

NERC ELIGIBLE CUSTOMER REGULATIONS

Background

In May 2017, the Honourable Minister for Power, Works and Housing made a policy declaration as to the categories of persons to be regarded as Eligible Customers in the Nigerian Electricity Supply Industry (NESI) pursuant to Section 27 of the Electric Power Sector Reform Act, 2005 (EPSRA or the **Act**) (the **Declaration**). With the Declaration, successor electricity Generation Companies (**Gencos**) and Independent Power Producers (**IPPs**) would be able to by-pass the Bulk Trader (the Nigerian Bulk Electricity Trading Plc (**NBET**)) and sell electricity directly to Eligible Customers. Since the Declaration was made in May, there has been some uncertainty as to manner of its implementation and its overall effect on the NESI.

Further to the Declaration, the Nigerian Electricity Regulatory Commission (**NERC** or the **Commission**) has now issued the NERC Eligible Customer Regulations, 2017 (the **Regulations**) in exercise of its powers under Section 96 of the EPSRA.

In addition to setting out the registration regime applicable to Eligible Customers envisaged by the Declaration, the Regulations adopt a phased approach to the introduction of declared classes of Eligible Customers as a first step to spawning retail competition and the licensing of traders in the Medium Term Market, and reflect a regulatory intent to promote third party access to distribution and transmission networks.

Phased Implementation of Eligible Customers Declaration

The Declaration sets out four categories of Eligible Customers, specifically customers or group of end-use customers, *registered* with NERC: (a) whose consumption is no less than 2MWhr/h over the course of one month, connected to a metered 11kV or 33kV delivery point on a distribution network or a distribution licensee under a distribution use of system (**DUoS**) agreement; (b) whose consumption is in excess of 2MWhr/h on a monthly basis and connected directly to a metered 33kV delivery point on the transmission network under a Transmission Use of System (**TUoS**) agreement; (c) whose minimum consumption is more than 2MWhr/h over a period of one (1) month, is directly connected to the metering facility of a generation company 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 relevant location; and (d) connected to a metered 132kV and 330kV delivery point on the transmission network under a TUoS agreement.

However, and as earlier indicated, the Commission intends to proceed with the introduction of the aforementioned categories of Eligible Customers, *other than* customers or groups of end-user customers whose consumption is *more than* 2 MWh/hr over the course of one (1) month, and are *connected to a metered 11kV delivery point* on the distribution network of a distribution licensee under a distribution use of system agreement, during the first phase of implementation of the Declaration.

Following the satisfaction of a number of conditions precedents including:

- a. achieving a spread of at least eleven (11) activated Eligible Customer transactions over a minimum of six (6) successor Distribution Licensees' (Discos) licensed areas;
- b. a declaration from the TCN (verified by the Commission) confirming the technical capacity of the Transmission Service Provider and Distribution Licensees to manage more Eligible Customers; and
- c. a satisfactory review by the Commission of the impact of the implementation of the first phase on the revenues of the Discos, within six (6) months after the commencement of the initial switch date,

The Commission will proceed with Phase II of the implementation of the Declaration and the customers or groups of end-user customers with consumption of *more than* 2 MWhr/h over the course of one (1) month that are *connected to a metered 11kV delivery point* on the distribution network of a distribution licensee under a DUoS agreement.

Registration of Eligible Customers

End-user customers seeking registration as Eligible Customers are required to have executed: (a) a Power Purchase Agreement (PPAs)¹ with the prospective Supplier;² (b) a TUoS agreement with the Supplier³ and Transmission Service Provider (where applicable); (c) a DUoS agreement with the Supplier and Distribution Licensee (where applicable); (d) a market participation agreement with the Market Operator;⁴ (e) a bilateral agreement with the relevant Distribution Licensee for the construction,

installation and operation of a distribution system to be used for the supply to the Eligible Customer (where applicable); and (f) other agreements prescribed by the Commission.

In addition to the documents listed above, applications for registration of Eligible Customers must be accompanied by: (a) corporate and financial documents⁵ of the Applicant; (b) copies of documents showing the Applicant and Supplier have satisfied technical and safety requirements; (c) a letter of introduction from the Applicant's bankers and other financial support documents; (d) copies of the Applicant's utility bills; (e) a statement from the System Operator or relevant Disco indicating the structures to which the Applicant is connected and that the Applicant meets the conditions prescribed in the relevant technical codes and conditions for supply of electricity; and (f) a Letter of Clearance from the relevant Disco that the Applicant is not indebted to it.

Furthermore, the Applicant is required to provide a Letter of Credit or Bank Guarantee in favour of the Market Operator in accordance with the Market Rules to cover Market administration charges, TUoS and Duos Charges⁶, and where it is proposed that electricity will be supplied to the Applicant, after registration, by a Genco, evidence of excess capacity above the quantities the Genco has contracted with NBET, will also be required. Applications will be verified and evaluated by the Commission, and a decision issued no later than thirty (30) working days after the date of filing by the Applicant.⁷

1. The Regulations require such executed Power Purchase Agreement be based on the Commission's standard template
2. Suppliers are required to hold either a (i) generation or (ii) trading license.
3. "Supplier" is defined in the Regulations as any licensee that is authorised by the Commission to supply electricity to an Eligible Customer
4. At the moment, the Transmission Company of Nigeria Plc.
5. These include the Applicant's (i) Certificate of Incorporation (ii) Memorandum and Articles of Association; (ii) Tax Clearance Certificate; (iv) Forms CAC2 and CAC7; (v) Board Resolutions approving the application.
6. and other charges approved by the Commission
7. Provided all supporting documentation required accompanies the application

Site Aggregation

The Declaration envisages the designation of "groups of end users" registered with the Commission as Eligible Customers. In this respect, the Regulations require groups of end-users applying to the Commission for registration as Eligible Customers to satisfy the following conditions:

- a. each end user to be aggregated must be connected to the same Distribution Licensee's network, an IEDN⁸ or an off-grid licensee, and are connected to the same feeder;
- b. the end-users to be aggregated must incorporate a company (special purpose vehicle) to apply for registration as an Eligible Customer on behalf of the group of end-users, and execute the relevant transaction documents;
- c. each end-user site must be located within a single geographic network as determined by the Commission; and
- d. a minimum of 500KVA must be consumed at each end-user site.

Rights of the Eligible Customers

Following registration, Eligible Customers are entitled to access transmission and distribution networks for the purpose of delivery of electricity pursuant to the terms of executed TUoS and/or DUoS agreements. Delivery and supply of electricity under relevant PPAs are required to comply with the provisions of the Grid Code, Metering Code, Distribution Code and other relevant NERC Regulations.

Eligible Customers are also entitled to freely choose a Supplier, secure more than one Supplier, and freely negotiate timing and quantity of electricity supplied under their relevant agreements, provided adequate infrastructure exists for the Transmission Company of Nigeria (in its role as System and Market Operator) to account for energy

quantities. Charges payable for use of distribution networks and transmission networks must also be based on the applicable tariffs set by the Commission.

Switching Rules

All PPAs with Suppliers must be approved by the Commission before commencement of service. Eligible Customers are required to provide a minimum of three (3) months' notice to a Supplier if they intend to terminate a PPA (subject to the applicable termination provisions in the PPA). Similarly, Eligible Customers that wish to reconnect to a Distribution Licensee must provide at least three (3) months' notice to ensure adequate planning for reconnection (unless waived).

Third Party Access to Transmission and Distribution Networks

Generally, the Regulations reflect a regulatory intent to improve third party access to transmission and distribution networks by ensuring (i) fair access; (ii) compliance with approved DUoS and TUoS tariffs; and (iii) compliance with the Market Rules, Technical and Quality Standards for supply of electricity and maintenance of frequency and regulation of voltage. Eligible Customers that wish to secure access to Transmission and Distribution Networks are required to apply to the entity licensed to operate the network in question, copying the Commission. Decisions on applications for third party access must be communicated within thirty (30) days of submission of complete documentation.⁹ Applicants refused access to transmission and distribution networks are entitled to file a petition with the Commission, and in cases where Applicants are unjustifiably denied access, the Commission may issue Orders granting access, and sanctioning the relevant Distribution or Transmission Licensee.

8. Independent Electricity Distribution Network

9. In cases of refusals, the reasons for refusal must be communicated to the Applicant.

Competition Transition Charges and Contributions to the Consumer Assistance and Rural Electrification Funds

Furthermore, in accordance with Section 28 of the EPSRA, the Regulations envisage the issuance of a directive by the Minister¹⁰ for the collection of Competition Transition Charges in the event that the Minister determines that the Declaration results in inadequate revenues for a Distribution Licensee or Trading Licensee to enable payment of committed expenditures or earn permitted rates of return on its assets, despite efficient management. The Regulations also state that the Commission may determine the rate of contributions to be made by Eligible Customers to the Power Consumer Assistance Fund and the Rural Electrification Fund.

Conclusion

While the Regulations provide some clarity on the implementation of the Declaration, there remain a number of issues related to the Declaration yet to be addressed. First, given the significant, potential effect of the Declaration on the revenues of Distribution Licensees, especially in view of the possibility of site aggregation by end-user customers intending to apply for registration as Eligible Customers, it was expected that the issuance

of the Regulations would be preceded by a specific Directive from the Minister authorizing the collection of Competition Transition Charges from Eligible Customers, once the parameters of the Eligible Customers registration process are delineated. Indeed, it is somewhat disappointing that the Regulations add nothing more than the expectation created by Section 28 of the Act, and the Commission's review of the impact of the implementation of the first phase of the Eligible Customers regime within six (6) months of the initial switch date. Moreover, the term "initial switch date" is not specifically defined in the Regulations. Second, the Commission has till date failed to establish the Power Consumer Assistance Fund as mandated by Section 83 of the Act, and from the language of the Regulations, it remains unclear when the fund will be set up, and the rate of contributions Eligible Customers will be required to make to the Power Consumer Assistance Fund and the Rural Electrification Fund.

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10. Upon consultation with the President.

