

The background of the page is a solid light blue color. It features two sets of thin, dark blue lines that radiate from a central point. One set of lines originates from the top center and spreads outwards and downwards, creating a fan-like shape. The second set of lines originates from the bottom center and spreads outwards and upwards, also creating a fan-like shape. The two sets of lines meet at the center of the page, framing the text.

**Legality of Section 8(a) (viii)  
of the  
Transitional Electricity Market (TEM)  
Supplementary Order**

Following the declaration of the Transitional Electricity Market (TEM) in February 2015, the Nigerian Electricity Regulatory Commission (NERC) issued the TEM Supplementary Order<sup>1</sup> (“the TEM Order”) on March 18, 2015 to provide for the effective administration and operation of TEM in accordance with the various Rules, Codes and Orders that regulate the Electricity Market.

The TEM Order lists conditions for operating trading arrangements between parties which have not fulfilled the requirements for participation in the TEM and/or which have not yet become effective. In accordance with the Order, Distribution Companies (“Discos”) have taken up the obligation of supplying power to customers on the 330 and 132 kV power lines; these customers are typically heavy users or consumers of electricity. A controversy has arisen on the basis of this provision, with the Transmission Company of Nigeria (TCN)<sup>2</sup> and other stakeholders stating that the said provision is illegal and ultra vires.

This article shall discuss the legality or otherwise of **Order 8(a) (vii) of the TEM Order**.

**Order 8(a) (vii) of the TEM Order** provides amongst other things, that

*“all off-takers of energy at the 132kV shall remain customers of the Disco<sup>3</sup>. The Transmission Service Provider (TSP) shall cut off such off-takers who do not meet their payment obligations at the request of the relevant Disco. The TSP shall be responsible for the payment for energy consumed by such customers if the TSP does not comply with such instructions”.*

**Section 100 of the Electric Power Sector Reform Act 2005 (EPSRA)** defines a distribution system as *“the system of facilities consisting wholly or mainly of low voltage (less than 132kV)<sup>4</sup> electric lines used for the distribution of electricity from grid supply points to the point of delivery to consumers or eligible customers and includes any electrical plant and meters operated in*

*connection with the distribution of electricity, but shall not include any part of a transmission system”.*

By this definition, the EPSRA clearly limits the allocation of electricity by Discos to consumers of electricity who utilize less than 132kV electric lines. The TEM Order however suggests that Discos are entitled to supply electricity to 132kV off-takers. This contradicts the provisions of the EPSRA and exceeds the scope of powers of the Discos, considering that a distribution system is not expected to wheel voltage exceeding 132kV.

The **NERC Eligible Customer Regulations (2017)**, governs the supply of electricity to Eligible Customers and lists the criteria contained in the Minister’s<sup>5</sup> declaration for customers who may apply for ‘Eligible Status’ which enables third parties among other things, to receive or be supplied electricity directly from the generating companies (Gencos) and the TCN, in a bid to promote competition in the industry, etc.

Four categories of ‘Eligible Customers’ are described in the Eligible Customer Regulations, with the second category comprising *customers who are connected directly to a metered 132kV or 330kV delivery point on the transmission network under a transmission use of system agreement for connection and delivery of energy<sup>6</sup>.*

**Section 100 EPSRA** defines a transmission system as *“a system consisting wholly or mainly of high voltage (greater than or equal to 132kV) electric lines for the conveyance of electricity within an undertaking or from one undertaking to another, including any transmission lines, transformers, switchgear and other works necessary for and used in connection with such electrical equipment, and the buildings as may be required to accommodate the transformers, switchgear and other works”.*

A conjunctive reading of this EPSRA definition, along with the above stated second category of eligible customers, supports the rationale that the

<sup>1</sup> No. NERC/15/0011

<sup>2</sup> Note that the TCN is also the Transmission Service Provider (TSP) in the TEM – NERC Website, ‘Transmission’, available at <https://nerc.gov.ng/index.php/home/nesi/404-transmission> and retrieved on 6 August 2019

<sup>3</sup> Emphasis on this phrase provided by the author.

<sup>4</sup> All underlining effects are for emphasis by the author of this Article.

<sup>5</sup> The Minister of Power, Works and Housing

<sup>6</sup> Par 5(2) Eligible Customers Regulations 2017



electricity customers who are connected to the 132kv/330kv lines should customarily transact directly with the TCN and Gencos and not with the Discos. Contrary to the provisions of the ESPRA, the Order purports to bring such Eligible Customers within the purview of Discos. The TCN is empowered to deal with Eligible Customers (who are connected to a 132/330kv line) while Discos cater to customers who are connected to less than a 132/330kv line. It can therefore be seen that the Order conflicts with both the EPSRA and the Eligible Customer Regulations.

In the case of **AG Lagos State v. Eko Hotels Ltd & Anor**<sup>7</sup>, the doctrine of ‘covering the field’ was explained by the Supreme Court. By this doctrine, where the main, principal or superior law has covered a given field or area, no other subsidiary law made in that area or field can operate side by side with the main, principal or superior law. If the inferior law is inconsistent with the principal law, it has to be declared void to the extent of its inconsistency. In this instance, Order 8(a) (vii) of the TEM Order, being inconsistent with the EPSRA (the primary law) is to be declared void to the extent of its inconsistency.

The Supreme Court held in **Gov., Oyo State v. Folayan**<sup>8</sup> that a subsidiary legislation derives its validity and authority from a substantive law. Furthermore, in the case of **Olanrewaju v. Oyeyemi & Ors**<sup>9</sup>, the Court of Appeal held thus: *“It is settled law that a subsidiary legislation derives its authority and validity from and subject to the provisions of the parent enabling statute. It follows therefore that a subsidiary legislation cannot expand or curtail the provisions of the substantive statute. It must be within the authority derived in the main enabling statute”.*

It can therefore be argued that the purport of the TEM Order in extending the Disco’s customers to off-takers of 132kV who are already being served by the TCN, is inconsistent with the clear provisions of the substantive statute (the EPSRA).

As stated above, where a provision of a regulation is inconsistent with the provisions of an Act/Statute, the provision of the regulation is void to the extent of its inconsistency<sup>10</sup>.

One should also note that the 132kv lines are typically maintained by the TCN and they expend costs in carrying out this service. In line with the tariff methodology contained in **Section 76(2) (a) of the EPSRA** which provides that tariffs shall allow a licensee that operates efficiently to recover the full costs of its business activities, including a reasonable return on the capital invested. It suggests that the TCN being the party that services the 132kv lines, is the party to handle the entire business of the 132kv/330kv lines-including the supply of electricity to its customers. It would be unfair for Discos to supply energy to customers while the TSP/TCN carries out other accompanying services/works.

In view of the foregoing, NERC may be required to amend the inconsistent provisions of the TEM Order, or in the alternative and in order to rectify this inconsistency, an amendment of the EPSRA may become necessary, peradventure the Act no longer reflects the current happenings, necessities and trends in the electricity Market.



Atinuke Dosunmu  
**Partner**  
adosunmu@alp.company



Adaora Nwajiakwu  
**Associate**  
anwajiakwu@alp.company

<sup>7</sup> CITATION: (2017) LPELR-43713(SC)

<sup>8</sup> (1995) 8 NWLR (Pt. 413) 292

<sup>9</sup> Olanrewaju v. Oyeyemi (2001) 2 NWLR (Pt.697)229

<sup>10</sup> See also Nigerian National Petroleum Corporation & Anor v. Famfa Oil Ltd (2012) 5 CLRN 1