**ELECTRICITY ACT 2022 AIMS TO TRANSFORM NIGERIA’S POWER SECTOR**

**THE LEGAL FRAMEWORK OF THE NIGERIAN ELECTRICITY SECTOR**

From the time of the emergence of electricity in Nigeria, till the present time, the Nigeria electricity sector has witnessed series of legal framework. However, this head will discuss the Electric Power Sector Reform Act (EPSR ACT), 2005, which has been amended as a result of the Introduction of the Electric Power Sector Reform (EPSR) Bill 2022.

Before the enactment of the EPSR ACT, several legislations which provide for laudable provisions on the Nigeria electricity sector[[1]](#footnote-1), however, the EPSR Act was enacted as a result of the failure in the efficiency of those legislations as well as the regulatory bodies. The EPSR Act was enacted to promote competitive market in the electricity sector and also, to suit the privatization of the sector.

The major reason behind the enactment of the EPSR Act, 2005, can be deduced from the background provisions of the Act, which provides as follows;

An Act to provide for the formation of companies to take over the functions, assets, liabilities, and staff of the National Electric Authority, to develop competitive electricity markets, to establish the Nigerian Electricity Regulation Commission; to provide for the licensing and regulation of the generation, transmission, distribution and supply of electricity; to enforce such matters as performance standards, consumer rights and obligations; to provide for the determination of tariffs; and to provide for related matters.[[2]](#footnote-2)

From the above provision, it can be deduced that the EPSR Act covers generation, transmission, distribution and supply of power to the consumer, and also make provisions for the protection and the enforcement of the interests and rights of the electricity consumers.[[3]](#footnote-3)

The Electricity Power Sector Reform Act also establishes the Nigerian Electricity Regulatory Commission (NERC) as the regulatory agency of the sector.[[4]](#footnote-4) Its duties include monitoring and regulating the Nigerian electricity industry, with issuing licenses to participants, and with ensuring compliance with market and operating rules.[[5]](#footnote-5)

Apart from the NERC, EPSRA also established an agency to be known as the Rural Electrification Agency (REA), which is a corporate body possessing the capacity to sue and be sued[[6]](#footnote-6) and also with the duty to administer the Rural Electrification Fund (REF),[[7]](#footnote-7) a designed fund to promote, support and provide rural electrification program through public and private sector participation. The Rural Electrification Fund purpose is to:

1. Achieve more equitable regional access to electricity;
2. Maximize the economic, social and environmental benefits of rural electrification subsidies;
3. Promote expansion of the grid and development of off grid electrification; and
4. Stimulate innovative approaches to rural electrification; provided that no part of the Rural Electrification Fund be used as subsidies for consumption.[[8]](#footnote-8)

The Act provides for consumer protection and requires high performance standards by the operators to engender maximum utility and safety to consumers of electricity.[[9]](#footnote-9)

**The Need for Review of the EPSRA.**

The Nigerian electricity sector has evolved since the passage of the EPSRA in 2005. As a reform bill, the EPSRA has done a great job in providing the necessary legal, regulatory and governance frameworks for the power sector, and also guiding the sector through a privatisation process. However, post privatisation, the EPSRA is no longer adequate or fit-for-purpose. The power sector needs more reforms, particularly the decentralisation of the single, central electricity market that the EPSRA (2005) created. Constitutionally, Electricity has always been a concurrent legislative subject in the 1999 Constitution for both the Federal Government and States to make laws on. This is contrary to the widely held (but erroneous) belief that electricity is on the exclusive legislative list in the 1999 Constitution. The recent constitutional amendment which President Buhari signed, removes all doubts as to the concurrent legislative nature of electricity in our constitution.

Besides the need to reflect the concurrent legislative status of electricity, the EPSRA needs further reviews to address the post privatisation challenges in the NESI. An amendment of the EPSRA or a new Electricity bill is needed to strengthen existing electricity regulatory and market structures, force the market to a more efficient contract based market, decentralise the operations of the Transmission Company of Nigeria, reduce government’s participation in the sector, while allowing more private investments in the sector, amongst other critical reforms in the sector that would require legal backing.

The Senate on Wednesday, 20th July 2022 passed the Electricity Bill, 2022 which seeks to repeal the Electricity and Power Sector Reform Act, 2005 and enact the Electricity Act. The said bill has now become an Act having been accented to by the former President Mohammud Buhari. The Act consolidates all legislations dealing with the electricity supply industry to provide an omnibus and ideal Institutional framework to guide the post-privatization phase of the Nigerian Electricity Supply Industry and encourage private sector investments in the sector.

The primary aim of the bill, as stated in its very first section, is to create a comprehensive legal and institutional framework to guide the Nigerian Electricity Supply Industry (NESI). It de-monopolises the generation, transmission and distribution of electricity at the National level, to empower States, companies and individuals to generate, transmit and distribute electricity. States would also be able to issue licenses to private investors who have the ability to operate mini-grids and power plants within the State, but such State licenses are not to extend to inter-state or transnational distribution of electricity.

It should be noted that electricity has never been an Exclusive Federal matter as it is guided by the provisions of the Concurrent Legislative List of the Constitution (in Item 14, Part II of the Second Schedule), which sets out the extent of Federal and State legislative powers. By this provision, 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 “not covered” by a national grid system “within” the State. The Act restates this constitutional provision but goes further to provide for areas of collaboration between State Governments, the Federal Government and the private sector. While the Act’s scope extends to all parts of the Federation, it recognises the State Assemblies’ power to legislate on electricity and clearly states that such laws made within the scope of the Constitution, shall not be invalidated by the Act.

It should also be noted that the Constitution amendment Bill No. 33 (Devolution of Powers, National Grid System), which was passed by the National Assembly in March 2022 expands the legislative powers of States to make laws on the generation, transmission and distribution of electricity to include areas within the State “covered” by the national grid. This bill is currently before the State Houses of Assembly for ratification and will have a further re-enforcing effect if adopted.

The Electricity Bill mandates the Ministry of Power in consultation with relevant Government Authorities and relevant stakeholders to develop an Integrated Electricity Policy and Strategic Implementation Plan. The objective of this policy plan is to guide the overall development of the Nigerian power sector and address policy gaps. The Bill also requires the Integrated Plan to incorporate specific policies including waivers and subsidies that will stimulate the development of renewable energy.

The bill gives legal backing to renewable energy by providing a framework for its development and utilisation. It is a progressive development to see the scope widened to capture the ability to generate renewable energy and address fast rising concerns over global warming. It retains the provision in section 62 (2) of the extant Electric Power Sector Reform Act that provides that licences would not be required for persons who want to generate power below one megawatt.

Interestingly, clause 68 (9) seems to prohibit receipt of funds by distribution companies from electricity consumers to purchase electricity transformers or related equipment, but then it goes on in 68 (10) to say that such consumers seeking stable power supply may elect to fund such acquisition and installation where there is a supply delay and there is a prior written request made by them to the electricity company with details such as the amount to be contributed, names, address and occupation of the consumer, and number of customers who will benefit from the transformer to be purchased.

Commendably, the bill makes an effort to be gender sensitive. In addition, clause 1 (5) (b) of the bill requires the Minister for Power to consult with the Ministry of Women Affairs and other relevant agencies to promote gender mainstreaming in the design and implementation of electricity projects and programmes. Clause 104 (3) (d) requires the Rural Electrification Agency to foster gender mainstreaming in rural electrification activities, while Clause 34 (1) (l) which deals with the Nigerian Electricity Regulatory Commission (NERC) mandates the Commission to promote gender mainstreaming and local content requirements within the Nigerian Electricity Supply Industry. NERC remains the independent and apex regulator of the industry with the bill providing that Ministry of Powers’ supervising authority shall not conflict with the provisions of bill or the Constitution. However, the powers of the Commission (NERC) to regulate licensees in the industry is further expanded.

Another subject the bill addresses is electricity theft. It introduces penalties such as prison terms and fines for theft of electricity, bypass of metres, theft of electrical lines and materials, disruption of power supply, damage to public streetlights, etc. This is particularly important as the extant Electric Power Sector Reform Act is not exhaustive on the issue and electricity theft has led to significant loss of revenue in the industry.

The establishment of the National Power Training Institute of Nigeria and the Power Training Fund (Power Fund) is another innovation of the bill worth mentioning. The National Power Training Institute is to serve as the focal point for human resource development, workforce capacity building and a training and research centre with collaborative efforts from local and international institutes of professional in the power sector. The power fund on the other hand is to be utilized for the promotion of skill acquisition and development of human capacity in the Nigerian Electricity Supply Industry (NESI) with the view to generate a pool of indigenously trained manpower to cater to the needs of the power sector.

Overall, the bill has been hailed by stakeholders as a potentially beneficial legislation. In many countries, communities generate their own electricity; therefore, giving the States the reins on energy generation and transmission would go a long way in improving the power sector as less pressure would be put on the National Grid especially with the licensing of mini-grids within the States. The introduction of renewable energy in our energy mix would be quite an innovation as it has the potential to attract investors to the power supply sector and hopefully put an end to the incessant challenges that occur in the generation, transmission and distribution of electricity. The bill will need be sent to the House of Representatives for concurrence.

## A look at the 1999 Constitution pre the Amendment

Section 4 of the 1999 Constitution provides for the legislative powers of the Federal and State governments vested in the National Assembly and the House of Assembly of each State, respectively. While the National Assembly is empowered to make laws on any matter included in the exclusive legislative list3 and any matter in the concurrent legislative list4 , the House of Assembly of each state is empowered to enact laws on matters not included in the exclusive list and on any matter in the concurrent list5 . The implication of the above is that both the National Assembly and the State House of Assembly have powers to make laws in respect of matters listed in the concurrent legislative list set out in Part II of the Second Schedule to the 1999 Constitution (the “Concurrent List”). However, if any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law made by the House of Assembly of a State shall, to the extent of the inconsistency, be void.6

In connection with the electricity market, Paragraph 13(a) and (b) of the Concurrent List provided, inter alia, that the National Assembly may make laws for the Federation or any part with respect to “electricity and the establishment of electric power stations”, and the “generation and transmission of electricity in or to any part of the Federation and from one State to another State”. Related, Paragraph 14(a) and (b) of the Concurrent List provides that the House of Assembly may make laws for the State with respect to “electricity and the establishment in that State of electric power stations” and on “the generation, transmission, and distribution of electricity to areas not covered by a national grid system within that State.” [Emphasis and underlining added].

Prior to the Amendment, the key debate was on the implication of restricting the powers of the House of Assembly of a State to only “areas not covered by a national grid system” within a State. That is, whether or not this restricted the possibility of willing States to set up an independent electricity market with an independent regulatory agency and market participants that report only to the State electricity market regulatory agency. These debates were predominantly premised on the meaning of “areas not covered by a national grid system” and if the phrase should be interpreted in a strict and literal manner that restricts States from setting up their electricity market, and therefore deny Nigerians access to electricity on the basis of technical arguments. The 1999 Constitution did not help matters as the phrase “national grid system” was not defined. As you will see immediately below, this debate is now academic following the Amendment.

## The Amendment – a win for State-focused electricity markets

Off the back of these debates and what could have potentially been a long-drawn legal battle on the interpretation of the provisions of paragraphs 13 and 14 of the Concurrent List, the National Assembly passed the Amendment, which has now been signed into law by the President. The Amendment essentially settles the debate regarding the powers of the States to establish their State electricity market.

Specifically, the Amendment deletes the phrase “not covered by a national grid system” from the provisions of paragraph 14(b) of the Concurrent List. Following the Amendment, paragraph 14(b) of the Concurrent List now reads that the House of Assembly may make laws for the State with respect to “the generation, transmission, and distribution of electricity to areas within that State. [Emphasis added]

While some have argued that this Amendment only “clarifies” what the position was prior to the Amendment, some others take the view that the Amendment now “allows” States to set up independent electricity markets. In whichever camp anyone may decide to pitch their respective tents, the fundamental point is that Lagos, Edo and Kaduna States, who before now already commenced steps to set up their separate electricity market within their respective States, can feel justified in their pursuit of this. The Amendment will also encourage private investment in the Sector, as investors may be more willing to invest in an independent market that is not entirely controlled by the Federal government. Private sector investments will be key in not only driving the development of the State focused electricity markets, but in structuring competitive, transparent and efficient State electricity markets

1. Electricity Ordinance Act of 1929, Electricity Corporation Ordinance No. 15 of 1950, The National Electric Power Authority Decree No. 4, signed on June 7, 1972. [↑](#footnote-ref-1)
2. Explanatory Background to the EPSR Act, 2005. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. EPSR Act, 2005, s. 31. [↑](#footnote-ref-4)
5. Ibid S. 32. [↑](#footnote-ref-5)
6. Ibid. S. 88(1). [↑](#footnote-ref-6)
7. EPSR Act, 2005, s. 88(11). [↑](#footnote-ref-7)
8. Ibid. S. 88(13). [↑](#footnote-ref-8)
9. Ibid. S. 80 and 81. [↑](#footnote-ref-9)