An Evaluation of the Nigerian Electricity Regulatory Commission Meter Asset Provider Regulations 2018

Background

The Electric Power Sector Reform Act 2005 ("EPSRA") empowers the Nigerian Electricity Regulatory Commission ("NERC") to make regulations with a view to, amongst others, ensuring fairness, safety, security, reliability and quality of service in the production and delivery of electricity to customers. NERC, therefore, issued the Meter Asset Provider Regulations 2018 (the "MAP Regulations") with a view to, inter alia, eliminating estimated billing and thus, engendering fairness in the industry whilst also enhancing revenue assurance in the face of the illiquidity which has pervaded the industry- especially on-grid power supply. Specifically, the MAP Regulations were issued in exercise of the powers conferred on NERC by section 96 of the EPSRA.

The increasing number of unmetered electricity customers who are continually subjected to estimated billing by the electricity distribution companies ("DisCos") and the significance of attracting private investment to metering services in the distribution sector have made the issuance of the MAP Regulations all too important. Little wonder, also, that a bill to criminalize the use of 'estimated billing' in the calculation of electricity consumed and tariff to be paid by consumers by Discos has passed first reading in Nigeria's House of Representatives.

An Analytical Review of the MAP Regulations

The MAP Regulations primarily introduce Meter Asset Providers("MAPs") as a new set of service providers in the NESI. As assets with technically useful life of 10-15 years, the regulation provides for the third-party financing of meters, under a Permit issued by the Commission, and provides for amortization over a period of 10 years. With the metering gap in the Nigerian Electricity Supply Industry reported to be almost five million meters as at December 31, 2017;

DisCos are required to engage the services of MAPs, in accordance with the provisions of MAP Regulations towards meeting their metering targets specified by the Commission. The key provisions of the MAP Regulation are analyzed below:

(i) Metering Obligations

DisCos are wholly responsible for meeting their metering targets as maybe prescribed by NERC from time to time and in furtherance of this mandate, the MAP Regulations directs all Distribution Licensees to engage the services of MAPs towards meeting its metering targets.

Additionally, Eligible Customers being served under the Eligible Customer Regulations may engage MAPs to ensure proper energy accounting. Of paramount consideration however is the lack of clarity on the context or process on how the Eligible Customers contemplated by the MAP Regulations are to engage the MAPs in ensuring accurate energy accounting. The writer notes that the MAP Regulations already empower every electricity customer with the right to a properly installed meter to ensure an accurate energy accounting and to ultimately prevent circumstances that could lead to estimated billing. Also, the MAP Regulation provides that in the event that the meter is in need of repair, such repair services must be provided within two (2) working days of the disrepair. It is unclear whether this provision out-rightly empowers Eligible Customers to engage MAPs without the normal process of going through the DisCos.

(ii) Grant of Permit and Procurement

A relevant DisCo is required to first declare a metering gap, stating its intention to meter certain areas and requesting prospective MAPs to express their interests.

Consequently, bidders must then submit an expression of interest in at least three Nigerian newspapers and on the licensee's website, in accordance with published requirements which must include –technical expertise, financial capability and experience in the metering business. Prior to participating in such bid rounds by DisCos for MAPs, such MAPs interested in bidding must first obtain a "No Objection" from NERC subsequent to the conduct of the relevant due diligence on the prospective MAPs by NERC.

Once a decision is made, the licensee issues a bid document to each qualified bidder and a letter of offer to enter into a Metering Service Agreement ("MSA") with the successful bidder.

DisCos are required to conclude the procurement process for the engagement of MAPs within 120 days from the commencement of the procurement process. However, the procurement process for the engagement of the first set of MAPs is required to be concluded no later than one hundred and twenty days from April 3, 2018. Upon completion of evaluation of bids, the successful Applicant shall submit an application for the grant of a Meter Asset Provider Permit to NERC. The tenure of the permit of a MAP, shall be fifteen (15) years in the first instance. Additionally, subject to NERC's approval of the procurement process and grant of a Meter Asset Provider Permit, the Distribution Licencee shall enter into Metering Service Agreement with the successful applicant for a Map Permit. It is pertinent to note that, rather surprisingly, the MAP Regulations do not prescribe a renewal period for permits granted to MAPs. Further, it is unclear if DisCos have commenced a bid process for the selection of MAPs. Importantly, the MAP Regulations specify that NERC shall convey its decision in respect of an application for a MAP Permit within twenty-one (21) days of the submission of the required documentation for a MAP Permit.

(iii) Local Content Requirements

Not less than 30% of the contracted metering volumes sourced by the MAPs shall be from local meter manufacturing companies in Nigeria. The implication of this directive encapsulates the NERC's underlying objective of encouraging competitive metering services within Nigeria, especially considering the wide gap between demand and supply of electricity meters in Nigeria; whilst simultaneously encouraging the participation of foreign investment (as there is an allowance for 70% of meters that may be manufactured by non-Nigerians).

At this point, it is germane to quickly consider the provisions of the NERC's Local Content Regulations regarding local content. By virtue of the NERC Regulations, all licensees shall give first consideration for Nigerian goods and services in award of contracts. The implication is that Nigerians shall generally be awarded contracts for the provision of goods and services in the power sector, before non-Nigerians are considered. Another interpretation of this provision implies that non-Nigerians will only be considered, when utilization of indigenous operators in the domestic power market is exhausted. The writer notes the seeming contradiction between this provision and the MAP Regulations which has restricted and streamlined the application of local content to a 30% minimum. Meaning that, in procuring the MAP services, foreign participation of up to 70% is allowed, as long as the metering volumes sourced is not below 30% local content. The writer is not unaware of Paragraph 24 of the Local Content Regulations which empowers NERC to make Orders in furtherance of the objectives of the Local Content Regulations.

This Paragraph gives fillip to the argument that NERC should not be reducing local content limits in the MAP Regulations as making Orders in furtherance of the objectives of the Local Content Regulations will mean providing further support to it and not reducing its effectiveness, which the 30% threshold stated in the MAP Regulations appears to do.

(iv) Contractual Framework

In a bid to further regulate the operations of the DisCos and the MAPs and to subject them to legally enforceable principles, the MAP Regulations introduce a compulsory legal requirement which mandates the distribution licensee and the MAP to enter into a Meter Service Agreement ("MSA") and a Service Level Agreement ("SLA"). The requirements of the MSA include the number of meters to be installed by the MAP and the licensee; recovery of the Cost of Meter Asset plus a reasonable return over a period of 10 years; securitization; meter specification and other provisions on indexation to cater to the variation in the macro economy. The SLA on the other hand would specify the timeframe for installation; maintenance; meter reading; meter replacement among others.

Furthermore, the Distribution Licensees shall include a metering service charge as a clear item on the billing of its customers provided with meters under an MSA with MAPs and shall be separate from the energy charge. It is important for Distribution Licensees and MAPs to consider and adequately address deal breakers such as financing and operational risks in these agreements to guard against unprecedented circumstances and liquidity crisis.

(v) Meter Ownership

The Map Regulations vests legal ownership of the meter asset on the MAP until fully amortized through payment of a metering service charge by beneficiary customers. Also, by virtue of the MAP Regulations and in line with guidelines for asset enumeration by Distribution Licensees, customers' meters are associated with feeders and distribution transformers and shall not be moved by customers.

It is germane to consider here, the seeming difficulty this particular provision will pose to electricity customers. The implication is that the amortization process may impose payment for electricity consumed on customers who may have just moved into the premises where the meter was installed. More so, customers may be subjected to paying for electricity for meters which eventually they might not own. There is also the risk of paying the meter service charge and cost of installation all over again where such a customer moves into any premises that is unmetered. On this note, it is paramount that electricity customers comply with a recent directive from NERC that enjoins customers to apply to their respective DisCos for reconciliation of charges and services transfer, where they are relocated.

(vi) Prohibited Activities

Towards achieving a transparent procurement process is an embargo placed by NERC on the Distribution Licensee, its directors, directors' spouses and children from owning shares and holding directorship and senior management in MAP companies. This is a crucial protection afforded the industry, to prevent MAPs and DisCos from colluding in the MAP services which ultimately will bring about conflict of interest. The writer also notes the significance of this provision in ensuring that transactions are dealt at an arm's length.

However, this provision is vague to the extent that it did not specify the senior management positions that is applicable to Distribution Licensees. Furthermore, in line with the provisions of the Companies and Allied Matters Act (CAMA), it is the writer's recommendation that such a Distribution Licensee who holds any management position in the MAP declares his nature of interest in any transaction or contract where he directly or indirectly has interest.

In Conclusion

The MAP regulatory framework no doubt will in no small measure, significantly improve the power sector situation in Nigeria by putting in place certain necessary measures to curb arbitral electricity billing of customers and by ushering in a new direction to private sector participation. Crucial to this motive is the attention the MAP Regulations draw to NERC; mandating NERC within Ninety (90) days of approving the MAP Regulation to "cap" unmetered customer bills as a gateway to addressing the issue of estimated billing in the NESI.

The foregoing notwithstanding, the writer notes certain issues which may predominantly pose problems and delay investments in the sector in the future. One of such identified issues is the wide discretionary powers given to the DisCos. The Regulation expressly provides that the DisCos would first declare a "gap" in metering before the other processes follow. The implication of this provision is that there is little room for a private investor to effectively and directly participate in metering unless a DisCo deems it fit that a MAP is needed, hence placing the MAPs at the mercy of the DisCos. This may be very restrictive and considering that the DisCos are also private entrepreneurs, there might be conflict of interest and the declaration of metering gap may take a very long while. A more efficient procedure might be where a prospective MAP may apply directly to NERC, with an approval or some form of certification from the DisCo in charge of the area where the meter is to be provided.

On another note, the Regulation provides that its applicability shall not affect metering contracts entered into by DisCos prior to its coming into effect and that the provisions of all other Regulations, Rules and Codes of the NERC shall only be applicable to the extent of their relevance. It is unclear whether the technical advantages and amortization benefits in the MAP Regulations will continue to apply to new meters installed as a replacement to old meters, subsequent to the commencement of the MAP Regulations. It is not also clear the extent of the relevance contemplated by the MAP Regulations, with regard to other NERC Regulations already in existence and which Regulation would override the other where there is an inconsistency.

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