

INDEPENDENT POWER PROJECTS IN NIGERIA: A DISCOURSE OF THE LEGAL ISSUES*

Abstract

Access to electricity is fundamental to development and a key driver for economic growth. However, Nigeria as the biggest economy in Africa and the giant of Africa still experiences epileptic power supply to its citizens. Without electricity, health clinics struggle to provide basic services, children are unable to get proper education, and businesses cannot grow and thrive in today's global economy. Reforms were initiated in the electric power sector to enhance economic and social development. As part of the reform process, Nigeria unbundled its power operations into generation, transmission, and distribution subsectors; privatized power generation stations and distribution utilities. Independent power projects were introduced to enhance electricity generation in the country. The objective of this research work is to evaluate the independent power projects as an alternative tool to enhancing electricity in the country and the legal issues arising from their operations. It highlights not only the challenges that policy makers are facing but also the underlying factors that contributed to healthy investment climates. Ultimately, this research paper is intended to offer references, options, and tools that may help Nigeria as a country achieve scaled-up and sustainable power sector investment for the benefit of her citizens and her economies as a whole.

Keywords: Electricity, independent power projects, power sector

1. Introduction

There is no gainsaying that one of the challenges that faces Nigeria as a nation is its epileptic electricity supply. Nigeria is presently faced with the challenge of providing sustainable, adequate, reliable and efficient electricity supply to residential, commercial and industrial consumers.¹ Electricity is a cornerstone on which the economy and the daily lives of Nigerians depend. Electricity is a capital intensive project and the financing requirements for such projects will eat deep into public finances hence the need for increase private investments in the sector to scale up electricity generation across the country. While public and utility financing has traditionally been the largest source of investment in power generation, independent power projects (IPPs) are now growing rapidly. The large funding gap that holds back investments in new power projects in Africa cannot be bridged by the public sector alone. Private participation is critical. Historically, most of such private sector financing has been channeled through independent power projects (IPPs), intended as nonutility generators that sell power to public utilities, end consumers, or wholesale power traders. To accommodate the nations demand for electricity, the Nigerian government encouraged private sector participation in order to boost the economy and the everyday lives of the Nigerian citizen. The government of Nigeria having been handicapped by the inability to solely fund and supply the quantum of electricity needed for sustainable development resorted to the allowance of private players in the electric sector

Independent Power Projects (IPPs) were intended to relieve state utilities of the burden of financing new plants, bring quick, quality power and reduce costs for end-users.² IPPs are defined as power projects set up as special purpose project companies with a significant proportion of private equity and/or debt, and long-term power purchase agreements (PPAs) with the national utility or other large customers.³ IPPs can also be defined as power projects that are, in the main, privately developed, constructed, operated, and owned; have a significant proportion of private finance; and have long-term power purchase agreements with a utility or another off-taker.⁴ Independent Power

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¹David A. Aderibigbe ' Power Supply To Industries– Pros and Cons of Available Options' being part of Presentation at the one-day conference of the Nigerian Society of Chemical Engineers (a Division of NSE), held at the Ikeja Sheraton Hotel and Towers, Lagos

²K N Gratwicketal 'Generating Power and Controversy: Understanding Tanzania's Independent Power Projects' in *Journal of Energy in Southern Africa* Vol 17 No 4 November 2006. Pg. 8

³A. Eberhard, K N Gratwick, 'Light inside: the Experience of Independent Power Projects in Nigeria (2012)' a paper written for International Consortium for Africa.

⁴A. Eberhard, K. Gratwick, E. Morella, P. Antmann (2016): Independent Power Projects in Sub-Saharan Africa Lessons from Five Key countries (a publication of the world Bank Group)

Producers can be private or public companies, municipal and regional governments, cooperatives, private individuals; and other entities.⁵ Independent Power producers generate and sell electricity through power projects financed by specialized and substantial private equity or debt funding. In Nigeria we have private IPP'S and state owned IPP.

2. Legal Framework for Independent Power Projects in Nigeria

The 1999 Constitution of the Federal Republic of Nigeria places electricity generation, transmission and distribution on the Concurrent Legislative List⁶. This allows both the federal and state legislature to enact laws and make policies to promote the electricity sector. The crisis in the electric power sector in Nigeria due to declining electricity generation from domestic power plants and gross inefficiency of the public utility provider led to the emergence of the Electric Power Sector reform Act 2005. The act was initiated to set the machinery in motion for the privatization of the Electric Power sector with a view to increasing market competition, consequent efficiency⁷ and to tackle the monopoly of National Electric Power Authority (NEPA)⁸. Through this Act, The government encouraged the private sectors to invest into the electricity industry so that, the monopoly created by the NEPA could be demolished and at the same time, some independent power producers could enter into the electricity sector. This Electric Power Sector Reform Act thus established The Nigerian Electricity Regulatory Commission ('NERC'). The Electricity Power Sector Reform Act 2005 (EPSRA) is the main statutory legislation focused on electric power sector regulation in Nigeria.⁹

3. The Nigerian Electricity Regulatory Commission ('NERC')

Nigerian Electric Regulatory Commission (NERC/Commission) is the body saddled with the responsibility of regulating the activities of IPP's in Nigeria¹⁰. Section 64(3) (b) of the Electric Power Sector Reform Act 2005 provides that 'Commission may issue generation licenses to one or more entities that are not successor companies formed under section 8, here in described as an Independent Power Producer'¹¹

Prior to the Electric Power Sector Reform Act, the National Electric Power Authority (NEPA) was responsible for the generation, transmission and distribution of electricity in Nigeria. The Act came with certain reforms such as the creation of the Power Holding Company of Nigeria (PHCN), creation of the 18 successor companies held by the PHCN, including the Transmission Company of Nigeria (TCN), Six Generation Companies (GENCOs), Eleven Distribution Companies (DISCOs), Development of a competitive electricity market by the creation of the Nigerian Bulk Electricity Trader (NBET).¹²

The NERC is an independent regulatory agency mandated to regulate and monitor the implementation of the reforms under the Electric Power Sector Reform Act¹³ ('EPSRA'). The EPSRA set out the principal functions and objectives of NERC, which include¹⁴

- (a) To create, promote, and preserve efficient industry and market structures, and to ensure the optimal utilization of resources for the provision of electricity services;

⁵ *ibid*

⁶Item 13, 14 and 15 of the Concurrent Legislative List of the 1999, Nigerian Constitution (as amended).

⁷www.electricpowerforum.com.ng last accessed on 17th October, 2019.

⁸ By Electric Power Sector Reform Act 2005, the assets and liabilities of NEPA were transferred to PHCN under the surety and monitoring of the Federal Ministry of Finance

⁹ *ibid*

¹⁰See Section 31 of the EPSR Act, 2005

¹² Philips Oladoyin, Policies For Investing In Nigeria's Power Delivery Capabilities 2014, being thesis Submitted In Partial Fulfillment Of The Requirements For The Degree Of Bachelor Of Science In Engineering Department Of Operations Research And Financial Engineering Princeton University.

¹³See Section 31 of the EPSRA 2005

¹⁴ Section 32 of the EPSRA 2005

- (b) To maximize access to electricity services, by promoting and facilitating consumer connections to distribution systems in both rural and urban areas;
- (c) To ensure that an adequate supply of electricity is available to consumers;
- (d) To ensure that the prices charged by licensees are fair to consumers and are sufficient to allow the licensees to finance their activities and to allow for reasonable earnings for efficient operation;
- (e) To ensure the safety, security, reliability, and quality of service in the production and delivery of electricity to consumers;
- (f) To ensure that regulation is fair and balanced for licensees, consumers; investors, and other stakeholders; and
- (g) To present quarterly reports to the President and National Assembly on its activities.

The NERC is also statutorily mandated to carry out the monitoring and regulation of the electricity industry, carry out the issuance of licences to market participants and ensure compliance with market rules and operating guidelines. The Act¹⁵ also gave power to the Minister to issue general policy directions to the NERC on matters concerning electricity, including directions on overall system planning and co-ordination, provided that such directions are not in conflict with the EPSR Act or the Constitution of the Federal Republic of Nigeria.

Licensing by NERC

Licensing and regulation of companies engaged in the generation, transmission, system operation, distribution and trading of electricity is one of the major functions of NERC. The EPSR Act provided a framework for the licensing¹⁶ and regulation of companies engaged in electricity generation, transmission, system operation, distribution and trading. However, the need to obtain license to construct, own, operate a company which may generate electricity does not apply to those who do not generate exceeding 1 (one) megawatt or distribute not exceeding 100 (hundred) kilowatts(KW)¹⁷.

Forms of Licenses issued by NERC:

1. The Interim Licence: The EPSR Act provides for the issuance of an interim license to the state owned PHCN¹⁸ and also to other private entities for a term not exceeding 18 months or for a shorter period if it is necessary and in the interest of the public.¹⁹ This form of licence is usually granted for a short while.
2. The Regular Licence: The EPSR Act provides for the issuance of regular Licenses (licenses other than interim licenses) which include:
 - i. **Generation Licences**²⁰: These are licences granted by the NERC which authorizes the licensee to construct, own, operate and maintain a generation station for purposes of generation and supply of electricity. The NERC usually issue generation licences to successor generation company and independent power producers. Some of those issued generation licenses in Nigeria include Omotosho Generation Company Limited, Omotosho Power Plc, Sapele Power Plc, Shiroro Hydro Electricity Plc, Ughelli Power Plc, Zuma Energy Nigeria Limited (Gas Plant) Imo, Afam Power Plc, Ikorodu Industrial Power Ltd (embedded generation), Island Power Limited (embedded generation), IsoloPower Generation Limited, Kainji Hydro Electric Plc (Jebba Station) amongst many others.

¹⁵ Section 33 of the EPSR Act, 2005

¹⁶Section 62(1) of the EPSR Act, 2005

¹⁷ Section 62(2) of the EPSR Act, 2005

¹⁸ Section 7 of the EPSR Act, 2005

¹⁹Section 62(3) of the EPSR Act, 2005.

²⁰Section 64 of the EPSR Act, 2005.

- ii. **Transmission Licences**²¹ : These are licences granted by the NERC which authorize the licensee to carry on grid construction, operation, and maintenance of transmission system within Nigeria and with neighbouring jurisdiction. The sole transmission company in Nigeria is known as the Transmission Company of Nigeria (TCN). For reasons of public policy and national security, TCN, currently remains under the government's control, although it is managed and operated by a private sector entity.
- iii. **Systems Operation Licences**²²: These are licences granted by the NERC which authorise the licensee to carry on system operation, including; generation scheduling, commitment and dispatch; transmission scheduling and generation outage co-ordination; transmission congestion management; international transmission co-ordination; procurement and scheduling of ancillary services and system planning for long term capacity; administration of the wholesale electricity market, including the activity of administration of settlement payments, in accordance with the market rules; and such other activities as may be required for reliable and efficient system operation.
- iv. **Distribution Licences**²³ : These are licences granted by the NERC which authorizes the licensee to construct, operate and maintain a distribution system and facilities, including; the connection of customers for the purpose of receiving a supply of electricity, the installation, maintenance and reading of meters, billing and collection. A distribution licensee may also have the obligation to provide electricity to its distribution customers, pursuant to the terms of a trading licence issued by the NERC. Distribution companies in Nigeria include ; Abuja Electricity Distribution Co Plc, Benin Electricity Distribution Company Plc, Eko Electricity Distribution Company, Enugu Electricity Distribution Co Plc, Ibadan Electricity Distribution Co Plc, Ikeja Electricity Distribution Company, Jos Electricity Distribution Company, Kaduna Electricity Distribution Company Plc, Kano Electricity Distribution Company Plc etc.
- v. **Trading Licences**²⁴: These are licences granted by the NERC which permit a licensee to engage in the purchasing, selling and trading of electricity. The Distribution Companies in Nigeria currently sell electricity to the end users.

The Act mandates the licensee to always comply with the provisions of the licence, regulations, codes and other requirements issued by the Commission from time to time²⁵.

4. Legal Challenges to the Development of Independent Power Projects

There are presently many legal issues which has arisen and sometimes hindered investments in IPP as allowed and desired by the Electric Power Sector Reforms Act, to meet the power supply needs in Nigeria. These legal issues in many instances cut across the three sectors of power industry, viz the generating, transmission and distribution sectors and they include the following:

The requirement that all electricity generated must first and foremost be sent to the national grid.

The current NERC policy requires that all the power generated by IPPs must be sent to the National grid from where the power will be distributed by the licensed Distribution Companies (Discos), and from there to the consumers. This requirement, being a mandatory one, must be complied with as forming part the terms of the generation license

²¹Section 65 of the EPSR Act, 2005.

²²Section 66 of the EPSR Act, 2005.

²³Section 67 of the EPSR Act, 2005.

²⁴Section 68 of the EPSR Act, 2005

²⁵Section 63 of the EPSR Act, 2005.

granted by NERC to the IPPs. Failure to comply with this requirement may, under Regulations 16 and 17 of the *NERC Application for Licences (Generation, Transmission, System Operation, Distribution and Trading) Regulations 2010*, amount to suspension or cancellation of the license granted to the IPP by NERC.²⁶ It has been said that this requirement not only slows down the operation of the IPP, it also does not encourage companies and individuals to invest in IPPs in Nigeria, as it utterly downplays the freedom and important business decision of the IPPs to fully be in charge of money realized from power generation.²⁷

Land Acquisition Issue— A Constitutional Issue?

The issue of land acquisition for IPPs is a serious legal issue that that can be looked at critically. To start with the procedure for land acquisition under the Act, empowers NERC and the President to acquire a private land from its owner and give same to owners of IPPs. The procedure under the section can be summarized as follows:

- a. Owners/investors of an IPP in need of land is to apply to NERC for a declaration that a particular piece of land belonging to another person is required for purposes of electricity generation.²⁸
- b. NERC may invite submission from Commissioner of Lands in the State where the land is to be acquired.²⁹
- c. NERC may thereafter declare on behalf of the owners of the IPP that the land is required for electricity generation.³⁰ The original owner(s) of the land will be given adequate opportunity to make representation against the declaration.³¹ The representation does not, however, guarantee that NERC will not make the declaration. The owners of the IPP will also make representation that generation of electricity is not practicable unless the land is acquired.³²
- d. NERC's declaration will thereafter be brought to the President's attention for him to issue a notice in the gazette that land is required by the government of the Federation for public purposes.³³
- e. Once the President has issued the notice, the Governor of the state where the land is situate is to revoke the existing right of occupancy on the land under section 28(4) of the Land Use Act in favour of the owners of the IPP, and grants a certificate of occupancy to them, although the denied previous owner will be able to claim compensation.³⁴

The whole drama of acquisition of land in favour of the owners of an IPP appears to be a situation that can best be likened to robbing Peter to pay Paul. Revoking the right of occupancy and acquisition of the land of one private or corporate citizen to satisfy the business need of another private or corporate citizen is most questionable in the modern times. The rather questionable conversation of a private purpose to a public purpose under section 77(9) of the EPSRA 2005 with the sole aim of acquiring a private land for an IPP is most unfair and offends the spirit of the constitution.

²⁶Regulation 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.

²⁷Ikechi Mgbeoji, *Nigeria's Independent Power Producers (IPPs) Demand Reform of Electricity Power Distribution System*, Black friars LLP Publication, June 2010, vol. 23, Issue 6.

²⁸Section 77(1) of the Electric Sector Power Reform Act (ESPRA)2005

²⁹Section 77(2) ESPRA 2005.

³⁰Section 77(3) ESPRA 2005.

³¹Section 77(4) ESPRA 2005.

³²Section 77(5) ESPRA 2005.

³³Section 77(6) EPSRA 2005.

³⁴Section 77(9) EPSRA 2005.

Payment of compensation: who bears the responsibility?

Closely related to the issue of private land acquisition in favour of owners of an IPP is the issue of payment of compensation. The issue of payment of compensation upon acquisition of land is a constitutional issue.³⁵ In line with this, section 77(9) of EPSRA 2005 requires that compensation be paid in line with the provisions of the Land Use Act 1978 to the person whose right of occupancy has been acquired and granted in favour of owners of an IPP. One major concern, however, is that the EPSRA 2005 does not state whose responsibility is it to pay the compensation. The compelling question that begs to be answered is: who pays the compensation? Is it the owners of the IPP who are the beneficiaries of the acquisition or the NERC that declared that the land is required for electricity generation? Or the President that published in a gazette that the land is required for public purposes? Or the Governor that eventually revoked the existing right of occupancy and granted same to the IPP? Other than a provision in the EPSRA that merely says that NERC shall ensure funds are available for liability arising from land acquisition³⁶, the EPSRA only refers to the Land Use Act for compensation. And the Land Use Act in turn has no contemplation for land acquired for a private business by the Governor upon a gazetted declaration that the land is needed for public purposes.

Owners of IPPs appear to have been given somewhat unrestricted and non-consensual easement rights over properties of other people.

The law in this regard is as contained under section 77(10) of the EPSRA, which provides as follows: 'A generation licensee...shall be entitled to access rights over lands, buildings and streets for discharging its obligations under its licence to the extent and in the manner prescribed in the regulations issued by the Commission.' The entitlement to access the lands, buildings and streets of private and corporate individuals as contained in this provision is unqualified. Also, the relevant regulations made so far by NERC do not say anything on qualification or restriction of this right.³⁷ This makes the right to access other people's lands and buildings absolute and subject to abuse by the owners and/or agents of IPPs— and the provision of section 77(10) may operate as a defence for the owners of IPPs in the event that the occupiers/owners of the lands and buildings the owners of the IPPs accessed without notice, consent or authorization sue them for trespass.

5. Conclusion and Recommendations

The whole idea of bringing in Independent Power Producers for the establishment of IPPs in the generation of electricity is a shift from the old regime to a presumably preferable one. It is also an expression of diversification of the sector from the monopolistic grip of the old era to a new one, which will serve as a catalyst for industrial evolution and improvement in standard of living through regular, efficient and effective electricity supply in the country. There is, therefore, no doubt that compared to the old regime, IPPs have contributed considerably to electricity generation and transmission in Nigeria. While this point appears convincingly valid, there are still some serious issues relating to the operation and regulation of IPPs in Nigeria that call for urgent attention. The scope of this paper covers only the legal issues which include the requirement that all electricity generated by the IPPs must first be sent to the national grid before distribution; acquisition of a private land to satisfy the business purpose of an IPP which has been said to be akin to robbing Peter to pay Paul; the less clarity on whose duty is it to pay compensation after acquisition of a private land; unrestricted and non-consensual easement rights over other people's private granted to IPPs and reliance of IPPs on other projects for their survival, In the light of the foregoing, the following recommendations are made with respect to the legal issues: There should be a policy shift by NERC that will allow electricity generated by IPPs to be traded by them directly to DISCOs and other customers with whom they have entered into a Power Purchase Agreement, instead of first send their generated electricity to the national grid. To avoid abuse, however, NERC can put a very strong regulatory structure in place that will adequately ensure protection of the final consumers. Acquisition of land of a private person for the business purpose

³⁵ Section 44(1)(a) of the Nigerian 1999 Constitution (as amended).

³⁶ Section 77(7)(c) EPSRA 2005

³⁷ See generally NERC Business Regulations 2006; NERC Application for Licences (Generation, Transmission, System Operation, Distribution and Trading) Regulations 2010

of an IPP should not be done compulsorily. The Government should not be involved or paint it as if the acquisition is needed for public purposes. Where a land is needed by owners of IPPs, the owners should enter into a private contract with the owner of the land. The law that allows compulsory acquisition of a private land in this regard should be amended. In the very exceptional instances where the land has to be compulsorily acquired, there is the need for the provisions of the law to be clear on whose responsibility is it to pay compensation to the previous owner. Marrying the provision of section 77 of the EPSRA 2005 with section 28 of the Land Use Act 1978 in relation to payment of compensation, it is clear that the position on who should pay compensation is clumsy and may create a situation of double jeopardy for the previous owner. There is therefore need for clarity. The EPSRA 2005 should be amended as it applies to the unrestricted and non-consensual access it gives to owners of IPPs over the land and buildings of other people. The power should be restricted in order to respect the proprietary rights of private land owners and also to save owners of IPPs attendant suits that may affect the operations of the IPPs.