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The Nigerian Electric Power Sector Reform: Establishing an Effective Licensing Framework as a Tool for Attracting Investment

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About the Author...



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Abstract

The Nigeria Electric Power Sector has over the years witnessed a slow and steady decline leading to a near complete failure of the system at the onset of the present civilian regime in 1999. The Government had therefore, as a matter of dire necessity embarked on an Electric Power Sector Reform Program, which led to the establishment of the Nigerian Electricity Regulatory Commission (NERC) in 2005.¹

This article will attempt to examine the role of NERC as a sector regulator and its impact so far in establishing a licensing regime that will be attractive to potential investors in the industry.

BACKGROUND

Since 1972, electricity production and supply in Nigerian has been a monopoly of the federally owned Electric Utility body known as the National Electric Power Authority (NEPA)¹. NEPA was solely responsible for the generation, transmission, distribution and sale of electricity to customers and was run as a vertically integrated company.

Lack of adequate funding and ineffective managerial strategies resulted in the continuing poor performance of the utility and by 1998, power generation had fallen to an all time low of about 1700MW inspite of an installed capacity of about 6,000MW and peak demand of about 7000MW². The Transmission and Distribution networks were no better as the infrastructures on ground were far too inadequate to meet the demands of the system.

It was therefore not surprising that by 1999 when this present Civilian Administration came on board, one of the key thrusts of the Government's economic reform strategy³ was to ensure the complete overhaul of the power sector leading to the setting up of a working group⁴ specifically focusing on power and the adoption of the National Electric Power Policy which defined the framework for the power sector reform in Nigeria.

¹ The Act establishing NEPA as a Statutory Body was repealed by the EPSR Act and a Public Limited Liability Company known as Power Holding Company of Nigeria Plc. Was incorporated in its stead in July, 2005.

² The peak demand figure does not take into consideration an estimated suppressed demand of 5000MW currently being met by self generation by exploration and production companies

³ The Government instituted a National Economic Empowerment and Development Strategy (NEEDS) to fast track economic growth through people empowerment, promotion of private enterprise and improvement of public sector service

The reform has so far led to the corporatization and unbundling of the state owned monopoly, now known as the Power Holding Company of Nigeria (PHCN). The unbundling will lead to the establishment of 18 successor companies from PHCN comprising of six Generation companies, one Transmission company and 11 Distribution companies.

The sector has also been deregulated leading to private sector participation in the generation sector and the operation of a number of Independent Power Plants in the country today. The establishment of the Nigerian Electricity Regulatory Commission (NERC) is also in line with the Reform Programme.



NERC's seven commissioners during the inauguration ceremony of the Commission

ESTABLISHMENT OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION (NERC)

NERC was established under the Nigerian Electric Power Sector Reform Act, which was passed into Law in March 2005. NERC effectively took off on October 31, 2005, following the inauguration of its seven full time Commissioners. NERC has been set up as an independent and self-funding sector regulator whose primary functions include:

- Ensure orderly development of a competitive power market
- Ensure efficient, safe and adequate production of electricity
- Promote competition & private sector participation
- Protect consumers and the public interest
- Evolve standards & codes that measure with international best practice
- Evolve stable & equitable rates – cost reflective + reasonable profit
- License and regulate persons engaged in electricity business
- Settle disputes amongst industry participants
- Ensure expansion of access to rural and urban dwellers
- Establish and administer the Power Consumer Assistance Fund for subsidizing underprivileged consumers

Structurally, NERC has a Chairman and Vice-Chairman appointed from among the seven commissioners and the Commission has six divisions each headed by a commissioner namely: Legal Support and Licensing; Engineering, Safety & Standards; Market Competition & Rates; Finance & Support Services; Government & Consumer Affairs; and Research & Development.

The Legal Support and Licensing Division is charged with the primary responsibility of:

⁴ The working group known as the Electric Power Sector Reform Implementation Committee (EPIC) was set up to recommend measures for sector reform, promote the policy of liberalization, competition & private sector led growth and superintend the drafting of a new power sector bill.

- Overseeing the processing of license applications, including issuance, amendment, renewal, suspension, or cancellation of licenses
- Advising the Commission on legal matters and provision of legal input in the drafting of licenses, regulations, contracts etc.
- Facilitating the establishment of participatory Dispute Resolution Panels/Committees with responsibility for formalized mediation, arbitration and resolution of disputes
- Articulating the Commission's response on legal questions and disputes including representation before other judicial bodies.

Out of all these responsibilities, the most challenging so far has been the establishment of an effective and transparent licensing framework that will attract potential investors on the one hand while also ensuring that best practices in industry standards and codes are enshrined to protect the interest of consumers and other stakeholders.

LICENSING FRAMEWORK OF NERC

Under the EPSR Act⁵, NERC is empowered to licence all industry participants involved in the following activities:

- Electricity Generation in excess of 1MW
- Electricity Distribution in excess of 100KW
- Electricity Transmission
- System Operation
- Trading
- Electrical Installation/Wiring

The Act makes it an offense punishable by a term of imprisonment or imposition of fine for any person to undertake these activities without a license.

Following the inauguration of NERC, the need to immediately put in place a licensing framework in line with the requirements of the Act became immediately apparent.

INTERIM LICENCES

The EPSR Act provides for the issuance an interim license to the state owned Power Holding Company of Nigeria after the Company was duly incorporated at the Companies Registry. Even though the Act recognizes the transient nature of the Company (as it was corporatized from the existing Statutory body to enable the unbundling and divestment of its assets to 18 Successor Companies within a time period of 18 months), an interim license still had to be issued to PHCN for a term not exceeding 18 months or until the formation of the successor companies. The law also provides for the issuance of interim licenses to the successor companies following the transfer order to be made by the National Council on Privatization⁶ pronouncing the commencement of operations of the Successor Companies. Interim Licenses to be issued to the Successor Companies shall not exceed a term of one year. These successor companies may thereafter be privatized following a decision of the National Council on Privatization (NCP) to that effect.

⁵ Section 62 of the EPSR Act

⁶ The Council is charged with the responsibility of overseeing the privatization of most state owned companies and utilities.

NERC's challenge was to develop an interim license for PHCN and its successor companies that suited their short tenure, while taking into account that the terms and conditions imposed on the licensees needed to reflect the existing vertically integrated structure of PHCN and the peculiar operating codes of PHCN and the successor companies.

NERC issued an interim license to PHCN on the 12th of January 2006 with a tenure of no more than one year or until the successor companies are formed. The NCP is currently working towards an agenda that will see to the effective take off of the successor companies before the end of the first half of 2006. NERC on its part is working closely with NCP to ensure that it will be ready to issue licenses to the successor companies as soon as the transfer order is made.

REGULAR LICENCES

NERC was also faced with the challenge of providing a licensing framework for Regular Licences (licenses other than interim licenses) especially generation licenses. Prior to the inauguration of NERC, there were already a number of existing and prospective independent power producers interested in investing in the generation of power in Nigeria. A number of these companies have approached NERC requesting licenses to enable them to commence operation.

To tackle this challenge, the Legal Support/Licensing Division immediately went to work on the drafting of a regulation on application for licenses. The draft regulation among other things provided for the manner and procedure for applying for a license. Applicants are expected to obtain application forms from the Commission's office or website, complete the forms and attach all the required documents which will be needed to assess their legal, technical and business competence to undertake the licensed activity. Applicants are also required to publish notices of their application for a license in two newspapers (one local and the other national) to enable stakeholders and the general public make their input in the form of objections or other comments.. Any objection filed will be considered taking into cognizance the rules of natural justice and fair hearing. The decision to grant or refuse a license lies within the discretion of NERC who is mandated to take into consideration such factors as the ability of the applicant to comply with industry codes (technical and financial), the sufficiency and veracity of the documents submitted as well as the general public interest. Applicants whose applications are refused also have the opportunity to appeal the refusal or seek a review of the decision.

NERC is under an obligation to ensure that the period between the its acknowledgement of the acceptance of an application and the time it informs an applicant of its decision or proposed decision to grant or refuse a license is not more than six months. The timeline given is to ensure prompt consideration of all applications.

The Regulation also makes provisions for the procedures for the amendment, renewal, suspension and cancellation of licenses and in all these respects, NERC was careful to ensure that the licensee is given ample opportunity to present his case to the Commission or in public as the Commission has an obligation to hold public hearings whenever the need arises to allow for transparency and fairness.

The proposed regulation was widely published in 7 (seven) national and local newspapers nationwide asking for inputs and contributions from industry participants, stakeholders and the general public before the final regulation could be adopted. Care was also taken to dispatch the draft regulation to major stakeholders including PHCN, existing and intending IPPS and unions of electricity services contractors to ensure their participation in the entire process.

By the end of the time specified for responses, NERC received a number of comments from stakeholders, most of which proved quite useful, and were adopted in the final regulation. The regulation was adopted and approved by the Commission on the 6th of February 2006 and with the regulation in place, NERC is now empowered to commence the licensing of industry participants using a framework that was designed to encourage easy entry into the market while ensuring that global best practices are also enforced.

CHALLENGES

Developing an appropriate licensing framework for the Nigerian Electric Power Sector was not without a number of challenges.

First, while issuing an interim license to PHCN and its successor companies may not be very tasking, the issue of arriving at an acceptable license fee to be paid by these companies may prove to be the major challenge. These government owned companies remain bogged down by a high level of indebtedness coupled with their inability to substantially improve revenue collection. This weak financial position may prove a hindrance in getting these companies to pay a license fee.

Second, since the Commission is quite new, there is still a dearth of adequate manpower to undertake the various activities that will ensure a quick and efficient licensing procedure. NERC however is on the verge of procuring the services of experienced international consultants who, it is hoped, will work closely with the staff of NERC to tackle this challenge.

Also, NERC has yet to put in place the management information tools and other IT resources that will give effect to this framework. However this is only a temporary problem that can be overcome in the short run as plans are underway to establish a fully functional and informative website for the Commission within the next couple of months.

Finally, NERC, in considering applications for licenses, will also have to come up with an effective and transparent procedure for dealing with applications with competing interests. Limited gas infrastructure means that most potential developers of independent thermal power plants will be vying for licenses within or around the same locations. NERC is already mindful of this fact and is already putting together the appropriate policy that will govern this issue.

CONCLUSION

With the establishment of the Nigerian Electricity Regulatory Commission, the reform of the Power Sector in Nigeria has indeed become a reality. Nigeria with its enormous potentials, high power demand and rapid economic growth remains a green field full of potentials for would be investors in the power sector. NERC is mindful of the huge and onerous responsibilities placed on it to revamp the ailing power sector, and the development of its licensing framework was formulated with this responsibility in mind. NERC will in its initial years of operation endeavor to make a positive impact on the general populace, industry participants, potential investors and consumers.

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