

Power Supply (2): NERC the Regulator or Facilitator

Last week the Nigerian Electricity Regulatory Commission (NERC) warned that it would sanction Electricity Distribution Companies, DISCOs found extorting money from consumers to supply transformers and other distribution accessories to them. At the commissioning of the Ebonyi State Consumer Complaints Forum Office in Abakaliki the Acting Chairman of the Commission Dr. Anthony Akah noted that 'the Commission will punish DISCOs caught in such acts to the full extent of the law.' He further added that this will include fines and even revocation of licences depending on the magnitude of the offence. This buying and selling of transformers etc reminds one of the bad old, dark old days of NEPA, the very NEPA that, after decades of failing to meet the demand for electricity in Nigeria and when it had become apparent that state-controlled establishments in the last quarter of the century had been vastly underperforming in comparison to the competitive advantages provided in the open market and by private service providers, was quite rightly dissolved. Thereafter NEPA's assets were transferred to the Power Holding Company of Nigeria (PHCN) as part of the Federal Government's transition programme for the Electric Power sector.

This in turn meant that the full open market system for the supply of electricity, which Nigeria is moving towards after the intended windup of the PHCN, needed a central regulatory authority that would ensure the continued protection of Nigerian consumers in the manner that NEPA was supposed to, and which would also maintain and encourage the competitive advantages available in the open market, which are sometimes stifled by for-profit-businesses that have enough influence to do so. The Nigerian Electricity Regulatory Commission (NERC) was created to serve this purpose.

NERC was established by the Electric Power Sector Reform Act of 2005 (EPSR Act) by virtue of Section 31 (1) of the Act. It is the regulatory body responsible for ensuring the unbundling, privatisation and other reforms implemented by the EPSR Act are successfully accomplished. By virtue of the fact that the sector prior to NERC was state planned and controlled through NEPA, the Commission serves the purpose of maintaining a supervisory role over the privately run business entities operating within the sector.

Section 32(1) specifically provides for the objects and functions of the Commission as follows:

(a) to create, promote, and preserve efficient industry and market structures, and to ensure the optimal utilisation of resources for the provision of electricity services;

(b) to maximise access to electricity services, by promoting and facilitating consumer connections to distribution systems in both rural and urban areas;

(c) to ensure that an adequate supply of electricity is available to consumers;

(d) to ensure that the prices charged by licensees are fair to consumers and are sufficient to allow the licensees to finance their activities and to allow for reasonable earnings for efficient operation;

(e) to ensure the safety, security, reliability, and quality of service in the production and delivery of electricity to consumers;

(f) to ensure that regulation is fair and balanced for licensees, consumers; investors, and other stakeholders; and

(g) to present quarterly reports to the President and National Assembly on its activities.

Section 32 (2) states that 'for the furtherance of the objects referred to in subsection (1) of this section, the Commission shall perform the following functions:

(a) promote competition and private sector participation, when and where feasible;

(b) establish or, as the case may be, approve appropriate operating codes and safety, security, reliability, and quality standards;

(c) establish appropriate consumer rights and obligations regarding the provision and use of electric services;

(d) license and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity;

(e) approve amendments to the market rules;

(f) monitor the operation of the electricity market; and

(g) undertake such other activities which are necessary or convenient for the better carrying out of or giving effect to the objects of the Commission.'

The drafting of Section 32 of the EPSR Act- the Objects and Functions of the Commission- is modelled to encompass all the major functionalities of a regulatory body and all the regular keywords are used i.e. 'to create, promote, and preserve efficient industry and market structures...to ensure that an adequate supply of electricity is available.' The intrinsic problem with the Commission however, only becomes apparent when these functions are examined against the overriding reason the Commission was actually setup for. There is one simple objective of the Commission from which all others flow. It follows on from the purpose of its predecessor NEPA and that is to ensure an economically viable supply of electricity to Nigerian consumers willing to pay for the service.

It is when this objective is reduced into 'SMART' goals i.e. specific, measurable, achievable, relevant and timely measured units of function that it is broken down in the manner in section 32. However, whatever nature the various functions in section 32 take, it should be traceable to the objective of providing an economically viable electric supply to Nigerian consumers. The problem is that rather than facilitating this objective, the Commission is a 'regulator' simply playing the role of an 'arbiter' or referee between the DISCOs, other parties in the Electricity Industry and Nigerian consumers. There is specificity as to what the Commission aims to achieve, but not in the way Nigerians want and demand. The Commission is also not doing well with communicating the basic 'hows' 'whys' or 'whens' to Nigerians in a way they can appreciate.

On 1st January 2015 the Commission issued notice to all GenCos, DISCOs and the TCN ending the interim rules that have guided the market since privatisation and beginning the Multi-Year Tariff Order (MYTO). At that point the former Minister of Power (Prof. Chinedu Nebo) said the Electricity Power sector had not yet matured fully and would operate until it had under the Transitional Electricity Market (TEM). MYTO is scheduled to operate until 2024, and will be reviewable bi-annually. The implementation of MYTO is supposed to be characterised by greater accountability and regulation under counterparty contractual agreements and encourage increased competition not supported under the initial interim rules.

The Commission still appears to be perceived in the worst tradition of most regulators to Nigerians - large, unproductive and unresponsive- which is not to say that this is true but is rather the current perception of the Commission. It is losing the battle for trust and fast becoming PHCN's big brother. For instance the Commission works with the long term strategic phases of the privatisation process which appears to be well laid out but Nigerians do not

care about MYTO 2015 or whether the TEM is in place except to know how it affects their wallet and how it affects today's electricity supply. This then is the story the Commission is failing to communicate, which also explains why there is so much consumer and labour discord over the introduction of MYTO 2015. Other players have stepped in to fill the void created by the absence of proper communication between NERC and Nigerians. In that void these other parties begin to interpret the issues and in the process sensationalise them (often for their own benefit), feeding Nigerians with stories that inflame the nation.

The Commission needs more consumer-stakeholder buy-ins that can only be created by earning Nigerians' trust. NERC needs specificity as to how to achieve electricity supply and by what period, not through the elaborate MYTO 2015 strategic plan but through a tactical day-to-day campaign explaining how the changes affect the average Nigerian, in every day terms.

NERC's primary responsibility to the country should be to create the enabling environment through appropriate regulation to guarantee that by the year 2025 every Nigerian will have access to electricity for a minimum of 18 hours per day. Specific, measurable, achievable, relevant and time bound- a truly 'SMART' objective that Nigerians can understand and buy-in to. In the long term if this target is achieved NERC will have earned the trust and high praise of Nigerians, however in the short term, NERC must communicate the issues to Nigerians and show that there is a change in perspective. Further improvements to the industry would be introduced where the supply of electricity though not constant, can at least be certain. Certainty cannot be overrated, it is the difference between where the sector and the country is and where we could be. For instance if there was electricity supply for 12 hours a day but consumers knew when those 12 hours would be and for what specific areas, Nigerians could accept this as progress and NERC would record greater acceptance of the long term strategic plans. In Ghana for example announcements are made in the newspapers and radio stating the sector, area and the hours when there will be no light. By imposing specific requirements on DISCOs to disclose when and where electricity shortages will occur within reasonable periods of notice the sector would achieve the greatest progress ever in Nigerian history, not 100% electricity supply but certainty. This is the commodity Nigerians are demanding, and it is the basic requirement for many would be investors -certainty of supply not constant supply.

However in the absence of such specific requirements what the EPSR Act in section 32 unwittingly creates is an arbiter not a facilitator and NERC must reprioritise. Policy reforms should be encouraged to drive the sector and reposition NERC.

On the pertinent issue of the Dispute Resolution process of NERC, section 96 of the EPSR Act empowers the Commission to create regulations for the effective operation of the Power Sector and more specifically for establishing a Dispute Resolution Mechanism for DISCOs and Consumers. Each DISCO is to establish a Customer Complaint Unit which becomes the first point of call for disputes between the customer and the DISCO. Complaints will be made orally or in writing and they are to be treated according to the Customer Complaints Handling Standards and Procedure Regulations 2006. The DISCOs record such complaints which are to be resolved within 15 days. If this is not possible the Customer must



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be so informed within those same 15 days of the complaint and from then on every 15 days until the resolution of the matter (Regulation 3(8)).

Furthermore Section 45 of the EPSR Act empowers the Commission to conduct its proceedings, consultations and hearing at the headquarters or at any other place in Nigeria and should the Customer Complaint Unit of DISCOs be unable to resolve the dispute the parties can escalate to the Commission's Forum Office. One must though acknowledge NERC's effort at establishing Forum Offices around the country. The Forum Offices are made up of 5 part-time members, 'one representative of industrial customers nominated by the Manufacturers Association of Nigeria (MAN), one representative of the commercial customers to be nominated by the Nigerian Association of Chambers of Commerce, Industry, Mining and Agriculture, one representative of the household customers to be nominated by the Consumer Protection Council, one representative of an NGO based in the Distribution Licensee's operating area nominated by the Commission, and one nominee based in the Distribution licensee's operating area who has an electrical engineering background, nominated by the Commission.'

A 'forum has the power to determine the admissibility of a complaint for hearing, which shall be done within ten working days from the date that the complaint is received. The Forum has a duty to hear every complaint expeditiously as possible, based on evidence presented by both parties, and must reach a decision within a maximum of two months, from the date of receipt of a complaint by the Forum' (The Nigerian Electricity Regulatory Commission -'The Role of NERC in Resolving Disputes Within the Power Sector').

The Commission's jurisdiction to hear disputes is not limited to those between Customer and DISCOs, as the Commission can also hear disputes between different disputing parties within the electricity distribution network. Section 50 EPSR Act gives the Commission authority to review its own decisions by taking and hearing applications from aggrieved or affected persons for such review. As stated above, NERC reviews its own decisions. However, the Act should be amended to make provisions for an independent appellate body to review the decisions of NERC because no one should be a judge in his own cause - 'nemo iudex in causa sua', as the law has it. In addition criminal matters should be referred to the State High Court and non-criminal matters should have recourse to Arbitration or other effective and timely forms of Alternative Dispute Resolution.

One thing is for certain the dispute resolution mechanism of NERC is robust enough to withstand the enormous task that lies ahead. All said and done NERC still needs to be repositioned to take the power sector to its next level.