# Electric Power Closer to the People:

## Can State Governments Legislate on Electricity Distribution?

### Proem

Recently, there have been debates on the Constitutional powers of State governments in Nigeria (States used in the sense of component parts of Nigeria, as an instance, Lagos State), to make laws relating to electricity distribution within their jurisdictions. This debate has particularly come to the front burner because of the proposed policy of Lagos State which raised that point.

Whilst I believe there is the need to, via an originating summons, have the courts interpret the Constitution, and States may, at some point, have to do this, I will attempt an analysis in this paper, nonetheless. My analysis, however, should not be taken as legal advice, but my views on the subject.

### Background

In the drive towards the actualisation of a liberalised power sector in Nigeria, major policy directives were introduced by the Federal Government (the "FG") to underscore the FG's commitment towards instituting a liberal, commercially viable and performance-driven electricity sector. Primary among these policies included the National Electric Power Policy, 2001 ("NEPP") and the Nigerian National Energy Policy 2003 ("NEP"). The fundamental thrust of the NEPP was to expand the power sector in Nigeria through the injection of private investments under the instrumentality of the National Council on Privatisation ("NCP"). The NCP set up an Electric Power Sector Reform Implementation Committee ("EPSRIC") which defined the three (3) principal phases for achieving the reform goals of a reliable and sufficient electricity supply system.

The first step aimed at the privatisation of the vertically-integrated behemoth, the National Electric Power Authority ("NEPA") at that time, was the introduction of Independent Power Producers ("IPPs") as well as private emergency power producers.

The second step focused on increasing the competition between market participants, reduction of subsidies (i.e. payment of full fuel prices) and sale of excess power to Distribution Companies ("Discos"). During the last phase, the market and competition would even be more intensified by full-cost pricing of supply, liberalised selection of suppliers, beyond the local Discos, by larger customers and fully competitive market trading.

The NEPP is considered the harbinger of the reformed power sector in Nigeria as we know it today. The general aims and objectives of the reforms as gleaned from the NEPP encompass- the establishment of an independent regulator to oversee the affairs of the sector; and the promotion of competition, transparency and efficiency within the Nigerian electricity supply industry; increasing private sector investments in the electric power sector; meeting current and future electricity demand of the populace; and the establishment of new market structure/rules and trading arrangement(s). The NEPP also defined the three (3) principal phases for achieving the reform goal of a reliable, dependable and sufficient energy system. The provisions of the NEPP were largely integrated into the Electric Power Sector Reform Act No. 6 of 2005 (the "EPSRA").

Despite the reforms and the privatization of the electric power sector, the average Nigerian does not believe that the sector has improved substantially. Specifically, much of the blame has been laid on the doorsteps of the electricity distribution companies (the Discos) and many people have claimed regulatory capture such that the Nigerian Electricity Regulatory Commission is not believed to be doing enough, in terms of sanctions, as far as the Discos are concerned. This has led to the situation where there have now been calls for State governments (and more specifically, the legislatures of those States) to get more involved in regulating Discos and electricity distribution generally as some claim that federal regulation has failed.

Being a Constitutional matter and the Constitution being the supreme law of Nigeria, it is germane to review the Constitutional provisions around the powers of State Governments to make laws relating to electricity distribution.

**The Fundamental Principles on Powers of the Federal and State Legislatures to Make Laws**

According to the Late Niki Tobi JSC (as he then was), in the case of Attorney-General of Abia State v. Attorney-General of the Federation:

> *"The Constitution of a nation is the fons et origo, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek language, it is the alpha and the omega. It is the barometer with which all statutes are measured. In line with the kingly position of the Constitution, all three arms of government are slaves of the constitution…in the sense of total obeisance and loyalty to it. This is in recognition of the supremacy of the constitution over every statute, be it an Act of the National Assembly or a House of Assembly of a State…All the arms of Government must dance to the music and chorus that the Constitution beats and sings, whether the melody sounds good or bad….."*

The principles of the law-making powers of both the federal and state governments are as spelt out in Section 4 of the Constitution. Specifically, Section 4 of the Constitution empowers the federal government to make laws:

- for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution (and such items in the Exclusive Legislative List shall be to the exclusion of the State government by virtue of subsection 3 of the same Section).

- any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto

- any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

Adopting the Expressio Unis Rule of Interpretation of Statutes (the express mention of an item excludes items not mentioned), it is safe to state that, the foregoing represents the complete powers of the federal government to make laws and any law made outside of these limits are ultra vires the powers of the federal legislature.

In summary, the federal legislature can only validly make laws with respect to three (3) areas, as follows- (a) items in the Exclusive Legislative List, (b) items the federal legislature is specifically empowered to make laws in the Concurrent Legislative List (emphasis on items the federal legislature is specifically empowered to make laws on) and (c) other matters the Constitution specifically empowers the federal legislature to make laws upon.

In light of the foregoing, it is pertinent to mention that subsection (5) of the same Section 4 of the Constitution then states that "[I]f any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void." It is germane to mention here, that the law of the State which will be void in the face of a federal law which is inconsistent will be a validly made federal law.

Consequently, a law made by a State government which inconsistent with an invalidly made law of the federal legislature cannot be invalid.

With respect of the fundamental principles around the legislative powers of the component States of Nigeria, Section 4(7) stipulates that the House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following:

- any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

- any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto.

- any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

The deductions from the foregoing (and the analysis of powers of the federal legislature) are that States can make laws in connection with matters which are not in the Exclusive List, for which the federal legislature has not been empowered to make laws in the Concurrent Legislative List and or in respect of which States are specifically empowered to make laws on, in other parts of the Constitution (but which are outside the Concurrent Legislative List).

Thus, where a State makes a law which is (a) not in the Exclusive Legislative List; and (b) is not specifically within the purview of the federal legislature in the Concurrent Legislative List, then that law is valid since it is not within the purview of the federal legislature as the federal legislative powers are clear, as adumbrated above. Conversely, the federal legislature cannot validly make laws on matters (a) outside the Exclusive Legislative List and (b) that it is not expressly empowered to make laws on under the Concurrent Legislative List or other provision of the Constitution. Any such law will be ultra vires its power and may be in place until validly challenged in court.

In the Supreme Court case of A.G. Federation v A.G. Lagos State (2013) 16 NWLR (Pt. 1380) page 249 SC, the Court held that "three laws promulgated by Lagos State are not items in the Exclusive and Concurrent lists but are rather Residual matters for the State; hence, the laws enacted by the Lagos State Government are intra vires the powers of the State Government". The purport of this is that an item the federal legislature is not empowered to legislate upon may only be validly legislated upon, by the State legislatures.

Having established the fundamental principles on the powers of each level of government to make law, it is vital to then review provisions of the Constitution on powers to make laws on electric power with emphasis on powers to make laws on electricity distribution.

**The Constitution and the Powers of the Federal and State Legislature to Make Powers on Electricity Distribution:**

The 1999 Constitution (also referred to as the "Constitution" in this part of this write up) places electricity generation, transmission and distribution on the Concurrent Legislative List. Although, both the Federal and State legislatures share legislative powers in respect of matters contained in the Concurrent Legislative List, the powers of the Federal legislature to make laws in respect of matters listed in the Concurrent Legislative List, is limited to those items specifically listed in the first column of Part II and those of State legislatures in the second column.

With regard to the electric power sector, Paragraphs 13 and 14 of the Concurrent Legislative List respectively, provide as follows:

> 13. The National Assembly may make laws for the Federation or any part thereof with respect to -
>
> (a) Electricity and the establishment of electric power stations;
>
> (b) The generation and transmission of electricity in or to any part of the Federation and from one State to another State;
>
> (c) The regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation;
>
> (d) The participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation;
>
> (e) The promotion and establishment of a national grid system; and
>
> (f) The regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy.
>
> 14. A House of Assembly may make laws for the State with respect to –
>
> (a) electricity and the establishment in that State of electric power stations;
>
> (b) the generation, transmission and distribution of electricity to areas not covered by a national grid system within that State; and
>
> (c) the establishment within that State of any authority for the promotion and management of electric power stations established by the State

With regard to electricity distribution, the powers of the federal legislature are limited to making laws for the 'participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation'. Relating this to the fundamental principles of the law making powers of the federal and State legislatures, there is a strong argument that the States are empowered to make laws on (a) distribution of electricity to areas not covered by a national grid system within that State and (b) distribution of electricity to areas covered by a national grid system.

My analysis for reaching the foregoing conclusion have already been put forward under the section on the fundamental principles explained above. For ease of reference, States can make laws in connection with matters which are not in the Exclusive List, for which the federal legislature has not been empowered to make laws in the Concurrent Legislative List and or for which States are specifically empowered to make laws on, in other parts of the Constitution (but outside the Concurrent Legislative List). Thus, where a State makes a law which is (a) not in the Exclusive Legislative List; and (b) is not specifically within the purview of the federal legislature in the Concurrent Legislative List, then that law is valid since it is not within the purview of the federal legislature as the federal legislative powers are clear, as adumbrated above.

For State legislatures to be empowered to validly make laws on electricity distribution for areas covered by a national grid system within such States, it is sufficient that neither the Concurrent Legislative List nor the Exclusive Legislative List (or indeed any other part of the Constitution) empowers the federal legislature to make laws on electricity distribution in such areas, in the relevant States. *This silence does mean, without prevarication, that there is a residual power of the State legislature, to make laws on electricity distribution 'for areas covered by a national grid system within the State'.*

It is further strongly debatable, that in line with the residual power argument above, that the fact that the Concurrent powers of the federal legislature are mentioned, under 13(b) of the Concurrent Legislative List, with the omission of distribution suggests the residual or local nature of electricity distribution and has been completely left for the State legislatures to legislate upon.

Again, a strong argument exists that if it was the intention of the drafters of the Constitution to vest the federal legislature (the National Assembly) with powers to make laws for electricity distribution within States (in areas covered by the national grid) then it will have expressly stated that, taking into consideration the fundamental principles of the law-making powers of the different levels of government. As already analyzed above, a basic principle of interpretation of statutes is that 'what is not specifically included in a list, is deemed excluded'. Hence, to the extent that the Constitution has failed to expressly include electricity distribution under paragraph 13 (b) part 11 of the Second Schedule to the 1999 Constitution, the Exclusive Legislative List or any other portion of the Constitution; has expressly excluded same.

### What Does the National Grid System Mean and Can a Possible Definition of Same Change the Conclusion?

The national grid system is understood in Nigeria to cover power stations and transmission, as reference to the national grid system is never really understood to cover distribution. Internationally, a national grid is regarded as a system or network that connects all power plants to ensure that there is electricity, everywhere and such that where a power plant is malfunctioning, another can replace same.

Thus, it is strongly arguable that the national grid system is the supply of electricity from a power station to a sub-station or from one sub-station to another sub-station. It would, therefore, appear that distribution activities outside of the foregoing especially distribution of electricity to end users fall outside the national grid system. Even if we were to assume that the term 'national grid system' includes electricity distribution, the powers of the federal legislature with respect to a national grid system are limited to promotion and establishment of same. Thus, it is still strongly arguable that the power to promote and establish is different from powers to make laws regulating activities related to same. Besides the assumption that the national grid system covers distribution activities is weak, whether by international standards or by the generally understood 'Nigerian' meaning of the term.

### What of the Doctrine of Covering the Field?

The doctrine of covering the field applies in federal systems, where both the federal government and component states can validly make laws regarding a matter (Please refer to A.G Lagos State v. Eko Hotels, (2017) LPELR-43713(SC)). The doctrine applies to ensure that once the federal legislature makes a law which covers the entirety of an issue or matter, the component states and their legislatures cannot again make laws on the same matter as the federal legislature will already have covered the field.

The key here is validity of the laws. To the extent that the Constitution and specifically the Concurrent Legislative List are clear as to the extent of each level of government's powers and the federal legislature cannot validly make laws in connection with distribution outside inter- governmental participation, then there cannot be any conversation or debate around the doctrine of covering the field. In fact, for residual matters, which is the case in the instance of distribution activities outside the participation of the Federation in any arrangement with another country, the federal legislature cannot validly make laws, speak much less of covering the field on the matter.

**Conclusion:**

The writer is of the reasoned view that the provisions of the Electric Power Sector Reform Act, a federal legislation, which relate to electricity distribution to end users are invalid such that the States may make laws which are inconsistent with same and the State laws will stand as it is only validly made federal laws that are capable of taking precedence over inconsistent State laws.

Where the foregoing is the case, the federal legislature having no powers to make such laws cannot confer the Nigeria Electricity Regulatory Commission (NERC) of the powers it does not have to make laws connected with electricity distribution.

Having stated the foregoing, considering that most Discos straddle more than one State, makes it crucial for States and the federal government, via NERC, to collaborate, in the regulation of these electricity distribution companies and electricity distribution generally. These State governments too may also not want to upset the applecart and just leave things as they are; but work more closely to regulate electricity distribution.

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