EXAMINATION OF THE ALTERNATIVE DISPUTE RESOLUTION MECHANISMS OF THE ELECTRIC POWER SECTOR REFORM ACT, 2005 AND THE ROLE OF NIGERIAN ELECTRICITY REGULATORY COMMISSION IN THE RESOLUTION OF DISPUTES AMONGST LICENCEES OPERATING IN THE NIGERIAN ELECTRIC POWER SECTOR

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Abstract

The reforms of the electric power sector in Nigeria culminated in the enactment of the Electric Power Sector Reform Act, 2005 (EPSR Act). The EPSR Act introduced a new governance structure along with novel concepts like licensing of operators, enabling different mechanisms for dispute resolution like Alternative Dispute Resolution (ADR) and the three-tier quasi judicial process and establishing the Nigerian Electricity Regulatory Commission (NERC) as the superintendant of the sector. Adopting the doctrinal methodology of research, this study was motivated by not only the novelty of ADR in dispute resolution amongst operators in the sector, but more by the need to highlight the workings of the mechanism to operators and other stakeholders with a view to making for a better understanding of the dispute resolution mechanism enabled by the EPSR Act and determine whether it meets with the requirement of it in the sector. The study discovered that powers granted NERC to re-hear matters and vary its decisions and also to preside over matters in which it is a party runs counter to the twin principles of procedure. The study recommended amending the EPSR Act in order to bring the powers of the NERC in relation to its function in dispute resolution to within accepted legal bounds. The study concluded that even with the shortcomings observed in the provisions of the EPSR Act on dispute resolution, the utilization of ADR by licensees has met the desired end of ensuring the synergy required in the overall operation of the sector.

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Introduction

The reform of the Nigerian electricity sector started with the commissioning of a study under the auspices of the Electric Power Implementation Committee (EPIC) by the newly installed democratic government in 1999. The study was commissioned to proffer ways and means to achieve a transformation of the sector which had largely performed below capacity and had, consequently, adversely affected the nation's economic development.[1] The study culminated in the production of a policy document, the Nigerian Electric Power Policy (NEPP), which outlined the objectives of the reform of the sector to include, amongst many others, the establishment of an independent regulator to superintend the activities of the sector and the continuous review of laws relating to the sector and the development of structures and rules relating to the sector.[2] The recommendations of this policy document led to the enactment in 2005 of the Electric Power Sector Reform Act (EPSR Act). The principles enunciated in the policy document formed the basis of the EPSR Act. The main point of difference between this Act and the previous laws[3] on electric power in Nigeria, is that it marked a significant legal departure from the old order of government control of the sector to an entirely new order of private participation as pushed forward by the EPSR Act. The EPSR Act enabled the paradigm shift in the sector from total government control to a privately driven one with an independent regulator created by the Act. This Act incorporated most of the principles of the NEPP which included the creation of an independent regulatory body to superintend over the sector and ensure compliance to standards in a transparent and effective manner. Thus, the reform process of the electric power sector in Nigeria, through the instrumentality of the EPSR Act, established the Nigerian Electricity Regulatory Commission (NERC or the Commission) as the independent regulator of the sector. The Commission was also saddled with the responsibility of coordinating the transition of the sector to a market driven electricity market.

Establishment of the Commission:

The EPSR Act, which is the legal regime of the reformed electricity sector in Nigeria, established the Commission pursuant to provisions contained in section 31 (1) and (2) of Part III of the Act which states:

> (1): There is hereby established a commission to be known as the Nigerian Electricity Regulatory Commission, which shall be a body corporate with perpetual succession which can sue or be sued in its corporate name and subject to this Act, perform all acts that bodies corporate may by law perform.
>
> (2): The headquarters of the Commission shall be in Abuja.

[1] M. T. Ladan, Electricity Law, Policy and Reform Implementation in Nigeria (Ahmadu Bello University Press Limited, 2013) 128.
[2] Ibid., 128-129. See also Ayodele Oni, The Nigerian Electric Power Sector: Policy: Law: Negotiation: Strategy: Business (CI-Plus, 2013) 18-19.
[3] Electricity Corporation of Nigeria Ordinance of 1950 and National Electric Power Act, 1990 (both repealed).

The Commission, established as a body corporate with perpetual succession, can sue and be sued in its corporate name and is empowered to do all things that bodies corporate are allowed by law to do, is the regulator of the generation, transmission and distribution activities of the Nigerian electric power sector. The Commission is headquartered in Abuja.[4]

The requirement to have the Commission in place as the midwife of the reform process and, subsequently, the chief regulator of the sector, was underscored in the long title of the Act which contained the central aim of the reform of the sector. The long title describes the Act as:

> An Act to provide for the formation of companies to take over the functions, assets, liabilities, and staff of the National Electric Power Authority; develop competitive electricity markets; establish the Nigerian Electricity Regulatory Commission; provide for the licensing and regulation of the generation, transmission, distribution and supply of electricity; enforce such matters as performance standards, consumer rights and obligations; and to provide for the determination of tariffs; and to provide for matters connected with or incidental to the foregoing.

This further underscores the importance of the Commission to the success of the reform and the regulation of the sector through affirmative actions, including the management of the dispute resolution mechanism in the NESI and enforcement of consumer rights amongst others.

Objects and Functions of the Commission

The objects and functions for which the Commission is established are spelt out in section 32 of the EPSR Act. In section 32 (1) (a), the Commission has a principal object "to create, promote, and preserve efficient industry and market structures, and to ensure the optimal utilisation of resources for the provision of electricity services." The same section in sub-section (2) provides for some key functions of the Commission to:

(a) Licence and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity;
(b) Approve amendments to the market rules;
(c) Monitor the operation of the electricity market; and
(d) Undertake such other activities which are necessary or convenient for the better carrying out of or giving effect to the objects of the Commission.

[4] s.31 (2).

The Minister in charge of Power may issue general policy directions to the Commission on such matters that relate to electricity and general system planning and co-ordination that will assist the Commission in the discharge of its functions provided such policy directions do not conflict with the provisions of the Act or Constitution.[5]

Proceedings of the Commission:

The Commission is enabled to conduct proceedings, consultations and hearings[6] and to make decisions and orders which shall contain the basis for the decision or order[7] and shall be properly recorded in writing[8] and also made accessible to the public at reasonable times and places.[9] In the conduct of its proceedings, the Commission is enabled to issue notices to interested parties[10] who may include licensees, consumers, eligible customers and other persons,[11] and may consult experts on technical questions.[12] Where questions of law arise from any of the Commission's decisions or orders, such may be referred *suomotu* by the Commission, or at the request of any person affected by the decision or order, to the High Court.[13] The Commission may review its decision or order through a process of re-hearing and appeals.[14]

Licensing under the EPSR ACT

The NERC was mandated by EPSR Act 2005 to issue licences to the authorized companies and to provide trading designs, new rules, codes and processes for the operation of the licensees in the industry. In the exercise of this mandate, the NERC licensed a number of companies across the entire spectrum of the electricity industry. Thus, six (6) companies were licensed in the generation arm, eleven (11) in the distribution arm and one (1) in the transmission arm[15]. These companies were eventually privatized under the Federal Government's privatization programme except the Transmission Company which was retained by the Federal Government.

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[5]s,33.
[6]s.45 (1).
[7]s.46 (1) (a).
[8]s.46 (1) (b).
[9]s.46 (1) (c).
[10]s.47.
[11]s.45 (2).
[12]s.48.
[13]s.49.
[14]s.50.
[15]s.51 EPSR Act.

Categories of Licencees

i) Generation Licensees (GENCOS)

Electricity is generated at power stations by electro-mechanical generations, which are primarily driven by heat engines and fuelled by chemical combustion or nuclear fusion. It can also be generated by kinetic energy of flowing water and wind.[16] In Nigeria, Kanji, Jebba and Shiroro power stations generate electricity through water while Sapele, Afam and Delta power stations use gas and steam.[17]

The generation companies are required to generate electricity through the various means for transmission and distribution for industrial and domestic use. According to the EPSR Act, the generation companies must specialize in generation as core investors, providing all the technical, financial and management competence, for efficient generation of electricity, to the transmission company.[18]

A company with generation licence, is authorized to construct, own, operate and maintain a generation station, for the purposes of generation and supply of electricity to the nation. Essentially, the responsibility of the generation companies is to build, maintain and operate power stations for electricity generation and dispatch. This must be done with the highest level of efficiency to keep power bills very low at a standard quality.

In Nigeria, the efficiency of the Generation companies has been limited due to poor funding and archaic facilities. There is obvious need for massive investment in the generation segment if Nigeria is to realize the desired objectives in the sector.

ii) Transmission Licensees (TCN)

Electricity Transmission is the technical process of wheeling electricity, through distribution, to the final consumer. It involves the transfer of electric energy to electrical sub-stations located near demand centres after generation.[19]

The EPSR Act requires that a Transmission Company, must be under licence by NERC. Section 65 mandated the NERC to authorize the transmission licensee to carry on grid construction, operation and maintenance of transmission system within Nigeria and may connect Nigeria with a neighboring jurisdiction.[20] In other words, the responsibility of the transmission company is to wheel generated electricity from the generation companies to the final consumers through the distribution companies (Discos).

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[16]A. A. Adegunwa, Electricity Development in Nigeria (University Press, 2008)10.
[17]Ibid
[18]s. 26 EPSR Act.
[19]C. A. Awosepe, Nigerian Electricity Industry: Issues, Challenges and Solution (Covenant University Press, 2014) 17.
[20]s.65 EPSR Act.

In Nigeria, the Federal Government retained 100% of the shares of Transmission Company of Nigeria (TCN), from the inception of the reform. TCN is the only company authorized to operate in the transmission segment of the sector. The Company operated under a contract then with Manitoba International Hydro Company of Canada but management has reverted to the Federal Government.

As noticed in respect of general state of facilities in the sector, the transmission segment is also in need of urgent upgrade. There is need for massive investment and up-grade of the transmission lines, to avoid loss of electricity in the process of travelling for distribution[21]. It is instructive that, if the federal government continues to maintain a total control on the transmission sub-sector, it must consider further substantial investment to up-grade facilities and capacities. Power generation will be meaningless, if transmission does not have the capacity to wheel it to distribution and consumption.[22]

iii) Distribution Licensees (DISCOS)

By the provisions of NERC, distribution licencees are obligated to carry out activities of operation, construction and maintaining distribution systems and facilities. A Distribution licencee is mandated to[23]connect consumers so that they can have access to the supply of electricity, install, maintain meters, meter reading and collection of revenues and, generally, to provide electricity to its distribution customers (industrial and domestic) at a fair price that is mutually beneficial to both parties.[24]

According to section 67 (3) of EPSR Act, a distribution licensee also has obligation to purchase power for resale from the Transmission Company of Nigeria or from any other trading licensee, as authorized by the Commission for distribution to the consumers.

It was noted earlier that, there were eleven (11) distribution companies, at the inception of the reforms. The companies have been allocated areas of operations across the country, and were finally issued with their licences in 2013. The main noticeable challenge in their operation is that facilities and distribution systems have remained out-dated which hinder effective distribution of power. This has led to poor power supply and restricted access to electricity. The archaic facilities have also resulted in constant power failures and load shedding, prompting consumers to seek alternative sources of power including self-generation.[25]

Additionally, metering of consumers and revenue collection is a major activity of the distribution licensees. Metering allows tarrif to be aligned with consumption, and prevents over-billing, theft of

[21]Awosepe (n.19) 41.
[22]Ibid
[23]s.67(3) EPSR Act
[24]Ibid
[25]Awosepe (n. 19) 31.

electricity and to recover prudent cost.[26] It is a common knowledge that in Nigeria, metering of consumers has been a major challenge which has led to accusations of over-billing and unnecessary reaping of consumers. This is an indication of lack of strategic planning for effective delivery of services to consumers. This is also an indication of the fact that the main intentions of the EPSR Act and the reforms arising therefrom are yet to be realized. There is need for massive investment in the distribution segment of the chain to be able to receive and distribute electricity for distribution.

It is important to mention that section 81 of the EPSR Act focused on performance standards and codes, for the licensees.[27]These standards deal with overall performance in connection with the provision of electricity supply services and promotion of the use of electricity by consumers. It is also to ensure that all the companies in the power value chain adhere to the quality of services as they are being monitored by the Commission to prevent exploitation on either side (consumer and distributor).[28]

iv) **Bulk Electricity Trading**

In section 68 of the EPSR Act provision is made for a trading licensee who shall be permitted to engage in purchasing, selling and trading of electricity.[29] This is in respect of bulk purchase and resale of electric power and auxiliary services from either Transmission Company of Nigeria (TCN) or Independent Power Producers (IPP) for resale to distributor licensees and eventually to consumers. The Nigerian Bulk Electricity Trading Company (NBET) was established as a transient company for this purpose. It was established by the EPSR Act as a broker between the transmission and distribution. Its major role was to stabilize the transaction between transmission and distribution, giving confidence to both parties, using Power Purchase Agreement (PPA) and Vesting Contracts (VC)[30]. The bulk trader also requires licence and it is monitored by the regulatory commission, NERC. It is under obligation to perform according to the standard and codes laid down by the Commission.

By section 68 (2) of the EPSR Act, the licence for bulk trading of electricity was expected to be a temporary one and not a permanent feature of the sector.[31] From all indications, it is unknown when the role of the company (NBET) will come to an end. The issue is that the whole of the sector requires massive over-haul, increased investment and adoption of strategic management. This will improve service delivery thereby enhancing economic growth of Nigeria.

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[26] A. E. Okoye, "The Nigerian Electric Power Sector" (being a term paper presented at the Faculty of Law, University of Benin, 2014) 17.
[27] s.8 EPSR Act.
[28] Okoye (n. 26).
[29] s.68 EPSR Act.
[30] O. Ebirim & A. Nwajiugo, Nigerian Electricity Industry Law (Electrofield SolicitorsPrinceton) 72.
[31] s. 68 (2) EPSR Act.

Generally, the potential for dispute among licensees in the industry is very high because of the nature of the contractual relationship. Between the Gas suppliers and the Generation Companies, there is the Gas Supply and Transportation Agreement (GSTA), the Transmission Company of Nigeria has Agreement with the Bulk Trader (NBET) in the form of Power Purchase Agreement (PPA) and Vesting Contracts (VC) with the Distribution Companies (Discos).[32] On the other hand, the relationship between the Distribution Companies and the Consumers is a contract of service, which is sometimes fraught with disagreements and suspicion. The EPSR Act anticipated the likely disputes and laid the responsibility for their resolutions with the NERC through Alternative Dispute Resolution (ADR). The NERC was given broad powers under the EPSR Act to make and enforce rules and regulations to govern the sector, including that of dispute resolution.[33]

It is important to note that licensing of operators in the entire value chain of the electric power sector is a very important function of the NERC. The EPSR Act precludes anybody or organization from undertaking any activities in the electric power sector without a licence issued by the Commission.[34] However, an exception was provided in section 62 (2) for only persons who generate not more than one (1) megawatt to undertake such without license but under a permit. In section 63 of the EPSR Act, all licensees are required to comply with the terms, regulations, codes, and other requirements of the license issued by NERC. It is germane to note that no licensee can transfer his operation or any part thereof without the prior consent of NERC. In the same vein, tariffs are regulated by the Commission and must be adhered to by the licensees to prevent abuse of the market and exploitation.

It is important to note the enormous powers granted the Commission by EPSR Act is for effective supervision of the industry and the licensees. It is good to note also that such powers include the adjudication of disputes among the licensees in the industry, using ADR methodology. Consequently, dispute handling procedures and structures have been established by the Commission. This is in recognition of the need to minimize disputes and to resolve same at the earliest possible time to avoid any spiral effect on the electricity supply value chain.[35] Among the structures put in place for dispute resolution are the Dispute Resolution Counselor (DRC), Dispute Resolution Panel (DRP) and Stakeholder Advisory Panel (SAP).[36]These were provided for in the Nigerian Electricity Supply Industry (NESI) Market Rules as established for market administration and operational guidelines in the sector. The Market Rules spell out the procedures to be adopted for adjudication of disputes involving licensees.

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[32]Ebirim & Nwajiugo (n. 30)74.
[33]Ayodele Oni, The Nigerian Electric Power Sector: Policy:Law: Negotiation: Strategy: Business (CI-Plus, 2013) 271.
[34]Ebirim & Nwajiugo (n. 30) 68.
[35]Okoye (n. 26)17.
[36]NERC: Market Rules for NESI (2014) 23.

The EPSR Act prescribed the use of ADR as a mechanism for resolution of disputes amongst licensees in the electric power sector. This is a recognition of the fact that ADR is result oriented, time and cost effective and enables the maintenance of continuous and cordial business relationship among participants including licensees in the electric power sector.[37] The need for continuous cordial relationship between the licensees is underscored by the necessity for effective, efficient and seamless service delivery to consumers.

In section 71(c) of EPSR Act, all the licensees and auxiliary services are required to refer all disputes for arbitration, mediation or determination by the NERC. This is viewed as a major innovation in the reform of electric power sector in Nigeria. The powers of NERC to regulate all activities in the sector also include managing all dispute situations to ensure that they do not degenerate to affect service delivery.

What are the likely dispute situations that may arise amongst licensees in the electric power sector? By the provisions of section 66 (2) of EPSR Act, the electricity market in Nigeria would be administered by a number of industry contracts and market rules. Thus, the various performance agreements amongst licensees are likely areas of disputes. Such agreements include Power Purchase Agreements (PPA), Gas Supply Aggregation Agreements (GSAA), Gas Transportation Agreement (GTA), Vesting Contract Agreements (VC), tariffs methodology and purchase of other resources in a manner prescribed by the NERC. The disputes may be in the form of business to business disputes. This may be in terms of tariff disagreement, breach of contracts, abandonment of agreements, sale and purchase agreements and practices capable of undermining the effective operation of another licensee.[38] In this category also is the demand for payment of tariff for services already rendered.

In the exercise of its powers of dispute resolution amongst licensees deploying ADR, the NERC has developed operational guidelines that provide elaborate steps for the utilization of ADR under its Market Rules (MR).

Rule 43of the Market Rules requires all disputing parties to submit to the ADR mechanism by using the Dispute Resolution Panel (DRP) and Dispute Resolution Counsellor (DRC) appointed by the NERC. The DRP is composed of seasoned professionals and its main function is to hear and resolve disputes. On his part, the DRC administers the dispute resolution provisions as stated in the Market Rules.

Alternative Dispute Resolution under EPSR Act

The EPSR Act was enacted as part of efforts of the government to improve power supply in Nigeria. The Act enabled the privatization of the electric power sector and established the NERC as the general superintendant of the sector with mandate to ensure delivery of an efficient power supply in

[37]NERC, Market Rules for NESI (2014) 23
[38]E. O. Ejike, "Developing Strategic Framework for ADR in Nigeria" in Nigerian Judicial Review (2011-2012) 283.

Nigeria and to, also, manage disputes amongst stakeholders and licensees in the sector. To manage the disputes, ADR is recommended and provided for under section 71 of the EPSR Act and NERC is mandated to manage the process through its own regulations.

In section 45 of the EPSR Act, NERC is empowered to conduct its proceedings, consultations and hearing at its headquarters or at any other place in Nigeria and to make regulations for the conduct of its proceedings with the participation of licensees and eligible customers. This wide range of powers to NERC is to ensure that conflicts are managed within its purview, in the first instance, for amicable resolution. The main reason for such powers is to ensure that conflicts do not degenerate to affect steady supply of electricity to consumers.

In section 50 of the EPSR Act, the NERC is further empowered to receive applications from any aggrieved licensee in respect of dissatisfaction with the outcome of any arbitration or mediation by the NERC of any dispute among licensees. This is authority not only to resolve conflicts or disputes through ADR, but also to further review the decision or award, in case of dissatisfaction by any of the parties. The NERC may reconsider, vary or rescind its decision before issuing a final decision, in accordance with the procedures it established for such purpose.

The main provision for the NERC to resolve disputes is provided in section 62 (4). It reads:

> The Commission shall have the power to resolve disputes as to whether a person is engaging or about to engage in a business for which a licence is required.

As part of the terms and conditions for issuing licences, section 71 (2) (c) requires licensees to refer disputes for arbitration, mediation or determination by the NERC. There is no doubt that the range of powers granted in this respect was innovative and connotes a new direction to move the operation of the industry to a higher level.

In exercise of its powers to utilize ADR to resolve disputes amongst licensees, the NERC established certain structures and guidelines to enable it effectively discharge its mandate of dispute resolution. These structures are:

i) Dispute Resolution Counsellor (DRC)

Rule 42 (3) of the Nigerian Electricity Supply Industry Market Rules of 2014 provides for the NERC to appoint a Dispute Resolution Counsellor (DRC) who has powers to ensure effective dispute resolution as provided in the Market Rules. The Counsellor also has powers under Rule 11 of the Market Rules to:

i. Specify the format of notices of dispute;

ii. Nominate members of Dispute Resolution Panel;
iii. Assign members of Dispute Resolution Panel to mediate, conciliate, arbitrate or otherwise resolve issues accordingly, among others.

The important role of the counsellor in this ADR dispute resolution mechanism of the EPSR Act is an indication of the importance attached to this mandate of the NERC. The Counselor must have requisite professional qualifications, cognate experience and vast understanding of dispute resolution practice and, also, a good understanding of the electricity industry or have the capacity to quickly acquire such knowledge. It seems that a person in the law profession may be suitable for this position because of the vantage position of the law and the knowledge of ADR methodology.

ii) The Dispute Resolution Panel

The NERC has also made provision for this Panel, which is responsible for arbitrating or otherwise resolving disputes between systems operators and market operators or transmission licensees and any participant licensee.[39] The provision requires any member of the Panel to be impartial in conduct and avoid favouritism to any party in dispute. The Panel, upon full composition, shall consist of ten (10) members who shall be experienced and of good standing in their various professional callings, including the electric power industry. The Panel is required to work with the Dispute Resolution Counsellor to develop criteria and processes for effective resolution of disputes and it shall serve for a term of five years with option to renew.[40]

iii) Stakeholders Advisory Panel

As part of its efforts to minimize conflict, the NERC has established a Stakeholders Advisory Panel (SAP).[41] According to rule 42 (2) of the NESI Market Rules, the Panel is saddled with the responsibility to review the Market Rules itself, the Grid Code and proposing/amending of these rules on an on-going basis. The Panel also has the mandate to advise the Commission on technical matters relating to the operations of the Market Operators, and market issues in general which may be referred to it by the NERC.

In exercising this power, the SAP is also required to delegate its duties in respect of Grid Code amendments to another body known as Grid Code Review Panel (GCRP).[42] However, the SAP retains the final responsibility for submitting all amendments to the NERC.

The composition of the (SAP) include[43]two persons representing the Generators, two persons representing the Distributors and one person representing eligible customers, one person

[39]Rule 65 of the Market Rules
[40]Rule 43, ibid.
[41]Rule 67, ibid.
[42]Ibid
[43]Rule 42, ibid.

representing the Bulk Traders, one person representing the Systems Operators, one person representing the Market Operators, two independent persons to be appointed by the NERC and one person representing the Transmission sub- sector.

The SAP is a disputes preventive body whose responsibilities include the review of the rules and market relationships among licensees, to minimize likely areas of disagreements. The fact that all the licensees are represented in this Panel leads to the inevitable conclusion that proposals and amendments will be agreed upon for the satisfactory operation of the industry. The Panel can therefore be viewed as part of efforts to prevent disputes by the use of alternative means. It is important to note that the Panel can only function at a satisfactory level if there are no interferences that will affect its recommendations.

Utilization of ADR by NERC/Licensees

The objective of the reform of electric power sector[44] is to create an enabling environment for the rapid development of the sector and achieve a thriving and profitable business environment in the sector that will deliver quality service to electricity consumers.

The licensees are the major participants in the sector and the relationship amongst them is based on the different agreements for interconnected services that they enter into with one another. In the operations of these Agreements, the usual area of disputes and disagreements are matters relating to market issues such as invoicing, records of generation dispatched and received, revenue collection, payment for services rendered and systems collapse, occasioned by unforeseen circumstances at the national grid.[45] For instance, recently it was reported in Nigerian Dailies, that Enugu and Port-Harcourt Distribution Companies (Discos) were suspended for a breach of Market Participation Agreement (MPA) and violation of Market Rules, respectively.[46]

In the case of Port-Harcourt Electricity Distribution Company (PHEDC), it was reported that the Independent System Operator (an arm of the Transmission Company of Nigeria TCN), published a "Notice of Intent to suspend" it for "Event of default and breach of market rules". The Market Operator constituted a panel to adjudicate at the hearing as requested by the Port-Harcourt Electricity Distribution Company (PHEDC).[47] The panel decided, after due consideration that the service providers should disconnect the interface facilities of PHEDC from the Grid until the event of default is remedied. Apparently, the decision of the panel was taken in good faith by all the parties as there was no further appeal from PHEDC.[48] The distribution company has since remedied the situation and normal service restored.

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[44]Oni (n. 33) 273.
[45]Ibid
[46]See page 11 of Daily Trust Newspaper of 30th July 2019
[47] Ibid
[48] Ibid

In another decided case between Eko Electric Distribution Company PLC (EKEDC) and PIPP LVI Disco Limited Lagos, the Commission received a petition on encroachment of distribution network.[49]Coincidently, the parties were all distribution companies in the Lagos territory. The issue at stake was that EKEDC petitioned to the Commission that PIPP had encroached on its distribution network and tampered with it distribution infrastructure. The Commission, pursuant to its powers under section 74 of EPSR Act conducted a site investigation to verify the EKEDC's claim. The investigation revealed that PIPP had breached the terms and conditions of its licence and therefore guilty of the allegation.

It is interesting to note that PIPP informed the Commission that it was "engaging with EKEDC with a view to finding an amicable resolution."[50] This arrangement did not yield any result. Consequently the Commission ordered the suspension of further encroachment of the infrastructure belonging to EKEDC and directed the payment of compensation to EKEDC for loss of revenue for each day until the cessation of the encroachment.

In this situation also, the use of ADR among licensees had been an important mechanism, in the resolution of disputes in the electric industry. The fact remains that the licensees have confidence in the method and the ability of the Commission to utilize it to the satisfaction of the licensees.

In a recent report, Kano Electricity Distribution Company (KEDCO) brought to the notice of NERC that there is dispute of overbilling in 2016 with TCN and the issue was yet to be resolved even after the intervention of NERC.[51] The main issue was that of over billing for energy payment, which resulted from an alleged inability of KEDCO to meet its letter of credit to guarantee payment for bulk energy dispatched to it. This also resulted in multiple suspension of KEDCO by the Market Operator (an arm of TCN) for failing to comply with Market Rules.

The NERC intervened in this matter through the use of ADR and observed that TCN was in breach of the regulating agreement with KEDCO.[52] It subsequently directed that TCN should pay the sum of N3.2bn as imbalance compensation and wrong meter reading to KEDCO. This award was based on the recommendation of an ADR Team comprising of two persons each from TCN, Market Operator and KEDCO which was raised by NERC.[53]

In another development, the Association of Nigerian Electricity Distributors (ANED), who are also licensees in the industry, engaged in a dispute with Transmission Company of Nigeria (TCN).The bone of contention, according to ANED, was that there was no load rejection on their part as being

[49] Ibid
[50] Proceeding of NERC 20th Oct. 2008 (NERC Headquarters)
[51] See page 13 of Daily Trust Newspaper of 2/9/2019.
[52] www.nercng.org, 2019
[53] Ibid

speculated by TCN. ANED contended that TCN had not been able to deliver the volume of power demanded daily by each Disco.[54]

In its response, TCN presented a table of energy requested and energy delivered.[55] The summary of the presentation was that energy requested by Discos and delivered by TCN were at variance, with the deliveries always above the request. The matter was presented to NERC for resolution and it received attention. Eventually, the matter of deliveries was reconciled and normal transaction continued.

In the same vein, NERC recently issued a notice of Commencement of Enforcement Action on the Market Operator (MO) for operating a bank account which was not approved by TCN or NERC.[56] Market Operator is the arm of TCN that issues market settlements and invoices to the market participants and service providers in Nigerian Electricity Supply Industry.

The issue at stake was that the Federal Government in 2015 appointed some staff of the MO as a separate management. TCN in response removed the names of the appointed staff from its payroll. On its part, MO also reacted by opening an account independent of TCN, and the matter was reported to NERC for resolution. Using its ADR mechanism, NERC directed that the "**status quo**" should be maintained. But the parties were adamant, which was regarded as a disobedience of section 63(1) of the EPSR Act.[57]

In the final analysis, the NERC through its Dispute Resolution Panel directed that the appointed employees should be returned to the payroll of TCN and the MO should close the subsidiary account in favour of the original account of TCN. Obviously, ADR has successfully resolved this dispute and normal flow of operations continued at TCN.

In his review of Nigerian electric power sector, Oni[58] posited that potential for disputes in the sector is very high, due largely to numerous contractual relationships and issues that may arise between the various market participants among themselves and with the sector regulator. This derogates from the twin principles of procedure where the regulator adjudicates over matters involving it.

A recent publication by NERC gave

> "Notice of intention to cancel licenses issued pursuant to S.74 of Electric Power Sector Reform Act."[59]

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[54] Ibid
[55] See page 8 of Daily Trust Newspaper of 20/9/2019.
[56] uabbaarabi@nercng.org 28/9/19
[57] s.63(1) EPSR Act.
[58] Oni (n. 33) 274.
[59] See Daily Trust Newspaper of 9th Oct, 2019, 25

Eight (8) Electricity Distribution Companies (Discos) were listed for offences ranging from "manifest and flagrant breaches of EPSRA, terms and conditions of their distributor licences and the order". The companies were requested to show cause as to why their licences should not be cancelled in accordance with section 74 of EPSR Act.

The Commission alledged that the Discos were in default of their remittances to NBET as they were not meeting the minimum expected thresholds as agreed in the market order. It further submitted that the Discos in question were in breach of condition 2 of their license which states that "each licensee shall maintain adequate financial, technical and managerial resources and capabilities to allow the licensee carry out the licensed business in accordance with the various regulations, codes, rules and service standards prescribed by the Commission". Finally the Commission noted that the failure of the Discos to comply with expected minimum remittances exposed NESI to systemic risk, which affects other parts of the value chain and eventually the ability to improve service delivery to consumers.[60]

It is important to note that the final letters of authority (licences) were issued to these companies in 2013 in form of licence. It seems that the threat of intention to revoke their licences, after a few years of operation, is an indication that the industry is operating below expectation. The fact that the licensees are not meeting the expected minimum remittances to NBET, affects both transmission and generation. The Discos are expected to engage in long term investment for improvement in operational facilities, which has not materialized. This has also prolonged the existence of NBET, which was conceived as a temporary arrangement.

Beyond the facts of the threat to cancel operational licenses of Discos, is our concern for mechanism of ADR. The dispute here is between the NERC and the Discos. It is assumed that NERC has done a proper assessment of the issues at stake before going public. The matter then is how ADR can be brought to bear in the resolution of the issues.

By the powers conferred on the NERC by the EPSR Act, the Commission shall have the powers to receive complaints from licensees, arbitrate on the matters received and may even vary its own decision if need be.[61]The licensees were given up to 60 days (from date of publication), to show cause in writing as to why their licences should not be cancelled. It is the desire of the stakeholders that the issues should be resolved amicably for the greater benefit to the consumers. The government may decide to recapitalize the Discos in place of cancelling the licences and going through another process of procuring new investors.

[60] Ibid
[61] s.50 EPSR Act.

Challenges of ADR in the Nigerian Electric Power Sector

The term ADR refers generally to the methods and procedures used in the resolution of disputes, either as alternative to traditional dispute resolution mechanism of the Court or, in some cases, supplementary to such mechanism. The resolution is usually an agreement between the parties. When parties strike a bargain, it is expected that they will abide by the terms of agreement. However, there is still need for a mechanism to ensure that the terms of the agreement are respected and adhered to in the event parties neglect or refuse to comply with the terms. Thus the issue of enforcement by the successful party arises.

Black's Law Dictionary[62] defines enforcement as the act or process of compelling compliance with the law, mandate, command, decree or agreement. In the same vein, it refers to a forced compliance, to compel or impose the terms of the bargain by the winning party. Generally therefore, enforcement remains a situation when people or parties are compelled to comply with the law, regulations, rules, standards or agreement proceeding from a due process. An arbitration award without an effective and efficient mechanism for enforcement may be valueless.

There are two methods of enforcement:

1) Self-enforcement
2) Use of third party

Self-enforcement refers to an acceptance of the terms of the bargain and voluntary implementation.[63] This is normally due to consideration of reputation and guide against future commercial relationship. When the terms of an agreement are not voluntarily complied with, then enforcement through a third party becomes obvious. The use of third party must also be guided by the cost of enforcement and efficiency to avoid collateral damage to the relationships.

NERC, by the provision of section 31 of EPSR Act[64] was given mandate to utilize ADR to resolve all disputes that may arise among the licensees in the sector. It is obvious that when issues are resolved between the licensees, there is the need to enforce them. It will appear that the mandate to resolve disputes among licensees also includes the powers to enforce the terms of the agreement, in required situations. In section 46 of the EPSR Act, NERC has the authority to make orders,

[62] Brian Garner, Black's Law Dictionary, 8th ed. (Thompson Reuters, 2004) 1475.
[63] Jide Olakanmi, Alternative Dispute Resolution: Cases and Materials (Panaf Press, 2013) 168.
[64] s.31 EPSR Act.

precisions or notices which shall be complied with by the licensees.[65] In section 63 also, all licensees are required to comply with the conditions of their licences, regulations, codes and other requirements issued by the Commission, notwithstanding that the licensee has or may intend to take legal action challenging any such order or Notice. Thus NERC is enabled to enforce decisions of its arbitral processes. This is so in order not to disrupt the operations of the entire sector.

It is a known fact that agreement to arbitrate is the foundation of any valid arbitration. This means that arbitration requires the consent of all the parties. In the case of Nigerian electric power sector, the use of ADR is a prescription of the EPSR Act, and therefore imposed on the licensees. The licensees are to utilize this methodology in case of disputes and must rely on the best judgment of NERC to resolve them. The major challenge in this provision is whether the parties are convinced and believe in the process to secure fair judgment. Where parties do not believe in the sanctity of the process, they become reluctant in enforcing the terms of the agreement. This was the situation in TCN and KEDC when a decision was taken which ordered TCN to refund some amount of money to KEDC for over billing, and counter arguments ensued.

It must also be noted that the use of ADR in the sector is without prejudice of any licensee to utilize the regular courts if dissatisfied after appeal to the Commission. Section 49 (1) of EPSR Act states:

> If any question of law arises from an order or decision of the Commission, the Commission may, on its own initiative or at request of any person directly affected by such orders, reserve that question for the decision of the High Court.[66]

But it is also important to mention that the licensees recognized that ADR is faster, cheaper and more flexible for business than litigation in Court. Consequently accepting the award of ADR by the Commission is a way of doing business with ease. This means also that the most likely means of enforcement is voluntary or self-enforcement by the parties concerned and without compulsion. This is because the mode of resolution enhances their commitment to comply with agreements they have also developed which will also instill greater long-term trust and understanding among them. It is important to state at this stage that for a seamless enforcement of awards, the Commission, being the regulatory agency, should engage in good faith negotiation of regulatory conflicts and breaches of contracts as early as possible. The regulatory body should also involve all legitimate stakeholders in the process to foster communication, cooperation and credibility. This way, acceptability and enforcement of awards will be a non-issue.

[65] s.46 EPSR Act.
[66] s. 49 EPSR Act.

Conclusion

The EPSR Act provided ADR as a method of dispute resolution amongst licensees and gave NERC the mandate to superintend over this process as a neutral body with powers to provide and establish performance standard for licensees in the electric sector and make rules that will guide the utilization of the ADR mechanism for dispute resolution amongst licensees in the sector. The purport of these is to ensure that disputes and conflicts amongst the operators in the sector are resolved within the shortest possible time and in an amicable manner so as not to disrupt the interconnected services of the sector which end result is the steady supply of electricity to the consumer. In this regard, the NERC has played a satisfactory role in this arbitration requirement among the licensees. On their part, the licensees have continued to patronize the process, albeit compulsorily, and this has created a friendly commercial relationship among them.

The main strategy of ADR methods is to create good interpersonal relationships to achieve possible and consensual outcome. In the case of electric power sector in Nigeria, it is the considered opinion of this paper that the interpersonal relationship and the consensual outcome of meditation by the NERC has played a desirous role in dispute resolution among licensees by ensuring that even with disputes and conflicts amongst operators/licensees in the sector, through the utilization of ADR to resolve such disputes and conflicts, the industrial harmony required to have a seamless operation in the sector has been maintained. The NERC has performed its role effectively in the regulation of market operations through the provision of guide lines, codes and adjudication in case of disputes. However, it is the considered opinion of this paper that the provisions of the EPSR Act on the utilization of ADR be amended to allow for the observance of the doctrine of *"nemo judex in causa sua"* which may affect proceedings when the Commission sits in judgement over a matter in which it is involved and to, also, determine when the Commission becomes *functus officio* in relation to its powers to re-hear and vary its own decisions.