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POWER SECTOR REGULATION IN NIGERIA: THE VALIDITY OF THE LAGOS STATE ELECTRICITY POLICY 2021 IN THE CONTEXT OF RECENT LEGAL DEVELOPMENTS

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INTRODUCTION

Nigeria's persistent inability to meet energy demand remains paradoxical, given the nation's abundant endowment of natural and mineral resources scattered across its 6 geo-political zones. The Electric Power Sector Reform Act (EPSRA) of 2005, born out of significant deterioration of the power sector under government monopoly, was envisioned as a gateway to privatizing the power sector, holding the promise of a new era in the sector.[1] After years of privatization, Nigeria's electricity supply industry (NESI) remained burdened by escalating debt, inadequate infrastructure, significant transmission and distribution losses, electricity theft, and extensive federal government control. Driven by these challenges and more, the Governments of States like Lagos,[2] and Edo[3] advocated for a devolution of regulatory oversight in the Power Sector. In 2021, the Lagos State Government unveiled its Electricity Policy (the "Policy"), aiming to establish its own electricity market exclusively managed by a State regulatory body.[4] This Policy was met with mixed reactions from stakeholders particularly on the legality of the State's regulatory control over power generation, transmission, and distribution vis-à-vis the position of the law at the time. This article seeks to assess the validity of establishing a State Electricity Market in light of the recent constitutional amendment on power sector regulation in Nigeria and the introduction of the Electricity Act 2023.

[1]20200909_Enlight_Vol-1_Issue-2_Power-Sector-History%20(2) (Accessed July 28, 2023)
[2]https://www.premiumtimesng.com/opinion/463518-engaging-with-lagos-states-drive-towards-energy-federalism-by-odion-omonfoman.html?tztc=1 (Accessed July 28, 2023)
[3]https://www.thisdaylive.com/index.php/2022/07/27/electricity-bill-to-boost-edos-participation-in-power-market-improve-supply-says-ngf-consultant (Accessed July 28, 2023)
[4]https://memr.lagosstate.gov.ng/wp-content/uploads/sites/57/2021/12/BROCHURE-SINGLE-PAGE-VIEW-LASG-Electricity-Policy-1.pdf (Accessed July 28, 2023)

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The Lagos State Electricity Policy 2021

Despite receiving barely 5.5% of its required electricity supply, Lagos State maintains an impressive standing as the fifth largest economy in Africa accounting for over 20% of the nation's GDP.[5] In recognition of the urgency to unlock the full potential of the State, the State Government introduced the Lagos State Electricity Policy 2021 (the "Policy") to address the incessant challenge of power deficit which had posed a stumbling block in the growth of the economy.

The main objective of the Policy was to establish a State Electricity Market (SEM) and enhance electricity access and supply within the State.[6] In its pursuit for universal access to energy, the Policy imbibed an off-grid solution and environmental outlook, proposing an active integration of renewable energy into the State's electricity mix. Furthermore, it aimed to provide an enabling environment for investment within its proposed electricity market. The Policy also highlights and considers 8 key factors necessary for establishing a viable electricity market. These are:[7]

1. Providing an enabling constitutional framework to facilitate the transition from federal regulation of the Power Sector to regulation by the State;
2. Maintaining a cordial relationship between the Federal Government and the State Government towards defining their individual roles in regulation and eliminating the possibility of conflicts;

[5] Ibid
[6] Ibid
[7] Ibid

3. Establishing an independent regulatory body to take over regulatory functions from NERC within the state;
4. Developing an integrated resource plan to identify and allocate resources for electricity generation to qualified investors;
5. Developing a competitive and transparent framework for the procurement of resources;
6. Developing a bankable commercial framework featuring; automated licensing system, alternative dispute resolution, and industry guidelines and codes introduced by the State regulator;
7. A market landscape characterized by technically and financially competent market players ranging from gas suppliers, generation companies, an independent transmission entity, an independent system operator, distribution companies and electricity trading companies.
8. Establishment of an independent System Operator (ISO) which would be born out of the Transmission Company of Nigeria (TCN) to take over TCN's role within the State.

Legal Status of the Policy Prior to the 2023 Constitutional Amendment

Prior to the 2023 constitutional amendment, Paragraphs 13 and 14 of Part II of the Second Schedule, delineated Power Sector regulation between the Federal and State Governments. Noteworthy was the provision of Paragraph 13 (b) which empowered the National Assembly to exercise regulatory oversight over the generation and transmission of electricity within and across the States of the Federation. It had been argued that the express omission of distribution from Paragraph 13(b) implied that the Federal Government lacked the competence to regulate distribution of electricity within States,[8] however, a careful examination of Paragraph 13(f) reveals that the Federal Government possessed the authority, which it rightfully exercised by the enactment of the Electric Power Sector Reform Act (EPSRA), to regulate not only the generation and transmission of electricity within and across States in Nigeria but also distribution of electricity.[9]

Among other provisions, Paragraph 14 (b) of Part II of the Second Schedule, empowered each State to make laws regulating electric-

[8] https://lagosstate.gov.ng/wp-content/uploads/2021/04/Lagos-Electricity-Policy-Consultation-Paper-Issued-19042021-1.pdf (Accessed July 28, 2023)
[9] Section 62(1) of the EPSRA 2005

ity generation, transmission and distribution to areas not covered by a national grid system within that State. The absence of a clear definition for the term "not covered by a national grid system" in the Constitution became a significant point of contention when States like Lagos and Edo opted to assert control over Power Sector regulation within their respective territories.

One of the points canvassed under the Lagos State Electricity Policy – Consultation Paper[10] for the establishment of a State Electricity Market was that the term 'covered by a national grid system' could not be reasonably inferred to mean the mere presence of electricity wires within a State. This argument was particularly relevant considering the fact that the total power supplied by the national grid to the entire country was insufficient to sustain Lagos State's electricity needs for a full 24-hour period.[11] Despite the pitiable state of affairs, this interpretation could not have been considered as the true position of law until legally determined by a competent court of law.

The Implications of the Recent Constitutional Amendment on Power Sector Regulation in Nigeria

On March 17, 2023, the former president, Muhammadu Buhari, assented to a bill seeking to amend various parts of the 1999 Constitution, including Paragraph 14(b) of Part II of the Second Schedule to the Constitution by the deletion of the contentious phrase "not covered by a national grid system".[12] This amendment eliminated the ambiguity formerly attached to the provision, thereby making it explicitly and unequivocally clear that States had the authority to regulate electricity generation, transmission, and distribution within their respective territories.

While this appeared to have laid to rest the ongoing debate on the legality of establishing a State Electricity Market, the failure to amend Paragraph 13 of Part II of the Second

[10] https://lagosstate.gov.ng/wp-content/uploads/2021/04/Lagos-Electricity-Policy-Consultation-Paper-Issued-19042021-1.pdf (Accessed July 28, 2023)
[11] Ibid
[12] https://punchng.com/buhari-signs-amended-constitution-to-allow-states-generate-transmit-electricity/ (Accessed July 28, 2023)

Schedule to the Constitution, to recognize the supremacy of State laws in power sector regulation had attendant consequences. By implication, both the Federal and State Government could lawfully regulate electricity generation, transmission, and distribution within a State.

One important constitutional law doctrine relevant in cases like this is the principle of 'Covering the Field'. The principle posits that where both the Federal and State Government have the power to make laws on a particular subject matter, and the National Assembly has already enacted a law that covers that subject matter extensively, a State House of Assembly cannot introduce any law which conflicts with the law validly enacted by the National Assembly.[13] Any law so introduced by the State House of Assembly will be inoperative till the federal law is either repealed or amended accordingly.

Relying on this principle, despite the constitutional amendment, the State Governments could not validly introduce any law which contradicted the provisions of the EPSRA particularly considering the fact that the EPSRA did not recognize the supremacy of State regulation in the Power Sector. Consequently, States could not lawfully establish regulatory bodies nor issue licenses to carry out electricity operations within their territories which were already under the purview of the Nigerian Electricity Regulatory Commission (NERC).

In order to achieve a full decentralization of the Nigerian Electricity Supply Industry ("NESI") without creating a regulatory void, either of two potential options could have addressed the situation. The first option involved the repealing of the EPSRA followed by a subsequent introduction of a federal legislation which recognized the supremacy of State laws in Power Sector regulation while the second option entailed the amendment of the EPSRA to that effect.

The Electricity Act 2023: The Beginning of a New Dawn

Addressing the concerns raised and aiming to bring to fruition the true intendment of the constitutional amendment, President Bola Ahmed Tinubu signed the Electricity Bill (which had been in the pipeline even before the constitutional amendments) into law in June 2023. The Electricity Act 2023 (the "Act") repealed the EPSRA[14] and paved

[13] A.G Lagos State V. Eko Hotels, (2017) LPELR – 43713 (SC)
[14] Section 231(1) of the Act

the way for a new dispensation in the NESI.

Supremacy of State Regulation

To overcome the applicability of the principle of "Covering the field", section 2(2) of the Act guarantees the supremacy of State laws on electricity operations within their respective territories and acknowledges the power of the States to set up their own electricity market and establish State regulators to oversee their affairs.

Parallel Regulation

The Electricity Act envisions a dual system of power sector regulation whereby States regulate all aspects of electricity generation, transmission, system operation and distribution within their territories while the Federal Government oversees interstate and trans-national transmission and distribution of electricity.[15] To achieve this, the Act makes comprehensive provision for a transition process.[16] Nonetheless, in the event that a State fails to follow through with the transition process, the provisions of the Act pertaining to electricity generation, transmission, and distribution shall continue to apply and be enforced within such State by the federal regulator, NERC.[17] This is commendable considering that not all the States will develop their electricity markets at the same pace and in the interim, leaving no room for regulatory vacuum.

According to section 230(2) of the Act, a State may initiate the transition process at any time, by enacting a law to foster the development of a State Electricity Market and establishing a State electricity regulatory body. Once these actions are taken, the State must formally notify NERC of these developments, requesting the transfer of regulatory authority over electricity operations within the State to the State regulator. Additionally, the State is obligated to deliver a notice to the Distribution Companies (DisCos) that operate within its territory and inform the National Council on Privatization through the Bureau of Public Enterprise to ensure that the DisCos fulfil what is required of them in the transition process. Upon receiving the notification, NERC must develop a draft order[18] which must be delivered to the State regulator within 45 days. The entire transition process shall be finalized within 6 months from the date of the initial notification.[19]

During the transition phase, DisCos are required to establish subsidiary electricity

[15] See section 230 of the Act
[16] Section 230(2) of the Act
[17] Section 230(8) of the Act
[18] The draft order shall outline a plan and timeline for the transition of regulatory responsibilities to the State regulator.
[19] Section 230(3) of the Act

distribution companies to take over their operations within the State.[20] This must be completed within 2 months from the date of notification. Once the transition process is finalized, NERC will no longer exercise oversight functions within such State, and the subsidiary DisCos shall be duly licensed and regulated by the State regulator.

Establishment of an Inter-governmental Body

To ensure stability and investor confidence post-transition, section 230(9) of the Act requires both NERC and the State regulators to maintain a harmonious relationship. They are also mandated to establish an inter-governmental body responsible for promoting cooperation and coordination in the development of principles, standards and rules aimed at reducing regulatory risks within the various electricity markets in the country.

The Road Ahead

Following the transition to a decentralized market, it is anticipated that States would begin to create favorable environments for investments thereby attracting the requite resources necessary to develop their respective electricity markets. By leveraging on the abundant resources peculiar to their territories, it is expected that access to electricity will increase in Nigeria, invariably resulting in a reduction in the cost of production for businesses thereby fostering economic growth across board. The introduction of new laws, regulations, and incentives is also expected to encourage the participation of more players in the market and the development of the renewable energy and energy efficiency subsectors in the coming years.

CONCLUSION

Taking a cue from Lagos State, other States can confidently forge ahead with developing their individual electricity policies, laws, and electricity markets, as the current legal framework unequivocally recognizes their autonomy. We, however, hope that the political will of the States will go beyond just developing legal and regulatory frameworks, to taking active steps towards collaboration, partnerships, and investment into this crucial sector of the economy.

[20] Section 230(4) of the Act

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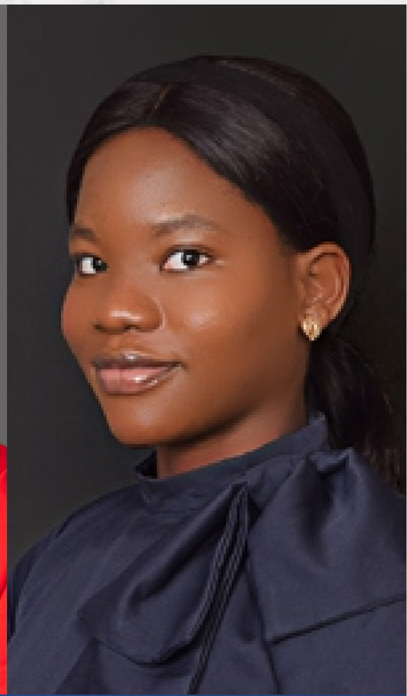

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