



CONSTITUTIONAL AMENDMENT ON ELECTRICITY; KEY IMPLICATIONS FOR THE NIGERIA ELECTRICITY SUPPLY INDUSTRY



INTRODUCTION

The Nigeria Electricity Supply Industry has reached yet another defining milestone courtesy of the Presidential assent to the Fifth Alteration (No. 33) Bill 2022 (the “**Electricity Constitutional Amendment**”) on 17th March, 2023.

The Amendment creates a new regime in the Nigerian Electricity Supply Industry whereby States within the Federation are now empowered to legislate with respect to the generation, transmission, and distribution of electricity in areas covered by the national grid system, in effect, all areas within the state.

This amendment potentially creates a new era of State controlled Electricity Markets as opposed to the former regime of centrally controlled market by the Federal Government. Although, before this amendment, State governments were empowered to legislate on generation, transmission, and distribution in areas outside the national grid, but in practice, the market is really monopolized by the federal government, while State governments majorly explored off-grid arrangements for electricity supply.

The constitutional amendment has received warm reception and encomiums across Nigeria for further liberating and decentralizing the Nigerian Electricity market. The amendment is poised to create a more competitive and efficient market in the Nigerian Electricity Supply Industry provided that the States fully explore the spirit and the opportunities created by the amendment.

However, as pleasant as this development may be, it attracts several legal and commercial challenges for existing investments and arrangements throughout the value chain of the Nigeria Electricity Supply Industry, which if not nipped in the bud, could become a recipe for chaos in the Nigeria Electricity Supply Industry (NESI).

In this publication, we examine the implications of the constitutional amendment on the power sector and the Nigerian economy at large.

STATE OF THE MARKET BEFORE THE AMENDMENT

Prior to this 5th amendment, the Constitution granted the Federal Government exclusive authority to regulate the generation, transmission, and distribution of electricity throughout the country (interstate and intrastate) through the national grid network, while States could regulate areas not covered by the national grid.

Despite the central control of the power sector by the Federal government through the defunct Nigerian Electric Power Authority (NEPA), which was eventually privatized and unbundled by the Electric Sector Reform Act, 2005, into eighteen (18) business units comprising of six (6) generation companies (gencos), one (1) transmission company, and eleven (11) distribution companies (discos)¹, because of gross underperformance, the sector still failed to meet legitimate expectations in spite of the enormous investments expended on the sector.

Consequently, to address the incessant underperformance of the sector, urgent and pragmatic solutions such as the extant constitutional amendment was necessary.

This constitutional amendment allows States to fully control their electricity markets within each state, while the federal government focus mainly on the interstate market. The key highlights of the constitutional amendment are analyzed as follows.

KEY HIGHLIGHTS OF THE CONSTITUTIONAL AMENDMENT

a. Emergence of State controlled Electricity Markets

The constitutional amendment now permits State governments to regulate and legislate on the generation, transmission, and distribution of electricity throughout each state, for areas within and outside the national grid. This presents limitless opportunities for the states across the federation.

First, State government can now develop their own electricity policy and create bespoke solutions based on the specific challenges in each state. States can now explore the abundant energy potentials and resources available within each state's territory for electricity generation, such that the states can develop appropriate massive generation infrastructure or explore small to medium scale energy generation projects depending on the available resources in each state. The State government can explore this amendment to cater for the unserved and underserved areas more diligently in the state, especially rural communities.



¹ Other gencos and discos have emerged over the years



Secondly, State governments are now empowered to enact their own electricity laws, and for States that already have an electricity law, such laws will be amended to align with the new constitutional realities. Therefore, States can now fully regulate their own electricity market, enact relevant laws, regulations, guidelines, set up relevant regulatory authority and issue licenses on terms which may be different and less onerous than what is obtainable and issued by the federal regulator, the Nigerian Electricity Regulatory Commission (NERC).

Further, the constitutional amendment, if fully explored, could reduce the pressure on the national grid which has unfortunately suffered constant collapse especially in the last few years. With this amendment, State governments can and may likely explore the establishment of their own transmission systems. Thus, it will not be out of place if several regional or isolated grid networks are established by State governments pursuant to the new constitutional enabling powers. We may see an increase in mini-grid and off-grid power projects. This would undoubtedly reduce the pressure and over-reliance on the national grid and result in a decline in system collapses and cost grid maintenance.

b. Concurrent legislative capacity and the doctrine of covering the field.

This constitutional amendment effectively creates a decentralized and dual electricity market across the federation particularly for the intrastate electricity market. While this approach is not uncommon around the world, the current dual intrastate market is susceptible to conflict, particularly on the issue of superiority of legislation and regulatory functionality.

While the federal legislation and regulatory authority is exclusively in charge of the interstate market, the intrastate market is subject to legislative and regulatory superiority tussle between the federal and state governments, as both tiers of government are enabled to regulate the intrastate market.

Essentially, based on the doctrine of covering the field, the state's legislation and regulatory capacity cannot contradict the federal position. In any such contradictory circumstance, the federal legislation will enjoy superiority to the extent of the state law's inconsistency.²

This situation may complicate risk analysis for potential investors who may be unsure what regime would enjoy dominance in a conflict situation. This possibility does not portend well for the electricity supply industry as it may disincentivize investment inflow in the industry. To avoid this situation, both tiers of government must adopt a collaborative approach for the intrastate market control. Necessary legislative and regulatory allowances/adjustments must

² The doctrine of covering the field is a legislative principle that applies in circumstances where the federal and state government enjoy legislative competence over a subject matter. Thus, in such situations, where there exists a federal legislation on such subject, the subsequent state legislation must not contradict the position of the federal legislation, otherwise, the offensive and contradictory provision would be invalidated in favour of the federal position. See *AG Lagos State v. Eko Hotels Ltd. & Anor* (2017) LPELR-43713 (SC)

c. Potential Over-regulation and Overlapping Regulatory Functionality

Ordinarily, the Nigerian Electricity Sector is heavily regulated across the entire value chain. The emergence of the concurrent/dual electricity market by both the Federal Government of Nigeria (“FGN”) (through the NERC) and the State Governments through their own regulators presents a potential overregulation and overlapping regulatory risk.

If both tiers of government fail to collaborate, existing and potential investors, and industry players may become apprehensive of the risk of multiplicity of legislations and multi-level, licensing requirements, charges, levies, etc. in the sector. The government’s failure to collaborate may cause further confusion in the sector, become a waste of scarce governmental resources, and undermine the good intentions of the constitutional amendment.



d. Negative effect on existing contracts, distribution franchise areas, and arrangements in the NESI

Before the constitutional amendment, several contracts, arrangements, and distribution franchise were operational. As States begin to implement the amendment, several existing arrangements could be affected.

For instance, existing distribution franchise areas where existing distribution companies operate may be affected as new state licensed distribution companies emerge. This may cause conflict between the existing discos and the new discos as the constitutional amendment implementation may impair their investment and revenue prospects.

In the same manner, investors in the NESI with existing contracts with the federal government may fight against the implementation of the constitutional amendment as the same could affect their rights and profitability prospects.

e. De-monopolization of the Distribution (Discos) Market

The regional monopoly of DISCOS will end as new state players will emerge and ultimately allow consumers a variety of discos to elect from for subscription purposes. This will ensure fair competition in the power distribution sector and would ultimately improve service delivery.

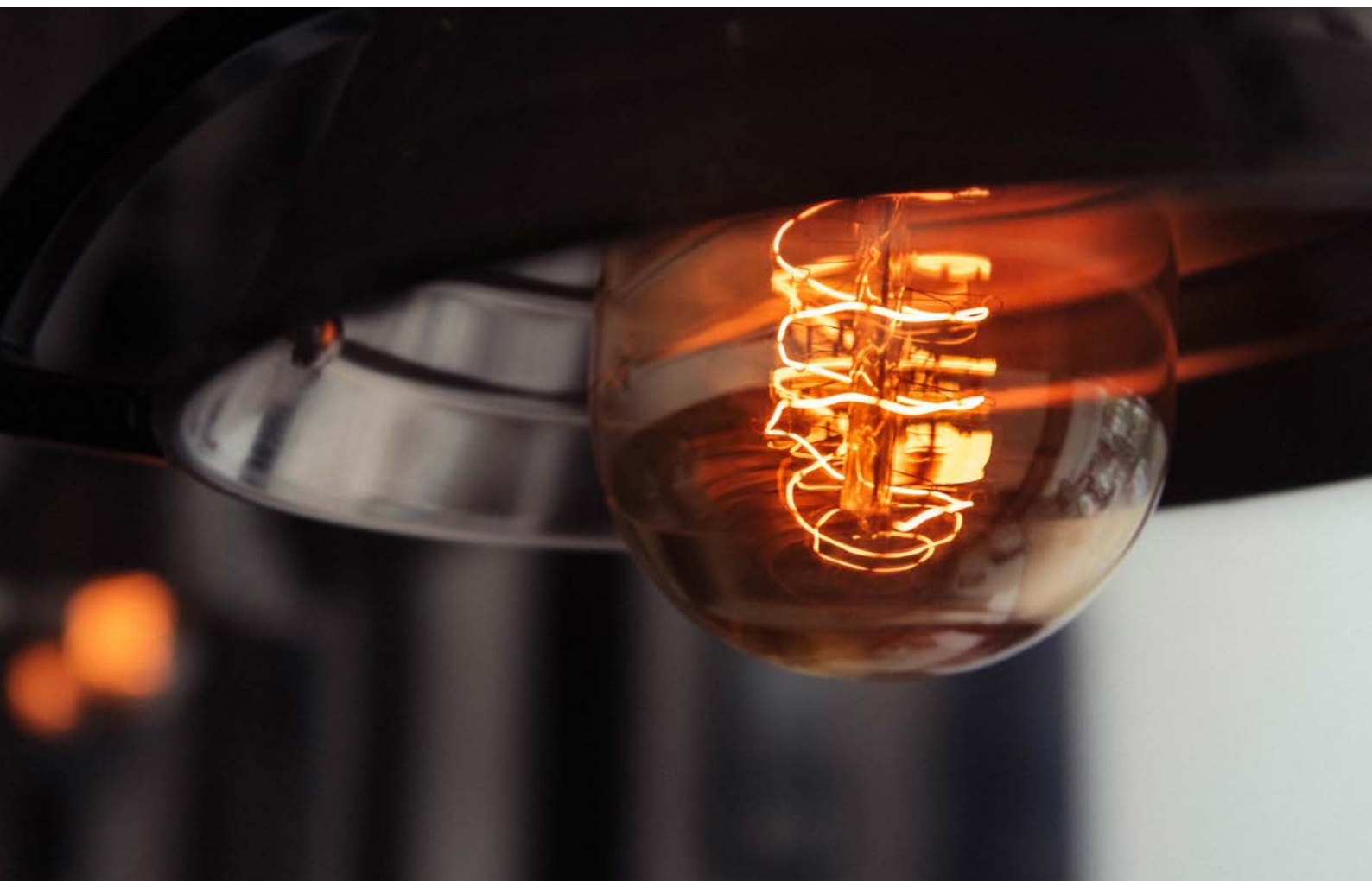
f. Impact on electricity tariffs

The NESI's refusal to adopt cost effective tariffs have proved over the years to be detrimental. It is expected that the constitutional amendments may, in the mid to long term, result in significant changes in the pricing of electricity. Given the devolution of regulatory powers to the States, there is a strong likelihood that States which are desirous of attracting investments into their power sector may decide to float electricity tariffs such that prices are determined by prevalent market forces; or continue to regulate tariffs but under an enhanced arrangement based on certain indices such as inflation force, cost of capital, exchange rate fluctuations, etc. This would stimulate fair competition among States such that those that are unwilling, or slow to adopt a flexible approach to tariff setting could lose their share of investments that the reforms attract.

g. Potential emergence of green energy

Another advantage of this constitutional amendment is that State governments can explore unconventional energy generation methods, particularly, explore the use of renewable energy based on the individual energy potentials within their territory. Renewable energy sources such as wind, solar, geothermal, eligible biomass, etc. can be explored as opposed to the heavy reliance of hydro energy as obtainable under the previous regime.

If States explore green energy options, especially for low consumption areas, it provides the opportunity for carbon offsetting, carbon pricing mechanism which will be a revenue source for these states thereby increasing their Internal Government Revenue. States will also be able to meet their global climate obligations set by United Nations, African Union, and other organizations.





CONCLUSION

Inadequate power supply continues to ground the growth of the Nigerian economy. Amongst other, the gross underperformance of the Nigerian power sector, is attributable to the poor governmental policies, lack of adequate infrastructure, corruption, etc.

Interestingly, the extant electricity constitutional amendment has the potential of reshaping and revamping the overall prospects of the Nigerian power sector. However, to adequately realize the full potentials of the constitutional amendment, a number of factors must be considered. Critical amongst these factors is the need for urgent collaborative efforts between the federal government, the state government and other stakeholders in the Nigerian Electricity Supply Industry.

Beyond enacting appropriate local laws and incentivizing the sector to attract investment, the two tiers of government must collaborate, strategize, readjust position by possible amendment of extant laws,³ re-enact laws jointly to clarify roles, functions, and duties to avoid potential overregulation and regulatory overlaps.

While we anticipate the implementation of the constitutional amendment by the States, it is hoped that the States will take useful lessons to ensure it avoids the errors that plagued the development of the NESI in previous regimes.

³ The Electric Power Sector Reform Act is currently undergoing amendment by the National Assembly. It is hoped that the amendment will reflect the new constitutional realities in the sector and realign parties roles accordingly to avoid overlaps.



Dayo Adu



Samuel Olawepo



Bamisope Kupoluyi



CONTACT US



+234 (0) 90 68909 300
+234 (0) 80 62801 020



info@famsvillesolicitors.com



128B, Association Road, Dolphin Estate, Ikoyi, Lagos