



DEVOLUTION OF POWER IN NIGERIA'S ELECTRICITY SECTOR: THE DUSK, THE DAWN AND THE MORROW

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 "... over **200 national electricity grid collapses** in the last decade, any move to decentralise the national grid would be a **breath of fresh air...**"

Introduction

For a nation that has suffered over 200 national electricity grid collapses in the last decade, any move to decentralise the national grid would be a breath of fresh air, which when ingested will bring life to an already crippled electricity sector. Such a move holds prospects for states, stakeholders and investors who are capable of bridging the gap between demand and supply in the electricity sector. This is the case in Nigeria today. On the 17th March, 2023, the power industry in Nigeria experienced a breath of fresh air, as President Muhammadu Buhari assented to the Fifth Alteration Bill (No. 33) Devolution of Powers (National Grid System), the long-awaited legislation which introduces significant changes to the governance, administrative, regulatory and fiscal framework of the Nigerian electricity sector.

Now, states have been empowered and permitted to make regulations and policies for the generation, transmission, and distribution

of power supply in their states, and freely operate electricity markets within their borders, as well as areas covered by the national grid. The Fifth Alteration Act (No. 33) Devolution of Powers (National Grid System) seeks to alter the provisions of the 1999 Nigerian Constitution to enable states to generate, transmit, and distribute electricity in areas covered by the national grid, and for related matters. While this can objectively be adjudged as aiming at strategic devolution of power, of pivotal importance, which is intrinsic in these, is the prospect of growing investors' confidence in Nigeria's electricity sector, expanding the electricity market and ultimately creating more employment opportunities. Consequently, it is expected that more private entities will emerge as Generation Companies (GENCOs), Distribution Companies (DISCOs) and Transmission Companies (TRANSCO) to stimulate competition in the electricity market.

This article adopts a tripartite approach in analysing the impact of this recent

development in Nigeria. These approaches are likened to various time phases in life. **The Dusk** reveals briefly, the challenges which the power industry faced in Nigeria previously, with a spotlight on how it foreclosed investment from the private sector. **The Dawn** shows the implications and impact of this constitutional amendment, while **The Morrow** analyses the inherent prospects trailing this development, with emphasis on the creation of new companies and structures to meet the electricity needs of consumers.

distribute electricity in all parts of the federation, and in between states. Owing to the inherent challenges plaguing the generation, distribution and transmission of electricity which resulted in incessant full and/or partial collapse of the national grid, unstable power supply, loss of investors' confidence, there was a move to divert into privatisation. This is where we saw distribution of electricity decentralise from the single Power Holding Company of Nigeria (PHCN) to the privately run distribution companies



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The Dusk: Nigeria's Electrical Sector - The Past

Before the emergence of this concurrent system that enables the state to equally generate, transmit and distribute electricity in all areas, whether or not covered by national grid, unrestricted power generation and distribution was vested in the Federal Government only. This means that the Federal Government could generate, transmit and

(DISCOs) that served the nation for years. As the issues in the electricity sector continued, the clamour for decentralization of power transmission heightened, with some states like Lagos already making pawn moves since 2021 to implement an electricity policy which will improve electricity in the state. Today, it can be stated categorically that the dusk regime is fading into dawn, as the Constitution of the Federal Republic of Nigeria, 1999 has been amended to allow state participation in transmission of electricity in their states.

The Dawn: The Impact of the Constitutional Amendment on the Power Industry



The amendment is, no doubt, a quantum leap in the right direction with its aims and objectives highly rooted in the progress of the power sector. The major highlights of the impact of the amendment are as follows:

1. States implementation of regulatory frameworks or review of existing frameworks:

One of the impacts of this amendment is the need for states to enact and implement their electricity laws, and make policies to incorporate their powers to generate, transmit, and distribute electricity in areas within their borders, as well as areas covered by the national grid. Formerly, this power was non-existent as the Electric Power Sector Reform Act, 2005 (EPSR Act), being the principal law regulating electricity in Nigeria provides for the licensing and regulation of the generation, transmission, distribution and supply of

electricity. Furthermore, this alteration would require the states that have existing electricity laws to amend their power laws in line with the constitutional amendments or make new Electricity reform Laws.

2. De-monopolisation of power generation, transmission and distribution:

The amendment de-monopolises the generation, transmission and distribution of electricity at the national level, and empower States to generate, transmit and distribute electricity. States would also be able to issue licenses to private investors who have the ability to leverage on the modest gains of the privatized electricity industry in Nigeria to accelerate growth in power generation capacity within the State. However, such State licenses are not to extend to inter-state or transnational distribution of electricity. They would also be able to make policies and regulations and this also in a way demonopolizes the current regulatory powers the Nigerian Electricity Regulatory Commission has on the power sector.

3. Diversification of power generation:

The amendment brings a range of economic, social, and environmental benefits. It creates an enabling environment to stimulate investments in renewable energy, improve the use of renewable energy off-grid and mini-grid solutions for electrification, and promote indigenous capacity in technology for renewable energy sources.

This would increase the overall reliability and resilience of the energy system by reducing the risk of disruption in power failure. It would also reduce dependence on a single source, which can leave a country vulnerable to price fluctuations, supply disruption, or geopolitical tensions. Additionally, diversification can help reduce greenhouse gas emissions by promoting cleaner and renewable energy sources, which can mitigate the impacts of climate change and promote sustainability. Finally, it can create new jobs in the renewable energy sector, which is often more labor-intensive than traditional fossil fuel-based energy production.

4. Decongestion of the national grid:

According to the US Agency for International Development, Nigeria's grid has an installed capacity of roughly 12,522 megawatts, but due to poor infrastructure, it is only able to deliver around 4,000 megawatts most days. It is therefore not surprising that millions of Nigerians struggle to get up to 15 hours of electricity every day.

With the Federal Government's long history of inefficiency and the generation of electric power which is significantly less than what is needed to meet basic household and industrial needs, the National Grid will experience less pressure and decongestion, particularly with the licensing of mini-grids inside the States.

5. Improvement in private sector participation:



There is no doubt that the amendment will improve private sector investments in the Nigerian Electricity Supply Industry (NESI), as many key private players and investors will be attracted to the sector. This will lead to the much-needed technical and non-technical support in the power industry. In addition, this amendment will expectedly grow investors' confidence in Nigeria's electricity sector, and create more employment opportunities in order to ensure transparency, strengthen the governing institutions and attract investment capital.

6. Promotion of sustainable development:

States can now set up their electricity Distribution Companies (DISCOs), and transmission infrastructure to operate with those existing in order to ensure an improvement of electricity supply, and improved internal generation of revenue for

the state. This will enable states to play their part in the realisation of the Sustainable Development Goal (SDG) 7 which deals with the provision of “affordable, reliable, sustainable and modern energy for all”.

7. Improvement in availability and reliability of electricity supply: As states would now have more autonomy to generate, distribute and regulate power within their respective territories in Africa's most populous country, there will be an improved availability and reliability of electricity supply in the various states.

8. Accountability: Residents in each state can now hold their governments responsible and accountable in terms of the policy, technology, operations and level of power supply in their states.

9. Healthy competition: The monopoly of the DISCOs will be halted as new key players will emerge which will result in increased healthy competition leading to improved service delivery of power within states.

10. Increased revenue streams for states: Generating their own power or licensing other companies to generate, distribute or transmit power creates new revenue streams, which can be used to fund infrastructure development and attract further investment. Furthermore, states can use their own power generation as a platform to attract private

sector investment in the energy sector, as investors can be incentivized with the prospect of participating in state-led energy projects.




The Morrow: Multifaceted Issues and Implications of the Constitutional Amendment

There are some multifaceted issues that are likely to arise from this amendment as it would affect existing investments, motivate new investors or propel more difficulties for key players in the Nigerian Electricity Supply Industry. It is therefore expedient that we provide in this piece, some of the legal, corporate and practical implications of the Fifth Alteration Act (No. 33) Devolution of

Powers (National Grid System) on the Electricity sector in Nigeria.

would be the emergence of new electricity DISCOs that are different from




 "... a new group of **distribution licenses and permits** would be allotted under a system that is not administered by the **NERC** ..."

Highlights of some of these multifaceted issues and implications are as follows:

- 1. Probable migration of some players in the industry:** Players who already hold licenses to run projects that were within a specific state such as distributed energy companies and mini-grids operators would likely migrate from the existing regulatory regime to regimes led by the state, specifically if the compliances and requirements to procure the state licenses and permit become less stringent compared to those in the current Nigerian Electricity Regulatory Regulations.
- 2. Encroachment by the New Electricity Distribution Companies, and Competition Issues:** One of the foreseeable effects of this Electricity Constitutional Amendment,

the extant traditional DISCOs, and these might be contingent on other market changes as investors might be influenced to shift their attention from the traditional DISCOs to the new entrants. Thus, the onerous requirements imposed by NERC on, and the unending opposition of the traditional DISCOs to, the allotment of independent electricity distribution licences and permits to interested applicants may also recede. The reason being that a new group of distribution licenses and permits would be allotted under a system that is not administered by the NERC and the new regulators (state regulators) are not yet acquainted with the administrations under which the traditional DISCOs presently file their objection to the allotment of new distribution licenses and permits by NERC.

This is a field of prospective squabble and conflict that regulators, government and other industry players must be wary of.



As increased consumers shift to new energy providers under the new administration, the traditional DISCOs are expected to maintain the narrative that they have proprietary rights or some form of cartel and monopolization on electricity distribution in their coverage or licensed regions, and that the application of the constitutional amendments would considerably diminish their inceptive projections and investments. The good side to all of these is that there would be increased competition propelled by the emerging DISCOs as against the legacy DISCOs who had failed over the years to deliver their various performance

agreements. This competition would foster a result-driven regime amongst Electricity Distribution Companies in Nigeria, and is therefore something to be looked forward to.

3. The Issue of the Definition of Areas “Covered by a National Grid”:

Based on this amendment, states are empowered to make laws with regards to the establishment and management of electric power stations in their States as well as the generation, transmission and distribution of electricity to areas “covered by a national grid”. However, the phrase “areas covered by the national grid” was not defined or described which may stimulate issues of interpretation in future.

4. Implication on Electricity Tariffs:

The failure of the Nigerian Electricity Supply Industry (NESI) to impose cost reflective tariffs has been one of its major plagues. Improper metering has always been the bane of the tariff system, with consumers decrying unjustifiable tariffs. However, it is expected that the implementation of this current constitutional amendment would, in due time, cause a significant change in administering the cost of electricity. Consequently, with the devolution of power to the states, it is highly probable

that states that are keen on appealing investors into their power sector might either drift the electricity tariffs such that pricings are determined by market dynamics or they might continue with the regulation of tariffs, but under an improved arrangement that gives room for more adequate, periodic and realistic reviews that efficiently keep track or adapt to inflation, exchange rate fluctuation, cost of capital and other material indications. This would also enhance competition amongst states in a way that those that are reluctant or nonchalant to adopt, a reasonable approach to tariff settings may lose out on their portion of investments that the reforms may captivate.

5. Probable Increase in Generation Projects:

With the incapacitation of central control, there might be a high possibility of increase in small to medium-scale generation projects, specifically renewables. States may begin to fix their gaze or provide a platform for investors to direct their attention on exploiting the states' energy prospects and employ resources that are available within their boundaries to foster industrial growth and development. These are already evident as we have seen propensity in the number of off-grid and mini-grid projects that are

undergoing development across the country and we must expect this movement to skyrocket in the coming months.



6. Multiplicity of Electricity Laws and Regulations:


The amendment might trigger a federal and state regulatory regime that creates multiple licensing, permits and approval requirements since electricity is a subject of the concurrent Legislative List of the Constitution. In addition, the amendment merely obliterated the phrase 'areas not covered by a national grid system'. However, there is the need to define the powers of each level of government in order to avoid multiple regulations in the industry or a clash between the governments.

The Morrow: Inherent Prospects for States and Stakeholders

Undoubtedly, just as the dawn presents, the impacts orchestrated, contemplated and anticipated by this amendment are enormous, with benefits to states and stakeholders alike. In analysing the prospects that this amendment holds for the power sector, it is important to state that the hands of all relevant stakeholders must be in deck to ensure a smooth transition into the concurrent system. These stakeholders include fuel (natural gas) suppliers, generation companies, a transmission entity, an independent system operator (ISO), distribution entities and electricity trading companies.

In Lagos state, for example, the power plan, which has been in place since 2021 “seeks to use available energy sources in the state – gas and renewable energy sources – to attain at least 18 hours of supply daily over five years with growth in peak energy traded in the state, from 12,000-15,000MWh daily in December 2022 to 81,000MWh by June 2028.” As captured in Section 2.5 of the policy document, “the Lagos State Government expects that by 31st December 2036, there will be a reliable supply of electricity in the Lagos Electricity Sector deploying the most efficient generation technologies and providing clean, adequate and constant access to all citizens without general recourse to off-grid generator capacity.”

Worthy of note is the fact that the commercial framework of the Lagos Electricity Market (which should be modelled by other states) is largely built on the existence of competitive tariffs and the vast involvement of private sector operators. This shows that private companies with objects targeted at meeting any need in the electricity supply funnel, from power generation, to transmission and distribution will have thriving operations in this new dispensation, and will be incentivised by the state government to deliver energy to residents of the state by adopting cleaner, commercially viable modern technologies power generation sources.



“... to attain at least 18 hours of supply daily **12,000-5,000MWh** daily in December 2022 to **81,000MWh** by June 2028.”

This new regime will equally require heavy investment in infrastructure. While different states in the federation cannot be said to be at the same level of economic advantage, as some states are more economically advanced than others, there still has to be structures in place to enhance, not just the commercial viability of this decentralization, but also the altruistic viability to see that the power needs of people in underserved, underdeveloped rural areas can also be met.

cover contract negotiation, loans from banks, incorporation of power companies, employment contracts, expatriate employment, licensing, regulatory compliance (since the electricity market is highly regulated), property acquisition and lease, dispute resolution, contract negotiation, tax obligations, environmental issues, policy formulation and review, due diligence, to mention but a few.



"... **stakeholders** must be mindful of the **electricity tariff framework**, as this affects the varying **interests of consumers**..."

In view of the above, Public-Private Partnerships (PPPs) are expedient, as well as the expansion of the operations of private companies in the power sector in states to adequately cater to power generation, transmission and distribution. This will definitely require advisory on several areas of legal concern which lawyers well-versed in the power industry can offer. These advisory areas

Moreover, stakeholders must be mindful of the electricity tariff framework, as this affects the varying interests of consumers. Nigerians have always decried increased electricity tariffs in relation to poor power supply by operators due to the harsh economic conditions this orchestrates. For a nation that heavily relied on electricity subsidy by the Federal Government which has long ceased, it is imperative for

stakeholders in this new regime to work on a system that balances socio-economic interest of consumers with the returns for investors, as financial viability of companies which will operate in this new regime is equally important.

In all, the morrow vests a responsibility on states to put in place well-detailed plans and strategies to ensure efficient administration of the power generation, transmission and distribution system. It also presents huge prospects to private power companies who can be well-positioned, not just to offer technical services, but professional advisory to states which will help in formulation and implementation of policies and laws.



Conclusion

In conclusion, these amendments allowing states in Nigeria to legally generate, transmit and distribute power in areas covered by the national grid would have a significant impact on the country's energy sector as a whole, but it would also have significant implications for the states.

While it is desired that electricity output in Nigeria will greatly improve, the desired change will not be magical as lots of work will first go into setting the right structures in place to dampen the effects that the prior centralized regime had created across the states, to pave a way for the new system to be functional.

Finally, states and stakeholders in the power industry are encouraged to be proactive in setting up legal and institutional structures needed for the decentralized ecosystem to thrive. This includes the prompt engagement and application of legal and technical advisory which will ensure that there is proper guidance for legal operations by the stakeholders. This also includes creating a system which will allow a cost-reflective tariff system to thrive, given the cessation of the subsidy-propelled regime, so as to create a win-win situation for consumers and investors alike.

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