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This is the 7th volume of the journal and it focuses on originality and providing information on contemporary legal issues in the field of law and related matters.

We acknowledge the resourcefulness and scholarship of the various contributors as well as the industry and thoroughness of our assessors.

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Prof. Olubayo Oluduro. PhD.
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AN APPRAISAL OF THE ELECTRICITY REGULATION AND GOVERNANCE IN NIGERIA THROUGH THE LENS OF HISTORICAL DEVELOPMENT

*CJP Ogugbara**

ABSTRACT

Despite enormous resources, energy security has remained a mirage for Nigerians; wherein about 40% of the 200 million populations have access to electricity. This is inspite of the integration of other energy sources into the energy mix. A school of thought believes that this failure is due to impotency of ideas by political actors and policy makers. There are also those who believe that the problem stems from regulatory governance and social imbalance. In any case, this study would attempt an appraisal of the historical development of the regulatory governance from time immemorial. In so doing however, the writer applies socio-legal, empirical and doctrinal research models to examine the adaptive evolutionary trajectory that birthed the present regulatory framework. The same tool was also used in analysing the efficaciousness of various laws and policies that have been deployed in regulating electricity in Nigeria, especially in relation to how they have shaped the current regime of electricity federalism introduced by the 5th Constitutional alteration and the Electricity Act, 2023.

Keywords: Regulation, Governance, Electricity, Federalism, Scarcity, Crisis.

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1. Introduction

Electricity Regulation is primarily designed to address the practices and administration of the electricity markets, investments, governances and all other activities involved in delivering and supplying the desired quantity and quality of electricity for economic, social or environmental advancement in a given economic society. The global explosions in technology and energy economic settings have made electricity one of the basic necessities of life. Every facet of human existence has become energy dependent. Thus, there is a high correlation in increased supply of stable electricity, enhanced national productivity and economic development.¹ Significantly, it has been established that there is a strong connection between the per capita consumption of electricity and the development of a nation.² Considering this huge role, regulation of electricity sector becomes indispensable and imminent not only for a free market, but also for the protection of investment. Unlike the free market system postulated by Karl Max, it is generally the duty of the government to regulate the electricity business in Nigeria.³ Since it is on the lap of the government to regulate, there would normally be need for articulated legislative and institutional frameworks; which covers all sets of codified legislative acts, principles, rules, policies as well as constituted body of

¹ Yemi Oke, *Nigerian Electricity Law and Regulation* (Law Lords Publications 2013)

² Claudius Awosope, 'Nigeria Electricity Industry: Issues, Challenges and Solutions' *Covenant University Public Lecture Series* [2014] (3) (2) 5

³ Sam Amadi, 'Regulating the Power Sector in Nigeria: Opportunities, Challenges and Prospects' (Text of a lecture delivered by Dr. Sam Amadi, Chairman/Chief Executive of the Nigerian Electricity Regulatory Commission (NERC) at the Annual Public Lecture of the Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN) on Thursday, March 27, 2014 at the Agip Recital Hall of the MUSON Center Lagos) 5 - 11

personnel management and authorities that execute the objectives of the government.

Law remains a tool of social engineering. Consequently, as regulation is antiquity with mankind, so also is regulation of electricity in Nigeria can be traced to the presence of first electric power in Nigeria. Obviously, there are several literatures on the history of electricity in Nigeria; the instant study considers the missing gaps that are almost becoming obsolete yet their presence have catalysed the formation of the present electricity business in Nigeria. Just like every other jurisdiction, industries do not just blossom; rather they gradually take a trajectory movement that progresses them into whatever they later turn out to be. These progressions either make or mar them. But what is important is the fact that the waters would be tested and the undesired would be sifted from the desired. The regulatory process in relation to electricity business in Nigeria is what this study tends to examine with a view to bringing to light such areas that may have been omitted in the course of history.

2. Historical Legal Regimes of Electricity Regulation

2.1. The Pre-Colonial, Colonial and Post-Colonial Regimes

Owing to the history of the Nigerian State and the influence of the English people on her developmental process, the Nigerian Legal system is partially comprised of the English laws which were voluntarily received and incorporated into the Nigerian Legal system. For instance, the received land law consists of the English case law establishing the common law of England and the doctrines of equity. It also includes all the Statutes of general application in England on January 1, 1900.

Section 315(1) of the Constitution⁴ is clear on the incorporation of all existing English laws with favourable modifications for local consumptions. Apart from the constitutional entrenchment, this position has also been accepted by the Courts in Nigeria in plethora of cases. Consequently, all English laws on electricity consumption prior 1900 will have similar application in Nigeria.

Several authors have settled that electricity in Nigeria dates back to the first production of electricity in Ijora, Lagos by the British Colonial Government.⁵ According this school, the first electricity dates back to 1896.⁶ This date is as against the opinion of Awosope who opined that the first generating power plant was installed in Marina, Lagos, in 1898 about fifteen years after its introduction in England.⁷ Thereafter, other regions were established as follows: Port Harcourt in 1928; Kaduna in 1929; Enugu in 1933; Maiduguri in 1934; Yola in 1937; Zaria in 1938; with both Warri and Calabar in 1939.⁸ Although, it is not certain by any authoritative author, that electricity in Nigeria as at 1896 was in the exclusive control of the British, however, the absence of any legal instrument for the regulation of electricity in Nigeria within this period therefore lends further credence that English Statutes on Electricity applied to Nigeria.

⁴ Constitution of the Federal Republic of Nigeria 1999

⁵ Niger Power Review, 'Development of Electricity Industry in Nigeria 1960-1985.' in Yemi Oke (ed), *Nigerian Electricity Law and Regulation* (Law Lords Publications 2013) p. 2

⁶ Ibid

⁷ n 2, p. 5

⁸ Ibid 5 - 6

Aligning with the opinion of Awosope that electricity was first introduced in Nigeria, about 15 years after its commencement in England is evident to buttress the administration of Nigeria as a British colony. Thus, before the enactment of the Royal Ordinances in the colony of Nigeria, all applicable Electricity laws in England applied to the regulation of electricity production and management in Nigeria. Consequently, two of the numerous English Statutes enacted before 1st January, 1900 would be examined in relation to electricity regulation and governance in Nigeria. They are: the Electric (Supply) Act, also known as the Electric Lighting Act, 1882 and the Electric Lighting Act, 1888 enacted on 28th June, 1888. Meanwhile, the Colonial Annual Reports of February, 1926, has indicated the possibility of a Colonial Control of Electricity Supply prior 1900 through the Electrical Branch of the Public Works Department.⁹

Sections 2, 3, 4, 5, and 6 of the Act enabled local authorities, companies or persons who obtained licensees or provisional orders from the Board of Trade to generate and supply electricity for public or private purposes within defined areas.¹⁰ The function of supervising the exercise of the powers of the undertakers was conferred upon the Board of Trade. The Undertakers were given powers to execute works including power to lay cables in the public streets, but they could not break up private streets, railways and tramways without the consent of the owners, or of

⁹ David Dorward, 'Annual Departmental Reports relating to Nigeria and British Cameroons, 1887-1960' *Microform Academic Publishers* [1979] (R97002) <<https://nairametrics.com/wp-content/uploads/2012/10/Annual-reports.pdf>> retrieved on the 11th July, 2024

¹⁰ Electric (Supply) Act, 1882 also known as the Electric Lighting Act, 1882

the Board of Trade.¹¹ They were also restricted with respect to above ground works. Moreso, the Undertakers were placed under an obligation to supply and distribute electricity without preference and were to be subject to limitations as to charges.¹² Provisions were also made for the keeping of accounts and for the recovery of charges. The local authority undertakers were given special borrowing powers. The Act recognised the Board of Trade as the regulatory body and issues the operating licenses to the undertakers. Apparently, this is the origination of the franchise system introduced by the Electric Power Sector Reform Act, 2005, wherein the successor Distribution companies in Nigeria were Eleven (11),¹³ and they are franchised according to their geographical locations under the supervision of a centralized Nigerian Electricity Regulatory Commission (NERC). The second Act¹⁴ authorises the Board of Trade to make decisions as regards to electrical lines and installations for the purpose of supplying electricity for public use. The Board also has the power to acquire lands and allocate to an Electricity undertaker. The Board had prosecutorial powers against persons contravening the provisions of the Act provided such default does not exceed a penalty in excess of twenty pounds.¹⁵

The Act went further to make provisions for the appointment of Electric Inspectors by the Minister of Fuel and Power, whose major job

¹¹ Sections 12, 13 and 14

¹² Sections 19 and 20

¹³ Wakeel Isola, 'Power Sector Reforms in Nigeria: Challenges and the Way Forward' *Unilag Journal of Humanities* [2016] (4) (1) 22 – 46 < <https://ir.unilag.edu.ng/handle/123456789/3974> > assessed on 9/7/2024

¹⁴ Electric Lighting Act, 1888

¹⁵ Section 4(3)

was to ensure compliance with standards in regards to lines and installations gadgets used by undertakers.¹⁶ The Inspectors carry out periodic tests on the equipment of the undertakers and it is the responsibilities of the undertakers to bear the cost of such expenses.¹⁷

The H.M.M. Moore Report issued on the 22nd February, 1926 is a significant authority to buttress regulation of electricity business in Nigeria through the abovementioned Acts. The report detailed the structure, control, management and regulation of electricity in the various British Colonies. For instance, the report makes an impression as regards to the maintenance of the lights of the coast, which referred to the coast of the British Cameroons.¹⁸ Furthermore there was report concerning the number of consumers served by the Lagos electric light as well as the gratifying increase and overwhelming with demands for more connections by the public from the Electrical Department in Lagos.¹⁹ Electricity was extended to Udi in the present Enugu which was harnessed using the coal.²⁰ The report also considered the electrical installation contracts awarded for the electrification of the Portharcourt, Kaduna and Ibadan.²¹ Indeed, these reports were good proofs of electricity governance in Nigeria by the colonial administrators.

¹⁶ Halsbury's Statutes of England (2nd edn, LexisNexis Butterworths, New York City, 1949) (8) 835 - 850

¹⁷ Ibid

¹⁸ Moore, HMM, 'Colonial Annual Reports for Nigeria' [1926] (1315) 124
<https://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/3064634/3064634_1925/3064634_1925_opt.pdf> retrieved on the 11th July, 2024

¹⁹ Ibid 140

²⁰ Hall KL, 'Colonial Annual Reports for Nigeria' [1927] (1335) 74
<https://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/3064634/3064634_1926/3064634_1926_opt.pdf> retrieved on the 11th July, 2024

²¹ Ibid 154

2.2. *Pre-Independence and Post-Independence Statutory Regimes.*

While there several legislations that underpinned electricity regulation in the colony of Nigeria, there are five significant statutes that stands out in the pre-independence regime. The first is the Company Ordinance of 1917; while the second is the Township Ordinance, 1917. The third and the first indigenous legislation was the Electricity Supply Ordinance.²² It was short-lived and was replaced by the Lights, Buoys and Beacons Ordinance²³ as the fourth legislation. The fifth²⁴ created the first indigenous electricity company in the Electricity Sector; the Nigerian Electricity Supply Company (NESCO) which commenced operations in 1929. As a company created by a statute, it was obligated to provide some sort of the regulatory activities, but primarily to manage and control electrical installations in regards to generation, supply and use of electrical energy.²⁵

Most importantly, while the NESCO was in existence, the colonial government established the Nigerian Government Electricity Undertaking (NGEU) under the supervision of the Public Works Department and saddled with the responsibility of managing the assets and liabilities of electricity business in Lagos²⁶ and few other southern parts of Nigeria. Thus, whereas the NGEU served in the southern Nigeria, the NESCO served some locations in the Northern part.²⁷

²² Electricity Supply Ordinances, 1918

²³ Lights, Buoys and Beacons (Colony) Ordinance No. 64, 1917

²⁴ Electricity Ordinance Act, 1929

²⁵ Long Title

²⁶ n 2 p. 6

²⁷ n 1 p. 3

With a view to have more centralised system of electricity business, the Electricity Corporation of Nigeria (ECN) was established by an Ordinance.²⁸ It will be recalled that hitherto the enactment of the Ordinance, all undertakings and operations in the electricity sector were vested in the Ministry of Power and Steel of the Federal Government. By so doing, such Minister/Commissioner overseeing the Ministry of Power and Steel automatically becomes an institutional regulating authority. But with the Ordinance coming into existence all the powers including the administrative functions were divested from the Ministry and vested on the Electricity Corporation of Nigeria (ECN).²⁹ However, by way of an Amendment, the Ordinance was reenacted into an Act³⁰ and had the ECN fully integrated. The ECN was created as a statutory public corporation and in essence was enabled to acquire, hold and dispose of lands for the purposes of its functions and Administration under the Act.³¹ The Corporation took over the supply and management of the electricity industry in Nigeria as an independent corporation and all existing deeds, bonds, agreement, instruments and working arrangements, as at the time of its commencement also vested on it.³²

It is very doubtful whether the ECN remained a regulator, because despite stripping of the powers from the Minister, the latter still exercised the powers to control the corporation with respect to matters of

²⁸ Section 3(1) of the Electricity Corporation of Nigeria Ordinance, (Ordinance No. 15), 1950

²⁹ Sections 20 and 21

³⁰ Electricity Corporation of Nigeria (Amendment) Act, 1958

³¹ Section 3(2)

³² Section 21

general concern,³³ albeit in consultations with the Electricity Corporation of Nigeria or the Electricity Advisory Committee or both for matters which appear to the Minister to be requisite in the national interest.³⁴

The Electricity Corporation of Nigeria (ECN) did not exist alone. As a result of increased demands for electricity, the government saw the need to broaden access to all Nigerians especially those that could afford electricity.³⁵ To achieve this feat, dams were constructed.³⁶ This was the effort that brought to light, the extension of Kainji-Dam to link the south and northern parts of Nigeria into one stream of electricity distribution.³⁷ The Niger Dams Authority existed side by side with the ECN. It was established by the Niger Dams Act.³⁸ The primary reason for the establishment of the Niger Dams Authority was for the construction and maintenance of dams and other works on the river Niger and elsewhere.³⁹

The dams worked on by the Authority were primarily to harness the water that enables electric power.⁴⁰ Apart from damming for electricity purposes, the works of the Authority extended to improving navigation and providing fisheries and irrigation.⁴¹ It is evident that the electricity generated from the Dams belonging to the Authority was primarily sent in bulk to the Electricity Corporation of Nigeria (ECN) as

³³ Section 29

³⁴ Ibid

³⁵ n 2 p. 7

³⁶ Chukwuka Onyekwena and other, 'Electrification in Nigeria: Challenges and Way Forward' *Centre for the Study of the Economies of Africa* [2017]

³⁷ Obadote D, 'Energy Crisis in Nigeria: Technical Issues and Solutions' (Abuja, Power Sector Prayer Conference, 2009)

³⁸ Niger Dams Act, 1962

³⁹ Section 2(a)

⁴⁰ Ibid

⁴¹ Section 2(b)

an independent organisation for distribution as utility voltages to the general public and other end-users.⁴² This represented a decentralised system, a classical regime of electricity governance in which power generation was separated from distribution.⁴³ The regime of NDA and ECN was short-lived and due to the effort of the Government to consolidate operations and promote efficiency, they were both merged to form the National Electric Power Authority (NEPA) in 1972.⁴⁴

Following the merging of the NDA and ECN, the regime of National Electric Power Authority (NEPA) was introduced by the NEPA Act.⁴⁵ The Act was created to develop and maintain an efficient, coordinated and economical system of electric supply for all parts of the Federation. In doing so, it was to generate or acquire electricity supply either in bulk or otherwise, to consumers within or outside of Nigeria.⁴⁶ Consequently, since the Authority has subsumed the roles of the Dams Authority, it becomes incumbent on it to generate, transmit, distribute and sell electricity.⁴⁷ It further empowers the Authority to manage, maintain and establish electricity undertakings in furtherance of its business.⁴⁸ Apart from maintaining, the Authority has power to acquire more undertakings either for expansion purposes⁴⁹ or in implementation of a ministerial regulatory mandate⁵⁰ or in exercise of its regulatory

⁴² Section 2(c)(e)

⁴³ n 1 p. 3

⁴⁴ n 33 p. 5

⁴⁵ National Electric Power Authority Act, 1972

⁴⁶ Section 1(1)(a) (b) and (c)

⁴⁷ Section 7

⁴⁸ Section 7(1)(a-b)

⁴⁹ Section 16(1)(a-b)

⁵⁰ Section 20(1)(a-b)

powers.⁵¹ This arrangement did not just create an integrated structure type of the value chain; it however incorporated the regulatory function. The Act also introduced delegated legislations where Regulations are made subject to the approval of the Minister.⁵² On the strength of the above provision, the Authority enacted the following regulations: Electricity Supply Regulations 1995; Electricity Wiring Regulations 11 of 1934 and L.N. 25 1958; Electricity (Private Licensees) Regulations L.N. 76 1965 and Electricity (Annual Returns) Regulations L.N. 15 1974.

3. The Constitutional Framework.

Nigeria as a country has had her fair share of electricity regulation whose trajectory has delved from one period to another. The organisational structure has also enjoyed several metamorphoses through the lens of history. The various Nigerian constitutions particularly 1960, 1963, 1979 and 1999 (with various alterations and amendments) have consistently maintained various constitutional provisions with respect to electricity regulation and institutional regulatory governance. This ofcourse includes the latest 5th Constitutional Alteration/Amendment that has ushered in a regime of Electricity Federalism where the Federal Government and the various component states federating under the Nigerian State are allowed to have independent and absolute regulatory contribution in electricity practice and development. Historically, the 1960 and 1963 Constitutions of the Federal Republic of Nigeria have respectively enunciated the regulation system in the Nigerian electricity

⁵¹ Section 23(1)

⁵² Section 43

business. First, the Parliaments of the Federal Government and those of the Regional Governments had joint and equal powers to make laws for Nigeria and other parts of it with respect to electricity or gas.⁵³ However, with respect to pure regulation business, only the Federal Parliament had exclusive jurisdiction to make laws to regulate the production, distribution or supply of electricity or gas.⁵⁴ The Regional Parliament is only permitted to make laws with regards to the manufacture, distribution or supply of electricity or gas in their respective Regions.⁵⁵

Furthermore, the 1979 and the 1999 Constitutions respectively also sustained the centralised structure type regulation in the Nigerian Electricity Business. First, the two Constitutions categorised the electricity as an item under the Concurrent Lists. But it however restricted the States Houses of Assembly to making of Laws on electricity, first with respect to electric power stations, electricity generation, transmission and distribution for the areas not covered by the national grid system within that State.⁵⁶ The second area the State Assembly can legislate on is in the area of establishment of any authority for the promotion and management of electric power stations established by that State.⁵⁷ In the case of the National Assembly, they are empowered to make laws with respect to rights of dams and water flow,⁵⁸ cross-border and trans-border electricity arrangements within or outside

⁵³ Section 73(1) of the 1960 Constitution; Section 79(1) of the 1963 Constitution

⁵⁴ Section 73(2)(b); Section 79(2)(b)

⁵⁵ Section 73(2)(a); Section 79(2)(a)

⁵⁶ Section 4(4) Part II of the Second Schedule Item 14(a-b) of both the 1979 and 1999 Constitution of Nigeria

⁵⁷ Section 4(4) (c)

⁵⁸ Section 4(4) Part II of the Second Schedule Item 13(c)

Nigeria,⁵⁹ national grid system⁶⁰ and general regulation of electrical energy business in Nigeria.⁶¹ Meanwhile, the only area the Federal Government shared legislative powers with the States Houses of Assembly is only in the areas of electric power station, electricity generation, transmission and distribution to any part of Nigeria and from one state to another state.⁶² Consequently, but for the arrival and intervention of the 5th Constitutional Alteration No. 33 to the 1999 Constitution of the Federal Republic of Nigeria, the position would have remained that only the Federal Government can regulate on electricity business in Nigeria.

It is important to reinstate that the policy and constitutional arrangement where both the Federal Government and State Governments shared the powers to independently manage, administer, supply, transmit, generate, and distribute electricity in Nigeria within their respective areas of competence, was meant to drive the business aspect of electricity activities. However, States found such framework purely as that of master-servant, unlike the imagined real federalism where Federal and States would appear as partners in progress. On one end, it was a good policy to have centralised the regulatory framework on the Federal Government due largely to the technical nature of electricity business and secondly to buttress the need and importance of centralised control over excessive and overbearing behaviours of some State Executives. In reality, what was given to the States was pure economic participation,

⁵⁹ Item 13(d)

⁶⁰ Item 13(e)

⁶¹ Item 13(f)

⁶² Section 4(4) Part II of the Second Schedule Item 13(a-b)

which to this author, was more than enough in an environment where the federating states are willing to play a part in electricity business. Hence according to Mr. Babatunde Fashola (SAN) at a function he had attended as the then Minister of Power, while responding to inquiries on whether state governments could produce their own power; he simply said ‘nothing in the Electric Sector Power Reform Act stops any state from doing so. What they need is to get the right license from the Nigerian Electricity Regulatory Commission (NERC).’⁶³ In any case, it was obvious that the States needed more; the policy makers could have altered the status quo to give room for growth rather than the unfortunate protracted adventure that retarded the development of the industry for several decades.

According to Chief Olusegun Obasanjo GCFR in his presentation dated 11th May, 2008, and addressed to Hon. Ndudi Godwin Elumelu, Committee on Power and Steel, House of Representatives, in response to the “INVITATION TO APPEAR AT THE PUBLIC HEARING ON THE POWER SECTOR”, he stated that ‘In spite of power being on the concurrent list in our Constitution, only Rivers State paid serious and appreciable attention to power generation and transmission, Akwa-Ibom followed later with Federal Government support.’⁶⁴ This assertion in as much it does not dispute the constitutional position; it however lays foundation for a debate on the attribution made by the former president in

⁶³ Babatunde Fashola, ‘Metering of customers not exclusive right of DisCos’ (The 18th Monthly Power Sector and Stakeholders Meeting held on 14 August, 2017 Kumboso, Kano State) < <http://thenationonlineng.net/metering-of-customers-not-exclusive-right-of-discos-fashola/>> retrieved 11th July, 2024

⁶⁴ Babarinsa, Dare, *AKANDA EDA: The Story of Olusegun Obasanjo*. (Gaskia Media Limited 2015, Lagos) 118.

favour of Akwa-Ibom State. There have been claims by various administrations in Lagos State, starting with Asiwaju Ahmed Tinubu till present, to the effect that Lagos State has had a fair share of State Participation in Electricity business despite the hindrance and deliberate frustrations from the Federal Governments.⁶⁵

4. The Electric Power Sector Reform Act, 2005

The need to finding the lasting solution necessitated the enactment of the Electric Power Sector Reform Act.⁶⁶ The enactment which was passed by the National Assembly was to set the machinery in motion for the privatisation of the electric power sector with a view to increasing market competition and consequent efficiency. This indeed is a radical turnaround from the trend which the sector has been used to. The National Council on Privatisation upon being constituted was mandated to ensure thorough transition into more competitive electricity market system for the betterment of the Nigerian population.

The Act was to provide for the formation of companies to take over the functions, assets, liabilities and staff of the National Electric Power Authority.⁶⁷ It is also to develop competitive markets. Apart from the market structure, the Act also established the Nigerian Electricity Regulatory Commission saddled with the responsibility for providing licensees and regulation of the stakeholders across the value chain,

⁶⁵ Mohammed Shosanya and Femi Akinola, 'Four Years After Huge Investment Lagos Power Plants Scarcely Work' Daily Trust Sunday 30 October, 2011 <https://dailytrust.com/four-years-after-huge-investment-lagos-power-plants-scarcely-work/> retrieved on 11th July, 2024

⁶⁶ Electric Power Sector Reform Act, 2005

⁶⁷ Long title

ranging from the generation, transmission, distribution, and supply of electricity.⁶⁸ Further there was also the power to enforce performance standards, consumer rights and obligations as well as determination of tariffs.⁶⁹ Indeed, the Act was designed to open the Nigerian Electricity industry to competitive market regime. This no doubt is for the interest of the consumers. It is also to enhance productivity and promote efficiency in the Nigerian electricity market. The Act provides for the initial holding company which was to be registered by the National Council on Privatisation and also provided that the holding company will acquire the assets and liabilities of the National Electric Power Authority.⁷⁰ This registration was to take effect not later than six months from the commencement of the Act.⁷¹

The initial holding company named Power Holding Company of Nigeria (PHCN) was subsequently incorporated under the Companies and Allied Matters Act. The shares of the initial holding company on its incorporation were to be held by the Ministry of Finance and the Bureau of Public Enterprises in the name of and on behalf of the Federal Government of Nigeria. This created Trust relationship. These shares were subsequently relinquished to the successor companies derived from PHCN which were basically classified as the generation, transmission, and distribution companies as well as the system operators. The successor companies were to be formed eight months after the formation of the Initial Holding Company. Among the Distribution Successor

⁶⁸ Ibid

⁶⁹ Loc. cit.,

⁷⁰ Section 2 Electric Power Sector Reform Act, 2005

⁷¹ Section 1

Companies are; Benin Disco; Eko Disco, Ibadan Disco, Ikeja Disco, Enugu Disco, PortHarcourt Disco and Yola Disco. These companies were demographically franchised to distribute electricity based on their locations. On the part of electricity generations, aside the Independent Power Projects, the following companies succeed under the new regime: Afam Power Plc, Egbin Power Plc, Kainji/Jebba Hydro Electric Plc, Sapele Power Plc, Shiroro Hydro Electric Plc and Ughelli Power Plc.⁷²

The sole trading and transmission companies that succeeded were the Nigerian Bulk Electricity Trading Plc (NBET) and the Transmission Company of Nigeria (TCN) both of which were owned by the Federal Government of Nigeria. Under this season, the Regulation of pure electricity business was centered on the Nigerian Electricity Regulatory Commission (NERC) which was a creation of the Electric Power Sector Reform Act.⁷³ The (NERC) was saddled with power sector governance including facilitating electricity generation in Nigeria through conventional and renewable resources,⁷⁴ without any business participatory interest in the electricity industry. This is unlike the era of NEPA which was later succeeded by the Power Holding Company of Nigeria (PHCN), where a single agency dominated the entire space in a

⁷² Onuoha, Kingsley, 'The Electricity Industry in Nigeria: What are the Challenges and Options Available to Improve the Sector?' *SSRN Electronic Journal* [(2010) <<https://www.researchgate.net/publication/228283290>>; NERC List of Gencos in Nigeria, locations and Capacity output <<http://nerc.gov.ng/index.php/home/nesi/403-generation>> retrieved 14th July, 2023

⁷³ Section 33(2)

⁷⁴ Yemi Oke, *Essays on Nigerian Electricity Law* (Princeton & Ass, Publishing Co. Ltd, 2016) 95

monotonous electricity structure that yielded unreliable electricity that couldn't stand the test of reliability, accessibility and availability.⁷⁵

5. The Current Regime.

The Electricity Act, 2023

The present Act no doubt is significantly different from the former. It is an improvement; albeit may not necessarily translate to significant effect on the industry itself. The Constitutional Alteration⁷⁶ devolved the hitherto grid system centralised on the Federal Government. It is otherwise called Devolution of Powers or National Grid System. As the name implies, the Alteration was simply an Act to alter the provision of the Constitution of the Federal Republic of Nigeria, 1999 to allow States generate, transmit and distribute electricity in areas covered by the national grid; and for related matters. Apart from the devolution of powers, repealing of the ESPRA Act, 2005 the Act introduced modern and innovative provisions to assist in electricity regulation and governance in Nigeria. The Act identified itself first as a legislative czar that consolidates all other fragmented pieces of legislations littering in the Nigerian Electricity industry.⁷⁷ The Act contemplated a regime of renewable energy.⁷⁸ It is policy-driven and intertwines around the National Integrated Electricity Policy and Strategic Implementation Plan

⁷⁵ Akin Iwayemi, 'Investment in Electricity Generation and Transmission in Nigeria: Issues and Options,' *International Association for Energy Economics* [2008] 37

⁷⁶ 5th Constitutional Alteration No. 33 to the 1999 Constitution of the Federal Republic of Nigeria

⁷⁷ Long title *Electricity Act, 2023*

⁷⁸ Section 1(n-o); Section 80(1-2); Section 164-165

and within other policy frameworks driving the electricity market.⁷⁹ Just like the former Act, it created for competitive electricity market but in a very wider approach.⁸⁰ This was achieved through the concept of willing buyer and willing seller⁸¹ as well as uncontrolled tariff regime.⁸² It promotes private and public partnership in electricity business and guaranteed protection of electricity infrastructures and investments as well as cross-border energy business.⁸³

The Act appeared to have achieved some kind of unbundling and decentralisation of powers across the value chains. The Act decentralised the transmission market by inviting private investment.⁸⁴ The Independent System Operator (ISO) was properly strengthened to operate and even enjoyed some kind of legal protection and immunity against litigation.⁸⁵ It retained the NERC⁸⁶ although with some level of independence, unlike what was seen in the last regime of EPSRA, 2005 where the NERC was subordinate to the Ministry of Power. For instance, under the erstwhile Act, the Minister monitors and regulates NERC budgets and determines the fiscal structure and calendar of the NERC.⁸⁷ In the extant Act, apart from creating, promoting and preserving efficient industry and market structures, the NERC ensures the optimal utilisation

⁷⁹ Section 1(h-m)

⁸⁰ Section 1(f, g, s); Sections 6, 7, 8 and 9

⁸¹ Section 116(4)(a)

⁸² Section 116(4)(b)

⁸³ Section 116(4a)(5)

⁸⁴ Section 109(p-s)

⁸⁵ Sections 21 & 22

⁸⁶ Sections 33(2) of the Electricity Act, 2023

⁸⁷ Sections 51 (1) and 54 of the defunct EPSRA 2005

of resources for the provision of electricity services.⁸⁸ It is also the duty of the NERC to ensure policing of the electricity environment to ensure fair tariff,⁸⁹ quality and consumer satisfaction in electricity supplies.⁹⁰ In order to achieve protection and quality for consumers, the NERC relatively promotes a competitive electricity market.⁹¹ In furtherance of this, the NERC makes the electricity market rules,⁹² issue licensees⁹³ and penalises defaulters through sanctions.⁹⁴ Apart from issuance of licensees, the Commission has powers to monitor and ensure standard compliance and performances of the licensees in tune with the terms of their respective licensees. The Act further permits the NERC to create platforms that allows it to interface with groups, stakeholders, consumers and licensees alike.⁹⁵ This apparently is the foundation of the various town hall, consultative meetings and workshops.

The Electricity Act consolidated several pieces of Regulations and Institutional Frameworks. In so doing, it incorporated Captive Power system which hitherto was provided under the Nigerian Electricity Regulatory Commission (NERC) (Permits for Captive Power Generation) Regulations, 2008. However, whereas the now relegated Captive Power Regulation had allowed for generation of electricity exceeding 1 MW without license, only for the purpose of consumption

⁸⁸ Section 34(1)(d and j) of the Electricity Act, 2023

⁸⁹ Section 34(1)(b, c, e,)

⁹⁰ Section 34(1)(a)

⁹¹ Section 34(2)(a)

⁹² Section 34(2)(e)

⁹³ Section 34(2)(d)

⁹⁴ Section 34(2)(f and h)

⁹⁵ Section 34(3)

by the captive power generator,⁹⁶ the Act however limits the threshold to below 1 MW.⁹⁷ In any case, the regime of generating electricity without license may have not been new, but what the extant Act has done is clearly to allay the fears of investors who would rather rely on a substantive Act to guarantee investment than mere Regulation with little or no force of law.⁹⁸ The Act provided for cost reflective tariffs⁹⁹ in favour of the licensees while making available interventions for consumers through subsidies.¹⁰⁰ Another innovative of the Act was the establishment of a power institute.¹⁰¹ There is also the incorporation of the Hydroelectric Power Producing Areas Development Commission Act and the establishment of the National Hydroelectric Power Producing Areas Development Commission (N-HYPPADEC).¹⁰²

The Nigerian Electricity Management Services Agency (NEMSA) was hitherto regulated by the Nigerian Electricity Management Services Agency (NEMSA) Act, 2015. With its incorporation into the Electricity Act, 2023 the former becomes repealed. The Agency is the technical warehouse of the NESI. It was primarily set up to manage technical and engineering standards regulation of the NESI for safety and consumer satisfaction. It was set up as the police or taskforce that monitors compliance with technical standards issued by

⁹⁶ Section 2 of the Nigerian Electricity Regulatory Commission (Permits for Captive Power Generation) Regulations, 2008.

⁹⁷ Section 63(2)(a) of the Electricity Act, 2023.

⁹⁸ *NNPC v Famfa Oil Ltd* (2012) ALL FWLR (Pt.635) Pg 204

⁹⁹ Section 116(2)(a)

¹⁰⁰ Section 116(3)

¹⁰¹ Section 185

¹⁰² Section 82

NERC.¹⁰³ This particular function places the Agency as a subordinate of the NERC. The Agency conducts electrical inspectorate services in the NESI.¹⁰⁴ Knowing the umpteenth move of technology and development, the Act creates the linkage between the Agency and the Standard Organization of Nigeria (SON). Basically, while the SON would ensure compliance with standards on gadgets within its jurisdictions,¹⁰⁵ the NEMSA would cover for electrical gadgets that are outside the reach of SON.¹⁰⁶ It is also the responsibility of the NEMSA to ensure standard in the qualities of the Meters installed for end-user; Customers and Consumers.¹⁰⁷

6. Ancillary Governance and Out Sourced Legislations.

Apart from the core electricity laws and institutions, over time, there had been other legislative instruments and institutions that have contributed to the regulation, maintenance and administration of electricity business in Nigeria, either in full capacity or in ancillary form.¹⁰⁸ They constitute what is called electricity governance in Nigeria. The first is the Energy Commission of Nigeria established by the Energy Commission of Nigeria Act.¹⁰⁹ The Minister in charge of Power and Steel was made a mandatory member of the Energy Commission of Nigeria.¹¹⁰ Under the Act, the primary responsibility of the Energy Commission of Nigeria was

¹⁰³Section 176(b)

¹⁰⁴Section 176(a)

¹⁰⁵Section 176(c)

¹⁰⁶Section 176(e-f)

¹⁰⁷Section 176(g-n)

¹⁰⁸n 1, p. 7

¹⁰⁹Energy Commission of Nigeria Act, 1990

¹¹⁰Sections 2(a)(i), 3(2)(b)

coordination and maintenance of a roadmap to sustainable development of the energy resources.¹¹¹ There was also the Utilities Charges Commission which was established by the Utilities Charges Commission Act, 1992. By the Act, the major function of the Utilities Charges Commission was to evaluate, on a continuing basis, trends in tariffs charged by any of the public utilities with a view to providing the Federal Government with such information as would enable the Federal Government to determine permissible increases.¹¹² The activities of the National Electric Power Authority (NEPA), however, formed part of the mandates of the Utilities Charges Commission.¹¹³

7. Current and Developing Governance Issues

Unfortunately, despite series of legislations and efforts to get it right in the Electricity industry, there appears to have been little or no much correspondent expected output. For the population with access to electricity, the supply has maintained epileptic momentum, while the rest of the populace continues to squab with energy poverty. Interestingly, this energy injustice translates to every facet of the livelihood ranging from GDP, economy, development, technology, security and even the living standard; all of which affects both the rich and poor. The relationship between suppliers and consumers has deteriorated extensively. In one hand, the consumers are employing deceit or the suppliers are shortchanging them. There is also the incessant activity of

¹¹¹ Section 5

¹¹² Section 6(a) Utilities Charges Commission Act, 1992

¹¹³ Item (a), 2nd Schedule. The 2nd schedule was made pursuant to Section 6 of the Utilities Charge Act.

miscreants engaging in energy theft and economic sabotage. Another resultant shortcoming is lack of adequate investment in the sector. At present there is paucity of infrastructure and investment along the electricity sector value chain. Even the current Discos have also not adequately invested to improve the current state of their distribution network. Again, the transmission network exclusively hitherto controlled by the Federal Government of Nigeria has also experienced unprecedented underdevelopment despite been managed by a contract management with Manitoba Hydro International (MHI) Canada.¹¹⁴ The Gencos have also had its fair share of the sector underdevelopment. In any case, it is not surprising that investors would rather engage in other economic activities that will be profitable to their economic interest than to participate in an inadequately funded and poorly regulated seemingly competitive economic environment; especially foreign investors.

Hitherto, the Grid Area inhibition compelled the Renewable Energy Power Investors to generate electric power for the National grid.¹¹⁵ Infact, failure to send power generated to the National Grid could lead to suspension or cancellation of the license granted to the Independent Power Projects (IPP), by the NERC.¹¹⁶ History has shown that the rigidity posed by this requirement not only jeopardised

¹¹⁴ n 74 pp. 117 – 118

¹¹⁵ NERC Application for Licences (Generation, Transmission, System Operation, Distribution and Trading) Regulations 2010

¹¹⁶ Regulation 16 provides that NERC may suspend a license granted if the IPP is unable to discharge or perform the duties imposed on it by the terms and conditions of the licence, the Act, applicable laws, NERC's regulations, market rules etc. Regulation 17 provides that NERC may cancel a license granted if the IPP willfully or unreasonably contravenes terms and conditions of the licence, the Act, applicable laws, NERC's regulations, market rules etc.

renewable investment, it seriously retarded the effort to achieve energy mix in Nigeria. It also downplayed the independence of business ventures in the Nigerian Electricity Supply Industry.¹¹⁷ The research also identifies that Nigeria has more than enough legal framework to actualise renewable energy sufficiency if there is a volition and political will to do so. It was evident that although there is multiplicity of laws to harness the resources, there has now been enacted a clear-cut piece of legislation that sets out to promote renewable energy simpliciter. Fourthly, it was discovered that while there are several laws already in existence that could have catalysed the Nigerian renewable energy dream, the reason for retarding the renewable energy sector remains unknown. Finally, just as practised in China, India and few other countries, the Electricity Act, 2023 now serves a piece of legislation that regulates the renewable energy in Nigeria.

There are so many renewable energy resources in Nigeria. As shown above, these resources have adequate legislative instruments to harness them in their different zones. There is however need to establish an independent Authority to recommend national targets for the use of renewable energy resources. Tax incentives are part of the drivers of renewable energy development; hence implementation of the provisions for tax incentives¹¹⁸ is very paramount. If these provisions are not implemented to the letter, there is the possibility of discouragement on the part of investors. In all, it's a good score card that there is now an Act

¹¹⁷Mgbeoji Ikechi, 'Nigeria's Independent Power Producers (IPPs) Demand Reform of Electricity Power Distribution System' *Blackfriars LLP Publication* [2010](23)(6)<www.blackfriars-law.com>accessed 14July 2023

¹¹⁸Section 166(1) of the Electricity Act, 2023

adequate enough to birth a prosperous Nigerian Electricity Supply Industry (NESI). The new Act has the propensity to surmount our energy crisis if properly implemented. It is proper that there is now one law for every renewable energy investor to reckon with in the practice of electricity business in the NESI; one stop shop. Historically, the renewable energy had been regulated using a mere ministerial instrument which was subject to abuse and disregard even by the stakeholders.

It is not also about having a new Act, it is far more important to begin the doing of the talks. Laws are only available if there is political will to implement them. Where there is no opportunity of implementation, it will remain docile and dumb. Meanwhile, the domestication of licensing powers in electricity business exclusively on the Federal Government solely controlled Nigerian Electricity Regulatory Commission (NERC)¹¹⁹ has not changed totally and it remains a challenge to true electricity federalism. The provision that the NERC is independent¹²⁰ is not supported by the correspondent powers to appoint the membership by the President.¹²¹ The quasi-judicial function of the NERC was retained in the Act¹²² and it is a ministerial rascality to usurp judicial functions.

At this point, we must applaud the NERC for issuing some Orders permitting some states (Ekiti, Ondo, Imo and Enugu etc.) to regulate

¹¹⁹ Sections 33(2-3) and 34 (2)(d) of the Electricity Act, 2023

¹²⁰ Section 33(3)

¹²¹ Sections 35(1-3); 36 (1-5); 39(1-2); 40 and 41

¹²² Sections 46, 47, 48, 49, 50, 51 and 63(4)(a-d)

electricity businesses in their respective States.¹²³ It is clearly a dawn for electricity federalism in Nigeria. This does not completely take away the role of NERC. Infact the NERC will continue to play a pivotal role as the central regulatory czar particularly in the areas of inter-state and international electricity transactions.¹²⁴ For Omonfoman,¹²⁵ the reality of this transition is a new breath and complete emancipation. According to him, “this change is likely to spur a wave of local investments in state electricity markets, as investors seek opportunities within these newly regulated environments.”¹²⁶ Meanwhile, it must be noted that since Nigeria has three tier levels of Government, the Constitutional Alteration that birthed the Act, didn’t achieve a total decentralised regulation, whereby every tier of Government is given the opportunity to regulate electricity within its geographical location. Thus, across the tier levels (Local, States and Federal) of the Nigeria Government,¹²⁷ there would have been institutionalised regulatory frameworks independent of each other. This is working in jurisdictions with heterogeneous and complex society like China and India.¹²⁸ Consequently, implementing the structure

¹²³ Ogaga Ariemu, ‘NERC issues Imo approval to regulate electricity’ Daily Post June 30, 2024 <<https://dailypost.ng/2024/06/30/nerc-issues-imo-approval-to-regulate-electricity/>> retrieved on 11th July, 2024

¹²⁴ Chike Olisah, ‘NERC cedes regulatory oversight of Enugu electricity market to state government’ Nairametrics April 11, 2024 <<https://nairametrics.com/2024/04/22/breaking-nerc-cedes-regulatory-oversight-of-enugu-electricity-market-to-state-government-commission/>> retrieved 11th July, 2024

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ CJP Ogugbara, *Analysis of the Legal Framework for Optimization of Renewable Energy Option in Nigeria* (LL.M. Dissertation Centre For Petroleum, Energy Economics and Law, University of Ibadan, Oyo State, Nigeria 2022) v + 116

¹²⁸ Ibid

will guarantee a greater future in the Nigerian Electricity Supply Industry.

8. Conclusion

Although each state in Nigeria has been given the power to regulate electricity business locally, it is however as Nigeria joins the rest of the world in economic, information technological and global advancement, Electricity appears very crucial to achieve sustainable growth. Electricity market has been a sensitive arena that continually attracts global attention and forms a top agenda on the to-do menu of virtually all governments globally. Predominantly, the effect of the unified and monotonous means of electricity supply has contributed mostly to the stagnated investment driven development in the sector. The various regulatory and institutional frameworks have had impacts in the industry. But each of the regimes have had one predominant setback; institutional weakness. Virtually all were dependent on the strength and attention of policy makers to thrive. This is apparently they are changed and substituted at will. The industry due to this situation has suffered endless policy turbulence and inconsistencies.

Moreso, from commencement of the industry it had a better regulatory structure. But overtime, there were several overlaps and undue interference which undermined the sector heavily. The role of the judiciary in the Nigerian power sector cannot be overemphasised. It is the duty of the courts to interpret the provisions of the law enacted by the National Assembly. In carrying out this task, the judge is expected to interpret the law as it is and not as it ought to be. However, dearth of

knowledge of the energy law will affect the progress of the sector; hence it would be good to introduce energy or electricity courts or tribunals in our judicature as seen in the Republic of Kenya.