“Don’t get your wires in a twist” – REGULATED THIRD PARTY ACCESS: A VIABLE ALTERNATIVE FOR THE ELIGIBLE CUSTOMER REGIME.

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The Nigerian Electricity Regulatory Commission (“NERC”) recently issued a Consultation Paper¹ on the framework for the implementation of Eligible Customers regime in the Nigerian Electricity Supply Industry (“NESI”) following the declaration of same by the Honourable Minister of Power, Works and Housing. The consultation paper covered several issues notable amongst which is “Third Party Access to transmission and distribution networks”.

The Eligible Customer regime presupposes that generation licensees (“GENCOS”) and eligible customers (EC) would utilize existing transmission and distribution networks (“wire networks”) owned by Transmission Company of Nigeria (TCN) and the various franchise Distribution Companies (“Distcos”) respectively for the delivery of their contracted energy supply. While the consultation paper on the policy framework identifies two major approaches for third party access to the wire networks – Regulated Third Party Access (“rTPA”) and Negotiated Third Party Access (“nTPA”) - NERC is yet to decide on which of the two approaches will be adopted for the implementation of the eligible customer regime.

The two approaches are examined hereunder for the purposes of ascertaining which approach may be best suited for NES. The rTPA envisages a legislative body or a regulatory authority such as NERC setting out the terms and conditions for granting GENCOs and ECs the right of access to the wire networks for the delivery of their contracted power while nTPA would allow the parties (“wire network owners & Gencos & ECs”) to contractually determine the terms and conditions which will regulate their relationship for the use of the wire networks on a non-discriminatory basis and hinged on good faith. For an electricity supply industry at its infancy it may be prudent to adopt the rTPA as opposed to the nTPA at this stage of the sector’s development. There are a number of key considerations which

¹ NERC Consultation Paper on Eligible Customers for the Nigerian Electricity Supply Industry
² Refusal to grant Third-Party Access by an Electricity Transmission System Operator – Overview of Competition Law Issues
makes the rTPA, a more viable option over the nTPA and these are discussed below:

1. **NON-DISCRIMINATORY ACCESS TO NETWORKS:**

   The adoption of the rTPA approach would afford the GENCOs and the ECs the opportunity to access the wire networks without discrimination, thereby safeguarding against the natural tendency of a system operator favouring its own customers as against GENCOs or an EC in the usage of its wire networks.³

2. **LESSENS THE BURDEN OF RENEGOTIATION FOR TERMS AND CONDITIONS OF ACCESSIBILITY TO NETWORKS:**

   Asides the fact that the adoption of the rTPA will curb the discriminatory tendencies by network owners it will also remove the burden of renegotiation of prices and other terms and conditions of accessibility to networks on GENCOs and ECs each time they intend to enter into a new contract for the use of wire network for the delivery of their contracted power supply.³

3. **FOSTER EFFICIENCY IN THE SUPPLY OF ELECTRICITY WITHIN THE NIGERIAN SECTOR:**

   The rTPA approach affords GENCOs & ECs the opportunity to determine the electricity tariffs for the use of the wire networks in advance which will guarantee adequate planning for the sale and purchase of electricity which in turn would enhance efficiency in the supply of electricity.

4. **MITIGATES RISKS OF MARKET ABUSE BY NETWORK OPERATORS:**

   The adoption of a rTPA approach would mitigate the risk of market abuse by wire networks owners who may take advantage under a nTPA approach to subject GENCOs & ECs to stricter market terms and conditions and prevent them from accessing its wire networks consequently hampering the successful implementation of the eligible customer regime. Such stricter terms may range from setting high tariffs for the use of the wire networks, to providing minimal information concerning access charges and requiring that a GENCO or EC provide certain commercially sensitive information before they can access the wire networks.

5. **GUARANTEES PROPER MANAGEMENT OF BALANCING SERVICES UNDER THE ELIGIBLE CUSTOMER REGIME:**

   The implementation of a rTPA approach would guarantee the efficient management of balancing services under the eligible customer regime where an EC exceeds its contracted electricity supply.⁴ The rTPA approach would ensure that the regulatory authority (NERC) sets the terms and conditions that ensures that a balance is maintained between the amount of electricity produced by the GENCOs and electricity consumed by an eligible customer via the wire networks owned by third parties.

6. **MITIGATES DISPUTES ARISING FROM CONTRACTUAL NEGOTIATIONS UNDER THE nTPA:**

   The adoption of the rTPA approach would reduce the number of possible litigation matters that would ordinarily arise under a nTPA approach for the settlement of disputes concerning negotiations and interpretation of contract for accessing wire networks by the participants in the regime.

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³ Ibid
⁴ Ibid
While most countries such as the United Kingdom, Norway and United States have opted for the rTPA approach for access to wire networks and recorded success in the efficient management of under discrimination in the use of wire networks, other countries such as Germany that adopted the nTPA have encountered a number of issues which has hindered the growth of their electricity industry. Such issues include but are not limited to several claims of undue denial of access to transmission networks being brought before the federal anti-trust authority; high network charges which exceeded those of other European Countries that adopted the rTPA, and the imposition of inflexible and burdensome terms by owners of wire networks on third parties as a condition for accessing their networks for the delivery of contracted power.

Given all the above, the adoption and implementation of a rTPA by NERC will guarantee a fair and non-discriminatory access to wire networks for Gencos and ECs and would in turn facilitate the successful implementation of the eligible customer regime.

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6 Ibid