

JUNE 2005 LEGAL ALERT: ELECTRIC POWER SECTOR REFORMS LAW.

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INTRODUCTION

Available literature shows that electric power generation in Nigeria began in the year 1896. In 1929, NESCO (Nigeria Electric Supply Company) was established. In 1951, ECN (Electric Corporation of Nigeria) was established to take over the assets of NESCO. In 1962, NDA (Nigeria Dams Authority) was established to develop the hydropower potentials in Nigeria. In 1972, ECN and NDA were merged to form NEPA (National Electric Power Authority).

The need to establish a substitute for NEPA was recognised to be immediate and or urgent as a result of the many impeding conditions under which NEPA was operating before it was dissolved. Examples of these conditions include an ever increasing consumer consumption of electricity vis-à-vis the ability and capacity of NEPA to meet the demand, non payment for the utility, accumulation of debts, vandalism of electric installations, high cost of maintenance and scarce foreign exchange to purchase spares and replacements, inadequate gas supply, low water levels, low tariff and high incidents of corruption and abuse of responsibility by all sectors responsible for managing NEPA.

BACKGROUND TO POWER REFORM LAW.

Power generation, transmission, distribution and supply have become like the proverbial parable, "water, water everywhere but non to drink". To combat the inefficiencies and incompetences' in this sector, the Nigerian Government has attempted to have in place, the stage for the privatisation of the electric power sector by enacting the Electric Power Sector Reform Act, 2005 (The Electric Power Sector Reform Law).

The Electric Power Sector Reform Law, signed into Law on March 11th 2005, has terminated the existence of the former holding electric power company in Nigeria called NEPA.

ELECTRIC POWER SECTOR REFORM LAW.

The new Electric Power Sector Reform Law seeks to achieve the following primary objectives: -

- (1) Unbundle the various aspects of NEPA's businesses namely generation, transmission, distribution, supply, etc.
- (2) Privatisise the unbundled entities of NEPA.
- (3) Establish a Regulatory Commission for Electric Power in Nigeria.
- (4) Establish a Rural Electrification Power Agency & Fund for Nigeria.

(5) Establish Power Consumer Assistance Fund.

(6) Develop competitive electricity markets in Nigeria.

(7) To provide for the determination of power electric tariffs.

TRANSITIONAL ARRANGEMENTS ? Power Holding Company of Nigeria Plc.

In accordance with the Electric Power Sector Reform Law, the Government of Nigeria registered and finally constituted the Board of Directors of a Power Holding Company of Nigeria Plc. The latter, a public limited liability company, is mandated to take over all the assets and liabilities of NEPA, unbundle, license, etc the various private sector-led players that will privately manage all aspects of electric power business in Nigeria.

The Power Holding Company is required after eighteen months of its existence to transfer/unbundle 18 different firms into privately held companies namely: -

I. 6 Generation companies.

II. A Transmission Company.

III. Distribution companies

ESSENTIAL SECTIONS OF THE ELECTRIC POWER SECTOR REFORM LAW.

The Electric Power Sector Reform Law, in its introductory Section, requires the registration of the Power Holding Company of Nigeria Plc. to take over the functions, assets, liabilities and staff of NEPA. Prior benefits and liabilities including guarantees or suretyship that the Federal Government of Nigeria had enter into with other private sector energy players, particularly the Independent Power Producers (IPPs) are preserved and will continue to be in force. This is in spite of the abrogation by the new Electric Power Sector Reform Law of the old Electricity Act. Section 7 of this Law provides that the Nigerian Electricity Regulatory Commission shall issue an interim license to the initial holding company for a period not exceeding eighteen months. Section 8 goes further to require the Government to, within eight months after the registration of the Power Holding Company, through the National Council on Privatisation, register such additional companies who would be responsible for power generation, transmission, trading, distribution and bulk supply and resale of electricity.

Attempts are made in this Law to ensure a transcession from NEPA to the initial Power Holding Company and then to the successor private companies. The successor companies are required to apply for a substantive license, within six months of the grant of an interim license, which interim license is only valid for a period not exceeding one year. Subsequently, the successor companies are required by Section 24 of the Electric Power Law to be privatised by the NCP in accordance with the provisions of the Public Enterprises (Privatisation and Commercialisation) Act.

NIGERIAN ELECTRICITY REGULATORY COMMISSION & COMPETITION.

To achieve the intentions of this Law and its reforms, the Nigerian Electricity Regulatory Commission is created with various objectives among which are: -

- (a) License and regulate persons and companies engage in the generation, transmission, system operation, distribution and trading in electricity power;
- (b) Promote Competition and Private Sector Participation, when and where feasible;
- (c) Establish appropriate Consumers rights and obligation;
- (d) Monitor the operation of the electricity market, etc.

Unfortunately, the Minister for Power and steel is empowered by Section 33 of this Law to issue general policy directions on matters concerning electricity provided that such directions are not in conflict with this Law or with the Constitution of the Federal Republic of Nigeria.

LICENCES AND TARRIFFS.

Section 62 of the Electric Power Reform Law expressly forbids any person who is not issued with a licence to engage in the business of:-

- (a) Electricity generation, excluding electricity generated by generators for private use and not for public sale;
- (b) Electricity transmission;
- (c) System operation;
- (d) Electricity distribution;
- (e) Trading in electricity.

Exceptions to the above rule requiring licence to operate are: -

- (i) Persons who construct, own or operate a system for generating electricity with a capacity not exceeding 100 kilowatts (kW) in aggregate.
- (ii) Secondly the Electric Power Commission is allowed, where necessary and in the public interest, to grant an interim licence to any person, interested in the various aspects of power electricity enumerated above.

The liability for operating an electricity system without licence as provided by the Electric Power Sector Reform Law is a fine not exceeding Five Hundred Thousand Naira or imprisonment for a period not exceeding two years or to both a fine and imprisonment.

There are numerous provisions in the Part IV of this Law (Sections 62 to 75) of the referenced Law under review which allows a licensee to apply for the amendment of its licence or for the licence to be cancelled based on the complaint of a customer or by the Electric Power Regulatory Commission itself, etc. In all these instances, attempts are made to ensure that all the parties are given an opportunity to state their case before a decision is made by the Electric Power Commission.

Intending private sector investors are allowed to apply to the Electric Power Commission for allocation of land required by them for constructing their electric power installations. The Power Commission, if satisfied with this application, is required to apply to the Governor of the State where the land is situated for allocation of land for public use. Compensation must be paid to the original Owners and where the Power Company no longer requires the land, the land must be returned to the original Owners who must now also pay a fair market price to the Power Company.

TARRIFFS REGULATIONS.

The Electric Power Sector Reform Law in Section 76 authorises the Power Reform Commission to regulate electric power tariffs using the defined methodologies in sub-section 2 of Section 76; this is especially in cases where there is a likelihood of abuse of market power by one or more Licensee. This is a commendable provision particularly as there is no anti-trust legislation or a strong consumer protection body to protect consumers.

Any licensee or person, who sells electric power above the parameters of the defined methodologies mentioned above, is liable to a fine two times the charge to the licensee's customers or to imprisonment of not more than one year or to both a fine and imprisonment. See Section 78 (14) of the Electric Power Law.

CONSUMERS PROTECTION.

Section 80 part VI of the Electric Power Sector Reform Law requires the Electric Power Reform Commission to develop consumer service standards and procedures so that the Nigerian consumer does not continue to be at the receiving end of a large stick. To further guarantee power supply, the Power Commission is empowered to establish standards for compensation to consumers who do not enjoy regular power supply.

Market power is defined by this Law to be "... the ability of a seller or group of sellers to maintain prices above competition levels, or to maintain stable prices while reducing the quality of products or service provided."

POWER CONSUMER ASSISTANCE FUND.

The Electric Power Commission is mandated by this Reform Law to establish and administer a Power Consumer Assistance Fund (The Power Fund). The Power Fund is meant to subsidise underprivileged power consumers as are so designated from time to time by the Minister for Power and Steel.

The income/revenues of the Power Fund is required to be derived from (a) contributions by other consumers and customers of electric power; (b) subsidies received from the Federal Government of Nigeria as approved by the National Assembly.

RURAL ELECTRICITY AGENCY & FUND.

A Rural Electricity Agency is established under this Law as a body corporate, capable to sue or be sued in its own name. The primary objective of the Rural Electricity Agency is to implement a sustainable and coordinated Rural Electric fund strategy and plan for rural areas in Nigeria.

A Rural Electrification Fund is established to achieve the above objectives. Any body or person who fails to timorously make his contribution to the said fund is liable to a fine not exceeding three times the amount required to be paid.

OFFENCES AND GENERALPROVISION.

To discourage the making of false declarations to the Power Commission, vandalism of electrical installations, etc., various fines and terms of imprisonment are recommended in the Electric Power Sector Law. For example, Section 94 (3) provides that any person, who wilfully destroys, injures or removes electrical equipment or apparatus commits an offence and is liable on conviction to imprisonment for a period of not less than five years and not more than seven years.

CONCLUSION.

A review of this legislation leaves its reviewer with only one conclusion which is that old wine has been poured into new bottles. This would if true make real and meaningful advancement very difficult.

The pitfalls of this Law include:

- A. Transitional provisions that make a lot of effort to retain the leadership and staff of the old NEPA who failed to improve all aspects of electric power for over two or more decades.
- B. Reported inconclusive Pension and business liabilities of NEPA, which the government's fund for discharging these liabilities under this Law may not be sufficient to discharge as a result of other pressing government obligations like local and foreign debts.
- C. An overbearing reporting procedure by the Electric Power Commission, to the Minister for Power and Steel. This may undermine the independence and professionalism of the Electric Power Commission.
- D. Continuation of multiple approvals for the eventual independent power companies from the Electric Power Commission, Local Government areas where the power installation, etc would be situated.
- E. Appointment criteria for the Commissioners to the Power Commission. The loyalties and responsibilities of the Commissioners including its Chairman, who are all appointed by the Government, based more on geo-political zones than on merit, would be to their political benefactors than to the end consumers of electric power.

MOTIVATIONAL QUOTE.

In troubled times lie the best business opportunities!

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