

DECENTRALISED ELECTRICITY MARKETS IN NIGERIA.



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A Critique of the Constitutional Alteration Bill No.33 of 2023 and the Creation of State Electricity Markets in Nigeria.

A TRANSADVISORY LEGAL ARTICLE

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1.0 BACKGROUND

In the past, Nigeria's electricity supply chain had been fused under a vertically-integrated state-owned utility, the National Electric Power Authority (NEPA). Guided by the Electric Power Sector Reform Act 2005 (EPSRA), the Power Sector reform programme saw to the liberalisation of the Nigeria Electricity Supply Industry (NESI), thereby charting a framework for the separation of potentially competitive market functions and establishing an industrial structure for the operation of those functions. Ultimately, competitive wholesale and retail electricity markets were established with the Nigeria Electricity Regulatory Commission (NERC) as the NESI's apex regulator.

As the regulator, Section 62 of EPSRA empowers NERC to license any operator seeking to venture into the business of generation, transmission, system operation, distribution and trading of electricity in Nigeria. NERC is also the regulator of electricity pricing and has, in that light, established the Multi-Year Tariff Order (MYTO) - a methodology for regulating electricity prices that outlines a pathway for the industry's transition to a service-based cost-reflective tariff. Similarly, NERC is responsible for the establishment, promotion and monitoring of a competitive, private sector-driven electricity market, and eliminating undue market power by a single or multiple group of players.



2.0 NEW SHERIFF IN TOWN?



On the 17th March 2023, President Muhammadu Buhari assented to the Constitutional Alteration Bill No. 33, seeking to alter the Constitution of the Federal Republic of Nigeria, 1999 to allow States generate, transmit and distribute electricity in areas covered by the National Grid; and for related matters, following the concurrence of State Houses of Assembly, effectively making it an Act. The Bill ushers in a new epoch of State Electricity Markets, a remarkable development in the NESI post-privatisation, allowing States to license, generate, transmit and distribute electricity in areas covered by the National Grid. Prior to this development, electricity generation, transmission and distribution in the areas not already covered by the National Grid was under the Concurrent Legislative List, thus allowing the Federal and State Governments to legislate on.

Hitherto, arguments were rife that the federalization of grid-connected electricity markets in Nigeria has hindered States that want to accelerate growth within their boundaries to do so. On the other hand, some have cited the inability of the States to leverage their right to generate, transmit and distribute electricity in off-grid areas in making a case for continued centralisation. In any case, we set out to analyse the Constitutional amendment ushering in decentralised electricity markets, and its potential impacts on the NESI.

3.0 POSITIVES OF THE NEW MARKET STRUCTURE

3.1 RESTRUCTURING AND DECENTRALISATION



The new market structure effectively sets the basis for the decentralisation of power systems in the NESI. If viewed from the vantage point of efficiency and performance, the new decentralised market structure could recalibrate the NESI for greater efficiency, more reliability and less vulnerability than the centralised market structure. This could not have come at a better time, especially in view of the abysmal performance of the power sector privatisation program and the slow pace of reforms. If States assert their rights under the structure, they could effect a liberalisation of the grid and the creation of sub-grids which, if coherently implemented, could allow for competitiveness in electricity supply and end the top-down model of that has characterized the NESI in the past. If the governance structure is decentralised, generation sources multiplied, options made available, control and management responsibilities devolved, the power sector could then push towards stability and balance.

3.2 COMPETITION

With the new market structure, greater competition will be seen between State-owned utilities and Distribution Company (Disco) Licensees in their territory of domain. With the emergence of new licensees comes the inevitability of competition, thus underscoring the need for an overhaul of traditional market

structures and sound regulatory frameworks to guide effective and sustainable competition.

As new licensees emerge, they will invest in power systems, meter customers and collect tariffs. In addition to reducing Aggregate Technical Commercial and Collection (ATC&C) Losses, this will introduce consumer choice of power supplier as an essential ingredient of a reformed electricity market. This will stimulate competition in electricity generation, distribution, trading and supply in addition to ensuring quality supply and swift response to consumer issues. In distribution especially, consumer choice will give end-users a bargaining tool through the ability to switch electricity suppliers, and this will indirectly impact price structures, price levels, product diversity and service conditions in the NESI.

3.3 BREATHING SPACE FOR DISCOS



With the growing inability of the grid to wheel mechanically-available electricity generation capacity due to weak and dilapidated transmission and distribution infrastructure, the new market structure will enable States and their new licensees to trial end-to-end supply of electricity within their domains. Opportunity for Captive Power Generation, Eligible Customers and Distribution Franchises will broaden to target industrial clusters, universities, and the likes. As these customers seek to connect to more reliable electricity suppliers, Disco network franchise areas can then focus on serving residential and average commercial customers within regular consumption bands. Under this structure, there could be an opportunity for collaboration for Discos to earn Distribution Use of System (DUoS) Charges, thereby recovering the cost of installing and maintaining the local distribution networks.

3.4 DECARBONISATION OF THE ENERGY MIX

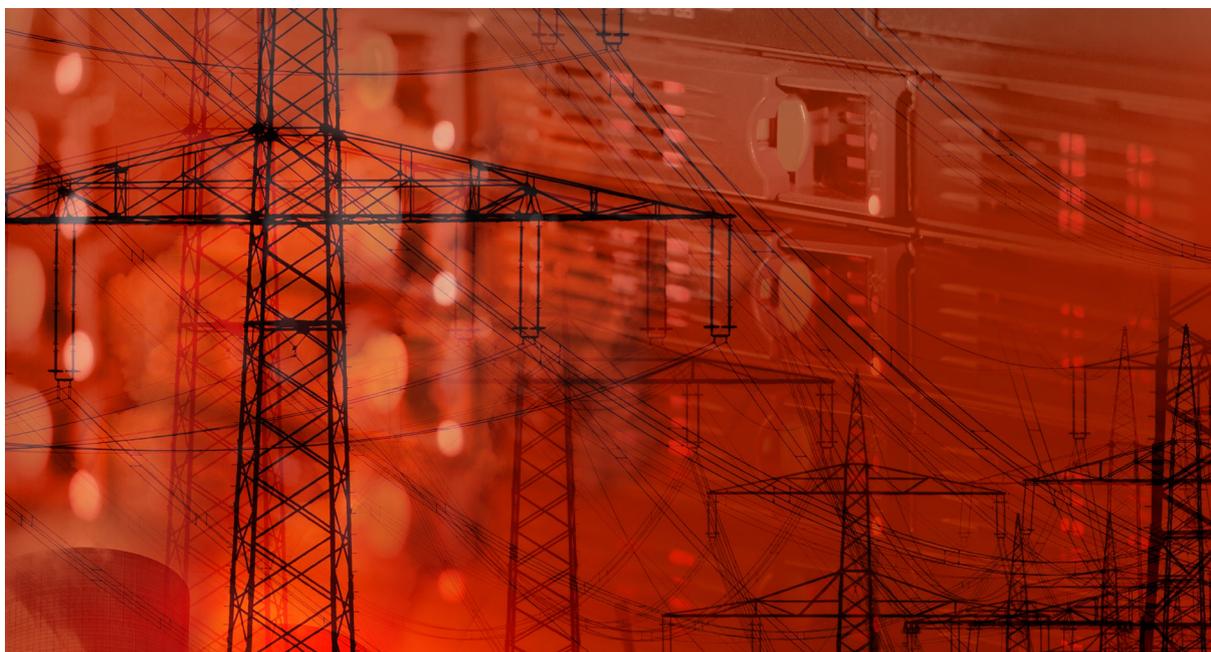


The new decentralised market structure, potentially offers support for decarbonisation and improves resilience. States can leverage available clean fuel sources to design and deploy minigrids and microgrids in a way that aligns with the goals of ensuring access to clean, reliable and sustainable electricity. States in the North-East for example, can tap into the abundance of solar radiation while opportunities for hydropower generation can be explored in the North to add to Kainji, Shiroro and Jebba. Distributed solar PV can provide affordable power supply to households and businesses, reducing their dependence on the national grid. With this, the market structure will enable States to produce and supply electricity in accord with their own needs customer preferences and can also support decarbonisation by enabling fuel switching, such as when distributed PV displaces fossil fuel-based generation.

3.5 AND END IN SIGHT FOR POWER THEFT

Notably, electricity theft hampers the economic viability of the NESI. This new market structure thus provides an opportunity for States to tackle power theft the best way they see how. With legislation, electricity theft will now attract varying sanctions, depending on what a State's law provides.

4.0 CHALLENGES OF THE NEW MARKET STRUCTURE



The existing structure in the NESI is fragile, and balkanising further may portend negative consequences. Experience has shown that a rapid uptake of distributed energy systems can challenge electricity markets that are unprepared. For example, a significant proportion of Nigeria's grid was designed for the 20th-century, when the share of Distributed Energy Resources was small. The larger electricity is generated from variable sources, the higher the need for system flexibility to consistently balance supply and demand.

Secondly, a hook-line-and-sinker implementation of the new market structure will further deepen the infrastructure gap between Nigerian States, leading to certain States accelerating energy access as others stagnate. Right or wrong, this will lead to rapid migration thereby causing overpopulation in certain States. This scenario is bad for the Sustainable Development Goals because efforts to implement them will not keep pace with rapid human population growth.

Thirdly, there are genuine concerns that for many years, The Constitution under its Second Schedule, Part II, Concurrent Legislative List, has enabled States to generate, transmit and distribute electricity in areas not covered by the National Grid. It leaves much to be desired that the States have failed to

leverage this opportunity to fund rural electrification and provide critical infrastructure and amenities. How then can they reliably drive grid-connected electricity, a hugely cost-intensive endeavour?

Fourthly, it is argued that the new market structure could allow for building sub-grids or alternative grids, which will see to new electricity networks parallel to existing ones. Besides being expensive due to the possibility of having multiple utilities with multiple network infrastructure serving the same customer group, this could have major technical and safety implications and further compound the existing Right of Way issues in the NESI.

Fifthly, controversial as it may seem, the new market structure could lead to a disenfranchisement of existing Discos and potential depletion of their customer base by new licensees. This could open up familiar wounds in the NESI with possible questions ranging from the exclusivity of Disco rights over their network franchise areas in the Terms and Conditions of their Licenses, to whether this could amount to a "Change in Law" situation declarable as a Force Majeure event under their Performance Agreements or industry contracts. This, regrettably, is a full-blown dispute in the making.

5.0 OPPORTUNITIES UNDER THE NEW MARKET STRUCTURE



Like every economic policy, the new market structure creates opportunities beyond the challenges highlighted above. Underlying the generations and supply of electricity in Nigeria is a fine cost structure and States governments need not reenact this wheel across board. States can pursue an ambitious electrification program with special focus on unserved and underserved areas. In areas already covered by the grid, sustainable energy access goals can best be achieved if States focus on Distributed Electricity Generation Systems that generate electricity close to consumption points, thus eliminating the need for transmission over high-voltage lines. In areas such as the far North that are distant from grid-connected power plants, or where generation does not meet demand, State Governments can invest in generation assets and interconnect with existing grid networks for a win-win approach to electricity delivery.

As this market structure opens up a complex and capital-intensive space to not necessarily credit-worthy players, the States can implement a private sector-led Build-Design-Operate-Maintain (BDOM) model in an integrated structure that combines Design and Construction with Operation & Maintenance of assets.

6.0 CONCLUSION

As we see these developments unravel, there is, now more than ever, a need for collaborations and continuous engagements with stakeholders across board to ensure the seamless operation of the Nigerian Electricity Market. Discos need to explore strategies that will mitigate the negative effects that this structure may inflict on their operations and other existing licensees. Most importantly, there is need for clarity in the legal and regulatory framework governing the NESI as a whole. Questions like the role of the Nigerian Bulk Electricity Trading Plc (NBET) as the offtaker of bulk power needs to be clarified in the new market structure. Other nagging questions such as the role of new State Electricity Regulators vis-a-vis the powers of NERC, and which takes precedence in the event of conflict, need to be sufficiently addressed and clarified. As Robert B. Sheidman puts it, *"Development cannot proceed save in a reasonably stable political and legal environment. Private capital will not invest in a country whose legal order does not possess a high degree of predictability. The private sector cannot advance unless long-range planning can be made effective, and effective long-range planning requires the same degree of predictability as does the private sector"*.