

AN APPRAISAL OF THE LEGAL IMPLICATION OF THE METER ASSET PROVIDERS (MAP) REGULATION 2018 FOR THE PROTECTION OF ELECTRICITY CONSUMERS IN NIGERIA*

Abstract

The privatization of the power sector in Nigeria heralded the enactment of the Electric Power Sector Reform Act 2005. The Act established the Nigerian Electricity Regulatory Commission as a corporate body. The Commission is mandated under the Act to make regulations to ensure fairness, safety, reliability and quality of service in the production and delivery of electricity to customers. The increasing number of unmetered Nigerians and have no choice but to depend on the estimated billing method employed by the electricity distribution companies (DISCOS). This has led to an outcry by Nigerian electricity consumers who are daily groaning under excessive and fraudulent billings by the distribution companies. The emergence of excessive and fraudulent billings is made possible by the adoption of the estimated billing method by the distribution companies. The penchant for using estimated billing methods by the distribution companies has reached an extent that they have jettisoned the postpaid meters that were initially installed by the Power Holding Company before the advent of the privatization of the electricity supply industry in Nigeria. DISCOS on their own part complain about inadequate resources to procure prepaid meters for all Nigerian electricity consumers. They make this complaint because they lacked adequate preparation before venturing into the electricity distribution business. It would appear that somebody somewhere has to bear the burden for their deficiencies. The government in response to this situation has adopted the pampering approach, by enacting regulations through the Nigerian Electricity Regulatory Commission (NERC) that will enable independent meter providers, in agreement with the DISCOS, supply prepaid meters to the Nigerian electricity consumers. These meters are to be paid for contrary to the tariff structure approved for the DISCOS, which had already incorporated the cost of the meters into the electricity bills to be paid by the Nigerian consumers. This paper examines the legal implications of the Meter Asset Provider Regulation of 2018 enacted by the NERC pursuant to the above objectives. The paper finds that the regulation while solving the immediate meter needs of the Nigerian electricity consumers who are at the receiving end of the fraudulent and excessive estimated billing methods of the DISCOS has left in its trail a lot of unanswered questions. First, in the context of the privatization of the electricity sector, whose responsibility is it to provide meter for the Nigerian electricity consumers? Second, what happens to the cost of meters already incorporated in the approved tariffs charged the electricity consumers by the distribution companies? Third, what is the method adopted in the payment of meter service charge by the electricity consumers? These and other questions are the unfinished task of the Meter Asset Provider Regulation 2018.

Keywords: Meter Asset Providers Regulation 2018, Legal Implication, Electricity Consumers, Protection, Nigeria

1. Introduction

The MAP Regulation¹ did not define the word ‘consumer’. It however defined the word ‘customer’ as any end user who is contracted to receive electricity supply from a Distribution Licensee. The Electric Power Sector Reform (ESPR) Act defined the word ‘consumer’ in relation to the electricity sector thus: ‘any end-user of electricity who is a customer of a distribution licensee that is not an eligible customer and, for purposes of filing a complaint with the Commission and for any other reason that the Commission may determine, a person who is temporally disconnected or otherwise without service, provided that a person who has applied for, but has yet to receive, service shall also be deemed to be a customer’.² The Act specifically mandates the Minister to issue directives specifying the class or classes of end-use customers that, from time to time, shall constitute ‘eligible customers’.³ The foregoing purports that there are two categories of electricity consumers, to wit, customers or end users of electricity utility in Nigeria. The first group may be in or out of service but has applied and are customers of

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¹ Meter Asset Provider Regulations No. NERC/R/112 2018, section 3.

² Electric Power Sector Reform Act 2005 section 100

³ Electric Power Sector Reform Act 2005 section 27.

distribution licensees. The second group is eligible customers who deal directly with the Commission for purposes of the Act.

2. Consumer Protection in the Electricity Sector

The major aim of consumer protection laws is to empower the consumer to enable him to enjoy consumer rights. The need to protect the rights of electricity consumers is predicated upon the rationale that they occupy weak position in commercial transactions in relation to suppliers of services. The rights of consumers are becoming increasingly important around the world. Governments have passed numerous laws to assure that end user of services have the same rights as providers of services. The Electric Power Sector Reform Act is one of those laws.⁴ Consumers internationally have eight internationally recognized rights. The goal of all Consumer Protection Movement is to give the consumer certain basic legal right. This includes⁵ right to the satisfaction of basic needs; right to safety; right to be informed; right to choose; right to be heard; right to redress; right to consumer education; and right to a healthy and sustainable environment. The Nigerian Electricity Regulatory Commission has acknowledged the rights of the Nigerian electricity consumer by declaring his right to fair billing for electricity consumed by making it mandatory for the DISCOS to provide all such consumers with appropriate meters. This is to ensure that they paid for only electricity consumed. It was for the purposes of ensuring efficient electricity power supply and at the same time provides for the protection of the rights of Nigerian electricity consumers that the Electricity Power Sector Reform Act was enacted on 2005.

3. Electricity Power Sector Reform Act as an Instrument for Promoting Consumer Rights in the Nigerian Electricity Sector

The privatization of the electric power sector led to the enactment of the Electric Sector Power Reform Act.⁶ The Act provided for the unbundling of Power Holding Corporation of Nigeria (PHCN) into separate units for generation, transmission and distribution.⁷ The unbundling of the PHCN and subsequent divestment was aimed amongst other things, at improving access to electricity and overall quality of service.⁸ The rights of end users of electricity in Nigeria are clearly captured in the Act.⁹ The Act established the Nigerian Electricity Development Commission (NERC) as a body corporate with perpetual succession, which can sue and be sued in its corporate name.¹⁰ The Act specifically mandated the Nigerian Electricity Development Commission (NERC) to develop in consultation with the licensee's customer service standards, customer complaint handling standards and procedures, codes of practice for the provision of assistance to special customers, such as the blind, disabled, the elderly and so on.¹¹ There are also established procedures for disconnecting non-paying customers or for those in breach of other terms and conditions of an applicable tariff or contract and the information to be provided to consumers and the manner of its dissemination.¹² The Commission shall establish standards for compensation to consumers who do not enjoy regular power supply. The Commission is also mandated to develop in consultation with licensees and other interested parties performance standards and codes for the efficient service delivery to electricity consumers.¹³ The Act also provides for the development of a competitive electricity market, which will no doubt protect the interest of the consumers.¹⁴ It also provided for customer service standards that facilitates constant

⁴ Electric Power Sector Reform (ESPR) Act 2005.

⁵ The Consumer International <http://www.consumersinternational.org> (as of Dec.19,2010)

⁶ An Act to provide for the formation companies to take over the functions, assets liabilities and staff of the National Electricity Power Authority, to develop competitive electricity markets, to establish the Nigeria Electricity Regulatory Commission; to provide for the licensing and regulation of the generation, transmission, distribution and supply of electricity to enforce such matters as performance standards, consumer rights and obligations; to provide for the determination of tariffs; and to provide for related matters.

⁷Electric Power Sector Reform Act 2005, section 8

⁸ See the Long Title to the Act.

⁹ See part II containing sections 25-30 (development of a competitive electricity market), Part VII Competition, and Market Power containing section 82).

¹⁰ Section 31 of the Act.

¹¹ Section 80 of the Act

¹² Section 80(f) and (g) of the Act

¹³ Section 81(1)(a) of the Act

¹⁴ Section 82 of the Act

communication with consumers to ensure materials on consumer rights(safety, service, etc) are up to date, protected and also establishing and ensuring an effective dispute resolution mechanism to guarantee consumer protection.¹⁵

The Commission is mandated pursuant to the Act to make Orders and Regulations for the purposes of actualizing the objectives of the Act.¹⁶ Pursuant to this power, the Commission made the Order on Credit Advance Payment for Metering Initiative (CAPMI) in 2013 to eliminate the abuse of estimated billing and to improve revenue collection. The CAPMI scheme was designed to enable customers willing to make another advance payment for the purchase of meters to do so and be compensated through a gradual reduction of the fixed charges on their monthly bill.¹⁷ The customers ordinarily paid for meters through the fixed charge component of their energy bills, yet the DISCOS were still unable to supply meters to customers. Unfortunately, most consumers paid for meters and either did not have the meters installed for many months or never received a meter at all. These consumers kept receiving estimated bills despite the delay in installation.¹⁸

Most electric consumers in Nigeria were not adequately metered before the commencement of the Act. This has led to estimated billing of a large segment of consumers. Consumers are billed based on the estimated quantity of consumed energy rather than their actual consumption. This has led to wide scale consumer oppositions to the continuance of the estimated billing system as it is commonly believed, as it appeared that the DISCOS are benefitting from the metering gap and exploiting the electricity consumers. The CAPMI Scheme was intended to reduce the metering gap, improve revenue generation for the DISCOS, eliminate estimated billing and reduce commercial losses for the Discos. Unfortunately, it did not achieve its intended objectives and was subsequently cancelled. The increasing number of unmetered electricity consumers who are continually subjected to estimated billing by the electricity distribution companies and the necessity of attracting private investment to metering services in the distribution sector consequently led to the enactment of the present MAP Regulation.

4. Meter Asset Provider (MAP) Regulation 2018

The Regulation comprise of nine chapters, thirty four sections and two schedules. The Meter Asset Provider Regulations was issued by NERC on March 2018 pursuant to its powers to make regulations for the efficient functioning of the electricity industry in Nigeria.¹⁹ The objectives of the Regulations are clearly spelt out under its provisions, which includes amongst others, to encourage the development of independent and competitive meter services, eliminating estimated billing practices, attracting private investment to the provision of metering services, closing the metering gap through accelerated meter roll out and ultimately enhancing revenue assurance in the Nigerian Electricity Supply Industry (NESI).²⁰ The Regulation is significant as it effectively unbundles Nigeria's electricity distribution sector by reallocating the responsibility for providing metering services thereby effectively creating a new class of market participants in the name of meter asset providers.²¹ This includes the existing licensed meter manufacturers, importers, installers and vendors granted permit by NERC to provide metering services that may include meter financing, procurement, supply, installation, maintenance and replacement.²² Under the MAP Regulation, a person called a meter asset provider(MAP) may apply for and be granted a permit by the NERC to provide metering services which may include meter financing, procurement, supply installation, maintenance and replacement.²³

¹⁵ *op.cit*,

¹⁶ Centre for Social Justice, 'Power Sector Reform' <<http://www.csj-ng.org/programspower.php>> accessed on 26 March 2011.

¹⁷ J Ehanmo ;Bridging the Metering Gap Strageies for Success www.pwc.com.ng accessed on 23/11/18.

¹⁸ ESI Africa Nigeria Electricity Body Terminate CAPMI Payment System' www.esi.africa.com

¹⁹ Section 96(2) of the Electric Power Sector Reform Act (ESPRA) Act 2005.

²⁰ Chapter III para. (2)

²¹ Section 96(1)

²² Chapter 1 section 3.

²³ *ibid*

The Regulations further prohibits the Distribution Licensee, its core investors, subsidiaries, affiliates, directors and their relatives from setting up owning shares or holding directorships and senior management positions in the MAP companies.²⁴ This is done essentially to open the market space and allow for a level playing ground for new entrants whose activities will act as a check on any perceived excesses of the DISCOS regarding billing of consumers. It is also aimed at checking insider dealings, which causes inefficiency. The MAPs are required to enter into a metering service provision agreement with a DISCO of their choice.²⁵ The MAP with such a service agreement therefore supplies and installs meters for the DISCO customers. On the surface, this implies that the hitherto exclusive preserve of the Discos to provide electricity meters to consumers has been abolished and a new class of operators- the MAPs has been introduced as service providers to the Discos under a meter service agreement.²⁶ The respective Discos subject to a tender process approved by the NERC will procure the MAPs. The holder of a MAP permit may enter into meter service agreements with more than one Disco.

Metering obligation is on the distribution licensees (the DISCOS). They are responsible for meeting the metering targets as specified by the Commission from time to time.²⁷ The Regulations require a licensed Disco to attain metering targets, as stipulated by the Commission, from time to time. Each Disco is expected to procure the services of a NERC –licensed Meter Asset Providers (MAP).²⁸ However, the discos are obliged to engage the services of MAPs in accordance with the provisions of the Regulation towards meeting their metering targets specified by the Commission.²⁹ Each Disco must make regular periodic disbursements to the relevant MAP for the metering service delivered, pursuant to a metering service Agreement (MSA) executed between the Disco and the relevant MAP in order to ensure proper energy accounting.³⁰ The tenure of entities that obtain a meter asset provider permit shall be for a period of 15 years in the first instance effective from the date of issuance by the Commission.³¹

The Regulations stipulates basic technical and technological requirements, which MAPs shall fulfill to include compliance with the metering code, the guidelines for certification of metering service provider and related matters.³² The MAPs and the DISCOS aim at ensuring a maximum standard and quality service delivery. The Regulation also stipulates the rights, obligations and duties of the major stakeholders in the critical aspects of metering and evaluation of electricity consumption. Therefore, the roles of the DISCOS, MAPS and even the consumers are provided in the Regulations to enable parties know the extent of the rights and corresponding obligations placed on the as relevant stakeholders in the NESI.³³ The applicability of the Regulation is to all distribution licensees, MAPs, customers and all types of end users customer in the NESI.³⁴ The Regulations shall however not override metering contracts entered into by Distribution Licensees prior to its coming into effect. Therefore, earlier arrangements or contracts already signed by the DISCOS for the provision of meters to its consumers are still subsisting and enforceable by parties.³⁵ However, all other Regulations, rules and codes of the Commission shall be applicable to the extent of their relevance. The provisions of MAPs Regulations shall prevail in the event of conflict with any other Regulation or Code.³⁶ Therefore, all provisions of existing NERC regulations that are inconsistent with the MAP are consequentially repealed. The Regulation in anticipation of any dispute that is likely to emanate from the agreement between parties pursuant to metering service agreement stipulates that all

²⁴ Chapter VIII, Section 26

²⁵ *ibid*

²⁶ Chapter 1, section 3.

²⁷ Section 4, Chapter II of the Regulations.

²⁸ Section 4(3) of Chapter II

²⁹ *ibid*

³⁰ Section 11 of Chapter IV

³¹ Chapter III, section 8(9)

³² Chapter III Section 6

³³ Chapter IV, section 16

³⁴ Chapter VII contains section 24 of the Regulations

³⁵ *ibid*

³⁶ Section 32

agreements entered into by parties shall contain appropriate dispute resolution clauses for settlement of disputes by arbitration.³⁷ The latter no doubt proffers speedy resolution of commercial disputes.

5. Prospects and Pitfalls of the MAP Regulation in Nigeria

The Regulation has many laudable provisions aimed at the protection of consumers. The MAP has a duty to repair or replace a customer's faulty meter within two working days.³⁸ This depicts a maintenance culture that will aid efficiency in power utility services. The customer shall not pay metering service charge for the said period.³⁹ The repair or replacement of faulty meters shall be at no cost to the customer within the amortization period provided it was not due to the customer's fault.⁴⁰ This will compel the MAPs to ensure that the meters are fit for their intended purpose. It is also commendable that DISCOS and their core investors including subsidiaries, affiliates, directors and their relatives are prohibited from setting up, owning shares or holding directorships and senior management positions in the MAP.⁴¹ This is a crucial protection aimed at preventing MAPs and DISCOS from colluding to defraud customers in the guise of rendering meter services. The activities of the MAPs will no doubt act as a check in any perceived excesses of the DISCOS if they are insulated from undue influence from the DISCOS. The Regulation introduced a monthly meter service charge. The meter service charge is to carter for the provision of the meter asset in the customer's premises on behalf of the distribution company. The major components of the meter service charge are the cost of the asset and cost of financing the asset. Meter service charge payments are to be made on a monthly basis. This arrangement is self financing. The DISCOS deploy meters to all customers according to their metering roll out plans. This is however based on the disclosed metering gap for each DISCOS. A customer may decide to bypass the discos rollout plan to be metered immediately. This involves self-financing as the customer pays charges for the meter upfront. In such arrangement, the DISCO will be liable to pay penalty including metering service charge in the case of prolonged outages. This is very significant to consumer protection as it will no doubt protect the cost recovery process for the MAP and incentivize the DISCOS to improve their service operations and delivery.

The Regulation has made provisions for a transnational arrangement that upholds sanctity of contracts entered between the DISCOS and previous meter providers. Such earlier contracts are deemed to have been completed before January 2019. The implication of the transnational arrangement is that from January 2019, there will be two categories of customers; those metered before January 2019⁴² and those metered after 2019.⁴³ Each category will pay tariff different from that of the other. (e.g if a customer meter is installed by a MAP, he will pay a lower tariff which will include a meter service charge. The differences in tariff are certain because DISCOS enjoy a guaranteed return of 11 percent on any asset they deploy. The customers metered under DISCOS regulatory asset base will not pay meter service charge, instead they will pay the reflective cost of those meters including their tariff. This situation will create disparity in customer tariff classes in relation to customers living even in the same area. This will generate confusion and not aid efficient administration and actualization of the objective of the Regulation. Another provision capable of undermining the underlying objectives of the Regulation is the wide discretionary powers given the DISCOS in relation to declaring metering gaps.

Regrettably, the power to declare and commence this sensitive process was conferred on the DISCOS. The implication of this is that private entrants can only effectively participate in metering when a Disco deems it fit that a MAP is needed. This will generate conflict of interest by the discos and frustrate the primary intendment of the Regulation. This work opines that it would have been better for a neutral body like NERC which is the specific electricity sector regulator to be involved in the engagement of the MAPS and possibly initiate as well as certify such processes. The liberty granted to MAPs and DISCOS to create terms of agreement for themselves in MSAs

³⁷ Section 27, Chapter IX

³⁸ Section 14(2)

³⁹ section 14(3)

⁴⁰ 14(2)

⁴¹ Section 26

⁴² those metered under the discos regulatory asset base.

⁴³ those metered by MAP.

will produce the same conflict results. The Regulation vests meter ownership on MAP until fully amortized. The MAP's cost of providing the meters and metering services will be provided for in the MSA negotiated by the MAP and the DISCOs. This will form the basis for the metering charges to be established by the DISCOs. This implies that the consumer is not part of the negotiation even when he will be heavily affected by it. Consumers are therefore at the mercy of MSA parties and the regulator. He has no input in the determination of the cost of the meters or the metering services and the resulting metering service charge. The new metering service charge is a new tariff, yet NERC did not call for public consultation before approval of the metering service charges. This is however inconsistent with the established procedure for establishing tariffs by NERC.⁴⁴

Furthermore, the regulation lacks clarity with respect to ownership of meter after the expiration of the technical life. This will further raise rather than clarify misgivings of ownership of meter between the customer or the owner of the premises. Regulation 17(4) of the MAP Regulation specifically provides that where a customer fails to pay for metering service charge in any given month or months, the cumulative metering service charge will be deducted upon the subsequent payment. The use of the word 'month' seems to imply that the metering service charge only contemplates post-paid customers. This provision smacks of insensitivity to the perception of end users in NESL. The MAP Regulation requires customers to pay for the metering service charge at the time of their energy payments unless they finance meter procurements upfront. This is a duplication of consumer charges as they pay their usual energy bills which includes the DISCOs metering costs only to now pay a separate metering service charge when meters are installed. It obviously cannot be in relation to prepaid meters. The prepaid payment arrangements are flexible hence; payments could be made in any number of ways depending on the customer's budget and preferences. The preference of the monthly energy payments is akin to postpaid meters and not prepaid meters. It is worrisome for the Regulation to emphasize post payment option instead of advocating a prepaid payment model or the pay as you go model. This is likely to be adverse to the interest of the consumers. Electric consumers will prefer to pay only for power consumed. The typical Nigerian does not trust the Discos with its meter reading and subsequent month end billing. Even if customers have postpaid meters installed and receive their energy bills at the end of the month, they mostly will prefer to pay only a fraction of the total charge stated on the bill. This is usually based on the individual's customer estimates of how many times power was supplied during the month. With prepaid meters, customers buy energy on an electronic device at various locations where there is a DISCO agent and obtain scratch cards or credit pins, which they enter into the prepaid meter before consumption. Effective price regulation is a major index of consumer protection.

Prior to the MAP Regulation, the DISCOs have not been able to effectively meter electricity consumers in Nigeria. This implies that the Nigerian electricity consumers will now be able to get electricity meters within limited days of payment. Consumers need not wait endlessly for free meters anymore and may choose to pay upfront in full or pay in installments through programmed deductions from payments made for electricity consumption. This no doubt will create value chain for end users of electricity. MAP provides for two payment mechanisms. Under the first arrangement, the consumer may choose to pay upfront and in full the cost of a meter to the MAP. In this case, the relevant consumer will not be liable to the pay any meter service charge to the Disco. The second arrangement is where the consumer is where the consumer is supplied a meter by a MAP and is registered by the relevant Disco which subsequently collects a meter service charge from such consumers for the meter supplied by a MAP. The DISCOs are required to ring-fence the sums collected from the consumers under this arrangement and remit same to the MAPs in each billing circle. This payment arrangement makes the MAPs susceptible to the vagaries of a Disco's revenue and collection challenges. This obviously is the return of the fixed charge in the consumer billing circles but now christened meter service charge. Discos are required to issue any of the many forms of payment security to MAPs. This payment security could be in the form of an irrevocable direct pay letter of credit or other forms of security executable on demand and provided by a bank or in another form acceptable to the MAP. A back-office structure mutually agreed between the parties under which all payments for metering services by customer at the time of vending are ring-fenced to a dedicated account established for securing payment to the MAP. A securitization framework that may be developed in collaboration with financial institutions such as development

⁴⁴ section the76 of ESPRA

finance institutions, Central Bank of Nigeria, the Infrastructure Bank, and any other payment security structure that may be acceptable to them. The Disco is also required to create a variance account for harmonizing payments to the MAPs arising from bulk or irregular purchase of energy credits by customers. The Regulations provides that customers' meters are associated with feeders and distribution transformers and as shall not be moved by customers. This implies that meter ownership will rest with the owner of the premises where they are installed as they cannot be moved by occupiers or non-owners of premises like tenants will be shortchanged in the process as they will be paying assets that they do not, and may not, eventually own when they vacate the premises. Where they move to any premises that are not metered, they may have to recommence the payment process all over again. The land lords and not the tenant should own meter. MAP Regulation makes no provisions for customers who paid for meters under the CAPMI scheme but were not provided such meters. Some of these consumers may not have known of their rights to complain to NERC or are not inclined to take such steps.

6. Conclusion and Recommendations

The Map unlike the CAPMI regime, gives the consumers two payment options that is into pay upfront or pay overtime *via* the meter service charge. Also unlike its predecessor equipment, MAP and no more Discos now perform supply and installation of meter. A major complaint of consumers under CAPMI was that a consumer has paid for meters but these were not installed. The exclusive preserve of the Discos to the provision of electricity meters has ceased to exist. MAPs will not only be responsible for the provision of meters but also for their installation, maintenance and replacement of any faulty meter. The Map Regulation sets out to proffer many useful provisions but has failed to harness and articulate them. The implication is that contrary to the intendment of the Regulation most electricity consumers are yet unmetered. In addition, the full actualization of the objectives of this regulation may not be achieved without a viable relationship between the MAPs and the electricity consumers. The consumers also have a role to play by being informed as well as fulfilling their obligations under the arrangement.