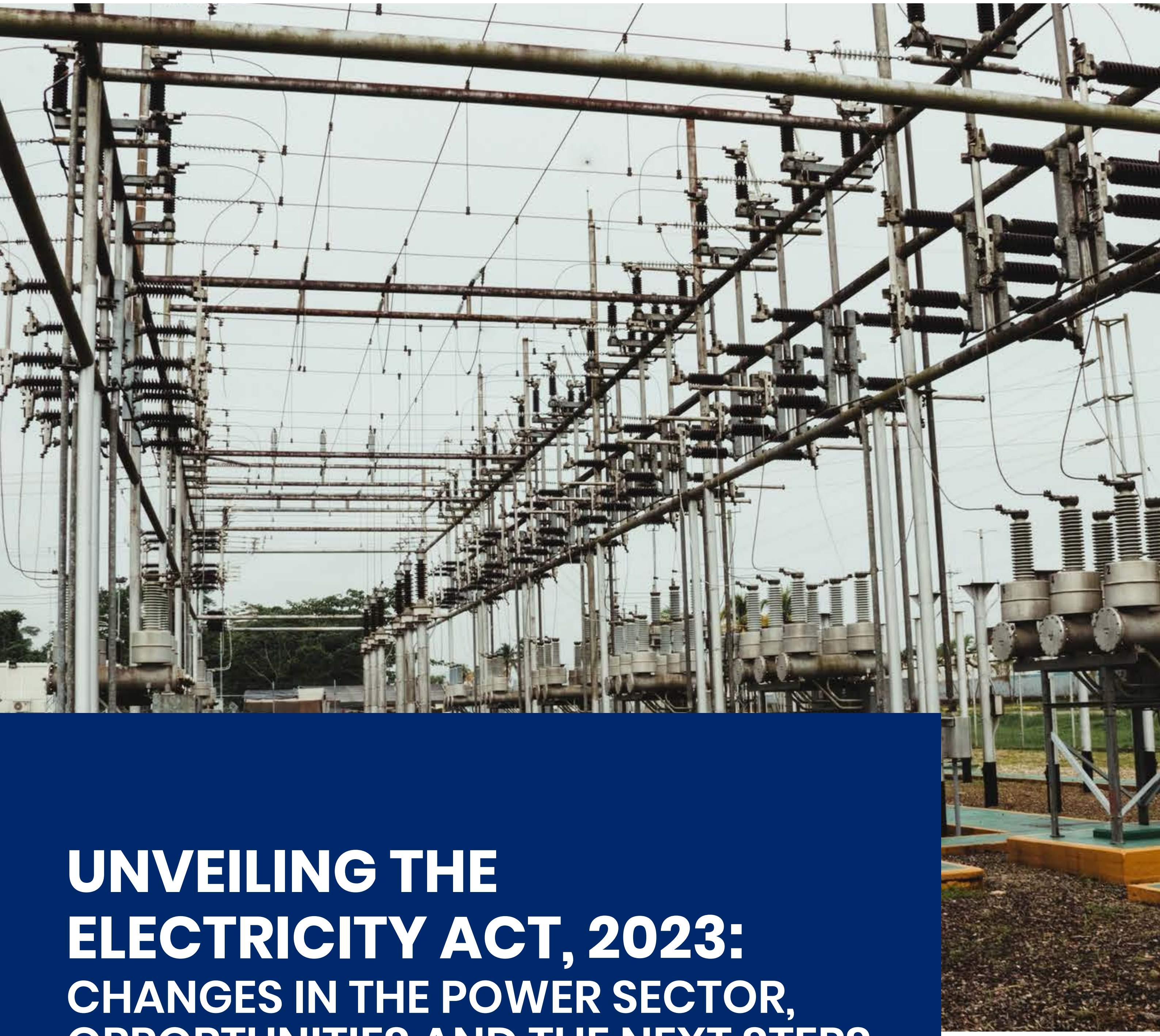


UNVEILING THE ELECTRICITY ACT, 2023:

CHANGES IN THE POWER SECTOR, OPPORTUNITIES AND THE NEXT STEPS

INTRODUCTION

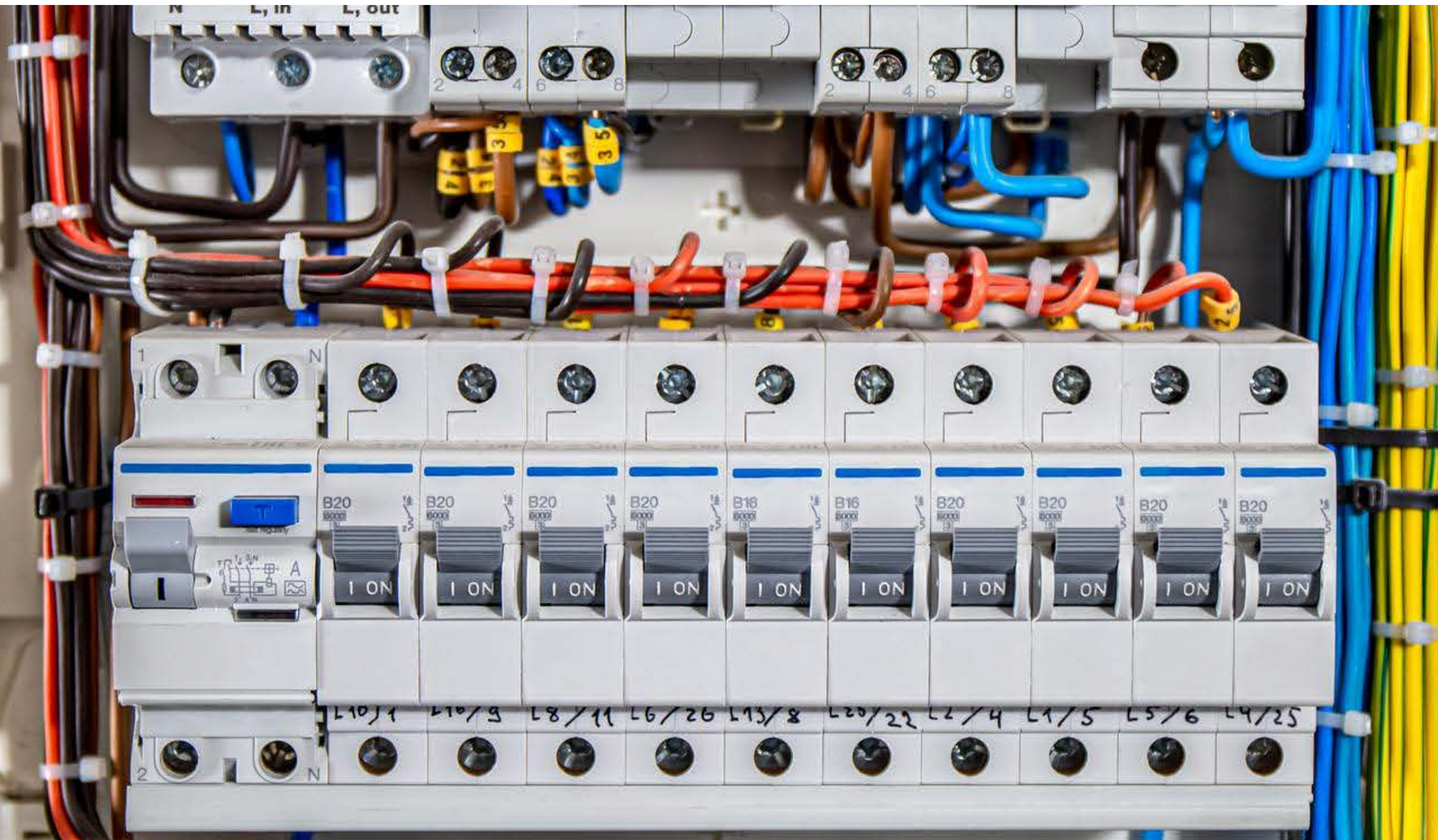
On 9th June 2023, the President of the Federal Republic of Nigeria, President Bola Ahmed Tinubu, assented the Electricity Bill 2022, effectively repealing the EPSRA 2005.

Before the emergence of the Electricity Act 2023 (the "EA 2023"), the repealed EPSRA 2005 was enacted as the foundation of the efforts to revive Nigeria's power sector and introduce private participation. Based on the ESPRA 2005, Nigeria's power sector was unbundled and privatized in the generation and distribution sub-sectors. The EPSRA 2005 further provided the general legal framework for forming successor companies to take over the defunct NEPA's assets and liabilities and to establish the NERC as the primary regulator of the power sector.

Eighteen (18) years after the passage of the EPSRA 2005 and thirteen (13) years since privatization, Nigeria's power sector still suffers the same perennial challenges since the inception of power supply in the country. Thus, necessitating a new legal framework to guide the post-privatization phase of the sector. Hence, the enactment of the EA 2023.

The new Act consolidates the laws relating to the Nigerian Electricity Supply Industry. It provides a comprehensive legal and institutional framework for the power sector in Nigeria in the areas of electricity generation, transmission, system operation, distribution, supply, trading, consumer protection. The Act further provides a holistic, integrated resource plan that compels the utilization of renewable and non-renewable energy sources for power supply in the country and attracts investments into the sector.

In this piece, we highlight the key changes in the sector introduced by the new Act, the opportunities the Act presents, and how these opportunities can be harnessed to deliver Nigeria's dream power sector.



KEY INNOVATIONS OF THE ELECTRICITY ACT 2023

A. DECENTRALISATION OF THE POWER SECTOR AND CREATION OF STATE ELECTRICITY MARKETS

One of the notable provisions in the EA 2023 is the decentralization of the power sector and the creation of state electricity markets. This is done on the backdrop of the recent constitutional amendment done on 17th March 2023, granting states the legislative autonomy to regulate electricity activities in all areas within their state, whether within or outside the areas covered by the national grid, while the federal government exclusively regulates interstate and international electricity activities.

By the combined effect of the provisions of sections 2(2), 63(1), 230 (2 – 9) of the EA 2023, the federating states of the Federal Republic of Nigeria are now empowered to create their electricity market, establish their state regulatory boards to oversee electricity activities within their jurisdiction.

Before the electricity constitutional amendment[1] and the EA 2023, the NESI operated majorly as a centrally controlled electricity market, whereby the federal government regulated electricity activity across the country while states could only participate in areas outside the national grid network. Thankfully, the EA 2023 has completely decentralized the entire power sector value chain, whereby states can freely regulate electricity activities within their state.

The decentralization of the sector and creation of State electricity markets is a transformative development in the NESI as this will improve energy access, delivery, and supply of electricity to citizens within a state, ensure less reliance on the national grid and effectively capture the unserved and underserved areas in the states.

Notably, the new regime of state electricity markets creates smaller regulatory space that will enhance flexibility, accountability, and transparency than when a single regulator was responsible for the entire country.

Through this development, States can explore innovative mechanisms to attract investment for large-scale projects, such as concessionary-based project arrangements or Private Public Partnerships (PPPs) for projects in the state and other viable financing options.

The Act further enables States to close the supply deficit gap by exploring innovative energy mix solutions. States can diversify the generation mix by using the abundant renewable energy resources domiciled in their respective jurisdictions to meet their energy needs.

This new regime of state electricity market gives States a unique opportunity and flexibility to address the perennial challenges affecting optimal electricity supply within their respective jurisdictions without waiting for the federal government's leading.

B. THE FULL TRANSITION OF REGULATORY AUTHORITY FROM NERC TO A STATE REGULATORY AUTHORITY

In furtherance of the creation of States electricity market, the EA 2023 imposes regulatory transition from NERC to State electricity regulatory agencies for States that set up their electricity markets and establish necessary agencies under the state electricity laws.[2]

The EA 2023 creates two parallel regulatory regimes. The first regulatory regime applies to States that do not enact their state electricity laws and establish state regulators. These States will remain under the regulatory authority of the NERC till when such states enact their state electricity law and set up their state regulator.[3]

The other regulatory regime applies to states that enact their state electricity law and set up their regulatory agency. These states will go through a transitional process whereby regulatory authority for all electricity related activities carried on intra-state level will be transferred from the NERC to the state regulator.

The regulatory transition process begins once the NERC is notified of the establishing of a state's electricity law and regulator. Within 45 days of receipt of the notification, NERC must issue a draft order containing a transition plan for transferring regulatory responsibility to the state regulator.

NERC will also notify the relevant successor distribution licensees (DISCOs) covering the area of the Order. After that, the DISCO will be required within 60 days to incorporate a subsidiary entity that will assume the assets, liabilities, employees, and contractual responsibilities of the DISCO within the state. The state regulatory authority will license the new entity and it will cease to be regulated by NERC upon completion of the transition process (transition process to be completed within 6 months).[4]

C. INTEGRATED NATIONAL ELECTRICITY POLICY AND STRATEGIC IMPLEMENTATION PLAN

Another commendable highlight of the EA 2023 is the provision of the Integrated National Electricity Policy and Strategic Implementation Plan for the power sector. The EA 2023 mandates the Ministry responsible for power to, within one year from the commencement of the Act, prepare and publish in a federal gazette an Integrated National Electricity Policy, and Strategic Implementation Plan to guide the overall development of the country's power sector[5] which is subject to review every five (5) years.[6]

The Plan is set to focus on the development of the electric power sector based on optimal utilization of a combination of renewable and non-renewable energy sources; mini-grids or stand-alone systems in rural areas, rural electrification and for bulk purchase of power and local power distribution; public-private partnerships; policies including waivers and subsidies to promote renewable energy, among others.[7]

This provision will ensure the optimal utilization of all energy sources in Nigeria in the long term and increased energy supply for the NESI.

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[2] Section 230 (2-9), EA 2023
[3] Section 230 (8), EA 2023
[4] Section 230 (3), EA 2023
[5] Section 3(1), EA 2023
[6] Section 4(1), EA 2023
[7] Section 3(2), EA 2023

D. UNBUNDLING OF TCN & CREATION OF ISO

Empowered by the repealed EPSRA 2005, the Transmission Company of Nigeria PLC (TCN) was licensed as the NESI's sole transmission service provider, market, and system operations. However, over the years, the TCN seemed overwhelmed by its triple responsibilities, thus, necessitating agitations for its unbundling.

Considering the realities and poor performance of the transmission network, market, and system operations under TCN's sole management, the EA 2023, provided for the unbundling of the TCN, such that, at a time to be determined by the NERC, the TCN shall cease to carry out market and systems operation in the NESI, as these responsibilities will be carried out by another entity; Independent System Operator (ISO) to be incorporated by TCN while the TCN retains its transmission service provider responsibility.[8]

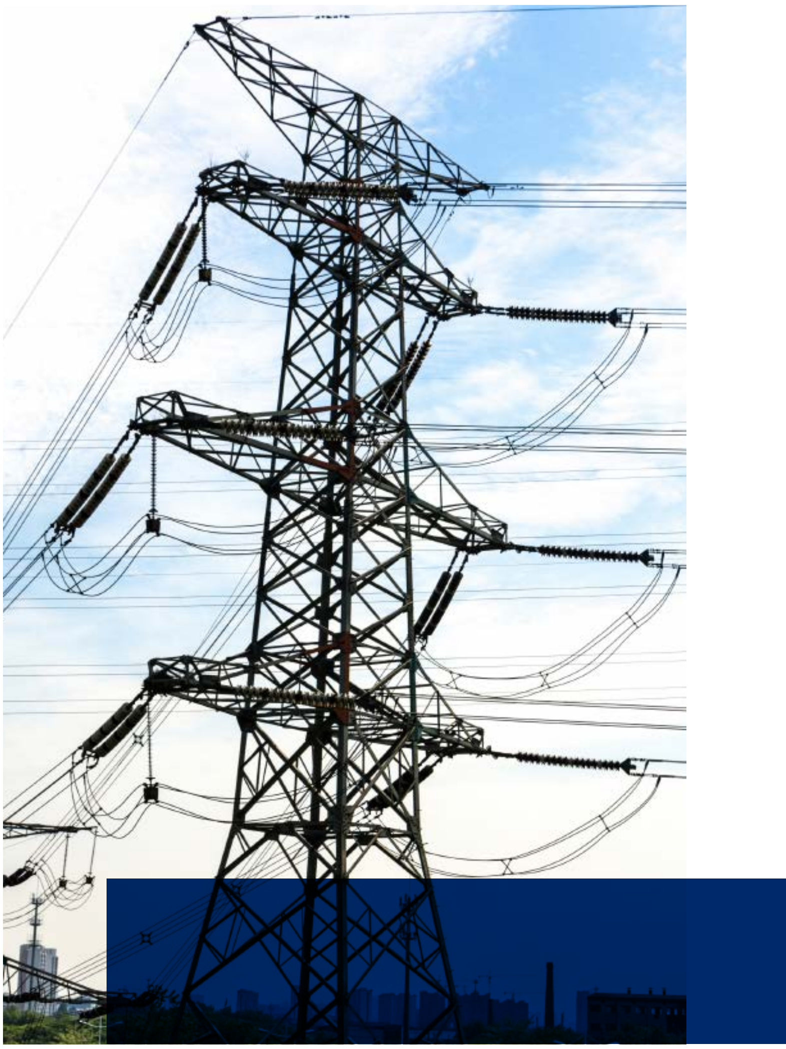
The ISO is to be registered as a company limited by shares or have such ownership structure as may be determined by the NERC.

The ISO is charged with the responsibility of issuing the market rules and grid code,[9] and the management of all market and systems operations in the NESI.[10]

The unbundling of the TCN will undoubtedly attract private participation and investment in the transmission sub-sector of the NESI and enhance the overall performance of the NESI.

E. STATE LICENSING/REGULATION OF MINI-GRIDS, IEDNS AND IETNS

Before now, mini-grid operations were supervised by the NERC. In a revolutionary move, the EA 2023 donated regulatory power over mini-grid operations, Independent Electricity Distribution Network Operations, and Independent Electricity Transmission Network Operations to the states. By this, States are empowered to establish the legal and institutional framework to regulate these activities and attract investment in electricity activities within their jurisdictions.



Given the associated cost of grid-powered electricity supply, States can utilize this provision to explore less capital-intensive power projects such as embedded generation model and mini-grids for power supply as these models are less capital-intensive compared to utility-scale projects supplied through on-grid channels, which are long-term based. This will ensure increased energy access and supply throughout states and cover the unserved and underserved areas.

[8] Section 7(3) and 15, EA 2023
[9] Section 10(1) EA 2023.
[10] Section 67, EA 2023

F. DISAGGREGATION OF DISTRIBUTION LICENSE INTO DISTINCT SUPPLY & DISTRIBUTION LICENSES

Under the repealed EPSRA 2005, distribution and supply activities were fused and undertaken under a distribution license issued by NERC. However, the EA 2023 separated distribution and supply activities under distinct distribution and supply licenses to be undertaken in the NESI. The separation of distribution and supply activities is to be effected at a period specified by NERC.[11] Further, the NERC is to implement a transfer scheme for the disaggregation distribution licensees into distinct distribution and supply licensees. Upon the completion of the transfer scheme, distribution licensees will cease to function as distribution and supply licensees but only as distribution licensees.

This development will attract more participants into the sector, especially the newly created supply chain of the NESI.

G. RENEWABLE GENERATION, PURCHASE AND DISTRIBUTION OBLIGATIONS

Nigeria's energy mix comprises renewable and non-renewable energy resources supplied through on-grid and off-grid channels. Specifically, the generation mix consists of thermal (predominantly gas, coal, oil fuelled plants), hydropower and other renewable energy sources (wind, solar, biomass).

However, thermal and hydro generation dominates the on-grid energy mix in the country. As of 2022/Q4, thermal generation produced 69.02% of energy while hydro generation performed at 30.98%[12]. Nigeria's renewable energy power generation reached 2,154MW in 2021.[13]

Unfortunately, Nigeria's renewable energy capacity is underutilized despite the enormous amount of renewable energy resources. To ensure increased exploration and utility of renewable energy sources, the EA 2023, amongst others, creates an enabling environment to attract renewable energy investment and activities in the NESI.[14]

The Act further imposes renewable energy generation, purchase and distribution obligations on GENCOs and DISCOs in the NESI.[15]

This is one of the most impactful provisions in the new Act, as it ensures an integrated utility of all energy generation sources available in Nigeria. This provision will primarily help realize Nigeria's target of increasing its renewable energy share to 30% of the generation mix by 2030,[16] and also help fulfill its carbon net-zero emission targets.

[11] Section 68(6), EA 2023
[12] NERC 2022/Q4 Report
[13] International Renewable Energy Agency, 2021 Report
[14] Section 164, EA 2023
[15] Sections 80, 81, and 113(1), EA 2023
[16] NERC, Consultation Paper on Proposed Review of Regulation for Mini-Grids 2016, p.1

H. NEW TRADING LICENSE REGIME

The Nigerian Bulk Electricity Trader PLC (NBET), is the sole licensed bulk trader for the bulk procurement and sale of electricity and ancillary services in the NESI. However, by the combined effect of the provisions of sections 7(2)(d) and 69(1) of the EA 2023, the NBET shall, at a time to be determined by NERC, cease to undertake trading activities in the NESI. At the determined time, NBET shall novate all its existing contractual responsibilities to other licensees that will be licensed to undertake trading activities in the NESI.

This is another laudable innovation introduced in the NESI. This innovation will ensure the de-monopolization of trading activities and attract qualitative investment in electricity trading activities in the NESI.

I. CRIMINALISATION OF ELECTRICITY THEFT, ILLEGAL METER TAMPERING/BYPASS, AND WILLFUL DAMAGE TO ELECTRICITY INFRASTRUCTURE

The repealed EPSRA 2005, which, understandably, being a reform Act, focused on the unbundling of the NESI and privatization without making adequate provisions for offences and penalties in the NESI.[17]

Acts such as electricity theft, theft of electricity lines, and receiving stolen electricity are unfortunately rampant offenses and have serious implications for the NESI, ranging from inefficient power supply, massive revenue losses, amongst others. These criminal acts are dealt with under the limited provisions of the Penal and Criminal Codes, Electricity Theft and Other Related Offences Regulations 2013, and Miscellaneous Offences Act. Thankfully, these acts have been specifically criminalized in the EA 2023 with penalties prescribed.

The EA 2023 in Part XX provides a long list of offences. About fourteen (14) offences with corresponding penalties[18] are created in the EA 2023.

Notably, the offence of electricity theft attracts between 6 months to 3 years imprisonment, and theft of electricity lines and materials attracts between 3-5 years imprisonment. Receiving stolen electricity attracts 14 years imprisonment. Interference with meters or works of licensees carries three years imprisonment. Similarly, obstruction of licensee staff from carrying out lawful activity has a 6 years jail term and at least N2M fine.

Interestingly, abetment, aiding and counselling the commission of any offences created by the Act attracts the same penalties to be meted on the principal offender.

Of significant note is that the Federal and State High Courts have concurrent jurisdiction to try offences created by the Act.

The importance of eradicating criminal activities in the NESI cannot be over-emphasized, given its adverse effect on the sector. The eradication of these activities will enhance efficient energy supply, energy audit, and viability of the power sector value chain, which will, in turn, impact positively on the economic development of the nation. It is, thus, welcoming to see the detailed provisions of the EA. Hopefully, this move will deter criminal activities and disruptive activities in the NESI.

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[17] The repealed Act generally prohibited any form of electricity theft by the provisions of Section 94(3) EPSRA 2005

[18] Penalties include imprisonment term or option of fine

J. INTERVENTION POWERS IN FAILING LICENSEES

Unlike the repealed Act, the EA 2023 makes adequate provision for NERC to intervene in failing licensees to rescue such licensees from total collapse.[19] In such situations, the commission is enabled to dissolve and remove the board of directors of such failing licensees and appoint special directors or administrators to steer the affairs of the licensee out of the impending collapse. However, where the affairs of the licensee do not improve after all therapeutic efforts have been exhausted, the commission is empowered to revoke the licensee's license,[20] and sell the undertakings of the licensee.[21]

This provision is commendable as it will help to guarantee stability and business continuity in the NESI.

K. ESTABLISHMENT OF THE NATIONAL HYDROELECTRIC POWER PRODUCING AREA DEVELOPMENT COMMISSION -N- HYPPADEX

The N-HYPPADEX is one of the unprecedented innovations introduced by EA 2023 into the NESI. The N-HYPPADEX is a commission comprising the hydroelectricity-producing areas in Nigeria, both current and future areas. The N-HYPPADEX is charged with the responsibility of formulating policies and guidelines for the development of hydroelectric power-producing areas in Nigeria.[22]

OPPORTUNITIES

The EA 2023 is undoubtedly a transformative Act in the NESI. The new Act decentralizes and demonopolizes the entire value chain of the power sector, heralding a new era of growth and accessibility in Nigeria's power sector.

The Act creates boundless opportunities for public and private participation to contribute to Nigeria's sustainable energy future. The Act creates investment opportunities in the state electricity markets. State governments may license new entities to undertake electricity activities within their jurisdiction.

The new Act also allows for new entrants in the electricity trading sector. It enables private individual to fund the acquisition of distribution facilities to aid easy access of electricity supply.[23]

The Act further improves speedy electricity distribution by empowering individuals to contract with DISCOs to facilitate power wheeling to their residences or business locations through the DISCOs facilities.[24]

The Act encourages PPP and concessionary arrangements to boost the performance of the country's transmission network.[25]

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[19] Section 75, EA 2023
[20] Section 75(4), EA 2023
[21] Section 77(1), EA 2023
[22] Section 89(1), EA 2023
[23] Section 68(11), EA 2023
[24] Section 113(3), EA 2023
[25] Section 109 and 112, EA 2023

NEXT STEPS

The new Act embodies lofty provisions to deliver an optimal electricity market in Nigeria. However, without proper implementation, the NESI could be easily plunged into chaos. The new regime created by the EA 2023 poses significant challenges to the overall coherence and coordination of the electricity market.

Important to clarify, federalism and centralization were not the major hinderance to the development of the power sector. Before the decentralization introduced by the EA 2023, the former regime provided several options that allowed various participants operate within the electricity market. The former regime provided framework that encouraged mini-grids, renewable generation, embedded generation, sub-franchising, amongst others.

The pertinent question is why did these options not work to deliver an optimal electricity market for Nigeria?
The answer is not farfetched and centers majorly on lack of political will, illiquidity, and infrastructural issues.

Transferring these responsibilities to states without addressing these issues is unlikely to yield any significant changes in the sector. In fact, there is the high likelihood that states may encounter similar complexities and replicate existing problems.

To avoid this occurrence, it is advised that before implementation, the NERC, Federal Government, the Ministry responsible for power, State Governments, and all other stakeholders in the NESI should hold a nationwide stakeholders' meeting to address the existing challenges and plan the implementation of the provisions of the Act.

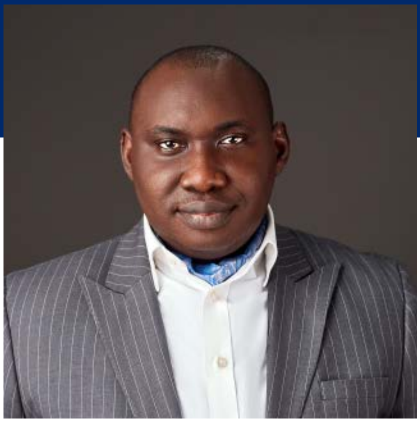
Thankfully, the NERC, by its 19th June 2023 Notice, has scheduled a stakeholders' workshop for July 2023 to discuss the implementation of the new Act.

The importance of this stakeholder engagement cannot be overemphasized. This stakeholder discussion will help smoothen the transition processes envisaged by the new Act and help the NESI avoid falling into the pitfalls experienced under the old regime.

CONCLUSION

The EA 2023 is a vast improvement on the repealed EPSRA 2005. The new Act captures prevailing market issues that require direction to make the NESI vibrant/viable for participation.

The EA 2023 is undoubtedly the game changer in delivering an optimal electricity market in Nigeria. However, the potentials of the Act must be matched with political will as government is the primary driver of the transformative measures promised by the new Act.



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