



CRITICAL EVALUATION OF THE INSTITUTIONAL REGULATORY FRAMEWORKS FOR ELECTRICITY REGULATION AND INVESTMENTS IN NIGERIA *

Abstract

Energy has become an essential commodity; probably with time and research, it will be announced the 4th basic need of life. Essentially, electricity cuts across several segments of human endeavour. Unfortunately, energy security has remained a mirage for Nigerians where about 40% of the populations have access to electricity. This has been attributed largely to insufficient electricity investments and poorly administered regulatory governance. This study attempts to critically assess the various institutional regulatory frameworks that superintend electricity business in Nigeria, with a view to understand the underlining inadequacies that underpin the retarded developments in the industry. It would critique the rationale for outsourcing institutions that complement the NERC while outlining their limits within the frameworks. The study would beam searchlights on the Electricity Act, 2023 now serving a Regulatory Czar for the Nigerian Electricity Supply Industry. These intensive academic explorations were achieved using socio-legal, empirical and doctrinal research models.

Keywords: Investment, Regulation, Electricity, Institutions, NERC, Permits

1. Introduction

As Nigeria joins the rest of the world to advance globally, sustainable electric power becomes very crucial. Virtually every sphere of our daily lives revolves around electricity. This makes electricity an indispensable component of economic growth and development.¹ According to Adenikinju, substantial expansion in quantity, quality and access to infrastructure services, especially electricity, is fundamental to rapid and sustained economic growth, and poverty reduction.² However, in recent times, Electricity market continues to attract attention. It has also formed top agenda on the to-do list of virtually all governments in Nigeria. The threat energy poverty poses to national economic integration has also been visibly manifested in the way most countries seek to exploit alternative energy sources in the most economical and environmentally friendly way.³ Yet, for the past three decades, lack of access to electricity services has been a regular feature in Nigeria. Hitherto, the electricity industry was dominated by the state-investor-regulator structured monotype electricity market. In the most recent past, actors like the National Electric Power Authority (NEPA); later succeeded by the Power Holding Company of Nigeria (PHCN) dominated the space. This monotonous electricity system despite the huge investments in terms human and capital was unable to yield electricity that could stand the test reliability, accessibility and availability.⁴ This inability produced the desire for outright deregulation that would later birth Nigerian Electricity Regulatory Commission (NERC) as a distinct independent regulator.

Expectedly, electricity regulation is primarily designed to address electricity investment, management, administration, governance and services through institutional framework in given

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¹ Yemi Oke, *Nigerian Electricity Law and Regulation* (Law Lords Publications 2013)

² A Adenikinju, 'Analysis of the cost of infrastructure failures in a developing economy the case of electricity sector in Nigeria' *African Economic Research Consortium AERC Research Paper 148*. Nairobi, February 2005

³ Titus Koledoye Olugbenga, Abdul-Ganiyu A Jumah and DA Phillips, 'The current and future challenges of electricity market in Nigeria in the face of deregulation process' *African Journal of Engineering Research* [2013] (1) (2) 33-39

⁴ Akin Iwayemi, 'Investment in Electricity Generation and Transmission in Nigeria: Issues and Options,' *International Association for Energy Economics* [2008] 37



electricity markets. It also extends to all activities involved in delivering and supplying the desired quantity and quality of electricity for economic, social or environmental advancement of the consumers. Arguably, time and technology may have placed electricity in an advantage position that it could be identified as the 4th basic necessity of life. In fact virtually all human activities have become energy dependent. For instance, there is correlation that increased supply of stable electricity can enhance national productivity and economic development.⁵ Electricity can only maintain its relevance through coordinated regulation by institutional legal regimes. The structures of the personnel management of these institutions as well as the dynamic technologies deployed into regulation would account for the level of milestone achievable.

2. Rights and Modes of Electricity Investments in Nigeria

The right to investment is statutory. This right may apply to the State, Citizens and Aliens. In the first instance, the State just like individuals is free to participate in the economic activities within its territory.⁶ Originally, the Nigerian constitution limited participation in economic activities exclusively to the state and its citizens.⁷ However, two critical federal legislations have opened the windows of opportunities for foreigners.⁸ Consequently, any person or body of persons who intends to establish business has the right to undertake any form of business,⁹ save the categories of trades considered categorized as the “negative lists.”¹⁰ Also, any person or body of persons may invest in any business using foreign currency imported into Nigeria through an authorized dealer either by telegraphic transfer, cheque or other negotiable instruments convertible into Naira in the market.¹¹ This right also extends to exportation of goods and services from Nigeria.¹² Therefore, by this Act, a private investment in the power sector is permissible; and both indigenous and foreign investors are free to invest. In assessing foreign investments as ineluctable for socio-economic development in Nigeria, Ajomo rightly observed:

Foreign investment is inevitable from the point of view of any state, be it developed or developing. However, the odds are weighted more against the developing countries who [that] lack the technical know-how and the capital for economic development. In consequence, governments of developing countries have endeavoured to formulate laws, regulations and adopt policies that would attract foreign investment and technology in the face of competition from the developed countries.¹³

3. Foreign Investments in Nigeria

One of the major innovations of the new Electricity Act, 2023 is the guaranteed assets and investment protection for every investment of foreign investors.¹⁴ This also includes the right and assurances of adequate compensation in the event of State revocation or takeover in the interest of National security

⁵ Oke, op cit

⁶ Section 16 (1) (c & d) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

⁷ Ibid

⁸ Nigerian Investment Promotion Commission Act, 1995 Cap N117, LFN, 2004 and Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995 Cap F34 LFN 2004

⁹ Section 19(1) of the Nigerian Investment Promotion Commission Act, 1995

¹⁰ Section 17

¹¹ Section 15(1) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995

¹² Section 27

¹³ MA Ajomo, ‘The Dimension and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model’ *NIALS La Series* [1989] (3)

¹⁴ Section 228 of the Electricity Act, 2023



interest.¹⁵ Foreigners engaging in electricity business in Nigeria can participate through any of the following modes:

- a. Foreign Direct Investment (FDI);
- b. Portfolio Investment (PI); and
- c. Unregistered excepted Companies.

Under the Foreign Direct Investment, an investor wishing to construct, own or operate an undertaking or in any way engage in the business of: electricity generation, excluding captive generation; electricity transmission; system operation; electricity distribution; supply or trading in electricity,¹⁶ may or may not have an already existing company in their home country.¹⁷ In either case, a Nigerian company must be registered by such investor either as a subsidiary of the parent company or as an independent company.¹⁸ One of such companies is the Schneider Electric Nigeria; a France-based multinational corporation that specializes in electricity distribution, automation management and produces installation components for energy management in Nigeria.¹⁹

The second mode of participation is through the Portfolio Investment, wherein an investor or bodies of persons acquire shares or equities of an existing electricity company. This means that such investors are free to take up shares in any electricity company. These are usually through stockbrokers who purchase shares of publicly quoted companies or by private placement of shares of private companies or direct application for allotment in which case Securities and Exchange Commission should be notified.²⁰

The third and final mode of participation in the Nigerian Electricity business is by the Unregistered excepted Companies procedure. These are usually companies invited by the Governments of Nigeria or any of their agencies to execute specified electricity project.²¹ The arrangement between the Nigerian Government and the Manitoba Hydro International Ltd (MHI) for the management of Transmission Company of Nigeria (TCN) seems to have demonstrated this feature. This author is not clear or definite if the Manitoba Hydro International Ltd is one of such exempted companies.

Repatriation of funds is an important aspect of foreign investment by foreign investors. There are local laws²² that regulate repatriation of funds out of Nigeria. The Central Bank of Nigeria acting through authorized Dealers remains the major regulator of capital importation and repatriation. Where funds were imported into Nigeria for any electricity investment, repatriation of such funds out of Nigeria can only be carried out through Authorized Dealers subject to certain conditions. For instance, by the provisions of the Bilateral Treaty between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria, Chinese investors are free to bring

¹⁵ Ibid.

¹⁶ Section 62 (1) of the defunct Electric Power Sector Reform Act, 2005 and now Section 63(1)(a-f) of the Electricity Act, 2023.

¹⁷ Edoabasi Udo, 'Nigeria: How Foreign Companies and Offshore Investors Can Establish in Nigeria' *Mondaq Platforms Commercial Law Contribution*, 16th Jan, 2018 <https://www.mondaq.com/nigeria/corporate-and-company-law/664116/how-foreign-companies-and-offshore-investors-can-establish-in-nigeria> accessed Retrieved on the 29 July, 2023.

¹⁸ Section 78 (1) of the Companies and Allied Matters Act, 2020

¹⁹ Editorial, 'Schneider Electric Company profile' <http://www.schneider-electric.com/ng/en/about-us/company-profile.jsp> accessed 29 July, 2023

²⁰ Nelson Ogbuanya, *Essentials of Corporate Law Practice in Nigeria*, (Bi-Fantasy Ltd Printing 2011) 207

²¹ Section 78 (3) (a-b) of the Companies and Allied Matters Act, 2020

²² Nigerian Investment Promotion Commission Act, Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Central Bank of Nigeria Act, Investment and Securities Act and National Office for Technology Acquisition and Promotion Act



in investment capitals into Nigeria and they are equally free to repatriate both the profits and the initial capital.²³ Such capital can be brought in or taken out in hard currency through an “authorized dealer” especially any of the licensed banks. When funds are remitted through an authorized dealer, that dealer issues a Certificate of Capital Importation (CCI) to the investors, which provides evidence of the funds that have been brought into the country. The Certificate of Capital Importation (“CCI”) is evidence of capital inflow/investment/loan into the Nigerian company. It legitimizes and facilitates the repatriation of dividends, capital and repayment of external loan facilities. A company can also obtain a CCI for the importation of equipment as a direct investment into a new company. The documentation requirement for obtaining a CCI depends on the nature of the transaction. There are Loan CCI and Capital Equipment CCI. There is also yet repatriation under Technology Transfer Agreement (TTA). The Technology Transfer Agreements are those service contract agreements executed between a Foreign Expert and a Nigerian beneficiary (either individual or company) for the transfer of foreign technology. Examples of such services could be Technical Know-How Agreement; Software License; Consultancy Services Agreement; they are paid for by process of repatriation. However, such agreements must be registered with the National Office for Technology Acquisition and Promotion in accordance with the NOTAP Act.

4. An Overview of the new Electricity Act, 2023

The new Electricity Act, 2023 is significantly different from the immediate past EPSRA. Albeit with much improvement, it may likely not have the strength to yield the needed impact in the industry. The 5th Alteration to the 1999 Constitution of the Federal Republic of Nigeria No. 33, had paved way to decentralize the grid system hitherto centralized on the Federal Government of Nigeria. In some opinions, the new Act is better called Devolution of Powers of the National Grid System Act. As the name implies, the Constitutional Alteration was to allow States generate, transmit and distribute electricity in areas covered by the national grid; and for related matters. Apart from the devolution of powers and repealing of the EPSRA 2005, the new Act singles itself out as a legislative czar that consolidates all other fragments and pieces of legislations littering in the Nigerian Electricity industry.²⁴

It enunciated a regime of renewable energy;²⁵ first of its kind in the industry. The Act is policy driven and intertwines around the National Integrated Electricity Policy and Strategic Implementation Plan and within other policy frameworks driving the modern Nigerian Electricity Market.²⁶ Unlike the former Act, the new Act created room for competitive electricity market in wider approach.²⁷ This was achieved through the concept of willing buyer and willing seller²⁸ as well as uninterrupted tariff regime.²⁹ It promotes private and public partnership in electricity business and guaranteed protection of electricity infrastructures and investments as well as cross-border energy business.³⁰ The Act appeared to have achieved some kind of unbundling or decentralization of

²³ Articles 3 and 6 of the Bilateral Treaty/Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments which was entered into in 2001 between the two countries

²⁴ Long title of the Electricity Act, 2023

²⁵ Section 1(n-o); Section 80(1-2); Section 164-165

²⁶ Sections 1(h-m) and 3

²⁷ Section 1(f, g, s); Sections 6, 7, 8 and 9

²⁸ Section 116(4)(a)

²⁹ Section 116(4)(b)

³⁰ Section 116(4a) (5)

The idea of cross-border electricity business is not new to us. At least Niger Republic and few other neighboring countries are beneficiaries of the Nigerian Electricity Supply Industry. Evidently this Act may be another local support for the current regime of African Continental Free Trade Area.



powers across the value chain. One significant example is the decentralized transmission market through private sector participatory investments.³¹ The Independent System Operator (ISO) was properly strengthened to operate with some kind of immunity against litigation and legal protection.³² There is also cost reflective tariffs regime³³ in favour of the licensees while making available interventions for consumers through subsidies.³⁴ Another innovation of the Act was the establishment of a power institute.³⁵

Hitherto, the Grid Area inhibition compelled the Renewable Energy Power Investors to generate electric power for the National grid.³⁶ In fact, failure to send power generated to the National Grid could lead to suspension or cancellation of the license granted to the Independent Power Projects (IPP), by the NERC.³⁷ History has shown that the rigidity posed by this requirement not only jeopardized renewable investment, it seriously retarded the effort to achieve energy mix in Nigeria. It also downplayed the independence of business ventures in the Nigerian Electricity Supply Industry.³⁸ Thus, the removal of the National Grid debacle and perhaps the addition of Electricity Supplier³⁹ along the value chain by the Act, may have been deliberate to entrench free but competitive market system where captive power generation companies can also supply electricity to users outside the grid catchment. Moreover, along the clamour for energy mix, the Act incorporated Hydroelectric Power Producing Areas Development Commission Act, 2010 and established the National Hydroelectric Power Producing Areas Development Commission (N-HYPPADEC),⁴⁰ to fully integrate Hydropower into the energy profile.

Just as earlier said, the Act indeed consolidated several pieces of Regulations, Policies and Laws. In so doing, it incorporated Captive electricity generation threshold Power hitherto provided under the Nigerian Electricity Regulatory Commission (NERC) (Permits for Captive Power Generation) Regulations, 2008.⁴¹ It also adopted the Regulations on Feed-In Tariff for Renewable Energy sourced electricity in Nigeria, 2015.⁴² However, whereas the now relegated Captive Power Regulation had allowed for generation of electricity exceeding 1 MW without license; only for the purpose of consumption by the captive power generator,⁴³ the new Act limits the threshold below 1 MW.⁴⁴ In any case, the extant change in the new Act perhaps is to allay the fears of investors who would rather have adequate confidence on substantive Act to guarantee their investments than mere Regulation with little or no force of law.⁴⁵

³¹ Section 109(p-s) of the Electricity Act, 2023

³² Sections 21 & 22

³³ Section 116(2)(a)

³⁴ Section 116(3)

³⁵ Section 185

³⁶ NERC Application for Licences (Generation, Transmission, System Operation, Distribution and Trading) Regulations 2010

³⁷ Regulation 16 provides that NERC may suspend a license granted if the IPP is unable to discharge or perform the duties imposed on it by the terms and conditions of the licence, the Act, applicable laws, NERC's regulations, market rules etc. Regulation 17 provides that NERC may cancel a license granted if the IPP willfully or unreasonably contravenes terms and conditions of the licence, the Act, applicable laws, NERC's regulations, market rules etc.

³⁸ Mgbeoji Ikechi, 'Nigeria's Independent Power Producers (IPPs) Demand Reform of Electricity Power Distribution System' *Blackfriars LLP Publication* [2010] (23) (6) <www.blackfriars-law.com> accessed 14 July, 2023

³⁹ Section 63(1)(d) of the Electricity Act, 2023

⁴⁰ Section 82

⁴¹ Section 63(2)(a)

⁴² Sections 164, 165, 166, 167, 168, 169 and 170

⁴³ Section 2 of the Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008

⁴⁴ Section 63(2) (a) of the Electricity Act, 2023

⁴⁵ *NNPC v Famfa Oil Ltd* (2012) ALL FWLR (Pt.635) 204



4.1. Appraisal of the Electricity Act, 2023 (A Dashed Hope?)

Unfortunately, despite series of legislations and efforts to get it right in the electricity industry, there appears to have been little or no much correspondent results. While the Nigerian population who have access to electricity experience epileptic supplies, whereas those who squab with energy poverty, do so in hopelessness. Interestingly, this energy injustice translates to negative impacts on the gross domestic product (GDP), economy, development, technology, security and even the living standard; all of which affect both the rich and poor. The relationship between suppliers and consumers has deteriorated extensively. In one hand, the consumers are employing deceit or the suppliers are shortchanging them. There is also the incessant activity of miscreants engaging in energy theft and economic sabotaged. Another resultant shortcoming is lack of adequate investment in the sector. At present there is paucity of infrastructure and investment along the entire electricity value chain. Even the current Discos have also not adequately invested to improve the current state of their distribution infrastructures. Again, the transmission network which hitherto was exclusively controlled by the Federal Government of Nigeria has also experienced unprecedented underdevelopment despite being managed under a management contract with Manitoba Hydro International (MHI) Canada.⁴⁶ The Gencos have also had their fair share of the sector underdevelopment. Meanwhile, it is not surprising that investors would rather engage in other economic activities that will be profitable to their economic interest than to participate in an inadequately funded and poorly regulated seemingly competitive economic environment.

At the dawn of 6th June, 2023 when the Electricity Act, 2023 was assented to by President Bola Ahmed Tinubu, there was so much noise and promises of total liberation from the problems in the sector. This made industry players jubilate in the belief that a completely new era of energy federalism has been birthed, but an introspection into the new law seem not to show nearness to the destination. It appears the Act merely codified existing soft laws and ministerial regulations into a statute. It more or less coordinated all existing laws in the NESI into single piece of legislation; more or less one-stop-shop. While such innovation is commendable, it however did not provide the long-anticipated progress that will usher in the much-desired energy satisfaction, security and sufficiency in this modern era. The Act missed the opportunity to birth a complete deregulation. The quasi-judicial function of the NERC was retained in the new Act.⁴⁷ Just like in the former Act, it is an attempt to usurp judicial functions which no court will ever allow.⁴⁸

As has been seen and argued extensively, government has no business doing business. Primarily, government should completely take the place of regulation in a decentralized manner that will reflect true federalism. The Nigerian Electricity Market Industry has significantly been dominated by the Nigeria government either through regulatory governance or business interest. In business participation, the strategy adopted was integrated structure that invested along all the value chain; starting from the era of ECN, NEPA and PHCN. Optimistically, each regime witnessed the best legislative output and granted the desired goals of their days based on the commensurate technology available at each period. However, if one wants to be realistic, Nigeria can only attain

⁴⁶Yemi Oke, *Essays on Nigerian Electricity Law* (Lagos: Princeton & Ass. Publishing Co. Ltd., 2016) 117 - 118.

⁴⁷ Sections 46, 47, 48, 49, 50, 51 and 63(4)(a-d) of the Electricity Act, 2023

⁴⁸ *Sofekun v Akinyemi & Ors* (1980) 1 ANLR 153; *NOSDRA v Mobil Producing Nigeria Unlimited (EXXONMOBIL)* (2018) 13 NWLR (PT. 1636) 334; (2018) LPELR-44210 (CA)

In this case, the court defined fine as a payment of money ordered by a Court from a person who has been found guilty of violating law. It may be specified as the punishment for an offender, usually a minor offence, but could also be specified and used as an option to imprisonment for major crimes or a complement to other punishments specified for such crimes. The court went further to rule that it is the exclusive preserve of the Court to impose fine as a punishment for offences and such exclusive preserve cannot be shared, exercised or usurped by any persons, organization or regulatory body as it will be ultra vires. An attempt to impose penalties or fines by persons or bodies other than the Court shall be deemed illegal, null and void and of no effect whatsoever.



electricity sufficiency when we begin to do the right things. Electricity federalism remains an indispensable approach towards achieving meaningful development in the industry. The much spoken about Devolution of National Grid System, contemplated by the he 5th Constitutional Alteration to the 1999 Constitution of the Federal Republic of Nigeria No. 33, and the Electricity Act, 2023 seem to have not guaranteed the much-needed solution in the industry. The Act cannot be considered to have birthed pure electricity federalism for a number of reasons. Although each Nigeria State has been given the power to have local legislations for its local electricity business,⁴⁹ the scope of such powers seems to have been eroded in view of the constitutional doctrine of covering the filed.⁵⁰

More so, the continued domestication of licensing powers on the Nigerian Electricity Regulatory Commission (NERC)⁵¹ pending the constitution of the State Regulatory Structure,⁵² adds to impede the idea of electricity federalism. The provision that the NERC is independent⁵³ has also been taken away by the correspondent powers of the President to determine its membership.⁵⁴ One would have also expected that the regulation should be trickled down along the tiers and levels of Government in Nigeria; Federal, State and Local Government, as against the two-tier level provided by the new Act. Thus, the optional mode and conditionality associated with the two-tier level of regulation in the industry as provided for in the new Act does not show readiness to do the needful.⁵⁵ The requirement for transmission of draft order and timeline by NERC to the yet to be formed State regulator,⁵⁶ may sound correct, but it is not of a typical framework for a proper deregulation and federating the NESI Regulatory Governance. The requirement for the creation of a harmonious body⁵⁷ to interface between the two-tier regulatory frameworks is another misfire and altogether another confusion waiting to implode. What is the role of such body in a terrain where overzealous regulatory staffs are more interested in offices than impact?

5. Regulatory Agencies and Applicable Laws

The control and regulation of all aspects of the economy are within the exclusive control of the State; which it uses the instrumentalities of its agencies to administer and this exercise is called regulation.⁵⁸ Strictly speaking, the regulation of the electricity business is within the exclusive powers of the Nigerian Government. This is perhaps why all the agencies under the old Electric Power Sector Reform Act, 2005 were further reestablished under the Electricity Act, 2023. It states:

any license, certificate, authority, permit, tariff, market rules, regulations, orders, directives, codes and standards or other subsidiary legislation whatsoever which was issued or recognized by the Commission under the Repealed and other Acts repealed and enacted under this Act and which had effect immediately before the commencement of this Act shall continue to have effect, to the extent that they have not been amended by this Act, or

⁴⁹ Section 2(a-e) of the Electricity Act, 2023

⁵⁰ *A-G of Abia State v A-G of the Federation* (2002) 3 S.C.106

⁵¹ Sections 33(2-3) and 34 (2)(d)

⁵² Section 230(2, 3, 6, 8)

⁵³ Section 33(3)

⁵⁴ Sections 35(1-3); 36 (1-5); 39(1-2); 40 and 41

⁵⁵ Section 230(2)(a-d)

⁵⁶ Section 230(2)(a-d)

⁵⁷ Section 230(9)

⁵⁸ Section 16(1)(a-d), (2)(a-d), 3(a-b) & (4)(a-c) Constitution of the Federal Republic of Nigeria 1999 (as amended)



where necessary an amendment is carried out to bring them into conformity with the provisions of this Act.⁵⁹

Most importantly, the Provision rejuvenated all laws, regulatory agencies and bodies whose mandates impacts on the developments of energy resources. By this new Act, apart from the NERC, there are other regulatory agencies that partake in issuance of permits, licenses and operational documentations for electricity investment. Apart from the Agencies discussed in this study, the following agencies partake in electricity investment and regulation in Nigeria. They are Corporate Affairs Commission (CAC), Nigeria Investment Protection Commission (NIPC); Central Bank of Nigeria (CBN); Securities Exchange Commission (SEC); Nigerian Immigration Service (NIS); National Office for Technology Acquisition and Promotion (NOTAP); Energy Commission of Nigeria (ECN); Federal Environmental Protection Agency (FEPA); National Environmental Standards and Regulations Enforcement Agency (NESREA); Nigerian Stock Exchange (NSE); Federal Inland Revenue (FIRS) etc.

5.1. Institutional Frameworks under the Electricity Act, 2023

The Electricity Act, 2023 remains the basic statute for regulation of the electricity business in Nigeria as at today. The Act has in clear terms made provisions for easy and convenient regulation of the electricity market and electricity practice in Nigeria. It becomes a one stop call for electricity practitioners in Nigeria and beyond.⁶⁰ Under it, the following regulatory institutions have been recognized according to the level of their regulatory roles in the management of electricity business in Nigeria.

5.1.1. Federal Ministry of Power

In the former Act, it was the Minister who issues a declaration that a more competitive electricity market is to be initiated.⁶¹ In the same limb, the Minister recommends for approval by the President, the market rules to be developed by the system operator in the operation of the national grid, the establishment and governance of electricity market as well as ancillary services.⁶² Hitherto, the Minister issued directives to the Commission specifying the class or classes of end-user customers who constitute eligible customers.⁶³ The Minister formulates policies and sees to their implementations especially as they relate to overall system planning and co-ordination which do not conflict with the Act or the Constitution of the Federal Republic of Nigeria.⁶⁴ Where the Federal Government makes available subsidies for consumers, it is the Minister that has the responsibility of determining the beneficiaries of the subsidized Electricity bearing in mind the underprivileged power consumers in the society at any given period.⁶⁵

In the current regime of the Electricity Act, 2023, the Minister and the Federal Ministry of Power have had their respective powers watered down. Thus, the Minister on behalf of the Federal Government merely formulates and coordinates policies that drive the electricity industry in Nigeria.⁶⁶ The Minister also acts as the link between the Federal Government and the NERC.⁶⁷ The Minister does not have any basic regulatory role but acts basically in advisory and directional

⁵⁹ Section 230(1)(b) of the Electricity Act, 2023

⁶⁰ Section 116(4a)(5) of the Electricity Act, 2023

⁶¹ Section 24 (3) of the defunct Electric Sector Power Reform Act, 2005

⁶² Section 26 (2) (a & b)

⁶³ Section 27

⁶⁴ Section 33 (1)

⁶⁵ Sections 86 and 83 (4)

⁶⁶ Section 5(1)(a) of the Electricity Act, 2023

⁶⁷ Section 5(1)(b-c)



capacity. The Minister promotes the policies and business interests of the Federal Government towards the development of the power sector through interfacing with private sector investors⁶⁸ while championing investments in renewable energy.⁶⁹ The Minister stands in for the Federal Government in energy matters involving the three tiers of the government.⁷⁰ It is not clear what relationship that exists between the Minister, the NERC and the Energy Commission along the regulatory ladder. It is however, seen that there is a common ground where they interfaced to undertake in research and dissemination of information on renewable technologies.⁷¹ This common role appears to have placed them in some kind of coordinate ranking with each other. It is not in doubt that the Minister issues policy direction to the NERC,⁷² such role however does not suggest superiority to the NERC. This is unlike the former Act where the Minister was out rightly superior to the NERC along the cadres of regulations.

5.1.2. Nigerian Electricity Regulatory Commission (NERC)

The new Electricity Act establishes the NERC as the apex regulatory body in the NESI.⁷³ There is total independence⁷⁴ unlike what was seen in the last regime of EPSRA, 2005 where the NERC was subordinate to the Ministry of Power. For instance, under the former Act, the Minister monitors and regulates NERC budgets and determines the fiscal structure and calendar of the NERC.⁷⁵ This said new independence is also questionable in view of the fact that the Commission is made to be accountable, first to the President and later to the National Assembly.⁷⁶ This is unlike what would have been the proper channel where they were supposed to be accountable to the National Assembly as another organ of government with the powers of checks and balances.

In the extant Act, apart from creating, promoting and preserving efficient industry and market structures, the NERC ensures the optimal utilization of resources for the provision of electricity services.⁷⁷ It is also the duty of the NERC to ensure policing of the electricity environment to ensure fair tariff regimes,⁷⁸ quality and consumer satisfaction in electricity supplies.⁷⁹ In order to achieve protection and quality for consumers, the NERC relatively promotes a competitive electricity market.⁸⁰ In furtherance of this, the NERC makes the electricity market rules,⁸¹ issue licenses⁸² and penalizes defaulters through sanctions.⁸³ Apart from issuance of licenses, the Commission has powers to monitor and ensure standard compliance and performances of the licenses in tune with the terms of their respective licenses. The Act further permits the NERC to create platforms that allows it to interface with groups, stakeholders, consumers and licenses alike.⁸⁴ This apparently is the foundation of the various townhall, consultative meetings and workshops.

⁶⁸ Section 5(2)(a)

⁶⁹ Section 5(2)(e, j, l, m, n)

⁷⁰ Section 5(2)(b)

⁷¹ Section 5(2)(i)

⁷² Section 5(1)(b)

⁷³ Section 33(2)

⁷⁴ Ibid

⁷⁵ Sections 51 (1) and 54 of the defunct EPSRA 2005

⁷⁶ Section 34(1)(g) of the Electricity Act, 2023

⁷⁷ Section 34(1)(a) of the Electricity Act, 2023

⁷⁸ Section 34(1)(d and j)

⁷⁹ Section 34(1)(b, c, e,)

⁸⁰ Section 34(2)(a)

⁸¹ Section 34(2)(e)

⁸² Section 34(2)(d)

⁸³ Section 34(2)(f and h)

⁸⁴ Section 34(3)



There appears to have been salient provisions that create another function for the NERC. The Act permits the NERC to intervene in the management and control of the affairs of licenses and permits holders which the Regulator considers has failed, is falling or in crisis, including entering the premises and doing whatever the commission deems necessary to maintain continuity in the provision of electricity service and ensuring the integrity of the of the NESI generally.⁸⁵ This provision is likened to the power of the then Central Bank of Nigeria Governor, Lamido Sanusi to recapitalize certain distressed Banks in Nigeria, due to mismanagement by the Directors of those banks who undermined public trust and sanity in the management of the investments of investors.⁸⁶ It would be recalled that there are several instances where electricity companies obtain loans or received intervention funds. These funds are most often mismanaged by the Directors of these companies. For instance, Omonfoman had noted of the CBN sponsored Nigerian Electricity Market Stabilization Facility.⁸⁷ This fund was a 10-year intervention facility to fund the power sector, and was particularly set up to help in providing low cost, long-term debt financing strength for the Discos.⁸⁸ Despite these funds and many others, some of these Licensees, particularly the Discos were unable to demonstrate appreciable improvement in their infrastructures. Even at this, some became distressed.

It is no doubt that the NERC through its Order No. NERC/181/2018 of 19th June, 2018 had suspended the Board of Directors of the Ibadan Electricity Distribution Company, which had fallen under the above category and was almost crippled before the takeover by the Assets Management Company of Nigeria.⁸⁹ It is not clear whether the legal basis or justification for such regulatory intervention by the NERC on IBEDC was the provision under EPSRA 2005.⁹⁰ It is the convinced opinion shared by many, that the defunct EPSRA 2005 had no sufficient provisions that empowers the NERC to wield such regulatory power. Unlike what is seen in the current Electricity Act, 2023. Although, it is likely possible that in order to avoid further rigorous process in such interventions, or to avoid regulatory steps unsupported by any statutory provisions, the drafters of the Electricity Act, 2023 enacted and vested this dimension of regulatory power on the NERC.

The Commission has the power to minimize monopoly to increase healthy competitive market in the electricity sector. In doing so, the Act ensures that the grant of a license to one company does not constitute in itself an inhibition to the grant of another license to yet another person either for the same purpose or for different purposes.⁹¹ Meanwhile this provision has exceptions. Hence, where the license was exclusively for a geographical area,⁹² monopoly becomes unavoidable. All the best intervention is to adopt other measures to control and checkmate the license holder. Another exception arises where considerations are given to development of Mini-Grid. The NERC selects a company to exclusively serve a specific geographical location with obligation to serve all customers that request services in that particular area under a mini-grid concessions.⁹³

⁸⁵ Section 34(2)(g); Section 75(1)(2)(a-c)(3)(a-d)

⁸⁶ Sanusi Lamido Sanusi, CON 'Public Statement on the Recapitalization of Eight Nigerian Banks, Governor Central Bank of Nigeria,' (2011) <<https://www.cbn.gov.ng/out/2011/pressrelease/gvd/press%20statement%20-%20gov.pdf>> accessed 1 August 2023

⁸⁷ Odion Omonfoman, 'Electricity Distribution Companies – The Challenges and Way Forward,' *Premium Times* [2023] <<https://opinion.premiumtimesng.com/2016/01/04/electricity-distribution-companies-the-challenges-and-way-forward-by-odion-omonfoman/>> accessed 1 August 2023

⁸⁸ Ibid

⁸⁹ Opeyemi Kalejaiye, 'AMCON takes over IBEDC over loan default, promises to retain staff,' *Business day News* <<https://businessday.ng/companies/article/amcon-takes-over-ibedc-over-loan-default-promises-to-retain-staff/>> accessed 1 August 2023

⁹⁰ Section 74(1)(a-b) of the defunct EPSRA 2005

⁹¹ Section 72 (6) of the Electricity Act, 2023

⁹² Ibid: Proviso.

⁹³ Oke, op. cit., [2016] 98 – 99.



5.1.3. National Hydroelectric Power Producing Areas Development Commission (N-HYPPADEC)

The National Hydroelectric Power Producing Areas Development Commission was hitherto regulated by the defunct National Hydroelectric Power Producing Areas Development Commission Act.⁹⁴ This commission was created and composed on the basis of hydroelectric presence in each State of the federation.⁹⁵ The body was created with an overall objective to carry out physical development of Hydroelectric Power Projects in Nigeria;⁹⁶ this includes policy and programme formulations.⁹⁷ The Commission prepares schemes designed to promote the physical developments of the hydroelectric power producing areas and estimate the cost of implementing such schemes.⁹⁸ They tackle ecological problems that arise from overloading of dams in the hydroelectric power producing areas and advice Federal and State Governments on prevention and control of floods.⁹⁹ Finally the commission also implements all measures approved for development of hydroelectric power producing areas by the Federal Government and assist States in the formulation and implementation of policies to ensure sound and efficient management of the resources of the hydroelectric power producing areas.¹⁰⁰ It is not in doubt that incorporation of the N-HYPPADEC is clearly an attempt to provide for an institutional framework that regulates the activities of hydroelectric projects and investments in various host communities of the hydroelectric power generating companies.¹⁰¹

Oke had criticized the former HEPADC Act for focusing only on communities with hydroelectric power generation presence.¹⁰² Unfortunately, the new Act has repeated the same trend by failing to allow for wider inclusion of States.¹⁰³ Thus, States with little or no water would not experience hydroelectric development. This is a very wrong approach to energy development for a country in need of energy security. This pattern has rather contributed to obsolescence of hydroelectric generation. In fact, most Gencos are embracing gas, wind, solar and other renewable alternatives. This study believes that hydroelectric driven policies with widespread outreach across the country would encourage private participation, either for private use or commercialization, thereby integrating hydroelectric power into the energy mix.

5.1.4. Nigerian Electricity Management Services Agency (NEMSA)

The Nigerian Electricity Management Services Agency (NEMSA) was hitherto regulated by the Nigerian Electricity Management Services Agency (NEMSA) Act, 2015. With its incorporation into the Electricity Act, 2023 the former becomes repealed. The Agency is the technical warehouse of the NESI. It was primarily set up to manage technical and engineering standards regulation of the NESI for safety and consumer satisfaction. It was set up as the police or taskforce that monitors compliance with technical standards issued by NERC.¹⁰⁴ This particular function places the Agency as a subordinate of the NERC. The Agency conducts electrical inspectorate services in the NESI.¹⁰⁵ Knowing the umpteenth move of technology and development, the Act creates the linkage between

⁹⁴ Hydroelectric Power Producing Areas Development Commission Act, 2010 Cap. H5, Laws of the Federation of Nigeria

⁹⁵ Section 82(2) of the Electricity Act, 2023

⁹⁶ Section 89(1)(a-h)

⁹⁷ Section 86(a-b)

⁹⁸ Section 89(1)(d)

⁹⁹ Section 89(1)(h)

¹⁰⁰ Section 89(1)(f)

¹⁰¹ Oke, *op. cit.*, [2013] 21

¹⁰² *Ibid* 22

¹⁰³ Section 84(1)(b)(3) of the Electricity Act, 2023

¹⁰⁴ Section 176(b)

¹⁰⁵ Section 176(a)



the Agency and the Standard Organization of Nigeria (SON). Basically, the SON ensures compliance with standards for electrical installations targets that falls within the frontline its regulatory boundaries,¹⁰⁶ while the NEMSA would be for electrical installation targets that are outside the reach of SON.¹⁰⁷ It is also the responsibility of the NEMSA to ensure standard in the qualities of the Meters installed for end-user; Customers and Consumers.¹⁰⁸ This also shows the importance of the Smart Metering System (SMS). This author once argued as regards Metering and Smart Meter System that:

The Metering System is the direct connector of the consumers to the electricity usage. The electricity distributed remains docile until meters are used to achieve the necessary conversion. Typically, it is the Metering System that converts the electricity into a utility for the consumer..., it is suggested that such report should consider a separate entity, independent of the existing ones along the value chain, to take the sole responsibility of issuing and installing meters for Customers and consumers.¹⁰⁹

5.1.5. National Power Training Institute of Nigeria

This is a training institute established under the Electricity Act to provide for training, human resource, research and development for matters relating to electric power in Nigeria.¹¹⁰ The outcome of such trainings is perhaps issuance of certifications¹¹¹ that qualifies electricity engineering practitioners and industry players with good knowledge and skills. The National Power Training Institute of Nigeria is a critical stakeholder in the regulation of electricity business in Nigeria. As the knowledge and innovation power house of the electricity industry, the institute if properly allowed to operate will turn out to positively advance the NESI. This is because, research and development remain indispensable for sustainability of any technology driven sector like the electricity industry. As has been argued earlier, the training and retraining of field engineers, lawyers and energy practitioners is paramount in producing favourable competitive industry. Where the institute is saddled with the power to issue qualifying certificates,¹¹² withdraw same,¹¹³ suspend or expel students,¹¹⁴ then it stands the chance to be counted among the regulators in electricity industry. Consequently, electric power engineers are by this means regulated against quackery and unskilled players.

5.2. Federal Competition and Consumers Protection Commission (FCCPC)

The Federal Competition and Consumers Protection Commission (FCCPC) survived the defunct Consumer Protection Council.¹¹⁵ The primary essence of the FCCPC is the promotion of competition

¹⁰⁶ Section 176(c)

¹⁰⁷ Section 176(e-f)

¹⁰⁸ Section 176(g-n)

¹⁰⁹ Ogugbara Chimezie JacobsPaschal, An Examination of the Legal Status of Consumers and Customers in Electricity Contracts in the Nigerian Electricity Supply Industry Value Chain *Redeemer's University Faculty of Law Journal (RUNLAWJ)* [2021] (4) 80 and 83

¹¹⁰ Section 186(1)(a) of the Electricity Act, 2023

¹¹¹ Section 186(1)(b)

¹¹² Section 186(2)(g-h); 196(a-h)

¹¹³ *Abia State University & Anor v Chief Dr. Orji Uzor Kalu* (CA/OW/246/2015, Court of Appeal Owerri Division, 30 November 2021); Okeoma Chidiebube, 'Appeal Court upholds withdrawal of Orji Kalu's degree certificate' *Punch Newspaper* (Owerri, 30 November 2021) <<https://punchng.com/appeal-court-upholds-withdrawal-of-orji-kalus-degree-certificate/>> accessed 5 August 2023

¹¹⁴ Section 197(3-4) of the Electricity Act, 2023

¹¹⁵ Section 165(1) of the Federal Competition and Consumers Protection Commission (FCCPC) Act, 2018 LFN



in the Nigeria Markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position and penalizing other restrictive trade and business practices.¹¹⁶ The objectives of the FCCPC include promotion of competitive market, protection of the interests of consumers, prohibition of unfair and restrictive business practice.¹¹⁷ One of the fundamental elements that have made the FCCPC stand out in regulation is the fact that it applies to all undertakings irrespective of whether such undertakings are under the regulatory scope of another regulatory agency or not.¹¹⁸ This is more or less a czar in the regulation of trade and commercial activities in Nigeria and beyond.¹¹⁹ The FCCPC makes policies and advises the Government on market competition and consumer protections.¹²⁰ The Commission carries out investigations into complaints on anti-competitive practices and resolves all arising disputes and complaints that affect consumer's interest or hinders the consumer interests.¹²¹ Also, where the Customer Complaints Units of Discos appear to underplay grievances of consumers and customers, the FCCPC would readily intervene to carry out full investigation and resolution of such arising complaints.¹²²

Technically, it is the obligation of the FCCPC to ensure that competitive market exists in the NESI. It does this through several measures. First, it frowns at restrictive agreements that undermine competition.¹²³ The commission also prohibits abuse of dominance positions in the market.¹²⁴ Thirdly, by investigating monopolistic market practice where it exists and taking appropriate steps against it.¹²⁵ The commission also has the function to regulate pricing system,¹²⁶ however it is not clear if the tariff and price control in the electricity industry can be part of the focus in this regard. This is because cost reflective tariff underpins profitability in the electricity industry. Therefore, controlling the tariff system in the NESI outside the perimeters used by the NERC would spell doom and have a counterproductive effect in the development of the industry especially in a multi-regulated economy like Nigeria where regulatory clashes can be misused by overzealous staffers.¹²⁷ Thus, it is expected that the President of the Federal Republic of Nigeria would ordinarily through Federal Gazette exempt electricity sector from such price regulation.¹²⁸

6. Conclusion and Recommendations

It is a good score card that there is now a new body of Law to regulate the Nigerian Electricity Supply Industry (NESI). The new Act has the propensity to surmount our energy crisis if properly implemented. First, there is now a single document every player in the electricity sector must reckon with in the regulation of the NESI; one stop shop. It means that the era of multiple regulatory instruments is gone forever. There is also a single law to integrate both the renewable and

It is important to note that the Consumer Protection Council Act 1992, Cap C32, LFN, 2004 had established the Consumer Protection Council to entertain complaints from consumers or communities that have suffered a loss, injury or damage as a result of the use or impact of any good, product or service.

¹¹⁶ Explanatory Memorandum of the *Federal Competition and Consumers Protection Commission (FCCPC) Act, 2018*

¹¹⁷ Section 1(a, c, d)

¹¹⁸ Sections 2(1)(2)(c), 104, 105(1, 2, 3, 4, 5)

¹¹⁹ Section 2(3)(a-d)

¹²⁰ Section 17(a, b, c, f)

¹²¹ Section 17(e, g, h, f)

¹²² Paul K Adegboyega, 'FCCPC: Fighting many battles for the Nigerian consumer' *Business day News* (Lagos, 19 November 2019) <<https://businessday.ng/opinion/article/fccpc-fighting-many-battles-for-the-nigerian-consumer/>> accessed 3 August 2023

¹²³ Section 59(1)

¹²⁴ Section 72(1)

¹²⁵ Section 76

¹²⁶ Section 88(1)

¹²⁷ Sections 104

¹²⁸ Section 88(1)



conventional energy resources in the industry. Hitherto, the renewable energy had been regulated using a mere ministerial instrument which was subject to abuse and disregard even by the stakeholders. This author has had to say:

There are so many renewable energy resources. As shown in Chapter three, these resources have adequate legislative instruments to harness them in their different zones. There is however no coordinating legislation that established legal, economic and institutional basis to promote or coordinate the use of the various renewable energy resources and for connected matters. There is also no independent Authority in affiliation with the existing Nigerian Electricity Regulatory Commission (NERC) to recommend national targets for the use of renewable energy resources.¹²⁹

It is not also about having a new Act, it is far more important to begin the doing of the talks. Laws are only available if there is political will to implement them. Where there is no opportunity of implementation, it will remain docile and dumb. Regrettably, the new Act missed the opportunity of electricity federalism. It would have integrated a tier level deregulation across the three tiers of governments in Nigeria the way it is done in other jurisdictions. The Constitutional Alteration that birthed the Act, failed to allow a decentralized regulation, whereby every tier of Government is given the opportunity to regulate electricity within its geographical location. Thus, from the Local, State up to the Federal Government¹³⁰ there should have been institutionalized regulatory frameworks independent of each other. This has been tried with approval in China, India etc.¹³¹

It is also a welcome development to have the National Power Training Institute of Nigeria in the new Act. But what is burdensome is the structure of the institute. There have been in existence two Energy Research Centers in Nigeria, which are: Sokoto Energy Research Centre (SERC) and the National Centre for Energy Research and Development (NCERD) at Nsukka.¹³² These are outside the six centers of Energy Commission, Ilenikhena¹³³ had suggested, are across the country. Of course, these existing energy research institutes had been denied needed funds to improve on research and development. It would have been expected that such institutions as institutions of professional and technical learning, would be positioned under the accreditation processes of the Nigerian University Commission (NUC) instead of self-center scheme provided under the Act. Another dimension is to ensure that this institute is not limited to the engineering and technical aspect of the electricity practice. Transactional lawyers lack the exposure for electricity contracts and in most cases; they erroneously regard electricity practice as area limited to only the NERC dispute management. Whereas forums like Stakeholder Advisory Panel and Dispute Resolution Panel, where all electricity disputes and conflictive industrial relationships are resolved or managed, are supposed to be manned by persons with legal minds. There should therefore be urgent need for all-inclusive educative sensitization and continued training that can onboard all stakeholders and practitioners. Such approach would acquaint litigation lawyers foraying into electricity transactions on the necessary skills to withstand the challenges of electricity investments. The power sector is technical

¹²⁹ Chimezie JacobsPaschal Ogugbara, Analysis of the Legal Framework for Optimization of Renewable Energy Option in Nigeria (LL.M. Dissertation Centre for Petroleum, Energy Economics and Law, University of Ibadan, Oyo State 2022)

¹³⁰ Ibid 116

¹³¹ Ibid 83-96

¹³² Energy Commission of Nigeria-United Nations Development Programme; Renewable Energy Master Plan: Final Draft Report at p 93.

¹³³ PA Ilenikhena, Solar Energy Applications in Nigeria; *WEC Montreal 2010: Paper* (135) <<https://www.osti.gov/etdeweb/servlets/purl/21390205>> accessed 4 August 2023



in nature and embraces engineering, accounting, legal and communication. These technical components could be overwhelming for a developing country like Nigeria. For example, drafting and negotiating power sector agreements are too complex. Yet such skills need to be sufficiently internalized by a regular Nigerian Lawyer to be able to advise clients properly. This challenge according to Oke, reared its ugly head in the Management Service Contract between Nigerian Government and Manitoba Hydro International (MHI) on the management of Transmission Company of Nigeria (TCN).¹³⁴ So it is recommended that the National Power Training Institute of Nigeria established under the Act¹³⁵ should undertake trainings that cut across the board for all stakeholders in the industry. It is hoped that the institute will indeed serve as a focal point for resource development¹³⁶ and other related purposes for which it was established and not merely in paper and thoughts.

¹³⁴ Oke, *op. cit.*, [2016] 117 - 118

¹³⁵ Section 185 of the Electricity Act, 2023

¹³⁶ Section 186(1)(a-k)