



Kissing and Making Up –“POST-PRIVATISATION CONFLICTS & DISPUTES IN THE NIGERIAN ELECTRICITY SUPPLY INDUSTRY”

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The frailties of the nascent Nigerian Electricity Supply Industry (NESI) is gradually coming to the fore with the recent lawsuit filed by the power generating companies (Gencos) against the Federal Government and the regulator Nigeria Electricity Regulatory Commission (NERC) alleging discriminatory practices and the ever looming threat of force majeure declaration by the distribution companies (Distcos) in the face of increased or new regulation.

Conflicts and disputes and the need for re-negotiation of long-term energy contracts are not uncommon particularly where there is a dearth of institutions that can credibly enforce such contracts. In the electricity sector, this situation can be further exacerbated where the market design is inadequate or regulation is incomplete as can be said of the NESI. There is therefore need for a robust institutional and regulatory redesigning of the NESI to stem the tide of conflicts and disputes and avoid the collapse of the sector.

By way of background, reformation of Nigeria’s power sector commenced with the introduction of the National Electric Power Policy (NEPP) in 2001 and this led to the enactment of the Electric Power Sector Reform Act in 2005 (EPSRA), the principal law presently governing the NESI. The EPSRA unbundled the government owned vertically operated Nigeria Electric Power Authority - NEPA (which was renamed Power Holding Company of Nigeria - PHCN) into 18 successor companies to wit: 6 Gencos, 1 transmission company (TCN) and 11 Distcos. An independent regulator, NERC was established to regulate the sector together with an electricity bulk trading company (Nigeria Bulk Electricity Trading Company – NBET) for the purchase and resale of electricity amongst the participants of the sector. In 2013, majority of the newly created successor companies save TCN, were privatized with the 11 successor Distcos privatized along franchised boundaries.

The privatization of the NESI was, premised on the notion that electricity generation is a potentially competitive market, while distribution and transmission were considered local and natural monopolies and therefore subject to regulation.

The NESI was designed to evolve over five stages of development to wit:

1. the Pre-Transition Electricity Market (TEM) stages (involved the physical unbundling of PHCN; privatization of PHCN; introduction of performance incentives for generation and distribution and a test run of the grid code);
2. Interim Rules Period (continuation of the Pre-TEM trading arrangement; power generation output not covered by the PPA put in place for successor Gencos; and Distco's billing is maintained by the market operator);
3. Transitional Electricity Market (electricity trading arrangements through contracts, no central administrative balancing mechanism for the market (no more NBET), introduction of a settlement procedure to address shortages and inadequate supply;
4. Medium Term Market (introduction of an electricity trading spot market, bilateral trading of electricity between the market participants and open entry to NESI); and
5. Long Term Market (introduction of retail competition, separation of distribution and retail activities and open access to transmission and distribution networks).

From the above and the current state of the NESI, the first two stages governed by non-enforceable rules have been accomplished meaning that the sector is now at the third stage – TEM where trading arrangements are to be consummated through enforceable contracts thereby establishing a competitive electricity market. The full implementation of TEM has however not occurred due to various challenges such as gas supply constraints, transmission constraints, distribution and collection losses. Consequently, the NESI continues to operate sub-optimally resulting in liquidity constraints in the sector value chain and presently financial distress for the sector participants. Despite several end user tariff reviews, the value chain continues to be plagued with debts which has led to the introduction of the Power Sector Recovery Programme (PSRP) by the Federal Government to save the sector from total collapse. The PRSP is a series of policy actions, operational and financial interventions designed to improve power supply reliability, strengthening of the sector's institutional framework and increasing transparency that will promote and encourage investor confidence in the sector so that the NESI can become contract-based and competitive.

Regulation in the electricity sector is usually complex both from a technical and economic stand point and for the NESI it is no different. The ongoing challenges of the NESI can be attributed to the fact that some aspects of the regulatory framework were either not in place at the time of privatization or lacked sufficient detail. This lack of clarity or omission thereof have become potential sources of conflict and disputes amongst participants in the NESI which in seeking to strengthen the sector's institutional framework, the PRSP must address. Below are some of the areas of potential conflict and dispute.

Market Structure Issues

(1) Eligible Customers

In 2017, The Federal Government issued a directive to the NERC permitting certain categories of customers (“Eligible Customers”) to purchase power directly from a licensee other than a Distco. Four categories of customers were declared as being eligible to buy power directly from Gencos. The classes of Eligible Customers include the following:

- (i) A group of customers whose consumption is 2MWhr/h and above, and are connected to a metered 11kV or 33kV delivery point on the distribution network;
- (ii) Customers connected to a metered 132kV or 330kV delivery point on the transmission network;
- (iii) Customers with consumption of 2MWhr/h and above on monthly basis and connected directly to a metered 33kV delivery point on the transmission network; and
- (iv) Customers with minimum consumption of more than 2MWhr/h over a period of one month and directly connected to the metering facility of a generation company.

Following the directive for the introduction of the Eligible Customer regime, the Distcos issued notices of force majeure, claiming that the declaration was premature and inconsistent with the pre-conditions established by the EPSRA. They were also of the view that regulation and governance of the sector had become inconsistent.

(2) Discrimination against Generating Companies

The successor Gencos recently filed a suit at the Federal High Court against the major institutions governing the sector including but not limited to the Federal Ministry of Power, Works and Housing (FMPWH) the ministry charged with policy formulation for the sector, NBET, Bureau of Public Enterprises (BPE), the Central Bank of Nigeria (CBN) and two new entrants to the NESI, Azura IPP and Accugas, alleging discriminatory practices based on the World Bank Partial Risk Guarantees (PRG) backed by a Federal Government sovereign guarantee granted to the new participants. The PRG and sovereign guarantee ensures that the new participants are fully paid for services rendered to the NESI irrespective of the ongoing market liquidity issues whilst the NESI continues to owe debts to market legacy gas suppliers and Gencos successor which are paid irregularly and in an indeterminable manner.

(3) Exclusivity of Concession Areas

The privatization of the Distcos was along geographical or franchise areas which hitherto the Distcos thought were exclusive. However with the introduction of the Eligible Customer regime, the regulator has categorically stated that the franchise areas are not exclusive to the Distcos alone. Given that different regulatory treatment may be applicable (e.g. Eligible Customer Regime, Independent Distribution Network Operators and differential regulated prices) in the geographical franchise areas, there exists the likelihood of conflicts and disputes between the participants operating in same.

Regulatory issues

Tariffs

The NESI pricing framework is governed by the Multi-year-Tariff Order (MYTO) system introduced to set tariffs for consumers over a 15 year period (2008 – 2023). This system is to be subject to minor reviews twice a year based on factors such as the rate of inflation, gas prices, foreign exchange rates and daily generation capacity. Major reviews of the tariff system are to be conducted every five (5) years to reassess the methodology and add further inputs to the existing model.

Post privatization in 2014, there was a minor review based on the major changes in the variables used for tariff assessment. This resulted in the introduction of MYTO 2.1 for the period 2015 – 2018. Further amendment was made by NERC to MYTO 2.1 to increase the price of electricity by an average of 43% across all Distcos franchises. Since its introduction in 2016, the amended MYTO Rule has remained unchanged despite the devaluation of the Naira which ordinarily should form the basis for a minor review. This potentially is an area of conflict and/or dispute for the Distcos as it threatens financial viability.

Given the number of potential areas of conflict, the institutional framework for the prompt settlement of conflicts and dispute must be robust. The following are the institutions charged with conflict and dispute resolution for the NESI:

Conflict resolution institutions in NESI

NERC

Under the EPSRA, NERC is mandated to act as a quasi-judicial body to hear any dispute between market participants save for where the dispute relates to a question of law, which then has to be reserved for the decision of the Federal High Court as is evident with the suit of the Gencos earlier discussed. In furtherance to this provision, and pursuant to the Market Rules, NERC has appointed a Dispute Resolution Counselor (DRC) an academic, to administer the dispute resolution provisions of the Market Rules and he has in turn appointed 12 members of a Dispute Resolution Panel (DRP) made up of engineers, economists and legal practitioners to resolve disputes amongst market participants.

The DRP resolves disputes arising out of the operations of the Market Rules and the Grid Code between and amongst market participants in the NESI and the modes of dispute resolution employed includes mediation conciliation and arbitration. Whilst mediation and conciliation are effective in the resolution of conflicts in the NESI, a review of the ESPRA does not provide comfort as to arbitration being an effective tool for dispute resolution in the sector. It is not clear from the reading of s.49 and 50 of the Act whether or not a review of the final decision of an arbitral panel can be undertaken by the courts particularly, if the basis for the review is one of those grounds on which an arbitral award may be challenged under the Arbitration and Conciliation Act (i.e. allegation of fraud). Furthermore, it is also unclear how arbitral awards issued by a NERC appointed arbitral panel can be enforced particularly where such awards have a monetary element without there being recourse to the courts.

High Court

The High court's role in the resolution of disputes in NESI is supervisory to that of NERC allowing for market participants dissatisfied with NERC's resolution of a matter on a point of law to approach the court for a review. The proceedings before the High Court are adversarial in nature allowing each litigant to lead evidence before a single judge.

The ESPRA does not stipulate whether the court with jurisdiction is the State High Court or the Federal High Court and neither is it clear under the ESPRA whether a right of appeal exists from the decision of the High court to the Court of Appeal and in turn the Supreme Court or whether the decision of the High Court in reviewing such point of law is final and binding on NERC and the participants. Disputes in the electricity sector are often extremely technical in nature, and therefore require an independent and well-trained judiciary to provide fair and technically balanced decisions. Nigerian judges may not be versed in economics or engineering and their formal education may be restricted to the field of law and any training in economics or engineering is likely to have been informal and thus limited. The lack of clarity in the law and likely lack of knowledge of all the requisite components of the sector, coupled with the slow pace at which cases are processed and resolved, allows for opportunistic behavior by sector participants which ultimately leads to conflicts and disputes creating an inefficient sector.

With the potential sources of conflicts and disputes and the weaknesses of conflict resolution institutions, there is a dire need to strengthen the institutional framework for the sector which is one of the objectives of the PSRP that will hopefully ensure the swift resolution of disputes. To this end, the PSRP must address the limitations of the Nigerian Judicial System (duration in concluding matters and lack of adequate knowledge of the technicalities of the power sector) by designing and implementing entities (i.e. Conciliation & Arbitration Commissions) that can dispense with disputes and renegotiations in the sector within a reasonable time frame. These entities should be able to deal with contractual disputes between licenses and the government/regulator within a relatively short time frame. Membership of any conciliation commission should be limited to appointed members of the disputing parties with a jointly chosen third member as opposed to any imposed member by NERC. This would inhibit any incentive to renegotiate by the parties as any settlement reached would have been based on the agreement of the parties representatives. The Arbitration Commission's award should be final and binding on the parties and not be subject to the possibility of a review by the High Court or Federal High Court. In addition, the membership of both conciliation and arbitration commissions must not overlap as the qualities required of members of each commission are markedly different.

In conclusion without the reformation of the institutional frameworks for conflict resolution in the NESI, the sector will continue to be beleaguered with the calls for renegotiation of contracts and disputes amongst market participants. It is hoped that the PSRP will be able to correct the present sector defects.