

RETHINKING STAKEHOLDERS' ENGAGEMENT IN POWER SECTOR RULE MAKING PROCESSES IN NIGERIA: EXAMINING THE INTERNATIONAL BEST PRACTICES*

Abstract

The optimum performance of the energy sector of a country is pivotal to her economic development and attraction of Foreign Direct Investments (FDIs) to the country. It is a major factor to returning high yields on investments, growing the Gross Domestic Products (GDP) especially in any developing country or emerging economy and setting the country on the path of economic prosperity. Thus for further advancement of the energy sector of a country, energy laws and regulations have to be made with adequate consultations that inputs the views of the sector's essential stakeholders. This is necessary for efficient functioning of the sector. The objective of this paper is to interrogate existing energy stake holder's engagement as practiced by Nigerian power sector regulator. Again it is aimed at espousing effective stakeholder's engagement as practiced in America and as prescribed by OECD and ICSABP models, thus provoking a new thinking necessary for a paradigm shift in energy stakeholder's engagement in Nigeria. In the end this paper seeks to achieve a new and inclusive energy rule making regimes in Nigeria, which promotes regulatory compliance especially within the Nigeria power sector regulatory environment.

Keywords: Stakeholders' engagement, Energy rulemaking processes, Power sector legislative and regulatory frameworks, Regulatory compliance, Accountability and Transparency, International best practices

1. Introduction

Adequate stakeholders' engagement in the making of energy rules is very fundamental to effective implementation of energy rules and ensuring regulatory compliance by energy licensees and consumers. Effective stake holders' engagement in energy rule making processes entails the adoption of and strict adherence to an inclusive rule making procedure in a transparent regulatory system that avails stakeholders with adequate access to information, feedbacks and honest accommodation of their views with respect to proposed regulations by the regulator. It is critical to improving the design of regulations, enhancing their compliance and increasing public trust in governmental regulatory agencies. Stakeholders include citizens, businesses, consumers, and employees, including their representative organizations and associations, public sector, non-governmental organizations, international trading partners and others. By inclusively engaging stakeholders who can contribute their experiences, expertise, perspectives and ideas to rule making discourses, the regulator, which represents the government, gains valuable information that would boost the quality of the proposed policy or regulatory framework. Information from stakeholders can help to avert unintended effects and practical implementation problems of regulations. Tapping into the knowledge of stakeholders is therefore very useful. Furthermore, stakeholders can provide a quality check on the regulators' assessment of costs and benefits.

Part of the initial challenges in stakeholder engagement that the regulator faces is determining actual stakeholders and necessary participants in the engagement process. Identifying who should take part in public engagement activities is a key aspect of preparing for a public engagement process. Any entity that has a concern with a particular policy, program or issue may be considered a stakeholder. Those who are likely to realize benefits or incur costs may also be considered stakeholders.¹ Stakeholders mapping efforts are particularly useful for public engagement because they allow for the identification of key actors while simultaneously generating information about stakeholders' positions and knowledge-levels. Stakeholders can be mapped according to their levels of influence and interest.

The objectives of energy legislative and regulatory regimes wouldn't be achieved if they are formulated in isolation of these critical stakeholders who are statutorily required to either implement or comply with them. Laws are known to be effective if they are aimed at curatively addressing societal problems, prevent mischief in the targeted sector and prescribe coercion which serves as deterrents against future commission of offences of similar nature. This paper interrogates the concept of stakeholders' engagement particularly as practiced by regulatory agencies of Nigeria's power sector .It evaluates the linkage between stakeholders' engagement and Nigeria's power sector rulemaking. The paper pays particular attention to Nigeria's power sector rule making processes and examines

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¹ Office of Public Engagement: Public Engagement Guide, Newfoundland Labrador

Nigeria's Electricity Regulatory Commission's (NERC) public hearing procedure. It discusses America's rule making models as identified and provided for by the United States of America's Administrative Procedure Act (APA) of 1946. It further examines other international best practices that emphasize the importance of stakeholders' engagement in rulemaking, with particular focus on rule making models of the Organisation for Economic Co-operation and Development (OECD) while making reference to International Council of Securities Associations Best Practices (ICSABP) for Regulatory Consultation. The paper concludes with drawing important lessons for Nigeria and other developing countries energy sector's from examined international best practices in rule making and stake holders' engagement.

Understanding Rule Making

Black's Law dictionary² defined rulemaking as the process used by an administrative agency to formulate, amend, or repeal a rule or regulation. United States Administrative Procedure Act (APA)³ defined rulemaking as agency process for the formulation, amendment, or repeal of a rule. It includes any prescription for the future of rates, wages, financial structures, and so on. Rulemaking includes the process by which federal agencies implement legislations passed by Congress and signed into law by the President. In addition, an agency may engage in rulemaking to update rules under existing laws, or to create new rules within existing authority that the agency believes are needed.⁴ Based on the foregoing, rule making in the energy sector includes administrative decisions, formulation of regulatory frame works, regulated energy products pricing benchmarks, regulated metering and electricity billing decisions, feed in tariffs decisions, petroleum products pricing, renewable energy generation embedded generation, captive generation and other energy generation, transmission, distribution, trading and pricing regulations.

2. NERC Rule Making Procedure

Energy rulemaking cuts across all energy sub-sectors; electricity, oil and gas, renewable and nuclear energy. The process of developing and repealing energy regulations, standards regulations is called rulemaking⁵. Rulemaking is the agency process for formulating, amending, or repealing a rule⁶. Rulemaking is the process federal agencies adopt to make new regulations⁷. It is also the quasi-legislative formulation of rules (as regulations) by an administrative agency that must be carried out in line with procedure prescribed by statute.⁸ Section 31 of the Electric Power Sector Reform (EPSR) Act, 2005⁹ makes provision for the establishment of the Nigerian Electricity Regulatory Commission (NERC) while Section 96 empowers NERC to make regulations.

NERC Stakeholders' Engagement for Inclusive Energy Rule Making

By virtue of the powers conferred upon NERC as Nigeria's power sector regulatory agency, and in exercise of its mandate for energy rulemaking or regulations formulation, pursuant to section 96(2) of the EPSR Act, 2005, the commission has formulated a regulation for the conduct of its proceedings and discharge of its functions referred to as the Business Rules of the Commission. This regulation does not specifically provide for stakeholder's engagement procedures. However it makes general provisions for public hearing. It is argued that the uniqueness and critical importance of stakeholders engagement in Nigeria's power sector, necessitates the formulation of a robust stakeholders engagement framework by NERC in line with international best practices. This is majorly because stake holder's engagement requires more technical opinions and inputs by a more enlightened power sector licensees, industry players and more experienced professionals and consultants. Unlike public hearing which is open for the entire public, stakeholders engagement requires a more constructive and detailed technical engagements and therefore its procedures needs to be specifically designed. Section 24 of the Business Rules of the Commission

²BA Garner (ed), *Black's Law Dictionary* 7th edition. West Group 1999.

³ Administrative Procedure Act (APA), 1946. Public law 404 – 79th congress, chapter 324 – 2D session.

⁴U.S. SEC, 2011. *Rulemaking, How It Works*. Available online at: <https://www.sec.gov/fast-answers/answersrulemakinghtm.html> accessed 07/11/2019.

⁵United States Nuclear Regulatory Commission (U.S. NRC), 2017. *The Rulemaking Process*, available online at: <https://www.nrc.gov/about-nrc/regulatory/rulemaking/rulemaking-process.html> accessed on 10/06/2019

⁶ United States Administrative Procedure Act (APA), definition of Rulemaking. 5 U.S.C. Section 551(5).

⁷Regulation Room, 2017, *What is Rulemaking?* Available online at: <http://regulationroom.org/learn/what-rulemaking> Cornelee Rulemaking Initiative (CeRI), Smart Participation, Cornell University, New York. accessed on 10/06/2019

⁸ Merriam-Webster, available online at: <https://www.merriam-webster.com/legal/rulemaking> accessed on 10/06/2019

⁹EPSR Act, 2005, Federal Republic of Nigeria. No. 77, Vol. 92. Government Notice No. 150

stipulates that the Commission (NERC) may hold a public hearing on any matter which it is empowered under the Act and which the Commission determines to be of significant interest to the general public¹⁰.

Public hearing: Under NERC public hearing procedure, the entire public or the masses are allowed to express their views on any matters which would be made into a regulation. It involves notifying the general public of a proposed new regulation. The notice would include a wide range of information on the proposed regulation. Such notification may be either by mail or by paid newspaper advertisement which must be published in two newspapers, one of which must be a national daily newspaper with wide coverage. After the issuance of the notice, the public is allowed to feed the regulatory institution back with their comments, views, opinions, interests, etc. through various designated means. Representations may be made in writing and submitted by the date fixed by the commission. Such representations may also be made orally on the day fixed for public hearing by the commission¹¹. In a country like Moldova, they include the general justification for the proposed regulation, contact details of civil servants responsible for the regulation, as well as the deadline and method for submitting recommendations, comments or feedback. Providing public notice of proposed regulation is part of ensuring predictability in the regulatory environment.¹² It is observed that NERC rule making system is centralized in keeping with Nigeria's centralized energy system and federal constitutional framework unlike South Africa which operate a decentralized energy system where different tiers of government are assigned constitutional functions in relation to energy governance in the country.

Stakeholders' Engagement and its Challenges

Despite the wide recognition of the importance of stakeholder engagement, there are still many challenges connected with its application. The OECD Best Practice Principles on stakeholder's engagement has identified some common challenges to stakeholders' engagement to include the following;¹³

- i. The risks of stakeholder engagement activities being captured by organised interest and pressure groups;
- ii. Difficulties in reaching out to some groups stakeholders and wider society in general;
- iii. Engaging stakeholders too late in the regulatory process, i.e. when the decision has been actually made and there is little will to change it, resulting in low public participation rates in the future;
- iv. Engaging too often, particularly in academic debates or with insufficiently precise plans and information, and/or not responding or reflecting stakeholders input in the final outcome, engendering 'consultation fatigue'; and
- v. Funding of stakeholders engagement in a wide society: regulatory agencies may not have enough financial capacity to cater for such.

3. International Best Practice in Stakeholders Engagement

Given that Nigeria and some other developing countries are lagging behind in matters of effective stakeholders' engagement in rule making processes and needs to learn from more advanced jurisdictions, it is imperative to examine international best practices in stakeholders engagement with the view to drawing important lessons for Nigeria and other emerging economies. This paper shall examine the following stakeholder's engagement models.

3.1. American Rule Making Models

The United States of America's Administrative Procedure Act (APA) of 1946 in providing for rule making procedures has identified and provided for rule making models and procedures to be complied with in rule making processes in America. This paper seeks to discuss these models with the view to understanding their applicability in Nigeria and other developing countries.

Formal Rulemaking Procedure: When agencies engage in rule making procedures that entail a trial-like procedure it is referred to as formal rule making procedure. It is usually a required by statute or at the agencies discretion and must be on the records after an opportunity for an agency hearing that complies with laid down procedures. This

¹⁰ Nigerian Electricity Regulatory Commission, Business Rules of the Commission (draft regulation no. nerc-r-0306

¹¹ Nigerian Electricity Regulatory Commission, Business Rules of the Commission (Section 24 (2), (3) and (4)). Draft regulation no. nerc-r-0306

¹² Melissa J, valentine S, Citizen Engagement in Rulemaking; Evidence on Regulatory Practices in 185 Countries, *Policy Research Working Paper*, 7840, (Research Support Team) World Bank Group Development Economics Global Indicators Group, September 2016. P 9

¹³OECD 2017, OECD Best Practice Principles on Stakeholder Engagement in Regulatory Policy. Draft for Public Consultations.

allows for submissions of evidence and cross examination of witnesses.¹⁴ The American jurisdiction adopts this nature of rule making. The Supreme Court of America has interpreted this language very narrowly, determining that formal rulemaking requirements are only triggered when Congress explicitly requires that the rulemaking proceed ‘on the record.’¹⁵ When formal rulemaking is required, the agency must engage in trial-like procedures. The agency, therefore, must provide a party with the opportunity to present his case through oral or documentary evidence and ‘conduct such cross-examination as may be required for a full and true disclosure of the facts.’¹⁶ Formal rulemaking proceedings must be presided over by an agency official or Administrative Law Judge who traditionally has the authority to administer oaths, issue subpoenas, and exclude ‘irrelevant, immaterial, or unduly repetitious evidence.’¹⁷ Formal rulemaking procedures also prohibit ex parte communications between interested persons outside the agency and agency officials involved in the rulemaking process.¹⁸ The agency or proponent of the rule has the burden of proof, and such rules must be issued ‘on consideration of the whole record and supported by substantial evidence.’¹⁹

Hybrid Rulemaking Procedure: This model of rulemaking entails, a where the enabling legislation directs the regulatory agency to follow a specific procedural rule making requirement in the process of engaging stakeholders. This allows stakeholders or interested persons to submit oral testimonies and grant them opportunities for cross examination. Under the United States frameworks Congress may direct the agency to follow specific procedural requirements in addition to those required by the informal rulemaking procedures of the APA.²⁰ Hybrid rulemaking statutes typically place additional procedural rulemaking requirements on agencies that may be found in the adjudicative context, but fall short of mandating that an agency engage in the APA’s formal rulemaking process.²¹ These statutes generally create a rulemaking process with more flexibility than the formal rulemaking procedures. It allows interested persons to submit oral testimony; and grant participants opportunities for cross examination or questioning.²² Hybrid rulemaking is only required where expressly directed by Congress, and such statutes were frequently enacted in the 1970s.²³

Direct Final Rulemaking Procedure:²⁴ Under direct-final rulemaking, the agency publishes a proposed rule in the Federal Register. In contrast to informal rulemaking, however, the notice will include language providing that the rule will become effective as a final rule on a specific date unless an adverse comment is received by the agency.²⁵ If even a single adverse comment is received, the proposed rule is withdrawn, and the agency may issue its proposed rule under the APA’s informal notice-and-comment requirements.²⁶ In this manner, the agency can efficiently

¹⁴ *Black’s Law Dictionary* 7th edition. West Group 1999.

¹⁵ *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 251 (1973)

¹⁶ 5 U.S.C. Section 556(d) America Administrative Procedure Act (APA), 1946

¹⁷ Section 556(c)-(d) America Administrative Procedure Act (APA), 1946

¹⁸ Section 557(d)(1) America Administrative Procedure Act (APA), 1946

¹⁹ Section 556(d) America Administrative Procedure Act (APA), 1946

²⁰ Federal courts may not impose procedural requirements beyond what Congress has provided for in the APA. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978) (‘In short, all of this leaves little doubt that Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.’)

²¹ See, e.g., Magnuson-Moss Warranty Federal Trade Commission (FTC) Improvement Act, P.L. 93-637, 88 Stat 2183 (codified at 15 U.S.C. Section 57a). For example, under Magnuson-Moss, before the FTC may issue a notice of proposed rulemaking (NPRM), the agency must publish an advance notice of proposed rulemaking (ANPRM) in the Federal Register that contains particular information and invites comments and alternative suggestions. The FTC must submit its ANPRM to certain Senate and House committees. Additionally, the agency must ‘make a determination that unfair or deceptive acts or practices are prevalent,’ and the FTC can only make that determination under either of two specified conditions: (1) ‘it has issued cease and desist orders regarding such acts or practices’ or (2) ‘any other information available to the FTC indicates a widespread pattern of unfair or deceptive acts or practices.’ Finally, 30 days before the FTC publishes its NPRM, the agency must submit the NPRM to the same congressional committees. 15 U.S.C. Section 57a (b) America Administrative Procedure Act (APA), 1946

²² Section 557a(c) America Administrative Procedure Act (APA), 1946

²³ Lubbers, *supra* note 16, at 308-09

²⁴ See *Sierra Club v. EPA*, 99 F.3d 1551, 1554, (10th Cir. 1996) (‘A direct final rule becomes effective without further administrative action, unless adverse comments are received within the time limit specified in the proposed rule. If adverse comments are received, the Agency withdraws its direct final rule and issues a final rule that addresses those comments.’)

²⁵ Administrative Conference of the United States Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking 1 (1995) <http://www.law.fsu.edu/library/admin/acus/305954.html>. An ‘adverse comment’ is any comment that raises an ‘objection.’ See Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1-2 (1995)

²⁶ *Ibid*

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finalize unobjectionable rules while avoiding many of the procedural delays of the traditional notice-and-comment rulemaking requirements. Although there is no express statutory authorization for direct-final rulemaking, this type of rulemaking has been justified under the 'unnecessary' portion of the APA 'good cause' exception, discussed *infra*, as well as the informal notice-and-comment rulemaking procedures.²⁷

Negotiated Rulemaking Procedure: Negotiated rulemaking leverages on consensus building between stakeholders and the agency. It has been said that negotiated rulemaking represents a supplement to traditional informal rulemaking procedures that allows agencies to consult with interested persons and interest groups at the developmental stages of the rulemaking process.²⁸ The goal of the negotiated rulemaking process is to increase administrative efficiency and decrease subsequent opposition to a promulgated rule by engaging the participation of outside groups with significant interest in the subject matter of the rule.²⁹ In principle, negotiated rulemaking allows the agency and other involved interests to reach consensus in the early rulemaking stages so as to produce a final rule that is more likely to be acceptable to all parties.³⁰ Under the Negotiated Rulemaking Act (the Act),³¹ the head of an agency is authorized to 'establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the use of the negotiated rulemaking procedure is in the public interest.'³² The Act lays out a number of mandatory considerations for determining whether a negotiated rule would be in the public interest.³³ Under this model, once an agency has made the decision to establish a negotiated rulemaking committee, the agency must follow the Federal Advisory Committee Act with regard to the committee and must publish a notice in the Federal Register detailing the duties of the committee and the committee's proposed membership.³⁴ The negotiated rulemaking committee generally consists of a maximum of 25 members, with at least one agency representative.³⁵ The public must have an opportunity to comment on the proposal to create the committee and the proposed membership.³⁶ If the committee achieves consensus on a proposed rule, the committee issues a report outlining the proposed rule.³⁷ If the committee does not achieve a consensus, the committee may issue a report with any negotiated positions on which it did reach consensus.³⁸ The report and the committee's conclusions are not binding on the agency. Indeed, any proposed rule that arises as a result of the deliberations of a negotiated rulemaking committee must subsequently 'be finalized through ordinary notice-and-comment procedures'.³⁹

Although agencies are authorized, at their discretion, to engage in negotiated rulemaking pursuant to the Act; in limited instances Congress requires an agency to comply with negotiated rulemaking procedures in issuing specific rules.⁴⁰ In negotiated rulemaking, disputants in a regulatory problem (including the agency itself) are brought to the table to negotiate the text of a consensus-based regulatory proposal.⁴¹ Under the Negotiated Rulemaking Act in the United States, a neutral facilitator or mediator oversees the negotiations.⁴² It has been argued that outcomes of

²⁷ *Ibid* at 2

²⁸ 5 U.S.C. Section 561 America Administrative Procedure Act (APA), 1946

²⁹ See Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 *N.Y.U. ENVTL. L.J.* 32, 33 (2000) (suggesting that negotiated rulemaking 'has been remarkably successful in fulfilling its promise.') But see, Cary Coglianesse, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 *N.Y.U. ENVTL. L.J.* 386, 386 (2001) (asserting that negotiated rulemaking 'neither saves time nor reduces litigation.')

³⁰ 5 U.S.C. Section 566 America Administrative Procedure Act (APA), 1946

³¹ *Ibid* at Section 561-70.

³² *Ibid* at Section 563(a).

³³ *Ibid*

³⁴ Section § 564, 565 America Administrative Procedure Act (APA), 1946

³⁵ *Ibid* at Section 565(b). ('The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership.')

³⁶ Section 564(c) America Administrative Procedure Act (APA), 1946

³⁷ *Ibid* at Section 566(f).

³⁸ *Ibid*

³⁹ See KOCH, *supra* note 9 at 295; see also CRS Report RL32452, *Negotiated Rulemaking*, by Curtis W. Copeland.

⁴⁰ See, e.g., 20 U.S.C. Section 1098a ('[T]he Secretary shall prepare draft regulations implementing this title and shall submit such regulations to a negotiated rulemaking process.')

⁴¹ P. J. Harter (1982) 'Negotiating Regulations: A Cure for Malaise,' 71 *Georgetown Law J.* 1-118. See also L. I. Langbein & M. K. Cornelius (2000) 'Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence,' 10 *J. of Public Administration Research & Theory* 599-632. See also W. Funk (1997) 'Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest,' 46 *Duke Law J.*, 1351-88.

⁴² J. S. Lubbers (2012) *A Guide to Federal Agency Rulemaking* (4th ed). Washington, DC: Administrative Conference of the United States.

negotiated rulemaking procedures, makes for easier implementation and compliance. It also reduces the rate of litigation.⁴³ Usually negotiated rulemaking aims at achieving agreements.

3.2. OECD Stakeholders Engagement Model

The Organization for Economic Co-operation and Development (OECD) is an international organization that works to build better policies for better lives. The organization has the goal is to shape policies that foster prosperity, equality, opportunity and well-being for all. The recommendation of the council of the OECD on regulatory policy and governance is the first comprehensive international statement on regulatory policy since the global financial and economic crisis. On regulatory policy and governance, the council recommends twelve (12) principles.

Principle 2 of the 2012 Organisation for Economic Co-operation and Development (OECD) Council Recommendation on Regulatory Policy and Governance, recommends that members⁴⁴:

Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.

The OECD Best Practice Principles for the Governance of Regulators also made some provisions for Transparency and stakeholders' engagement.

Chapter 4 states thus:

Accountability and transparency: Businesses and citizens expect the delivery of regulatory outcomes from government and regulatory agencies and the proper use of public authority and resources to achieve them. Regulators are generally accountable to three groups of stakeholders: i) ministers and the legislature; ii) regulated entities; iii) the public⁴⁵.

Accountability and Transparency to Ministers and Legislatures⁴⁶

1. The expectations for each regulator should be clearly outlined by the appropriate oversight body. These expectations should be published within the relevant agency's corporate plan.
2. Regulators should report to ministers or legislative oversight committees on all major measures and decisions on a regular basis and as requested.
3. Governments and/or the legislator should monitor and review periodically that the system of regulation is working as intended under the legislation. In order to facilitate such reviews the regulator should develop a comprehensive and meaningful set of performance indicators.

Accountability and Transparency to Regulated Entities⁴⁷

1. Information and access to appeal processes and systems should be made easily available to regulated entities by regulators. Regulators should establish and publish processes for arm's length internal review of significant delegated decisions (such as those made by inspectors).
2. Regulated entities should have the right of appeal of decisions that have a significant impact on them, preferably through a judicial process. Such right of appeal shall be allowable, *inter alia*, on the grounds that the regulator has exceeded the powers attributed to it, insufficiency of

⁴³ J. S. Lubbers (2012) A Guide to Federal Agency Rulemaking (4th ed). Washington, DC: Administrative Conference of the United States.

⁴⁴ OECD (2012), Recommendation of the council on Regulatory Policy and Governance, OECD Publishing, Paris. https://www.oecd-ilibrary.org/governance/recommendation-of-the-council-on-regulatory-policy-and-governance_9789264209022-en;jsessionid=918q1Yy28lauNKUNlJB6Awtq.ip-10-240-5-170 p 7

⁴⁵ This is also referred to as the principles of accountability and transparency. OECD (2014), *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing; https://www.oecd-ilibrary.org/governance/the-governance-of-regulators_9789264209015-en

⁴⁶ *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, https://www.oecd-ilibrary.org/governance/the-governance-of-regulators_9789264209015-en p 80

⁴⁷ *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, OECD (2014)

consultation, and/or material omissions in the evidence and actions that are disproportionate to the issue being addressed.

3. Regulators may rescind decisions as a result of appeal.

Accountability and Transparency to the Public⁴⁸

1. Key operational policies and other guidance material, covering matters such as compliance, enforcement and decision review, should be publicly available.

2. The regulator should recognise its special responsibility in ensuring that members of the public have channels of complaint and possible redress in relation both to the actions of a regulated entity and to the actions of the regulator.

3. All major decisions made by the regulator shall be accompanied by publicly stated reasons.

4. The opportunity for independent review of significant regulatory decisions should be available in the absence of strong public policy reasons to the contrary.

5. The right of appeal of decisions by the regulator should be extended to members of the public where their standing is recognised by the judiciary.

Following the provisions of chapter 4 stated above, chapter 5⁴⁹ provides thus:

Engagement: Good regulators have established mechanisms for engagement with stakeholders as part of achieving their objectives. The knowledge of regulated sectors, businesses and citizens affected by regulatory schemes assists to regulate effectively. Regulators should also regularly and purposefully engage with regulated entities and other stakeholders to enhance public and stakeholder confidence in the regulator and to improve regulatory outcomes. Procedures and mechanisms for engagement should be institutionalised as consistent transparent practices. There should be a focus on establishing structured and regular consultation mechanisms with regulated entities. Engagement processes used should protect against potential conflicts of interests of participants and guard against the risk that the regulator may be seen to be captured by special interests.

3.3. International Council of Securities Associations Best Practices for Regulatory Consultation (2013)⁵⁰

The Best Practices document emphasizes several key aspects of the consultation process. This includes the need for regulators to ensure that:

(i) Sufficient time is allocated for the consultation process, particularly for consultations on major reforms; (ii) Any proposed measures have well designed policy objectives and are written in a clear and precise manner so that stakeholders are able to provide comprehensive comments; and (iii) Any proposed new regulations are consistent and coherent with the existing regulatory framework.

4. Conclusion and Recommendations

In conclusion, stakeholder's engagement should be inclusive and transparent unless this would compromise the intended outcome. Inclusive consultation allows any regulated party or member of the public to contribute or comment on proposals, rather than just representative groups, building confidence that all interests are heard. Based on the foregoing study, this article recommends some selected jurisdictional rule making models that exemplify effective stakeholders' engagement in rulemaking, including the following; Accountability and Transparency. The paper also recommends the following International Best Practices in Stakeholders engagement; The Organisation for Economic Co-operation and Development (OECD) Council recommendations on regulatory policy and governance and International Council of Securities Associations Best Practices for Regulatory Consultation. The following are the lessons drawn from international best practices on stakeholders' engagement and hereby recommended to Nigeria energy sector and other developing countries;

- i. Governments should establish a clear policy, identifying how open and balanced public consultation on the development of energy rules will take place.

Pursuant to the American rulemaking model, this article recommends the following:

⁴⁸The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD (2014)

⁴⁹Ibid, p 89 & 90

⁵⁰International Council of Securities Association (2013).Cited in OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing.https://www.oecd-ilibrary.org/governance/the-governance-of-regulators_9789264209015-en. P 93

- ii. The power sector regulatory agency in Nigeria should adopt the American negotiated rulemaking procedure where stakeholders are consulted to negotiate on a proposed rule such that a consensus is reached to produce a final rule that is more likely to be acceptable and makes for effective energy regulatory compliance.
- iii. Consensus between the agency and stakeholders must be the hallmark for any proposed rule on energy. The rationale here is to reduce subsequent opposition to a promulgated rule.

Again, in keeping with OECD stakeholders' engagement model, this article recommends that governments should co-operate with stakeholders on reviewing existing and developing new regulations by doing the following;

- i. Actively engaging all relevant stakeholders during the regulation-making process and designing consultation processes to maximise the quality of the information received and its effectiveness.
- ii. Consulting on all aspects of impact assessment analysis and using, for example, impact assessments as part of the consultation process;
- iii. Making available to the public, as far as possible, all relevant material from regulatory dossiers including the supporting analyses, and the reasons for regulatory decisions as well as all relevant data;
- iv. Structuring reviews of regulations around the needs of those affected by regulation, cooperating with them through the design and conduct of reviews including prioritisation, assessment of regulations and drafting simplification proposals;
- v. Evaluating the competitive effects of regulation on various economic players in the market.

Given lessons from the foregoing, this article submits that adequate stakeholders' engagement and transparency are critical to inclusiveness in energy rule making, effective implementation and regulatory compliance. Furthermore, to achieve regulatory compliance in the energy sector of Nigeria and other emerging economies, the formulation of energy rules should adequately involve critical energy stakeholders who are affected by those rules. Their expert opinions, on field experiences and peculiar industry challenges should be adequately sought after, respected and imputed into those rules by energy regulators. This is the only guaranty to effective compliance to and efficient implementation of energy rules critical to optimum achievement of any objectives of energy rules within the energy regulatory environment.