Legal Alert – May 2011 – Electricity Licenses & Tariffs – Law & Regulations

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Introduction

The Electric Power Sector Reform Act, 2004 ("the EPSRA") in its preamble or Explanatory Memorandum, states that the EPSRA "...... provides for the formation of companies to take over the functions, assets, liabilities and staff of the National Electric Power Authority, develop competitive electricity markets, establish the Nigeria Electricity Regulatory Commission; provide for the licensing and regulation of the generation, transmission, distribution and supply of electricity; enforce such matters as performance standards, consumer rights and obligations and provide for the determination of tariffs."

The EPSRA has not being able to achieve, on the average, its preliminary objectives. Power generation, transmission, distribution and tariff regulation are still at dismal levels. Most contentious is the methodology for computing electricity consumption in Nigeria and charging the appropriate tariff for the electricity consumed on a balanced, commercially viable basis. Another related contentious matter is the tariff to be charged for privately generated electricity in private estates in Nigeria, on a commercial basis, due to poor public-sector generated electricity.

This Legal Alert will practically examine the above critical issues as they relate to sustainable electricity supply and investment in Nigeria.

Electricity Licensing

Section 62 of the EPSRA provides that only persons duly licensed by the Nigeria Electricity Regulatory Commission ("NERC") or persons deemed to have being issued with such a license under Section 98(2) – i.e. licenses issued before enactment of EPSRA and the unbundling of NEPA – can construct, own or operate, or in any way be engaged in the business of:-

(a) Electricity generation, excluding captive generation;
(b) Electricity transmission;
(c) System operation;
(d) Electricity distribution; or
(e) Trading in electricity.

The second exemption to the mandatory licensing requirement above stated is where a person constructs, owns or operates an undertaken that generates electricity that **does not exceed 1 megawatt ("MV") in aggregate at one site**; or where a person or an undertaking distributes electricity with a capacity **not exceeding 100 kilowatts ("KW") in aggregate at a site**; or in such other instances as the NERC determines, in the public interest, that an operating license will not be required for the electricity activity.

Electricity Tariffs

The Nigeria Electricity Regulatory Commission ("NERC") is authorised by law to create the methodologies that this Regulatory Commission will adopt for regulating electricity tariffs/prices resulting from electricity generation and trading, in addition to electricity transmission, distribution and system operations, in respect of which licenses are required as explained above.

The tariff methodologies to be adopted by NERC must incorporate the following factors:-

(a) Allow a licensee to recover its full operating costs and a reasonable return on the capital invested in the electricity enterprise;

(b) Provide incentives for the continued improvement of the quality of the electricity services provided;

(c) Provide incentives for the continued improvement of the technical and economic efficiency with which the electricity services are provided;

(d) Give to consumers information and data regarding the costs of the electricity generated;

(e) Avoid undue discrimination between consumers and consumer categories; and

(f) Phase out or substantially reduce cross subsidies.

NERC is authorised by the EPSR Act to, in establishing the tariff methodologies, differentiate among electricity consumers on the basis of differences in the total electricity consumed, the time periods that the electricity is consumed, load factors, power factors, voltage levels, location within the country and such other criteria that may affect the costs of providing electricity services and allow a lifeline tariff for some consumers.

The NERC is also required to publish a tariff methodology or any change in an existing tariff methodology that the Commission intends to approve and enforce. Objections or representations received from interested consumers or consumer groups, licensees and other electricity stakeholders must be considered by NERC before any tariff methodology is approved and enforced.

In addition to the above statutory requirements, all electricity licensees are required to keep in their offices a current copy of the tariff methodology applicable to that licensee's business and provide a free copy to any person that request for the tariff methodology during normal working hours.

Licensees are barred from transferring to the consumers any fines or penalties imposed in accordance with the EPSRA. There are Fines and terms of imprisonment, if convicted, where the tariff methodology duly approved are not followed or the consumer protection measures are not adhered to by a Licensee.

Case Law on Electricity Licensing and Tariffs

Billing for the electricity actually consumed, and adhering to the approved electricity tariffs, have lead to many disputes due to the disconnect between electricity regulations vis-à-vis the market forces of demand and supply in the electricity sector in Nigeria. An examination of some of the litigation in this subject area will provide some further enlightenment on the urgent need for practical electricity reforms.

Order No. NERC/H/061 – Funke Adekoya, SAN v. VGC Management & Maintenance Co. Limited & Eko Electricity Distribution Company.

The petitioner in this case challenged the legality of the power supply arrangement within Victoria Garden City Estate ("VGC Estate") wherein the 1st Respondent funded the design, construction and commissioning of a 15MVA (33/11kv) injection sub-station. The Nigeria Electricity Regulatory Commission ("NERC") held on 25th August 2008 that the trading arrangements in VGC Estate contravened Sections 62(1) and 100 of the EPSRA which requires that vendors in all aspects of electricity generation, distribution and tariff must possess a valid license duly issued by NERC in accordance with the EPSRA. The only exception to this license rule is where the electricity distribution capacity is less than 100kw in a designated site.

NERC also held that the Respondents cannot increase the electricity tariffs payable by the residents of VGC Estate as all the parties are under a legal obligation to abide by the NERC prior approved electricity tariffs or rates.

In another matter, Petadis Enterprise v. HFP Properties Limited, Case No. NERC/ 10/0011/08, the petitioner complained about the power supply arrangement whereby electricity was sold to the residents at Ikota Shopping Complex, by the Respondents, at rates above those approved. The Electricity Regulator held that pursuant to Sections 62, 67 and 69(1) of the EPSRA 2004, and following the Commission's decision in the above cited matter, the electricity distribution arrangement at Ikota Shopping Complex is illegal in the absence of the Respondents applying for and obtaining a NERC license for power generation in excess of IMW in the aggregate at one site. The Appeal against this decision failed as NERC held, while determining the appeal, that as a creation of statute and as the Regulator of the Electricity Industry, it must comply strictly with the provisions of the Electricity Power Sector Reform Act, 2004 (''EPSRA'') which prohibits any person, without a valid license issued by NERC, engaging in the business of electricity generation except where such electricity generation is below 1MW at a site, or where the electricity distribution takes place its capacity is below 100KW in aggregate at a site. Trading in electricity generally also requires a license subject to the exemptions mentioned above.

Soft copies of the above decisions can be found on the NERC website www.nercng.org

Conclusion:

The inability of the Nigerian Government and the Nigeria Electricity Regulatory Commission to privatise the different aspects of electricity businesses in Nigeria in accordance with the provisions of the Electricity Power Sector Reform Act, 2004 continues to inhibit and discourage private investment in the electricity sector which has in turn retarded development in other facets of life. For example, the unbundled entities are not functioning as commercial enterprises without government interference, thus resulting in very poor corporate governance, and very poor service delivery.

Also, the tariff regime, from metering to a tariff methodology, is not transparent to encourage consumer voluntary compliance or private sector increased investment. Electricity consumers continue to receive and pay for estimated electricity bills without their electricity metres being read by the electricity distribution companies.

Ultimately, the mustering of the political will to adhere to/implement the provisions of the Electricity Power Sector Reform Act will attract the much required direct local and foreign investment to the electricity industry in Nigeria.

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