

## AN ANALYSIS OF THE POWERS OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION TO REVOKE LICENCES



### 1.0 INTRODUCTION

**O**n the 8th of October 2019, the Nigerian Electricity Regulatory Commission (NERC) issued a Notice of Intention to Cancel Licences pursuant to section 74 of the Electric Power Sector Reform Act, 2005 (EPSRA).

Prior to this latest development, NERC had issued the 2016-2018 minor review of Multi Year Tariff Order (MYTO 2015) and minimum remittance order for the year 2019 for each of the eleven (11) DisCos. The Order took into account the historical tariff shortfall for the period of 2016 to 2018 and provided a basis for adjustment with regards to

period of mutual non-performance in order to determine the remittance obligations of each of the DisCos for the year 2019 to the Nigerian Bulk Electricity Trading Plc (NBET).

The recent notice of intention to cancel the licences of eight (8) DisCos is hinged on the non-compliance with the remittance obligations spelt out in minor review of 2015 MYTO and remittance framework applicable to each of the eight DisCos.

This report undertakes a review and analysis of the extant powers of NERC in revoking the licences of DisCos under section 74 of the EPSRA.



## 2.0 POWER OF NERC TO CANCEL LICENCES

The power of NERC to revoke licences stems from section 74 (2) (a)-(d) of EPSRA which stipulates four grounds upon which the licence of a licensee may be revoked by NERC.

For clarity the exact provisions of section 74 (2) (a)–(d) of EPSRA states as follows:

“Subject to this section, and after an inquiry, including an opportunity for the licensee to show cause to why the licence should not be cancelled, the Commission may cancel any licence if, in its opinion-

- a) *The licence was issued through fraud or misrepresentation or non-disclosure of a material fact by the licensee;*
- b) *The licensee has wilfully or unreasonably contravened any provisions of this Act that is applicable to the licensee;*
- c) *The licensee has failed to comply with any term or condition of the licence, the breach of*

*which is expressly declared by such licence to render it liable to cancellation; or*

- d) *The financial position of the licensee is such that he is unable to fully and efficiently discharge the duties and obligations imposed by the licence.”*

In addition the EPSRA empowers NERC to revoke licences:

*“if the Commission is satisfied for any reason specified that in subsection 2 of this section that it is in the public interest that the licence concerned should be cancelled...”*

Thus in succinct terms, the powers of NERC to revoke licences can be grounded on the following:

1. Fraud, misrepresentation or non-disclosure of material facts by the Licensee;
2. Wilful or unreasonable infraction of the provisions of the Act;
3. Failure to comply with the terms of a licence;
4. The licensee is unable to fulfil its obligations



under the license, due to its bad financial position;

#### 5. Public interest concerns.

However before exercising its powers under the EPSRA, NERC is mandated to allow the licensee an opportunity to demonstrate within sixty (60) days of notification that circumstances have changed in warranting the cancellation. The EPSRA also empowers NERC to allow the license remain in force instead of revoking it, subject to imposing further terms and conditions which shall from part of the licence.

### **3.0 APPLICATION OF SECTION 74 OF EPSRA ON THE 8 DISCOS**

The ground upon which the notice of intention to cancel the licence of eight of the DisCos by NERC is predicated on non-compliance with the remittance obligations imposed under the minor review of MYTO 2015 and Remittance Order 2019. In particular the said DisCos failed to remit fully the minimum threshold stipulated for each of the DisCos for the July 2019 billing cycle.

The Remittance framework for 2019 became effective by July 1 2019. According to NERC the Order was enacted to enable DisCos meet with their contractual/performance obligations as well as condition 2 of their licence terms and conditions which states that:

*“Licensees shall maintain adequate financial, technical and managerial resources and capabilities to allow the licensee(s) carry out the licensed business in accordance with the various regulations, codes, rules and service standards prescribed by the Commission”*

Effectively, NERC is of the view that failure to fully remit in line with the Remittance Order for the month of July 2019 by eight of the DisCos amounted to an infraction which is further heightened where the DisCos have not posted a

three (3) month security bond for payment obligations as required under the remittance framework.

The above development therefore poses an obligation on the eight DisCos to demonstrate within sixty (60) days that they are not in a bad financial situation as to prevent them from undertaking fully their remittance obligations toward the NESI or otherwise.

### **4.0 IMPLICATIONS OF REVOKING THE LICENSE OF THE 8 DISCOS**

At the expiry of the inquiry, NERC has the option of allowing the license to remain in force, subject to such further terms and conditions as it may deem necessary to impose. However in the event NERC decides to revoke the licence, a notice of cancellation shall be issued by NERC stipulating the date on which the cancellation shall take effect.

With regard to the undertaking/business operations of the licensee, the EPSRA stipulates that an order may be made by NERC for the sale of the assets/undertakings of the licensee, where necessary for maintaining continuity in the provision of electricity.

The effect of paragraph 6 of the section 74 of the EPSRA on the 8 DisCos is that their assets are liable to be the subject of sale to another interested party in the event NERC decides to cancel their licence. Upon the successful sale, divestment and transfer of their assets, it does appear the new owners will be given fresh licences stipulating terms and conditions of the undertaking.

### **5.0 DISPUTE RESOLUTION FOR LICENSE REVOCATION**

The ESPRA and the NERC Business Rules (Schedule I – Arbitration of Disputes) does not provide for dispute resolution between NERC and its Licensees. In this event, such disputes will be resolved by the Federal High Court by virtue of

Section 251 (1) (p-r) of the Constitution of the Federal Republic of Nigeria.

## **6.0 CONCLUSION**

It does appear NERC's power to revoke the licence of the 8 DisCos may be predicated on the inability of the 8 DisCos to fully carry out their minimum remittance obligations under the applicable remittance framework towards the NESI as a result of their inadequate financial resources as required under their respective licences. In line with the EPSRA, the 8 DisCos have an opportunity to demonstrate otherwise and that the circumstances do not warrant a revocation of their licence.

NERC has expressed its willingness to enforce the market rules, regulations and in particular the recently enacted remittance order 2019, which it believes would steer the NESI towards a cost reflective market, as failure to fully comply with the remittance obligations according to NERC poses a systemic risk while threatening the sustainability of the other members of the value chain in the NESI.

It remains to be seen how many amongst the 8 DisCos that will survive NERC's recent enforcement action.