



SHIFTS IN THE NIGERIAN POWER SECTOR UNDER THE
NEW ELECTRICITY ACT 2023

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INTRODUCTION

The structure of the Nigerian electricity supply industry has changed significantly since the introduction of the Electric Power Sector Reform Act (EPSRA) in 2005. The ESPRA facilitated the unbundling, restructuring and eventual privatisation of the electricity sector. This enabling law has however, not been able to drive the rate of growth in the marketplace as well as the level of competition required to deliver reliable and efficient power supply. The ailing transmission and distribution infrastructure has made wheeling electricity to consumers difficult creating a weak and near non-functional market. The ESPRA also inadvertently constituted a barrier to economic growth in major commercial cities and states such as Lagos, which were precluded from developing their own electricity markets to address local needs and foster growth in the sector. Hence, the clamour from the states for the decentralisation of the power sector to enable them superintend their own electricity markets has led to recent constitutional and legislative amendments. In furtherance of this objective, the Nigerian constitution has been amended to permit constituent states of the federation to create their own electricity markets to co-exist in parallel with the national market structure. This constitutional amendment has also necessitated the repeal of the ESPRA and other sector related laws such as the *Hydroelectric Power Producing Areas Development Commission (Establishment, Etc.) Act, No. 7, 2010*; *Hydroelectric Power Producing Areas Development Commission (Establishment, Etc.) Act, 2010 (Amendment) Act, 2013*; *Hydroelectric Power Producing Areas Development Commission (Establishment, Etc.) Act, 2010 (Amendment) Act, 2018*; the *Nigerian Electricity Management Services Agency*

(Establishment) Act, 2015 replacing the Electricity Act 2023.

The new Electricity Act (Act) seeks to achieve amongst others, the following objectives:

- *consolidate the laws relating to the Nigerian Electricity Supply Industry (NESI);*
- *provide a comprehensive legal and institutional framework for the power sector in Nigeria in the areas of electricity generation, transmission, system operation, distribution, supply, trading, enforcement of consumer rights and obligations; and provide a holistic integrated resource plan and policy that recognises all sources for the generation, transmission, and distribution of electricity, including the integration of renewable energy to Nigeria's energy mix and attract investments, and for related matters.*

Some of the features of the new Act includes:

1. ENHANCED AND STRENGTHENED REGULATORY BODIES:

a. The Nigerian Electricity Regulatory Commission (NERC):

The Act designates NERC as the apex regulator for the NESI enhancing its powers and further strengthening its independence. The new law provides greater clarity around licensing, monitoring and supervision of the electricity market which should ensure transparency and accountability from



participants making enforcement easier for NERC and other sector regulators.

In addition to empowering NERC, the Act also establishes other specific bodies with distinct mandates. These bodies include the following:

b. National Hydroelectric Power Producing Area Development Commission:

The Act introduces a new body, the National Hydroelectric Power Producing Areas Development Commission (N-HYPPADEC) who shall without prejudice to the powers of the Minister to issue sector specific policies and NERC's regulatory powers to be responsible for formulating policies and guidelines for the development of hydroelectric power producing areas¹. The activities of N-HYPPADEC are to be funded from a statutorily created fund² which is to be financed from

- (i) **Ten percent of total revenue generated by any company or authority from the operations of any hydroelectric dams in any member State of the N-HYPPADEC.**
- (ii) **Fifty percent of money due to member States of the N-HYPPADEC from the Ecological Fund;**
- (iii) **all money raised for the purpose of the functions of the N-HYPPADEC through gifts loans, grants-in-aid, testamentary disposition or otherwise; and**

- (iv) **proceeds from all other assets that may, from time to time, accrue to the N-HYPPADEC.**
- (v) **Contributions by the Federal Government to the N-HYPPADEC Fund through appropriations by the National Assembly.**

c. The Rural Electrification Agency:

The Rural Electrification Agency's (REA) mandate under the Act is to facilitate the electrification of rural, unserved, and under-served areas of the country on such basis that would allow private investors a reasonable rate of return on investment and manage the Rural Electrification Fund (REF) which is to be funded from:

- (i) **any surplus funds in the NERC account following annual audits;**
- (ii) **finances and penalties collected by the Commission;**
- (iii) **donations, grants, gifts, and loans;**
- (iv) **special intervention funds provided by any of the three tiers of government;**
- (v) **endowments, bequests, gifts of money, movable, or immovable property;**
- (vi) **funds appropriated by the National Assembly for the operation of the Agency; and**
- (vii) **Two percent of funds accruable to NERC from the tariff structure as operational cost.**

The fund is to be utilized in providing capital subsidies to qualified sustainable and renewable electrification projects for unserved and under-served communities through public and private sector participation for the implementation of the policies of the REA. The purpose of the REF³ includes, to achieve more equitable access to electricity; promote

¹ S.82 Electricity Act 2023

² S.95 ibid

³ S.143



expansion of the grid and development of off grid electrification; promote research and development of new technological advancement in the Nigerian renewable energy space; implement programmes to adopt international best practices with respect to renewable energy utilization and to promote the execution of renewable energy projects for non-electricity purposes amongst others. The REF is to be managed by the Fund management Directorate of the Agency in accordance with the provisions of the Act.

d. The Nigerian Electricity Management Services Agency:

The Act provides for the transfer of the operations of the Electricity Management Services Plc to the Nigerian Electricity Management Services Agency (NEMSA)⁴ and is to amongst its other functions, enforce all statutory technical electrical standards and regulations as may be published by NERC, conduct periodic inspections on existing power facilities including power plants, transmission lines and any transmitting equipment to ensure their alignment with industry specifications and issue competency certificates to qualified electrical personnel working in the NESI.

e. The National Power Training Institute of Nigeria:

The Act establishes the National Power Training Institute of Nigeria (NPTIN or “the Institute”) and is charged with the human resource development as well operating as a research center for

matters relating to electric power in Nigeria and Africa⁵. The Act further empowers the NPTIN to receive and manage the Power Training Fund and other funds accruing to the Institute. The funds of the institute, which will be used to offset its expenditure, is to be derived from the following sources:

- (i) **training fees**
- (ii) **charges and dues recoverable by the Institution**
- (iii) **budgetary appropriation by the National Assembly,**
- (iv) **fees earned from consultancy services, subvention, grants-in-aid, endowments, and**
- (v) **donations and legacies that may accrue to the Institute.**

2. CREATION OF NEW MARKETS AND LICENCE CATEGORIES:

The Act seeks to create new electricity markets by giving legal force to the constitutional amendment that allows for states to generate, transmit and distribute electricity⁶. Each component state of the Nigerian federation will now be able to licence participants to generate transmit and distribute electricity provided that such state has passed a law to create an electricity market and has in place a regulator to oversee such market.⁷ Given that only a handful of the 36 states of the federation have enacted state electricity laws, this in essence creates two parallel legal and regulatory regimes – the federal and state regimes for some sector participants in particular, the successor distribution companies.

For distribution companies with franchises that are interstate such as Ikeja Disco which traverses Lagos and Ogun States and with Lagos state having passed its own electricity law with a pseudo regulator in place in the form of the Lagos State Electricity Board, Ogun state is yet to pass an electricity law or put in place a regulator. Ikeja Disco could find itself, once regulatory responsibility is shifted to the state regulator,

⁴ S.172 ibid

⁵ S.185 ibid

⁶ The Constitutional Amendments- Fifth Alteration (No. 33) Devolution of Powers (National Grid System) Bill

⁷ S.63(2) Ibid



being compelled within a specified timeframe to incorporate a company that will be licenced by the state regulator to assume all the assets, liabilities, employees, and other contractual rights of Ikeja Disco within Lagos state while the regulation of Ikeja Disco's operations in Ogun state will continue to be regulated by NERC⁸.

While this appears, uncomplicated there are likely to be several issues ranging from technical to legal and financial. While the technical may be surmountable given that a similar exercise was undertaken during the unbundling of the NESI under the ESPRA prior to the privatization, the same cannot be said for the legal and financial complications that may arise with the proposed new arrangements.

As stated earlier using the Ikeja Disco analogy, the Discos in their present form have coverage areas over multiple states and this raises several questions. How will liabilities from existing vesting contracts with Nigerian Bulk Electricity Trading company (NBET) or contracts with other third parties including those with the Central Bank of Nigeria (CBN) be allocated between the newly incorporated state regulated disco and the federal regulated disco? What will happen to those distribution companies which the lenders recently took control over as it relates to state delineations. How will the debt be allocated between the state regulated disco and the federal regulated disco? For instance, security packages for some of the loans would involve landed properties. Again, using Ikeja Disco as an analogy, the value of landed properties are significantly higher in Lagos than in Ogun state. While understandably, the states are owners of 40% of

shares in the discos that traverse their geographical areas, the question arises as to whether the shareholding of the new state regulated company will change, or remain the same allowing for cross ownership of state regulated discos by different state governments? Furthermore, in the event of discrimination against an existing non – state investor in a pre-existing disco by a state regulator when licensing a state regulated disco, what immediate recourse or dispute resolution mechanism away from the courts will be afforded such investor? In addition, will state regulators to be created, have the necessary finance, workforce, and skill to be able to effectively regulate participants in the state electricity value chain for optimum performance? These are some of the issues which the Act does not adequately or readily provide answers to. No doubt there will be need for further amendments to the Act and regulations introduced to ensure that existing investments in the electricity market are adequately protected, and the Federal Government insulated from what could if not properly addressed, be protracted and expensive litigation.

3. NEW LICENCE CATEGORIES.

a. *Systems operation licence:*

The Act requires the TCN to incorporate an entity that will serve as the Independent Systems Operator (ISO)⁹. The ISO is to be licensed by the NERC to take over the administration of market and system operation functions as stipulated by the Act. Consequently, the TCN is required to transfer assets and liabilities relating to its market and

⁸ Section 230(8) *ibid.*

⁹ S.15 *ibid*



system operation functions to the ISO, retaining only its transmission license.

The ISO is to perform the following functions:

- (a) generation scheduling, commitment, and dispatch.
 - (b) transmission scheduling and generation outage coordination;
 - (c) transmission congestion management;
 - (d) international transmission coordination;
 - (e) procurement and scheduling of ancillary services and system planning for long term capacity;
 - (f) administration of the wholesale electricity market, including the activity of administration of settlement payments, in accordance with the market rules; and
 - (g) such other activities as may be required for reliable and efficient system operation.¹⁰
- (a) connection of customers to receive electricity supply;
 - (b) installation, maintenance and reading of meters, billing and collection;
 - (c) expansion of the distribution network in the licensed areas, and
 - (d) such other functions as may be prescribed in the Act.

Based on the above, the TCN will focus on functions that are relevant to the development and maintenance of the power transmission infrastructure.

b. Distribution and Supply Licence (DSL):

A DSL authorizes the licensee to operate a distribution system that facilitates:

The licensee is subject to a review of its performance every 2 years to assess the condition of the distribution system and the licensee's performance in meeting the average annual demand in its area of service. For Application & Renewal of Licenses, the Act requires for an applicant to publish within 30 days of application, a notice of application in a newspaper circulating in the area in which it intends to operate as a licensee, and in a separate national circulation newspaper, in accordance with the directions provided by NERC. Further, NERC is to notify the applicant of its decision on the license application within 6 months from the date of receipt of a satisfactory application. Duration of licences is to be determined by NERC and licences can be renewed upon application before the expiration of the valid date. Specifically, Section 73(3) of the Act provides that ***"the provisions of Section 71 of this Act shall apply, mutatis mutandis, to the renewal of licenses"*** meaning that the renewal of licenses will be subject to the same conditions stipulated for the initial application, with consideration of the necessary differences.

¹⁰ S.67 ibid

States through their electricity boards are empowered to grant and provide the framework for the operation of the following:

- (i) mini-grid licenses,
- (ii) Independent Electricity Distribution Networks (IEDN),
- (iii) IEDN Operators (IEDNO),
- (iv) Independent Electricity Transmission Networks (IETN), and
- (v) IETN Operators (IETNO)¹¹.

CONCLUSION

In sum, the Act provides an opportunity to further open up the sector and attract the necessary investment to revamp ailing infrastructure such as transmission and distribution lines for increased wheeling capacity. The introduction of renewables as an alternative in the energy mix should allow for greater diversity and cheaper electricity. There is however need for abundance of caution in how the parallel electricity markets are to co-exist and the effective regulation of the markets that will evolve. Extensive stakeholder dialogue prior to implementation of the provisions of the Act will be necessary particularly to allay the fears of existing and potential investors.

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¹¹ S.63(7) ibid