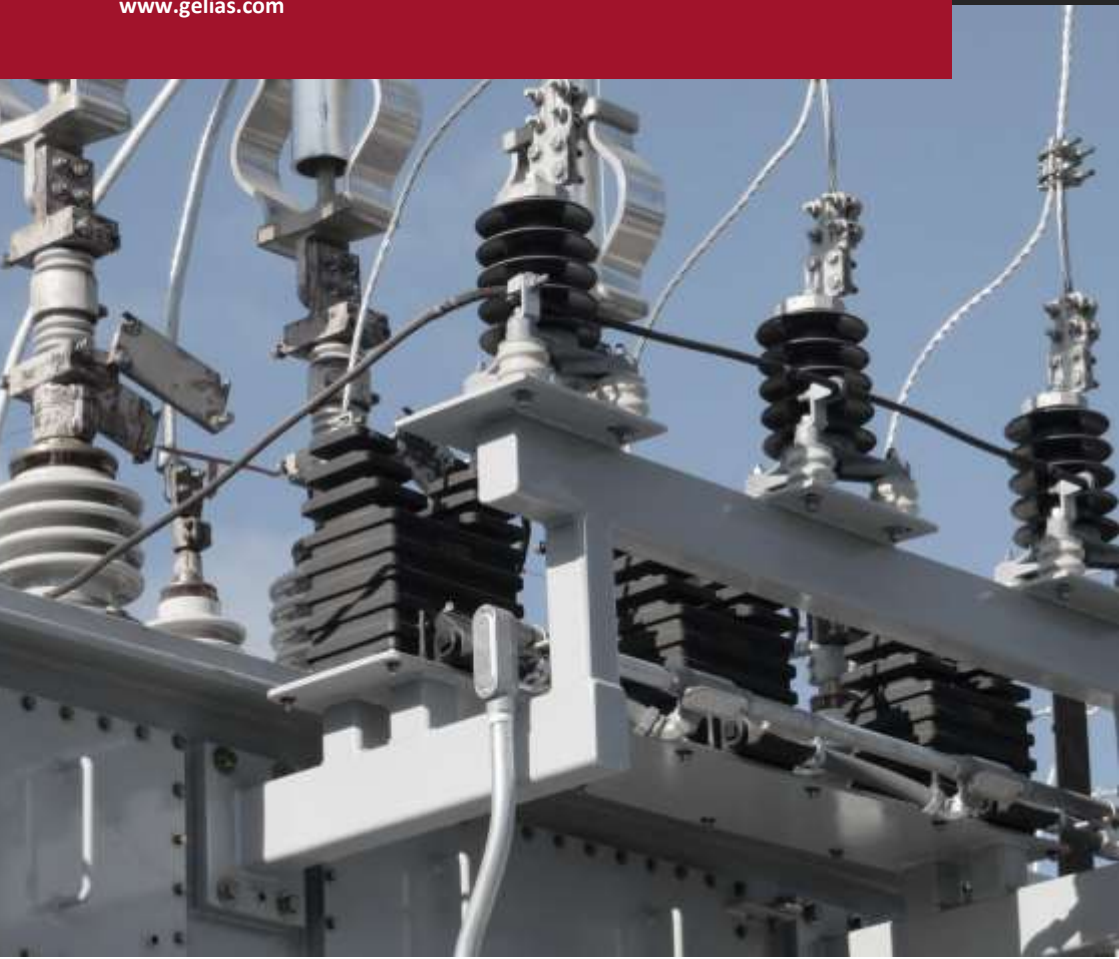
G. ELIAS

States Making Electric Power Laws: A Constitutional Amendment?

www.gelias.com



States Making Electric Power Laws: A Constitutional Amendment?

Recently, the National Assembly commenced the process of amending the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "**Constitution**") to allow States to make laws with respect to the generation, transmission and distribution of electricity to areas covered by a national grid system.[1] This is in contrast with the current legal regime which only allows states to make laws for the generation, transmission and distribution to "areas not covered by a national grid system" within the State (Paragraph 14(b), Part II, Second Schedule to the Constitution).

What exactly is meant by areas "covered by a national grid system" is not clear. The national grid has installations in nearly every locality in the country, but it does not appear to work very well anywhere.

Depending on how high one sets the bar for the meaning of "cover", under the Constitution today, the right answer may be that virtually every locality is "covered" (to the extent that a national grid installation exists there) or that virtually no locality is "covered" (to the extent that no locality is guaranteed constant electric power), or anywhere in between these two extremes – that there is virtually unlimited room for Federal legislation or virtually none, or anywhere in between.

The point has not yet been tested in the courts. It is not surprising that the Federal authorities have tended to set the bar for "cover" much lower than the states do. It is far from clear which of the

[1] The Constitution of the Federal Republic of Nigeria (Fifth Alteration) Bill, No. 33, 2022 (*Hon. Ahmed Idris – Wase Federal Constituency).*

Federation or the States is right as far as our constitutional law currently stands.[2]

However, despite this constitutional arrangement, under the current regime, all regulatory powers over generation, transmission and distribution of electricity (whether or not covered by the national grid) has been vested in a federal body, the Nigerian Electricity Regulatory Commission ("**NERC**") established under the Electric Power Sector Reform Act. 2005 ("**EPSRA**"). Hence, NERC has in exercise of its regulatory powers issued regulations covering captive electricity arrangements, independent electricity generation and distribution and mini-grid/off-grid power projects.

The effect of this wide powers is that even for localized power projects (including mini-grid power projects as low as 100KW) that are neither federal in character nor connected to the national grid, NERC has absolute regulatory oversight. This regulatory oversight extends to both underserved and unserved areas.

The situation for the states is also not helped by the establishment of the Rural Electrification Agency ("REA") under the EPSRA. The establishment of the REA, and the functions and mandate given to it, is in effect the exercise of legislative powers by the federal legislature over "areas not covered by a national grid". This is so because the REA's mandates is over areas that are unserved or underserved by the national grid, which in practice translates to areas not covered by the national grid over which states should ordinarily have power to make laws.

[2] The NERC Regulation for Mini-Grids 2016 uses the term "served" rather than "covered" in recognising distribution gaps over which NERC may issue Mini-Grid licences. The uncertainties that attend the term "cover" also apply to the term "serve".

Far from being an infringement on the law-making powers of states, the creation of the REA aligns with paragraph 13(b), part II, second schedule to the Constitution which empowers the federal legislature to make laws for the federation or any part thereof with respect to "generation and transmission of electricity in or to any part of the Federation and from one State to another State". The above provision makes no distinction for areas covered or not covered by the national grid.

The implication of the foregoing is that under the current constitutional framework, the legislative powers of states over areas not covered by the national grid, has in principle been "taken over or covered" by federal law – EPSRA. No state law can therefore derogate from or add to the EPSRA, in order to avoid the inconsistency rule in s. 4(5) of the Constitution. It is this legal regime that the proposed amendment attempts to change.

The amendment currently being proposed in the National Assembly simply deletes from the Constitution the words "areas not covered by a national grid system". The aim here is to make it unnecessary to interpret the quoted words and empower each state to legislate on electric power supply within its own borders, with the Federation left to legislate only for the supply of electric power across states lines.

This new agenda is prompted by widespread public disenchantment with the failure of the federal regime to meet the demand for power in every one of our 36 states and the Federal Capital Territory. There is much sympathy for the notion that the nation has been trying, and then fairly consistently without success, only a federal solution to its electric power problem for far too long, and that it is now time to try a different approach.

However, on the face of the texts of the proposed amendment, there are two plausible views about the proposed change. One is to the effect that it is a retrograde event. The other is that it is a progressive game-changer. Let us begin with the latter.

On the latter view, states can now legislate over areas that they lacked the power to legislate over prior to the proposed change. This will mean that the proposed change will expand the legislative powers of the state to include "unserved, underserved and served areas" whether or not covered by the national grid.

Based on this view, the proposed change is not unwelcomed, but it is likely to lead to challenges that will call for fresh legislation, and that may not work as smoothly as may be assumed and desired. An immediate, and apparently bigger problem is that the amendment will lead to multiple regulation of electricity in Nigeria. This concurrent regime, much like other matters in the concurrent list, will trigger a federal and state regulatory regime that may create multiple licensing, permit and approval requirements.

This will not encourage significant investment in the electricity sector and may in fact, become a burdensome pyrrhic victory for states seeking to develop independent or inter-connected electricity infrastructures.

Perhaps, an unintended but glaring consequence of state-led development of the electric power sector, will be that the majority economically weak states will be unable to develop or attract the development of viable and economically sustainable power projects.

It is therefore clear that managing the several apparent issues that will be thrown up by the amendment and its application in practice, will call for detailed and thoughtful legislation at both federal and state levels. It is important that the work of developing such further detailed legislation at the level of the states should begin sooner rather than later. The volume of work required for the purpose should not be underestimated. At least for the more populous states, it is unlikely to involve generating considerably less material than the current volume of legislation at the Federal level.

It is clear that for the presumed expansion of the legislative powers of the states to work in practice, the EPSRA has to be repealed and replaced with a law that recognises the proposed legislative powers of the state. The EPSRA in its current form will render the proposed change a more retrograde situation for the states than previously thought.

The proposed constitutional change would only empower, not obligate, the states to make their own laws on the supply of electric power. To the extent that a state does not make any new law, the Federal regime at least may continue to apply. This may prove to be the salvation for less economically viable states—surrendering to the federal cover for as long as the state is economically incapable of attracting the necessary electric power projects.

In the long run, there is every likelihood that in the economically-stronger states, the states' legal regime on electric power will in practice tend to marginalize the Federal regime. The demand for power in such states currently is critical for the economic health of the federal regime. The anecdotal evidence is that the national grid is economically viable only in the economically stronger states.

Further, the states, not the Federation, control the all-important rights to land and rights of way, and there is deep dissatisfaction with the Federal regime. At least in the dozen or so economically-stronger states, economic considerations would not appear to discourage the growth and flourishing of state law regimes for the generation, transmission and supply of power.

We understand that it is technically possible for each of two different distribution companies (licensed by state and federal authorities) to lay separate wires to every building on the same road in the same town with each of the companies connected to every building there. Although possible, that would be inefficient. It would be duplicative, expensive and untidy.

It is to be expected that going forward, in practice the relevance of the Federal regime for electric power regulation will shrink while that of most state regimes will rise. Given the ineffectiveness of the Federal regime for many decades, it is difficult to argue that that would be a bad development.

As to the former view, the proposed change may well be retrograde to the extent that it would delete the constitutional words “areas not covered by a national grid system”. On one reading, such a deletion would mean that in future the states would no longer be able to legislate even for “areas not covered by a national grid system”: the states’ legislative power would then be abridged rather than enlarged.

In such a scenario, the powers of the state to legislate over areas not covered by the national grid will be replaced by a hierarchical order where the state can in theory legislate on generation, transmission and distribution of electric power everywhere within the state, but in practice cannot do so because a federal law has

been made covering the whole of the state (and which does not in fact distinguish whether an area is covered by the national grid or not).

To preclude such a conclusion, the National Assembly should without delay take steps to ensure that the proposed amendment has clear words showing that the aim is to enlarge the legislative powers of the states, to legislate on electric power matters, not to abridge them.

In particular, the National Assembly should repeal the EPSRA and replace it with a law that does not unduly limit or take away the powers of the states to make laws on electric power. In view of the provisions of s. 4(5) and the doctrine of covering the field that has arisen from it, carefully crafted legislation will be required if the amendment will have its intended impacts.

It is expected that the states will be granted (perhaps exclusively) powers, to make laws in the areas of off-grid, mini-grid and captive electric power, which by their character are localized in particular states and are not usually connected to the national grid.

Authors

Okechukwu Okoro
Partner
okechukwo.okoro@gelias.com

Emeka Ezekwesiri
Senior Associate
emeka.ezekwesiri@gelias.com

LOCATIONS

LAGOS OFFICE
6 Broad Street
Lagos, Nigeria

T: +234 (1) 460 7890
E: gelias@gelias.com

ABUJA OFFICE
2nd Floor, Abia House,
Plot 979, First Avenue,
Central Business District
F.C.T, Abuja.

T: +234 (1) 888 8881

● Corporate ● Mergers and Acquisitions ● Securities Offerings ● Project and Structured Finance ● Tax ● Litigation and Arbitration ● Privatization ● Intellectual Property ● Employment ● Compliance ● Insurance ● Pensions ●Private Equity ● Oil and Gas ● Electricity ● Food and Healthcare ● Trade and Industry ● Media and Entertainment ● Telecommunications and Technology ● Real Estate and Construction ● Infrastructure ●Transport and Logistics ●