

A NEW DAWN FOR NIGERIA'S POWER SECTOR: HIGHLIGHTS OF THE ELECTRICITY ACT, 2023

INTRODUCTION



The repeal and re-enactment of the Electric Power Sector Reform Act, 2005 (the ESPRA) as the Electricity Act 2023 (the Act) is a major game changer in the Nigerian Electricity Supply Industry (NESI). On Thursday 8th June 2023, His Excellency, President Bola Tinubu GCFR, assented to the Act. The Act introduces amongst other things, a comprehensive legal and institutional framework to guide the operation of a privatised, contract and rule-based competitive electricity market in Nigeria and attract private sector investments in the NESI through transformative policy and regulatory measures.

The Act harmonises the Senate Bill¹ which sought to repeal the ESPRA and the House of Assembly Bill² which sought to amend the ESPRA. The Act has 234 sections classified into chapters under Parts I to XXIII, and 5 Schedules.

The key modifications introduced by the Act are categorized as follows:

¹ Electricity Bill (SB. 511)

² Electric Power Sector Reform Act, 2005 (Amendment) Bill (HBs. 287, 657, 681 & 1528)

³ Electricity Act 2023, s.2(2)(b)

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1. Recognition of States' Rights

The Act explicitly recognizes States' rights to make laws for electricity generation, transmission, distribution, system operation and establishment of power stations³ within its territory, in line with the Constitution of the Federal Republic of Nigeria 1999 as amended (the Constitution)⁴. This unequivocally grants State governments the authority to regulate their own electricity markets, grant licenses to private investors to build power plants, establish transmission networks, operate mini-grids, and distribute power in a state, thereby creating a State Electricity Market (SEM) independent of the Nigerian Electricity Regulatory Commission (NERC).

It is important to note that until a State has enacted its electricity legislation and established its electricity market, NERC will continue to regulate electricity businesses in such States⁵. Lagos⁶, Edo and Kaduna States are in the process of passing their electricity laws which will enable them to regulate their electricity markets through State electricity regulatory authorities or commissions.

NERC retains the power to regulate trans-national and inter-state electricity businesses to ensure coordination within the Federal Electricity Market.

2. National Integrated Electricity Policy and Strategic Implementation Plan (the Policy)

Within a year from the commencement of the Act, the

⁴ Electricity Act 2023, s.13(b) and 14 (b), Second Schedule

⁵ Electricity Act 2023, s.230 (9)

⁶ Lagos State Electric Power Sector Reform Law 2018

Ministry of Power (the “Ministry”) to initiate the preparation and publication of the Policy in consultation with MDAs⁷ and other stakeholders that are relevant to the NESI’s development. Upon adoption, the Policy must be approved by the Federal Executive Council before publication in a Federal Gazette. The Policy may be reviewed as required, but not later than every five (5) years.

This Policy will cover:

- development of the power sector by optimal utilization of coal, natural gas, nuclear and renewable sources;
- providing rural electrification through captive generation, stand-alone system generation, non-conventional energy systems, bulk purchase of power and management of local distribution;
- public-private partnerships for rural electricity through rural electricity infrastructure;
- power–source specific policies including waivers and subsidies to stimulate renewable energy development; and
- development of the electricity value chain by aligning expansion in generation, transmission, distribution, and supply infrastructure for reliable supply and to minimize losses.

The Ministry is also responsible for recommending exemptions (such as exemption from customs, levies, and duties) and financial incentives to develop, produce and utilize renewable energy.

We believe that involving relevant MDAs and stakeholders in formulating the Policy will ensure that the Policy is comprehensive and effective in achieving its goals, and periodic reviews will ensure that it remains relevant with changes in the NESI.

Overall, the Policy is a critical document that will outline the government’s strategy for developing and

maintaining a reliable and efficient electricity sector in Nigeria. It will prioritize rural electrification and promote renewable energy, thereby improving access to electricity and reducing the country’s reliance on fossil fuels.

3. Re-establishment of NERC and Continuous Role Post Privatization

The Act re-establishes NERC, but its focus is on regulating and overseeing the development of the sector except the SEM. NERC is tasked with ensuring that the market progresses from its transitional stage to the medium-term and long-term stages, in accordance with any prescribed terms, preconditions or features laid out in the market rules or amendments approved by NERC.

NERC therefore has a crucial role in guiding the progression of the Nigerian electricity market and ensuring that it operates efficiently and effectively.

Under the Act, NERC continues to ensure that the market is competitive as it evolves, benefiting both consumers and industry stakeholders.

NERC has new powers to intervene when a licensee is failing. This means that NERC can step in and take action to prevent the licensee company from collapsing, to prevent serious market problems in the NESI. This allows NERC to take a more proactive role in regulating the sector and ensuring that companies are operating effectively and sustainably. NERC has the powers to⁸:

- approve amendments to the Market Rules;
- monitor the operation of the electricity markets and sanction licensees in deserving circumstances;
- enter and seal the premises of persons operating without a license or suspected to have committed an offence under the Act; and
- conduct examination, inquiry and inspect all books, records, accounts, and documents

⁷ Government Ministries, Departments and Agencies.

⁸ Electricity Act 2023, s.34(2)

required to be kept by a licensee.

4. Promotion of Renewable Energy

NERC is responsible for promoting the development and use of renewable energy from solar energy, wind, small hydro, and biomass, by issuing licenses for embedded generation, hybridised generation, co-generation, and the generation of electricity from renewable sources, thereby increasing their contribution to Nigeria's energy mix. In addition, NERC, together with the Independent System Operator (ISO), has a continuing obligation to encourage generation, distribution, sales, and installation of electricity from renewable sources.

NERC's measures to support the growth of renewable energy sources in Nigeria under the Act, include:

- simplifying licensing and fees,
- setting technical standards and certification procedures,
- providing regulations for power purchase agreements,
- monitoring compliance with renewable purchase obligations,
- developing guidelines for energy storage and net metering,
- promoting local content development,
- supporting the Rural Electrification Agency, and
- monitoring the installation, decommissioning, and disposal of renewable energy accessories.

The Act introduces renewable purchase obligations and renewable generation obligations, and states that NERC must consider factors such as technology, financial viability, and impact on tariffs to ensure a balanced and sustainable approach⁹.

The Act recognizes the importance of promoting the development and use of renewable energy sources while balancing potential costs passed on to end-users,

⁹ Electricity Act 2023, s.167(1)

¹⁰ Electricity Act 2023, s.171(5)

and therefore mandates the Federal Ministry of Finance to introduce tax incentives to promote and facilitate the use of renewable energy sources.

These obligations are necessary for realising Nigeria's sustainable energy goals, attracting investment in clean energy, and transitioning towards a low-carbon future. Furthermore, these will help ensure the long-term sustainability of the environment by reducing the country's dependence on fossil fuels and promoting the use of renewable energy sources.

The Act highlights the importance of local content in the renewable energy subsector. It provides that licensees, contractors, sub-contractors, or any other entity executing renewable energy-related activities must ensure that they incorporate local content as a significant component in their operations.¹⁰

5. Protection of Investment in the Power Sector¹¹

This new provision gives several guarantees related to asset protection such as the right to sell or transfer a licensee's undertaking and compensation where there is any forceful takeover in the interest of national security. This means licensees can sell or transfer their undertakings even in the event of a revocation of their license.

In addition, anyone who suffers a forceful takeover is to be compensated. This will ensure that businesses in the electricity market continue to operate even in uncertain situations, and that their assets are protected against any adverse action or expropriation, thereby providing safeguards against arbitrary actions of the government.

6. Establishment of the Rural Electrification Fund (REF)

The Act re-establishes the REF to promote, support

¹¹ Electricity Act 2023, s.228

and provide sustainable and renewable rural electrification programmes and projects for underserved and unserved communities, through public and private sector involvement. The REF aims to achieve more equitable regional access to electricity and maximise the economic, social, and environmental benefits of rural electrification subsidies.

The REF shall be funded with monies from various sources such as:

- a. any fines and penalties imposed and collected by NERC in the enforcement of the provisions of this Act;
- b. donations, grants, gifts, assistance, or loans made by local or international multilateral agencies, Non-Governmental Organisations (NGOs), the private sector, Federal or State Government, and businesses; and
- c. licensees and eligible customers who contribute to the Power Consumer Assistance Fund (PCAF).

The Act exempts contributions paid to the REF by licensees and eligible customers from income tax.

7. Establishment of an Independent System Operator¹²

The Transmission Company of Nigeria Plc (TCN) must incorporate an entity called the Independent System Operator (ISO) in accordance with the Companies and Allied Matters Act, 2020, and subject to the National Code of Corporate Governance. The ISO will be responsible for market and system operation functions and may be a company limited by shares or have a specific ownership and governance structure specified by NERC.

Once the ISO is incorporated and licensed, TCN will transfer all assets and liabilities related to market and system operations to the ISO, subject to NERC's terms and conditions. TCN will retain its Transmission Service Provider license and its responsibilities for transmission of assets and

liabilities. NERC will need to put in place a clear plan and timeline for the transition process to avoid disruption of industry operations.

We note that the Act empowers NERC to lead the establishment of the ISO, this differs from other countries where market participants typically establish ISOs. This is also a significant peculiarity because the ISO will be established by a government agency that makes policies and regulations for the electricity market. As such, there is a clear conflict of interest that could potentially undermine the independence of the ISO especially as the NESI still has government institutions participating in the market.

8. Transitional Provisions for SEMs and Additional Successor Electricity Companies¹³

The Act outlines the steps a State can take to establish an SEM and regulatory authority for electricity operations within its jurisdiction. The steps are as follows:

- The State notifies NERC of the State law and requests the transfer of regulatory authority over electricity operations to the State regulator.
- NERC develops and delivers a plan and timeline for the transfer of regulatory responsibilities to the State regulator within 45 days of the State's notification.
- The transition must be completed within six (6) months of receiving the State's notification.
- If a successor distribution company in the State is required to transfer its assets, liabilities, employees, contractual rights, and obligations to a new entity (the additional successor company), the State must notify the relevant successor distribution company.

¹²Electricity Act 2023, s.15, Part IV

¹³Electricity Act 2023, s.230(2)

- The State requests that the licensee takes the following steps through the National Council on Privatisation and Bureau of Public Enterprises¹⁴:
 - i. incorporation of the additional successor company within two (2) months;
 - ii. transfer its assets, liabilities, employees and contractual rights and obligations to the additional successor company, and
 - iii. apply for the State regulator to license the additional successor company.

Upon completion of the transition and transfer process, NERC ceases to regulate the electricity market within the State.

The above provisions grant State autonomy after navigating the processes, with NERC responsible for ensuring a smooth transition. The timeline suggests a sense of urgency and importance placed on the transfer process. This further encourages the need for efficient and effective communication and collaboration between different regulatory bodies to maintain continuity of service for customers during the transfer process.

9. Establishment of Subsidiary Regulators of the NESI

The Act repeals several laws that established some agencies and re-establishes the agencies and other agencies that existed under the EPSRA.

a. Nigerian Electricity Management Establishment Services Agency (NEMSA)

NEMSA will take over Electricity Management Services Plc and is responsible for enforcing all technical electrical standards and regulations as published by NERC, in addition to carrying out electrical inspectorate services for NESI.¹⁵

¹⁴ Electricity Act 2023, s.230 (4)

¹⁵ Electricity Act 2023, s.176

¹⁶ Electricity Act 2023, s.6(f)

b. Nigerian Electricity Bulk Trading Plc. (NBET)

NBET holds a bulk purchase and resale license for electricity and ancillary services and will manage existing power purchase agreements (PPAs). It plays a crucial role in facilitating stable contracts in the power sector.¹⁶

NBET was established to function as an intermediary between generation and distribution companies. NBET will now manage existing PPAs to the end of their term, in recognition of the importance of stable contracts in the power sector.

c. National Hydroelectric Power Producing Area Development Commission (N-HYPPADEC)

N-HYPPADEC formulates policies and guidelines for the development of hydroelectric power-producing areas, subject to the Minister of Power (Minister's) policy directives and NERC's powers to regulate the NESI.¹⁷

d. National Power Training Institute of Nigeria (NAPTIN)

NAPTIN's primary purpose is manpower training and coordination of training activities in NESI. It also serves as a research center for power-related matters and a convergence point for the development of human and workforce capacity.¹⁸

e. Rural Electrification Agency (REA)

The REA facilitates the provision of affordable power supply for rural and peri-urban areas in Nigeria. REA's main objectives include enabling market entry for rural electrification services, coordinating corporate bodies involved in supplying such services, and providing efficient and economical electrification services that meet the needs of rural communities.¹⁹

10. Funds created under the Act

¹⁷ Electricity Act 2023, s.82

¹⁸ Electricity Act 2023, s.6(e)

¹⁹ Electricity Act 2023, s.127

a. National Hydroelectric Power Producing Areas Development Commission Fund²⁰

The Act mandates N-HYPPADEC to establish a Fund, comprising monies from the following sources:

- i. 10% of the total revenue generated by companies or authorities from operating hydroelectric dams in any member State of N-HYPPADEC;
- ii. 50% of monies due to member States of N-HYPPADEC from the Ecological Funds;
- iii. 5% of all revenue accruing from generating companies;
- iv. all monetary gifts, loans, grants-in-aid, testamentary disposition raised for N-HYPPADEC's functions; and
- v. proceeds from all other assets that may accrue to N-HYPPADEC.

b. Power Consumer Assistance Fund (PCAF)

NERC will manage the money and assets of the PCAF which would be used in subsidizing electricity rates for underprivileged power consumers. In doing this, NERC will:

- oversee the procedures of disbursement of the money from the PCAF;²¹
- determine the contribution rates of eligible customers and designated consumers to the PCAF; and
- factor the contributions of eligible consumers into their tariffs.

c. Establishment of the Power Training Fund (PTF)²²

The PTF is set up to:

- promote and encourage skills acquisition and the development of human capacity in the NESI; and

- generate a pool of indigenously trained manpower for the NESI.

The PTF is exempted from income tax.

The PTF will be funded by:

- i. 40% of monies accruing into the Fund;²³
- ii. loans, grants or voluntary contributions from licensees, local and international development partners; and
- iii. any other monies that may come to the NAPTIN outside what is provided by (i) above.

11. Protection of Consumer Rights²⁴

NERC is charged with creating and enforcing standards and procedures related to customer service, quality of service, complaint handling, bill payment assistance, electricity service application, disconnection procedures, information dissemination, and emergency response. The aim of these guidelines is to ensure that the customers receive quality service from the electricity providers.

NERC must also develop performance standards and codes related to overall service provision and efficient electricity use, as well as technical codes and manuals for safe and reliable system operation. NERC will publish the standards which will be binding on applicable licensees.

In summary, NERC is responsible for overseeing and regulating the electricity service providers to ensure they provide high-quality service to customers while maintaining safe and reliable systems. The companies must comply with the standards that NERC sets and report on their compliance; failure to follow the guidelines can result in fines or penalties.

²⁰ Electricity Act 2023, s.95

²¹ Electricity Act 2023, s.122

²² Electricity Act 2023, s.202

²³ Electricity Act 2023, s.202

²⁴ Electricity Act 2023, s.119

12. Small-Scale Electricity Generation, Transmission and Distribution²⁵

Individuals and entities can now generate electricity or set up a distribution site up to 1 megawatt (MW)/100 kilowatts (KW) in total capacity at a single site, without the need for a license. However, NERC reserves the right to determine alternate capacities from time to time.

The Act provides that States can issue licenses for individuals to build, own, or operate an enterprise that generates, transmits, delivers, and sells electricity, including mini-grids, Independent Electricity Distribution Network (IEDN) or Independent Electricity Distribution Network Operators (IEDNO), or Independent Electricity Transmission Network (IETN), Independent Electricity Transmission Network Operator (IETNO) within the State.

13. Promotion of a more Competitive Market²⁶

The Act mandates NERC to continue its responsibilities to ensure the development of the Nigerian electricity market from its current transitional stage to the medium and long-term stages. NERC must monitor and ensure that the Market Operator and market participants perform their responsibilities in accordance with the Act and Market Rules. NERC must also prepare and submit annual reports on market conditions and advise the Minister on the establishment and operational dates for the medium and long-term markets.

NERC may direct NBET Plc to cease entering contracts for the purchase and resale of electricity, to promote competition in the post-privatisation stage and in preparation to the initiation of Medium Term and Long-Term Electricity Market stages.

NERC is further tasked to monitor the industry for potential competition, report annually to the Minister, and in consultation of the Minister determine whether any regulated services should be exempt from tariff

regulations in the public interest.

NERC also has the responsibility to prevent abuses of market power, such as market concentration, in competitive markets. It can require information from licensees, undertake inquiries, and levy fines or issue cease orders if it determines there is an abuse of power.

14. Separation of the Powers of the Minister and the Ministry of Power²⁷

According to the Act, the Minister is responsible for:

- setting and monitoring policies for the NESI;
- advising the government on matters related to the NESI;
- promoting local content and gender mainstreaming; and
- issuing policy directives on cross-border electricity trading and other related functions.

On the other hand, the Ministry of Power is responsible for:

- coordinating the overall development of the electric power sector;
- conducting public-private partnerships;
- coordinating activities with States and local governments;
- policy matters relating to research and development;
- participating in bilateral and multilateral relations;
- recommending financial incentives and exemptions from customs levies;
- promoting conventional and renewable energy sources; and
- facilitating the coordination of activities among parastatals under its supervision.

The provisions of the Constitution and other relevant Acts of the National Assembly guide the Ministry.

CONCLUSION

²⁷ Electricity Act 2023, s.5

²⁵ Electricity Act 2023, s.63(2)

²⁶ Electricity Act 2023, s.6, 7 and 121

The Act creates a comprehensive legislative framework that codifies various electricity laws, and provides an all-inclusive legal structure for generation, transmission, distribution, trading, and use of electricity. It simplifies the process of updating and enforcing regulations in the NESI to ensure that the electricity sector is governed by consistent and transparent rules, which would result in efficient and reliable power supply.

The Act outlines the roles and responsibilities of different stakeholders such as regulators, commissions, distribution companies, generating companies and transmission companies. It also defines the rights of consumers and provides a mechanism for their protection.

Unlike the ESPRA, the Act gives more attention to renewable energy by having explicit provisions on generating power from renewable energy sources and creating obligations to purchase same.

The transitional provisions under the Act aid the realisation of the States' constitutional authority to enact laws on the entire power value chain from generation to distribution of electricity within their territory and to create SEMs, thereby limiting sole reliance on the national grid.

The Act is a major step towards achieving a well-functioning power sector that meets the needs of consumers and promotes sustainable economic growth.

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