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## **NIGERIAN ELECTRICITY REGULATORY COMMISSION GUIDELINES ON DISTRIBUTION FRANCHISING IN THE NIGERIAN ELECTRICITY SUPPLY INDUSTRY (NESI)**

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### **INTRODUCTION**

The privatization of the Nigeria's power sector was done in a bid to establish a competitive market, improve management and efficiency, attract private investment, increase generation and provide reliable and cost-efficient power supply. In order to reduce technical and commercial loss which had impeded the growth of the Nigerian Electricity Supply Industry (NESI) the Distribution Companies (**DisCos**) is permitted under their licences to adopt some level of outsourcing of activities primarily in the area of revenue collection and distribution system operation.

The Regulation issued by the NERC on 2 July 2020, is designed to provide regulatory guidance to the Discos on the procedure and requirement for obtaining a "No Objection" prior to the grant of any franchise. Also, the NERC seeks to gain more control over the franchise process in order to ensure that all parties comply with the term of the franchise agreement and customer needs are duly met.

### **APPLICATION PROCEDURE**

A DisCo intending to enter into a franchise agreement with a third party shall upon conclusion of the engagement process apply to the NERC for a "No Objection" before entering into an agreement with the franchisee. The NERC shall in granting or withholding consent takes into cognisance the objectives of the guideline.



## CONSIDERATIONS FOR GRANT OF “NO OBJECTION”

In deciding whether or not to grant a “No Objection” the NERC will consider the commercial and contractual arrangement under which the parties propose to enter into the franchise Agreement.

### 1. Commercial Arrangements

- a) **Tariff Regime:** For a franchise arrangement to be approved by the NERC, the tariff applicable MUST Be in accordance with the prevailing tariff methodology approved by the NERC which is the Multi Year Tariff Order.
- b) **Additional Generation Capacity:** procurement of additional generation capacity for any franchised area through a bilateral contract or embedded generation shall be in compliance with existing law, regulations and codes. This means that all procurements will go through the public competitive process and be approved by the NERC.
- c) **Requirement for public consultation:** where the procurement of additional generation capacity will result in cost being higher than the prevailing wholesale tariff, the NERC will review the procurement for prudence as a condition for allowing the extra cost to be passed through to the consumer in the franchised area. In furtherance of this, the NERC shall conduct a public hearing for the determination of any supplementary charge to consumers. This may mean that if consumers in the franchised areas are unwilling to pay the supplemental cost, the franchisee may have to charge the MYTO or decline to enter into the agreement.

### 2. Contractual Arrangements

- a) **Mandatory terms in the agreement:** the guideline mandates that certain terms must be firmly agreed and included in the draft agreement between the disco and licensee. These include at a minimum; base data for the franchise area prior to contract, amount payable by the franchisee, deliverables of the franchisee, capital expenditure, tenor of the agreement (which shall not exceed the tenor of the DisCo’s license), cancellation terms, remedies for failure of franchisee, technical delineation of franchised area, asset register, trading point, treatment of legacy contracts, reporting obligations, metering arrangement, termination and a dispute resolution mechanism.
- b) **Securitisation of payment obligation:** the franchisee must provide a security for its payment obligation in the form acceptable to the DisCo. This is to avoid a situation where the disco is unable to fulfil its responsibility to the market as a result of a delayed payment or default.
- c) **Related Party:** the guideline provides that persons who are shareholders or directors of a DisCo shall not be eligible to enter onto a franchise arrangement with the DisCo. A literal interpretation would mean that a related party to a DisCo may enter into a franchise agreement with another DisCo.
- d) **Transparent Procurement:** the guideline provides that where practically feasible, DisCos should adopt an open competitive procurement approach for the purpose of engendering competition. THE guideline did not provide for circumstances which may not make it feasible, it is assumed that the NERC will determine based on the circumstances of each case.

## REVOCAION OF A FRANCHISE ARRANGEMENT

The NERC may upon receipt of a petition from relevant stakeholders or other licensees initiate an enquiry into the conduct and performance of a franchise agreement. It may issue an order revoking a franchise arrangement after holding a public hearing into the allegations if it finds the following:

1. Where the franchise arrangement is being operated in a manner that willfully contravenes any provision of the Electric Power Sector Reform Act 2005, license terms and conditions of the distribution licensee, regulations and Order of the Commission, Market Rules, Network Codes.
2. Where the franchisee is carrying out business in a form or manner which constitutes an immediate threat to public health and safety.
3. Where it is necessary in the overriding public interest to suspend the franchise arrangement.

If a franchise arrangement is revoked, the DisCo shall be responsible for continued provision of service to the consumers. Compensations to a DisCo or franchisee for unamortised investments shall be settled in accordance with the terms of the franchise agreement.

## CONCLUSION

The NERC in furtherance of the public consultation held on the prospects of distribution franchising has recognised the following models;

- a) Metering, Billing and collection;
- b) Total management of electricity distribution function in a ring-fenced area;
- c) Total management of distribution feeders including billing & collection;
- d) Loss reduction and provision of embedded generation; and
- e) The NERC may consider other innovative franchise models provided by discos which is not included above.

It is expected that this regulation will be an impetus for more investors to make their entrance into the NESI and lead to an improvement in distribution infrastructure and supply of electricity to the consumer. However, the ban on the increase of tariff beyond the MYTO may be a disincentive for investors.

It is instructive for lawyers representing franchisees to ensure that the franchisee is adequately protected under the franchise agreement so as to ensure that franchisee is adequately compensated for any damage suffered as a result of the DisCo's breach of its obligations under its distribution license.

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