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**BEFORE THE NIGERIAN ELECTRICITY REGULATORY COMMISSION**

**IN THE MATTER OF A PETITION FOR THE REVIEW OF NERC ORDER NO. NERC/GL/179 ON THE 2016 - 2018 MINOR REVIEW OF THE MULTI YEAR TARIFF ORDER (MYTO) 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019 FOR PORT HARCOURT ELECTRICITY DISTRIBUTION PLC**

**BETWEEN:**

**PORT HARCOURT ELECTRICITY DISTRIBUTION PLC (PHED)**

**PETITIONER**

**AND**

**NIGERIAN ELECTRICITY REGULATORY COMMISSION (NERC)**

**RESPONDENT**

**THE PETITION IS BROUGHT PURSUANT TO SECTIONS 50 (1)(h) & 50(2) OF THE ELECTRIC POWER SECTOR REFORM ACT 2005 AND SECTION 22 OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION (BUSINESS RULES OF THE COMMISSION) REGULATION, 2006.**

**Introduction**

1. The Petitioner is a limited liability company incorporated under the laws of the Federal Republic of Nigeria, whose registered office is at 1 Moscow Road and it is a holder of the Distribution License No. NERC/LC/638702, responsible for the distribution of Electricity in Rivers, Cross River, Akwa Ibom and Bayelsa States.
2. The Petitioner is one of the Successor Companies that emerged from the defunct Power Holding Company of Nigeria (PHCN) and privatized in 2013 through the acquisition by the core investor, 4Power Consortium Limited of majority equity stake constituting 60% in the Petitioner following a rigorous bid process.
3. The Respondent is a statutory body established by established pursuant to the Electric Power Sector Reform Act, 2005 with its head office at Plot 1099, First Avenue, off Shehu Shagari Way, Central Business District, Garki, Abuja. The Petitioner is the regulator of the Nigeria Electricity Supply Industry (NESI).
4. Pursuant to section 32 and 76 (2)(a) of the Electric Power Sector Reform Act, the Respondent has amongst others, the statutory objectives and obligations to ensure that tariffs set by it for the Licensees including the Petitioner are sufficient to allow it to finance its activities as well as reasonable earnings for efficient operations.

- 5. On 19<sup>th</sup> August 2019, the Commission issued Order No. NERC/GL/179; The 2016 - 2018 Minor Review of Multi Year Tariff Order (MYTO) 2015 And Minimum Remittance Order for The Year 2019 (Minor Review Order).
- 6. Though said to have been issued to provide a cost-reflective tariff regime, the Minor Review Order has not been able to achieve this objective as the Minor Review Order proceeds on a number of inaccurate assumptions, analysed in turn in the ensuing paragraphs, which has inhibited the ability of the Petitioner to meet its obligations.

**ATC&C Loss Assumption**

- 7. 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 losses in computing the tariff.
- 8. Further, 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.
- 9. Relatedly, the Respondent has not accounted for the years 2015 and 2016 as Force Majeure years, which were years that were adversely affected by a number of events and the 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. In 2015 and 2016, for instance, the following events took place and impacted on the overall performance of the market, which should have been considered by the Respondent
  - i. Declaration of **Order NO. NERC/136** directing the commencement of the **Transitional Electricity Market (TEM) of 29<sup>th</sup> January 2015** while all the Conditions Precedent (CP) were not sufficiently fulfilled or waived especially the cost-reflective part of it, which had implications for tariff shortfall and hence loss reductions. This, the **MYTO 2015 Order NERC/142.10** sought to correct, as set out in Paragraph 3 of the Background to the Order which provided that:
 

"The intent of this tariff review, therefore, is to ensure cost-reflective tariffs as required by the EPSRA".

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- ii. Freezing of R2 tariff, which denied the Petitioner funds to operate towards achieving its loss trajectory, resulted in some tariff shortfall that was corrected in December 2015 MYTO and took effect from 2016
  - iii. Following a **Federal Government Circular dated 27<sup>th</sup> July 2012, Ref. No SGF/OP/1/S.3/IX/409**, MDAs were mandated to settle unpaid electricity bills within three months and all unsettled bills after a month were to be deducted by the Accountant-General of the Federation from the overhead allocation of the owing MDAs. (**Annexure A**). MDA debts were removed from the Petitioner's baseline losses by the Commission in the **MYTO 2015 Order NERC/142.10**. This meant that the new baseline was to take effect from 2016 when the Order came into effect
  - iv. The final agreement on the figures to be used for the baseline loss was arrived at in 2015 after NERC verification and inputted in the **MYTO 2015 Order NERC/142.10**
  - v. The drastic increase in Foreign Exchange in 2016 had a significant impact on the petitioner's cost of energy, cost of equipment and impacted the Petitioner's Capital Expenditure.

### Generation Cost Assumption

10. Whilst the Minor Review Order assumes a generation cost of N20.80, the invoices from NBET to the Petitioner, following the issuance of the Minor Review Order, indicated a generation cost significantly higher than NERC's assumed figure resulting in a gap of N2.80 on the average. Whilst NBET's case appear to rest on the premise that it is merely applying the monthly escalation mechanism provided under the Power Purchase Agreement with the Generation Companies, the Petitioner on the other hand would, however, not be able to pass through the increased cost of electricity to its customers until the next minor review.
11. 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 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 **N435 Mn (Four Hundred And Thirty Five Million Naira)** and too huge a deficit to be accommodated by the Petitioner's monthly collections.

**MDA Debts**

- 12. The removal of MDA debts from the Minor Review Order is shocking because as the Respondent is aware there is ongoing conversation on the crippling effect of the legacy debts incurred by MDAs, their enormous impact on the Petitioner's books and the 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.
- 13. Consequently, the only fair outcome in the circumstance is for the Respondent to allow MDA debts to be deductible against the minimum remittance obligation for NBET's invoices until such a time as the collection of MDA's debts has been satisfactorily resolved.
- 14. The MDA debt owed to the Petitioner till date are given in the table 1 below:

MDA	2015 (N)	2016 (N)	2017 (N)	2018 (N)	As at August 2019 (N)
<b>Local</b>	1,186,061	18,597,082	27,601,518	66,516,973	74,455,199
<b>State</b>	931,245,743	1,428,592,737	1,967,118,568	2,365,464,006	2,365,888,507
<b>Federal</b>	1,534,526,651	2,536,909,894	3,542,977,971	<b>4,309,468,367</b>	4,949,337,853
<b>Total</b>	2,466,958,454	3,984,099,713	5,537,698,057	6,741,449,347	<b>7,389,681,559</b>

- 15. A partial reconciliation of Federal MDA Debt between the Petitioner and FGN was carried out for the years 2015, 2016, 2017 and 2018. The reconciled amount of **N1,697,887,485.00 (One Billion, Six Hundred and Ninety-Seven Million, Eight Hundred and Eighty-Seven Thousand, Four Hundred and Eighty-Five Naira Only)** for 2015 and 2016 and **N1,686,118,403.66 (One Billion, Six Hundred and Eighty-Six Million, One Hundred and Eighteen Thousand, Four Hundred and Three Naira, Sixty-Six Kobo Only)** for 2017 and 2018 remain outstanding, aggregating to **N3,384,005,888.66 (Three Billion, Three Hundred and Eighty-Four Million, Five Thousand, Eight Hundred and Eighty-Eight Naira, Sixty-Six Kobo Only)** as at the end of 2018.

**Exchange Rate Assumption**

- 16. The Minor Review Order 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.

- 17. Whilst the foregoing accurately reflect the CBN exchange rate, the Respondent is very much aware that foreign exchange is 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. This disparity in rates on account of difference between CBN exchange rate and Market rate has significantly impacted the Petitioner's cost without commensurate increase in end Customer tariff.

**Other Issues**

**18. Treatment of Shortfalls**

The Order computed and recognised the sum of **N104.3 Bn (One Hundred and Four Billion and Three Hundred Million Naira Only)** as the tariff shortfall and stated that all funds retained by the Petitioner as represented by excess of market (remittance) shortfalls over tariff shortfall are to be recovered from the Petitioner as its liability including applicable interest. As per Petitioner's computation, the tariff short fall works out to **N130.69(One-Hundred and Thrity Billion, Six-Hundred and Ninety Million Naira Only).**

**19. Treatment of Outstanding**

The Order stated that all funds retained by the Petitioner as represented by excess of market shortfalls over tariff shortfall, are to be recovered from the Disco as its liability including **applicable interest**. However, the Order makes no mention of the amortization period for the net market shortfall. Based on the Order and the foregoing, the amount payable to the Petitioner's as excess of tariff shortfall as at 2018 should be **N4.165 Bn (Four Billion, One Hundred and Sixty-Five Million Naira Only)** as against the figure of **N22.216 Bn (Twenty-Two Billion, Two hundred and Sixteen Million Naira Only)** computed in the order.

**20. Market shortfall should not include Genco and Transco Host communities**

- 1. Some Gencos and Transcos have been supplying their host communities as Corporate Social Responsibility and this supply is credited to be paid for by the Disco, example Afam and Odukpani. An order should be made for these Gencos and Transcos to pay for such communities or the amount for energy consumed should be netted off NBET bills. Please find in table 2

below, the total unpaid amount of **N11,339,942,752 (Eleven Billion, Three-Hundred and Thirty-Nine Million, Nine Hundred and Forty-Two Thousand, Seven-Hundred and Fifty-Two Naira Only)**, for energy consumed by Afam, Odukpani, and Itu Communities from 2016 – August 2019.

**Table 2**

	2016	2017	2018	2019	Total
	(N)	(N)	(N)	(N)	(N)
<b>AFAM</b>	1,973,549,871	2,472,624,166	2,452,061,606	1,570,854,450	<b>8,469,090,093</b>
<b>ODUKPANI</b>	651,722,400	445,683,004	642,928,346	472,984,875	<b>2,213,318,625</b>
<b>ITU</b>	268,075,424	143,017,491	113,856,600	61,466,843	<b>657,534,034</b>
<b>TOTAL</b>	2,893,347,695	3,061,324,661	3,208,846,552	2,105,306,168	<b>11,339,942,752</b>

2. That the Order by the Commission on Minor Review and Minimum Remittance should recognise the Petitioner's challenges due to the peculiar nature of the Niger Delta region as different from other parts of the country. Oil spills cases and environmental disasters (that includes gas flaring, toxic pollutant and etc.) which have robbed the people of their natural means of livelihood and impoverished them, have rendered most of them unable and unwilling to pay. The Commission working with the State and Federal Government should recognise a special subsidy for this area.

**21. Market Remittance**

Following the Minor Review Order, the tariff shortfall for PHED for 2019 is **N49.262 Bn (Forty-Nine Billion, Two Hundred and Sixty-Two Million Naira Only)**. Consequently, the difference between this and the cost of energy which represents the minimum remittance expected from the Petitioner as given by the tables in the 2016 - 2018 MINOR REVIEW OF THE MYTO 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019 (Order No. NERC/GL/179) is **N4.992 Bn (Four Billion, Nine Hundred and Ninety-Two Million Naira Only)**.

The Commission expects the Petitioner to be able to earn 100% of its share of allowable Revenue in order to be held accountable for expected service level improvements. The remittance levels proposed in the Order should be varied to enable Petitioner achieve them. The Petitioner will be constrained from payment of the proposed remittance thresholds for the following reasons:

1. **Impact of Minor Review on collection:** There is no automatic increase in the efficiency due to this minor tariff review that could enable the Petitioner to absorb the high remittance obligation at the present ATC&C and collection level.
2. **High level of loss:** The Petitioner had over the years been unable to attract sufficient fund for its CAPEX as a result of non-cost reflective tariffs. Hence our actual ATC&C loss level is higher than the figures recognized in the MYTO Model.
3. **MDA debt:** As shown earlier, the Petitioner has accumulated about **N686,785,184.42 (Six Hundred And Eighty Six Million, Seven Hundred And Eighty Five Thousand, One Hundred And Eighty Four Naira, Forty Ten Kobo Only)** of MDA debts from January to July 2019. Deducting the said debt from Market bill will assist the Petitioner towards meeting the Market remittance. However, the Petitioner will still require the threshold to be reduced to enable the Petitioner retain some funds for CAPEX


22. The Petitioner submits that the Minimum Remittance Order while seemingly well intentioned is impracticable and more particularly is not sustainable as it will severely and adversely impact the business operations of the Petitioner with the horrific ultimate result of taking the Petitioner into insolvency and by extension the Nigerian Electricity Supply Industry at large.

23. The particulars of the detrimental effects of the Order is monumental and impractical for:
- a) The Petitioner to be able to collect cost-reflective tariffs to finance its activities and to engage in the much-needed capital projects that will help improve its facilities.
  - b) The Petitioner's Investor to meet up with its obligations to the Bureau of Public Enterprises (BPE) under the Performance Agreement.
  - c) The Petitioner to meet up with its market obligations under the Amended and Restated Disco Disbursement Agreement.

**Our Prayers:**

24. In the light of the foregoing, we humbly urge the Respondent to further reflect on the shortcomings inherent in the Minor Review Order and:
1. Give due recognition to the impact of the Petitioner's ATC&C loss level as an input into the tariff, to also recognize 2015 and 2016 as Force majeure years and make adequate provision for CAPEX aimed at reducing the Petitioner's ATC&C loss level;

2. Compel NBET, which is also a licensee of the Respondent to comply with the Minor Review Order with particular respect to generation cost;
3. Allow MDA debts to be deductible from our payments of invoices received from the Nigerian Bulk Electricity Trader (NBET). The basis for this prayer is the absence of any certainty within the industry regarding a Recovery Mechanism for Outstanding MDA Bills. Once such a mechanism is successfully implemented, this variation can be revisited;
4. Reflect the inter-bank exchange rate in the Respondent's tariff assumptions;
5. That the historical tariff shortfall for the Petitioner be recognised as **N130.69Bn (One-Hundred and Thirty Billion, Six-Hundred and Ninety Million Naira Only)** following the recognition of 2015 and 2016 as Force Majeure Years;
6. That the minimum remittance to for the Petitioner be reduced from **N15.264Bn ( Fifteen Billion, Two Hundred and Sixty-Four Million Naira Only)** to **N4.992Bn (Four Billion, Nine Hundred and Ninety-Two Million Naira Only)** to account for the shortfall between the 2019 tariff shortfall and cost of energy as used in the Order 2016 - 2018 MINOR REVIEW OF THE MYTO 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019 (Order No. NERC/GL/179) after recognition of 2015 and 2016 as Force Majeure Years;
7. That the TCN and the GenCos within PHED franchise areas should treat supply to their host communities as Corporate Social Responsibility and therefore pay for it.
8. Suspend the Minimum Remittance Order pending when a truly cost reflective tariff is implemented.



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**Naveen Kapoor**  
**For Port Harcourt Electricity Distribution PLC**

**On Notice:**  
 Nigerian Electricity Regulatory Commission  
 Adamawa Plaza, Plot 1099, First Avenue,  
 Off Shehu Shagari Way,  
 Central Business District,  
 Garki, Abuja.



**BEFORE THE NIGERIAN ELECTRICITY REGULATORY COMMISSION**

**IN THE MATTER OF A PETITION FOR THE REVIEW OF NERC ORDER NO.: NERC/GL/179 ON THE 2016 - 2018 MINOR REVIEW OF THE MULTI YEAR TARIFF ORDER (MYTO) 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019 FOR PORT HARCOURT ELECTRICITY DISTRIBUTION PLC.**

**BETWEEN:**

**PORT HARCOURT ELECTRICITY DISTRIBUTION PLC - APPLICANT/PETITIONER**  
No. 1 Moscow Road, Port Harcourt, Rivers State.

**AND**

**NIGERIAN ELECTRICITY REGULATORY COMMISSION - RESPONDENT**  
Plot 1387 Cadastral Zone A00, Off Shehu Shagari Way, Abuja.

**THE PETITION IS BROUGHT PURSUANT TO SECTIONS 50 (1)(h) & 50(2) OF THE ELECTRIC POWER SECTOR REFORM ACT, 2005 AND SECTION 22 OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION (BUSINESS RULES OF THE COMMISSION) REGULATION, 2006.**

**AFFIDAVIT OF URGENCY IN SUPPORT OF APPLICATION/PETITION**

I, Naveen Kapoor, the Chief Executive Officer of Port Harcourt Electricity Distribution Plc and an adult, male Indian citizen of No. 1 Moscow Road, Port Harcourt, Rivers State do hereby make an oath and state as follows:

1. I am Chief Executive Officer of the Applicant/Petitioner in this matter.
2. I have the authority of the Applicant/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 and correct 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 conscientiously believing its content to be true and correct and in accordance with the Oaths Act, CAP O1, LFN 2004.

*C. Naveen Kapoor*  
Sworn to this 21<sup>st</sup> day of August 2019



*C. Naveen Kapoor*  
DEPONENT

0054797  
THE JUDICIARY  
HIGH COURT REGISTRY  
PORT HARCOURT  
**CASH OFFICE**  
Date 21-10-19

*KAKORO DJE*  
COMMISSIONER FOR OATHS/NOTARY PUBLIC

**BEFORE THE NIGERIAN ELECTRICITY REGULATORY COMMISSION**

**IN THE MATTER OF A PETITION FOR THE REVIEW OF NERC ORDER NO.:  
NERC/GL/179 ON THE 2016 - 2018 MINOR REVIEW OF THE MULTI YEAR TARIFF  
ORDER (MYTO) 2015 AND MINIMUM REMITTANCE ORDER FOR THE YEAR 2019 FOR  
PORT HARCOURT ELECTRICITY DISTRIBUTION PLC.**

**BETWEEN:**

**PORT HARCOURT ELECTRICITY DISTRIBUTION PLC - APPLICANT/PETITIONER  
No 1 Moscow Road, Port Harcourt, Rivers State.**

**AND**

**NIGERIAN ELECTRICITY REGULATORY COMMISSION - RESPONDENT  
Plot 1387 Cadastral Zone A00, Off Shehu Shagari Way, Abuja.**

**AFFIDAVIT IN SUPPORT OF PETITION**

I, Naveen Kapoor, the Chief Executive Officer of Port Harcourt Electricity Distribution Plc and an adult, male Indian citizen of No. 1 Moscow Road, Port Harcourt, Rivers State do hereby make oath and state as follows:

1. I am the Chief Executive Officer of the Applicant/Petitioner in this matter.
2. I have the authority of the Applicant/Petitioner to depose to this affidavit.
3. The statements made in all the paragraphs of the Petition are true and correct to the best of my knowledge.
4. I depose to this affidavit conscientiously believing its contents to be true and correct and in accordance with the Oaths Act, CAP O1, LFN 2004.

*Deputy Attorney General*

Sworn to this 21<sup>st</sup> day of October 2019.



*[Signature]*  
DEPONENT

COMMISSIONER FOR OATHS/NOTARY PUBLIC

0056067  
 THE JUDICIARY  
 HIGH COURT REGISTRY  
 PORT HARCOURT  
 CASH OFFICE  
 Date 21-10-19