

AFOLABI ELEBIJU & DANIEL ODUPE

FEBRUARY 2019



“TODAY, WITH POLICIES AND PROGRAMMES SUCH AS THIS IPP, WE HAVE DEMONSTRATED THAT IF THE COMMON GOOD IS OUR MUTUAL OBJECTIVE, IT CAN BE ACHIEVED IRRESPECTIVE OF PARTY DIFFERENCES AND CONSTITUTIONAL LIMITATIONS. ELECTRICITY HAS NO POLITICAL COLOUR.”

PRESIDENT MUHAMMADU BUHARI.¹

The success of Nigeria's planned economic growth and development is substantially hinged on improvements within the power sector. Doubtless, power is the lifeblood of any economy and a key driver of industrialisation; unfortunately, there remains a substantial energy deficit to power Africa's largest economy. Despite having abundant (hydro, thermal, solar) resources to produce power, Nigeria's 144 kilowatt hour (kWh) per capita is one of the lowest in the world, resulting from years of underinvestment and decrepit infrastructure.²

changing this sorry state of affairs. Subsequently, the enactment of the **Electric Power Sector Reform Act (EPSRA)**³ and respective implementation of **EPSRA** reform initiatives including creation of Power Holding Company of Nigeria (PHCN) and successors companies, privatisation/licensing of Electricity Generation Companies (Gencos) and Electricity Distribution Companies (Discos) together with attainment of other **EPSRA** milestones have not made as much transformative impact in improved power supply.⁴

Thirteen years after enactment of **EPSRA**, Nigeria's power generation capacity is still under 6,000 megawatts (MW) compared to South Africa's 51,309 MW⁵ and population of 56.717 million.⁶ The crux of Nigeria's challenge is therefore the underutilization of the energy resources while her South

The reform of Nigeria's power sector commencing with the National Electric Power Policy (NEPP) 2001, was informed by the imperative of

“POWER IS THE LIFELOOD OF ANY ECONOMY AND A KEY DRIVER OF INDUSTRIALISATION; UNFORTUNATELY, THERE REMAINS A SUBSTANTIAL ENERGY DEFICIT TO POWER AFRICA'S LARGEST ECONOMY”

¹ Excerpts from President Buhari's speech at the commissioning of the Ariaria Market Power Project in Abia on 29.01.2019. See [Awwal Hassan, 'Buhari Commissions Ariaria Market Power Plant in Abia'](https://lms247.com/2019/01/29/buhari-commissions-ariaria-market-power-plant-in-abia/), LNS247, available at: <https://lms247.com/2019/01/29/buhari-commissions-ariaria-market-power-plant-in-abia/>, (accessed on 14.02.19)

² The World Bank, *'Electric Power Consumption (kWh Per Capital)'*, 2014, available at , (accessed on 24.07.18)

³ *Cap. E7, Laws of Federation of Nigeria (LFN) 2004*

⁴ For instance, the objects of NERC which *Section 32(1) EPSRA* provides for includes ensuring that adequate supply of electricity is available to consumers; creating, promoting, and preserving efficient industry and market structures, and ensuring the optimal utilisation of resources for the provision of electricity services, have all largely remained unachieved.

⁵ The United States Agency for International Development (USAID), *'South Africa Power Africa Fact Sheet'*, November 2018, available at <https://www.usaid.gov/powerafrica/south-africa>, (accessed on 07.08.2018).

⁶ The World Bank, *'Population Totals of Countries'*, 2017, available at <https://data.worldbank.org/indicator/SP.POP.TOTL?end=2017&start=1960&view=chart>, (accessed on 07.08.2018)



African counterpart boasts of 86% access rate with 91% of her power generated through thermal power stations.⁷ The dire state of Nigeria's power sector is further complicated by transmission constraints, such that TransCo's antiquated infrastructure is unable to convey all the power generated, resulting in huge transmission losses. When considered with distribution losses and power theft, Nigeria has one of the worst system losses in the world.⁸

It is saying the obvious that given the enormity of her market and the suppressed demand for power, Nigeria has the potential to absorb significant investments at all levels of the power sector value chain and provide commensurate returns on these investments. However, care must be taken to ensure that the participation of the private sector fits into the existing licenses and regulatory

arrangements in the sector. With the inadequate performance of the Discos, Federal Government (FG) has been considering the embedded generation option as one of the quick ways of solving Nigeria's power challenge. As the sector regulator, the Nigerian Electricity Regulatory Commission (NERC), proceeds to take action on embedded generation with interested investors, push back from the Discos is to be expected. This article joins the fray, focusing on some of the legal and commercial context.

The 'Why?' Question: Imperatives and Policy Benefits of Embedded Generation

Regulation 35 Nigerian Electricity Regulatory Commission (Embedded Generation) Regulation 2012 (NERCER) made pursuant to **EPSRA** defines embedded generation as “the generation of electricity that is

directly connected to and evacuated through a distribution system”. It is electricity generated by an independent generator and evacuated via the grid.

Nigeria's power supply deficit necessitates the utilization of every available means to meet the required supply. This is because adequate power energizes economic growth, drives job creation and improves citizens' quality of life. Consequently, there is an urgent need for focused diversification through the development of renewable energy alongside other energy sources, to complement existing output. Embedded generation represents a key avenue to achieve this. As we will show shortly, fairly adequate policy framework are already in place to improve both on-grid and off-grid power distribution in Nigeria through embedded generation.

By **Regulation 6 NERCER 2012**, a distribution licensee (DL or Disco) is expected to make access to the distribution system available to the embedded generation licensee where there is capacity after reaching an agreement with the embedded generation licensee on acceptable conditions, including fees. The DL is to negotiate in good faith and offer fair and reasonable terms for the connection of an embedded generation unit. Accordingly, an embedded generator (EG) is generally prohibited from engaging in the business of distribution, transmission, trading

⁷ Ibid (note 5)

⁸ The World Bank, 'Electric Power Transmission and Distribution Losses (% of Output)', 2014, available at <https://data.worldbank.org/indicator/EG.ELC.LOSS.ZS>, (accessed on 29.01.19)

and systems operation as these are differently regulated under the **EPSRA**. However, where **NERC** is satisfied that there would be no abuse of market power, a holding or subsidiary company of the EG may be licensed to engage in these regulated activities.⁹ Similarly, a DL can incorporate a separate legal entity to undertake embedded generation where it intends to engage in power generation.¹⁰

Thus, embedded generation provides a major opportunity for private sector participation given paucity of public finances to fund increased power generation. Meanwhile, increased generation alone will not solve the woes in the power sector. System losses represents a huge source of power leakage in Nigeria as the current grid capacity is unable to accommodate more power supply.¹¹ Substantially increasing the quantum of power generated and wheeled onto the grid will result in massive system failures. Recently, Discos were reportedly queried for load shedding because of faulty lines and bad equipment – a line of least resistance - rather than repairing the said equipment.¹²

Thus, investment in power generation must be supplemented by investment in the enhancement of the transmission and distribution capabilities within the power value chain. This means replacement and reinforcement of

network assets as well as enhancement of people, processes and systems in transmission and distribution.

Embedded Generation and Distribution: 'Microscoping' the Controversies

Despite the clearly overwhelming benefit of attracting investors into the power sector through investment in embedded generation and upgrading distribution networks, a major dilemma bedevilling the sector is how to manage such investments along with the existing licensees in franchise areas. Several disputes have arisen in the power sector since the entry of the Discos into the sector.

In newspaper advertorials, Eko Disco warned a private company, PIPP LVI Distribution Limited to

remove all the lines it laid on its network and cease from soliciting further business from its customers.¹³ Sometimes, it is the consumers who themselves kick against the territorial exclusivity of the Discos, as demonstrated by the protest by some small business owners against Eko Disco.¹⁴

Ariaria Market Case-study

Ariaria is a major market not only in Nigeria but also in the West African sub-region producing and supplying consumer goods such as shoes, clothes and bags from Aba to entire sub-region.¹⁵ Planned provision of power to the market (which had suffered deprivation over the years) resulted in several controversies due to its strategic importance in terms of current and future jobs as well as its economic diversification contribution potential.



⁹ Regulation 30(2) NERCER, 2012

¹⁰ Regulation 30(4) NERCER, 2012

¹¹ NERC, 'Transmission', available at <http://www.nercng.org/index.php/home/nesi/404-transmission>, (accessed on 01.02.2019)

¹² Federal Ministry of Power, Works and Housing, 'My Directives on Improved Service Delivery in the Power Sector Went to Legal Entities, not to an Interloper - Fashola' (Press Statement), 20.07.2018, available at www.pwh.gov.ng/read_02 (accessed on 05.02.2019).

¹³ Isaac Anyaogu & Harrison Edeh, 'DisCos Kick Against Embedded Projects in Franchise Areas', *Business Day*, pg. 1, 14.06.18

¹⁴ Joshua Basse, 'Erratic Power Supply Sparks Protest in Lagos', *BusinessDay*, p. 16, 20.07.2018

¹⁵ Linus Effiong, 'As Independent Power Plant Lights up Ariaria Market', *Daily Trust*, 10.02.2019, available at: <https://www.dailytrust.com.ng/as-independent-power-plant-lights-up-ariaria-market.html>, (accessed on 17.02.2019)



Thus Ariaria has been a major talking point on the controversy over embedded power generation and distribution in licensed territories in Nigeria, with companies such as Geometric Power Limited (GPL), Enugu Disco, Interstate Electrics Limited (IEL), Ariaria Market Energy Solutions Limited (AMESL) and Ariaria Independent Energy Distribution Network Limited (AIEDNL) all in the mix. While IEL is the core investor of the Enugu Disco, AIEDNL was reported to be a special purpose vehicle spearheaded by AMESL for the purpose of generating and distributing off-grid power to 32,000 shops in Ariaria.¹⁶

GPL on its part, secured a twenty-year concession from the FG in May 2004¹⁷ to supply power exclusively to the Aba Industrial City and its

surrounding communities and constructed the Aba Integrated Power Project (Aba IPP). However, the FG embarked on the unbundling of the defunct PHCN and the consequential privatisation of its assets in November 2013¹⁸ before GPL could commence operations. This led to the sale of the Enugu Disco to IEL, with the entirety of Abia State falling under Enugu Disco's territory. It took the intervention of Vice President, Prof. Yemi Osinbajo SAN, and the office of the Minister for Power, Babatunde Raji Fashola SAN, for the parties to agree to work together after almost five (5) years of dispute.¹⁹

Meanwhile, AMESL proceeded on its proposed power project upon obtaining requisite license from NERC²⁰ with the Rural Electrification Agency (REA) offering support under its Energising Economies

Initiative (EEI).²¹ The said project was only recently commissioned by President Buhari with about 4,000 Small and Medium Enterprises (SMEs) receiving affordable and constant power supply out of about 37,000 shops located within the busy Ariaria International Market.²² The wrangling between Investors and the Enugu Disco clearly delayed the progress of the project.²³ Thus, is there any justification for the presumed territorial exclusivity purportedly exercised or claimed by the Discos?

*Considerations: Pro-Territorial
Exclusivity Arguments*

No doubt, private investors' participation in any sector (including power) is usually influenced by the prospects of making return on investment (ROI). A major driver of this is

¹⁶ Emmanuel Uzodinma, 'Power Distribution: EEDC, AMESL Battle for Ariaria Market', available at <http://dailypost.ng/2018/06/07/power-distribution-eedc-amesl-battle-ariaria-market/>, (accessed on 17.02.19)

¹⁷ 'Geometric Power Deal and Sanctity of Concession Agreements', Business Day Editorial, 15.04.2016: <https://www.businessdayonline.com/opinion/analysis/editorial/article/geometric-power-deal-and-sanctity-of-concession-agreements/> (accessed on 26.07.2018)

¹⁸ Ikeogu Oke, 'Geometric Power and the Nigerian Electricity Market' ThisDay 04.05.2016, available at: , (accessed on 26.07.2018)

¹⁹ Sam Hart, 'State of Affairs at Geometric Power Limited, Aba', available at (accessed on 24.07.18)

²⁰ Okechukwu Nnodim, 'NERC Issues Power Generation, Distribution Licences for Ariaria', Punch 13.06.2018, available at: <https://punchng.com/nerc-issues-power-generation-distribution-licences-for-ariaria/amp/>, (accessed on 17.02.2019)

²¹ Chineme Okafor, 'Buhari Commissions 9.5MW Plant to End Power Shortage in Ariaria Market', ThisDay, available at: <https://www.thisdaylive.com/index.php/2019/01/29/buhari-commissions-9-5mw-plant-to-end-power-shortage-in-ariaria-market/?amp>, (accessed on 17.02.2019)

²² Supra (footnote 15)

²³ Chineme Okafor, '4,000 Ariaria Shops now Enjoy Constant Power Supply', ThisDay, 05.02.2019, p.24.

sanctity of contracts, as investment decisions are usually predicated on certain assumptions, including stability of contractual arrangements.

Any perceived failure of government to honour the sanctity of contracts impacts negatively on the confidence of potential investors, and oftentimes, is a critical consideration in declining to proceed with otherwise promising transactions. Since government is a continuum, the sanctity of contracts must be guaranteed, regardless of change in governments. Thus, it has been argued that what the Discos purchased when they acquired the license was not just a territory but the electricity supply services that can be rendered to people living in those franchise areas and excising part of that market is a violation of the contract.²⁴

Another argument in favour of the Discos is the doctrine of *legitimate expectation*. A legitimate expectation may arise from an express promise “given on behalf of a public authority”, and “some benefit or advantage which the applicant had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment.”²⁵ Investors in Discos clearly expect to enjoy complete right of distribution in their licensed areas. However, the capacity to rely on legitimate expectation may cease once it



is shown that they are given opportunity to comment after being presented with rational grounds on the imperative of embedded generation in licensed areas or where the expectation of the investors is inconsistent with express statutory provisions.²⁶

Considerations: Anti-Territorial Exclusivity Arguments

On the other hand, so much depends on power supply to unlock/actualize Nigeria's growth and development potential. The need for steady power supply to boost economic activities particularly in strategic locations like the Ariaria Market (part of GPL coverage area excised from

Enugu Disco territory) and the spill over effects on the economy of the success of the traders and manufacturers in such places cannot be overemphasized. It seems logical that a supplier who is unable to meet the demands of its license area should not stand in the way of anyone who can.²⁷ EGs who have opted to construct Independent Electricity Distribution Network (IEDN) ought to be fully allowed to do so and the consumers must be allowed to freely choose the power provider they prefer. This is a fundamental principle of free enterprise. But what is the position of the law on this controversy?

²⁴ Isaac Anyaogu, 'Fashola Directs NERC to Stop Discos Monopoly', *Business Day*, 09.07.2018, available at www.businessdayonline.com/exclusives/article/252082/ (accessed on 17.7.2018)

²⁵ *Council of Civil Service Union v. Minister of Civil Service* [1984] 3 All ER 135

²⁶ *Federal Board of Internal Revenue v. Halliburton (West Africa) Limited* [2016] 4 NWLR (Pt. 1501), 53; *A.G Hong Kong v. Ng. Yuen Shiu* [1983] 2 AC 629.

²⁷ Federal Ministry of Power, Works and Housing, 'Act to Make Discos Deliver on Responsibilities to Consumers, Fashola Directs NERC' (Press Statement), 10.07.2018, available at https://www.pwh.gov.ng/read_02, (accessed on 01.02.19)

Embedded Power Generation and Distribution in Licensed Areas: A Legal Impossibility?

Discos' position over embedded generation and distribution in their licensed territories is usually that such is not only a violation of their contract, but is also illegal. The embedded power projects are seen as an encroachment and a trespass on their distribution license coverage area. Discos maintain that their licenses gives them exclusive right over their franchised territories. But is this the intention of **EPSRA**? We think not.

Section 71(6) EPSRA 2005 provides that *“unless expressly indicated in the licence, the grant of a licence shall not hinder or restrict the grant of a licence to another person for a like purpose and, in the absence of such an express indication, the licensee shall not claim any exclusivity; provided that the Commission may allow a licensed activity to be exclusive for all or part of the period of the licence, for a specific purpose, for a geographical area, or for some combination of the foregoing.”*

In **Buhari v. INEC**,²⁸ the Supreme Court (SC) held that when 'shall' is used in a statute it connotes mandatory intendment of the legislator. It gives no room for evasiveness. Again, in **Chief Sunday Obong & Ors v. Government of Akwa Ibom State & Anor**,²⁹ the Court of Appeal held that the meaning of the word 'may' ordinarily means

permissive, that is, the person who has a duty to carry out may choose among available options. Above all, the law is trite that where words of a statute are clear and unambiguous, those words shall be construed as to give effect to their natural or literal meaning.³⁰

This suggest that the DisCos are generally not entitled to exclusivity in their territories. Where any DisCo has been granted exclusivity through its license and the latter fails to perform, such exclusivity may be modified. **Section 71(7) EPSRA** provides that a licence may contain terms and conditions for the licence to cease to have effect or to be modified or

amended by the Commission in such circumstances as may be specified in the licence or as may be determined by the Commission. **Section 63 EPSRA** provides that a licensee shall comply with the provisions of his licence, regulations, codes, and other requirements issued by the NERC from time to time.

Unless stayed by a court of competent jurisdiction, each licensee is mandated to duly implement or follow, as the case may be, NERC's orders and written notices, notwithstanding that the licensee has or may intend to take legal action challenging any such order or notice. Ultimately, an interpretation of the enabling laws and regulations by a court of competent jurisdiction is not likely to be in favour of exclusivity but the enforcement of **NERC's discretion** in the overall interest of the consumers in line with its statutory mandate.

Conclusion

A policy of exclusivity over licensed area will no doubt result in monopoly. Indeed, there have been cases where Discos were accused of holding States to ransom (allegedly frustrating State sponsored IPPs) under the guise of exclusive rights over such States.³² Thus, for Nigeria to reap the dividends of the power sector privatization, the enabling laws, particularly **EPSRA must be fully implemented**. Policies entrenched in the Act such as the declaration of eligible customers as provided

‘FOR NIGERIA
TO REAP THE
DIVIDENDS OF
THE POWER
SECTOR
PRIVATIZATION,
THE ENABLING
LAWS,
PARTICULARLY
EPSRA MUST
BE FULLY
IMPLEMENTED’

²⁸ [2008] LPELR-814(SC)

²⁹ [2014] LPELR-24259(CA)

³⁰ *Uwazurike & Ors. v. AG Federation* [2007] LPELR-3448(SC)


³¹ However, from when an interim or interlocutory injunction is given for example, there is no need to comply. *Kotoyev. Central Bank of Nigeria*[1989] 2 S.C.N.J 31

³² *Adibe Emenyonu, 'Obaseki Walks Osibodu Out of Govt House for Throwing State into Darkness', ThisDay* 28.11.18, available at: <https://www.thisdaylive.com/index.php/2018/11/28/obaseki-walks-osibodu-out-of-govt-house-for-throwing-state-into-darkness/>, (accessed on 08.02.19)




EXTREMES OF
MONOPOLY AND
EXCESSIVE
COMPETITION ARE
BAD AS THEY
CREATE
UNCERTAINTY FOR
DISCOS WHO HAVE
ASSUMED
RESPONSIBILITY FOR
INFRASTRUCTURE,
HAVE INVESTED
AND ARE EXPECTED
TO INVEST MORE

in **section 27 EPSRA** demonstrates the intendment of the law to avoid any form of exclusivity or monopoly.³³ Again, competition, such as is witnessed in Nigeria's telecommunications industry, has been known to engender growth and efficiency. Considering the crucial role of the power sector, nothing short of competition should be encouraged in the sector as envisaged by **section 26 EPSRA**.³⁴

However, extremes of monopoly and excessive competition are bad as they create uncertainty for Discos who have assumed responsibility for infrastructure and have invested and are expected to invest more.³⁵ NERC must seek to achieve a balance by managing and monitoring competition.³⁶ The Commission must also ensure open access to the distribution networks by all EGs by supervising the activities of the Discos regarding applications for connections. EGs must also be encouraged to construct IEDNs to distribute its generated electricity upon the obtainment of the required license 

LeLaw Disclaimer

Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the authors, Afolabi Elebiju and Daniel Odupe at a.elebiju@lelawlegal.com and danielodupe@lelawlegal.com respectively, or email : info@lelawlegal.com 

³³ NERC, 'FG Declares Eligibility in the Power Sector', available at: <http://www.nercng.org/index.php/media-library/press-releases/506-fg-declares-eligibility-in-the-power-sector>, (accessed on 16.02.19)

³⁴ This section provides for modus operandi of transactions in the sector after the declaration by the Minister that the electricity market has developed to the point where a more competitive market ought to be established as provided by **section 24(3) EPSRA**.

³⁵ The **Federal Competition and Consumer Protection Act 2018** recently signed into law seeks to achieve a balance by preventing monopolies and abuse of dominant market positions to ensure the development and promotion of fair, efficient and competitive Markets in the Nigerian economy.

³⁶ This is expected to result in the declaration by the Minister of Power under **Section 24(3) EPSRA** that a more competitive market ought to be established. The said declaration is yet to be made despite the handing over of assets to Discos and Gencos since November 2013.