

# THE FIFTH ALTERATION TO THE NIGERIAN CONSTITUTION: ANTICIPATED IMPACT ON THE NIGERIAN ELECTRICITY SECTOR AND POTENTIAL OPPORTUNITIES FOR STAKEHOLDERS

## Proem

The legislative powers of component Nigerian states and the Federation, in connection with electricity, had always been in the Concurrent Legislative List of the Constitution of the Federal Republic of Nigeria 1999 (“CFRN”). However, until recently, state legislatures (also referred to, as States, in this piece) were only empowered to make laws on distribution- generally being a residual matter, and on generation and transmission, in areas not covered by a national grid system.<sup>1</sup> The term, ‘national grid system’ was not defined, but is generally understood to relate to the network of electricity transmission lines connecting generating stations to loads across the entire federation.

The CFRN exclusively conferred on the Federation, through the National Assembly, the powers to make laws connected with the generation and transmission of electricity in or to any part of the Federation, and from one State to another.<sup>2</sup> Thus, administration of electricity in areas covered by the national grid was the exclusive preserve of the Federal government. Moreso, the regulatory powers for generation, transmission and distribution of electricity, including those not covered by the national grid, was vested in the Nigerian Electricity Regulatory Commission (“NERC”). NERC was established, pursuant to the Electric Power Sector Reform Act, 2005 (“EPSRA”) and exclusively empowered to license and regulate persons engaged in the generation, transmission, system operation, distribution and trading of electricity.

However, on 17th March, 2023, the President of the Federal Republic of Nigeria, President Muhammadu Buhari signed sixteen (16) Constitutional Amendment Bills into law, one of which is the Fifth Alteration (No. 33) (Devolution of Powers – National Grid System) Bill, 2022 (the “Constitutional Amendment”); imbuing States with the powers to make laws relating to generation, transmission and distribution of electricity in areas, whether or not, covered by the national grid. The implication of the said Constitutional Amendment is that, like the National Assembly, State Houses of Assembly can now make laws to regulate generation, transmission and distribution of electricity, to areas covered by a national grid system within their respective States.

This article analyzes the Constitutional Amendment, with a view to understanding its potential impact on the Nigerian electricity sector, and the risks inherent therein.

It also takes a cursory look at the economic opportunities available to the States and businesses, in view of the Constitutional Amendment, as well as strategies to fully maximise such opportunities.

## Anticipated Impact of the Constitutional Amendment on the Electricity Market

Following the announcement of the Constitutional Amendment, a foremost question on the minds of stakeholders is the impact this would have on the Nigerian Electricity Supply Industry (“NESI”). Generally, the Constitutional Amendment is a step in the right direction, as it is expected that the decentralisation of NESI would create competition, boost investment and further strengthen the market.

However, whilst the Constitutional Amendment has been celebrated across the country, there are certain issues which should be considered, as set out below, as stakeholders anticipate possible future benefits of the Constitutional Amendment to the NESI:

**1. Introduction of State Legislation and Regulation:** By virtue of the Constitutional Amendment, States can now make laws relating to the generation, transmission and distribution of electricity in areas covered by the national grid. Consequently, States that do not have electricity laws may enact legislation to regulate such matters, within their purview. We also expect that States with existing electricity laws, would seek to amend same, to capture the extent of the new legislative powers conferred on them. Similarly, States would be expected to set up regulatory bodies, that will administer the powers of the States in this respect.

An obvious concern with the foregoing, is the potential conflict between the provisions of a state law and a federal legislation. In such instances, the provision of the federal enactment may ordinarily take precedence, which then creates uncertainty, and is likely to adversely impact the market. For instance, transmission is naturally, an inter-state and inter-regional affair. This implies that it should lend itself to the authority of a federal regulator such as NERC, which already regulates same.

1. Para 14

2. Para 13, Part 2, 2nd Schedule to the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended).

To move that to State legislation may be an invitation to chaos. There may be debates around regional grid systems, which would work just like distribution networks on a larger scale, and one could argue that where this is the case, States and the federal legislatures may co-operate to legislate on these matters. As is obtainable in other climes, state regulators may also regulate the siting and physical construction of generation (except commercial nuclear facilities), transmission and distribution facilities. When a proposed facility passes through two or more states, the project developer would be required to secure authorization from the regulator of each affected State.

**2. Dual Licensing Regime:** A direct implication of having state law and state regulatory agencies is that States would now have powers to issue licences to prospective players within their jurisdiction. The consequence of the foregoing is that sooner than later, there would be some licence holders under the old regime issued by the Nigerian Electricity Regulatory Commission (NERC), and there would be those whose licence would be issued by the State government under its own terms and conditions. The existence of such dual licensing regime may create a situation of conflict between the two categories of licensees. One is left to wonder what would happen in a situation whereby the interest of a licensee under the former regime conflicts with the interest of another licensee under the new regime because consideration was not given to the existing licences by the States prior to the issuance of their own.

**3. Implementation Capacity:** One important question is, whether the Constitutional Amendment means States can successfully create and run their own electricity markets. Beyond putting in place rules and regulations, there are several other factors which help to develop a market with respect to investment and profitability – one of this is the development of the requisite capacity and resources to drive the market and create an enabling environment that makes it attractive to investors. The Constitutional Amendment anticipates that State governments would start to tap into the economic benefits from controlling their own electricity market. However, to enjoy these benefits, States would have to put in place mechanisms to attract investors to their jurisdiction. As it stands, and in view of the amendment, one cannot but ponder on how many States in Nigeria have the requisite capacity, in place, to drive their own electricity markets, with needs ranging from human and capital resources, fiscal strategies, dealing with electricity theft, amongst others.

### Possible Opportunities for Stakeholders

With the decentralization of the electricity market and the devolution of powers to States, there is a clear indication of certain economic opportunities for the States and individual investors. In subsequent paragraphs, some of the likely opportunities for investors, States and other stakeholders are examined:

**1. Investments and Collaboration for More Projects:** A promising opportunity for stakeholders with the Constitutional Amendment is the creation of avenues for more investments and collaboration at different levels. We envisage that there would be collaborations in the following forms:

- Between the State and the Federal government;
- Amongst States;
- Between the states and private entities;
- Between the State and other agencies; and
- Amongst two or more private entities.

It is hopeful that collaborations of this nature would positively impact the electricity value chain, from generation to distribution (including other areas such as retailing, enforcement and diversification of the energy mix).

For electricity distribution, the Constitutional Amendment is a potential window for more investments in the area of electricity retail, as is the case in more developed climes. States can enact laws that clearly delineate different categories of customers and allow interested entities to handle electricity retailing for select areas, with the distribution companies and their infrastructure only serving as conduit with access to third party retailers, using their facilities for a fee.

With respect to collaborations between States and other agencies, the Rural Electrification Agency ("REA"), in carrying out its mandate, explores alternative energy sources including solar energy (particularly for its mini-grid projects). With this Constitutional Amendment, REA can work with States to develop mini-grid projects for underserved and unserved communities within jurisdiction. For inter-State collaborations, more technologically advanced States like Lagos can also support the electricity needs of neighbouring States, based on an arrangement that would generate more revenue for Lagos.

- 2. Improved Tariff Structure:** States can be creative and foster investments from private sector participants in distribution infrastructure and equipment, such that there would be a variety of marketers and franchisees of networks that consumers can choose from. However, there should be free access for such customers, with the distribution companies taking a distribution use of network tariff ("DUOS Tariffs") or such similar variant(s) of same.
- 3. Access to Funds:** The decentralization of the electricity market can also encourage both local and international lenders to support private entities or State governments in their prospective projects. With proper collaborations, bankable structures and commercial terms that ensure returns on investments, many lenders may be willing to support electricity related projects at many levels. In addition, the shift to green energy and push for renewable energy sources can attract specific international lenders to electricity generation through solar and other renewable energy options.
- 4. Alternative Energy Source:** In the face of the growing conversation around energy transition and renewable energy sources, the Constitutional Amendment presents an opportunity for State governments to maximally explore energy sources that are peculiar and abundant within their region. Therefore, States can now more efficiently utilize the available resources (coal, sunlight, etc.) within their territory, as alternative sources of energy. States would be expected to lead the way on renewable energy use, development and policy by continuing to propose and enact legislation aimed at increasing renewable energy growth, establishing renewable energy generation targets; and removing barriers to entry into the market for renewable energy.
- 5. Local Enforcement:** It is believed that the locals of a geographical location are usually more familiar with the environment and happenings within it. As a result, States can set up local enforcement authorities and taskforces to handle reports, and incidences of electricity theft within the State. With adequate planning and proper enforcement,



this strategy can help address the issue of electricity theft and ensure adequate enforcement. This task force would also create jobs for members of the respective States.

- 6. Technological Advancement:** Technology companies can begin to provide services such as software applications for distribution companies and retailers for the improvement of their services to their customers. Essentially, technology companies can invest in providing equipment/ infrastructure to track electricity usage, electricity theft, and so on. With support from State governments which is closer to the market, interested companies can make use of this to drive their market and improve their customer services.

In addition to the foregoing, stakeholders must be ready to address other foreseeable issues including interference with the exclusivity of the distribution companies' franchise areas, pricing and tariff related matters, electricity theft, infrastructural deficits, creation of decentralized transmission grid and enforcement. The Nigerian power sector may indeed be plagued with several challenges; however, this amendment could potentially bring some structural improvement to the market and sector at large.

## Conclusion

As indicated in preceding paragraphs, the Constitutional Amendment opens new opportunities for stakeholders at a more decentralized level. Whilst the amendment will not automatically solve the issues inherent in the NESI, it does open a new foray in the industry, for State governments to handle certain critical issues such as transmission infrastructure, liquidity, distribution and sales of electricity at retail, siting and construction of transmission facilities, generation facilities and distribution systems and enforcement. It is to be noted that the ability to make far-reaching laws alone, will not solve the lingering problems in the sector. It is expected that certain States will make a success of it where they can adequately address the plethora of problems that have continued to plague the sector until this time.

To better realize the objectives of this Constitutional Amendment, it is reiterated that a key factor that should play out is strong collaboration at various levels and from different stakeholders. Additionally, technical and commercial issues need to be holistically considered for the Constitutional Amendment to be effective and the likelihood of conflicting rights, and interests between licences issued by NERC and those that would be issued by the State regulators must be promptly addressed.

There may be a need for the issuance of joint regulations, and a forward-looking arrangement with respect to the terms of existing licences and the licences to be issued by the States. It is anticipated that the Nigerian Electricity Bill 2022, which is currently being debated at the National Assembly to repeal and replace the Electric Power Sector Reform Act (EPSRA) 2005 will address some of these concerns.

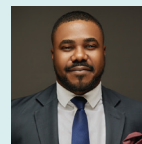
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