Top Ten Changes to the Nigerian Electricity Supply Industry by Virtue of the Electricity Act, 2023

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Within the space of a couple of months, two tectonic events altered the legal landscape of the Nigerian Electricity Supply Industry ("**NESI**"). First, the immediate past President, Muhammadu Buhari, assented to a constitutional amendment that essentially decentralised the licensing, generation, transmission, and distribution of electricity only in respect of areas covered by the national grid – a departure from the old regime where the States could only legislate on areas not covered by the national grid.

Second, one of the first acts of President Bola Tinubu upon assuming office earlier in June 2023 was to sign into law the Electricity Act, 2023 (the "**New Act**"). The New Act repealed the Electric Power Sector Reform Act, 2005 (the "**Old Act**") – and is now the primary federal statute on matters relating to the NESI. Below, we set out ten groups of provisions in the New Act which are innovative and significant either by reason of their absence in its predecessor, the Old Act, or because they significantly improve the governance or regulatory terrain that reigned supreme under the Old Act.

1. **Promoting Renewables**. The New Act undeniably recognizes current global energy trends as it sharpens its focus on meeting the needs of NESI through renewable energy sources. The New Act expressly mandates the NESI regulator, the Nigerian Electricity Regulatory Commission ("**NERC**") to *"support the development and utilization of renewable energy"*[1] and to take steps to increase *"the contribution of renewable energy to Nigeria's energy mix."*[2] The measures which the New Act has authorized NERC to take in this regard include the issuance of embedded renewable electricity generation subsidiary legislation, including those on wind turbines and the regulation of biomass electricity. Among other initiatives aimed at promoting renewable energy utilization in Nigeria, the New Act contemplates new fiscal measures to incentivize the generation and consumption of energy from renewable sources.[3]

2. **Hydro Power.** The New Act sustains the creation of the National Hydroelectric Power Producing Areas Development Commission (the "**Commission**"), originally established by the National Hydroelectric Power Commission Act, 2010 as amended ("**Repealed Hydroelectric Act**"). The New Act makes three significant changes. First, it reduces the contribution to the fund established for the Hydroelectric Commission ("**Hydroelectric Fund**") by a company or authority from 30% (as was the case under the Repealed Hydroelectric Act[4]) to 10%.[5] These contributions are to come from the operations of any hydroelectric dams in a member State of the Hydroelectric Commission areas. Second, the new Act mandates that 5% of all revenue accruing from power generated by the various power-generating companies shall be administered by the Hydroelectric Commission.[6] Third, the New Act bases the quantum of the contribution of the federal government to the Hydroelectric Fund to be based on the appropriation of the National Assembly from time to time[7] rather than the minimum 40% of the annual budget specified by the Repealed Hydroelectric Act.[8]

3. **State Regulation**. The New Act gives fillip to the new constitutional position that a Nigerian State may to regulate all of the economic stages of electricity production – namely its generation, transmission, and distribution – by reiterating that the authority of NERC to issue

[1] New Act, s. 165.
[2] *Ibid*.
[3] New Act, s. 167.
[4] Repealed Hydroelectric Act, s. 14(2)(a).
[5] New Act, s. 95(2)(a).
[6] New Act, s. 95(2)(d).
[7] New Act, s. 95(3).
[8] Repealed Hydroelectric Act, s. 14(3).

licences for these activities is without prejudice to the rights of the States to do the same.[9] In the same vein, the New Act does not stand in the way of the construction, ownership of generation, transmission, distribution, and supply assets within a State pursuant to the laws of such State.[10] The regulation of intra-State mini-grids, independent electricity transmission networks and independent electricity transmission network operators is within the exclusive preserve of the concerned State, unless such State does not have an existing legal framework for their regulation (in which case NERC may provisionally act as regulator) or their operation relies on any part of the national grid.[11]

4. **Transmission Licence**. The New Act creates a regime for the issuance, by NERC, of an independent electricity transmission network licence in two situations. One is where there is no existing transmission facility and there is need for extension of the nationwide transmission network to increase electricity access. A second is where there are existing transmission facilities that require reinforcement of transmission network to connect new power generation facilities.[12] There was no such framework in the Old Act.

5. **Distribution Franchising**. The New Act empowers NERC to give its *imprimatur* to distribution, supply franchising or other comparable commercial arrangements between a distribution or supply licensee (in respect of its coverage area(s)) and a third party.[13] The terms, models, tariffs of the arrangement must all be approved by NERC.[14] NERC's approval of such existing franchising or distribution arrangements does not, however, make such third-party franchisee a NERC licensee or sublicensee in respect of the concerned coverage area(s).[15]

6. **The NERC's Duty of "Intervention"**. Under the Old Act, NERC is empowered to cancel the licence of a licensee on *"[NERC's] own initiative."*[16] This somewhat authoritarian power of NERC is tempered in the New Act, which introduces to the fray a number of intervention measures which NERC can put in place where there is an errant licensee in lieu of the unilateral cancellation of such licensee's licence. These intervention measures include NERC provisionally removing and replacing the licensee's board, ordering the licensee to take certain actions, or deploying other regulatory tools.[17] NERC may only cancel the errant licensee's licence when all of these regulatory measures fail to reverse the licensee's fortunes.[18]

7. **Recovery of Outstanding Electricity Bills.** The New Act prohibits a distribution licensee, franchisee, or supply licensee from enforcing outstanding electricity bills of a previous landlord or tenant against a new landlord or tenant.[19] All outstanding electricity bills on any premises must be enforced against its former occupants under whose occupation the outstanding bills accrued, and not against any previous landlord or occupier.

8. **Mandatory Installation of Meters**. Unlike the Old Act, the New Act is clear that no licensee shall supply electricity from a date to be ordained by NERC except through installation of a proper meter in accordance with subsidiary legislations of NERC.[20]

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[9] New Act, s. 63(1).
[10] New Act, s. 63(2).
[11] New Act, s. 63(7).
[12] New Act, s. 66(2).
[13] New Act, s. 68(4).
[14] *Ibid*.
[15] *Ibid*.
[16] Old Act, s. 74(1)(b).
[17] New Act, s. 75(2).
[18] New Act, s. 75(4).
[19] New Act, s. 115(4).
[20] New Act, 114.

9. **Much Expansive Provisions on Offences and Penalties**. Whilst the Old Act criminalized certain conduct such as the making of false statements,[21] the contravention of an express provision of the Old Act,[22] the withholding of information,[23] or the obstruction of a law officer,[24] the New Act itemizes new, more-everyday, instances of infractions, such as electricity theft and/or damage of electrical installations,[25] theft and/or damage of electrical installations and other paraphernalia,[26] and misuse of information by a law officer or NESI personnel.[27]

10. **Independent System Operator**. The Old Act foresaw and provided for a system operator, which is unaffiliated to a transmission licence holder ("**ISO**"), to operate the transmission systems (as defined in the Old Act) from the Transmission Company of Nigeria ("**TCN**") when the NESI is *"substantially privatised."*[28] The New Act has specifically provided for such matters as (A) the ISO's incorporation as a registered company under Nigerian company law[29] and shareholding,[30] (B) the transfer of the ISO's employees, assets, and liabilities of the TCN to the ISO,[31] (C) the limitation of actions against the ISO,[32] and (D) the composition of the ISO's board and management.[33] In substance however, despite setting out the mechanics for the establishment and structure of the ISO, the New Act has not materially changed the previous position. The ISO will still be incorporated and operationalized when the market is right for it, as determined by NERC.

The foregoing constitutes a comparative review of the Old Act and its successor the New Act for the academic purpose of identifying ten key changes brought to the NESI by the New Act. Nothing in this paper should be construed or read as legal advice. Do not hesitate to contact our Okechukwu Okoro (okechukwu.okoro@gelias.com; +2348037701610); Emeka Ezekwesiri (emeka.ezekwesiri@gelias.com; +2348062421406) or Fidelis Oguche (fidelis.oguche@gelias.com; +2348154051010) should you wish to discuss how the New Act specifically impacts your business.

[21] Old Act, s.93.
[22] Old Act, s. 94(1).
[23] Old Act, s. 94(2)(a).
[24] Old Act, s. 94(2)(b).
[25] New Act, s. 209.
[26] New Act, s. 210.
[27] New Act, s. 220.

[28] New Act, s. 7(3).
[29] New Act, s. 15(1).
[30] Ibid.
[31] New Act, s. 19(1).
[32] New Act, s. 22(1).
[33] New Act, s. 30.

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