

# The Eligible Customer Regime –

## Can the Electricity Distribution Companies in Nigeria Validly Declare Force Majeure?

### Introduction

In exercising some of the powers conferred on him by the Electric Power Sector Reform Act 2005 (“EPSRA”), the Minister of Power (the “Minister”), declared four (4) categories of customers eligible to buy power directly from the generation companies (“GenCos”) and other licensees, other than the electricity distribution companies (“DisCos”). By virtue of this policy and Regulations subsequently issued by the Nigerian Electricity Regulatory Commission (“NERC”), the entities who qualify as eligible customers are authorised to source power directly from GenCos, thereby skipping the typical intermediary role of the DisCos in the power sector value chain.

The inception of this policy has triggered reviews for and against the current regime on the side of the eligible customers, the DisCos and the GenCos alike. This article therefore seeks to evaluate the effect of the policy and the subsequent regulations in the development and improvement of the Nigerian Electricity Supply Industry (the “NESI”) and to express a view as to whether the DisCos can validly declare force majeure merely because of the state of policy and law on eligibility.

### Legislative & Policy Background

Section 100 of the EPSRA defines an eligible customer as “a customer that is eligible, pursuant to a directive or directives issued by the Minister under section 27, to purchase power from a licensee other than a distribution licensee”.

The Minister invoked the eligible customer regime, following the declaration of the Eligible Customer Status for the electricity market, pursuant to Section 27 of the EPSRA. This status permits certain classes of consumers of power to approach GenCos directly for the purpose of purchasing power.

To give further clarity to the EPSRA and the declaration of eligibility by the Minister, NERC recently issued a comprehensive guideline on the procedure and operation of the eligibility regime. Under the guidelines, the classes of customers that may apply for an eligible customer status include:

- A customer or group of end-use customers registered with NERC whose consumption of electricity is no less than 2MWhr/h. The end-users under this category are also connected to a metered 11kV or 33kV delivery point on the distribution network, subject to a distribution use of system agreement for the delivery of electrical energy;
- A customer or a group of end-use customers connected to a metered 132kV or 330kV delivery point on the transmission network under a transmission use of system agreement;
- A customer or a group of end-use customers, whose consumption is in excess of 2MWhr/h over the course of one month, that is connected directly to a metered 33kV delivery point on the transmission network under a transmission use of system agreement, and has entered into a bilateral agreement for the construction, installation and operation of the distribution system used to connect the customer to the 33kV delivery point, with the distribution licensee licensed to operate in the location where the customer and the 33kV delivery point is located; and
- A customer or a group of end-use customers whose consumption is more than 2MWhr/h over a period of one month and directly connected to the metering facility of a GenCo, and has entered into a bilateral agreement for the construction and operation of a distribution line with the distribution licensee licensed to operate in the location.



### The Force Majeure Argument

It would appear that some of the DisCos, or indeed, their investors, relying on Clause 7 of the performance agreements (the “Performance Agreements”) signed in connection with the sale of the majority (or all) shares in the relevant companies, have begun the process of declaring force majeure pursuant to the Performance Agreements. This is in reaction to the Minister’s declaration of the criteria for customer eligibility and the subsequent issuance of regulations in that respect. The only force majeure head under the Performance Agreement that the declaration of eligibility and the issuance of the Regulations for the implementation of the eligibility regime, can potentially fall under, is Political Force Majeure under Clause 7.4.4 of the Performance Agreements.

Specifically, Clause 7.4.4 stipulates that Political Force Majeure includes any Change in Law or Change in Tax (as defined in the Performance Agreements) that renders any material obligation of Bureau of Public Enterprise (the “BPE”) under the Performance Agreement unenforceable, invalid or void; makes it unlawful for the DisCos or Investors to make or receive any material payment, to perform any material obligation or to enjoy or enforce any material right under any consents or the Performance Agreement; materially restricts or limits on the ability of the DisCos or Investors to repatriate any dividends or return of capital, which are in place for more than 180 days; or causes the DisCoS to incur any taxes materially in excess of those the Company would have incurred under the laws in effect on the date of the Performance Agreement.

The declaration of eligibility and the subsequent issuance of the Regulations neither constitute Change in Law nor Change in Tax as specified in the Performance Agreements. Rather, the declaration has only created the much-needed competition in the Nigerian electricity supply industry, necessary to drive dedicated performance and ensure stable power supply. Based on the express provisions of the EPSRA, the declaration of the criteria for eligibility and the issuance of the relevant Regulations, eligible customers are allowed in the current market to purchase power directly from generation companies and same does not constitute a Change in Law. Same also does not result in any of the outcomes listed in Clause 7.4.4 of the Performance Agreements.

Consequently, the declaration of customer eligibility and the issuance of the Regulations cannot validly be relied upon by the DisCos to justify a claim of Political Force Majeure under Clause 7.4.4 or any other form of Force Majeure. Interestingly, there are opportunities for the DisCos to make money under the Distribution Use of System (“DuoS”) Agreement. Eligible customers are required to execute DuoS Agreements, to the extent applicable, and as a requirement for approval by NERC of each arrangement.

Consequently, the Regulations further guarantee access to distribution and transmission networks, following evidence of required capacity, hence ensuring continued stream of revenue for the network providers within the current regime. There is also an obligation for generation companies/ eligible customers to enter arrangements with DisCos before constructing distribution facilities. It is noteworthy that the Minister, as provided under Section 28 and 29 of the ESPRA, may issue directives for the collection of competition transition charges from eligible customers, which could in turn guarantee constant revenues for the discos.

### Conclusion

Contrary to the view that the policy is a premature step by the government, the writer is of the considered opinion that this policy is timely, if not long over-due. Following the liquidity crises and other militating factors which have plagued the sector for decades, this policy can indeed be termed a long-awaited development. It is expected that the new policy will usher in a transition from a monopolised power distribution market to a fairly competitive one and in turn, bring about significant economic growth. The unrestricted access to electricity by the qualified consumers will boost commercial businesses and compel other distribution companies to deliver quality and reliable power in a bid to measure up. This is in addition to the fact that DisCos will still stand a good chance of generating reasonable revenues via DuoS Agreements and their distribution assets and rights generally.

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