

# LEGAL ISSUE BRIEF

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## Towards Improving Electricity Provisioning in Nigeria

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### 1. Introduction

One of the fundamental objectives of the government as prescribed in the Constitution is to provide social amenities for the betterment and enhancement of citizens<sup>1</sup>. In realization of the said objectives, the federal government enacted a law to improve power supply in the country.<sup>2</sup> The importance of the power sector in any society cannot be overemphasized. It affects all Nigerians and virtually every sector of the economy. Electric power is an important component for the development of any economy and hence for prosperity. Besides capital and labor, it is regarded as the third most important production factor in economic models.<sup>3</sup> According to World Bank Report, in 2015, about 75 million Nigerians lacked

access to adequate electricity. Nigeria has been ranked highest amongst countries with electricity access deficit even as energy access, efficiency and renewable energy are on the rise in many developing nations.<sup>4</sup>

Prior to the enactment of the Electric Power Sector Reform Act 2005 (hereafter EPSR), there was in existence the National Electric Power Authority Act, Cap 256, LFN 2004, regulating the power sector. Under this Act the Authority was saddled with the responsibility of developing and maintaining an efficient, coordinated and economical system of electric supply for all parts of the Federation.<sup>5</sup> Prior to the enactment of the ESPR Act, 2005. The National Electric Power Policy 2001, was put in place by the Federal Government.<sup>6</sup> Despite these legal

<sup>1</sup> See Chapter II of the Constitution of Federal Republic of Nigeria

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<sup>3</sup> C. Awosope., 'Cost Implications of Electric Power Outages in the University Of Lagos'. *The Nigerian Engineer*, 1985, Pp 48 – 60. Cited in U. K. Nkalo & E. O. Agwu 'Review of the Impact of Electricity Supply on Economic Growth, A Nigerian Case' *Study Journal of Electrical and Electronics Engineering (IOSR-JEEE) Volume 14, Issue 1 Ser. I* (Jan. – Feb. 2019), PP 28-34 [www.iosrjournals.org](http://www.iosrjournals.org) accessed 25 January 2020

<sup>4</sup> Ibid

<sup>5</sup> See the Preamble to the Act which reads "An Act to establish the National Electric Power Authority to develop and maintain an efficient, co-ordinated and economical system of electric supply for all parts of the Federation and other matters incidental thereto."

<sup>6</sup> The Policy laid out the policy framework for the reform and liberalisation of the Nigerian Electricity Supply Industry (NESI). The critical goal of the Policy is to ensure that the NESI meets current and future electricity demand in Nigeria in an efficient and economically viable manner. The Policy

and policy framework, improvement in electricity supply/access has remained elusive. A number of reforms have been put in place by the Federal Government to provide sustainable solution to the electricity problem in Nigeria. This culminated in the enactment of the EPSR Act In 2005. This Act has been applauded by many for bringing in new innovations that are expected to move the electric power sector forward.<sup>7</sup> This review examines the innovative provisions of the Act and discusses how they can be effectively implemented towards improving the electric power sector in Nigeria. The review draws on comparative context to extrapolate useful lessons which can be of benefit to Nigeria.

## 2. Power Sector Regime before ESPR Act 2005

Electricity generation started in Nigeria in 1896 but the first electric utility company, known as the Nigerian Electricity Supply Company, was established in 1929.<sup>8</sup> By the year 2000, a government-owned monopoly, the National Electric Power Authority (NEPA) was put in charge of generation, transmission and distribution of electric power.<sup>9</sup> By the year 2001, the reform of the electricity sector began with the unveiling of

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provided the framework for the restructuring of the erstwhile state-owned utility which led to its unbundling into several successor companies. See Nigeria Electricity Regulation at <https://gettingthedealthrough.com/area/12/jurisdiction/18/electricity-regulation-nigeria/>.

<sup>7</sup> A.A.Ajibade 'A Critical Appraisal Of Electric Power Sector Reform Act Of Nigeria' [2016] *NIALS International Journal of Legislative Drafting Vol 2, No.2*

<sup>8</sup> See the 'History of Electricity Generation in Nigeria' Available at Nigerian Electricity Regulatory Commission (NERC) Website:

the National Electric Power Policy which had as its goal the establishment of an efficient electricity market in Nigeria. It had the overall objective of transferring the ownership and management of the generation and distribution infrastructure of the electricity sector to the private companies.<sup>10</sup> In 2005 the Electric Power Sector Reform Act was enacted to implement this new policy initiative. Pursuant to the provisions of the Act, the Nigerian Electricity Regulatory Commission (NERC) was established as a regulatory body for the electricity sector. In addition, the Power Holding Company of Nigeria (PHCN) was formed as a transitional corporation that comprises of the 18 successor companies (6 generation companies, 11 distribution companies and 1 transmission company) created from NEPA.<sup>11</sup>

## 3. The ESPRA Act 2005

Pursuant to the ESPR Act 2005, NEPA which managed the electricity sector was unbundled and replaced with a new NERC,<sup>12</sup> with the duties of formulating policy and regulation for the entire power sector. Under the new law, the responsibilities of generating, and distributing electricity are now shouldered by the private sector, while the federal

<https://nerc.gov.ng/index.php/home/nesi/401-history> accessed 27 January 2020

<sup>9</sup> Established under the National Electricity Power Authority Act. LFN. 2004.

<sup>10</sup> See the 'History of Electricity Generation in Nigeria' Available at Nigerian Electricity Regulatory Commission (NERC) Website: <https://nerc.gov.ng/index.php/home/nesi/401-history> accessed 27 January 2020

<sup>11</sup> Ibid

<sup>12</sup> S.31 Electric Power Sector Reform Act (EPSR) 2005

government has retained ownership and direct control of the transmission chain.<sup>13</sup> Unlike the previous law, this law touches new areas that were not part of the earlier legal framework such as: development of a competitive market (by involving the private sector); consumer protection; and subsidizing bills for less privileged consumers.<sup>14</sup>

One of the significant changes under the new regime is the enactment of the Rural Electrification Agency (REA).<sup>15</sup> The expansion of the main grid, development of isolated and mini-grid systems and renewable power generation, are the main focus of REA.<sup>16</sup> It appears that Electricity generation at the rural level is a matter within the purview of the States as provided under the Concurrent Legislative list (paragraph 14 of Part II in the Second Schedule to the Constitution).<sup>17</sup> In giving effect to the constitutional provisions and ensuring the mandate of REA are achieved, it is expedient for REA to have a working relationship with States as regards rural electrification projects. REA being a body established by the Federal Government with its headquarters in Abuja,<sup>18</sup> may not be able to ascertain the

electricity needs across the rural areas of the country.<sup>19</sup> States appear to be in a better position to directly handle this important aspect of electricity access.

#### 4. Some Comparative Lessons

##### *United States of America (USA)*

In the United States of America (USA), the Federal Energy Regulatory Commission (FERC), regulates inter-state transmission and wholesale power sales; while individual states regulate retail rates and electricity distribution.<sup>20</sup>

Functions, such as facility siting and environmental impact may be regulated by the local authorities. Some functions such as customer billing are treated as monopoly services in many states, and as competitive ventures in others.<sup>21</sup> It means that apart from interstate power sale and services, each state in USA regulate its power and decides on who to deal with for the supply of such power.

This shows that in the USA, electric power sector regulation is not a sole responsibility of the Federal Authority. States participate,

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<sup>13</sup> See the 'History of Electricity Generation in Nigeria' Available at Nigerian Electricity Regulatory Commission (NERC) Website: <https://nerc.gov.ng/index.php/home/nesi/401-history> and Sections 7 & 8 of the Act.

<sup>14</sup> Ibid Part 7 & 8

<sup>15</sup> See Sections 88-92 of the EPSR Act

<sup>16</sup> See Section 88(9)(a) to (c) *ibid*

<sup>17</sup> Constitution of the Federal Republic of Nigeria 1999. The section provides that: "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".

<sup>18</sup> See section 88(3) of the EPSR Act

<sup>19</sup> See generally section 91 *ibid*

<sup>20</sup> J. Lazar [2016]. Electricity Regulation in the US: A Guide. Second Edition. Montpelier, VT: The Regulatory Assistance Project. Retrieved from <http://www.raponline.org/knowledge-center/electricityregulation-in-the-us-a-guide-2>. accessed 28 January 2020

<sup>21</sup> *Ibid*

while local authorities as well as the private sectors also have roles to play. There is therefore a significant measure of decentralisation of power in electricity generation, transmission and distribution between the federal and the state governments. It appears that this approach has helped in effective power provisioning in the United States, as every level of government is involved in the development of these all important sector, starting from the local, states to the federal government.

#### *Australia*

In Australia, electricity provisioning is managed by each State, while the federal government serves as watch a dog by monitoring how states fare through the instrument known as *Australian Energy Market Operator*.<sup>22</sup> Electricity generated from coal forms 63% of Australian power supply. This is because electricity generation in Australia is majorly powered by coal. In Australia, the Federal Government has limited role in electricity generation, as each state is in charge of generating electricity using available resources.<sup>23</sup> The States involve several private organizations in generation of electricity to facilitate competition among providers. As such, there is what is called *competitive market* in electricity sector of Australia<sup>24</sup>. The system of electricity generation in Australia is

similar to that of the USA, although many of the States in Australia generate electricity with available natural resources within their localities.

#### *Canada*

The system of electricity generation in Australia and the United State is similar to what is obtainable in Canada. The central government only has power in matters related to: nuclear power generation sector; electricity export and inter provincial transmission of electricity.<sup>25</sup> Electricity regulation in relation to generation and distribution is primarily the concern of each provincial government. As such, regulations are different from province to province depending on laws of each province. Many provinces' electricity sector are dominated by government-owned vertically integrated utilities<sup>26</sup>. Therefore in Canada, electricity generators, transmitters, and distributors are regulated by the provincial electricity board of each province.<sup>27</sup>

### **5. Conclusion and Recommendations**

The ESPR Act 2005 is a good initiative aimed at revamping the electric power sector in Nigeria. However, the enactment does not satisfactorily resolve the electricity problem. Although the Act is not a failure in its entirety, with lots of positives to be drawn from it, yet there are many avenues for

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<sup>22</sup>'Electricity Regulation in Australia' [2013] AIIFL working paper no.8 [www.AIIFL.com](http://www.AIIFL.com). accessed 29 January 2020

<sup>23</sup> Ibid

<sup>24</sup> O. Hugh. (2000). 'The Competitive Market for Electricity in Australia: Why it Works so Well' Conference on System Sciences, 2000. *Proceedings of the 33rd Annual Hawaii International Conference*

*on System Sciences School of Engineering and Telecommunications University of New South Wales.*

<sup>25</sup> Electricity Regulation 2017 Available at

<https://cruzmarcelo.com/wp-content/uploads/2018/06/GTDT-Electricity-Regulation-2017-Book.pdf> accessed 28 January 2020

<sup>26</sup> Ibid

<sup>27</sup> Ontario Energy Board Act 1998

improvements. It is therefore recommend as follows:

- i. Considering the enormous responsibility of the Federal government and the challenges of electric power provisioning in meeting the needs of Nigerians, there should be a decentralization of power over electricity in the manner practiced in the USA, Australia and Canada. This approach seems appropriate and more effective as the states have more efficient capacity to respond to the needs of their localities better than the federal government. The

federal government should play the role of a gatekeeper in inter-state electricity regulation matters, in order to avoid the problem of free-riding and other market vices which may result from competition in the sector.

- ii. States should be empowered to generate and regulate electricity in accordance with their peculiarities and means as practiced in Australia.
- iii. There should be constitutional alteration to effect the recommendations in paragraphs (i) and (ii) above.