



**BEFORE THE NIGERIAN ELECTRICITY REGULATORY
COMMISSION**

HOLDEN IN LAGOS

CASE NO: NERC/H/03/07

ORDER NO: NERC/H/ 061

IN THE MATTER OF:

**THE PETITION ON THE SUPPLY OF ELECTRIC POWER
AND EXCESS CHARGES BILLED TO THE RESIDENTS
OF VICTORIA GARDEN CITY (VGC) ESTATE, LAGOS**

DECISION

BETWEEN

PETITIONER: MRS. FUNKE ADEKOYA, SAN

AND

RESPONDENTS: 1. VGC MANAGEMENT & MAINTENANCE COMPANY
LTD. (“VMMCL”)

2. EKO ELECTRICITY DISTRIBUTION COMPANY
 (“EEDC”)

INTERVENOR VGCPORA (Represented by Mr. TOYIN PINHEIRO)

BEFORE

- 1. DR. RANSOME OWAN - CHAIRMAN
- 2. MALLAM ABDULRAHMAN ADO - VICE-CHAIRMAN
- 3. DR. ALIMU ABDUL-RAZAQ - COMMISSIONER
- 4. ENGR. ABIMBOLA ODUBIYI - COMMISSIONER
- 5. DR. GRACE EYOMA - COMMISSIONER
- 6. PROF. O.C. ILOEJE - COMMISSIONER
- 7. ENGR. M.B.G. BUNU - COMMISSIONER

APPEARANCES

Mr. GIDEON AGBEDE } (Esq)
Mr. KELECHI UGBEVA } (Esq) for the Petitioner

Mr. DELE MARTIN }
} for the 1st Respondent

Mr. L. A. ORESANYA for the 2nd Respondent

FACTS OF THE MATTER

This is a petition brought by Mrs. Funke Adekoya, SAN (the Petitioner), acting through her solicitors, ALEX, Legal Practitioners. The Petitioner challenges the legality of the power supply arrangements which, prior to and until January 2008, existed at the Victoria Garden City Estate (VGC Estate or the Estate).

The Estate, located in the Lekki Peninsula area of Lagos State, is a private estate. It comprises, for the most part, residential dwellings with a few commercial and light industrial occupants. The Estate is managed by VGC Management & Maintenance Company Ltd (VMMCL or the Company). The Company is incorporated at the Corporate Affairs Commission as a private company limited by shares, with Registration Certificate number (RC No.) 504288.

In return for managing the Estate and maintaining its infrastructure, VMMCL charges residents management or maintenance fee. It often interacts with property owners and residents of the estate through the VGC Property Owners and Residents Association (VGCPORA). The term “residents” in the last sentence and in subsequent parts of this decision, also includes businesses within the Estate.

Like virtually all areas of the country, the Estate has historically suffered unreliable power supply. In a bid to find a solution to this problem, VMMCL approached the

Eko Electricity Distribution Company Plc (EEDC) to find ways of improving the reliability of power supply to the Estate sometime in 2006. EEDC, a successor company to the Power Holding Company of Nigeria Plc (PHCN), is the distribution licensee responsible for distribution of electricity within the Eko Distribution Zone, within which the Estate is located.

EEDC advised VMMCL to connect VGC Estate directly to its 33KV line, from which supply is more reliable. The 33KV line is a bulk electricity network facility, used by distribution companies in Nigeria to supply power directly from the 132KV transmission network. The salient features of the structure proposed by EEDC to VMMCL are outlined below:

VMMCL will fund the design, construction, commissioning of the 15MVA, 33/11KV injection substation that would enable it secure connection of the Estate to the 33KV line; [EEDC would treat VMMCL or VGC Estate as a single bulk customer, supply to which would be measured by a bulk, Maximum Demand (MD) meter placed by EEDC at the 33KV side of the substation;

- EEDC would deliver power to the substation, from where VMMCL would be responsible for delivery to residents in the Estate.
- EEDC will continue to offer technical support to the Estate to facilitate prompt repairs of faults/damages to existing electrical distribution equipment. VMMCL also sought a commitment from EEDC that they would continue to maintain the distribution network in the Estate (the network was initially built by the developer of the Estate);
- EEDC would, for each billing period (monthly) deliver to VMMCL, a single bill for all the electricity consumed in the Estate, on the basis of readings of the MD meter;
- based on the tariff approved for MD customers, EEDC will bill VMMCL at the rate of ₦8.50 per kWh; and
- VMMCL would pay EEDC the amount so billed, and would, in turn, bill and collect payments from residents of the Estate for electricity consumed in their individual premises.

The above arrangement was soon implemented, and by 4 May 2007, the Estate's electricity supply was successfully upgraded from the 11KV supply to the 33/11KV supply, although the terms of the arrangement were never reduced into an agreement. VMMCL had communicated EEDC's proposal and conditions to the residents of VGC Estate by a letter dated 3rd of July 2007. According to the VMMCL, the property owners and residents in the Estate were informed of the arrangement before it was accepted, and at all stages of project implementation.

The petitioner confirmed receipt of the letter notifying her of the new power supply arrangement dated 3rd July 2007 and responded through her solicitors protesting the imposition of this arrangement without proper consultation by a letter dated 13th July 2007.

The residents were advised by the VMMCL that as part of the new arrangement, new meters would be installed in premises where there were no Pre-payment meters while the old Pre-payment meters (PPMs) earlier supplied by EEDC would be reconfigured to reflect the new unit cost arising from change of tariff class from R3 to R5. However, due to the fact that the old electro-mechanical meters supplied by EEDC and in use in the Estate could not be reconfigured, it was agreed that EEDC would remove these meters so as to ensure accurate electricity metering and proper revenue collection for electricity consumed by residents. The PPMs and the associated vending machine installed by VMMCL at the Estate were operated and maintained by VMMCL.

VMMCL billed residents at the rate of ₦12.00/kWh. This represented the ₦8.50/kWh billed by EEDC and a mark up of ₦3.50. However, despite EEDC charging VMMCL the bulk tariff of ₦8.50/kWh as a single customer on the 33KV side of the substation, EEDC was still vending electricity within VGC Estate at ₦6/kWh for consumption through the EEDC installed meters.

The Petitioner contends that the above power supply arrangement is illegal by reason of being contrary to the Electricity Power Sector Reform (EPSR) Act of 2005. The basis of this contention is that VMMCL has not been granted a licence to distribute, or trade in electricity under the EPSR Act. Furthermore, the Petitioner contended that there has been no approved increase in the tariff of ₦6.00 approved for R3 category of residential customers under the prevailing NERC approved tariff for PHCN.

The Petitioner therefore claims refund of tariffs charged to her in excess of ₦6.00, being the approved R3 residential tariff, as well as stoppage of further “excess” billing by VMMCL.

VMMCL contended that it was not trading in, or distributing electricity, but was only “coordinating” the use of electricity by the residents of VGC Estate, and the payment of their bills. Thus, the Company asserted that it did not require a licence. The 2nd Respondent, EEDC, stated, amongst other things, that the VGC Estate is among over 40 estates presently on bulk metering in Lekki Business District. According to the EEDC, all of these Estates are billed on the R5 tariff, i.e. at ₦8.50/kWh (the approved tariff for Maximum Demand (MD) residential customers). It supplies power to VMMCL and leaves the management of the electricity distribution infrastructure behind the bulk metering point to VMMCL. EEDC did not see any illegality in this

arrangement, while it was VMMCL's contention that the illegality, if any, in the transaction was perpetrated by EEDC.

In fact, VMMCL joined issues with EEDC on various matters, and sought a number of reliefs against EEDC. In particular, VMMCL asked the Commission for the following reliefs:

- refund of the sum of ₦7,805,908.56, being an estimate of the cumulative total of the balances due to VMMCL from EEDC as a result of the differential in the ~~₦6.00~~/kWh charged by EEDC on the EEDC meters and the ~~₦8.50~~/kWh charged to VMMCL by EEDC at the bulk metering point;
- enforcement of an alleged "agreement" between VMMCL and EEDC for a 10% rebate on the tariffs charged by EEDC to cover VMMCL's costs of administration of the metering arrangement within the Estate;
- investigation of an alleged discrepancy in the calibration of EEDC's bulk meter for the Estate and a check meter installed by VMMCL, with a view to determining the amount, if any, due to VMMCL by reason of over billing by EEDC and ordering a refund of this amount;
- a refund to VMMCL, of the sum of ₦6,720,000 paid to PHCN by HFP Engineering (Nig.) Ltd. (HFP) for the supply and installation of 128 units of 3 Phase PPMs at ₦52,500 per PPM, prior to commencement of the bulk billing arrangement; and
- reversion to a tariff of ~~₦6.00~~/kWh for residents of the Estate.

ISSUES FOR DETERMINATION

The issues for determination, as defined by the Commission are as follows:

- (a) Does VMMCL require a licence for the activities it is carrying on?
- (b) Can VMMCL unilaterally impose electricity tariffs on the residents of VGC Estate over and above approved electricity tariff rates?
- (c) Can EEDC delegate its responsibility for the maintenance of the distribution network to VMMCL? In other words, should VMMCL be responsible for maintenance of the distribution network in VGC Estate?
- (d) Can VMMCL install meters and vend cards for electricity purchase?
- (e) Who should be responsible for the difference of ~~₦2.50~~/kWh between the ~~₦8.50~~/kWh bulk tariff paid to EEDC by VMMCL and the ~~₦6.00~~/kWh paid by residents previously on EEDC Pre-Payment Meters (PPM)?
- (f) Can VMMCL compel residents previously on EEDC PPM to pay the difference (~~₦2.50~~/kWh) between the amounts paid by other residents on the VMMCL

- meters and those on EEDC meters for the period when purchases were made by the latter directly from EEDC?
- (g) Can VMMCL compel EEDC to remove the PPMs already installed by EEDC to enable VMMCL install its own meters?
 - (h) Who bears the risk of technical and non-technical losses between the bulk metering point and the rest of the Estate?
 - (i) Can the residents pay the R3 residential tariff of ₦6.00/kWh, even though the Estate is bulk metered?
 - (j) What should be the ideal contractual and legal arrangement between VMMCL and EEDC?
 - (k) Does VMMCL have the right to install check meters?
 - (l) Should VMMCL be compelled to refund the difference between ₦12.00/kWh charged to residents prior to January 2008 and the approved ₦8.50/kWh charged by the EEDC?

THE COMMISSION'S FINDINGS

This Petition raises many questions that are of significant impact on the regulatory regime for the Nigerian Electricity Power Sector. Consequently, we have stated the factual basis for our findings on the issues raised by the parties in this matter, the arguments advanced for and on behalf of the parties on each issue, before rendering our decision on the issues. In particular, we have also provided the regulatory and logical principles underlying the legal provisions.

In reaching our decisions on the various issues raised in this matter, we have considered our primary responsibility to make decisions in harmony with the public interest, whilst, in accordance with our statutory mandate, creating, promoting and preserving efficient industry and market structures. On the foregoing basis, the Commission finds on the various issues raised in this matter as stated below.

1. Does VMMCL require a licence for the activities it is carrying on?

This question may be phrased differently by asking whether VMMCL is engaged in a regulated activity for which the EPSR Act requires an electricity licence. Counsel to the Petitioner argued that the power supply arrangement in VGC Estate involves VMMCL intermediating between EEDC and the residents of VGC Estate. Furthermore, he argued, VMMCL purchases electricity from EEDC and resells to residents of the Estate, and is therefore engaged in

marketing. He therefore urged the Commission to hold that VMMCL was engaged in illegal trading of electricity.

Responding, VMMCL urged that “we are not engaged in trading, neither are we engaged in the supply of power.”¹ VMMCL argued that the arrangement merely allowed VMMCL, the entity responsible for managing VGC Estate, to settle PHCN (*sic*) bills on behalf of all the residents of the Estate, instead of PHCN preparing and sending bills to each individual resident or customer, and “then chasing them up to collect its money.”

The Commission holds that VMMCL’s assertion that it was not engaged in trading is not a matter of fact to be presented in evidence, but a conclusion to be drawn by the Commission, upon consideration of the relevant facts and the law. In reaching that conclusion, we will juxtapose the relevant provisions of the EPSR Act with the activities being performed by VMMCL and EEDC.

Section 62(1) of the EPSR Act provides that the following activities may only be undertaken in accordance with a licence issued or deemed issued under the EPSR Act:

- electricity generation, excluding captive generation (generation of electricity for the purpose of consumption by the generator and which is consumed by the generator itself and not sold to a third party);
- electricity transmission;
- system operation;
- electricity distribution; or
- trading in electricity.

Of the above-listed regulated activities, the activities relevant to this matter are distribution and trading in electricity.

Section 100 of the EPSR Act provides the following definitions, which are relevant to the issues at hand:

- “Distribution” is the delivery of electricity over a distribution system.
- “Distribution System” is defined as the system of facilities, as defined by the Commission, consisting wholly or mainly of low voltage (less than 132kV) electric lines used for the distribution of electricity from grid supply points to the point of delivery to consumers or eligible customers, and includes

¹ See page 9, paragraphs 11 & 12 of VGC Hearing Transcript

any electrical plant and meters operated in connection with the distribution of electricity, but shall not include any part of a transmission system.

- “*Trading*” is any form of marketing, brokering or intermediation in the sale of electricity, whether or not it entails the purchase of electricity for resale, or whether or not title is taken to the electricity sold.

To answer the question raised in this section, the Commission will juxtapose VMMCL’s activities against the definitions of the term, “distribution”, “distribution System” and “trading” in the EPSR Act.

1.1 *Is VMMCL engaged in distribution of electricity?*

From the definitions in section 100 of the EPSR Act, electricity distribution occurs when:

- there is a conveyance of electricity;
- the conveyance occurs over low voltage (less than 132 kV) electric lines;
- the electricity is delivered from the grid supply points over the low voltage electricity lines to the ultimate consumer.

Thus, the regulated activity, for which a distribution licence is required, involves taking delivery of power from the grid connection point, for onward delivery to the end users. The construction, ownership, operation and or maintenance of the low voltage wires and associated facilities for carrying out such activity would form part of the distribution “undertaking” within the meaning of section 100 of the EPSR Act. We note, that this network is said to be owned by VMMCL. However, statutorily it forms part of the electricity undertaking of EEDC even though it was built by the HFP. Consequently, maintenance remains the obligation of EEDC. Notwithstanding the fact that the network within the Estate has been maintained by VMMCL as well as HFP since construction, it does not shift responsibility for the maintenance away from EEDC whose responsibility is statutory.

From the evidence, EEDC merely delivers electrical power to the bulk metering point from which VMMCL assumes responsibility for all other aspects of the distribution function. These functions include the following matters expressly reserved for a distribution licensee by section 67(1) of the EPSR Act:

- connection of customers for the purpose of receiving a supply of electricity; and
- the installation, maintenance and reading of meters, billing and collection.

The only exception to the requirement of licensing for distribution activities is where the electricity distribution capacity is less than 100kW. The power consumption at VGC Estate is estimated at more than 7MW. Consequently, we find that VMMCL is engaged in the business of electricity distribution for which a license issued under section 67 of the EPSR Act is required.

Thus, VMMCL having been engaged in the act of building and maintaining electricity distribution facilities, including metering, billing and collecting money from residents at the Estate without a licence or prior permit from the Commission is in clear contravention of the EPSR Act.

1.2 *Is VMMCL engaged in electricity trading?*

The question that may arise is whether, if a finding is made that VMMCL does not own, operate or maintain the distribution network within VGC Estate, and is therefore not engaged in distribution, VMMCL is engaged in the activity of trading, for which a licence is required under the EPSR Act?

Section 100 of the EPSR Act defines “trading” *to mean any form of marketing, brokering or intermediation in the sale of electricity, whether or not it entails the purchase of electricity for resale, or whether or not title is taken to the electricity sold*’.

Clearly, this definition envisages a situation where a person purchases electricity for resale, or even facilitates sale of electricity as a broker or other intermediary. The definition is wide enough to encompass the usual activity of a Distribution Company. However, we will distinguish distribution from trading. Distribution is the maintenance of a distribution undertaking, that is, low voltage wires and other facilities with which the electricity is delivered. In its customary signification, electricity trading does not necessarily require ownership and or operation of electricity wires: a trader could merely intermediate in the electricity supply chain by buying electrical energy from a seller (which could be a generation or Distribution Company, or even another trader) and on-selling same to any other party that requires the energy. Of course, the buyer could be the end-user or a market participant that buys for resale.

The trader does not take physical delivery of the power; it is delivered to the buyer over electricity wires owned by a transmission or Distribution Company. The terms of electricity transportation or conveyance by such companies are specified in the appropriate agreement.

The Commission has not issued any trading licenses and subject to an exception in the case of the Special Trader referred to in the EPSR Act; it will consider the issuance of trading licences at the appropriate time.

The Commission therefore concludes on this issue that, even if by reason of disclaiming ownership and operation and or maintenance of the distribution undertaking within VGC Estate, VMMCL argues that it is not engaged in electricity distribution, it will be unable to avoid a finding that it is involved in intermediation between EEDC and electricity users in VGC Estate within the definition of “trading” in the EPSR Act.

On the basis of the foregoing, because the capacity engaged in is more than 100kW, the Commission holds that VCMML is in part engaged in a regulated activity for which an electricity licence is required. We reject the assertion by VMMCL, that it was coerced into accepting the bulk billing arrangement by EEDC – it was a fully responsible corporate party entering into an agreement with another corporate party. It acted of its own volition, and was motivated, not by coercion by EEDC, but by a desire to obtain for the residents of VGC Estate, more stable electricity supply at higher voltage than was provided when EEDC directly handled the “last mile” connections into the Estate.

In addition, while it is understood that the VMMCL was pressed for reliable power for its tenants and so opted to go into this arrangement and the bulk charge of ₦8.50/kWh, the fact that they added extra charges to this would amount to trading without a licence.

What applies to VGC applies to every bulk meter customer anywhere in the country. If any extra charge is made part of the Unit cost, it becomes an embedded cost which is the tariff, in this case ₦12.00/kWh. Once there is a charge over and above approved rates and that are made part of a tariff surcharge (without distinction) for delivery of electricity, that would amount to trading.

VMMCL states that it is not-for-profit company. For the avoidance of doubt, a not-for-profit company should be limited by guarantee, not shares. Furthermore, the Commission rejects VMMCL’s assertion that it had no control over supply of power in the Estate. It was engaged in unauthorised regulated activities, since it has no licence to undertake the activities carried out as required by the EPSR Act nor was there evidence that such an arrangement had been authorised by the Commission as required under the terms of the licence of the Distribution Company.

2. Can VMMCL unilaterally impose electricity tariffs on the residents of VGC Estate over and above electricity tariff rates?

The Petitioner, through her counsel, asserted that the difference between the ₦8.50/kWh at which EEDC supplied power to VMMCL and the ₦12.00/kWh that VMMCL sold to end users amounted to excess charges which should be refunded. The Petitioner argued that distribution and trading are subject to tariff regulation, and that any tariff not established in accordance with tariff methodologies issued by the Commission is illegal. Thus, the Petitioner concluded that since the Commission was yet to issue any methodology for tariff increase, section 98(3) of the EPSR Act requires that tariffs chargeable to the residents of the Estate must remain at pre-Act levels. The Petitioner asserted that, no entity, VMMCL included, can set tariffs above what was in place before enactment of the Act.

VMMCL, in relation to the above, argued that it collected a tariff of ₦12.00/kWh for the sole purpose of ensuring that it collected sufficient money to enable it pay for the amount metered by EEDC, irrespective of losses within its system and that “there was never any intention to make profit, there was never any intention to keep the difference between what we had to pay to PHCN and what we collected from the residents of VGC”².

On this matter, we are compelled by law and logic to totally accept the argument advanced on behalf of the Petitioner. VMMCL, not being a distribution or trading licensee cannot, whether acting unilaterally or in consultation with other parties, increase the tariffs payable for electricity. Section 76(1) of the EPSR Act provides that certain activities, including electricity distribution and trading, for which licences are required under the Act, are subject to tariff regulation by the Commission. The purpose of tariff regulation is to set tariffs which specify the prices, terms and conditions under which electricity service is to be provided. All licensees are required to comply with applicable tariffs as set for the industry, or derived in accordance with the methodology established by the Commission. Thus, even if VMMCL was a distribution and/or trading licensee, it is bound to comply with the methodologies issued by the Commission before implementing a tariff increase for captive customers. The Commission had not made any changes to rates as was the case at the time the trading arrangements in question were implemented. Section 98(3) of the EPSR Act requires that the tariffs charged before the EPSR Act was passed should continue to be charged. Thus, VMMCL and for that matter, EEDC, cannot validly charge a tariff other than the approved residential tariff to VGC Estate residents, or any other class of customers.

² See page 11, lines 28-31 of the transcript of the Hearing

The purpose of tariff regulation is to protect end use customers from unreasonable or unjustifiably high tariffs. We would be abdicating our responsibilities in this regard if we were to permit a distribution licensee and a private company, by private treaty or otherwise to charge higher than approved tariffs.

3. Can EEDC delegate its responsibility for the maintenance of the distribution network to VMMCL? In other words, should VMMCL be responsible for the maintenance of the distribution network in VGC Estate?

The Petitioner asserted that, under the existing arrangements, EEDC supplies power to the Estate's injection substation, from which VMMCL distributes the electricity to the residents through distribution facilities established by VMMCL. VMMCL admitted this assertion. Its witness and the Deputy Managing Director of the Company, Mr. Dele Martins, stated that "our duty, as we saw it, was to promptly settle the bill of PHCN, to ensure that meters were installed in each household, to measure what they consumed, to recover the amount billed by PHCN via the sale of electricity recharge cards, to maintain all the electricity infrastructure within the network, the transformers and meters..."³. Furthermore, EEDC stated that under the licence issued to it by the Commission, VMMCL can be made responsible for the maintenance of the distribution network within VGC Estate. EEDC admitted that VMMCL and or the developers of VGC Estate built and installed the network in the Estate.

Again, we agree with the Petitioner and reject, in unequivocal terms, the position advanced by VMMCL and EEDC. We find no provision in EEDC's licence which justifies its assertion that VMMCL can unilaterally manage the distribution network within the Estate without permission from the Commission. Section 62(1) of the EPSR Act clearly prohibits "operation" of an electricity distribution undertaking by an entity which is not licensed for that purpose. VMMCL is not so licensed and is not entitled to operate and or maintain a distribution undertaking. Indeed, we further find that the EEDC, by virtue of its licence, is responsible for the maintenance of the entire distribution network to the meter of the consumer, unless otherwise approved differently by the Commission and upon petition by the EEDC.

In the particular circumstances of EEDC, Conditions 21 and 25 of its Distribution Licence obliges EEDC to ensure that distribution networks within

³ See.... Lines 9-14 of page 15 of the transcript of the Hearing

its licence areas are operated in a safe and efficient manner and to bear full responsibility for the operation and maintenance of the distribution infrastructure within its area of operations. Condition 41(1) imposes the responsibility of installing and maintaining of meters within that area on EEDC. Furthermore, the Distribution Code in Section 3.13 (Maintenance and Testing) as well as Section 1.4 (Maintenance) requires the EEDC to prepare maintenance schedules.

Thus, the electricity Distribution Company entitled to operate and maintain distribution undertakings in the area is EEDC, which, by virtue of its license conditions and the Commission's Connection and Disconnection Procedures for Electricity Services Regulations of 2007, S.I. No. 41 of 2007 (Connection and Disconnection Regulations), also has a universal service obligation within the territory covered by its distribution licence, including VGC Estate.

Furthermore, the issue here is whether or not EEDC may delegate or transfer all or part of its universal service obligations with particular emphasis on maintenance obligations for the distribution network in the VGC Estate to VMMCL. The Commission has examined this issue from the perspective of two (2) alternative scenarios, namely:

- where VMMCL is engaged in electricity delivery on its own account, and not as agent or other contractor for EEDC; and
- where VMMCL is engaged in electricity delivery as agent or other contractor for EEDC.

3.1 *Transfer of distribution obligations to VMMCL in its own right*

From the facts of the matter, as presented at the Hearing, this scenario is more representative of the current power supply arrangements in VGC.

In our view, such transfer/delegation without permission would require VMMCL to engage in regulated activities without a licence. The terms and conditions of EEDC's licence prohibit such transfer and its effect would be to promote an illegality. It would require VCMML to construct, own or operate an undertaking for the distribution of electricity in contravention of the EPSR Act.

Furthermore, section 69(1) of the EPSR Act provides that a licensee ***“...shall not, ... assign or cede his licence or transfer his undertaking, or any part thereof, by way of sale, mortgage, lease, exchange or otherwise without the prior consent of the Commission provided that, should the Commission determine that in any instance the circumstances so require, it may establish licence terms and conditions providing its specific or***

general consent for any or all of the foregoing. In accordance with this provision, Condition 9 of EEDC's Distribution Licence states that EEDC shall not, without the Commission's consent, transfer, assign or cede to any person, all or any part of the licensed business.

Thus, EEDC cannot validly transfer its distribution obligations in VGC Estate to VMMCL without "...the prior consent of the Commission."

3.2 *Appointment of VMMCL as agent or contractor for EEDC*

The Commission notes, and is guided by the general principle of law enacted in Section 10(2) of the Interpretation Act, Cap. I23, LFN, 2004, that a person empowered at law to do any act may do all such things as are reasonably necessary to enable that thing to be done or which are incidental to doing it. In this case, the immediate conclusion that one would ordinarily draw from this principle is that EEDC may appoint VMMCL or any other competent entity as its agent and or contractor for the performance of any aspects of its distribution obligations, on a territorial basis or otherwise. This principle would, for example justify the various Revenue Cycle Management (RCM) and Metering and Billing Management (MBM) that EEDC and its precursors (National Electric Power Authority and Power Holding Company of Nigeria Plc) have, in the past, engaged in.

However, in the specific circumstances of VMMCL and similar estate management companies, the application of this principle may not be so straightforward.

In the first place, the provisions of section 69(1) of the EPSR Act and Condition 9 of EEDC's licence require that the Commission's written consent must be first had and obtained before such an arrangement can be undertaken. The effect of this is that the EEDC may elect to take advantage of this Provision. However, this arrangement should not result in payment of an increased tariff by the end-use customer.

In view of the foregoing, we find that EEDC cannot legally delegate or transfer its maintenance obligations to the VMMCL or to any other party without the approval of the Commission. Of course, EEDC's universal service obligations, including the provisions of electricity connection to any applicant that meets the relevant criteria, and the prohibition against arbitrary disconnection, would bind such agents and or contractors.

We find further that VMMCL from the facts, as well as from the testimony of the witness for VMMCL regarding what they considered their duties to be under

the arrangement, is engaged in this business as a principal actor, and not merely as an agent for EEDC.

In this case, when asked whether EEDC formally transferred the maintenance of the network in the estate to VMMCL, the answer from VMMCL (the 1st Respondent) was in the negative but averred that whenever they had a problem requiring maintenance, “EEDC would either not show up at all or when they do, VMMCL would have to provide the necessary materials for the maintenance..... They never come to maintain.”⁴ Hence, VMMCL is not a validly appointed agent of, or subcontractor to, EEDC. They only took up the responsibility of maintaining the network because EEDC appeared to have abandoned its responsibility. VMMCL cannot validly maintain and should not maintain any electricity distribution network within VGC Estate without permission of the Commission and subject to the request by EEDC. We find that EEDC can ONLY delegate its responsibility subject to the approval of the Commission by virtue of Condition 9 of the Distribution Licence Terms and Conditions.

4. Can VMMCL install meters and vend cards for electricity purchase?

We agree with the Petitioner’s contention that VMMCL cannot validly install revenue meters and vend cards for electricity purchase transactions. We find it interesting that VMMCL failed to provide a legal justification for its action in this regard. Instead, VMMCL stated that the basis of it undertaking such activities is that it was part of the “roadmap” given to the Company for the implementation of the supply arrangement and that it was a condition precedent to the Company’s participation in the arrangement. EEDC on the other hand, justified the installation of PPMs and vending of cards by VMMCL on the grounds that the Company, as managers of the Estate, have to find a way of ascertaining the proportional usage of electricity by residents. Again, no attempt was made to proffer any rational arguments that would justify this activity on the part of VMMCL when clearly it is the responsibility of the Distribution Company. It would not be unusual to install a check-meter for the bulk-meter, but not revenue/billing meters to ascertain consumption. The practice noted at VGC went beyond installing a check-meter and is therefore unjustified under the law.

Therefore, we find that the action of EEDC in transferring the responsibility for vending of electricity in the Estate to VMMCL is not legally justifiable. The activities mentioned above are necessarily incidental to the operation of electricity distribution licences and are reserved for distribution licensees. Thus, VMMCL will only be able to undertake those activities as agent and/or contractor for EEDC under an arrangement approved by the Commission in line

⁴ See page 18, lines 9-11 of transcript of Hearing

with paragraph 3.2 above. Installation, maintenance and reading of meters, billing and collection are matters reserved for distribution licensees.

Section 1.1.3 of Part 3 (Distribution Metering Code) of the Metering Code for the Nigerian electricity industry (Version 01) provides that the Distributor “*shall* own, install, verify, operate, maintain, inspect and replace *all* metering Systems at Metering Points on the Distribution System.” The Code defines “Distributor” to mean a successor distribution entity to PHCN and/or a person holding a distribution licence. VMMCL does not fall into any of these categories. It cannot validly install revenue/billing meters, and for that matter, vend electricity purchase cards and or other tokens.

5. Who should be responsible for the difference of ₦2.50/kWh between the ₦8.50/kWh bulk tariff paid to EEDC by VMMCL and the ₦6.00/kWh paid by residents previously on EEDC Pre-Payment Meters (PPMs)

VMMCL claimed from EEDC, the sum of ₦7,805,908.56. This was allegedly the a “conservative” estimate of the cumulative total of the balances due to VMMCL from the differential between the ₦6.00/kWh credited to VMMCL by EEDC from sales on the “legacy” Pre-Payment Meters installed by PHCN and the ₦8.50/kWh charged to VMMCL by EEDC at the bulk metering point. VMMCL therefore sought a refund of this amount.

From the evidence before the Commission, VMMCL actually agreed and is only obligated to pay to EEDC, a tariff of ₦8.50/kWh at the bulk metering point. The Commission rejects VMMCL’s assertion that the Company assented to this tariff under duress from EEDC. VMMCL is a company with full corporate responsibility for its actions. VMMCL as a sophisticated agent must have, or at a minimum should have been aware of the prevailing tariff applicable to bulk metering service from EEDC. From its own evidence, one can only conclude that VMMCL knowingly and without duress assented to this arrangement with a view to obtaining improved power supply in VGC Estate.

Although the behind-the-meter arrangement was unauthorised and illegal, by reason that it involved a cession of EEDC’s service obligations without obtaining the consent in writing of the Commission as required, the matter of applicable tariff is indisputable.

Consequently, we find that EEDC was fully aware that the tariff payable by residents of the Estate was ₦ 8.50k/kWh as this was the tariff that was being paid by VMMCL for the supply at the bulk meter. Despite this, however, EEDC continued to dispense credit at the former tariff of ₦ 6.00/kWh. We therefore find in favour of VMMCL that EEDC was directly responsible for the shortfall

incurred by VMMCL and the amount, subject to verification, should be refunded to VMMCL as it would be refundable to any other customer who has been overbilled by EEDC. We further order that the parties should ascertain/verify the refund amount and the EEDC shall pay such verified amount to VMMCL. Within 21 days of this Order, EEDC shall present a proposal to the Commission for the refund of the due amount.

We note, and also reject in totality, VMMCL's alternative claim that it is entitled, on the basis of its agreement with EEDC, to a 10% rebate in the price of electricity delivered to VGC Estate. We have seen no document signed by both parties recording this agreement. The Commission is therefore constrained to act otherwise in the absence of any commercial or legal basis for the implied agreement. But even if the agreement is established, it would be an illegal agreement and the Commission will not lend its authority to its enforcement as this would translate to a modification of the approved tariff by the mutual agreement of the Parties. Any sums payable by EEDC to VMMCL ought to be separate from the tariff and treated accordingly.

6. Can VMMCL compel residents previously on EEDC PPM to pay the difference (~~₦~~2.50k/kWh) between the amounts paid by other residents (~~₦~~8.50k/kWh) and the EEDC charges (~~₦~~6.00/kWh) for the period when purchases were made from EEDC?

On the basis of our ruling in 5 above, this claim is disallowed. The responsibility for this amount continues to be that of EEDC who facilitated the shortfall. It would stand to reason that VMMCL is only obligated to pay the EEDC ~~₦~~8.50k/kWh per bulk meter tariff and the EEDC to refund any shortfall from under-billing, an act that should have ceased once the rate switch or bulk meter was installed and operational. Therefore, since VMMCL is entitled to a refund from the EEDC it could not collect the same shortfall twice, first from the EEDC and second from the residents. That would be tantamount to double collection.

7. Can VMMCL compel EEDC to remove the PPMs already installed by EEDC to enable VMMCL install its own meters?

Again, we will dismiss this question summarily. EEDC is not only competent to install and maintain the PPMs, it is required to do so by the EPSR Act, the Distribution Code and by the Commission's metering regulations. VMMCL on the other hand, has no legal authority to engage in such actions.

As we stated above, any valid rights that VMMCL can exercise in this matter must be granted pursuant to an arrangement to which the Commission grants prior consent. The terms of the agreement documenting that arrangement must be approved by the Commission.

In this case however, there is no legal delegation consented to by the Commission. VCMML is not in a position to install electricity vending machines, and cannot compel EEDC to remove its PPMs.

Where the terms of an agreement to which the Commission consents require that the agent of the Distribution Company should install vending machines to replace existing meters already installed by the Distribution Company, the Commission will consider the following matters:

- the need to protect the end-use customer from unnecessary, duplicated costs which will arise if the customer is made to pay for another PPM when they had earlier paid for PPMs installed by the Distribution Licensee; and
- the need to ensure that while purporting to delegate its service obligation, the distribution licensee does not actually abdicate the obligation.

8. Who bears the risk of technical and non-technical losses between the bulk metering point and the rest of the Estate?

The allocation of the risk of technical and non-technical losses between the bulk metering point in VGC Estate and the amount actually collected by VMMCL is a matter to be determined by the contractual arrangement between the parties. Of course, this presupposes EEDC has validly appointed VCMML as its agent and/or contractor, and their contractual arrangement has been approved to by the Commission. One of the factors that the Commission would consider in making the decision whether to grant or to withhold consent to such arrangements is the equitable allocation of the risks inherent in the arrangement. Where the risk falls upon the agent or contractor, we will want to ensure that that entity has the financial and technical ability to assume and mitigate the risk.

At this time, the Commission does not feel compelled to make an order or pronounce an opinion on the matter, since it has not been approached to approve any arrangement between EEDC and VMMCL, or between any Distribution Company and the management of any residential estate.

9. **Can the residents pay the residential tariff of ₦6.00/kWh, even though the Estate is bulk metered?**

We have ruled above that neither EEDC, nor VCMML has the authority to unilaterally alter approved tariffs. The approved tariff is ₦6.00/kWh for R3 residential customers on 11KV Lines and ~~₦8.50/kWh~~ for R5 residential customers on bulk meters. Any service to residents will attract the approved tariff for the category to which such service is upgraded.

If the residents are to continue to be served from the 33KV line, they are subject to the tariff for that service which is ₦8.50/kWh.

We note that the bulk metering practice for residential estates and many communities is widespread nationwide, and that it holds significant advantages for the various parties affected. It provides residents of the Estate with some assurance of greater reliability of electricity supply. Usually, the ease of collection provides the necessary incentive for the Distribution Company to ensure that it delivers relatively stable power supply. The Distribution Company in fact enjoys benefits on many fronts: its cost of delivery and collection is reduced (it is delivering to a single point and being paid by a single, reliable customer). It also seeks to, and often charges a tariff above the normal rates for individual residential supply.

The Commission is of the view that an important justification for engaging a company such as VMMCL to **intermediate** between EEDC and residents of the Estate is that the Company can operate more efficiently than the Distribution Company, and is therefore able to make efficiency gains, by reason, amongst other things, of its knowledge of the area. The ultimate beneficiary of this arrangement is the Customer. The EEDC might have been quite content to continue to serve the residents of the Estate from the 11KV line. If the residents, as in this case, in their pursuit of better service choose to upgrade through for instance an arrangement as undertaken in this case, the parties, namely VMMCL and the residents have to agree on the responsibility for the additional cost attendant to the arrangement without affecting the approved tariff for the power supplied.

We hold that, irrespective of the prevailing arrangement between EEDC and VMMCL for delivery of electricity to end-use customers, the residents should pay the tariffs approved for the class of Users to which they have been upgraded under the approved electricity tariff, in this case ₦8.50k.

10. What should be the ideal contractual and legal arrangement between VMMCL and EEDC?

The Commission would not allow unregulated participation in a regulated activity. However, where the situation warrants, the parties agree and upon proper documentation, the Commission may consider an application to appoint an agent or contractor to undertake part of a regulated licensee's functions. That part may be defined by reference to functionality, or to territorial area.

The Commission would consider any such arrangement on its merits, if and when, an application in that regard is made to the Commission.

11. Does VMMCL have the right to install a check meter for the bulk-meter?

The purpose of installing meter in an electricity network is to measure the flow of electricity in or out of a node. It is not allowed under current laws and statutes for VMMCL to install revenue meters for the purpose of billing and collecting money from residents at VGC Estate. Until there is a proper arrangement and agreement between EEDC and VMMCL approved by Commission which would enable VMMCL install revenue meters, and collect money on behalf of EEDC, the only party responsible for revenue metering, billing and payment collection is the EEDC.

Should the Commission approve the appointment of any company to act as agent and/or contractor for a Distribution Company, the Commission expects that, in line with electricity industry standards, the parties would meter and measure electricity delivered to the bulk metering point from which responsibility for delivery and billing passes to the agent and/or contractor. The Commission would nevertheless be minded to ensure that such "agent" or "management contractor arrangement" would not amount to unlicensed trading in electricity.

However, in relation to the present case, we want to point out the following regulations:

1. Sections 2.3 and 2.4 of the Metering Code provide that the installation of a check meter is the responsibility of the Distribution Company upon request by the "user".
2. Section 3.1 of the Metering Code provides that in the event of a dispute as to the accuracy of the bulk meter or the check meter, the Commission has the responsibility of resolving the dispute; and

3. The parameters for checking the accuracy of both the main meter, as well as the check meter will be regulated by the provisions of the metering Code.

Consequently, we find that VMMCL failed to follow the procedure for the installation of check meters as provided in the Metering Code by installing a check meter on the System without contacting the EEDC as required by the metering Code.

12. Should VMMCL be compelled to refund the difference between ₦12.00/kWh charged to residents prior to January 2008 and the approved ₦8.50/kw charged by the EEDC?

We have ruled that neither EEDC nor VMMCL can unilaterally alter approved tariffs. Therefore, in the event that VMMCL has charged and received from residents, tariffs in excess of the approved rates, the residents are entitled to proceed against VMMCL for the excess charges.

Other Matters Arising

We have, in the above passages, provided our rulings on the matters raised at the Hearing. In addition to those matters, VMMCL has also approached the Commission, by a letter dated 7th April 2008, for other reliefs against EEDC. We have dealt with most of these reliefs in our rulings above. However, we will make a few additional comments on some of the reliefs.

VMMCL alleged that there were irregularities in the bulk meter installed by EEDC with which electricity delivered to VGC Estate was measured. It alleged irregularities in the metering, stating that its check meter showed a variation of almost 30% of the electricity delivered, with the EEDC meter. Consequently, VMMCL prayed the Commission to “investigate this matter and make appropriate recommendations regarding the actual load consumption at VGC, the amounts [VMMCL] should have been charged by PHCN since inception of the new billing arrangement and the amount, if any, that should be refunded to us”⁵.

We note that VMMCL is within its right as any other customer to request for investigation into the volume of electricity that is being delivered to it in order to ensure that the bill it receives is accurate. We however find that VMMCL must follow the laid down procedure as contained in the Distribution code and the Metering Code as referenced above in order to commence the process of

⁵ VMMCL letter of 7th April 2008

investigation. The Commission is empowered to rule on the outcome of such investigation and make appropriate orders.

Furthermore, the Commission would not engage in retroactive rulemaking or Orders. In our estimation, a check meter if and when installed would be unable to verify when the suspect meter may have gone wrong. Therefore, ascertaining the veracity of a meter may only take place upon the installation of an operational check meter but not prior. In any event and upon due consideration, this request is deemed premature at this stage.

REFUNDS ON UNINSTALLED METERS

A secondary point which arose in the course of the Hearing was VMMCL's request for a refund of the sum of ₦6,720,000 paid to PHCN by HFP Engineering (Nig.) Ltd. (HFP) for the supply and installation of 128 units of 3 Phase PPMs at ₦52,500 per PPM, prior to commencement of the bulk billing arrangement. According to VMMCL, the meters were never installed or delivered, a charge that EEDC did not deny. Rather, EEDC claimed it had initiated an investigation of the matter.

We note EEDC's reply to VMMCL that it is conducting all enquiries into the true state of affairs regarding this payment. We rule that any such pending inquiry must be concluded on or before 21 days of this Order. Subject to VMMCL establishing that it is entitled to succeed to the rights of HFP in this matter, EEDC should forthwith after that date, refund any moneys which were collected in respect of PPMs that were never delivered or installed.

We note that the payment in this instance was made to EEDC to enable it discharge its statutory functions and responsibility. It was part of a perfectly legal transaction and was made to enable EEDC control meters and connect to VGC Estate residents. Having failed to install the meters, EEDC cannot be permitted to retain the proceeds of its wrong doing. It does not appear that the meters are still required for the purposes of connecting VGC Estate residents. Nonetheless, a customer is entitled to full refunds for payments collected without concomitant service delivered.

OUR DECISION AND ORDER

In summary, we therefore rule on the various issues raised in this Petition and Order as follows:

1. The electricity trading arrangement in VGC Estate is contrary to the provisions of the EPSR Act and it contravenes the terms of EEDC's electricity distribution licence. Such an arrangement is only permissible upon necessary approval of the Commission. It is therefore unauthorised. VMMCL cannot legally undertake the activities that the arrangement envisages that it would undertake. Consequently, the Commission orders VMMCL to, as soon as practicable without jeopardizing proper supply of electricity in the Estate, transfer responsibility for maintenance and operation of the distribution system in the Estate to EEDC.
2. In the event that VCMML feels that its management function in the Estate would be better served by performance of the distribution function in the Estate, it should reach an agreement that conforms to the existing regulatory framework for the Nigerian power sector on the matter, and ensure the satisfaction of all the conditions precedent to the legality of such an arrangement, including, pre-approval by the Commission.
3. VMMCL cannot, unless pursuant to an agency or contractor arrangement with EEDC, which is pre-approved by the Commission, operate and or maintain the electricity distribution network in VGC Estate. If and when any such application is made, the Commission would consider it with a view to ensuring that: i) EEDC does not abdicate its universal service obligations; ii) the safe and efficient operation of the distribution system is not jeopardised; iii) risks inherent in the arrangement (*i.e.* absorption of technical and non-technical losses) are allocated to the party best suited to bear them; and iv) that the interests of consumers, financial and otherwise, is not unduly prejudiced.
4. In view of the foregoing, it is and remains the responsibility of EEDC to maintain the distribution network in the Estate. EEDC is the only entity recognised by law as having this obligation at the moment. It is therefore in furtherance of this obligation, that we hereby order that EEDC provide to the

Commission within **thirty days** of this Decision, a report on the state of the facilities within the Estate as well as a programme for the maintenance of these facilities

5. VMMCL cannot, either unilaterally, or in conjunction with EEDC, increase electricity tariffs payable by residents of VGC Estate. The EEDC as well as the residents are under a legal obligation to abide by prior approved rates or NERC approved tariffs for the industry. The current arrangement whereby the Estate is upgraded to R5 MD residential customers is in itself not illegal. The tariff of ~~N~~8.50/kWh for R5 residential customers on bulk meter is captured in the NERC approved tariff. However, the illegality attaches to the intermediation of VMMCL (installation of meters, vending etc.) without NERC approval. In order for this arrangement to be sustained, the EEDC is hereby ordered to seek the approval of the Commission within thirty days from the date of this Order to the power supply arrangement in the VGC Estate failing which the arrangement must be discontinued.
6. VMMCL cannot legally operate, install and vend meters, vending machines and other equipment for measuring electricity delivered to consumers without the permission of the Commission.
7. With respect to the claim for refund by the residents for the amounts collected over and above the approved tariff by VMMCL until January 2008, it is hereby ordered that VMMCL refunds to the concerned residents the excess amount collected over and above the approved tariff of N8.50. VMMCL shall present to the Commission within twenty-one days of this Order a proposal as agreed with the residents on the methodology to be adopted for the refund of these excess amounts collected.
8. With respect to the shortfall of ~~N~~2.50k/kWh between the amount paid by the residents on PHCN meters and the sum paid by VMMCL to EEDC on the bulk meter, we find that the shortfall was facilitated by the failure of EEDC to correct the anomaly despite the fact that they were aware of the situation. We therefore order that the shortfall be refunded to VMMCL. The EEDC is to present to the Commission within twenty-one days of this Order, the Proposal for the refund of this amount.
9. Subject to VMMCL establishing that it is entitled to succeed to the rights of HFP or any other party that made such payments, EEDC should forthwith make

arrangements to refund any moneys collected in respect of PPMs that were never delivered or installed. EEDC shall refund the money forthwith to VMMCL within **thirty days** of the date of this Order.

10. EEDC remains the only competent body to install and maintain meters in the Estate. Thus, VMMCL, a body that is not so authorised, cannot compel EEDC to remove its own meters.

**THE OFFICIAL SEAL OF THE COMMISSION IS HEREBY AFFIXED
THIS 25TH DAY OF AUGUST 2008.**

SIGNED

Dr. Ransome Owan

Chairman/CEO