



NIGERIAN ELECTRICITY REFORMS: WHAT DOES THE FUTURE HOLD?

1.0. Introduction

The Nigerian Electricity Supply Industry (“NESI”) has undergone a number of reforms over the past two decades. The modern history of the NESI can be traced to the National Electric Power Policy, 2001 and the Nigerian National Energy Policy, 2023 which brought about a number of policy formulation for the NESI.¹ The first legislative enactment under the Constitution of the Federal Republic of Nigeria 1999 (the “Constitution”) for the NESI was the Electric Power Sector Reform Act, 2005 (“EPSRA”).² The ESPRA governed the Nigerian electricity industry including electricity generation, transmission, distribution, trading, and supply.³

Under ESPRA, the Nigerian Electricity Regulatory Commission (“NERC” or “Commission”) was established as the regulatory body saddled with the responsibility of issuing policies, regulations, guidelines, and licenses with respect to power generation, transmission and distribution in the NESI.⁴ Also, the Power Holding

¹ https://www.linkedin.com/posts/dr-ayodele-oni-97a3b3b_s45-of-the-constitution-state-powers-activity-7059097646212202497-CxqY?utm_source=share&utm_medium=member_android

² <https://nairametrics.com/2022/09/11/a-look-at-laws-governing-the-power-sector-in-nigeria/>

³ <https://nairametrics.com/2022/09/11/a-look-at-laws-governing-the-power-sector-in-nigeria/>

⁴ <https://nerc.gov.ng/index.php/home/nesi/401-history>

Company of Nigeria (PHCN) was formed as a transitional corporation that comprises 18 successor companies (6 generation companies, 11 distribution companies and a transmission company) created from the National Electric Power Authority.⁵

Under the Constitution, matters relating to electricity can be found under Part II of the Second Schedule to the Constitution. Whilst Item 13 (b) of the schedule to the Constitution enables the National Assembly to make laws with respect to electricity generation and transmission, item 14(b) of the schedule to the Constitution restricts State Houses of Assembly law-making capacity with respect to electricity generation, transmission, and distribution, only to areas not covered by the national grid. The supposedly harmless inclusion of the word “*not covered by the national grid*” has hampered the ability of states of the federation to develop a robust electricity market within their respective states. Implicitly, states can only make electricity laws on areas within that state that are not covered by the national grid.

Notwithstanding the provision of the schedule to the Constitution, it has been argued in some quarters that the National Assembly does not have the powers to make laws on distribution, as same was not expressly mentioned in the Constitution, thus questioning the validity of ESPRA with respect to electricity distribution in the NESI.⁶

The above debate became academic when the former president of the Federal Republic of Nigeria, Muhammadu Buhari, on 17 March 2023, signed the Fifth Alteration Bill No. 33, Devolution of Powers (National Grid System) (“Constitutional Amendment”). The Constitutional Amendment effectively expunged the limiting phrase “*areas not covered by national grid*” that was in Item 14 (b) of the Constitution Schedule. Thus, this Constitutional Amendment heralded a new outlook in the NESI as willing states could now make laws with respect to electricity generation, transmission and distribution even in areas covered by the national grid.

2.0. The Electricity Act, 2023

Despite the laudable Constitutional Amendment which effectively ushered in a decentralized electricity market, there was no clear-cut direction on how the Constitutional Amendment will be implemented. Besides, the ESPRA was still seen as a stumbling block to the achievement and realization of the spirit and letter of the Constitutional Amendment. There was therefore an urgent need to either amend the ESPRA or repeal and re-enact another electricity law to replace the ESPRA. On the strength of this argument, the President of the Federal Republic of Nigeria, Bola Ahmed Tinubu on 8 June 2023 signed the Electricity Bill now Electricity Act, 2023 (the “Act”) into law.⁷ The Act brought a number of changes, ensuring that it was in tandem with the Constitutional Amendment.

As expected, the Act introduced a number of changes as discussed below.

⁵ Section 32 of the Electric Power Sector Reform Act, 2005

⁶ https://www.linkedin.com/posts/dr-ayodele-oni-97a3b3b_s45-of-the-constitution-state-powers-activity-7059097646212202497-CxqY?utm_source=share&utm_medium=member_android

⁷ <https://kpmg.com/ng/en/home/insights/2023/06/commentaries-on-the-electricity-act--2023.html>

2.1. State Electricity Laws, Regulatory Bodies and Licensing Regime

Unlike the ESPRA, the Act does not preclude states of the federation from enacting their own state electricity law with respect to all aspects of generation, transmission, distribution, supply of electricity within that state whether the area is covered by the national grid or not⁸. Consequently, willing states can now set up their own electricity market law to regulate their affairs with little recourse to the Act.

Interestingly, some states had commenced the creation of their own electricity market prior to the Constitutional Amendment and subsequent enactment of the Act. In December 2021, the Lagos State Government unveiled its Power Policy⁹ and there is also a pending Lagos State Electricity Bill seeking to amend the Lagos State Electric Sector Reform Law of 2018.¹⁰ This forward-thinking approach was also adopted by states like Kaduna, Ekiti and Ondo who have created their electricity market.¹¹

The Act permits states within the federation to enact laws to sanction the establishment of a state electricity market, the establishment of a state electricity regulatory authority or any entity by whatever appellation with powers to regulate such markets.¹² It is not unlikely that any state that sets up its own electricity law will also set up its own regulatory body to oversee the affairs of the electricity market in that state. In such circumstances, the state regulatory body will have to assume the responsibility of NERC in that state.



Under the Act, corporate entities can now construct, own or operate an undertaking for generation, transmission, distribution, supply, and sale of electricity including the construction, ownership and operation of mini grid, IEDN/IEDNOs or its IETN/IETNOs within a state, pursuant to the law enacted by the House of Assemble of the relevant

⁸ Section 2(2)(a) of the Act

⁹ <https://www.vanguardngr.com/2021/12/lagos-unveils-electricity-policy-for-reliable-affordable-energy/>

¹⁰ Sanwo-Olu unveils new Power Policy to meet Lagos electricity needs – Lagos State Government Lagos state electricity bill will be passed before June 2023– Odusote - Businessday NG.

¹¹ <https://newsdiaryonline.com/inside-ondo-state-power-sector-reform-2020-by-tunji-ariyomo/#:~:text=There%20are%20therefore%20two%20planks%20upon%20which%20the,the%20protection%20of%20consumer%20interests%20of%20their%20constituents.>

¹² Section 2(2)(c) of the Electricity Act, 2023

state, provided that such a license does not permit the licensee to provide inter-state or transnational distribution of electricity in Nigeria.¹³

2.2. TCN unbundling and ISO creation.

The Act also mandates the Transmission Company of Nigeria (“TCN”) to incorporate an entity called the Independent System Operator (“ISO”)¹⁴ to take over the functions of the TCN regarding System Operations which functions, amongst others, will be power generation, scheduling, commitment & dispatch, transmission scheduling and generation outage, coordination, transmission congestion management and international transmission coordination.¹⁵

Considering the poor performance of the transmission network, market, and system operations under TCN's exclusive management, the unbundling of the TCN has the potential of attracting private participation and investment in the transmission arm of the NESI which may eventually lead to optimization of the NESI.

2.3. Disaggregation of Distribution Licenses into Supply and Distribution license

Under the repealed ESPRA, the activities of distribution and supply were coalesced and were therefore covered by a single distribution license. Under the Act however, distribution and supply activities have now been disaggregated.¹⁶ Whilst a Distribution License allows the construction, operation and maintenance of a distribution system, and the delivery of electricity to consumers, a Supply License authorizes the sale of electricity to license holders or consumers.¹⁷ Consequently, a distinct license will be required for distribution and supply activities. The separation of both licenses is to be effected at a period specified by the Commission.

2.4. Trading License

By the combined effect of Sections 7(2)(d) and 69 of the Act, the Nigerian Bulk Electricity Trader Plc (“NBET”) shall at a time to be determined by the Commission, cease to be the sole licensed bulk trader for bulk procurement and sale of electricity and in the NESI. NBET shall novate all its existing contractual responsibilities to other licensees that will be licensed by the Commission to undertake trading activities.

2.5. Intervention Powers in Failing Licenses

The Act makes sufficient provision for the Commission to intervene in failing licensees. A licensee will be said to be a failing licensee where the licensee informs the

¹³ Section 63(2)(b) of the Electricity Act, 2023

¹⁴ Section 15 of the Electricity Act, 2023

¹⁵ Section 67 of the Electricity Act, 2023

¹⁶ Section 68(6) of the Electricity Act, 2023.

¹⁷ Based on a snapshot published by the Commission highlighting the various licenses issuable under the Act.

Commission that it is unable to discharge its obligation under the Act; where such licensee is in prolonged default in carrying out its activities under the Act; or such licensee is plagued with protracted management crises that will be detrimental to its shareholders and consumers within the NESI; or the licensee has insufficient assets to cover its liabilities to lenders and it is in eminent risk of receivership from lenders.¹⁸ In this circumstance, the Commission has the power to dissolve and remove the board of directors of a failing licensee and to appoint administrators to steer the licensee in order to avoid the corporate collapse of such licensee.¹⁹ Undoubtedly, this intervention will guarantee sustainability in the NESI.



The introduction of this provision may not be unconnected with some challenges experienced by the Ibadan Electricity Distribution Company (“IBEDC”) over its inability to repay its loan obligations to banks.²⁰

2.6. Integrated National Electricity Policy and Strategic Implementation Plan

One of the praiseworthy highlights of the Act is the provision of the Integrated National Electricity Policy and Strategic Implementation Plan for the NESI. The Ministry of Power responsible for power is, within one year from the commencement of the Act, to prepare and publish in a federal gazette an Integrated National Electricity Policy and Strategic Implementation Plan for the NESI²¹. The plan is subject to review every 5 years²². This will engender a national roadmap for the NESI.

¹⁸ Section 75(3) of the Electricity Act, 2023

¹⁹ Section 75(2) of the Electricity Act, 2023

²⁰ <https://dailytrust.com/amcon-why-we-took-over-ibadan-disco/>

²¹ Section 3(1) of the Electricity Act, 2023

²² Section 4(1) of the Electricity Act, 2023



2.7. Establishment of National Hydroelectric Power Producing Areas Development Commission

The Act establishes the National Hydroelectric Power Producing Areas Development Commission which shall be responsible for formulating policies and guidelines for the development of hydroelectric power producing areas.²³

2.8. National Power Training Institute of Nigeria.

The NESI requires expertise and technical know-how. To bridge the knowledge gap in the NESI, the Act established the National Power Training Institute of Nigeria (NPTIN or “the Institute”)²⁴, to serve as a focal point for human resources development and workforce capacity building, as well as a research center for matters relating to electric power in Nigeria and Africa.²⁵ The institute will also offer engineering, technical and other training/certificate programs in collaboration with foreign and local institutes for professionals and practitioners in the power sector and serve as a pupillage center and finishing school for graduates of engineering.²⁶

The Act further empowers the NPTIN to receive and manage the Power Training Funds and other funds accruing to the Institute. The funds of the institute, which will be used to offset its expenditure, shall be derived from; training fees, charges and dues recoverable by the Institution and budgetary appropriation by the National Assembly etc.²⁷

²³ Section 89(1) of the Electricity Act, 2023

²⁴ Section 185 of the Electricity Act, 2023

²⁵ Section 186(1) of the Electricity Act, 2023

²⁶ Section 186(2) of the Electricity Act, 2023

²⁷ Section 200 of the Electricity Act, 2023

2.9. Renewable Energy Considerations

As the world gradually transitions from fossil fuels to renewable energy, Nigeria and the NESI are not left out. In August 2022, the former Vice President of the Federal Republic of Nigeria, Professor Yemi Osinbajo SAN, launched the Energy Transition Plan to demonstrate Nigeria's commitment to achieving carbon neutrality, ending energy poverty, and driving economic growth.²⁸ The plan focuses on power, cooking, oil and gas, transport, and industry to ensure Nigeria's pathway to achieving net-zero emissions by 2060.²⁹

Against this backdrop, the Act promotes embedded generation, hybridized generation, co-generation, and the generation of electricity from renewable sources such as solar energy, wind, small hydro, biomass, and other defined renewable sources. The Act empowers the Commission to support the development and utilization of renewable energy and for this purpose, take the measures stipulated under this section to increase the contribution of renewable energy to Nigeria's energy mix. Some of the key measures include:

- i. simplification of licensing and fees regime for issuance of licenses to renewable energy service companies;
- ii. provision of regulations specifying the role of generation licensees, transmission, service providers, and ISO distribution licensees in the integration of renewable energy generated capacity into the national grid and distribution network;
- iii. provision of mini-grid regulations on renewable energy to cater for installation, metering, acting, and other requirements for renewable energy mini-grid Systems;
- iv. provision of standards for Power Purchase Agreements with specific requirements and terms for marketing and trading renewable electricity;
- v. provision for regulations specifying the role of generation licensees, Transmission Service Provider, Independent System Operator distribution licensees in the integration of renewable energy generated capacity into the national grid and distribution network;
- vi. monitoring and enforcing compliance with Renewable Purchase Obligations and Generation Purchase Obligations as may be prescribed by the Commission;
- vii. provision of embedded renewable electricity generation regulations including review of extant standards for solar PV, wind turbines and regulation for biomass electricity;
- viii. provision of mini-grid regulations on renewable energy to cater for installation, metering, billing and other requirements, etc for renewable energy mini-grid Systems, etc³⁰.

Fiscally, the Federal Ministry of Finance shall introduce such tax incentives as are necessary to promote and facilitate the generation and consumption of energy from renewable energy sources and in accordance with the provisions of the Nigerian

²⁸ <https://www.thisdaylive.com/index.php/2023/01/03/tackling-the-challenges-of-nigerias-energy-transition-plan>

²⁹ <https://www.energytransition.gov.ng/#Plan>

³⁰ Section 164 of the Act

Industrial Development (Income Tax Relief) Act or such other fiscal policy framework, foster such tax reliefs that would incentivize implementation of renewable energy projects in Nigeria.³¹

The Act further provides that an electricity distribution utility shall not buy or negotiate a Power Purchase Agreement with a generator of electricity from renewable energy sources unless it is in accordance with guidelines provided by the Commission.³² Thus, NERC is required to publish the approved feed-in-tariff rates for electricity generated from renewable energy sources in the Federal Gazette and the mass media³³.

3.0. NERC as the “Big Brother”

Although the Commission has been the only regulatory body statutorily empowered to oversee the activities of the NESI prior to the enactment of the Act, the Act reiterated the establishment of the Commission.³⁴ The Act also stated that the Commission shall be the apex regulator of the NESI and shall be an independent body in the discharge of its functions and exercise of its powers.³⁵ The Act empowers the Commission to, amongst others, license and regulate persons engaged in the generation, transmission, system operation, distribution, supply, and trading of electricity. This obviously is without prejudice to the powers of state regulatory body to issue licenses within its state. The Commission will also be responsible for promoting competition and private sector participation in the power sector, as well as other related functions outlined in the Act.³⁶

Notwithstanding the leeway given to states to establish their state regulatory commission, a state should be careful in reinventing the wheel as they still have a lot to learn from their would-be predecessor, NERC. Some of the challenges for states in leveraging on the Constitutional Amendment and the Act will include:

3.1. Funding constraints

The liberty now given to states to establish their own electricity market may still hit a brick wall as some states are not financially buoyant to carry out the capital-intensive project attendant to the establishment of a state electricity market due to limited internally generated revenue and budgetary allocation.³⁷

One of the ways willing states can limit their financial burden should they leverage on the Constitutional Amendment and the Act is to engage in Public Private Partnerships.

³¹ Section 166 of the Act

³² Section 168 of the Act

³³ Section 170 of the Act

³⁴ Section 33(1) of the Electricity Act, 2023

³⁵ Section 33(3) of the Electricity Act, 2023

³⁶ Section 33(2) of the Electricity Act, 2023

³⁷ The National Bureau of Statistics reports for instance that in the second half of 2021, Lagos State, Abuja and Rivers State had the highest Internally Generated Revenue with N267,232,774,434.06, N69,072,879,664.43 and N57,324,672,372.42 respectively. In the light of the tight budget constraint of State Governments, the financing of large scale power projects within states' budgetary allocation would be difficult.

Such collaboration will alleviate the financial burden of states willing to create their own electricity market in the NESI.

Another way willing states can achieve success is to introduce policies, regulations and incentives that encourage investment in embedded generation and mini-grids, especially to underserved and unserved urban and rural areas within States.

Finally, two or more states could come together to form a Joint Electricity Regulatory body. This will help allay the burden of a state that may have financial constraints in implementing the provisions of the Constitutional Amendment and the Act.

It is apparent that in view of these potential constraints, some states may have no choice but to retain their existing structure with NERC being the “Big Brother”.

3.2. Legacy transmission and distribution network

The existing national grid already has a national spread to which most customers in the NESI are already wired to through the Transmission Company of Nigeria (“TCN”). It will therefore be a herculean task for some states to undertake the construction of new transmission and/or distribution infrastructure given the proximity to existing infrastructure to existing customers. States will thus need to do a comprehensive review and analysis of the transmission and distribution infrastructure network within their territories in order to develop a roadmap that assists with pinpointing areas where new investments are best situated and those for which collaboration with the TCN or the relevant Discos will be essential.

3.3. Multiplicity of Regulators

Does the NESI need 36 electricity regulatory bodies³⁸? It has been argued by some persons that the multiplicity of regulatory bodies in the NESI will occasion undue disruptions and possible frictions in the NESI. Others believe the above question is a subtle ploy to be employed by NERC to retain regulatory powers in various states of the federation. Whichever way it swings, it is presumed that not all the states of the federation will be able to have their own electricity state regulator due to reasons already stated herein.

4.0. The future

Given the new decentralized regime, Investors will be willing to work with states that have created their own electricity market with the expectation that the state laws and policies will be flexible to accommodate their desires.

³⁸ This was a question put forward by the Vice Chairman of NERC at a stakeholders’ forum held on Thursday, 13 July 2023 at Lagos Marriot Hotel, Ikeja, Lagos.

The disaggregation of licenses will also expand the scope of play within the NESI. The unbundling of the TCN will also boast efficiencies in the transmission sub-sector within the NESI.

States are yet to either enact or amend laws post – enactment of the Electricity Act to align state laws with the National law. Investors are keenly anticipating actions to be taken by States with respect to creating an enabling environment for investment.

NERC has continued to issue notices and publications that will aid stakeholders in the understanding of the NESI.³⁹ It is also expected that a number of regulations and guidelines will be issued to back-stop the Constitutional Amendment and the Act. In this regard, the Commission has continued to engage relevant stakeholders at different fora to see how both the regulator and stakeholders can seamlessly transition into the new regime.⁴⁰

Please the above serves as a public commentary of the views of the authors and is not intended to serve as legal advice. For further enquiries and consultations please reach out to any of the authors

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³⁹ A month ago, the Commission published a snapshot highlighting the various licenses issuable under the Act.