

DRAFT CONSULTATIVE PAPER ON ACQUISITION OF LAND AND ACCESS RIGHTS FOR POWER PROJECTS IN NIGERIA.

TABLE OF CONTENTS

Chapter 1

1.0	Executive Summary.....	6
1.1	Background.....	6
1.2.	Principles of Consultative Paper.....	7
1.3.	Objectives of Consultative Paper.....	8
1.4.	Structure of Consultative Paper.....	8
1.5	Summary of Proposals.....	8
1.5(i)	Acquisition Conditions and Procedures.....	9
1.5 (ii)	Legal and Regulatory Framework.....	9
1.5 (iii)	Institutional Framework.....	10
1.5(iv)	Electricity Projects Impacts, Eligibility and Entitlement.....	10
1.5(v)	Assessment of Compensation - Appraisal Issues.....	11
1.5(vi)	Negotiation, Payment of Compensation and Closing.....	11
1.5(vii)	Settlement of Disputes.....	11
1.5(viii)	Resettlement of Displaced Persons.....	12
1.5(x)	Miscellaneous.....	12
1.6	Conclusion.....	12
1.7	Response to this CP.....	12

Chapter 2

2.0	Acquisition Conditions and Procedures.....	13
2.1	Distinction Between Acquisition of Land and Acquisition of Access Rights.....	13
2.2	Conditions for Land Acquisition.....	13
2.3	General Procedure for Acquisition of Land and Access Rights.....	14
2.4	Conclusion.....	15
2.5	Responses.....	15

Chapter 3

3.0	Legal and Regulatory Framework.....	16
3.1	The Constitution.....	16
3.2	The Land Use Act.....	16
3.3	The Conditions for Valid Revocation.....	17
3.4	Electric Power Sector Reform Act 2005.....	18
3.4.1	Acquisition of Land.....	18
3.4.2	Acquisition of Access Rights.....	19
3.4.3	Protection of Land and Access Rights.....	19
3.5	International Best Practice.....	19
3.6	Comparing Nigerian Law and the World Bank Op 4.12 and International Finance Corporation (Ifc) Standard 5.....	20
3.7	Conclusion.....	21
3.8	Responses.....	21

Chapter 4

4.0	Institutional Framework.....	22
4.1	The Commission.....	22
4.2	Establishment of Department of Acquisition of Land and Access Rights or Way-Leave Department or Right Of Way (Row) Department.....	23
4.3	Staff and Capacity Building.....	23
4.4	The Role of Licensee.....	23
4.5	Town Planning Department.....	24
4.6	Environmental Protection Agency.....	24
4.7	Federal Ministry of Justice.....	24
4.8	State Government.....	24
4.9	State High Courts.....	24
4.10	Local Government.....	25
4.11	Other Utilities.....	25

4.12	Conclusion.....	25
4.13	Responses.....	25
<u>CHAPTER 5</u>		
5.0	Electricity Projects Impacts, Eligibility Criteria and Entitlement.....	26
5.1	Nature of Impact.....	26
5.2	Assessment of PAPs.....	26
5.3	Eligibility.....	27
5.4	Proof of Eligibility.....	27
5.5	Defining Entitlement.....	28
5.6	Conclusion.....	28
5.7	Responses.....	28
<u>CHAPTER 6</u>		
6.0	Assessment of Compensation - Appraisal Issues.....	29
6.1	Use of Appraisers.....	29
6.2	Compensation And Appraisal.....	29
6.2(i)	Fair Market Value.....	29
6.2(ii)	Replacement Cost.....	30
6.2(iii)	Replacement Cost, Less Depreciation.....	30
6.2(iv)	Sales Comparism Approach.....	30
6.3	Appraisal of Land.....	30
6.4	Appraisal of Economic Trees and Crops.....	31
6.5	Contents of a Detailed Appraisal Report.....	31
6.6	Owner's Right in Appraisal.....	31
6.7	Appraisal Review and Approval.....	32
6.8	Conclusion.....	32

6.9 Responses.....32

CHAPTER 7

7.0 Negotiation, Payment of Compensation and Closing.....33
7.1 Negotiation.....33
7.2 The Cut – Off Date.....33
7.3 Timing of Compensation Payment.....33
7.4 Payment of Compensation.....34
7.5 Evidence of Acquisition.....34
7.6 Demolition and Salvage.....34
7.7 Conclusion.....35
7.8 Responses.....35

CHAPTER 8

8.0 Settlement of Disputes.....36
8.1 Administrative Process.....36
8.1.1 Application for Appraisal Review.....36
8.1.2 Petition to NERC.....36
8.2 Judicial Review.....36
8.3 Conclusion.....36
8.4 Responses.....37

CHAPTER 9

9.0 Resettlement of Displaced Persons38
9.1 Resettlement Option.....38
9.2 Timing of Resettlement.....38
9.3 Resettlement Assistance.....38
9.4 Conclusion.....38
9.5 Responses.....39

CHAPTER10

10.0	Monitoring and Evaluation.....	40
10.1	Internal Monitoring.....	40
10.2	External Monitoring.....	40
10.3	Completion Audit.....	40
10.4	Corrective Action Plan.....	40
10.5	Conclusion.....	40
10.6	Responses.....	40

CHAPTER 11

11.0	Miscellaneous.....	41
11.1	Penalties	41
11.2	Fees.....	41
11.3	Conclusion.....	41
11.4	Response.....	41
11.5	NEXT STEPS.....	41

List of Acronyms

EIA	Environmental Impact Assessment
EPRSA.....	Electric Power Reform Sector Act
SIA	Social Impact Assessment
OP.....	Operational Procedures
PAPs.....	PAPs
RAPs.....	Resettlement Action Plans
ROW.....	Right of Way

CHAPTER 1

1.0 Executive Summary

1.1 Background.

The regulation of acquisition of land and access rights by electric utility industry in developed countries is done through the instrumentality of a complicated mass of rules, regulations and structures that has governed the industry for more than a century. The same cannot be said of Nigeria, and other developing countries, where the concept and practice of deregulation are yet to engender the kind of challenges that necessitated government regulation in developed countries. Nonetheless, noticeable changes in the law, together with the liberalization of the electric power sector and the creation of certain agencies like the Nigerian Electricity Regulatory Commission (NERC), are quickly changing the entire legal and regulatory regime. It is within this context that we can situate and appreciate the present efforts by NERC to develop a body of rules and regulations on acquisition land and access rights for the electricity utility industry in Nigeria.

There is no doubt that electricity is an indispensable building block and driving force for economic growth and development. In our world of today, electricity generation, transmission and distribution have become key indices for measuring or predicting a nation's economic growth, hence the increasing role of government in promoting the development of the electric power sector in Nigeria.

However, the present efforts by government to improve the power situation in Nigeria will be hampered if there is no clearly defined and easily ascertainable body of rules and regulations for the acquisition of land and access rights for electricity projects . This is so because the building of power plants requires land acquisition, while the evacuation of generated power from power stations and the provision of stable and reliable transmission and distribution require the construction of several kilometers of high voltage (HV) transmission lines on land to deliver power to the major load centers and distribution networks for the delivery of electricity to customers across the country.

In essence, the generation, transmission and distribution electricity require the acquisition of land or access rights over land, which entail the giving up of certain private or communal rights over property, such as structures, crops and economic trees. Consequently, there is the need for the regulator to initiate and put in place relevant regulations to facilitate power projects and ensure that PAPs (PAP) are not impoverished or left in a worse state than they were before the project.

It is in recognition of this fact that Section 77 of the Electric Power Sector Reform Act 2005 (EPSRA) gives NERC the power to prescribe the form of application for acquisition of land and make declaration that a particular land identified by a licensee is required for the purpose of the license. The same section also gives the Commission the power to make regulations for the acquisition of access rights by licensees.

The need to activate this provision is further buttressed by the realization that some of the existing regulations are inadequate and unsuitable to drive the reform process of government.

We recognise the very recent changes in the law which has made it possible for the private sector to supply some of the services which hitherto had been supplied by public authorities. In the disappearing old order, it was very easy to see the hand of government in projects, hence the reliance on the public purpose clause to acquire private land compulsorily. Whether we can still rely on the public purpose mantra to acquire land from the poor and transfer same to a private business entity that is primarily motivated by profit, is a very big question. We must recognise that there is now a need to regulate the use of the power of compulsion to acquire land for the utilities that now supply many of the services which were originally undertaken by public authorities. Consequently, there has to be a significant shift in procedure for acquisition and compensation to reflect the new legal and business environment.

Therefore, the pressure to accommodate a growing number of new powerful, profit-making entities who seek private uses of power of government to acquire land and access rights compulsorily, makes new regulations imperative.

This Consultative Paper (CP) is therefore a forerunner for the Regulation on Acquisition of Land and Access Rights for Power Projects in Nigeria. The main objective of the CP is to articulate and clarify the policies, principles and procedures that will govern the acquisition of land and access rights to facilitate power projects and ensure the mitigation of adverse social impacts which are induced by the power project operations. The rationale for preparing the CP is that the Nigerian Electricity Regulatory has found it imperative and useful to have a regulatory document establishing principles and procedures that will govern the acquisition of land and access to share with various stakeholders in the sector for their input.

1.2. Principles of the CP

The principles underlying the CP which will birth the Regulation are summed up below:

1. Compulsory acquisition of land and access rights should be avoided where Possible, and where population displacement is unavoidable, it should be minimized by exploring all viable project options.
2. Persons affected by acquisition and face relocation or loss of incomes associated with change in land use due to the project should be given compensation or resettled in such a manner as to improve or at least maintain their former standard of living.
3. The estimation of compensation cost and/or benefit should be based on the appropriate method so that the cost of land and other properties taken or demolished are accounted for and determined impartially. This will ensure that the living standards of the PAPs are maintained or raised to a substantial level.
4. PAPs should be consulted and given full information on the qualification (eligibility), mode of compensation, the restoration plan of production income and the project's progress as well as be involved in the implementation of acquisition of land and access rights arrangements (community participation).
5. The land, property or crops affected should be taken only when the PAPs are paid compensation or satisfied with the compensation arrangements except in cases of unavoidable compulsory acquisition.
6. The Commission supervise the acquisition of land and access rights activities including appraisal processes and the payment of compensation as well as monitoring and evaluation to ensure transparency and compliance with Regulation.

1.3. Objectives of the CP

The main objective of this CP on the Regulation on Acquisition of Land and Access Rights is to develop, articulate, clarify and seek the views of all stakeholders on the policies, principles and procedures that will govern the acquisition of land and access rights to facilitate power projects and ensure the mitigation of adverse social impacts which are induced by the power project operations. Specifically, the Regulation which will flow from this CP is designed to ensure:

- That PAPs would be consulted and given the chance of participating in the design, implementation and monitoring of the acquisition of land and access rights processes;
- All types of losses are identified, clearly defined and properly categorized to reflect the nature of the loss;
- A standard or measure for defining eligibility, entitlement and valuation in order to have a fair basis for assessing compensation for the loss or impact suffered;
- Compliance with the provisions of our national laws and measured adoption of international standards and policies;
- That acquisition of land and access rights activity are conceived and executed as development programs, to restore the livelihood of PAPs and in some deserving cases enable the PAPs to share in project benefits;
- Displaced persons will be compensated for their losses at full replacement cost resettled and provided assistance for disturbance prior to beginning of civil works;
- A comprehensive database, based on which values will be assessed, validated in the event of disputes and more importantly serve as the database for monitoring and evaluation of the acquisition of land and access rights Regulation;
- Establish regulatory oversight over land and access rights acquisition for power projects in Nigeria;
- Mitigate the risks and delays associated with land and access rights acquisition in the interest of power project sponsors and investors;
- Entrench a regime of smoother and quicker resolution of disputes arising from land and access rights acquisition.

1.4. Structure of Consultative Paper

This Consultative Paper (CP) on Acquisition of land and access rights Regulation covers the following issues and themes:

- Executive Summary
- Acquisition Procedures
- Legal and Regulatory Framework

- Institutional Framework
- Electricity Projects Impacts, Eligibility and Entitlement
- Assessment of Compensation - Appraisal Issues
- Negotiation, Payment of Compensation and Closing
- Settlement of Disputes
- Resettlement of Displaced Persons
- Monitoring and Evaluation
- Miscellaneous.

1.5 Summary of Proposals.

1.5(i) Acquisition Conditions and Procedures .

The Commission will discourage compulsory acquisition of land and access rights and encourage Licensees to enter into negotiations with PAPs. Project impacts will also be reduced or minimized by requiring project companies to explore all viable alternative project designs. This will entail a review of project designs by the Commission as a means of achieving this objective. However, where it is not feasible to avoid compulsory acquisition, the Commission will require the licensee to prepare a Resettlement Action Plan (RAP) that will contain measures to improve the livelihoods and standards of living of PAP's or at least restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.

To ensure that best practices are adopted , the Licensee will follow procedures consistent with the Commission's Regulation during all the phases of acquisition.

PAPs will be consulted and enabled to participate in the planning, implementation and monitoring of the acquisition and resettlement of displaced persons, to guarantee their maximum support for projects. Also, project companies will be required to seek and obtain the Free Prior Informed Consent (FPIC) of PAPs for acquisition of land and access rights to reduce the incidence of compulsory acquisition by government. The adoption of these principles will ensure that our regulatory regime is in conformity with international best practices.

1.5 (ii) Legal and Regulatory Framework

This section addresses the legal and regulatory frameworks that the Regulation needs to comply with. These are the laws of the Federal Republic of Nigeria and to a reasonable degree, the policies and standards of the World Bank and International Finance Corporation (IFC). Fundamentally, the Nigerian Constitution, like the Constitution of all civilized nations, gives the right to own property and outlaws arbitrary compulsory deprivation of property or expropriation. However the constitution allows acquisition for public purpose and entitles the property owner to prompt payment of compensation and a right of access for the

determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria. The same constitution validates any general law, subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect poles cables, wires, pipes or other conductors or structures on any land, in order to provide, or maintain the supply of distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities. Furthermore, Section 77 of the Electric Power Sector Reform Act 2005 gives NERC the power to prescribe the form of application for acquisition of land and to make declaration that a particular land identified by a licensee is required for the purpose of the license. The same section also gives the Commission the powers to specify the conditions for land acquisition and make regulations for the acquisition of access rights by licensees.

1.5 (iii) Institutional Framework

Section 4 of the CP addresses the institutional arrangements and agencies that will be impacted by or are available to implement the Regulation. The Commission has the ultimate responsibility for ensuring that Licensees comply with the Regulation. The Commission will through its Department of Acquisition of Land and Access Rights, coordinate the roles of other agencies and statutory bodies participating or concerned in land and access rights acquisition operations such as the Federal Ministry of Justice, Ministry of Lands of the various states, Local Governments and Utility agencies. The Licensees, will be required to identify issues associated with particular power project and prepare and implement Resettlement Action Plans to address the adverse impacts.

1.5(iv) Electricity Projects Impacts, Eligibility and Entitlement

In this segment we shall deal with how to assess impact of projects and estimate the number of persons expected to be affected by any power project. This is necessary to establish the total number, categories, needs and preferences of PAPs as part of the preparation for the delivery of compensation or resettlement entitlements. This will inform the choice of compensation options and help estimate compensation cost. In order to effectively implement acquisition of land and access rights operations, this section of the CP defines the eligibility criteria noting that the criteria will be specified in the Regulation and each RAP must cover any person who suffers loss of or damage to an asset or loss of access to productive resources, as a result of the carrying out of any power projects under the EPSRA. Eligibility criteria will be guided by Nigerian law and the three criteria given in Clause 15 of the World Bank Operational Policy 4.12, viz;

- Those who have formal legal rights to land (including customary and traditional rights recognized under the laws of Nigeria);
- Those who do not have formal legal rights to land at the time the census begins but have a claim to such land or assets – provided that such claims are recognized under the laws of the country or become recognized through a process identified in the Regulation;
- Those who have no recognizable legal rights or claim to the land they are occupying but have established their means of livelihood on the land.

1.5(v) Assessment of Compensation - Appraisal Issues

In order to satisfy PAPs, the valuation procedures of all structures, economic trees and crops to be affected, as a result of the implementation of power projects have been outlined in this chapter. Valuation will be done by the licensee under close supervision of the Commission or Consultants appointed by the Commission. The various valuation methods will be discussed with the intention of allowing responses on the most appropriate method, which will be adopted in the Regulation. Compliance with Nigerian law standards and methods may undermine international best practice, hence the need to regard our national law as having established the minimum standard only. The overriding goal of any method will be to ensure that PAPs are adequately compensated for the sacrifice they make in the interest of the good of the larger society.

1.5(vi) Negotiation, Payment of Compensation and Closing

Delivery of the offer of compensation constitutes initiation of negotiations and is the principal date for determination of cutoff date. Negotiations will be conducted through personal contacts with the property owner. If the owner is available in the local area, they should be offered the option of a personal contact. Where the owner is unavoidably absent or unavailable his next of kin or authorized agent can be contacted. Although our Constitution and the Land Use Act provide for prompt compensation, the practice over the years shows that compensation takes place several years after demolition or acquisition, leaving the PAP in abject poverty, deprivation and frustration. This state of affairs will be changed to a new procedure that will require payment prior to commencement of civil works, which is in the best interest of the Licensees and the PAPs.

1.5(vii) Settlement of Disputes

It very obvious that we have no satisfactory dispute settlement mechanism to drive the reform process and minimize delays in project execution together with the resultant cost overruns. A clear evidence of this is the fact that we have several thousands of cases in our courts resulting from grievances from PAPs who feel deprived and shortchanged by project sponsors who fail to meet their legitimate expectations. These cases stall electricity projects and impede the goal of government to improve the power situation in Nigeria.

Most of these cases arise where the PAP disputes the offer of compensation and demands an increase in value, while the rest arise due to non observance of the requisite procedure. The Regulation will, in any of these circumstances, require the aggrieved person to apply for review by an Appraisal Reviewer of the Commission. Where he is dissatisfied with the decision of the Appraisal Review, the Regulation gives him a right to petition the Commission and a further right of judicial review on points of law.

1.5(viii) Resettlement of Displaced Persons

The Land Use Act provides that resettlement may be offered at the discretion of the Governor in any other place or area by way of a reasonable alternative accommodation and that where a person accepts resettlement no further compensation will be paid. However, for this right to be meaningful there is the need to apply certain basic principles to reflect the real intent of the Act. Thus, resettlement must be aimed at giving the PAP a reasonable alternative accommodation which should for all intents and purposes be comparable to his former

dwelling. Licensees whose project will entail displacement will be required to prepare RAP that will incorporate these principles.

1.5(ix) Monitoring and Evaluation

The emphasis in this chapter section will be on monitoring and evaluation of land and access rights acquisition for power projects. To this end, obligations and mechanisms for effective monitoring of post conditions of PAPs will be highlighted. Two types of monitoring, viz; Internal and External monitoring will be established. Internal monitoring of acquisition of land and access rights process will be undertaken by the licensee and its agencies following schedules itemized in the RAP, while external monitoring will be done by the Commission or any other interested agencies or stakeholders.

1.5(x) Miscellaneous

This final section will deal with penalties to ensure the effective enforcement of the Regulation by the Commission and compliance by Licensees and PAPs. Also matters relating to fees for permits, declarations and certificates to be issued by the Commission will be clarified.

1.6 Conclusion

The Regulation we have in view will facilitate power projects and ensure the mitigation of adverse social impacts which are induced by the power project operations. In other words, the Regulation will protect the interest of Licensees and ensure that PAPs do not suffer disproportionately as a result of power projects which are designed for the benefit of the public as a whole.

1.7 Response to this CP

Persons who wish to make comments should send their comments within 30 days from date of this publication to: DGM (Legal, Licensing & Enforcement)
Nigerian Electricity Regulatory Commission, Adamawa Plaza
1099 1st Avenue
Abuja
Email:odinneh@nercng.org

Responses:

Stakeholders are invited to respond to issues raised in this Chapter particularly as it relates to

1. The sufficiency and adequacy or otherwise of objectives and principles underlying the Regulation;
2. Whether the present framework for acquisition and compensation is wholly appropriate where a commercial organisation wishes that government acquires land or access rights for its private commercial purposes;
3. Whether the structure have fully covered the field as it relates to developing a Regulation on acquisition of land and access rights for power projects in Nigeria.

CHAPTER 2

2.0 Acquisition Conditions and Procedures

The conditions to be satisfied and procedures that will be followed during planning, preparation and implementation of land and access rights acquisition will all be routed in the Commission's operational procedures for acquisition of land and access rights which is outlined in this chapter 2. At project identification and preparation, a Social Impact Assessment (SIA) and Environmental Impact Assessment (EIA) of the power project will be conducted to determine, whether or not, the project(s) would require a compliance with the Commission's Regulation. The application of the principles set out in the Regulation will be triggered wherever there will be land and access rights acquisition that would entail adverse social impacts.

2.1 Distinction Between Acquisition of Land and Acquisition of Access Rights.

A proper distinction must be made between acquisition of land and the acquisition of access rights within the context of our laws. Keeping this in mind would create room for a better understanding of the underlying principles and procedures for their respective acquisition.

One major difference is that land acquisition extinguishes the title of the owner and transfers same to the person on whose behalf it is acquired. The same cannot be said of access right acquisition, which merely transfers possession or right of easement to the licensee. The essential point in access right is that the licensee merely obtains a right to have access or pass through a particular piece of land to place his facilities on or under the land. This right may be permanent or temporary, and may not necessarily entail the cessation of use of that same land by the owner. For instance, an owner of land may grant access for the building of electricity overhead lines, yet he may still continue to farm on the land provided he does not interfere with the overhead lines facilities. This is not the case with land acquisition, as the owner's right to use the same land is totally and finally extinguished.

Another major difference is that acquisition of land is by way of revocation of the right of occupancy by the Governor in favour of a licensee, while nothing of this sort applies to acquisition of access right. Under the Land Use Act, the entire process of land acquisition is controlled by the state where the land is situate, including the determination of compensation. However, access rights acquisition does not involve the revocation of any right by the state, rather it involves negotiation between the owner and the person or authority seeking to have access, and in the absence of any statutory provision, is regulated by the received English common law.

Significantly, the EPSRA fully took cognizance of this distinction and clearly made separate provisions for them. Essentially the Act clearly provides the framework for land acquisition leaving the Commission with powers to regulate only the form of application and to determine the terms and conditions for making declaration that land is required by a licensee for the purpose of the license. On the other hand, the Act gave to the Commission, the power to make regulation for access rights acquisition.

2.2 Conditions for Land Acquisition.

Section 77 of the EPSRA provides the legal framework for land acquisition. Of greater relevance is the provision that the Commission has the power to specify such conditions as it

may specify for land acquisition. Although the framework for land acquisition is defined in the EPSRA, it still remains the duty of the Commission to give flesh to the bare bones of that framework and put in place a regulation that will give force to the letters of the law. Consequently, the licensee on whose behalf and benefit land is to be acquired by the government will be required to follow the procedure laid down by the Commission and collaborate with the Commission to achieve outcomes that are consistent with the objectives of the Regulation. Also, the licensee will prepare a Resettlement Action Plan (RAP) or framework that together with the government policy will address the relevant standards of the Regulation. This plan or framework may inter alia contain;

- A description of the entitlements of PAPs under the applicable laws and regulations;
- The measures proposed to bridge any gap between such entitlements and the regulation; and
- Financial and implementation responsibilities of the government and the licensee.

Finally, persons aggrieved by the declaration of the Commission are entitled to the right of appeal as set out in Section 50 of the EPSR Act.

2.3 General Procedure for Acquisition of Land and Access Rights

The general procedure for acquisition of land and access rights can be divided into ten general phases:

1. Planning: This phase concerns the licensee and involves location identification, social and environmental impact assessments certification, and design studies. This would require the consent of the PAP his agent as the case may be.

2. Consultation.

Thereafter, Licensee will give the PAPs information on licensee's interest in acquiring land or access and procedures to be followed, including the overall timing of acquisition, the general type of facility to be constructed, and the appraisal procedure that will be followed. This may also entail public involvement in the nature of public hearing and consultation with relevant stakeholders. The licensee and the Appraiser will also extend invitation to PAP or his representative to accompany the appraiser during the process of enumeration and appraisal.

3. Approval. The licensee will at this stage submit to NERC, EIA and SIA approvals or certificates together with a RAP which will satisfy the requirements of NERC as set out in the Regulation.

4. Appraisal: This phase deals with appraisal qualifications, appraisal requirements, enumeration, and appraisal or evaluations of assets, economic trees, crops and businesses, appraisal reviews etc. The Licensee in conjunction with NERC's approved appraiser will enumerate and appraise the value of the economic trees and assets and have the appraisal reviewed to establish amount of compensation in accordance with the Regulation.

5. Negotiation, Compensation Payment and Documentation: This phase deals with the Licensee's offer to acquire land or access rights over lands, buildings and streets, prompt payment of compensation, notices to vacate, retention of improvements. The Licensee will deliver the written offer (initiation of negotiations) to acquire land or access rights in an amount not less than the approved appraised value with a copy of the appraisal to the owner and immediately furnish a copy of the offer letter to NERC. When the offer is accepted, the Licensee will arrange payment and proceed to closing the deal. The Licensee will notify NERC when the deed is signed by both parties on each part and file a duplicate copy with NERC. In case of Land acquisition, the Commission will deliver the Certificate of Occupancy to the Licensee.

6. Dispute Settlement: This phase will deal with the mechanism for settlement of disputes that may arise in the course of enumeration, valuation and compensation payment. If the offer is not accepted within twenty one (21) days from the date of the offer letter, then either the PAP or the Licensee shall proceed to an Administrative Settlement. NERC will give a decision within thirty days (30) days and deliver copies of its decision to the parties. Thereafter NERC will issue certificate as evidence of acquisition of access rights.

7. Property Management: This phase otherwise known as demolition and salvage deals with disposition of improvements acquired in the acquisition and methods for accomplishing the clearing of right of way.

8. Resettlement: This phase deals with making provisions for resettlement of PAPs.

9. Monitoring and Evaluation: This will assist in the identification of gaps in the implementation process with a view to rectifying them.

10. Corrective Action Plan Implementation: Gaps identified during the process of monitoring and evaluation will be addressed.

2.4 Conclusion

This procedure, without doubt is intended to protect the interest of PAPs, Licensees and the general public. The Commission will ensure that no request for acquisition of land or access rights is entertained until the Licensee submits a RAP to be reviewed and approved by the Commission. This RAP will embody the principles contained in the Regulation, which will inter alia require that no civil works is commenced and no displacements are made until people receive their compensation or are resettled.

2.5 Responses

Responses are invited on:

1. The design of the Regulation to reflect the difference in land and access rights acquisition as contained in the EPSRA, 2005.
2. What further terms and conditions should be imposed on land acquisition, apart from those highlighted in the foregoing passages.
3. Whether the phases for acquisition are exhaustive.

CHAPTER 3

3.0 Legal and Regulatory Framework

Acquisition activities more than any other aspect of project development are controlled by state and Federal Laws and Regulations. Consequently, personnel and Licensees reforming acquisition function must be constantly alert to the content of Laws and Regulations, and to the appropriate interpretation to them in the field. Specifically the Constitution, Land Use Act and the EPSRA are the principal laws that regulate acquisition of land and access Right for Power Project in Nigeria.

3.1 The Constitution

The Constitution of the Federal Republic of Nigeria forbids arbitrary compulsory or involuntary acquisition of private property. Accordingly, compulsory deprivation of property or expropriation is subject to prompt payment of compensation and a right of access to a court of law or tribunal or body having jurisdiction in that part of Nigeria for the determination of the affected person's interest in the property and the amount of compensation. The same constitution validates any general law, subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect poles cables, wires, pipes or other conductors or structures on any land, in order to provide, or maintain the supply of distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.

3.2 The Land Use Act

Government is statutorily empowered to acquire land for power projects in Nigeria under the Land Use Act. This is so because, Section 28 of the Land Use Act can very easily be invoked by the Governor (in the case of any land comprised in his state, excluding "federal" land) or the President or his Minister (in the case of land comprised in the Federal Capital Territory, Abuja or any other land anywhere in Nigeria vested in the Federal Government) so as to revoke the right of occupancy therein and have the land granted on the relevant company for power projects.

Although revocation is tied to public purpose, the definition of "Public Purposes", under Section. 51 (1) (e) of the Land Use Act, provides that land can be revoked and vested in any company licensed to generate, transmit or distribute electricity in Nigeria. In the context of this law, it is immaterial that the company generating the electricity and being vested with right of occupancy in the land for that purpose is a privately owned firm or corporation.

Of significant note is the provision for the payment of compensation for revocation. The Act defines compensation for land as the rent, if any paid by the occupier during the year in which the right was revoked, while that of building, installation or improvement is the amount of their replacement cost less any depreciation together with interest at the bank rate for delayed payment of compensation. If items to be compensated for are crops growing on a land, it is for the State's chief land officer to determine the amount payable as compensation.¹

¹ See, s. 29(5) L. U. A.

Apart from compensation, the Act provides that resettlement may be offered at the discretion of the Governor in any other place or area by way of a reasonable alternative accommodation and that where a person accepts resettlement no further compensation. If the value of the said alternative accommodation is higher than what the monetary compensation should otherwise have been, the difference can be deemed as loan by the government to the holder, which it is his obligation to pay. Conversely, if a person shows preference for alternative resettlement as against monetary compensation, he is deemed to have waived the right to further compensation, even if the real value of the alternative accommodation is lower than the improvements for which compensation are due.²

Also refundable, as a form of compensation, is any ground rent already paid in the year when revocation is affected. On the other hand, if only a part of a given piece or parcel of land is affected by the revocation order, compensation is proportionate to the percentage of the area revoked. In other words, the adequate proportion of what should have been payable had the right of occupancy of the entire land been revoked.³

In the case where the holders of the land is a community, and as such entitled to compensation, it is the Governor who determines whether to pay the compensation to the community or its chief/leader, whose responsibility it shall be to utilize the money in a manner consistent with the customary laws of the community. If it is payable to the community, the Governor decides whether the money should be paid into community fund designated for the interest of the entire community.⁴

3.3 The Conditions for Valid Revocation

Given the significant qualification of the Governor's powers by the Act and the effect of judicial activism as illustrated in the cases, it is obvious that the Governor's power of revocation of lands in his state is not necessarily absolute, at least, not in the sense of an absolute owner. The following authorities add credence to this opinion:

- (a) Where there is a failure to serve the notice of intention to revoke a right of occupancy personally on the holder, before the notice is published in the gazettes, it amounts to substantial non-compliance with the law.-*A.G. Bendel State v. Aldyan*⁵.
- (b) The reason for revoking a person's right of occupancy must be stated in the notice of revocation - *Obikoya v. Governor of Lagos State*⁶.
- (c) A certificate or right of occupancy can only be revoked by the specific methods laid down under S.28 of the Act- *Oboro v. R.S. H. & P.D.A*⁷
- (d) In the absence of notice of revocation, any purported revocation of right of occupancy would be void and of no legal effect- *NITEL and 2 others v. M. O. Ogunbiyi*⁸, **Hon. Justice Achike J. C. A (as he then was)**, made the following postulation: *'It would be quite invidious to regard any substituted service as a proper service of notice of revocation when the residence and whereabouts of holders are within the knowledge of the party serving the notice. This will hardly accord with good sense or common sense. That would be erecting an imminently dangerous precedent at the hands of mischief-*

²s. 33 of the Act.

³ Ibid, s. 29(5).

⁴ Ibid, s 29(3)

⁵ (1989) 4 NWLR (pt 118) 85.

⁶ (1997) INWLR (Pt 350) 385

⁷ (1997) 9 NWLR (pt 521) 425.

⁸ (1992) 7NWLR (pt 255) 543

makers outside the contemplation of the combined effect of sections 28 (6) and (7) and 44 of the Act.'⁹

The Act goes on to expressly provide that when the property is extinguished by revocation, the continued stay on the land by the holder becomes illegal and he may be forcibly ejected by the state, free from any judicial intervention.¹⁰

Furthermore, the Act vests in the Land Use and Allocation Committee, the right or power to settle disputes that may intermittently arise in relation to the amount of compensation payable in accordance with the provisions of the Act.¹¹ A follow up to this, is a curious provision in Section 47 (2) to the effect that courts are devoid of any jurisdiction to inquire into any question concerning the amount of any compensation paid under the Act. However, in *Enugwu v. Okefi*,¹² the Court of Appeal, Enugu division, held the provision invalid for being inconsistent with the unlimited jurisdiction of the State High Court as constitutionally preserved¹³.

3.4 Electric Power Sector Reform Act 2005

The regulation of land and access rights acquisition for power projects in Nigeria is vested in the Nigerian Electricity Regulatory Commission (NERC) by section 77 of the EPSRA 2005. The said Section 77 provides the legal framework for land acquisition, but of immense relevance to this assignment is the provision that the Commission has the power to specify such conditions as it deems fit for land acquisition in addition to the ones stipulated under the Act. Therefore, it remains the duty of the Commission to give flesh to the bare bones of that framework and put in place a regulation that will give force to the letters of the law.

3.4.1 Acquisition of Land

Section 77 of the Electric Power Sector Reform Act 2005 gives NERC the power to make declaration that land is required by a licensee for the purpose of discharging its obligations under the license. That same Section 77 empowers NERC to prescribe the form of application, which a licensee will fill whenever it requires land for the purpose of its license. The Commission is also empowered to call for information from any quarter prior to issuing a declaration, and this may include extending an invitation to the Commissioner of Lands of the state where the concerned land is situated.

The Commission on being satisfied that its conditions and requirements have been met, will issue a declaration, that a licensee for the purpose of the license requires the land so identified. It is on the strength of this declaration that the President will issue a notice in a gazette to the effect that the Government of the Federation requires the land for the public purpose of the Federation¹⁴.

The commission in issuing the declaration must ensure that:

- The physical environment is protected;

⁹ Ibid at p557.

¹⁰ See, s-28 of the Act.

¹¹ Ibid, s. 30

¹² (2000) 3NWLR (pt 650) 620 at 629

¹³ s. 236, 1979 constitution FRN, now s. 272 1999 constitution.

¹⁴ Section 77 (6) *ibid*.

- There is no greater damage to streets or interference with traffic than is reasonably necessary; and
- Funds are available for meeting any liabilities, which may arise from the exercise of any rights or powers of land acquisition.

The Act also provides that any person having an interest in the land will be given an opportunity to make representation with respect to the licensees' application. In addition, any person aggrieved by the declaration of the Commission has a right of appeal to the Commission, which is regulated by the provision of Section 50 of the EPSRA.

Most importantly, Section 77(9) provides for the legal mechanism for achieving the end objective of acquisition process. It provides that: *“ Where the President issues a notice under subsection (6), the Governor shall in accordance with the provisions of section 28(4) of the Land Use Act , revoke the existing right of occupancyand grant a certificate of occupancy in favour of the concerned licensee in respect of the land identified by the Commission...and the grant of such certificate, the right of occupancy over the land shall vest in such licensee to the exclusion of the previous holder of the right of occupancy... who shall be entitled to claim compensation in accordance with the provision of the Land Use Act. ”*

3.4.2 Acquisition of Access Rights

The same Section 77 in its subsection (7) gives the Commission the power to make regulations to entitle a generation, transmission licensee, and distribution licensee to have access rights over lands, buildings, and streets for discharging its obligations under its license. This present assignment represents part of the Commission's best efforts in this direction. It is important to point out that the term “access right” means the same thing as “Wayleave” or “Right of Way”.

3.4.3 Protection of Land and Access Rights

Section 79 of the Act also affords protection to land and access rights acquired for power projects by providing that any person who desires to construct any road, railway, or any works for telecommunications on any such land or access right must notify and seek the approval of the Commission.¹⁵ Where the Commission determines that the construction would adversely affect electric facilities, the Commission is required to direct the person to remedy or prevent the injury or interference. The Act imposes liability for all losses and damages on any person involved in the construction if he fails to heed the Commission's directive. The sense in this provision is not far to grasp bearing in mind the prime importance of electricity and the danger in unauthorised interference with its facilities.

3.5 International Best Practice

The World Bank Operational Policy for Involuntary Resettlement (OP 4.12) and IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement have always been regarded as representing the best standard practice all over the world for land and access right acquisition operations, popularly called resettlement. These documents are highly admired because of their in depth and thorough understanding of the issues involved in land and access rights acquisition coupled with their clear and fair position on how to treat PAPs. The Bank's policy (in paragraph 2) therefore advocates that where feasible, involuntary

¹⁵ It appears that the enforcement of this provision is presently weak or that government appears to be ignorant of its obligation as evidence abound of cases of unapproved interference with land and access rights by government.

resettlement should be avoided or minimized and that resettlement must be conceived and executed as a sustainable development program, providing sufficient investment resources to enable persons displaced by the project, share in project benefit.

Persons displaced must be:

- Meaningfully consulted and should have opportunity to participate in the planning and execution of the resettlement;
- Compensated for their losses at full replacement cost prior to civil works;
- Assisted with the move and supported during the transitional period in the resettlement site; and
- Assisted in their effort to improve their former living standards, income earning capacity and production levels or at least to restore them.

Furthermore, the IFC Performance Standard 5 requires projects companies to:

Avoid or at least minimize involuntary resettlement wherever feasible by exploring alternative project designs;

Mitigate adverse social and economic impacts from land acquisition or restrictions on affected persons' use of land by:

Providing compensation for loss of assets at replacement cost; and

Ensuring that resettlement activities are implemented with the appropriate disclosure of information, consultation and the informed participation of those affected;

Improve or at least restore the livelihoods and standards of living of displaced persons; and

Improve living conditions among displaced persons through provision of adequate housing with security of tenure at resettlement sites.

3.6 Comparing Nigerian Law and the World Bank Op 4.12 and International Finance Corporation (Ifc) Standard 5

The World Bank OP 4.12 and International Finance Corporation(IFC) Standard 5 contain language that demands that there should be a deliberate policy to avoid or at least minimize involuntary acquisition or resettlement wherever feasible, by requiring project sponsors to explore alternative project designs. Also project owners are mandated to mitigate adverse social and economic impacts from land and access right acquisition or restrictions on affected persons' use of land by:

- Providing compensation for loss of assets at replacement cost; and
- Ensuring that acquisition and resettlement activities are implemented with appropriate disclosure of information, consultation and the informed participation of those affected.

Furthermore, these documents explicitly make adequate provision for PAPs who are either displaced or suffer other losses, as a result of projects, to be adequately compensated and taken care of. Taking care of PAPs is not the concern of Nigerian law, although there is provision for compensation.

Nigerian laws provide for compensation to be paid to only persons whose legal interests have been affected in the land in question. However, the World Bank and IFC Policies and Standards insist that all forms of interests other than legal should be respected and compensated for losses without exception. Under Nigerian statutes, it is the preserve of the Commissioner for Lands to assess loss due to land and access rights acquisition but the World Bank and IFC Policies and Standards recommend informed participation of the PAPs to ensure that the project enjoys the full support of the Bank and affected persons.

Furthermore, the Operational Policy of the World Bank and the IFC Performance Standard directs that PAPs are assisted during their transition period in the resettlement site and that efforts should be made to restore their livelihoods. Nigerian laws are entirely in the deficit in these areas.

3.7 Conclusion

It is also important to note that there is no single reference document for persons involved in acquisition of private property for electricity projects in Nigeria, and that it is usually difficult to identify various Federal and State laws and regulations that must be followed in the acquisition process. Also from the foregoing, we have come to realize that there are serious gaps in our national legal and regulatory framework which ought to be remedied. We shall therefore give serious consideration to the World Bank Policy and the IFC Standard documents, which represent international best practice, as they would provide the essential building blocks for the Regulation.

3.8 Responses

Responses are invited on:

1. What other legal and regulatory framework should have been considered as having a bearing on land and access rights acquisition for power projects?
2. Whether the present legal and regulatory framework for acquisition of land and access rights together with compensation is wholly appropriate?
3. Whether adopting World Bank Policy and the IFC Standard will violate Nigerian law.

CHAPTER 4

4.0 Institutional Framework

Some institutions and agencies will participate in the enforcement and implementation of Regulation on land and access rights acquisition process, while others will be impacted by it. The ultimate responsibility, however, rests with the Commission and its implementing agencies to ensure that there is proper interface and avoid regulatory chaos.

For the purpose of this CP, the activities of the major institutions are highlighted.

4.1 The Commission

NERC as the regulator is saddled with enormous responsibilities with respect to acquisition of land and access rights for power projects in Nigeria. Primarily, the task of developing and updating regulations is one of such responsibilities, which this present assignment represents. It is expected that the regulation will be whole and entire in its scope and substance in view of the importance of land and access right acquisition to power projects.

Another important task is the granting of approvals or certificates and the issue of declarations to licensees at various stages of the process of acquisition. The performance of this task will, for instance carry with it the responsibility of ensuring that projects are designed in such a manner as to reduce impact. It will also entail the use of certain clearly defined criteria for the issue of approvals, certificates and declarations, all of which will be defined in the Regulation.

The appraisal of compensation in conjunction with licensees is also one of the major responsibilities of the Commission considering its sensitive nature and the fact that most disputes over land and access rights acquisition emanate from this point. Hitherto we have not had an independent or NERC certified Appraiser who have the duty of appraising the value of assets, economic trees and crops. This novelty will ensure transparency and instill confidence in the minds of all, especially the PAPs.

The regulator will also drive the machinery for the settlement of disputes that may arise in the process of acquisition. This aspect is vital because of the need to ensure that disputes do not stall projects and create a situation of hopelessness in the minds of investors. An administrative process that is quick in the dispensation of justice will be highly admired by foreign investors in particular and the parties involved in general. Accordingly, the regulator will have to put in place an efficient and just system of dispute settlement as one of its major responsibilities, which will do away with the attendant problems of unending litigations in the regular courts of law. To this end, the decision of the Commission will bind the parties except on issues of law.

The regulator will also set resettlement standards and approve resettlement measures and plans to ensure that PAPs are treated fairly. Its duty in this respect will also extend to monitoring and evaluation.

Interface with other relevant agencies like the Nigerian Communication Commission, the Railways, Town Planning Authority, etc, is another major task of NERC in its regulation of land and access rights acquisition. The essence of this is to avoid regulatory chaos and conflicts which might create unnecessary challenges.

Finally, we recognize that developing the regulation is not sufficient, as there is an added burden of ensuring compliance by licensees, PAPs, the government, other agencies and all other stakeholders. This will entail close monitoring of all the processes and practices to ensure that the legitimate expectations of all are met within the context of our national laws and international best practice. Further to this is the need to have a Department of Acquisition of Land and Access Rights that will be in the driving seat to interface with licensees, PAPs, other agencies to ensure full compliance with the Regulation.

4.2 Legal and Licencing Division of NERC

As we pointed out earlier, there are on-going land and access right acquisition exercises for electricity projects almost all over Nigeria, which are being executed by PHCN or Licensees without the consent, knowledge or oversight of NERC and most probably, if not certainly in breach of the extant laws and the Electric Power Sector Reform Act. To address this gap, the Legal and Licensing Division of NERC would set up a committee that will primarily be responsible for oversight and enforcement of the regulation to ensure strict compliance.

Accordingly, this committee is to be responsible for the administration of the regulation and compliance by licensees, PAPs, the government, other agencies and all other stakeholders. Its primary duty will also entail close monitoring of all the processes and practices in collaboration with Licensees and affected parties in land and access rights acquisition processes.

4.3 Staff and Capacity Building

NERC is to ensure that it has qualified and competent Appraisers (Estate Surveyors and Valuers), Lawyers, Accountants, Project Development Experts and Social Scientists. Each of these professionals has a role to play, though collectively in ensuring optimum realization of the regulatory mandate of the Commission as it pertains to land and access right acquisition administration.

There will be the need to train and retrain the staff in order to adequately equip them for the onerous task placed on them. They will also spearhead the development of a manual for land and access rights acquisition for power projects in Nigeria, which will detail succinctly the procedure for land and access rights acquisition and the rights of PAPs.

4.4 The Role of Licensee

Licensee will be expected to discharge certain responsibilities to ensure the overall success of the regulation realizing that the regulation is in their best interest. Some of these responsibilities include:

Compliance with the procedures, practices and standards established by the regulation.
Preparation and submission of Corporate Policy on acquisition of land and access rights or RAP, EIA, and SIA reports or certificates which will be approved by NERC.

4.5 Town Planning Department

There is a Town Planning Department in every state which usually operates under the Ministry of Land. They have the responsibility of ensuring that developments are done orderly and that land use is not abused. It is responsible for the preparation of layouts for towns and cities. It also vets and approves layout by prospective developers (especially the Private Estate Developers) and specifies all reservations based on projected land use plans. They also receive applications for development permits, vets them and recommends their approval or otherwise.

Town planning schemes will therefore be considered and consultations will be made with the Department to ensure that those plans are not violated without recourse to the Department. Accordingly the Department will be involved to ensure that the acquisition of land or access rights is implemented in accordance with the approved planning schemes.

4.6 Environmental Protection Agency

The Environmental Protection Agency (EPA) was established by the Environmental Protection Agency Act. The EPA is charged with the duty of prescribing standards and guidelines relating to environmental protection and/or pollution. Development of power project is one of the undertakings that require the issuance of environmental permit before construction could be done. This permit is preceded by an Environmental Impact Assessment of the project by the EPA.

4.7 Federal Ministry of Justice

Grievances usually arise in land and access rights acquisition which end up in the courts of law. Affected persons who are not satisfied with the process of acquisition or the quantum of compensation due them are empowered by the constitution to seek redress in the court of law. When this happens, the Attorney General's Department represents the government in the court's proceedings. The Attorney General's Department is also responsible for drafting the Gazette for acquiring the needed land for power projects under Section 77 of the EPSRA 2005.

4.8 State Government

We have noted the extensive powers of the state Governor over land within each state. The Act vests in the Governor the power to delegate any of his powers to any of his commissioners.¹⁶ Furthermore, the Act vests in the Land Use and Allocation Committee, the right or power to settle disputes that may intermittently arise in relation to the amount of compensation payable in accordance with the provisions of the Act.

No doubts, the enormous and exclusive powers vested in the Land Use and Allocation Committee, on disputes bordering on compensation, pursuant to **Sections 30 and 47 (2)** is appointed and constituted by the Governor. Thus being the case, fairness and objectivity are not likely beyond the whimsical interest of the Governor whose pleasure determines the longevity of the tenure of members of the committee. Also if items to be compensated for are crops growing on a land, it is for the state's chief land officer to determine the amount payable as compensation.¹⁷

4.9 State High Courts

State High Courts have jurisdiction over land in Nigeria. Accordingly matters relating to acquisition of land and access rights are within the jurisdiction of the High Court. Although there is a curious provision in **Section 47 (2)** to the effect that courts are devoid of any jurisdiction to inquire into any question concerning the amount of any compensation paid under the Act. However, in *Enugwu v. Okefi*,¹⁸ the Court of Appeal, Enugu division, held the

¹⁶ Ibid, s. 45

¹⁷ See, s. 29(5) L. U. A.

¹⁸ (2000) 3NWLR (pt 650) 620 at 629

provision invalid for being inconsistent with the unlimited jurisdiction of the State High Court as constitutionally preserved¹⁹.

4.10 Local Government

The right of occupancy regime created by the Land Use Act creates two broad categories of right of occupancy, namely, right of occupancy by the express grant of the Governor or Local Government.²⁰ If the land is located in an urban area of the State, it is the subject of *Statutory Right of Occupancy*. On the other hand, if it is located in the non-urban area of the state, it is the subject of *Customary Right of Occupancy* granted by the Local Government.

4.11 Other Utilities

Other utilities are bound to be impacted by acquisition of land and access rights for power projects. It is for this reason that Section 79 of the act provides: “*that any person who desires to construct any road, railway or any works for telecommunications on any such land or access right must notify and seek the approval of the Commission.*”

Also some of these agencies at the appropriate times disconnect and reconnect PAPs to their services before and after land and access rights acquisition as the case may be. It is against this backdrop that there will be the need for proper interface and regulatory harmony. Thus, special consideration will be given to these agencies.

4.12 Conclusion

Regulatory interface and harmony are essential to avoid chaos and conflicts between different agencies of government and the Commission. It is against this backdrop that effort will be made to ensure that the Regulation is developed with care to reflect a proper understanding of this principle.

4.13 Responses

Responses are invited on;

1. What other institutional framework should have been considered as having a bearing on land and access rights acquisition for power projects.
2. How best to achieve regulatory harmony and interface between the Commission and other agencies of government in matters of acquisition of land and access rights for power project.

¹⁹ s. 236, 1979 constitution FRN, now s. 272 1999 constitution.

²⁰ ss. 5 and 6 of the Act

CHAPTER 5

5.0 Electricity Projects Impacts, Eligibility Criteria and Entitlement

5.1 Nature of Impact

Electricity projects have far-reaching impacts on land and livelihood of PAPs. This is inevitably the case because the generation, transmission and distribution of electricity require the acquisition of land or access rights, which may entail the cessation of businesses and the giving up of certain private or communal rights over property, such as structures, crops and economic trees. Sometimes, the project may require only a temporary right on a portion of property; sometimes, a permanent easement on a portion of property; sometimes, the project may require total ownership of a portion of property; and sometimes, the project may require total ownership of the entire property.

A matrix of project impact is in Table A. However, a list of some of the likely impacts which electricity projects may entail is as follows namely:

- Disturbance of quiet possession and ownership of land and businesses.
- Giving up of all or part of possession or title over land.
- Loss of farmland.
- Destruction of crops.
- Loss of businesses.
- Demolition of houses and structures on land.
- Destruction of cultural heritage.
- Adverse environmental effects like pollution and erosion.
- Destruction or relocation of graves and shrines.
- Relocation or resettlement of project displaced persons.

5.2 Assessment of PAPs

The term "PAPs" (PAPs) refers to people who are directly affected environmentally, socially, economically and spiritually by power projects. A good knowledge of the population affected, their categories and special needs early in the planning process is critical to a successful acquisition of land and access rights operation. A census/ socioeconomic survey will be undertaken by licensees to obtain the total number, categories and needs and preferences of PAPs as part of the RAP preparations.

This will inform the choice of resettlement/compensation options and help estimate compensation cost. The size of the population affected is determined by the project design which would be finalized early. In a situation where the design is reviewed, the data on PAPs will be updated to correspond to the current design. The census will be done as early as possible to avoid the inflow of other individuals into the affected right of way (ROW). The likely displaced persons will be categorized using identifiable groupings or demographics (such as occupational groups, gender, age groups) and their standards of living and specific needs identified, described and assessed. The socioeconomic survey will constitute the basis for evaluating the success of the acquisition of land and access rights operations in terms of whether the PAPs have been able to restore their incomes and improve their standards of living. The needs of vulnerable households such as the under listed will be particularly noted:

- (a) Female headed households with dependents.
- (b) Disabled household heads.
- (c) Households falling under the generally accepted indicator for poverty.
- (d) Elderly households with no means of support.
- (e) Indigenous minorities.

5.3 Eligibility

Any person who suffers loss of or damage to an asset or loss of access to productive resources, as a result of the carrying out of any of the licensed power projects will be considered eligible for compensation and/or resettlement assistance, provided the damage or loss is induced by the project and satisfies the conditions of the cut-off date (which will be set out and enforced during the socioeconomic survey). This is consistent with the laws of Nigeria and the World Bank policy. For instance, provisions under Clause 15 of the World Bank's Operational Policy 4.12 suggest the following three criteria for eligibility which may be adopted in the Regulation:

- Those who have formal legal rights to land (including Customary and Traditional rights recognized under the laws of the country);
- Those who do not have formal legal rights to land at the time the census begins but have a claim to such land or assets provided that such claims are recognized under the laws of the country or become recognized through a process identified in the RAP;
- Those who have no recognizable legal rights or claim to the land they are occupying.

The eligibility will be based on the category of losses at the cut-off date identified through the various interest and rights derived from customary laws, common law and international conventions and in specific cases as agreed with affected community.

5.4 Proof of Eligibility

The Licensee will require proof of eligibility to receive entitlement from claimants so as to ensure that the right people who are actually affected by the projects are the ones receiving the compensation. This will reduce the incidence of ghost claimants and waste of scarce resources.

The Licensee is expected to consider various forms of evidence as proof of eligibility to cover:

- Affected persons with formal legal rights, documented in the form of land title instruments like Certificate of Occupancy (C of O), Deed of lease, tenancy agreements, rent receipts, building and planning permits, business operating licenses, utility bills among others. Unprocessed/unregistered formal legal documents will not bar eligibility and procedures for confirming authenticity of such documents will be established in the Regulation.
- Affected persons with no formal or recognized legal rights -

Criteria for establishing non-formal, undocumented or unrecognized claims to eligibility shall be established paying particular attention to each situation and its peculiarities. Alternative means of proof of eligibility will include:

- Affidavit signed by Landlords and Tenants;
- Witnessing or evidence by recognized Traditional Authority, Customary

Heads, Community Elders, Family Heads and Elders and the general community.

5.5 Defining Entitlement

The basis of what is to be paid as compensation will be determined by identifying the most appropriate entitlement for each loss. Based on these entitlements, compensation options would be defined by the Regulation.

5.6 Conclusion.

The Regulation will ensure that all types of losses are identified, clearly defined and properly categorized to reflect the nature of the loss. Furthermore, a standard or measure for defining eligibility and entitlement in order to have a fair basis for assessing compensation for the loss or impact suffered which have been outlined in the foregoing passages will be incorporated into the Regulation.

Responses

Responses are invited on;

1. Proper classification and definition of type of loss, eligibility criteria and entitlement.
2. Supplementary assistance as a form of compensation considering the fact that it is presently unknown in Nigeria.
3. How to treat squatters.

CHAPTER 6

6.0 Assessment of Compensation - Appraisal Issues

Determining what should be paid is not usually an easy task as proper care must be taken to ensure that an appropriate value is placed on assets, economic trees and crops through the appraisal process. The Land Use Act defines compensation for land as the rent, if any paid by the occupier during the year in which the right was revoked, while that of building, installation or improvement is the amount of their replacement cost less any depreciation together with interest at the bank rate for delayed payment of compensation. For crops, the value is an amount equal to the value as prescribed and determined by the appropriate officer. Apart from compensation, the Act provides that resettlement may be offered at the discretion of the Governor in any other place or area by way of a reasonable alternative accommodation and that where a person accepts resettlement no further compensation is to be paid.

Recognizing the complicated nature of assessment of compensation or evaluations and the need to ensure transparency and reduce the likelihood of disputes, Licensees will be required to consult with the Land and Access Rights Department of NERC regarding the appraisal.

Before initiation of negotiations, NERC certified and appointed appraiser together with the licensee would be required to evaluate the structures, economic trees and crops and have the values reviewed by a qualified reviewing appraiser in order to establish compensation. An exception to this requirement is when a parcel will be donated and the property owner waives the establishment of compensation through the appraisal process. Compensation will not be approved until the appraisals are reviewed and accepted by NERC.

For acquisition by negotiation, compensation is the amount established as the approved value through the appraisal process.

6.1 Use of Appraisers

There would be appraisers who are certified or licensed by the Council of Estate Surveyors and Valuers and registered with the Commission. These appraisers will work in close collaboration with the Department of Land and Access Right Acquisition of NERC. There will also be an independent appraiser who is a staff of NERC whose responsibility will be to review and approve the appraisal report. The Department will maintain a roster of certified/licensed appraisers.

6.2 Compensation And Appraisal

Some methods have evolved regarding how to estimate the value of assets in an appraisal. A proper consideration of these methods would be apposite in our search for the most appropriate to adopt in appraisal of structures.

6.2(i) Fair Market Value

"Fair market value" method is the standard rule and practice in the United States and has been defined by the courts as *"the value that would be assigned to the acquired property by*

knowledgeable parties freely negotiating for its sale under normal market conditions based on all surrounding circumstances at the time of the taking”²¹

6.2(ii) Replacement Cost

This is a method of evaluation of structures that seeks to evaluate the value of the structure and the cost of building a similar structure within the same area. All the attendant costs like labour, transportation and cost of building materials are taken into account in determining the replacement cost. In determining this cost, the appraiser should be guided by the fair open market cost of replacement.

6.2(iii) Replacement Cost, Less Depreciation

Nigerian law provides for compensation less depreciation. This method requires the appraiser to reduce the value of the structure by taking into account the level of obsolescence of the structure. In effect, the owner is exposed to a risk, since compensation payment may not be sufficient to replace his former structure.

Considering that this situation does not satisfy international best practice, we are to proceed on the understanding that our law has set a minimum standard, and that there is nothing to be lost if the provision is made to go beyond that minimum standard. Hence licensees should be required to take further measures to ensure that compensation would not leave the PAP in a worse position as a result of the project.

6.2(iv) Sales Comparism Approach

The sales comparism approach is most useful when a number of similar properties have recently been sold or are currently for sale in the property market. The appraiser produces value indication by comparing a project affected property with similar properties, called comparable sales. The sale prices of the properties that are judged to be most comparable tend to indicate a range in which the value of the affected property will fall.

An appraiser estimates the degree of similarity or difference between the affected property and comparable sales by considering various elements of comparism. Among these are location, market conditions, physical characteristics, economic characteristics etc.

6.3 Appraisal of Land

A proper consideration of the Constitution and the Land Use Act shows clearly that there is no provision for compensation for undeveloped land or bare land. What is compensated for is the unexhausted improvement on the land. However, a holder of a certificate of occupancy over an undeveloped land should in all fairness get a compensation for his land; hence it is desirable to pay an owner of undeveloped land, the market value of a similar land in the area.

²¹ ." State v. Silver, 92 N.J. 507, 513-14 (1983).

6.4 Appraisal of Economic Trees and Crops

The Land Use Act provides that for crops, the value is an amount equal to the value as prescribed and determined by the appropriate officer. In determining the value of the economic trees and crops, the appraiser is to be guided by the approved rates by the various states' and Federal Ministries of Agriculture or Forestry as the case may be. It has been discovered that the rates are not uniform throughout Nigeria, hence the need to require the appraiser to do a comparative study and adopt the highest rate paid either by any State Ministry or the Federal Ministry.

Another pertinent question arises here as regards the method of valuation by the government as evidenced in the various rates, which only takes into account the value of the standing tree or crop. There is nothing to show a real appreciation of the degree of loss which an owner suffers as a result of the loss of an economic tree or crop. For instance any fair method of appraisal ought to take into account the actual loss and the loss which the owner will suffer until such a time when the replanted economic tree or crop will start yielding fruits. Although this method might be more expensive for licensees, yet it appears to reflect and represent the core values of just compensation.

6.5 Contents of a Detailed Appraisal Report

A detailed appraisal report will be required and shall reflect nationally recognized appraisal standards and must contain sufficient documentation, including valuation data and the appraiser's analysis of that data, to support his or her opinion of the value. As a minimum requirement, the appraisal shall contain interalia, the following items:

- The purpose and/or the function of the appraisal, a definition of the asset, economic trees or crops being appraised, and a statement of the assumptions and limiting conditions affecting the appraisal.
- An adequate description of the physical characteristics of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property); a statement of the known and observed encumbrances, if any; title information, location, zoning, present use, an analysis of highest and best use;
- All relevant and reliable approaches to value, consistent with commonly accepted professional appraisal practices;
- A statement of the value of the asset to be acquired and for a partial acquisition, a statement of damages and enhancements, if any, to the remaining real property;
- The effective date of valuation, date of appraisal, signature, and certification of the appraiser.

6.6 Owner's Right in Appraisal

The regulation will require that the property owner, or the owner's designated representative, be given an opportunity to accompany the appraiser during the appraiser's inspection of the assets or economic trees. The invitation to the property owner will be given either by the Licensee and copied to the appraiser. The invitation should be made in writing, with sufficient

length of time for the owner to arrange to be present or to request an alternative time. If the owner declines the invitation to accompany the appraiser, the declination should also be in writing and be retained in the Licensee's file. Where the owner is unavoidably absent or unavailable, his next of kin or authorized agent can accompany the appraiser.

6.7 Appraisal Review and Approval

NERC shall have an appraisal review process, which includes as a minimum: A qualified reviewing appraiser who shall examine all appraisals to ensure that they meet NERC appraisal requirements and shall, prior to acceptance, seek correction or revision of those which do not.

The review appraiser plays an important role in the acquisition process and is charged with a great deal of responsibility. Persons assigned this responsibility should be thoroughly qualified with both education and the experience to review the appraisal so as to ensure that the approved estimate of fair market value is reasonably supported.

6.8 Conclusion

The Regulation will ensure that all types of losses are identified, clearly defined and properly categorized to reflect the nature of the loss. Furthermore, a standard or measure for defining eligibility and entitlement in order to have a fair basis for assessing compensation for the loss or impact suffered which have been outlined in the foregoing passages will be incorporated into the Regulation. In addition, the appraisal process will make it possible for both the PAPs and qualified appraisers certified by NERC to actually take part in the appraisal exercise.

6.9 RESPONSES

Responses are invited on:

1. What method(s) will reflect and represent the core values of just or appropriate compensation.
2. Considering that there is no provision in our constitution for compensation for bare land, would payment for such, amount to a breach of the Constitution.
3. How best can PAPs be protected in the appraisal process.
4. The use of NERC certified appraisers and a staff appraisal reviewer which are novel in Nigeria.

CHAPTER 7

7.0 Negotiation, Payment of Compensation and Closing

7.1 Negotiation

Negotiations shall be conducted through personal contacts with the property owner. Due to constraints of staff or travel, negotiations may be conducted via electronic means or by postal service mail, with a follow-up telephone call. If the owner is available in the local area, they should be offered the option of a personal contact. Where the owner is unavoidably absent or unavailable, his next of kin or authorized agent can be contacted.

The *negotiation* contact may consist of more than one meeting with a property owner. During negotiation contact the Licensee will:

- Present the offer letter;
- Fully discuss the offer;
- Answer any questions the owner has regarding the offer and acquisition;
- Explain the *administrative, and judicial settlement* of any dispute;
- Deliver a copy of the appraisal upon which the offer is based; and
- Have the owner sign an Acknowledgement of Receipt of Appraisal Report. Should the property owner refuse to sign an acknowledgement of receipt of appraisal report, the Licensee may send the appraisal report to the property owner via certified mail and return the receipt requested.
- No specific negotiation report is required; however, *all* owner contacts should be documented in the file.

7.2 The Cut – Off Date

The Appraiser must give a clear and definite date of enumeration and appraisal to ensure that only the assets, economic trees and crops that are found on the land on such date are appraised. The reason for this is to stop speculators who invade or occupy the land after such a cut-off date from claiming any interest or making claims for compensation.

7.3 Timing of Compensation Payment

Although our Constitution and the Land Use Act provide for prompt compensation, the practice over the years shows that compensation takes place several years after demolition or acquisition, leaving the Project Affected Person in abject poverty, deprivation and frustration. These states of affairs impoverish PAPs and this will be changed to a new procedure that will require payment prior to commencement of civil works, which is in the best interest of the Licensees and the PAPs.

7.4 Payment of Compensation

The Licensee will be required to make a prompt written offer for the full compensation amount to the property owner. If the updated appraisal report or new appraisal indicates a need to change the compensation offer, then the licensee will submit a revised written offer to the property owner. Delivery of the offer constitutes initiation of negotiations and is the principal date for determination of cut-off date. The Licensee will include the following items in the written offer:

- A statement of the amount offered as just compensation. In the case of partial acquisition, it will state the compensation for real property and compensation for damages, if any, separately.
- A description and location of the access right parcel and of the type of interest to be acquired. The description and location of the parcel can be in general terms.
- A copy of the appraisal (excluding the review document) on which the offer is based.

Licensee is to retain copies of all signed letters in Licensee's files and promptly forward one copy of the offer letter to NERC.

The Licensee shall sign *all* offer letters. The Licensee shall when delivering final offer letters, include an explanation of the administrative and judicial settlement process for the owner's (s') information.

7.5 Evidence of Acquisition

The acquisition of access rights over land involves a transfer of legal interest in land and ought to be by deed, while the acquisition of land is evidenced by a Certificate of Occupancy. Accordingly, a licensee will be required to obtain and execute a deed of transfer of that interest from the Project Affected Person. The current practice in Nigeria is that PAPs sign INDEMNITY CERTIFICATES in favour of the Power Holding Company of Nigeria stating among other things that they have renounced all their claim and interest over the land.

Upon presentation of either the Deed or Certificate of Occupancy, NERC will now issue an order declaring the Land or Access Right comprised in the Deed or Certificate as having been acquired for the purpose of the License.

7.6 Demolition and Salvage

During construction, the following may be required:

- Temporary removal or relocation of certain structures and fences.
- Early harvest of crops where possible or felling down of economic trees.
- Removal or relocation of equipment and livestock.
- Relocation of shrines, graves and cultural monuments.

NERC will insist on payment of Compensation prior to demolition. During demolition a licensee, may allow the property owner to retain improvements and make appropriate reductions in the parcel price if the property owner retains improvements.

When improvements are retained by the owner, compensation for the real property interest acquired will not be less than the difference between (1) the *approved value* for the owner's entire interest and (2) the established retention values of all improvement(s). The amount deducted from just compensation for a parcel when any improvement is retained is referred to as "retention value."

If improvements are retained, the property owner's deed to Licensee must properly indicate all retention.

7.7 Conclusion

The acceptance of compensation signals the end of negotiation and helps to reduce the incidence of compulsory acquisition by government. The high points of these proposals are:

- Negotiation with the owner;
- Payment prior to acquisition and demolition; and
- Documentary evidence of acquisition.

7.8 Responses

Responses are invited on:

- The sufficiency and adequacy or otherwise of the process of negotiation and payment.
- Whether the present proposals are appropriate and sufficient to protect the right of the licensee over acquired land or access rights.

CHAPTER 8

8.0 Settlement of Disputes

8.1 Administrative Process

We have noted in our gap analysis that there is no satisfactory dispute settlement mechanism, hence there are in our courts several thousands of cases resulting from grievances from PAPs who feel deprived and shortchanged by project sponsors who fail to meet their legitimate expectations. These cases stall electricity projects and impede the goal of government to improve the power situation in Nigeria.

Most of these cases arise where the PAP disputes the offer of compensation and demands an increase in value, while the rest arises due to non observance of the requisite procedure. In any of this circumstance, the aggrieved person may apply for review by the Appraisal Reviewer and has a right to petition the Commission and a further right of judicial review on points of law.

8.1.1 Application for Appraisal Review

A PAP who is dissatisfied with the amount of compensation can apply to the commission for the review by appraisal reviewer, who may approve or recommend a value either by an additional appraisals or by any other method consistent with the Regulation.

8.1.2 Petition to NERC

Where the aggrieved person is not satisfied with the decision of the Appraisal Reviewer, he will be required to submit a petition to NERC within 14 days of the decision of the Appraisal Reviewer. Proceedings by NERC may require the PAP to substantiate the claim for higher compensation and give evidence as regards any other matter that will guide NERC in reaching a determination within 14 days of the filing of the Petition.

Any other issue or dispute arising from land or access right acquisition is also to be decided by petition to the Commission in the first instance.

8.2 Judicial Review

To reduce delays associated with litigation and the risk of project cost overruns, the PAP will be entitled to apply for judicial review only on points of law. This position is consistent with other regulations of the Commission.

8.3 Conclusion

The procedure for dispute settlement is designed to mitigate the risks and delays associated with land and access rights acquisition in the interest of power project sponsors and investors, while in the same process adopting, as far as possible, international best practices for settlement of disputes that would entrench a regime of smoother and quicker resolution of disputes arising from land and access rights acquisition.

8.4 Responses

Responses are Invited on:

1. The sufficiency and adequacy or otherwise of principles underlying the procedure for dispute settlement.
2. Whether the use of this procedure will conflict with that contained in the Land Use Act as it relates to settlement of dispute arising from compensation determination and payment.

CHAPTER 9

9.0 Resettlement of Displaced Persons

9.1 Resettlement Option

The Land Use Act provides that resettlement may be offered at the discretion of the Governor in any other place or area by way of a reasonable alternative accommodation and that where a person accepts resettlement no further compensation will be paid. This option is solely at the discretion of the Governor and it could be in any other place or area.

However, for this right to be meaningful there is the need to apply certain basic principles to reflect the real intent of the Act. Thus, resettlement must be aimed at giving the PAP a reasonable alternative accommodation which should for all intents and purposes be comparable to his former dwelling. A reasonable alternative accommodation should be:

- Decent, safe and clean.
- Functionally equivalent to the displacement dwelling.
- Adequate in size to accommodate the occupants and in an area not subject to unreasonable, adverse environmental conditions.
- In a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, commercial and public facilities and reasonably accessible to the person's place of employment.
- For a squatter or tenant who paid little or no rent for the rental unit in the dwelling being acquired, the fair market rent (economic rent) is used, unless its use would result in a hardship because of the person's income or other circumstances.

9.2 Timing of Resettlement

The question of timing of resettlement is very vital because any rule or practice that allows a Licensee to displace a person prior to resettlement would definitely work or invoke untold hardship on the PAP. It is the view that the rule demands that resettlement before displacement will be preferred.

9.3 Resettlement Assistance

Project displaced persons usually suffer considerable hardship in relocating, hence the need to render assistance to them to ameliorate their hardship. Licensees would therefore be required to render one form of assistance or the other in this regard, like providing preferential employment opportunities, counseling and other activities that show a high degree of corporate responsibility.

9.4 Conclusion

These principles enunciated in the foregoing passages are intended to ensure that PAPs are not left in a worse state because of the project instead they should at least be restored as far as possible to their former status.

9.5 Responses

Responses are invited on:

1. The sufficiency and adequacy or otherwise of these proposals for the purpose of restoring PAPs to their former status prior to the project.
2. Whether these proposals fully capture the expectation of PAPs, Licensees and stakeholders.
3. Whether resettlement should carry additional burden on the licensee to ensure that PAPs are restored to their former status prior to the project.

CHAPTER 10

10.0 Monitoring and Evaluation

Monitoring and evaluation will be a continuous process and will include internal and external monitoring to ensure that the objectives of the regulation are satisfied.

10.1 Internal Monitoring

Internal monitoring of the resettlement/rehabilitation operations will be undertaken by the Licensee and its agencies following the schedules in the RAPs. The licensee will continuously take stock of all expropriation and compensation report and produce quarterly report for the Commission. Cost of monitoring will be taken care of by the licensee.

10.2 External Monitoring

External monitoring will be done by the Commission. Also NGOs will be considered in the external monitoring.

10.3 Completion Audit

An independent audit NERC approved Consultant will be done to determine whether the efforts to restore the living standards of the affected population have been properly designed and executed. This completion audit will verify that all physical inputs earmarked in the RAP have been delivered and all services provided.

The audit will also evaluate if the mitigation actions prescribed in the RAP have had the desired effect. The baseline conditions of the affected parties before the relocation will be used as a measure against their socio-economic status after the resettlement. To be effective, the completion audit will take place after all RAP activities have been completed including development initiatives, but before the financial commitments to the programme are finished. This will allow the flexibility to undertake any corrective action that the auditors may recommend.

10.4 Corrective Action Plan

Gaps identified during the process of monitoring and evaluation will be addressed by this plan, of which NERC will require every licensee to incorporate in its RAP or Corporate Policy on Land and Access Rights Acquisition. Such action may incorporate how best the licensee intends to treat vulnerable persons who are affected by the project and how to restore livelihood of persons whose businesses have been affected adversely by the project.

10.5 Conclusion

Monitoring and evaluation are critical aspects of the entire process as they will assist in the identification of gaps in the implementation process with a view to rectifying them.

10.6 Responses

Responses are invited on: Further proposals to ensure effective monitoring and evaluation.

CHAPTER 11

11.0 Miscellaneous

11.1 Penalties

This final section will deal with penalties to ensure the effective enforcement of the Regulation by the Commission and compliance by Licensees and PAPs. Also matters relating to fees for applications, permits, declarations and certificates to be issued by the Commission will be regulated. For instance, a Licensee who embarks on acquisition of land or access rights in violation of the Regulation may stand the risk of having his license cancelled or suspended.

11.2 Fees

The Commission will also issue necessary permits, certificates, forms for application for acquisition of land and access rights and charge processing fees. Also, application fees will be charged for the registration of Appraisers and Consultants who will be involved in the Appraisal processes.

11.3 Conclusion

Regulations are meant to be obeyed or enforced for meaningful impact. It is for this reason that the Commission will impose such penalties as it deems fit for contravention of the Regulation, while the fees will take care of administrative issues relating to processing of applications and permits.

11.4 Response

Responses will be invited on:

1. Adequate penalties for violation of the Regulation.
2. Appropriate fees for permits, applications and Certificates.

NEXT STEPS

The proposals set out in this Consultative Paper, together with all the responses obtained will be discussed by all the stakeholders during a national stakeholder's workshop. Following these discussions, we anticipate publishing the conclusion with a view to making the new rules.