage in the purchasing, selling and trading of electricity and the Commission shall have the authority to determine the terms and conditions of trading licensees as may be appropriate in the circumstances, and having regard to the nature of the activities in which the licensee intends to engage.”

The definition of a trading licensee clearly illuminates the issue. It therefore goes without saying that the intended sale of electricity by the Respondent to the Petitioner amounts to trading in electricity, since the Respondent has contracted to sell electricity to the Petitioner. The critical question though, is whether the execution of the PPA without a licence amounts to a violation of the Act. We would answer this question in the negative. This is because, by the NERC Application for Licence Regulations, submission of an executed PPA is a mandatory requirement for the issuance of a licence.

The Commission, therefore, holds that to trade in electricity, the Respondent must obtain a licence as trading is not exempted by S.62 (2) of the Act.

Issue 3 - Whether by virtue of clause 4 of the PPA and sub headed “Sale and Purchase of Energy and Capacity”, the Respondent would require a licence to enter into and execute the PPA.

This issue is related to the second issue. Here, the Petitioner argued that by the totality of the express provisions of the Act, the Respondent who is engaged in the business of both generating and trading in electricity has a duty to obtain a licence before engaging in the trading of electricity. He relied on S. 62(1) and 68 of the Act, and argued further that having proceeded to carry on with the business of generating and trading of electricity without licence, the Respondent has violated the Act. He invited the Commission to take a detailed look at the PPA, and note that the quantum of electricity which the Respondent undertook to generate and sell to the Petitioner exceeds 1MW, and therefore requires a licence, as well as the Respondent's engaging in the trading of electricity. Finally, he argued that the Respondent cannot generate, sell or trade in the quantum of electricity in the PPA without a licence.

Counsel to the Respondent argued that the PPA is not ex-facie illegal. He stated further that, assuming without conceding that the Respondent requires a licence to carry out its obligations under the PPA, it does not render the PPA illegal as one of the conditions/prerequisites for obtaining a licence for power generation is the submission of the relevant contract/agreement to the Commission. On the claim by the Petitioner that the PPA is derived through fraud, he argued that the allegation and other contractual issues would be left to the Courts to determine. We agree with this submission. Issues of fraud and contracts are clearly outside the jurisdiction of this Panel, and must be reserved for determination by the court of competent jurisdiction, before which they are presently pending.

With respect to the issue of selling the power generated on the Petitioner's site, S. 64 of the EPSR Act 2005 provides as follows:

“(1) Subject to such terms and conditions as the Commission may fix in the licence, a generation licence shall, as the circumstances may require, authorize the licensee to construct, own, operate and maintain a generation station for the purposes of generation and supply of electricity in accordance with this Act.

(2) Subject to this Act, the holder of a generation licence may sell power or ancillary services to any of the classes of persons specified in the licence.”

Unlike the provisions of S. 62(2) of the Act, the above quoted provisions gives the holder of a generation licence express right to sell the power to any classes of persons specified in the licence issued by the Commission. It is therefore clear that any person who intends to engage in the business of selling electricity must come under the regulatory purview of the Commission.

To determine this issue, the Commission will first define what a Power Purchase Agreement means and its legal implication.

What is a Power Purchase Agreement (PPA) in the electricity industry parlance?

The PPA is the central contract that governs the sale and purchase of electricity in the Nigeria Electricity Supply Industry (NESI).

A PPA is a contract between two parties, one who generates electricity for sale (seller) and the other who seeks to buy (buyer) the generated capacity.

The legal implication of a PPA therefore is that it is an agreement to sell or buy electricity.

A rigorous review of the EPSR Act 2005 proves that a person can only sell electricity under 3 circumstances as outlined below:

1. Holder of a generation licence issued pursuant to S. 64 of the EPSR Act;
2. Holder of a trading licence issued pursuant to S. 68 of the EPSR Act 2005;
and
3. Holder of a Permit for Captive Generation issued in accordance with NERC Permit for Captive Power Generation Regulations 2008 (i.e., with authorization to sell less than 1MW to a third-party).

In view of the above, the Commission holds that the Respondent does not require a trading licence to enter into a PPA because PPA is an undertaking to

sell electricity by the Respondent which is one of the requirements that must be submitted by parties while applying for a licence.

THE COMMISSION DECISIONS AND ORDERS

The Commission therefore rules on the various issues raised in this Petition and orders as follows:

A. RELIEF NO. 1:

“A declaration by the Commission that the Respondent requires a licence from Nigerian Electricity Regulatory Commission (NERC) to legally carry out or execute the Power Purchase Agreement (PPA) dated 5th April, 2013 between the Respondent and the Petitioner.”

On this issue, the Commission rules that by virtue of the provisions of S.62(2) of the EPSR Act 2005, the Respondent is required to obtain a trading licence from the Commission to legally carry out its obligations to sell electricity under the PPA. The Commission further rules that to obtain a trading licence, a PPA entered into between parties is a requirement that must be fulfilled or submitted by parties while applying for a trading licence.

ORDER

The Commission hereby orders that the Respondent apply to the Commission for a Trading Licence to enable it sell electricity to the Petitioner as stipulated in the *Power Purchase Agreement (PPA) between parties dated 5th April, 2013.*

B. RELIEF NO. 2:

“A declaration by the Commission that the Power Purchase Agreement dated 5th April, 2013 between the Respondent and the Petitioner is contrary to the Electric Power Sector Reform (EPSR) Act 2005 and therefore illegal.”

On this issue, the Commission would like to first reiterate that by virtue of the provisions of S.62(2) of the EPSR Act 2005, the Respondent is not required to obtain a licence from the Commission prior to the execution of the PPA. To that extent, the Commission cannot issue a declaration that the executed PPA of 5th April, 2013 is contrary to the EPSR Act, 2005, and therefore illegal.

The Commission however notes that Suit No.ID/817/2013 is currently before the High Court of Lagos State on the issue of the PPA between the parties. However, the Commission is not privy to the issues before the court and cannot comment on those issues.

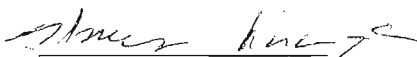
ORDER:

No further order is hereby made as to cost, other than the Petitioner should ensure it pays a total sum of ₦50,000 (Fifty Thousand Naira Only) awarded the Respondent on the 3rd of April, 2014, as cost of reimbursement of air and accommodation fares.

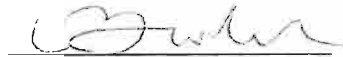
THE OFFICIAL SEAL OF THE COMMISSION IS HEREBY AFFIXED

THIS 10TH DAY OF DECEMBER 2015

SIGNED



Dr. Steven Andzenge
Commissioner
(Legal, Licensing & Enforcement)



Engr. (Mrs.) Mary E. Awolokun
Commissioner
(Engineering, Safety, and Standards)



Mr. Patrick Umeh
Commissioner
(Market, Competition & Rates)