



LEGAL PRACTITIONERS & ARBITRATORS

# Legal and Commercial Implications of The Electricity Act, 2023

For The Nigerian Electricity Supply Industry (NESI)



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# Introduction

The Electricity Act, 2023, ("the Act") was signed into law by His Excellency, President Bola Ahmed Tinubu, GCFR, on 6 June 2023. The Act was passed in light of the Federal Government's initiatives to accelerate Nigeria's energy transition process as well as consolidate the regulation of the Nigerian Electricity Supply Industry (NESI) for optimum functionality and effective service delivery.

Essentially, the Act, repeals the Electric Power Sector Reform Act, 2005, consolidates the laws relating to the NESI, and provides a comprehensive and institutional framework for the power sector in Nigeria. Areas covered by the Act include electricity generation, transmission, distribution, supply, trading, system operations, electricity offences and the enforcement of consumer rights and obligations.

It also makes provision for a holistic integrated resource plan and policy that recognises all the sources for the

generation, transmission and distribution of electricity, including the integration of renewable energy into Nigeria's energy mix.

The enactment of the Act marks the second of a three stage reform process that started with the Constitutional Amendment to remove the constitutional restrictions on the States' right to legislate for power generation, transmission and distribution and which will culminate in the enactment of electricity laws by the various houses of assembly for each State.

This article, therefore, is an overview of the provisions of the Act, in light of the reform proposals therein, factoring in the current state of play to ascertain the implications of its provisions on the structure, organisation and administration of the NESI.

# *Overview of the Electricity Act*

The main objective of the Act is to attract private sector investment into the value chain of the NESI by providing a comprehensive framework for the operation of “a privatised, contract and rule based competitive electricity market in Nigeria through transformative policy and regulatory measures”.

The Act comprises of provisions relating to licensing for electricity generation, distribution and transmission as well as tariffs and subsidies, acquisition of land, renewable energy and rural electrification, consumer protection, offences and penalties.

In alignment with the constitutional amendment, the provisions of the Electricity Act apply throughout the Federal Republic of Nigeria in respect of all aspects of the power sector with the caveat that nothing in the Act will invalidate any law passed by the House of Assembly of a State or a collaboration between the State, the Local Government, and the Federal Government in relation to any aspects of the electricity market.

# *Notable Reforms in the Electricity Act*

The Electricity Act proposes consequential reforms in the power sector. These reforms are aimed at facilitating the effective progression of the electricity market into a more commercially driven phase. The key reforms are examined below, albeit, cursorily:

## **1. The National Integrated Electricity Policy and Strategic Implementation Plan.**

By Section 3 of the Electricity Act, the Federal Government is mandated to publish, through the Ministry of Power, a National Integrated Electricity Policy and Strategic Implementation Plan (NIEPSIP) in the Federal Government Gazette within one year from the commencement of the Act to guide the overall development of the electric power sector in Nigeria. Upon issuance, all project development in the electricity sector will be expected to conform with NIEPSIP as the applicable policy and implementation plan document for electricity in Nigeria. Some level of stakeholder input is also contemplated in the formulation of the NIEPSIP which shall be approved by the Federal Executive Council and reviewed after successive five year periods.

Specifically, the NIEPSIP is to encompass aspects relevant to the development of electric power sector in Nigeria such as; the utilisation of relevant resources (both renewable and non-renewable) for power generation, transmission, distribution and supply, electricity infrastructure, rural electrification, public private partnerships, waivers and subsidies and the overall development of the electricity value chain.

## **2. Development of a Competitive National Electricity Market**

While recognising the legal validity of the evolution and reform of the electricity market from the vertically integrated structure, to the privatized structure - under the repealed Electric Power Sector Reform Act, 2005 (the repealed EPSR Act), and other subsequent institutional and legislative innovations, the Electricity Act sets the framework for the transition of the electricity market to the medium term and long-term electricity market stage under the oversight and supervision of the National Electricity Regulatory Commission ("the Commission").

In addition, the Electricity Act provides that the sale and purchase of electricity and ancillary services during the medium term stage shall be in accordance with the Market Rules and the Grid Code, and the Commission shall have the power to approve such amendments to the Market Rules to prescribe the preconditions for the declaration of the long-term market stage.

Specifically, the Act recognises the System Operator as the issuing and amending authority of the Market Rules and the Grid Code howbeit, subject to the approval of the Commission. Also the Commission is imbued with the powers to issue directives specifying the class(es) of end-use customers to be designated as eligible customers at every market stage as well as issue directives to specify competition transition charges in circumstances where the designation of eligible customers would adversely affect trading or distribution licenses in terms of the reduction in electricity prices.

### **3. Incorporation and licensing of the Independent System Operator (ISO)**

The Electricity Act mandates the Transmission Company of Nigeria Plc ("the TCN")<sup>13</sup>, to take steps to incorporate an entity under an ownership and governance structure as the Commission may specify and such entity shall apply to the Commission to be licensed as an ISO to perform the market and system operation functions stipulated by the Act.

Further to the above, the Electricity Act requires that upon incorporation and licensing of the ISO, the TCN is to transfer all assets and liabilities pertaining to its market and system operation functions to the ISO. This implies that the regulation of existing transmission licenses will transfer to the ISO. Specifically, the functions of the ISO include the generation, and transmission scheduling, generation outage co-ordination and transmission congestion management, international transmission co-ordination, procurement and scheduling of ancillary services, system planning, administration of wholesale electricity market and such other activities as may be required for reliable and efficient system operation.

### **4. Establishment of relevant institutions of the electricity sector under the electricity Act**

The Electricity Act makes elaborate provision for the establishment, administration, organisation, functions, powers of relevant power sector agencies. Accordingly, the agencies established under the Electricity Act include the National Electricity Regulatory Commission (NERC), the National Hydroelectric Power Producing Areas Development Commission (N-HYPPADEC), the Rural Electrification Agency (REA), Nigerian Electricity Management Services Agency (NEMSA), National Power Training Institute of Nigeria (NAPTIN).

While these agencies are not all new, the Act makes specific provisions to ensure that all essential electricity related agencies are brought under the umbrella of a single legislation.

## 5. Licensing Requirements

The Electricity Act reviews the licensing requirement for engaging in the business of electricity generation, transmission, distribution, supply, trading or system operation to accommodate the rights of States of the Federation to make laws and establish markets for generation, transmission, system operation, distribution and supply of electricity within their respective territories.

Specifically, the Electricity Act recognises the power of States to enact laws that allows a person to be licensed to construct own, and/or operate an undertaking for generation, transmission, distribution, supply and sale of electricity, including the construction and operation of mini grid, independent electricity distribution network/independent electricity distribution operator (IEDN/IEDNOs) or its independent electricity transmission network operators (IETN/IETNOs) within the State. Accordingly, the Act stipulates that the State Electricity Board shall have the responsibility to grant licences for mini-grids, IEDN/IEDNOs and IETN/IETNOs and provide framework for the operation of such licensees within the State.

In respect of electricity generation, the Electricity Act makes it the responsibility of the Commission to promote the generation of electricity from renewable energy sources, and stipulates that in granting generation licences, the Commission shall promote embedded generation, hybridised generation, co-generation and the generation of electricity from renewable energy sources. Essentially, the NERC retains the overarching generation licensor for power generation in respect of the national grid, while the State Electricity Boards will become the licensor for power generation within their respective states.

As regards electricity transmission, the Electricity Act empowers the Commission to issue IETN licence where there is no existing transmission facility or existing facilities require reinforcement to increase electricity access or connect new power generating facilities. In addition, the Electricity Act now expressly approves private sector investment in electricity transmission, the grant of concession (or other commercial arrangement) to a non-licensee for the finance, construction, ownership and maintenance of a transmission network, as well as public private partnerships to facilitate transmission of electricity.

In respect of electricity distribution, the Electricity Act provides for a phase where distribution will be disaggregated into distribution and supply and each activity will be subject to the grant of a separate licence.



This is a novelle creation in the Act that will eventually see a separation of roles currently performed by electricity distribution companies into either distribution or supply licensee roles. The Act further distribution or supply franchising arrangement between distribution or supply licensees and third parties within their respective coverage areas subject to the approval and regulatory oversight of the Commission. In addition, the Act provides for the grant of IEDN and IEDNO licence within an area with no existing distribution system or where the existing distribution infrastructure is unable to meet the demands of such customers.

With respect to Electricity trading, the Act, while recognising the establishment of the institutional trading licensee – Nigeria Bulk Electricity Trading Company (NBET), which holds a bulk purchase and resale license for bulk procurement and bulk sale of electricity and ancillary services, provides that the Commission may direct the NBET to cease to enter into contracts for the purchase and resale of electricity and ancillary services and novate its existing contractual rights and obligations to other licensees within such period as the Commission may specify.

Furthermore, the Act empowers the Commission to issue such number of trading licences as it considers appropriate which shall authorise the trading licensee to enter novation agreements with the

institutional trade licensee – NBET, for the novation of the contractual rights and obligations for purchase and resale of electricity and ancillary services as well as enter contracts with generation companies for the purchase and resale of electricity and ancillary services.

The Electricity Act further provides that any person who contravenes the provisions of the Act in respect of any of these licensing requirements, shall be liable on conviction to a fine of at least 10 (ten) times the application and license fees for the relevant licence contravened; imprisonment for a term not exceeding five years; or both such fine and imprisonment as well as an order for permanent forfeiture of the undertaking to the Commission.

## **6. Renewable energy and energy efficiency**

The Electricity Act makes it the responsibility of the Commission to support the development and utilisation of renewable energy and stipulates measures to be deployed by the Commission to increase the contribution of renewable energy to Nigeria's energy mix<sup>36</sup>. This implies that Nigeria's electricity mix now includes renewable energy on an institutional level, such that the Commission is empowered to reckon renewable energy as one of the sources of energy in Nigeria.

## 7. Offences and Penalties

The Electricity Act makes elaborate provisions which criminalises and stipulates punishments for acts of electricity theft, theft of electric lines and materials, receiving stolen electricity, interference with meter or works of licensee, negligently breaking or damaging electricity materials, intentionally disruption power supply, damage to public street lights, contravention of regulations and orders pursuant to the Electricity Act, false declaration, aiding and abetting an offence punishable under the Electricity Act. Further to this, the Electricity Act provides that both the Federal High Court and the State High Court are imbued with concurrent jurisdiction to try offences under the Act.

These foregoing offences provision marks a watershed in electricity regulation as it institutionalises specific electricity offences which were hitherto dealt with as conventional offences without specific reference to the specific impact of that these offences on the electricity supply value chain. These provisions also complement the assurances and protections provided in the Act for investments in the electricity value chain.



# *Implications of the Reforms on the Nigerian Electricity Supply Industry*

## **1. Setting the stage for a more competitive electricity market stage**

In driving the activation of this medium term phase, the Electricity Act empowers the Commission to make a declaration to that effect in accordance with the Market Rules. Thus, upon the satisfaction of the preconditions, and the declaration by the Commission, the state of play envisioned by the medium term phase within the electricity sector will be set in motion.

Thus, the medium term phase which is characterised by a more decentralised and privatised electricity market is expected to be a more competitive and developed market.

## **2. Recognition of subnational regulation of the electricity sector**

Another key implications of the Electricity Act, is the recognition of subnational regulation of electricity and the power of states to issue electricity generation, transmission, distribution and supply licences to eligible entities within their State.

This will encourage decentralisation and expansion of electricity supply services and allow States to be needs and capacity specific in terms of generation, transmission, distribution, and supply of electricity within their respective State.

However, it is worthy of note that these multiple layers of regulations may lead to certain degrees of unpredictability and uncertainty regarding electricity regulation within the country as several states may have several regulatory parameters. In this regard, the overarching role of the Commission may be pivotal to streamlining the regulation of State Electricity Boards in respect of licensing standards.

## **3. Multiple Regulatory Regimes**

The Act envisions a National Electricity Market regulated by NERC co-existing with State Electricity Markets in each State with their own Electricity Regulators. Therefore, power generation, distribution and transmission projects will fall under any of three categories of regulation.

The first category will be projects within the geographical boundaries of a state which shall be regulated by the State's electricity Regulator. The second category will be projects that are transnational or between two or more states which shall be regulated by NERC. The third category are projects within the geographical boundaries of a state for which a State Electricity Regulator is yet to be established in which case NERC shall continue to regulate until such a State Electricity Regulator is appointed.

Upon establishment of a State Electricity Regulator, NERC is expected to transfer all regulatory functions with respect to existing Licensees under the first category to the State Electricity Regulator. Existing Licensees will therefore cease paying fees and other obligations to NERC and transfer all such obligations to the appropriate State Electricity Regulator.

#### **4. Increased participation of private entities in the NESI**

As part of its energy transition objectives, the Electricity Act provides for increased participation of the private sector, other than the successor companies, within the NESI for purposes of electricity generation, transmission, distribution, trading and supply. In this regard, the private sector is specifically empowered to participate in the transmission, and trading (supply) aspects of electricity value chain through the issuance of trade (supply) licenses to other

trading companies and the introduction of investment mechanisms for private sector to invest in the transmission infrastructure of Nigeria's electricity value chain.

#### **5. Institutionalisation of renewable energy in the NESI**

The Act makes elaborate provisions on renewable energy. Specifically the Act makes it the responsibility of the Commission to promote renewable energy through licenses, measures and strategies, including tax reliefs and incentives for the promotion and execution of renewable energy projects in Nigeria. Also the Act recognises renewable energy as an integral part of Nigeria's energy mix and as such provides for standards and procedures for their connection to the national grid.

This signifies a significant leap forward in Nigeria's energy progression as Nigeria will now enjoy the gains of transitioning to renewable energy in terms of tackling the impacts of climate change towards achieving sustainable development in the energy sector. Moreso, Nigeria will take advantage of the available and existing finance mechanism tailored towards renewable energy development by international organisations and development partners.

# *Conclusion*

The Electricity Act establishes all the agencies and regulatory authorities within the NESI within a single legislation to ensure coherence of the regulatory and institutional framework governing the NESI. It is a conscious attempt by the government to organise and administer the NESI under a single legislative framework.

Furthermore, the Electricity Act presents a picture of the journey so far in the deregulation of the NESI for optimal performance. It is our view that the Act is a well thought out legislation given the specific areas of reform which will go a long way boost the overall investment base of the NESI through increased private sector involvement.



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