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**PERISCOPING COMPETITION IN THE  
NIGERIAN ELECTRICITY SUPPLY INDUSTRY**

**Alfred M. Tijah<sup>1</sup>**

**ABSTRACT**

*For decades, the Nigerian power sector was vertically integrated with the National Electric Power Authority (NEPA) vested monopoly over the entire sector. NEPA though established to provide quality services rather oppressed electricity consumers who had no option but to endure the skanky services offered. Electricity consumers under NEPA suffered inter alia poor power quality supply, outrageous estimated billing and illegal disconnections with impunity. To smash the monopoly and establish a competitive electricity market to reduce electricity prices, stimulate investment and incentivise innovation, the Federal Government of Nigeria enacted the Electric Power Sector Reform (EPSR) Act 2005. However the competition sought to be introduced in the power sector was rather symbolic than substantive since the reforms mainly transferred government monopoly in NEPA to privately owned monopoly made up of eighteen Successor*

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<sup>1</sup> LL.M; PhD Candidate and Lecturer, Department of Public Law, Faculty of Law, Benue State University Makurdi. atijah@bsum.edu.ng. 07039161957

*Companies. This paper employed doctrinal research methodology in probing competition in the Nigerian power sector and found that despite the recent review of EPSR Act and re-enactment as Electricity Act 2023 the power sector is still shrouded in monopoly. The electricity market structure must therefore be fully liberalised with the removal of restrictive clauses and geographical market divisions to bring the gains of competition in the power sector.*

**Key words:** Competition, Consumer Protection, Electricity Market, Monopoly, Retail Electricity, Wholesale Electricity

## 1.0 INTRODUCTION

The Nigerian Electricity Supply Industry was for over three decades from 1972-2005 under the National Electric Power Authority (NEPA) monopoly. NEPA beclouded by its monopoly situation coupled with the immunity conferred on it by law<sup>2</sup> assumed sweeping powers exercised with impunity. Officials of NEPA were engrossed in corruption and managerial ungainliness, which culminated in poor electricity service delivery throughout Nigeria.<sup>3</sup> Many electricity consumers were made to pay for electricity not supplied with the collection of fixed charges and payment for electricity based on estimated billing methodology. As the sole electricity service provider and regulator, NEPA laid a solid foundation for anticompetitive practices in the Nigerian Electricity Supply Industry.

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<sup>2</sup> National Electricity Power Authority Decree No. 4 of 1972, s12(1) and (2)

<sup>3</sup> Yemi Oke, *Nigerian Electricity Law and Practice* (2<sup>nd</sup> edn, Princeton Publishing Co. 2021) 4-5

The insensitivity to consumer welfare by NEPA is characteristic of most public utilities that are not open to competition. Many nations including the United States and the United Kingdom with similar monopolies have restructured their electricity sector to develop competitive wholesale and retail electricity markets for improved consumer welfare. In the United States for instance, the restructuring which allowed for competitive electricity market, stimulated innovation in renewable energy; decreased electricity prices; and led to better consumer welfare.<sup>4</sup> To achieve similar objectives in Nigeria by developing a competitive electricity market, the Federal Government of Nigeria sought to reform the Nigerian Electricity Supply Industry by enacting the Electric Power Sector Reform (EPSR) Act 2005.<sup>5</sup> This led to the restructuring of the power sector with the formation of at least eighteen (18) Successor Companies that took over the responsibility of electricity generation, transmission and distribution from NEPA with the hope of developing a competitive electricity market.

In 2018, to further promote and maintain competitive markets and consumer protection in Nigeria's economy, the Federal Competition and Consumer Protection (FCCP) Act 2018 was enacted. And recently, the Electricity Act 2023 was enacted and though it repealed and replaced the EPSR Act 2005, it granted legal validity to the restructuring initiated by the EPSR Act 2005.<sup>6</sup> Despite the statutory provision of the FCCP Act 2018 and the Electricity Act 2023 on competition and consumer protection and the consequential unbundling and privatisation of the power sector into several successor

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<sup>4</sup> Xuejuan Su, 'Have Customers Benefited from Electricity Retail Competition?' <[https://sites.ualberta.ca/~xuejuan1/docs/retail\\_competition.pdf](https://sites.ualberta.ca/~xuejuan1/docs/retail_competition.pdf)> accessed 25 May 2023

<sup>5</sup> No. 6 of 2005, now repealed and replaced by the Electricity Act 2023

<sup>6</sup> Electricity Act, 2023, s6

companies engaged in electricity generation, transmission and distribution in Nigeria, electricity consumers still do not have the option of choosing their electricity suppliers or the choice of switching from one supplier to another as customary in a competitive market. Still, they are consigned to the services of a specific distribution company exclusively licensed to operate within a franchise area with no room for competition.

This paper, therefore, seeks to examine the extent to which the legal regime on competition in Nigeria has safeguarded electricity consumers against unfair business practices that limit competition or control prices. The paper is compartmentalised into six major parts. The first part is the introduction; the conceptualisation of competition follows this. Part three examines the emerging competitive electricity market in Nigerian. The fourth part discusses competitive wholesale electricity, while the fifth part examines competitive retail electricity and the paper ends at part six with conclusion.

## 2.0 THE CONCEPT OF COMPETITION

‘Competition’ is not defined under the foremost law on competition in Nigeria- the FCCP Act 2018- nor is it defined under the Electricity Act 2023, though this concept is copiously used under these enactments. The definition of the concept ‘competition’ as considered by the court, and attempted by text writers and dictionaries, generally mean a contest, struggle or contention for superiority. In the case of *Okoko v Dakolo*<sup>7</sup> the Supreme Court of Nigeria defined competition as ‘contest between two rivals.’ The court further considered the word competition etymologically to mean rivalry, contest or

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<sup>7</sup> (2006) LPELR-2461 (SC)

match.<sup>8</sup> In an economic or business sense, competition connotes the efforts of two or more parties, acting independently, to secure a third party's business by offering the most favourable terms.<sup>9</sup> It is also defined to mean a process of rivalry between firms seeking to win consumers patronage over time.<sup>10</sup>

By nature, competition is not an end in itself but a dynamic process.<sup>11</sup> It is intended to spur producers to deliver quality goods and services to outwit other competitors resulting in robust service delivery to consumers at reasonable and fair prices.<sup>12</sup> The law on competition usually consists of rules that are intended to protect the process of competition in order to maximise consumer welfare.<sup>13</sup> Competition in the market enhances consumer welfare and ensures an efficient allocation of resources.<sup>14</sup> The first objective of competition is usually considered as justifying consumer welfare.<sup>15</sup> The creative role of competition is part of an effective economic regulatory regime.<sup>16</sup> Since the concentration of resources in the hands of monopolists is a threat to the very notion of democracy, freedom of choice and economic

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<sup>8</sup> *Ibid*, per Niki Tobi, JSC, at 44-45, paras. G-A

<sup>9</sup> JR Nolan and others, *Black's Law Dictionary* (6<sup>th</sup> edn, West Group 1998) 284

<sup>10</sup> Richard Whish and David Balley, *Competition Law* (7<sup>th</sup> edn, Oxford University Press 2012) 3

<sup>11</sup> Maurice E Stucke, 'What is Competition?' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing Limited 2012) 33.

<sup>12</sup> S Apinega, 'The Goal of Anti-Trust Laws and the Concept of Consumer Welfare' (2008-2006) 4(1) *A.B.U Law Journal* 161-174; Uzoamaka Gladys Eze and Ozioma Mary Ogbonna, 'An Evaluation of the Protection of Nigerian Consumers under the Federal Competition and Consumer Protection Commission Act' *IRLJ* (2021) (3)(3)14; Stephen Andzenge, 'Electricity in Nigeria: A Need to End a Natural Monopoly' in Epiphany Azinge and Laura Ani (eds), *Competition Law and Policy in Nigeria* (NIALS 2012) 183.

<sup>13</sup> Whish and Balley, (n9) 1.

<sup>14</sup> *Ibid*, 12.

<sup>15</sup> Louis Kaplow, 'On the Choice of Welfare Standards in Competition Law' in Daniel Zimmer (ed), *The goals of competition law* (Edward Elgar Publishing Limited 2012) 26.

<sup>16</sup> Reena Nair and Simon Roberts, 'Competition and regulation interface in energy, telecommunications and transport in South Africa' in Jonathan Klaaren and Simon Roberts and Imraan Valodia (eds), *Competition Law and Economic Regulation* (Wits University Press 2017) 121.

liberation, competition is therefore aimed at safeguarding the interest of consumers and promoting economic equity or the dispersal of economic power and the redistribution of wealth.<sup>17</sup> Another aim of competition is the protection of small firms against more powerful rivals. It thus seeks to protect the competitors as well as the competitive market or the process of competition.<sup>18</sup> The state basically makes competition law to monitor market competition and sanction firms that engage in anticompetitive practices.<sup>19</sup> Some of the benefits of competition are lower prices, better products, wider choices, innovation and greater efficiency which would not be ordinarily obtained under monopoly conditions.<sup>20</sup> Competition makes it possible for producers to offer goods and services on better terms and stimulates constant innovation in terms of technical and economic progress.<sup>21</sup> Competition in this paper is used in the economic sense to mean independent efforts to secure consumers' patronage by two or more rivalry firms, selling or rendering identical products or services. In the electricity supply industry, competition involves the establishment of a competitive wholesale and retail electricity market.

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<sup>17</sup> Whish and Balley, (n9) 21.

<sup>18</sup> *Ibid.*

<sup>19</sup> Zhe Shen and Joseph Sowahfio Sowah and Cephas Simon Peter Dak-Adzaklo and Shan Li, 'Competition Laws and Corporate Risk-Taking around the World' *Pacific-Basin Finance Journal* (2023) (1) 80

<sup>20</sup> Alfred M Tijah, 'The Role of the Minister of Power in Nigeria Electric Power Sector Reform: A Legal Perspective' *Law Digest* (Lagos, issue 29 Winter 2022) 17.

<sup>21</sup> Walter Frenz, *Handbook of EU Competition Law* (Springer 2016) 9.

### 3.0 THE EMERGENCE OF COMPETITIVE ELECTRICITY MARKET IN NIGERIA

The origin of electricity generation in Nigeria is traced to 1896 when the British Colonial administration established a 60kw electricity generating plant in Ijora, Lagos.<sup>22</sup> Then electricity was not made available to the general public but extended only to a few strategic buildings, like European residential area, the hospital and the Government House in Lagos.<sup>23</sup> Efforts at increasing electricity generation capacity to cover more areas and cities in Nigeria led to the construction of a hydroelectricity power station at Kurra falls in Plateau State of Nigeria in 1925;<sup>24</sup> the construction of both the Kainji Power Station and Afam Power Station in 1962, and the Ughelli Power Station in 1964.<sup>25</sup>

At the primal years of electricity in Nigeria, measures were taken to separate electricity generation from supply or distribution by establishing the first electric utility company- the Nigerian Electricity Supply Company (NESCO) in 1929 pursuant to the Electricity Ordinance of 1929.<sup>26</sup> This company was charged with electricity supply until 1946 when the Public Works Department (PWD) established by the Colonial Government took over the responsibility of electricity supply in Lagos.<sup>27</sup> By 1950 the Electricity

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<sup>22</sup> VK Abanihi and SO Ikheloa and F Okodede, 'Overview of the Nigerian Power Sector' (2018) (7) (5) *American Journal of Engineering Research* 253

<sup>23</sup> Ayodeji Olukoju, 'Infrastructure Development and Urban Facility in Lagos, 1861-2000 (IFRA-Nigeria 2003)

<sup>24</sup> A.C. Ohajianya and others, 'Erratic Power Supply in Nigeria: causes and Solutions' (2014) (3) (71) *International Journal of Engineering Science Invention* 51

<sup>25</sup> Folorusun Oladipo and Oluwu Temitayo, 'The Nigerian Power System Till Date: A Review' (2014) (1) (5) *International Journal of Advance Foundation and Research in Science & Engineering* 22 & 23

<sup>26</sup> Electricity Ordinance 1929 became the Electricity Act Cap. 106 LFN 1990 and was revised as the Electricity Act Cap. E7 LFN 2004 before it was repealed in 2005

<sup>27</sup> Yemi Oke, *Nigerian Electricity Law and Regulation* (Lawlords Publications 2013) 3

Corporation of Nigeria (ECN) was established and centralised the electricity distribution in Nigeria. The ECN was saddled with the responsibility of supplying electricity in the whole nation and it exercised its responsibility by purchasing electric energy produced by the generation plants for distribution to end users at utility voltage.<sup>28</sup>

In 1972, the Federal Government of Nigeria unified all its electric power sector undertaking under the National Electric Power Authority (NEPA) with the promulgation of the National Electricity Power Authority Decree.<sup>29</sup> The entire Nigerian electric power sector thereby came under the monopoly of NEPA as it was then vested with electricity generation, transmission and distribution throughout Nigeria. NEPA commenced operations a year after its establishment in 1973 with mainly four power stations namely, Ijora, Ugheli/Delta, Afam and Kainji Power Stations, with a total installed capacity of 532.6MW serving more than two million customers. Subsequently, other power stations were established which increased the installed generation capacity of electricity in Nigeria as at the year 2000 to 5,958MW.<sup>30</sup>

With the monopoly of power generation, transmission and distribution throughout Nigeria, NEPA mismanaged the power sector in the country for over three (3) decades. For instance, barely two years after becoming operational and precisely in May 1975, two of the four power stations at Kainji broke down and defied efforts at repairs.<sup>31</sup> By 2001, only nineteen (19) out of the seventy-nine (79) installed electricity-generating units under

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<sup>28</sup> *Ibid.*

<sup>29</sup> National Electricity Power Authority Decree No. 4 of 7<sup>th</sup> June, 1972

<sup>30</sup> Isa Amisu and Zainab Brown Peterside, 'The Impact of Privatization of Power Sector in Nigeria: A Political Economy Approach' (2014) (5)(26) *Mediterranean Journal of Social Science* 115.

<sup>31</sup> Olukoju, (n22)



NEPA, were in operation. Electricity generation went down from an average installed capacity of over 5,958MW to about 1,750MW.<sup>32</sup> During the over thirty (30) years NEPA monopolised and mismanaged the Nigerian Electricity Supply Industry, there was the absence of a competitive electricity market and the industry was bedevilled by abject disregard for electricity consumer rights and welfare as electricity consumers experienced poor electric power supply; frequent power cut, outrageous estimated bills and illegal electricity disconnection.

Owing to the deplorable state of the power sector as a result of the manifest inefficiency of NEPA, the Federal Government of Nigeria in recognition of the need to restructure the power sector, embarked on power sector reforms and opted for legislative measures to actualise the same by enacting the Electric Power Sector Reform (EPSR) Act 2005.<sup>33</sup> The reforms were intended to revamp the electricity sector and establish a competitive electricity market to reduce electricity prices, incentivise innovation and stimulate investment in the Nigerian electricity supply industry.

The EPSR Act 2005 dismantled the monopoly held by NEPA by making provisions for the separation of the functions of power generation from transmission and distribution; and the formation and issuance of licenses to privatised successor companies limited by shares to take over the functions of electricity generation, transmission and distribution from NEPA.<sup>34</sup>

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<sup>32</sup> A. S. Sambo 'Matching Electricity Supply with Demand in Nigeria' (2008) (4<sup>th</sup> Quarter) *International Association for Energy Economics* 32 available at <<https://www.iaee.org/documents/newsletterarticles/408sambo.pdf>> accessed on 28<sup>th</sup> February, 2023

<sup>33</sup>EPSR Act No.6, 2005

<sup>34</sup> EPSR Act 2005, s8 and 23

The implementation of the provisions of the EPSR Act 2005 on restructuring led to the formation of a trading licensee and eighteen (18) autonomous successor companies which assume the assets and liabilities of the monopolistic NEPA through an initial holding company called the Power Holding Company of Nigeria (PHCN). The 18 autonomous successor companies comprised of six generating companies,<sup>35</sup> one transmission company called the Transmission Company of Nigeria (TCN); and eleven distribution companies,<sup>36</sup> while the Nigerian Bulk Electricity Trading (NBET) Plc was established and licensed as the sole trading licensee. These companies were later privatised except the TCN and NBET Plc which remained wholly owned by the Federal Government of Nigeria.<sup>37</sup>

The formation of the successor companies and trading licensee laid the foundation necessary for developing a competitive wholesale and retail electricity market in Nigeria. In the case of *Jos Electricity Distribution Plc v John*<sup>38</sup> the Court of Appeal held that the establishment of a competitive electricity market in Nigeria is the whole essence of restructuring under the EPSR Act 2005. Restructuring was thus expected to attract new players in the Nigerian Electricity Supply Industry for effective competition and a

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<sup>35</sup> The six (6) generation companies (GENCOs) are (1) Afam Power Plc (2) Egbin Power Plc (3) Kainji/ Jebba Hydro Electric Plc (4) Sapele Power Plc (5) Shiroro Hydro Electric Plc (6) Ughelli Power Plc

<sup>36</sup> The eleven (11) distribution companies (DISCOs) are (1) Abuja Distribution Company (2) Benin Distribution Company (3) Eko Distribution Company (4) Enugu Distribution Company (5) Ibadan Distribution Company (6) Ikeja Distribution Company (7) Jos Distribution Company (8) Kaduna Distribution Company (9) Kano Distribution Company (10) Port Harcourt Distribution Company and (11) Yola Distribution Company

<sup>37</sup> Victor Okolobah and Zuhaimy Ismail, 'On the Issues, Challenges and Prospects of Electricity Power Sector in Nigeria' (2013) (2)(6) *International Journal of Economy, Management and Social Sciences* 413; Ebele S. Nwokoye and others, 'Power Infrastructure and Electricity in Nigeria: Policy Consideration for Economic Welfare' (2017) (2)(1) *KIU Journal of Humanities* 9

<sup>38</sup> (2018) LPELR-46395(CA)

competitive electricity market to lead to a reduction of electricity prices as well as stimulate the emergence of new technologies for efficient production and delivery of safe, reliable and sustainable electric power supply in the Nigerian electricity supply industry.<sup>39</sup> The development of a competitive electricity market in Nigeria as initially envisaged under the EPSR Act 2005 and maintained under the Electricity Act 2023<sup>40</sup> was designed to be consummated in two phases: the pre-privatisation phase<sup>41</sup> involving mainly the development of a competitive wholesale electricity market and the post-privatisation stage<sup>42</sup> involving largely the development of competitive retail electricity.

#### **4.0 COMPETITIVE WHOLESALE ELECTRICITY**

Wholesale electricity involves the bulk sale of electric power for resale. The wholesale electricity market allows trading between electricity generators, retailers, and other financial intermediaries for short-term delivery or future delivery periods. A wholesale electricity market subsists where different electricity generators offer electricity supply to retailers for sale, and the retailers then re-price the electricity and take it to market for sale.<sup>43</sup> A competitive wholesale electricity market is therefore a market system whereby electricity retailers can purchase electric energy from a variety of

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<sup>39</sup> Oke (n2) 425

<sup>40</sup> Electricity Act, 2023, s6

<sup>41</sup> EPSR Act 2005, s25

<sup>42</sup> EPSR Act, s26

<sup>43</sup> Electric Power Supply Association (EPSA), 'What is a Competitive Wholesale Electricity Market?' < <https://epsa.org/faq/what-is-a-competitive-wholesale-electricity-market/#:~:text=In%20a%20competitive%20wholesale%20electricity,and%20other%20large%20electricity%20users.>> accessed 26 May, 2023.

power producers and the producers can compete to trade electricity to an assortment of retailers.

The competitive wholesale electricity market in Nigeria is expected to be developed within the pre-privatisation phase of the Nigerian electricity market. The pre-privatisation phase as visualised under the EPSR Act 2005 as modified and given legal validity under section 6 of the Electricity Act 2023, is the period immediately following the issuance of interim licences to the successor companies to a time after the privatisation of the power sector when NERC, in consultation with the Minister of Power may make a declaration pursuant to section 8 of the Electricity Act 2023, that a more competitive electricity market is to be initiated.<sup>44</sup> The pre-privatisation phase, literally as the name suggests ought to have ended immediately after the privatisation of the power sector. However, its termination was tied to the NERC's declaration that a more competitive electricity market was to be initiated.<sup>45</sup> That declaration has not been made despite the fact that the privatisation of the power sector was completed since 2014.<sup>46</sup> Legally therefore, the Nigerian electricity market is still in the pre-privatisation stage. Competition under the pre-privatisation stage entails a market for the sale of electricity by the Generation Companies and Independent Power Producers to the Nigerian Bulk Electricity Trading (NBET) Plc, Distribution Companies and eligible customers pursuant to the terms of any contracts formed with the Distribution Companies and eligible customers.<sup>47</sup> In the wholesale electricity market under the pre-privatisation phase, there are four (4) major players: the

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<sup>44</sup> Electricity Act, 2023, s8; EPSR Act 2005, s25

<sup>45</sup> *Ibid.*

<sup>46</sup> Tijah, (n19) 17

<sup>47</sup> EPSR Act, s25(1) (a)(c) and (e)

Generation Companies and Independent Power Producers as generators; NBET Plc, as bulk electricity trader and off-taker; the Distribution Companies as retailers; and Eligible Customers as bulk electricity purchasers and retailers. Among the above, NBET Plc is very strategic to the development of a competitive wholesale electricity market in Nigeria during the pre-privatisation phase of reforming the Nigerian electricity supply industry.

NBET Plc was designed as an interim or transitional undertaking to develop a competitive wholesale electricity market, and it will cease to exist once this is achieved. The company is 100% Federal Government of Nigeria owned and incorporated on the 29<sup>th</sup> day of July, 2011. It was initially issued a ten (10) years operational trading license in November 2011 by the NERC,<sup>48</sup> and the license was renewed upon its expiration in November 2021 for only another three (3) years.<sup>49</sup> The licence authorised NBET Plc to function as a middleman/bulk electricity trader and an off-taker that guarantees payments to Generation Companies and Independent Power Producers (IPP) by mitigating risks that would hamper private sector investments in power generation in Nigeria.<sup>50</sup>

The role of NBET Plc as an off-taker is to provide assurance of payment to Generation Companies and intending investors in electricity generation as well as provide assurance of the supply of electricity to Distribution

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<sup>48</sup> Odion Omonfoman, 'To Renew or Not?: Analysing the NBET Trading Licence' *Premium Times* (Lagos, September 14, 2021)

<<https://www.premiumtimesng.com/opinion/484853-to-renew-or-not-analysing-the-nbet-trading-licence-by-odion-omonfoman.html>> accessed 3 April, 2022

<sup>49</sup> Obas Esiedasa, 'FG Renews NBET's Operating Licence for 3 Years' *Vanguard* (Lagos, November 24, 2021) <<https://www.vanguardngr.com/2021/11/fg-renews-nbets-operating-licence-for-3-years/>> accessed 3 April, 2022

<sup>50</sup> Oke, (n2) 418-419

Companies and Eligible Customers pending the activation of post-privatisation stage of competition in the Nigerian electricity supply industry.<sup>51</sup> Because the electricity demand far outweighs the electricity generated in Nigeria and the situation cannot support competition in the electricity market, the core mandate of NBET Plc was to develop a competitive wholesale electricity market by stimulating private investment to increase electric power generation through assuring intending investors or existing Generation Companies that, their output will be purchased.<sup>52</sup> Bulk power purchase and commercial assurance are therefore the essential bases for establishing NBET Plc.<sup>53</sup>

NBET Plc, as an off-taker and bulk trader of electricity, was fashioned in a similar model as the Ontario Power Authority (OPA) of Ontario, Canada whose objectives like NBET Plc are ‘to provide independent power producers and other sellers of power with a creditworthy counter-party to power purchase agreements, and ensure that such agreements would be financeable by third-party lenders.’<sup>54</sup> In Ontario, Canada, the bulk trader proved to be very vital.<sup>55</sup> In Nigeria, the capability of NBET Plc to stimulate investments in electricity generation seems cynical. The creation of NBET since 2011 led principally only to the development of the 450 MW Azura IPP in Edo State. NBET Plc in 2016 though initialled Private Public Agreements (PPAs) with 14 on-grid solar Independent Power Producers (IPP) developers, for the

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<sup>51</sup> Omonfoman, (n47).

<sup>52</sup> Oke, (n2) 426; Omonfoman, (n47)

<sup>53</sup> Oke, (n2) 448

<sup>54</sup> Ron Clark and Ajeet Grover, ‘Electricity Restructuring in Canada and the Role of its Bulk Trader: Potential Lessons for Nigeria?’ ALP Business Review <[http://akindelano.com/wp-content/uploads/2014/03/Electricity- Restructuring-in-Canada-and-the-Role-of-its-Bulk-Trader.pdf](http://akindelano.com/wp-content/uploads/2014/03/Electricity-Restructuring-in-Canada-and-the-Role-of-its-Bulk-Trader.pdf)> accessed 3 December 2014 cited in Yemi Oke (n2) 427-428

<sup>55</sup> Oke, (n2) 428

generation of a total capacity of over 1000MW of electricity. Sadly, the solar IPPs were not developed as the PPAs were not executed.<sup>56</sup>

Several challenges are responsible for NBET Plc's inability to accomplish its obligations in practical reality as envisaged in its license and terms of establishment. Principal among these challenges are financial constraints, and corruption.<sup>57</sup> The Federal Government of Nigeria allegedly capitalised NBET Plc with the sum of US\$750 million in 2013. However, it was never capitalised in reality, and it had no equity capital to back up its financial obligations under the PPAs.<sup>58</sup> The primary source of funding of NBET Plc to meet its payment obligations to Generation Companies and gas suppliers are limited to the insufficient monthly market remittances from the Distribution Companies for the sale of energy, and intervention loans from the Central Bank of Nigeria (CBN) guaranteed by the Federal Ministry of Finance.<sup>59</sup> NBET Plc in its over 10 years of existence, except for the periods after the intervention loan from the CBN, has not been able to 100% settled the invoices of Generation Companies for electricity purchased.<sup>60</sup> It has not as well been able to collect market revenues from DISCOs in full, despite having executed firm vesting contracts with Distribution Companies.<sup>61</sup> NBET Plc has a growing liability, which was, as of 2021 over ₦1.5 trillion owed the CBN and the Generation Companies with their gas suppliers.<sup>62</sup>

The restructured Nigerian Electricity Supply Industry is intended to be mainly privatesector-driven and regulated by the government. NBET Plc, in

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<sup>56</sup> Omonfoman, (n47)

<sup>57</sup> Oke, (n2) 422

<sup>58</sup> Omonfoman, (n47)

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

this understanding, was not established by statutory provisions like several other government institutions but was incorporated as a going business concern in a supposedly privatised sector. However, it enjoys direct funding from the Federal Government of Nigeria, advanced by the CBN through the Federal Ministry of Finance under the Payment Assurance Guarantee (PAG) Scheme without approval from the National Assembly. NBET Plc relies on the Federal Government of Nigeria for palliatives, interventions and guarantees.<sup>63</sup> The Federal Government of Nigeria injected ₦212 billion (two hundred and twelve billion naira) as power intervention funds through NBET Plc to kick-start the Nigerian Electricity Market Stabilisation Facility (NEMSF). In 2019, the CBN's support to the electric power sector had reached over ₦1.69tn.<sup>64</sup>

NBET Plc, as a private company, was not capitalised upon establishment but funded totally under the political whims of the government in power without definite statutory appropriation. It is axiomatic that political favours and policies fluctuate, and this is not only adverse to policy stabilisation but also portends great risk to the protection of electricity consumers. The arrangement where public funds from the Central Bank of Nigeria is employed to finance the private business of NBET Plc without statutory appropriation or scrutiny from the National Assembly is faulty, illegal and orchestrated to foster corruption and political control or manipulation of the Nigerian Electricity Supply Industry.

NBET Plc no doubt has failed to achieve the purpose for which it was created as the Nigerian Electricity Supply industry is still bedevilled by an assortment

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<sup>63</sup> Oke, (n2) 448

<sup>64</sup> *Ibid*, 451



of challenges extending to inadequate investment in infrastructure, failure to stimulate the emergence of new players and new technologies, and unlawful government interference in its private business. In terms of power generation and consumption, Nigeria was in 2017 ranked second lowest country in the world.<sup>65</sup> The failure of NBET Plc is sufficient reason to remodel it as a public institution under the oversight responsibility of the National Assembly, and its responsibility as an off-taker expanded as an insurer of Generation and Distribution Companies with statutory responsibilities to apply distress resolution over ailing electricity companies such as purchase and sale; or take over and control the management of failing electricity companies who are unable to perform their service and financial obligation adequately. The interim nature of NBET Plc, particularly as an off-taker, cannot provide the needed assurance to sustain competition as some company may fold upon the exit of the off-taker or insurer.

Though the Electoral Act 2023 seeks to encourage the development of renewable energy in Nigeria,<sup>66</sup> research reveals that a competitive electricity market stimulates the adoption of renewable energy offerings in many suppliers of electricity in the United States who strived to cut costs to reduce electricity prices.<sup>67</sup> The renewable energy mix under the Electricity Act, 2023, especially from the private sector angle, may not experience monumental achievement without a competitive electricity market.

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<sup>65</sup> Samuel EC Nwosu and Samuel Chisa Dike, 'Decentralization of Electricity Generation and Distribution in Nigeria: Revisiting the Legal and Policy Reforms' *African Journal of International Energy and Environmental Law* (2020) (4)(4) 86

<sup>66</sup> Electricity Act 2023, s113 and s164-171

<sup>67</sup> Su, (n3); Clean Energy Ministerial, 'An Introduction to Retail Electricity Choice in the United States' <<https://www.nrel.gov/docs/fy18osti/68993.pdf>> accessed 25 May, 2023

## 5.0 COMPETITIVE RETAIL ELECTRICITY

Retail electricity entails the sale of electricity to end-use consumers. A competitive retail electricity market exists when end customers can choose their electricity supplier from competing electricity retailers.<sup>68</sup> In a competitive retail electricity market, multiple electricity suppliers compete for customers in the same areas they serve. For instance in the 1990s, many States in the United States restructured their electricity markets and adopted retail competition as against the traditional cost-of-service (COS) regulation.<sup>69</sup> The retail competition in the United States allowed electricity consumers to purchase electric power from any competitive retail suppliers available within their environment. In 2017, not fewer than thirteen (13) States in the United States and the District of Columbia fully restructured their retail electricity markets.<sup>70</sup>

Retail electricity choice was implemented in the United States with the hope of increasing competition that is capable of lowering prices, improving electricity services, and stimulating innovative product offerings.<sup>71</sup> This yielded results as competitive retail electricity in the United States enthused electricity suppliers to adopt renewable energy offerings to distinguish themselves from competitors; the competitive pressure equally gave electricity suppliers a strong incentive to cut costs.<sup>72</sup> The gains of retail competition then condense to consumers through reduced prices. For

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<sup>68</sup> NERC, 'Nigerian Electricity Market' <<https://nerc.gov.ng/index.php/home/operators/ltmr/405-nigerisn-electricity-market>> accessed on 1 April, 2022.

<sup>69</sup> Su, (n3)

<sup>70</sup> Clean Energy Ministerial, 'An Introduction to Retail Electricity Choice in the United States' <<https://www.nrel.gov/docs/fy18osti/68993.pdf>> accessed 25 May, 2023

<sup>71</sup> *Ibid.*

<sup>72</sup> Su, (n3)

instance, the decline in retail price in Texas is attributed to the fact that Texas possesses the most competitive retail electricity market in the whole of the United States.<sup>73</sup>

One fundamental attribute of retail competition is the ability of electricity consumers to choose their suppliers. The right of electricity consumers to choose or switch suppliers disciplines the market players and incentivises innovation.<sup>74</sup> Consumer choice or capacity to switch suppliers is strategic to electricity reforms and it is difficult to contemplate competition without the capacity to choose.

Competitive retail electricity in Nigeria is expected to be developed within the post-privatisation phase of the Nigerian electricity supply industry. The post-privatisation phase is the second phase for the development of competition in the Nigerian electricity market.<sup>75</sup> This phase was scheduled to begin immediately upon the declaration that a more competitive electricity market ought to be initiated.<sup>76</sup> The authority to declare a more competitive electricity market in Nigeria is vested on NERC under section 8 of the Electricity Act 2023,<sup>77</sup> but NERC is yet to make the declaration.

The post-privatisation phase is expected to crystallise the wholesale electricity market and the possibly develop a complete retail electricity market. The Electricity Act 2023 does not give much attention to the development of retail electricity market in Nigeria. The law only makes provisions for developing a cluster of electricity consumers in the form of

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<sup>73</sup> *Ibid.*

<sup>74</sup> International Energy Agency, *Competition in Electricity Markets* (OECD 2001) 137

<sup>75</sup> EPSR Act 2005, s26

<sup>76</sup> EPSR Act, S26(1)

<sup>77</sup> Electricity Act 2023, s8

Eligible Customers. Eligible Customers Scheme is thus the foundation for a competitive retail electricity market in Nigeria.

Eligible Customer is defined by the Electricity Act, 2023 to mean a customer that is eligible to purchase electricity from a licensee other than a distribution licensee pursuant to the directives issued by the Minister of Power under section 27 of the EPSR Act 2005 and under the declaration made by NERC under section 12<sup>78</sup> of the Electricity Act 2023.<sup>79</sup> An Eligible Customer is, therefore an electricity consumer or a group of electricity consumers licensed by NERC to purchase electricity directly from Generation Companies/Independent Power Producers or from the trading licensee (NBET Plc) other than from Distribution Companies. The electricity suppliers to Eligible Customers must either be a generation company<sup>80</sup> or a trading licensee<sup>81</sup> but not a Distribution Company.

The Electricity Act 2023, under section 11, empowered the Nigerian Electricity Regulatory Commission (NERC) to develop the Eligible Customer Scheme in Nigeria. NERC on the 25<sup>th</sup> day of May 2017 initiated the Eligible Consumer Scheme for the licensing of eligible customers through the Eligible Customers Regulations (ECR) 2017. The objectives of the Eligible Customers Regulations (ECR) 2017 include the facilitation of competition in the supply of electricity and setting the foundation for full retail competition in the Nigerian electricity market.<sup>82</sup> Other goals of the ECR are to promote the rapid expansion of generation capacity, improve the

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<sup>78</sup> The section 12 is wrongly referred to, the correct section is section 11 of the Electricity Act, 2023

<sup>79</sup> Electricity Act 2023, s232; EPSR Act 2005, s100

<sup>80</sup> Eligible Customers Regulations (ECR) No. NERC-R-111 of 2017, s11

<sup>81</sup> ECR 2017, s12

<sup>82</sup> ECR 2017, s2(a) and (b)

financial liquidity of the electricity industry and enhance the stability and operational efficiency of generation companies through the sale of bulk electricity to eligible customers.<sup>83</sup> The eligibility consumer scheme is a precursor to the eventual introduction of retail competition in Nigeria's electricity supply industry.<sup>84</sup>

In exercise of its responsibility of specifying the categories of Eligible Customers or reviewing any class or classes of Eligible Customers that can operate in Nigeria,<sup>85</sup> NERC, through the Eligible Customers Regulations (ECR) 2017,<sup>86</sup> specified four classes or categories of electricity consumers as eligible customers thus:<sup>87</sup>

- a) Electricity consumers eligible to purchase bulk electricity through a distribution network: comprising eligible customers qualified to purchase bulk electricity through a metered 11KV delivery point on the distribution network; and eligible customers qualified to purchase bulk electricity through a metered 33KV delivery point on the distribution network.
- b) Electricity consumers eligible to purchase bulk electricity through the transmission network.
- c) Electricity consumers eligible to purchase bulk electricity from the grid through a distribution system; and
- d) Electricity consumers eligible to purchase bulk electricity directly from a power plant.

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<sup>83</sup> ECR 2017, s2

<sup>84</sup> ECR 2017, s34

<sup>85</sup> Electricity Act, 2023, s11(1) - (4)

<sup>86</sup> Eligible Customers Regulations (ECR) No. NERC-R-111 of 2017

<sup>87</sup> ECR 2017, s5

NERC is equally imbued with the responsibility to license or refuse an application for the grant of eligibility status not later than 30 working days from the date of application.<sup>88</sup> Upon the grant of eligibility status, an Eligible Customer has the right to freely choose from which generation company to buy electric energy and can freely switch suppliers or contract for the supply of electricity from more than one generation company, provided that adequate infrastructure is available for accountability for the energy quantities.<sup>89</sup> The Eligible Customer Regulations makes it clear that no contract shall contain any provision to limit the eligible customer's choice of supplier or impose a discriminatory fee, in case of supplier switching.<sup>90</sup> This provision is germane in sustaining eligible customer's right to choose its suppliers. The freedom of choice is germane to the development of a competitive wholesale and retail electricity market.

The implementation of the eligible customer scheme is required by the Eligibility Customer Rules 2017 to be undertaken in two phases.<sup>91</sup> The first phase consists of all the four categories of eligible customers as enumerated above except part of the first category of electricity consumers eligible to purchase bulk electricity through a distribution network. This category of Eligible Customer is reclassified for the implementation of the eligible customer scheme, into two classes: eligible customers qualified to purchase bulk electricity through a metered 11KV delivery point on the distribution network and eligible customers qualified to purchase bulk electricity through a metered 33KV delivery point on the distribution network. While the later

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<sup>88</sup> ECR 2017, s14(1)(d) and (e)

<sup>89</sup> ECR 2017, s15(2)

<sup>90</sup> ECR 2017, s15(2)(c)

<sup>91</sup> ECR 2017 s34

reclassified category belongs to the first phase of implementation, the eligible customers qualified to purchase bulk electricity through a metered 11KV delivery point on the distribution network, is the only set of electricity consumers in the second phase.

While electricity consumers or companies can apply to be conferred eligibility status under the first phase of implementation, the second phase is yet to commence. The set of electricity consumers under the second phase of implementation are principally residential and commercial electricity consumers, and they constitute the largest percentage of electricity consumers in Nigeria and the largest customer base of the Distribution Companies.<sup>92</sup> The implementation or commencement of the second phase is left at the discretion of NERC.<sup>93</sup>

Eligible Customers are intended to develop competition in the retail electricity market by competing with Distribution Companies in purchasing electric energy from any of the available generation companies and distributing same to consumers within the same area the Distribution Companies are licensed to operate. The emergence of the eligible customer regime, owing to the competition it sought to introduce and the consequential expected reduction of electricity prices, threatens the customer base and revenue of the existing Distribution Companies.<sup>94</sup> This is because the eligibility customer scheme is intended to license Eligible Customers to buy electricity directly from the Generation Companies, leaving the Distribution

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<sup>92</sup> Sina Sipasi and Maranath Abraham and Crystal Okwurionu, 'Eligible consumers: The Dawn of Competition in Electricity Supply in Nigeria' <www> accessed on 31 March, 2022.

<sup>93</sup> ECR 2017, s36 and 2<sup>nd</sup> schedule.

<sup>94</sup> Tijah, (n19) 18.

Companies with the few consumers who may wish to rely or transact with the Distribution Companies.

There are however statutory obstacles to the actualisation of the eligibility customer scheme. First, the Electricity Act 2023 and the ECR 2017 contain provisions principally aimed at limiting competition for the benefit of the existing Distribution Companies against the interest of electricity consumers and eligible customers by providing for phased implementation of the eligible customer regime with the postponement of the second phase which has the largest percentage of electricity consumers, to such time as NERC may deem appropriate.<sup>95</sup>

Another challenge under the Electricity Act<sup>96</sup> is the introduction of discriminatory competition transition charges, chargeable only on Eligible Customers to raise revenue to be shared by NBET Plc and the Distribution Companies. It is unthinkable that Eligible Customers who are supposed to be rivals of Distribution Companies are levied and the revenue is in turn distributed to its rival. According to section 12 of the Electricity Act 2023:

If the Commission determines following its directive given under section 11 of this Act will result in decreasing electricity prices to such an extent that a trading licensee or a distribution licensee would have inadequate revenue to enable payment for its committed expenditures or is unable to earn committed rates of return on its assets, despite its efficient management, the Commission may issue

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<sup>95</sup> ECR 2017, s36 and 2<sup>nd</sup> schedule

<sup>96</sup> See also ECR 2017, s29



further directives on the collection of a competition transition charges from eligible customers, the distribution of the funds collected to the trading licensees or distribution licensees licensed under this Act and the duration of the competition transition charges.

One more great challenge is that, despite the over six (6) years of the eligible customer regime, NERC has not registered even one Eligible Customer in Nigeria.<sup>97</sup> There were over thirty (30) applicants for the eligible consumer status in the country. Notwithstanding the non-registration, NERC suspended the scheme on the 7th day of July, 2021, relying on the claim that some applicants/companies arrogated the powers of NERC to vest on themselves eligible customer status. The companies were alleged to have entered into bilateral contracts with some Generation Companies and commenced operation by supplying electricity to some electricity consumers<sup>98</sup> which prompted NERC to suspend the eligible customer scheme through the issuance of a directive<sup>99</sup> to the Transmission Company of Nigeria, directing it to transfer back to the Distribution Companies, all electricity customers that failed to obtain eligibility status under the Eligible Customer Regulations.<sup>100</sup> On the other hand, some of the companies affected by the suspension claimed

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<sup>97</sup> Sunday Oduntan, 'Facts on Suspension of Eligible Customer Regulation' (The Guardian Newspapers 30 August 2021) <<https://guardian.ng/opinion/facts-on-suspension-of-eligible-customer-regulation/>> accessed 31 March 2022

<sup>98</sup> Ogundele Bolaji, 'Investors Battle Electricity Regulator Over Policy Suspension' <<https://thenationonlineng.net/investors-battle-electricity-regulator-over-policy-suspension/amp/>> accessed on 31 March, 2022

<sup>99</sup> Directive with Ref. No: NERC/REG/OCFML/APPR/EC/2655/068, dated 7th July 2021

<sup>100</sup> Oduntan, (n128)

that NERC and the Distribution Companies colluded to orchestrate the suspension of the scheme to frustrate the implementation of the ECR 2017.<sup>101</sup>

There is no iota of competition in the Nigerian retail electricity market. The Electricity Act, 2023 neglects the development of retail electricity market but has discriminatory provisions against Eligible Customers. For instance, the Electricity Act 2023 provides for the collection of a discriminatory charge referred to as the ‘Competition Transition Charge’ collectible only from Eligible Customers. This charge is intended to limit competition when the Distribution Companies are unable to compete with Eligible Customers. However, there is no corresponding provision that the Distribution Companies may be charged a Competition Transition Charge to save a dying Eligible Customer who cannot withstand competition with Distribution Companies or other Eligible Customers. NERC has stifled the emergence of Eligible Consumers by suspending the scheme. There is this supposition that the politicians who bought the successor companies at low rates are head-bent at using the instrumentality of the law through the legislature and the regulator, to stifle competition in the electricity market. Also, the law only makes provisions for developing a cluster of electricity consumers in the form of Eligible Customers and not the licensing of new Distribution Companies that can compete with existing distribution companies. From the present legal regime, it is difficult to actualise a competitive retail electricity market in Nigeria where electricity consumers are not allowed to choose their suppliers from different competing electricity suppliers.

Worst still is that the Nigerian retail electricity market is totally without competition especially with the geographical allocation of the electricity

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<sup>101</sup> *Ibid.*

market. Before the privatisation of the Successor Companies, the Federal Government of Nigeria divided the Nigerian retail electricity market among the eleven (11) Successor Distribution Companies, granting them a monopoly over respective business areas. Each Distribution Company is restricted to a business area and prohibited from entering into another company's business area. The table below shows the eleven Distribution Companies and their monopolistic coverage areas.

*Table 1: Nigerian Electricity Distribution Companies and their Franchise Areas*

S/N	Names of Nigerian Electricity Distribution Companies	Franchise Area
1.	Abuja Electricity Distribution Company (AEDC)	FCT, , Kogi, Nassarawa,and most parts of Niger States
2.	Benin Electricity Distribution Company (BEDC)	Edo, Ekiti, Delta and Ondo States
3.	Eko Electricity Distribution Company (EKEDC)	Lagos State [Ojo, Festac, Ijora, Mushin (also covers Orile areas), Apapa, Lekki (also covers Ibeju areas), Lagos Island (also covers Ajele areas) and part of Ogun State (Agbara)
4.	Enugu Electricity Distribution Company (EEDC)	Abia, Anambra, Enugu, Ebonyi, and Imo States

5.	Ibadan Electricity Distribution Company (IBEDC)	Oyo, Ogun, Osun, Kwara and part of Ekiti, Kogi and Niger States
6.	Ikeja Electricity Distribution Company (IKEDC)	Part of Lagos State (Abule Egba, Akowonjo, Ikeja, Ikorodu, Oshodi and Shomolu)
7.	Jos Electricity Distribution Company (JEDC)	Bauchi, Benue and Gombe and Plateau
8.	Kaduna Electricity Distribution Company (KNEDC)	Kaduna, Kebbi, Sokoto and Zamfara States
9.	Kano Electricity Distribution Company (KEDC)	Jigawa, Kano and Katsina
10.	Port Harcourt Electricity Distribution Company (PHEDC)	Akwalbom, Bayelsa, Cross River and Rivers States
11.	Yola Electricity Distribution Company (YEDC)	Adamawa, Borno, Taraba and Yobe States

**Source:** Nigerian Electricity Regulatory Commission (NERC)<sup>102</sup>

The Nigerian electricity supply industry is structured in a manner that restricts or distorts competition contrary to the provisions of the Federal Competition and Consumer Protection (FCCP) Act 2018. The FCCP Act 2018 is the foremost and most superior legislation on issues on competition and consumer protection, and it is only subject to the provisions of the

<sup>102</sup> Nigerian Electricity Regulatory Commission (NERC), 'DisCos' Contact Information' <<https://nerc.gov.ng/index.php/contact/discos>> accessed on 24 April, 2023.

Nigerian Constitution.<sup>103</sup> The scope and application of the FCCP Act is general, it is not sector-specific but applicable to all sectors of the Nigerian economy, all undertakings and all commercial transactions within or having effect in Nigeria.<sup>104</sup> The application of the FCCP Act extends to all body corporate or agencies of the Government of the Federation or any State or Local Government which engages in commercial activities or where any government agency has a controlling interest in a body corporate which engages in economic activities.<sup>105</sup> The FCCP Act is thus applicable to all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public, including the Nigerian electricity supply industry.<sup>106</sup> The FCCP Act 2018 promotes and maintains competitive market in Nigeria by prohibiting abuse of dominant position, abuse of monopoly position, restrictive agreement, regulation of prices, price mergers and the enforcement of criminal sanctions for offences against competition.

Although the EPSR Act 2005 designed the present structure of the electricity retail market before the enactment of the FCCP Act 2018, it was expected that the Electricity Act 2023 which repealed and replaced the EPSR Act 2005 would remedy the situation to bring the electricity industry in line with the provisions of the FCCP Act which is the most superior law on competition and consumer protection in Nigeria. However the Electricity Act 2023 under section 6 rather granted legal validity to the current structure which camouflages competition but allows the abuse of monopoly position and restrictive contracts prohibited under the FCCP Act 2018.

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<sup>103</sup> *Ibid.*

<sup>104</sup> FCCP Act, s2(1)

<sup>105</sup> FCCP Act, s2(2)(a) and (b)

<sup>106</sup> FCCP Act, s2(2)(c)

Monopoly is a market condition that exists when only one economic entity produces a particular product or service over the commercial market within a given region.<sup>107</sup> Although monopoly situation simpliciter is not prohibited in Nigeria, the FCCP Act 2018 rather prohibits the abuse of monopoly position and makes provisions geared towards curtailing the adverse effect of monopoly on competition through the Competition and Consumer Protection Tribunal (CCPT) which has the powers where a monopoly situation operates or may be expected to operate against the public interest, to make orders as considered necessary for remedying or preventing the adverse effects of the monopoly as specified in a report made by the Federal Competition and Consumer Protection Commission to the CCPT.<sup>108</sup>

The adverse effects of the monopoly situation held by the distribution companies in the retail electricity market are evident in the arbitrary estimation of consumption for arbitrary billing, the illegal disconnection of electricity supply with impunity and poor electricity services rendered. The distribution companies abuse their monopoly situation, knowing electricity consumers cannot switch to another distribution company but must transact with them or use a private generating set, which is very expensive to sustain. The present structure of the Nigerian retail electricity market also conflicts with the FCCP Act's provisions on restrictive agreements. Restrictive agreements are oral or written anticompetitive agreements between two or more bodies intending to distort market competition. It is any agreement among undertakings or a decision of an association of undertakings that has the purpose of actual or likely effect of preventing, restricting or distorting

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<sup>107</sup> BA Garner and Others, *Black's Law Dictionary* (7<sup>th</sup> edn, West Publishing Co. 1999) 1023

<sup>108</sup> FCCP Act, s84(1)

competition in any market.<sup>109</sup> Restrictive agreements include agreements which directly or indirectly fix a purchase or selling price of goods or services; divide markets by allocating customers, suppliers, territories or specific types of goods or services, that is, fixing quotas and dividing markets geographically; limit or control production or distribution of any goods or services, markets, technical development or investment; involving collusive tendering; or making the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreement.<sup>110</sup> It also include agreements establishing minimum prices to be charged on the resale of the goods or services in Nigeria,<sup>111</sup> withholding supplies of goods or services from dealers (whether parties to the agreement or not) who resell or have resold any goods or services in breach of any condition as to the price at which those goods or services may be resold; or refusing to supply goods or services to the dealers in breach of any condition as to the price at which those goods or services may be resold except on terms and conditions that are less favourable than those applicable to other dealers carrying on business in similar circumstances; and agreement authorising the recovery of penalties, however described, by or on behalf of the parties to the agreement from dealers who resell or have resold goods or services in breach of any condition as to the price at which those goods or services may be resold.<sup>112</sup>

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<sup>109</sup> FCCP Act, s59(1)

<sup>110</sup> FCCP Act, s59(2)

<sup>111</sup> FCCP Act, s63(1)

<sup>112</sup> FCCP Act, s60

The FCCP Act prohibits all restrictive agreements and clearly provides that all such agreements are void and of no legal effect<sup>113</sup> except however the following agreements:

- a) Restrictive agreements among undertakings or decisions of association of undertakings authorised by the FCCPC provided FCCPC is satisfied that the agreement or decision are indispensable to contribute to the improvement of production or distribution of goods, services or the promotion of technical or economic progress for the benefit of consumers and does not have the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.<sup>114</sup>
- b) price fixing agreements between interconnected undertakings or undertakings under an agency (principal and agent) relationship,<sup>115</sup>
- c) restrictive agreements for the production or distribution of any goods or services reasonably necessary for the protection of the public in the practice of a trade or profession or the collection and dissemination of information relating to a service;<sup>116</sup> and
- d) collusive tendering by affiliate undertakings.<sup>117</sup> That is agreement entered into or a submission that is arrived at only by undertakings each of which, in respect of ever one of the other is an affiliate.

The market division by allocating electricity consumers or the division of the Nigerian electricity market geographically among the eleven

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<sup>113</sup> FCCP Act, ss59 and 63

<sup>114</sup> FCCP Act, s60

<sup>115</sup> FCCP Act, ss59(2)(a) and 107(2)

<sup>116</sup> FCCP Act, ss59(2)(c) and 108(2)

<sup>117</sup> FCCP Act, ss59(2)(d), 63 and 109(2)



(11) Distribution Companies is an anticompetitive practice prohibited as a restrictive agreement under sections 59 and 63 of the FCCP Act, 2018.

## **6.0 CONCLUSION**

Nigeria recently restructured its electric power sector and moved away from a vertically integrated government-owned electricity sector to an unbundled and privatised electricity supply industry with the emergence of wholesale and retail electricity markets. However, the restructuring of the Nigerian electric power sector initiated by the EPSR Act 2005 and granted legal validity under the Electricity Act 2023 mainly transferred a government monopoly called NEPA to a privately owned monopoly made up of eighteen (18) Successor Companies that took over the business of electricity generation, transmission and distribution from NEPA through the PHCN. Although there are six (6) main generation companies and eleven (11) distribution companies, neither the wholesale and retail electricity markets in Nigeria are competitive.

The retail electricity market structure of the Nigerian electricity market is characterised by market allocation of electricity consumers and the division of the Nigerian retail electricity market geographically among the eleven (11) Distribution Companies by NERC. Section 6 of the Electricity Act 2023 which sanctioned the anticompetitive structure of the Nigerian Electricity Market is in conflict with sections 59 and 63 of the foremost legislation on competition in Nigeria, the FCCP Act 2018 which prohibits such anticompetitive practices like abuse of monopoly position and restrictive contracts that limit competition. Also, Sections 11 and 12 of the Electricity Act 2023 is found to retain discriminatory and competition-restricting

provisions against Eligible Customers in favour of Distribution Companies, thereby making the actualisation of competitive retail electricity market in Nigeria illusory.

Although NBET Plc was incorporated as a private company to stimulate the emergence of new generation companies for the development of a competitive wholesale electricity market in Nigeria, NBET Plc failed to actualise its core mandates of promoting investment in electricity generation. The funding arrangement of NBET Plc is illegal as public funds from the Central Bank of Nigeria without appropriation are applied to finance it even though it was incorporated to operate as a private company. NBET Plc is indebted to the brim and cannot stand as an autonomous private business entity except with political patronage. This, therefore, opens room for corruption to thrive in the power sector.

Owing to the lack of competition in the Nigerian electricity supply industry, electricity consumers in the country do not have the right to choose their electricity suppliers and are not adequately safeguarded against the tyranny of the distribution companies who issue outrageous estimated bills, cut electricity supply indiscriminately in disregard to the safety of electricity consumers and illegally disconnect electricity supply with impunity. The legal framework regulating the electricity sector does not allow the licensing of new Distribution Companies to compete with the existing eleven (11) Successor Distribution Companies. From the present legal regime, new players in the electric power sector by way of distribution companies cannot emerge.

To develop a competitive electricity market capable of encouraging investment, incentivising innovation, reducing electricity prices and

maximise consumer welfare in Nigeria, it is recommended that the electricity market structure should be fully liberalised with the removal of restrictive clauses and geographical market divisions under the distribution licenses issued by the Nigerian Electricity Regulatory Commission to Distribution Companies. The Electricity Act 2023 should be amended to clearly prohibit restrictive agreement. This will allow for competition among the existing eleven (11) Distribution Companies and bring the law and practice under the electricity sector in line with the provisions of the FCCP Act 2018, which is superior to the Electricity Act 2023. Section 6 of the Electricity Act 2023 which gives legal validity to the implemented pre-privatisation phase of the Nigerian Electricity Supply Industry and thus sanctioned the anticompetitive market allocation of consumers should be amended to provide for a competitive electricity market.

The Electricity Act 2023 should equally be amended to remove discriminatory provisions against Eligible Customers, including the biased collection from Eligible Customers of Competition Transition Charge,<sup>118</sup> while no corresponding provisions are made for the collection of these charges from Distribution Companies. The Electricity Act 2023 should be amended to make provisions for the licensing of new Distribution Companies to operate in competition with the existing Distribution Companies.

It is also recommended that NBET Plc be remodelled as a public institution under the oversight and responsibility of the National Assembly. In addition to its responsibility as an off-taker, NBET Plc should be re-established as an institution with statutory allocation and regulatory responsibility capable of taking over the management and control of ailing Distribution Companies

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<sup>118</sup> Electricity Act 2023, s12; ECR 2017, s29

who are unable to perform their duties or meet their financial obligation, rather than tax Eligible Customers by way of Competition Transition Charge to spoon-feed Distribution Companies that are unable to perform their duties or withstand a competitive electricity market.

Finally, it is recommended that an Electricity Investment Promotion Council be established to source and promote investment in the Nigerian Electricity Supply Industries to incentivise the emergence of new competitors in both the wholesale and retail electricity market.