

Transition to State Electricity Markets in Nigeria - A Number of Noteworthy Issues

Proem

On March 17, 2023, the erstwhile President of the Federal Republic of Nigeria assented to a Bill of the National Assembly, referred to as the Fifth Alteration to the Nigerian Constitution, which allowed States to enact laws across the electricity value chain in their States (the “**Fifth Alteration**”). Subsequently, on June 9, 2023, President Bola Ahmed Tinubu assented to the Electricity Act, 2023 (the “**Electricity Act**”), which effectively repealed the Electric Power Sector Reform Act (“**EPSRA**”) of 2005.

The Fifth Alteration is an improvement on the previous legal regime, enabling States to make laws on electricity operations within such a State, even where there is a national grid system throughout such State. When considered together, the Fifth Alteration and the Electricity Act jointly provide considerable opportunities for private investments in electricity operations at the State level of the Federation.

States now have the authority to implement their policies and regulations governing all facets of the electricity sector solely within their borders. Crucial concerns in this regard will revolve around whether States must make their electricity laws or create their own electricity market. What is the process for so doing? If they must, what can they do and what opportunities exist? What should governors and, indeed, investors, know, take care of or guard against? The foregoing and more, are some of the questions, sector enthusiasts must be asking from legal, policy and technical perspectives. This piece will seek to answer some of these questions.

The above said, Nigeria is transforming its electricity supply industry, from a centrally regulated system to a dual-tier framework, such that the federal arrangement will comprise diverse electricity generation companies connected to the national transmission grid, which systems and market operations functions are managed by the system operator arm of the Transmission Company of Nigeria (the functions of the incumbent system operator are to be vested in the recently incorporated Independent System Operator (“**ISO**”).

On the other hand, State electricity markets will also emerge, featuring distribution retail markets that receive power from either State-regulated generators/ traders or federally-regulated generation companies or traders.

Specifics of the Electricity Act & Where We Are

Section 230(2) of the Electricity Act prescribes the procedure for the establishment of a State electricity market and the regulation of electricity operations. It provides that a State may, at any time, enact a law, by whatever appellation, to provide for the establishment of a State electricity market.

In addition to the above, the State is also required to establish its State electricity regulatory authority (“**the State Regulator**”) and appoint a governing body and staff for the said entity. It is expected that the State Regulator would be established by virtue of the law enacted by the relevant State.



Upon completing the foregoing, the State may deliver a formal notification of the events above and request the Nigerian Electricity Regulatory Commission (“NERC” or the “Commission”) to transfer regulatory authority over electricity operations in the State to the State Regulator.

The State is then required to deliver a formal notification of the foregoing events to the relevant successor electricity distribution licensee (“the **successor company**”), with a copy to the National Council on Privatization (“NCP”) through the Bureau of Public Enterprise (“BPE”) requesting them both to ensure that the successor company carries out the steps set out herein.

Within forty-five (45) days of receiving formal notification of the enactment of the law mentioned above, the Commission is mandated to develop and provide the State Regulator with a draft order outlining a plan and timeline for the transfer of regulatory responsibilities from the Commission to the State Regulator. This *transfer* is required to be completed within *six (6) months from the date the formal notification was delivered to NERC*.

The Electricity Act makes it clear that once the transfer of regulatory oversight to the State Regulator is completed, NERC will no longer have any regulatory responsibilities for electricity market activities carried out solely within the State. These regulatory responsibilities will now rest with the State Regulator and the additional successor company, including the assets, liabilities, employees, rights, and obligations associated with the transferred operations. In fact, with respect to the forty-five (45) days period within which NERC is to develop a draft Order for the transfer, the Electricity Act uses the term “shall” (which in law generally makes an action mandatory).

Currently, six (6) Nigerian States have followed the procedure spelt out in the Electricity Act and NERC has issued the relevant orders.

Any Mandatory Obligations for States To Take Over Electricity Regulations and or Should They Think Differently?

State governments are not obliged to change their approach due to the Electricity Act. Whilst the Electricity Act provides the option for States to implement their own electricity regulations, there is no mandatory requirement for them to do so, and some States may choose not to adopt new legislation at all.

Nevertheless, the Electricity Act of 2023 represents a major advancement in Nigeria’s electricity sector, prompting State leaders to reconsider their strategies regarding electricity delivery and how to enhance management for the benefit of State residents. This is, primarily because electric power supply and market issues will more likely than not, become an electoral conversational and determinant issue,

in the future, such that the electorate will begin to reward politicians and political parties for ensuring that State residents have efficient and reasonably affordable power supply through the creation of their own unique electricity market arrangements. Those politicians who fail to inculcate this in their States, are then likely to be compared with those who succeeded in doing so and may suffer electoral damage in future elections for failing to solve the electric power supply challenge in their States.

What Else is Critical?

Research is critical and research should focus on understanding a State’s requirements, future plans, strategic goals, energy demands, auditing processes, regulatory framework, funding methods, and appeal to investors, among various other factors. All of the foregoing should form the basis of each State’s power policy. Otherwise, the policy will be an empty, document. The author is particularly of the view that a State’s electricity policy should precede its law as the law should be the vehicle for implementing said policy.

The State will need skilled personnel, sourced either locally or externally, to assist in crafting policies, laws, and regulatory structures as well as developing the market. There is also a need for advanced technology and partnerships with States that have advanced significantly in this regard. Gathering comprehensive baseline data is also crucial for effective policy formulation. Before a thorough establishment of an electricity market can take place, it might be important to secure budgetary allocations and support from civil society and academic institutions, especially from a research perspective.

State legislation must be transparent, coherent, and appealing to investors by ensuring stable tariffs, providing protection against expropriation, and permitting international arbitration, among other features that would attract investment. It is also important for States to collaborate with the Minister of Power, who is effectively advancing the National Integrated Electricity Policy and Strategic Implementation Plan, to ensure alignment between federal and state policies and avoid conflicts.

What Investors Must Know

In view of the fact that States are now able to control their own electricity markets, there may be more opportunities to invest in various States without having to look to the federal bulk trader for grid-connected power arrangements. There would be more independent power generation, arrangements and concessions to improve State infrastructure (across supply, distribution and transmission), and more categories of licensing and licensees like the supply and trading licences and licensees.



States are also likely to be desperate for success and may provide concessions for investors. What investors must, however, ensure they do is internationalize their contracts and ensure they have sufficient protection to guide against the effects of situations like the obsolescing bargain amongst others, especially where governors or, indeed, government personnel change.

Investors should also look out for States providing liquidity backup instruments as well as other mechanisms to address risks beyond the control of project sponsors. It may also be pertinent to ensure land-related and right-of-way issues are well catered to. Other necessary incentives should also be sought and obtained from the relevant States. Investors should be sure to have provisions such as waiver of sovereign immunity, amongst others, in their contracts with State governments.

Conclusion

With State governments now having substantial power over electricity issues in their States, electric power supply issues are soon to become a significant electoral factor for these governors and we expect that, in the future, elections will be won and lost based on the (relative) success or failure of a State governor in connection with access to electricity issues and actual cost of electricity. The writer believes that, in the future, especially in more savvy States, residents are likely to judge the success of their governors' administration with other governors based on electricity access and electricity affordability amongst other factors.

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