

# A Review of the NERC Eligible Customer Regulations 2024

OALP POWER NEWSLETTER

## INTRODUCTION

The gradual evolution of the National Electricity Supply Industry (NESI) to a long-term competitive market through the various stages has necessitated the introduction of policy and regulatory initiatives. One of such initiatives is the introduction of the Eligible Customer regime (**EC Regime**). In Nigeria and other climes, Eligible Customers (**ECs**) are typically consumers that have the right to choose their suppliers, and in the phasing of the electricity market towards increased competition, large consumers rank in priority as ECs before other consumers can enjoy such special privileges.<sup>1</sup> In Nigeria, the EC regime was first introduced in the NESI by the repealed Electric Power Sector Reform Act (**EPSRA**) and this led to the issuance of the Eligible Customer Regulations (**EC Regulations 2017**).

However, the language of the EC Regulations 2017 and its implementation left a lot to be desired. As a result, NERC held a wide consultation with stakeholders on the best way to position the EC regime considering the rapid increase of bulk consumers within the NESI.<sup>2</sup>

Consequently, on 26th March 2024, the Commission issued the NERC Eligible Customer Regulations (**EC Regulations 2024** or the **Regulations**). The EC Regulations 2024 were issued pursuant to Section 11 of the Electricity Act 2023 (EA) which provides the legal basis for Eligible Customer transactions (**EC transactions**). In this newsletter, we will examine the provisions of the EC Regulations 2024, analyse its innovative provisions in contrast to the EC Regulations 2017 and make comments on its potential impact on the NESI.

## PRECURSOR TO THE ADOPTION OF THE EC REGULATIONS 2024

In May 2017, the Honourable Minister for Power, Works, and Housing made a policy declaration as to the categories of persons to be regarded as Eligible Customers in the NESI pursuant to Section 27 of EPSRA (the **Declaration**). Following the Declaration, NERC issued the NERC Eligible Customer Regulations, 2017 in exercise of its powers under Section 96 of the EPSRA.

1. See *European Union Electricity Directives for instance*.

2. The Commission released a consultation paper wherein it identified key issues such as: Execution of Market Participation Agreement with the Market Operator; Confirmation of Non-indebtedness to a DisCo; Investment in Networks as Condition for EC Transaction; Phase II of Eligible Customers Implementation

Further to the Declaration and the Eligible Customer Regulations 2017, the following categories of ECs were recognized in NESI: customers or group of end-use customers, registered with NERC:

01

whose consumption is no less than 2MWhr/h over the course of one month, connected to a metered 11kV or 33kV delivery point on a distribution network or a distribution licensee under a Distribution Use of System (DuoS) agreement;

02

connected to a metered 132kV and 330kV delivery point on the transmission network under a Transmission Use of System (TuoS) agreement;

03

whose consumption is in excess of 2MWh/h on a monthly basis and connected directly to a metered 33kV delivery point on the transmission network under a Transmission Use of System (TuoS) agreement and has entered into a bilateral agreement with the distribution licensee licensed to operate in the relevant location;

04

whose minimum consumption is more than 2MWhr/h over a period of one (1) month, is directly connected to the metering facility of a generation company and has entered into a bilateral agreement for the construction and operation of a distribution line with the distribution licensee licensed to operate in the relevant location.



By the provisions of the EA, these categories of consumers continue to be recognized as EC under the extant legal framework. However, in May 2023, NERC issued a consultation paper on the Review and Codification of Eligible Customer Regulations and the Guidelines on Competition Transition Charges (the **Consultation Paper**) with the goal of improving the framework under the EC Regulations 2017.

Following the enactment of the EA and the vesting of powers on NERC to declare what categories of consumers are eligible in the NESI, NERC has revised the EC Regulations 2017, issuing the EC Regulations 2024.<sup>3</sup>

#### HIGHLIGHTS OF THE ELIGIBLE CUSTOMER REGULATIONS 2024

The EC Regulations 2024 came into force pursuant to the order of the Commission on 1st March 2024. The EC Regulations 2024 differ in several respects from its predecessor. Generally, the objectives of the Regulations are to facilitate competition in NESI, promote third-party access to the transmission and distribution networks, improve the liquidity in the sector, enhance the stability and operational efficiency of generating companies (GenCos), provide a framework for collecting competition transition charge (CTC) from ECs.<sup>4</sup> Below, we highlight some salient provisions of the EC Regulations 2024, while drawing on similarities and dissimilarities with the EC Regulations 2017.

3. See section 11(1) of the EA which provides that from the commencement of the Act, it shall be the responsibility of NERC, and not the Minister of Power, to declare which consumers in NESI would be recognized as eligible.

4. Regulation 3, EC Regulations 2024

## CATEGORIES OF ELIGIBLE CUSTOMERS

The EC Regulations 2024 provides for 5 categories of ECs in contrast to the 4 categories of ECs under the EC Regulations 2017.<sup>5</sup> These are:

### Point to Point Connection

This category refers to ECs with an average or planned consumption of not less than 6MWh/h over the course of 90 days (three months). They are directly connected or to be connected to a generation facility vide a metered 33kV delivery point operated by a distribution licensee or have entered an arrangement for the development of such distribution network with a distribution company (DisCo) for such connection.



### New Connection to 33kV Network

Here the EC is not connected to any networks but has a planned average consumption not less than 10MWh/h over the course of 90 days (three months) under an arrangement with a DisCo to connect to a metered 33kV delivery point on the distribution network.



### Existing DisCo's Customer Transitioning to Eligibility

For this category of ECs, the average consumption is not less than 10MWh/h over the course of 90 days (three months) and is connected directly to a metered 33kV delivery point on the distribution network.



### Existing Customer Connected to Transmission Network

For the fourth category of EC, the average consumption is not less than 20MWh/h over the course of 90 days (three months) and the EC is connected directly to a metered 132kV or 330kV delivery point on the transmission network.



### New Connection to Transmission Network

For the last category of ECs, the EC is not connected to the transmission network, but a planned average consumption is not less than 20MWh/h over the course of 90 days (three months). The goal is to be connected to a metered 132kV or 330kV delivery point on the transmission network.



## REGISTRATION AND APPROVAL PROCESS

A distinctive feature of the EC Regulations 2024 is the introduction of a three-staged application process for the grant of the EC status. In addition to satisfying such conditions, applicants will have to provide supporting documents for each stage as listed in Schedule I of the Regulations. The documents shall be submitted in triplicate copies. The stages are set out below:

### Review of Eligibility

This is a critical stage because it is at this stage that the Commission clears the applicant as being eligible. The application entails the completion of a Licence/Permit Application Form and will be accompanied the following documents:

- Letter of intention to switch supplier, where applicable.
- Evidence of the applicant's load profile or connected load analysis of the facility after six (6) months of commencing operations.
- Evidence of uncontracted capacity from the prospective supplier.
- Connection point/voltage level.
- Evidence of a three-month switch-over/exit notice to the DisCo, where applicable or waiver due to force majeure events subject to verification by the Commission.
- Filing application for CTC further to NERC's receipt of the documentation in paragraphs (i) to –(v) above.<sup>6</sup>

### Approval of EC Status

The second stage is the approval of the EC status. The Applicant, upon confirmation of meeting the requirements for eligibility status, shall file an application to the NERC for Approval of Eligibility Status with the submission of the following documents:

- An initialled Power Purchase Agreement (PPA);
- An initialled TUoS Agreement and/or DUoS Agreement as may be required;
- Executed CTC agreement between the DisCo and the EC;
- An initialled supplier of last resort agreement (**SLR Agreement**) by the prospective supplier. A SLR Agreement makes provision for a contingent supplier to an EC in the event of a failure by the contracted supplier to deliver contracted quantities;<sup>7</sup>
- An initialled project execution agreement, where applicable; and
- A letter of clearance for non-indebtedness or a settlement agreement for unpaid bills from a DisCo serving the applicant at the time of the application, where applicable.

The EC Regulations 2017 did not have provisions for submission of CTC agreement and SLR Agreement. Upon receiving the documentation in paragraph (a) to (f) above, NERC is required to issue a decision within 30 working days.<sup>8</sup>

### Post Approval

The Requirements for post approval process are:

- Executed market participation agreement (**MPA**) with the Market Operator;
- Executed copies of PPA, TUoS, DUoS, and SLR Agreements;
- Evidence of payment of applicable regulatory fees.

It is useful to note that while entering into an MPA was a mandatory requirement in the EC Regulations 2017<sup>9</sup>, this has been included as a post filing process for Eligibility Status in the EC Regulations 2024.

6. Regulation 12.2.1 EC Regulations 2024  
 7. Regulation 33, EC Regulations 2024  
 8. Regulation 12.2.g EC Regulations 2024  
 9. Regulation 8.1. d EC Regulations 2017

## DOCUMENTATION FOR THE APPROVAL PROCESS

### Documentation of the EC Applicant

From Schedule I, the Applicant for Eligibility Status is also required to provide other documentation for the pre-approval process, some of which are not industry documents but relate to the Applicant’s governance arrangement.

New requirements in the pre-approval process also include the requirements that the Applicant should provide Letter of Intention to Switch Supply, Evidence of Consumption Load Profile and Permit Application Form. Correspondingly, the EC Regulations 2024 has introduced some new documentation under the approval process for being an EC in line with the three-staged procedure.<sup>11</sup>

Further, the EC Regulations 2024 provides that the applicant must provide copies of documents showing that the applicant and supplier have satisfied safety and technical requirements including a minimum consumption threshold of 10MWh/h.<sup>12</sup>

Also, with respect to the utility bills, the EC Regulations 2024 provides that the utility bills to be submitted must be for the preceding six months before the application. In addition, the statement from the Independent System Operator or Distribution Network Operator must provide details on the location of the customer, the feeder from which the customer shall be supplied, and the availability of sufficient network infrastructure to meet the demand without displacing existing off-takers.<sup>13</sup>

### Documentation of the Supplier

A Supplier is defined as any licensee of NERC that is required to supply electricity to an EC. The documentation required from a Supplier under the EC Regulations 2024 has been updated to include the following for an application of EC Status to be granted.

These include:

- Evidence of excess capacity over and above already contracted capacity by the supplier;
- Independent system Operator’s written confirmation of compliance with connection requirement as provided in Chapter V of the Regulations;
- Initialled SLR Agreement.<sup>15</sup>

## FINANCIAL REQUIREMENTS

In setting out the financial requirements that ECs must meet, the EC Regulations 2024 requires that an EC Applicant must post a letter of credit or bank guarantee in favour of the Market Operator in accordance with the Market Rules; and introduces the requirement of providing “Take or Pay” obligations and payment securitisation in the PPAs for EC transactions.<sup>16</sup> This was not provided for in the EC Regulations 2017.

## RIGHTS AND OBLIGATIONS OF ELIGIBLE CUSTOMERS

Further to the provisions of the EC Regulations 2024, ECs have the following rights:

- Right of access to the transmission and distribution networks;
- Right of an EC to contract with any supplier of his choice and bilaterally contract for the pricing, quantity, and time of supply.

Correspondingly, the Regulations provide that ECs have certain obligations. These include obligations to:

- procure and ensure installation of meter/meter infrastructure;
- enter contract for supply on “take or pay” terms with the holder of a generation or trading licence;
- pay the CTC where it is applicable.<sup>17</sup>

10. Schedule 1, EC Regulations 2024  
 11. Schedule I, EC Regulations 2024  
 12. Ibid  
 13. Ibid  
 14. Ibid  
 15. Ibid  
 16. Regulation 9, EC Regulations 2024  
 17. Regulation 14, EC Regulations 2024

These new obligations reflect the documentation requirements for the approval process and are mandatory before the Commission can approve an EC Status. With respect to the obligations of the Supplier, two new obligations have been imposed under the EC Regulations 2024. Accordingly, the Supplier has the obligation to:

- a. ensure the availability of uncontracted capacity before entering into an agreement with the EC; and
- b. provide the SLR Agreement with the alternative supplier in support of the EC application.<sup>18</sup>

This obligation will ensure that the Supplier is indeed supplying uncontracted capacity and not merely using the EC Regime and the bilateral nature of it to avoid obligations to existing customers.

**SWITCHING RULES**

Like the EC Regulations 2017, the EC Regulations 2024 provides for the procedure for an EC to change or switch supplier. However, there are new/expanded provisions on switching rules. In addition to the requirement of filing for the Commission’s approval of the PPAs with the prospective suppliers before the commencement of service, there is a new provision that requires ECs who intend to switch suppliers to follow the Stage 2 Process (Approval Eligibility Requirements) in the EC Regulations 2024.<sup>19</sup>

Furthermore, any EC that wishes to switch supply to a distribution licensee shall provide a minimum of 3 months’ notice of intent to allow for adequate planning unless waived. We note that the language ‘waiver due to a force majeure event but subject to verification by the Commission’ used under the EC Regulations 2017 has been removed. Also, it is provided that the applicable tariff for the EC switching to a distribution licensee shall be at the prevailing tariff rates for customers in the same tariff class.

The EC Regulations 2024 provides for bilateral negotiations of tariff rates. Thus, there is room for contractual agreement on the applicable tariffs upon a supplier switch. Accordingly, a Disco may offer a negotiated lower tariff provided that any decrease in revenue arising from such concession prior to rate redesign shall be borne by the DisCo.

In relation to the switching process, the Market Operator role shall prior to the effectiveness of the new contract, undertake a meter reading of the customer’s energy consumption for final settlement between the old supplier and the eligible customer. The EC Regulations 2024 removes the requirement in the EC Regulations 2017 for the Market Operator to submit to the previous and new supplier data on accounting balance and metering data of the EC within three days counting from the date the balance was determined.<sup>20</sup>

**PRICING AND COST OF SUPPLY**

In determining the components of the price at which the Supplier delivers power to an Eligible Customer, in line with the operative tariff methodology, the 2024 EC Regulations now introduces a new component which is additional surcharge as may be approved by the Commission.<sup>21</sup>

**COMPETITION TRANSITION CHARGE (CTC)**

*Implementing the CTC*

The EC Regulations 2024 creates a framework for the operationalization of the Competition Transition Charge under Section 12(1) of the EA. It is recognized that an EC transaction may lead to stranded costs and loss of revenue for the distribution licensee. Accordingly, the CTC is the additional revenue that a distribution licensee is eligible to collect outside its normal tariff as compensation for loss of revenue (to cover its committed prudent expenditure) and/or its inability to earn permitted rates of return on its assets arising from losing a customer to an EC transaction.<sup>22</sup>

18. Regulation 16, EC Regulations 2024  
 19. Regulation 21, EC Regulations 2024  
 20. Regulation 26(1)(d) EC Regulations 2024  
 21. Regulation 25(1)(c) EC Regulations 2024  
 22. Section 12 of the EA

Thus, the CTC regime is a good avenue for the distribution licensees to cover for the revenue shortfall or cost implications that may arise from an eligible customer exiting the distribution network.

### **Procedure for Applying for and Calculating the CTC**

To claim the CTC, a distribution licensee is required to file an application with the Commission for applicable CTC within 30 days of the receipt of the prospective EC's notice of intention to exit the network by the distribution licensee.<sup>23</sup> The application must provide a justification showing that, despite its efficient management, the utility would be unable to meet its revenue requirement arising from the exit of an EC.<sup>24</sup> The Commission will review the claim for CTC by the DisCo and upon satisfactory justification, approve the charge and issue a directive for the payment of the CTC by the EC.<sup>25</sup>

- The CTC shall be determined based on the difference between the actual tariff payable by the potential EC and the approved weighted end-user tariff of the Non-MD Customers in the affected Disco adjusted for collection efficiency.<sup>26</sup>
- The CTC per kWh will be determined and this will be multiplied by the average monthly energy billed to the customer during the 90 days (3 months) preceding the application.<sup>27</sup>

The payment of the CTC shall have a sunset which is defined as the recovery period for payment of the CTC and will be limited to the extent of the recovery of stranded costs, deferred liabilities, and loss of revenues.<sup>28</sup>

### **OUR THOUGHTS ON THE EC REGULATIONS 2024**

The EC Regulations 2024 seeks to promote competition and provide comfort for electricity distribution companies who are likely to be apprehensive due to the exit of ECs from the electricity distribution networks. Below we

analyse the potential impact of adopting the EC Regulations 2024 on the NESI.

First, it will be recalled that the EC Regulations broaden the categories of EC which may participate in the wholesale electricity market in Nigeria. Although NERC is now tasked with the responsibility to declare which consumers qualify as ECs, looked at critically, it is clear from the definition of EC under section 232 of the EA that NERC's recent categorization does not extinguish the licenses already issued to existing ECs in NESI, neither are subsisting ECs required to meet new threshold or licensing requirements. This provides comfort for existing ECs.

Second, the EC Regulations 2024 not only provides comfort for existing ECs but also for DisCos from whose networks ECs may exit. In connection with this, there are robust provisions on the determination and payment of CTC from an EC to a DisCo to mitigate the losses occasioned by loss of business opportunities of DisCos within their franchise areas. All that DisCos are required to prove is that their claim to loss of revenue is 'satisfactorily justified'.

While some may regard the compensation to be paid DisCos as CTC as disincentive for the application for Eligibility Status, the increase in the consumption threshold of ECs by NERC could mitigate this concern due to the economies of scale enjoyed by such potential ECs who apply for Eligibility Status under the EC Regulations 2024. Also, we note that CTC is not to be paid in perpetuity but shall have a sunset and be limited to the extent of the recovery of stranded costs, deferred liabilities, and loss of revenues of such DisCos.<sup>29</sup>

Third, we expect to see increased competition in the NESI due to the issuance of the EC Regulations 2024. Large consumers have always been known to choose their suppliers first in the creation of competitive electricity markets.<sup>30</sup>

23. Regulation 29(2), EC Regulations 2024  
 24. Ibid  
 25. Regulation 29(3), EC Regulations 2024  
 26. Ibid  
 27. In the NERC Consultation Paper, two methodologies were proposed. Methodology 1: Adoption of the distribution cost component of the tariff as CTC. Methodology 2: Adoption of tariff differential as CTC. The EC Regulations 2024 adopted the 2nd methodology.  
 28. Regulation 29(4), EC Regulations 2024  
 29. Regulation 29(4) EC Regulations 2024  
 30. See: EU Electricity Directive 1996 and subsequent Electricity Directives by the EU.



It is expected that with the unbundling of electricity distribution and retailing (supply) as contemplated in the EA, NERC will issue similar EC Regulations to enable retail consumers switch suppliers. While this is envisaged for the long-term electricity market, the evolution of competitive markets has always been a process and not a destination.

Furthermore, the introduction by the EC Regulations 2024 of take or pay commitments and payment securitization in PPAs entered between ECs and Suppliers has the promise of derisking supply and payment security commitments to Suppliers and improving the market liquidity conditions in the NESI.

Notwithstanding the foregoing, it would have been expected that the threshold for the direct participation of consumers in the wholesale market will be gradually reduced rather than increased. The increase in the threshold of the consumption for the pre-qualification of Eligibility Status, sends the wrong signal that the market is not prepared for smaller potential entrants to choose their suppliers. This is especially so considering that the CTC regime exists to protect the interests of the incumbent DisCos. Thus, while smaller entrants are locked in by the EC Regulations 2017, smaller new entrants are not permitted in the market by the EC Regulations 2024.

To illustrate, the European Union's Electricity Directive 2009 defined 'eligible customer' as a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33 of the Directive. Further to Article 33, a timeline is prescribed for all Member State to grant eligibility status to all consumers within their respective electricity markets.

**Accordingly, Article 33 which deals with market opening and reciprocity provides that:-**

- a. Member States shall ensure that the eligible customers comprise:
- b. until 1 July 2004, the eligible customers as specified in Article 19(1) to (3) of Directive 96/92/EC. Member States shall publish by 31 January each year the criteria for the definition of those eligible customers;
- c. from 1 July 2004, all non-household customers;
- d. from 1 July 2007, all customers.

Even though macro-economic and political conditions differ in Nigeria, the foregoing could provide sufficient guidance in determining the threshold for eligible customers in NESI. A preferred approach in line with the above should have been to reduce the threshold or permit any customer that can switch supplier but meet the criteria set out in the Regulations to apply for Eligible Status. This will more likely promote than restrict competition in NESI.

## CONCLUSION

The EC Regulations 2024 can be seen as a useful tool for promoting increased competition in the NESI and consolidating the progress made towards the medium-term stage of the market. Given the experience with the operations of the EC Regulations 2017, it is imperative that potential EC Applicants engage in early stakeholder consultation with all the parties to secure buy-ins. NERC must also ensure that it has proper regulatory oversight over the approval and post-approval operations of the EC transactions in a non- bureaucratic manner.

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