

BEFORE THE NIGERIAN ELECTRICITY REGULATORY COMMISSION
HOLDEN AT ABUJA

CASE NO. NERC.....

IN THE MATTER OF A PETITION AGAINST SOME
PORTION OF NERC ORDER No. NERC/GL/173A
ESPECIALLY ON THE REMOVAL OF MDA DEBT
OF THE COLLECTION LOSS OF THE ATC&C LOSS
BY THE COMMISSION AND THE SEETING OF
THE BASELINE REMITTANCE AT 42% FOR NBET



BETWEEN:

ENUGU ELECTRICITY DISTRIBUTION PLC

PETITIONER

AND

1. NIGERIAN ELECTRICITY REGULATORY COMMISSION

RESPONDENT

THE PETITION IS BROUGHT PURSUANT TO SECTION 36 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED); SECTION 32(1)(D)(F) &(3), 50(1)(H), 50(2) OF THE ELECTRIC SECTOR POWER REFORM ACT, 2005; AND SECTIONS 7(3), 12, 13 17 19&22 OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION (BUSINESS RULES OF THE COMMISSION) REGULATION, 2006 AND UNDER THE INHERENT JURISDICTION OF THE COMMISSION

1. The Petitioner of No. 62, Okpara Avenue, Enugu, Enugu State, is a limited liability company incorporated under the laws of the Federal Republic of Nigeria and a holder of the Distribution License NERC/LC/024, covering the Enugu Distribution Zone comprising Abia, Anambra, Ebonyi, Enugu and Imo States.
2. The Respondent of Plot 1387, Cadastral Zone A00, Central Business District, Abuja is the Statutory body established pursuant to Section 31 of the Electric Power Sector Reform Act, 2005 ("ESPR Act") with objectives and functions/powers stated in Section 32, ESPR Act. The Respondent is the Regulator of the Nigerian Electricity Supply Industry (NESI).
3. The Respondent has amongst others, the statutory principal objective of ensuring that prices charged by the Licensees including the Petitioner are

sufficient to allow it to finance its activities as well as for reasonable earnings for efficient operation. That regulations are fair and balanced to both the Licensees and consumers alike.

4. The Respondent in carrying out the objectives/powers is expected to inter alia duly consult Licensees especially where the outcome will touch on and affect the rights and obligations of such a licensee.
5. The Respondent on 19th August, 2019 published "THE 2016-2018 MINOR REVIEW OF MULTI YEAR TARIFF ORDER(MYTO) 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019"("Remittance Order 2019"). The effective date of this Remittance Order 2019 was stated to be July 1, 2019 though it was signed on 19th August, 2019.
6. The Petitioner states that it was not duly consulted BEFORE the Remittance Order, 2019 with 42% baseline remittance contrary to Section 32(2) ESPR Act and now being compelled to comply with its provisions.
7. The further particulars of statement in paragraph 6 above are as stated hereinunder:
 - a) In the build up to the issuance of Remittance Order 2019, the Respondent invited the Petitioner for a meeting on 20th June, 2019 where it expressed an intention to carry out the accumulated Minor Reviews from 2015 and to henceforth set a Baseline Remittance to curb or eliminate discretionary remittances.
 - b) The presentation made on that 20th June, 2019 revealed that the Commission placed the Baseline Remittance for the Petitioner at 22% for NBET invoice and 100% for MO's invoice. Find attached and marked **EEDC 1** a copy of the said presentation and the Petitioner shall place reliance on same at the hearing of this Petition.
 - c) At the meeting of 20th June, 2019, the Petitioner led by her Managing Director, expressed some concern and informed the Respondent of the Petitioner's inability to meet up with the baseline remittance of 22% for the NBET invoice while calling for a downward review of the 100% for MO's Invoice.
 - d) The Respondent as part of its processes informed the Petitioner to document her concerns in written form so that the Commission can respond accordingly. Pursuant to this directive, the Petitioner wrote a letter dated June 26, 2019 but duly received on June 27, 2019 by the

Respondent. A copy of the said letter is hereby attached and marked **EEDC 2**.

- e) The Petitioner neither received any response from the Respondent nor was anyway consulted/informed beforehand that the Respondent will change or rather increase the already onerous Baseline Remittance of 22% to 42% for the NBET invoice.
- f) The Petitioner only received a letter with Ref. No. NERC/REG/SEC/ORDERS/1771/19/4 dated 23rd August 2019 forwarding a copy of the Remittance Order.
- g) The Petitioner even after the issuance of the Remittance Order, 2019 has made strenuous efforts to draw the attention of the Respondent to inherent difficulty in the Remittance Order, 2019 especially in relation to the 42% baseline remittance for NBET invoice and the need for the Commission to review the baseline remittance even if in a graduated fashion.

8. The Petitioner categorically states that the 42% baseline remittance for NBET invoice provided in the Remittance Order, 2019 is onerous (in view of the realities and challenges to the Petitioner's business expressed in letter of 26th June, 2019 and other engagements with the Commission) and capable of irretrievably harming the Petitioner's business.

9. The Petitioner invites that Respondent to reconsider the Remittance Order, 2019 against the backdrop of the following issues:

- a) **ATC&C Loss Assumption:** The Petitioner states that a key element to making an assessment of and reaching a determination on what constitutes a truly cost-reflective tariff is the ATC&C losses suffered by the Petitioner in operating the business. However, quite curiously the Petitioner notes that the Minor Review Order does not include the annual ATC&C loss targets in computing the tariff. The Petitioner further states that a critical requirement to achieving the target ATC&C loss level, is the capital expenditure (CAPEX) which is required to make significant investments towards reducing the ATC&C loss level. Whilst, the CAPEX allowance previously allowed under the pre-Minor Review Order was grossly inadequate to make the needed investment to achieve the loss reduction target, it is shocking to note that the Minor Review Order totally excluded CAPEX from its revenue requirement. Relatedly, the Respondent has failed to account for the years 2015 and 2016 as Force Majeure years, which were years that were adversely hit by macro-economic factors beyond the control of the Petitioner and as such should have been recognized together with 2017 and 2018 being non-performing years

b) The Remittance Levels for 2019:

The Petitioner submits its monthly collections to the Respondent, which undoubtedly shows that the expected collections and our reality are still materially apart. Based on the Respondent's assumptions, Petitioner's average monthly collections are estimated to be **N6bn** when in fact, they are an average of **N3bn**. The ATC&C loss levels assumed for the Petitioner are much lower than the reality and this is known to the Respondent as our report on this key performance indicator is made monthly.

Again, the Petitioner's remittance level(s) is predicated upon ATC&C losses of 28.71% (2019) is inconsistent with our reality of 53% (2019 YTD). It is important to note that this is not in line with the Performance Agreement (PA) dated 21st August, 2013 signed by the Petitioner with the Bureau of Public Enterprises (BPE). There are however certain factors that play key roles in the Petitioner's being unable to achieve and possibly surpass the targets in the performance agreements. Some of the major factors are: **Non-bankability of the Disco and Non implementation of Minor Reviews.** See attached and marked **EEDC 3** a Table showing the breakdown of the remittance levels proposed by the Respondent and that by the Petitioner.

c) Generation Cost Assumption: The Petitioner states that whilst the Remittance Order, 2019 assumes a generation cost of **N20.80**, the invoices from NBET to the Petitioner, after the issuance of the Remittance Order, 2019, shows a generation cost higher than the Respondent's figure resulting in a gap of **₦3.17** on the average. This shows that NBET is merely applying the monthly escalation mechanism provided under the Power Purchase Agreement with the Generation Companies. The Petitioner on the other hand would only however not be able to pass through the increased cost to electricity consumers until the next minor review. The Petitioner states that the effect of this state of affairs is the inability of the Petitioner to meet the minimum remittance threshold as it will be practically impossible for the Petitioner to source for the excess above the permitted generated tariff by the Respondent to meet the minimum remittance threshold. From the Petitioner's computation, the excess above the Respondent's allowed generation cost is a monthly sum in the region of **₦450,000,000.00** and too huge a deficit to be accommodated by the Petitioner's monthly collections.

d) MDA Debts: The Petitioner states that the removal of MDA debts from the Remittance Order, 2019 is shocking because as the Respondent is aware.

there is ongoing conversation on the crippling effect of the legacy debts incurred by MDAs and their enormous impact on the Petitioner's books and their negative impact on the Petitioner's collection efficiency. To carry on this huge debt burden in addition to the expected remittances is an untenable and unsustainable venture which will literally bring the Petitioner's business operations to a halt if left unchecked. Consequently, the only fair outcome in the circumstance is for the Respondent to allow MDA debts to be deductible from NBET's invoices until such a time as the collection of MDA's debts has been satisfactorily resolved.

- e) **Exchange Rate Assumption:** The Petitioner states that the Remittance Order, 2019 utilizes official exchange rates of the Central Bank of Nigeria (CBN), plus the premium of 1% permitted for transaction costs under the MYTO 2 methodology, which in effect pegs the average exchange rates for determining the applicable end user tariff for the years 2016, 2017, 2018 and 2019 at ₦255.90, ₦308.80, ₦309.14 and ₦309.90 to US\$ 1.00 respectively. Whilst the foregoing accurately reflect the CBN exchange rate, the Respondent is very much aware that foreign exchange is not generally not accessible on the CBN exchange rate as the Petitioner has to contend to obtain foreign exchange at the interbank rate to run its operations which is significantly higher than the CBN official rate which the Respondent has adopted in computing the tariff.

Further Issues for your kind consideration:

- f) **Interest Payable on outstanding NBET amounts should be remove in line with Section 10 (d) Remittance Order, 2019** as the Petitioner has not been granted interest on our shortfall accrued within the same period, as such interest has never been a component of the retail tariff of the Petitioner. We shall contend at the hearing of this petition that removal of the sum of ₦57,399,266,300.64 which accrued as at August 2019 from our books will improve the bankability of the Petitioner.
- d) **The effect of Aba and Ariaria court cases:** The Petitioner shall canvass this point at the hearing of the petition.
- e) **The effect of MAN on EEDC revenues:** The Petitioner shall canvass this point at the hearing of the petition.
- g) **The effect of The Eligible Customer Regulation:** The Petitioner avers that the status of Inner Galaxy Steel Company Limited ("Inner Galaxy") a steel Company located in Ahala Ukwu Village, Umuahala Community, Obuzor Ukwu Autonomous, Ukwu West Local Government Area, Abia State within

our licensed area should be resolved by the Respondent in favour of treating their payments as that of the Petitioner to the market and the cost of energy included in our NBET invoice.

10. At or before the hearing of this Petition, the Petitioner shall humbly request from the Commission that the issues of law hereinunder stated be referred to the Federal High Court pursuant to Section 19 of the Nigerian Electricity Regulatory Commission (Business Rules of the Commission) Regulation, 2006. The issues of law are as follows:

- a) Whether in view of the mandatory provision of Section 32(3) ESPR Act, the Respondent is bound by law to consult the Petitioner BEFORE the Remittance Order, 2019 especially in view of the fact that the previous presentation of 20th June, 2019 have a baseline remittance of 22% for NBET invoice while the Remittance Order, 2019 was promulgated with 42% for NBET invoice?
- b) Whether failure to consult the Petitioner in respect of the Remittance Order, 2019 is not a breach of the Petitioner's fundamental right to fair hearing as enshrined in Section 36 of the Constitution of the Federal Republic of Nigeria, 1999(as Amended)?
- c) Whether in view of Section 36 of the Constitution of the Federal Republic of Nigeria, 1999(as Amended) it is not unconstitutional, null and void for the 1st Respondent to make an Order with retroactive effect especially in view of the fact that the said Remittance Order, 2019 may, is likely and would be used by the 1st Respondent to penalize the Petitioner?

Whereupon the Petitioner Prays as follows:

- (a) **A Review** of THE 2016-2018 MINOR REVIEW OF MULTI YEAR TARIFF ORDER(MYTO) 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019, especially the portion relating to Baseline Remittance of 42% for NBET invoice, in line with the concerns raised in this Petition;
- (b) **An Order** of the Commission reversing all the collection loss of the Petitioner or in the **ALTERNATIVE** reversing the full collection loss less 4% of the MDA of the Baseline Study outcome verified and approved by the 1st Respondent;

- (c) **An Order** of the Commission to compel NBET to comply with the Remittance Order, 2019 with respect to generation cost;
- (d) Reflect the inter-bank exchange rate in the Respondent's tariff assumptions; and
- (e) All other Orders as the Commission may deem fit to **make** in the circumstances.

Dated this 18th day of October, 2019.



OKEY NWOSU
MANAGING DIRECTOR/CEO
For: Enugu Electricity Distribution Plc

On Notice:

Nigerian Electricity Regulatory Commission
Adamawa Plaza
Plot 1387 Cadastral Street, A00
Central Business District,
Abuja

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PETITIONER

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1. NIGERIAN ELECTRICITY REGULATORY COMMISSION

RESPONDENT

AFFIDAVIT IN SUPPORT OF PETITION

I, Mr. Okala Onuka Uche, adult, male, of No. 62 Okpara Avenue, Enugu State,
do hereby make an oath and state as follows:

1. I am the Head, Regulatory Affairs Department of the Petitioner in this matter.
2. I have the authority of the Petitioner to make the statement in support of this Petition.
3. The statement made in all the paragraphs of the Petition are true to the best of my knowledge.
4. I make this affidavit in good faith and in accordance with the Oaths Act.



DEPONENT

Sworn to this 18th day of Oct 2019.

BEFORE ME


NOTARY PUBLIC



receipt
No. 1365



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PETITIONER

AND

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RESPONDENT

AFFIDAVIT OF URGENCY IN SUPPORT OF PETITION

I, Mr. Okala Onuka Uche, adult, male, of No. 62 Okpara Avenue, Enugu State,
do hereby make an oath and state as follows:

1. I am the Head, Regulatory Affairs Department of the Petitioner in this matter.
2. I have the authority of the Petitioner to make this affidavit in support of the Petition on its behalf.
3. The statements made in all the paragraphs of the Petition are true to the best of my knowledge.
4. I verily believe that unless this matter is dealt with urgently and expeditiously, it shall cause negative and potentially irreversible damage to the Applicant/Petitioner's business and drastically impede its ability to discharge its obligations to the electricity market, other industry stakeholders and ultimately its customers.
5. I make this affidavit in good faith and in accordance with the Oaths Act.



DEPONENT

Sworn to this 18th day of Oct, 2019

BEFORE ME

NOTARY PUBLIC



receipt
paid 1865

