The Energy Regulation and Markets Review

Seventh Edition

Editor
David L Schwartz

TheLawReviews

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PREFACE

In our seventh year of writing and publishing *The Energy Regulation and Markets Review*, we have seen dramatic changes in global energy policies. Europe has experienced a strong economic rebound, which has allowed many countries to dedicate increased resources to the infrastructure needs of the energy sector, including for renewables. While the United States commenced efforts to withdraw from the Paris Agreement, the signatories to the Paris Agreement countries have continued to make efforts to reduce greenhouse gases (GHGs). There is still a significant need to invest in infrastructure, and we have seen significant investment throughout the supply chains in the oil, gas and power sectors globally. The 2011 Fukushima nuclear incident continues to impact energy policy in many countries, and we continue to see extensive liberalisation of the energy sector. Oil prices have started to rebound somewhat, which presents some hope to those countries that remain dependent upon oil prices for national revenue.

I CLIMATE CHANGE DEVELOPMENTS

With respect to climate change efforts, the Paris Agreement was placed into effect on 4 November 2016, but President Trump announced last year that the United States would be withdrawing from the Paris Agreement. Nonetheless, we continue to see significant carbon reduction efforts, such as increased development of renewable resources, as well as energy efficiency and demand reduction measures, globally, including in the United States.

Following the Brexit vote, the United Kingdom closed its 'renewable obligation' programme to new generation, and limited new contracts for differences, which has significantly reduced new renewable construction this year. France has announced a plan to close all coal-fired power plants within five years, double the capacity of wind and solar renewable generation and prohibit shale gas production and all new searches for hydrocarbons. Denmark continues to seek to have renewable energy meet all of its electricity demands by 2050, and over the past year has initiated an effort to improve the output of solar and wind resources through technology improvements. The Netherlands has a goal of reducing GHGs by at least 25 per cent by 2020, and has announced its intent to close all coal plants by 2030. While Germany will likely miss its 2020 renewable energy goals, it has an ambitious goal to achieve 65 per cent renewable generation capacity by 2030. Belgium has continued its effort to develop offshore renewable wind resources (including the development of an offshore grid), but has reduced historical green certificate subsidies. Italy is seeking to reduce carbonisation by having a goal of relying on renewable resources for 28 per cent of its energy needs by 2030. Switzerland has continued to promote the development of renewables and is supporting the development of large-scale hydroelectric resources through state subsidies.

Spain is seeking to reach 20 per cent renewables by 2020, and has initiated new auctions for 6,000MW of new renewable installed capacity. Turkey seeks to have 30 per cent renewables by 2023.

China released a plan to have 15 per cent of its energy supplied by non-fossil fuels, 20 per cent from natural gas and no more than 58 per cent from coal by 2020. Korea's goal is to cut GHGs by 37 per cent by 2030, and it is seeking to have 95 per cent of all new installed capacity come from clean energy sources and to shut down coal power plants that are more than 30 years old. India's announced goal to have at least 40 per cent of its installed electric capacity powered by non-fossil fuels may be overshadowed by the fact that it is developing and constructing 50,000MW of new coal-fired generation capacity. Japan is looking at offshore wind and a variety of other new renewable energy sources to assist with the reduction of capacity following the shutdown of most of its nuclear generation capacity. Malaysia has been working hard to reduce its overdependence on coal and natural gas, and to encourage the production and use of renewable energy in an effort to meet its target of 50 per cent renewable resources by 2050. As of last year, 33 per cent of the installed capacity in the Philippines was from renewable resources, and 35 per cent was from coal generation. The United Arab Emirates continues its efforts to reduce its carbon footprint, announcing a goal of having 25 per cent of its capacity from renewables by 2030, and 75 per cent by 2050. South Africa relies upon coal generation for 85 per cent of its generation capacity but has taken steps to increase the development of renewable resources. Australia is adding significant new renewable resources to meet its 2020 renewable energy targets.

While the Trump Administration is seeking to reverse the Obama administration's Clean Power Plan, we are seeing continued significant investment in renewable energy development in the United States. Individual states are moving forward to achieve reduced reliance on fossil fuels and greater reliance on renewable energy, including California and New York, which are seeking a 50 per cent renewable portfolio standard goal by 2030, and Hawaii, which is seeking 100 per cent reliance on renewables by 2045.

II INFRASTRUCTURE DEVELOPMENT

For many countries, reliable energy supply is the primary concern, regardless of fuel source. Rural electrification and system reliability remain priorities in India, Indonesia, Myanmar, Mozambique, Angola, parts of Nigeria and Central and West Africa and we are seeing significant efforts to pursue electric generation and transmission projects in those regions. Turkey seeks to increase energy industry infrastructure in the power sector and the oil and gas sectors, in light of an estimated 6 per cent demand growth per year through 2023. Denmark has a new North Sea Agreement to secure future exploration and production of hydrocarbons from the North Sea. Panama continues to seek to attract foreign investment to assist with badly needed transmission and generation infrastructure needs. The 8 May 2018 announcement by President Trump that he intends to withdraw from the Iran nuclear deal and institute significant new sanctions is expected to present a significant roadblock to further foreign investment in the Iranian energy sector.

III NUCLEAR POWER GENERATION

Seven years after the Fukushima disaster, Japan has stopped operations for 43 out of its 48 nuclear power stations, and 14 nuclear power stations are in the process of complying with new safety standards for possible restart. Germany continues to phase out all nuclear generation by 2022. Belgium is seeking to dismantle all nuclear plants by 2025. France is seeking a reduction of nuclear power generation to 50 per cent of total electricity production within five years. Switzerland and Korea are planning to limit the life of their nuclear generation units, with Korea abandoning the construction of six new nuclear power plants and cancelling the extension of others.

On the other hand, Turkey is continuing with development of the Akkuyu nuclear power plant (first unit estimated to be operational in 2023), and the United Arab Emirates is almost finished with the construction of the Barakah nuclear power plant, both of which are expected to be operational in 2020. South Africa is facing substantial resistance to its efforts to develop 9,600MW of new nuclear generation capacity. India's goal of 40 per cent non-fossil fuel generation is expected to require a substantial ramp-up of nuclear generation capacity.

In the United States, the early retirement of certain nuclear plants has been driven by cost and power market considerations, rather than safety concerns. Some nuclear owners in the United States have sought state subsidies in New York, Illinois, Ohio and Pennsylvania, among others, in order to avert premature retirements. Illinois and New York have implemented legislative and regulatory payment programmes for nuclear facilities in those states, but they are currently being challenged on constitutional grounds and remain pending before US federal circuit courts of appeal.

IV LIBERALISATION OF THE ENERGY SECTOR

We have seen significant energy sector regulatory reforms in many countries. Italy is seeking to reduce the gap between price and cost of energy, compared to the rest of Europe. Portugal continues to work on liberalising its electricity and gas markets. Japan has now fully liberalised the retail electricity sector. And we are seeing continued efforts to encourage further privatisation of the electricity sector in the United Arab Emirates and in certain countries in Central and West Africa. Turkey is seeking to privatise its generation assets. Brazil has seen significant privatisation, including the auction of four hydroelectric plants. Given Switzerland's interest in promoting the use of renewable resources, it has suspended a planned 49 per cent divestiture of its state-owned hydroelectric fleet. China has made moves to deregulate energy pricing. In a move away from privatisation, Colombia ordered the liquidation of Electricaribe (owned primarily by Gas Natural Fenosa), which is now in arbitration.

I would like to thank all the authors for their thoughtful consideration of the myriad of interesting, yet challenging, issues that they have identified in their chapters in this seventh edition of *The Energy Regulation and Markets Review*.

David L Schwartz
Latham & Watkins LLP
Washington, DC
May 2018

Chapter 25

NIGERIA

Gbolahan Elias and Okechukwu J Okoro[1]

I OVERVIEW

i Petroleum

The Nigerian petroleum industry is regulated by the Department of Petroleum Resources (DPR), an arm of the Federal Ministry of Petroleum (the Ministry). The Ministry is headed by the Minister of Petroleum Resources (the Minister). The petroleum industry is also dominated by major joint venture arrangements, production sharing contracts and service contracts between the Nigerian National Petroleum Corporation (NNPC), wholly-owned by the federal government of Nigeria (FGN), and international oil companies with global operations (IOCs). A number of statutes and policies encourage indigenous companies to actively participate in the industry.

Activities in the petroleum industry are regulated by several laws. These laws regulate the ownership, control and enjoyment of rights, construction and maintenance of installations, and environmental protection in the industry. The principal law regulating the exploration, production and distribution of petroleum in Nigeria is the Petroleum Act 1969 (PA).

ii Electricity

The Nigerian Electricity Regulatory Commission (NERC), established under the Electric Power Sector Reform Act 2005 (EPSRA), regulates the Nigerian electricity industry. EPSRA is the legal framework for the electricity industry. Through EPSRA, the FGN unbundled and privatised the then state-owned monopoly, the National Electric Power Authority (NEPA) into the Power Holding Company of Nigeria, generation companies (Gencos), distribution companies (Discos) and the Transmission Company of Nigeria (TCN). Today, the Gencos and Discos are controlled by private sector investors. The FGN retains sole ownership of the TCN.

II REGULATION

i The regulators

Petroleum

The Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution) and the PA vest the ownership and control of petroleum under or upon any land in Nigeria, its territorial waters and exclusive economic zone in the FGN. The FGN exercises its control

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over and regulates the petroleum industry through the Ministry. The Ministry has general oversight responsibilities, and determines and formulates policies governing the petroleum industry. The Minister has broad discretionary powers to grant licences and leases; regulate construction, maintenance and operation of installations and refineries; and supervise all operations carried out under the licences and leases granted.

The DPR ensures that operators in the industry comply with the applicable laws, supervises all petroleum operations and processes applications for licences, leases and permits required to operate in the industry. The DPR also regulates the abandonment and decommissioning of installations.

The DPR and Federal Ministry of Environment (FMoE) regulate the environmental aspects of the production, transmission, distribution and supply of petroleum and petroleum products in Nigeria. Also on environmental protection, the National Environmental Standards and Regulations Enforcement Agency (Establishment) 2007 Act, the Environmental Impact Assessment Act 1992 (the EIA Act) and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 2002 prescribe the environmental and emission standards applicable to petroleum activities in Nigeria.

There is also a 'local content' regulator, the Nigerian Content Development and Monitoring Board (the Board), established under the Nigerian Oil and Gas Industry Content Development Act, 2010 (NCA). The Board is required to ensure the growth of 'Nigerian content' in the petroleum industry.

Other regulatory agencies whose functions have an impact on the industry include:

a the Joint Development Authority, which promotes and supervises petroleum activities in the Nigeria-Sao Tome and Principe joint development zone;

b the Nigerian Investment Promotion Commission, which registers foreign investments in Nigeria;

c the Central Bank of Nigeria (CBN), which under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 supervises foreign exchange dealings in Nigeria (including the importation of foreign capital and repatriation of export proceeds from oil and non-oil exports);

d the Niger Delta Development Commission, which formulates policies and guidelines for the development of the Niger Delta area and liaises with operating companies to ensure pollution prevention and control;

e the National Oil Spill Detection and Response Agency, which deals with waste emanating from petroleum production and exploration; and

f the Nigerian Ports Authority and Nigeria Customs Service acting under the Nigerian Ports Authority Act 1999, the Pre-shipment Inspection of Exports Act 1996 and the Customs and Excise Management Act 1959, all of which regulate the export of petroleum.

The NNPC is not a regulator. It is a vertically-integrated state-owned statutory corporation. The NNPC has various subsidiaries, one of which is the Nigerian Gas Company (NGC). The NGC owns and operates the main gas transmission systems in Nigeria. The Nigerian Petroleum Development Company Limited has the responsibility for petroleum exploration and production activities. The National Petroleum Investment Management Services, a division of the NNPC, oversees the NNPC's interests in joint venture arrangements, production sharing contracts and service contracts with IOCs. The Pipelines and Products Marketing Company Limited and NNPC Retail Ltd import and market refined petroleum products respectively.

There are a number of regulations made pursuant to the PA that regulate specific aspects of the industry. The Mineral Oils (Safety) Regulations 1962 prescribe standard safety measures for lessees and licensees. The Petroleum Regulations 1967 regulate importation, shipping, unshipping and landing of petroleum; storage of petroleum; transport of petroleum; fuelling of aircraft and so forth. The Petroleum (Drilling and Production) Regulations 1969 regulate applications for leases and licences, exploration and drilling, field development, and payment of fees, rents and royalties. The Petroleum Refining Regulations 1974 regulate construction, operation and maintenance of refineries.

The construction, operation and maintenance of oil pipelines are regulated by the Oil Pipelines Act 1956 and the Oil and Gas Pipeline Regulations 1995. The transportation of crude oil in Nigerian waters and payment of terminal dues on any ship evacuating oil from terminals in Nigeria are regulated by the Oil in Navigable Waters Act 1968 and Oil Terminal Dues Act 1969 respectively. The Associated Gas Re-injection Act 1979 regulates the re-injection of associated gas into oil wells. The Petroleum Profit Tax Act 1958 taxes profits from upstream mining operations in Nigeria.

Electricity

EPSRA is the principal statute for the electricity industry in Nigeria. Under EPSRA, NERC, as the regulator of the Nigerian electricity industry, issues regulations and orders giving effect to EPSRA. NERC is also vested with the power to grant licences for the generation, transmission, system operation, distribution, and trading of electricity. NERC is also required to promote competition and private sector participation, and ensure quality standards in the electricity industry. EPSRA further established the Rural Electrification Agency to promote, support and provide access to electric power by rural and semi-urban areas of Nigeria.

The Federal Ministry of Power (FMoP), guided by EPSRA and the FGN's National Electric Power Policy 2001, formulates electricity policy in Nigeria. The FMoP is empowered under EPSRA to issue general policy directions to NERC on the electricity industry, and NERC is bound to comply except where such policy is in conflict with EPSRA or the Constitution. The Energy Commission of Nigeria (ECN) also plays a strategic role in the electricity industry. The ECN was established by the Energy Commission of Nigeria Act 1979 (as amended) with the mandate to plan and coordinate national policies in the field of energy, and has been promoting the use of renewable energy sources in generating electricity.

The TCN has two key operating officers: the systems operator and the market operator. The market operator administers the wholesale electricity market, promotes efficiency and competition. The systems operator is responsible for planning, administration and grid discipline. In addition, the National Inland Waterways Authority established under the National Inland Waterways Authority Act 1996, regulates inland waterways navigation and issues permits for generation projects requiring water usage.

ii Regulated activities

Petroleum

The petroleum industry consists of the upstream, midstream and downstream sectors. The rights to explore, prospect, produce, process and distribute petroleum and petroleum products are granted through the issuance of leases, licences and permits by the Minister and the DPR (in some cases) to operators in these sectors.

For the upstream sector, the relevant leases and licences are the Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL) and Oil Mining Lease (OML). An OEL confers a non-exclusive right to explore for petroleum for a term of one year. An OEL can be further renewed for one year.

An OPL has a duration of not more than five years including renewals, and confers a right to prospect for petroleum. However, the duration of an OPL granted in respect of the deep offshore and inland basin is a minimum of five years and an aggregate period of 10 years. An OML has a duration of 20 years and is subject to renewal. The OML confers an exclusive right to explore, carry away and dispose of petroleum. A drilling rig licence is also required to operate a drilling rig while a permit is required to conduct seismic data survey.

For the midstream and downstream sectors, a licence is required to construct or operate a refinery or processing plant, export, import, store, sell or distribute petroleum and petroleum products. The approval of the DPR is required to construct and operate a petroleum products filling station, and a blending plant, and to retail lubricants. A permit is required to survey the route for a pipeline. A licence is required to construct and operate a pipeline, any pumping station, storage tanks, loading terminals or other ancillary installations. Further, to construct pipelines, a right of way must be obtained from the state government on which the land is located. This may be conveyed through a certificate of occupancy or permit from the relevant state government or by special agreement with the owner of the land (subject to payment of compensation).

DPR permits are also required to render services in the petroleum industry. The permits are in three categories: general, major; and specialised. The general category covers minor supply, works and maintenance services. The major category covers rehabilitation, upgrade and fabrication works, onshore pipeline and storage facility maintenance, equipment supply, consultancy, survey and calibration. The specialised category covers pipeline laying, drilling, exploration, technical consultancy, dredging and environmental restoration services.

The procedures for obtaining these leases, licences and permits vary but are all overseen by the DPR. In addition, the EIA Act requires the issuance of a certificate stating that an environmental assessment of a petroleum project has been conducted before one can embark on such a project, and that the outcome has been officially approved. The environmental laws of some states make it mandatory to obtain a permit from the state environmental agency to construct or operate any project or activity that affects the environment.

Electricity

As with the petroleum industry, activities in the Nigerian electricity industry are also strictly regulated. Through EPSRA, a NERC licence is required to construct, own or operate an electricity generation, transmission, distribution, system operation or trading undertaking. Applications for licences are made in writing to the chairman of NERC, accompanied by the prescribed fees and in the manner prescribed by NERC.

Licences issued by NERC include generation licences, which authorise the licensees to construct, own, operate and maintain generation stations. A licence is not required, however, to construct or operate a generating plant not exceeding 1MW in capacity.

A transmission licence allows the licensee to carry out grid construction, operation and the maintenance of transmission system in Nigeria, or connect Nigeria with a neighbouring country. The holder of a transmission licence may also be required to carry out system operation and the procurement of ancillary services. A system operation licence authorises the licensee to carry out system operation such as generation and transmission scheduling, transmission management and coordination, procurement and scheduling of ancillary services and administration of wholesale electricity market.

A distribution licence holder has the right to construct, operate and maintain a distribution system and facilities such as supply of electricity, installation, maintenance and reading of meters, billing and collection. A licence is not required for a distribution station not exceeding 100kW in aggregate. A trading licence authorises the licensee to purchase, sell and trade in electricity. NERC may also issue a temporary bulk purchase and resale licence authorising the purchase of electrical power and ancillary services from independent power producers and Gencos for resale.

In addition to the licences required under EPSRA, the Factories Act 1987 requires factory owners (which includes electricity generating and distribution companies) to apply to the Director of Factories for registration within a month of commencement of business. A licence from the Minister of Water Resources is also required to undertake any hydroelectricity project as the Ministry of Water Resources regulates the diversion, storage, pumping or use on a commercial scale of any water.

iii Ownership and market access restrictions

Petroleum

Except for the general requirement to incorporate a Nigerian company before carrying on business in Nigeria, there are no restrictions on a foreign company acquiring an interest in the petroleum industry in Nigeria. The NCA, however, provides for certain privileges for companies in the industry with over 51 per cent Nigerian equity participation. Under the NCA, such companies will be given first consideration in the award of oil leases and licences. Also, in awarding contracts for the provision of services, Nigerian indigenous companies will be exclusively considered. The DPR also has a practice of not granting majority stakes in OPLs or OMLs to foreigners.

The Minister has the right to require refinery licence holders to deliver petroleum products to the FGN, or OPL or OML holders to deliver crude oil to a person with a refinery licence. Also, where there is a state of emergency or war, the Minister has the right of pre-emption of all petroleum obtained under a lease or licence subject to payment of an agreed price; or, if there is no such agreement, a fair price for the time being at the point of delivery as may be agreed; or in default of such an agreement, by arbitration. By the National Domestic Gas Supply and Pricing Policy (the Domestic Gas Policy) and National Gas Supply and Pricing Regulations 2008 (the Gas Pricing Regulations), OPL and OML holders are required to supply up to a specific volume of gas for domestic consumption. An OML holder is further required to relinquish one-half of the leased area 10 years after the grant of the OML.

The Minister may revoke an OPL or OML if the holder is not conducting operations in accordance with the basic approved work programme and good oilfield practice, or fails to pay rent, royalties, furnish reports on its operations or comply with the PA, regulations and the terms of the licence or lease. The Minister may also revoke these rights if the holder becomes controlled directly or indirectly by a citizen of or a company incorporated in a country the laws of which do not permit citizens of Nigeria or companies incorporated in Nigeria or controlled by Nigerians to acquire, hold and operate petroleum concessions on conditions that, in the opinion of the Minister, are reasonably comparable with the conditions upon which such rights are granted to subjects of that country.

Electricity

EPSRA prohibits anyone holding a NERC licence from assigning or ceding his or her licence or transferring his or her undertaking without the prior consent of NERC. Similarly, no person holding a licence from NERC may, without NERC's consent, acquire or affiliate with, the licence or undertaking of any other licensee or person who is in the business of generating, transmitting, distributing or trading electricity.

In addition, every licensee is required by NERC Regulations on National Content Development for the Nigerian Electricity Supply Industry 2013 to develop a framework for the development and promotion of 'Nigerian content' in the electricity industry. The licensees are also mandated to maintain a technology transfer plan (detailing various technologies deployed by the operator and the modalities for transfer to Nigerians where applicable).

iv Transfers of control and assignments

Petroleum

The prior consent of the Minister is required before any transfer of an interest, power or right in a licence or lease whether by way of acquisition, merger, takeover, exchange or transfer of shares, listing, testamentary devises, judgment or arbitral award. For the farm-out of marginal fields, the consent of the President is required. The DPR is, however, to be notified prior to the commencement of any such transaction. The responsibility for obtaining consent is that of the assignor. Also, a production-sharing contract or joint venture agreement, depending on the contractual arrangement of the parties, may require that the non-assigning parties waive or assert their pre-emption rights.

Consent will only be granted where the Minister is satisfied that the proposed assignee is of good reputation, has sufficient technical knowledge, experience and financial resources to effectively carry out the operations under the licence or lease and is in all other respects acceptable to the FGN. For the farm-out of marginal fields, the President will only give his consent if he is satisfied that it is in the public interest to do so. In the case of a non-producing marginal field, the marginal field must have been left unattended for an unreasonable time, not less than 10 years, and the parties to the farm-out must be acceptable to the FGN.

Electricity

NERC has the statutory responsibility to consider whether or not to approve a merger, acquisition or affiliation. To do so, NERC may require information from licensees, undertake inquiries and establish or contract with an independent entity to provide monitoring services. The prior consent of NERC is required for a licensee to assign or cede his licence or transfer his undertaking, or any part of it, by way of sale, mortgage, lease, exchange or otherwise to another. The prior written consent of NERC is required for a licensee to acquire, by purchase or otherwise, or affiliate with, the licence or undertaking of any other licensee under the EPSRA. However, a distribution licensee may also be issued with a trading licence to provide electricity to customers.

The approval of the Securities and Exchange Commission is required for mergers, acquisitions, takeovers and business combinations. Mergers and schemes of arrangement are also required to be sanctioned by the Federal High Court. In addition, mergers, acquisitions and other forms of business arrangements concluded through schemes of arrangement are to be registered with the Corporate Affairs Commission (Nigeria's companies' registry) to become effective.

III TRANSMISSION/TRANSPORTATION AND DISTRIBUTION SERVICES

i Vertical integration and unbundling

Petroleum

The NNPC is vertically integrated. Through its subsidiaries, the NNPC engages in exploration, production, processing, importation, transportation, distribution and retail of petroleum and petroleum products. IOCs also have control over exploration, production and transportation facilities in the petroleum industry. Some IOCs have downstream operations in Nigeria, but those operations are not integrated with the upstream operations of the group. In exercise of statutory powers, the Minister may grant third parties access to pipelines to aid transportation of petroleum from the field or well to processing plants or terminals for export.

Electricity

The Nigerian electricity industry was originally controlled by the NEPA (the old, state-owned monopoly). The NEPA controlled generation, distribution, transmission and trading of electricity. Through EPSRA, the NEPA was unbundled into the Power Holding Company of Nigeria, 18 successor companies consisting of six Gencos, 11 Discos and the TCN. With the unbundling and subsequent privatisation of the NEPA, EPSRA reduced vertical integration in the electricity sector with the aim of developing a competitive electricity market in Nigeria.

ii Transmission/transportation and distribution access

Petroleum

In Nigeria, petroleum is usually transported from the field and well through pipelines owned and operated by a holder of an oil pipeline licence. The licence holder has exclusive rights to use the land covered by the licence for the construction of a pipeline and ancillary installations required (e.g., pumping stations, storage tanks and loading terminals) for the conveyance of petroleum, and any substance (including steam and water) used or intended to be used in the production or refining or conveying of petroleum.

However, a third party may apply to the Minister for a right to use the pipeline constructed and operated by the licence holder. Before approving such use, the Minister must consult the applicant and the licence holder. The terms for the use of the pipeline are to be negotiated between the licence holder and the applicant. Where the licence holder and the applicant fail to reach an agreement, the Minister may determine such terms. The Minister, if satisfied with the application for use of a pipeline, may serve a notice on the licence holder to secure the applicant's right to use the pipeline, regulate the charge payable and ensure that the applicant's right is not prevented or impeded.

The NGC owns, operates and maintains most gas pipeline facilities in Nigeria. There are other private participants who own gas pipeline facilities in Nigeria. Transportation and storage of gas are usually governed by gas transportation agreements. The NGC imposes terms and tariffs for gas transportation agreements. To boost the gas sector, a Gas Master Plan Infrastructure Blueprint, which provides for the development of central gas processing facilities and gas transmission systems, has been developed.

Electricity

In the electricity sector, Discos have monopolies over their distribution areas. However, a captive power generator (generating electricity exceeding 1MW for, and that is consumed by, the generator itself, and not sold to a third party) requires the prior written consent of NERC before it can supply surplus power not exceeding 1MW to an offtaker. Such a captive generator holder must apply for a generating licence before it can supply power exceeding 1MW to an offtaker. Also, embedded power generators (generation of off-grid power to be evacuated through a distribution network to end users) with a capacity above 20MW are required to evacuate the power produced through the grid.

In respect of third-party access to transmission, transportation and distribution facilities in the electricity sector, owners and operators of these facilities are not obligated to provide third-party access. There are also no restrictions on the provision of such third-party access. Therefore, third-party use of transmission, transportation and distribution facilities in the electricity sector is based on agreements between third parties and the owners or operators.

iii Rates

Petroleum

Under the PA, the Minister is to fix prices at which petroleum products may be sold in Nigeria. However, the Petroleum Products Pricing Regulatory Agency (PPPRA) Act 2003 created the PPPRA to determine the pricing policy of petroleum products, regulate the supply and distribution of petroleum products and moderate volatility in petroleum product prices. Retail petroleum product prices were previously fully subsidised by the FGN. In May 2016, the FGN announced the removal of subsidy on petroleum products. However, to date, the NNPC, as the major importer of petroleum products in Nigeria, still bears the loss for the high landing cost of petroleum products.

The price of gas in the domestic market is regulated by the Domestic Gas Policy and the Gas Pricing Regulations. The Domestic Gas Policy defines the policy of the FGN in respect of the pricing of gas to be supplied to customers in the downstream gas sector. The Department of Gas, established under the Gas Pricing Regulations, is to establish the aggregate price that shall be used as a basis for gas supply to the domestic market.

Electricity

NERC is responsible for creating tariff methodology in the electricity industry. In fixing the methodology, NERC is required to consider full cost-recovery plus reasonable return on investment, promotion of technology and market efficiency through incentives, fairness and openness to consumers, and reduction or elimination of cross-subsidies. NERC established the Multi-Year Tariff Order (MYTO) for the electricity industry. The MYTO provides a 15-year tariff path for the electricity industry, with limited reviews each year to cover changes in a limited number of parameters (such as inflation and gas prices) and major reviews every five years. Recently, NERC issued MYTO 2.1 for the period 1 January 2015 to 31 December 2018. On 1 April 2015, NERC approved an amendment to MYTO 2.1. The MYTO does not apply to embedded power. Embedded power is priced on a discrete basis to cover cost of production and distribution with a margin added. Purchases of embedded power are also subject to open tender.

iv Security and technology restrictions

The acquisition, promotion and development of technology in Nigeria are regulated by the National Office for Technology Acquisition and Promotion (NOTAP). NOTAP has regulatory oversight over all contracts for the transfer of foreign technology to Nigerian parties. The registrable contracts include use of trademarks and patented inventions; supply of technical expertise, detailed or basic engineering, machinery and plant; the provision of operating staff or managerial assistance; and training of personnel. Failure to register with NOTAP does not make a contract between a Nigerian and a foreign company for transfer of technology void or unenforceable, but NOTAP prohibits purchases of foreign currency from the CBN-regulated foreign exchange market to make payments under the unregistered contract.

IV ENERGY MARKETS

i Development of energy markets

The first utility company, the Nigerian Electricity Supply Company, was established in 1929, about 33 years after the first power generating station in Nigeria. From mainly hydroelectric and coal sourced energy, Nigeria has developed to a multi-source generation market (though gas is now the dominant source of power generation). The industry initially had distinct generation and transmission operations; energy was produced by the Nigeria Dams Authority and sold to the Electricity Corporation of Nigeria for distribution to end-users. These companies were integrated in 1972 to form NEPA, which was responsible for the generation, transmission, distribution of electricity and the overall management and administration of the energy market.

With the reforms introduced by the National Electric Power Policy 2001 and EPSRA, the Nigerian Bulk Electricity Trading Plc (the Bulk Trader) was incorporated. The Bulk Trader is licensed to purchase grid electricity in bulk from the Gencos and other independent power generation companies for resale to the Discos until such a time as the market would be fully competitive and the Discos achieve self-sufficiency. This arrangement is backed by both Nigerian and international governmental financial assistance in diverse forms. Another significant milestone in the energy market occurred when the National Integrated Power Project power plants built by the FGN were sold to private investors to encourage competition in the market.

ii Energy market rules and regulation

The energy market is regulated by NERC. NERC is responsible for rule-making and the licensing of market operators. The market rules in force govern the different stages the industry is anticipated to undergo; the 'pre-transition', 'transitional' and 'medium' stages.

The pre-transitional stage involves the unbundling of NEPA, the old, state-owned monopoly. Trading arrangements in the transitional and medium stages are and will be through contractual arrangements, and the market is expected to be centrally-administered and fully competitive.

iii Contracts for sale of energy

The applicable documentation for sale of energy will generally depend on the stage of the market in force. The Bulk Trader, as the major purchaser of on-grid power, has its standardised bulk power purchase agreements for electricity off-take from the Gencos. Vesting contracts are used for the resale of electricity by the Bulk Trader to the Discos.

For natural gas sales, gas aggregation agreements are typically used for domestic supply obligation gas (gas that producers of petroleum in Nigeria must sell locally and not export), while gas sale agreements are used for non-domestic supply obligation gas. Increasingly, private producers are developing their own standard form gas sale agreements. Template alternative energy supply agreements are also available for renewable energy projects. For the transmission and delivery of evacuated electricity, the TCN enters into grid connection agreements and transmission use of system agreement.

iv Market developments

NERC has continued to grow and reform the electric sector. It grants generation licences to investors with both on-grid and off-grid intentions. Embedded generations are now popular and have been embraced by independent generators and the Discos. Some of the ready-made National Integrated Power Project plants that were privatised, with construction shortcomings yet to be fully fixed in many cases, have been commissioned and in some cases, installed with additional capacity and are now producing electricity. NERC has also expressed its intention to regulate the generation and distribution of electricity in unserved mini-grid areas.

The transitional stage of the electricity market, whereby wholesale buying and selling of electricity is based on contractual arrangements subject to regulatory rules, took off in the second month of 2015. When this stage of the market is fully in force and effect, it is expected that there will be greater investment certainty triggering investors' interest and growth of the market. NERC's MYTO 2.1 is also in place to govern electricity pricing for both individual and industrial users.

V RENEWABLE ENERGY AND CONSERVATION

i Development of renewable energy

The clamour for renewable energy arose in Nigeria as a result of increased awareness of the environmental impacts of fossil-based generation. It was not until 2006 that the actual need for sustainable energy can be said to have been recognised by the FGN with the formulation of a renewable energy plan as part of its national energy policy to depart from a monolithic fossil-fuel economy to one driven by an increasing share of renewable energy in the national energy mix.

The FGN, NNPC and NERC have encouraged the exploration and development of renewable energy in Nigeria because of the wide range of renewable natural resources (such as hydro-power, solar, wind, geothermal, biofuel). A Renewable Energy Division was created at the NNPC to develop renewable energy initiatives. The NERC through its Renewable

Energy, Research and Development Division developed the feed-in-tariff regulations for renewable energy-sourced electricity to further support the aim of generating 2,000MW of renewables-sourced electricity by 2020 and to encourage favourable pricing for such electricity. NERC also grants licences for renewable power generation like solar and coal. The Nigerian Biofuel Policy and Incentives 2007 (which specifies a plan to produce biofuel primarily for thermal and power generation) includes several tax exemptions from withholding tax, capital gains tax, value added tax and custom duties. There is a wide range of renewable energy projects at various stages of implementation. In fact, roads in numerous urban areas are lit or powered by solar sourced energy.

ii Energy efficiency and conservation

Efficiency and conservation are still poorly advanced despite the inclusion of basic policies and strategies, for the efficiency and conservation of energy in the national energy policy and the energy master plan. However, there are no definitive codes and regulations for energy efficiency and conservation. The FMoE's renewable energy programme unit has introduced initiatives to address the need to source and deploy sustainable energy sources.

The ECN established the National Centre for Energy Efficiency and Conservation. This Centre is responsible for organising and conducting research and development in energy efficiency and conservation, and has conducted studies into promoting energy efficient appliances and light bulbs. Also the ECN in partnership with the Cuban government and with support from the Economic Community of West African States has advanced the usage of compact fluorescent lamps. Likewise, under the supervision of the FGN's National Clean Cooking Scheme, there has been production and distribution of a purpose-designed biofuel stove.

In addition, NERC has expressed its intention to develop energy-efficiency labelling standards for domestic appliances and energy efficiency standards for luminaires, air conditioners and other household appliances. Market operators have advocated the use of energy-saving equipment that is now more readily obtainable in the Nigerian market such as high-efficiency voltage controllers.

iii Technological developments

Technological development in Nigeria is significantly slower than it should be. There are, however, indications that some Discos have signed memoranda of understanding to formalise agreements with the United States Trade and Development Agency to promote smart-grid solutions for Nigeria's transmission and distribution challenges. We anticipate that these solutions will be in place in the near future.

VI THE YEAR IN REVIEW

i Petroleum

Recently, there has been an increase in the international price of crude oil. However, most operators of oil acreage in Nigeria are still struggling to recover from the aftermath of the decline in the price of crude oil, and settle outstanding debt service obligations. To stay afloat, these companies have resorted to debt refinancings and, in some cases, limited equity injection.

With the increase in crude oil price, the FGN's oil revenues have also increased. Notwithstanding this increase, the FGN has maintained its position on the removal of subsidy on petroleum products. For instance, subsidy payments were not included in the 2017 budget. However, as the largest importer and supplier of petroleum products in the market (over 90 per cent), the NNPC continues to bear the loss for the high landing costs of petroleum products. NNPC imports petroleum products and sells to the oil marketers who then sell to the end users.

In 2017, in a move towards revamping the Nigerian petroleum industry, the FGN approved two major policies for the sector: the National Gas Policy 2017 (NGP) and the National Petroleum Policy 2017 (NPP). The policies are wide-reaching and address the barriers facing investment and the development of the Nigerian petroleum industry. The NGP replaces the FGN Gas Master Plan 2008. The purpose of the NGP, as set out in the policy document, is to define the FGN's policy in respect of Nigeria's natural gas endowment, establish its medium- to long-term targets for gas reserves' growth and utilisation and record strategies to be pursued to ensure the successful implementation of the policy in accordance with Nigeria's national socio-economic development priorities. The NPP, which builds on the NGP, is meant to address the issues affecting investment in the Nigerian petroleum industry. The NPP articulates a vision and sets policy goals, strategies and implementation plans for the introduction of an appropriate institutional, legal, regulatory and commercial framework to resolve these issues. The policies are aimed at revamping the Nigerian oil and gas sector. A major focus of the NPP is the need to actively move away from oil as a source of income to oil as a fuel for economic growth. The NPP is expected to be reviewed and updated periodically.

On 28 March 2018, the Petroleum Industry Governance Bill (PIGB) was passed by both chambers of the Nigerian federal legislature (the National Assembly). The PIGB is expected to deal with governance and the institutional framework for the Nigerian petroleum industry. The Bill still has to be assented by the President before it becomes law.

ii Electricity

In the past year, NERC has, despite the outcry for a review, continued to implement the MYTO-2015 electricity tariff that became effective as of 1 February 2016. The tariff, which eliminates all forms of fixed charges, has been criticised as not being cost-reflective. NERC recently issued the Meter Asset Provider Regulations (MAP) 2018. MAP is designed to bridge the widening end-user metering gap in the Nigeria electricity supply industry, with the goal of eliminating 'estimated billing'. Through MAP, the Discos ceases to have exclusive right to the metering of end-users. Under MAP, a new class of operators, the meter asset providers, would be responsible for the provision, installation, maintenance and the replacement of meters. However, the meter asset providers are expected to liaise with the relevant Discos to ensure compliance with industry standards in the provision of the metering services.

Within the year in review, the Minister of Power, pursuant to the powers of the Minister of Power under EPSRA, issued a directive to NERC declaring certain categories of customers as eligible to buy power directly from the Genco. Following this, NERC issued the Eligible Customer Regulation 2017. This regulation is expected to trigger competition and liberalise the Nigeria electricity supply industry by allowing the eligible customers access to contract directly with the Gencos. The Discos have opposed the new regulation as likely to impact their revenue as these eligible customers constitute the Discos' high-demand customers. Several eligible customer agreements are currently being negotiated with the Gencos.

At the state level, the Lagos State Government passed into law the Lagos State Electric Power Sector Reform Law 2018. The law is aimed at providing an enabling environment for generating and delivering up to 3,000MW power in three years though private sector support. The law has been applauded by actors in the industry and is expected to engender similar moves by other states in Nigeria.

VII CONCLUSIONS AND OUTLOOK

With the fluctuation in crude oil price, there have been calls from various stakeholders that the FGN should pursue an active diversification policy to move the Nigerian economy away from its dependency on oil revenues. Following these calls, there are ongoing plans for a massive reform of the Nigerian oil and gas industry. The PIGB is currently awaiting presidential assent. The PIGB, when signed, is expected to create commercially oriented and profit-driven (but government-controlled) business entities and regulators, and improve transparency and accountability. The NPP and NGP have been applauded by actors in the oil and gas industry. However, to realise the laudable objectives of these policies, the FGN must commit to actively pursue and measure the implementation of these policies within the set timelines.

The FGN is expected to continue the electricity industry reforms. Some observers think that the current administration will deregulate and privatise the power transmission business (which is under the control of the TCN wholly owned by the FGN) to attract more foreign direct investment into the electricity industry and enhance competition in the electricity market. There is, as yet, no express communication from the current government that any fundamental changes will be made to the electricity sector.

A major review of the MYTO-2015 is expected within the coming year. This review is expected to address concerns around a cost-reflective tariff and the issue of inflation. On the NERC Eligible Customer Regulation, industry experts are waiting to see how the regulation will be implemented and how the Nigeria electricity supply industry will react, given the threats raised by the Discos.

Appendix 1

ABOUT THE AUTHORS

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G Elias & Co

Professor Gbolahan Elias is the presiding partner of G Elias & Co, one of Nigeria's leading business law firms. He is also a visiting professor of law at Babcock University, Ilishan where he teaches shipping, petroleum and arbitration law. He has published widely on a range of both historical and topical legal matters and served on numerous law reform committees, university administration boards and law journal editorial boards.

He read law at Magdalen and Merton Colleges, Oxford. He has DPhil, BCL (first-class honours), MA and BA (first-class honours) degrees from the University of Oxford. He was called to the New York Bar in 1990. Professor Elias was an associate at the Cravath firm in New York and has been a senior advocate of Nigeria since 2005. He is a member of the Chartered Institute of Arbitrators.

He has advised on numerous transactions in the Nigerian energy sector, including the largest acquisitions to date of electricity generation and distribution companies. He also advised on the development and negotiation of the precedent-setting power-purchase contracts and vesting contracts for the federal government-backed single buyer of grid electric power. He recently advised on a US$1.2 billion 'gas-to-power' project financing and a US$1.5 billion refinancing of NNPC petroleum product import receivables. He is currently advising the Transmission Company of Nigeria on the Eligible Customer Regulation 2017.

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Okechukwu J Okoro is a senior associate in the law firm of G Elias & Co. He holds a Bachelor of Laws degree from Ebonyi State University.

He has been involved in several of the firm's energy deals. He has been actively involved in the legal review of gas sale documentation and is currently advising on three embedded power projects. He was on the team that recently advised two distribution companies on the Central Bank of Nigeria's Nigerian Electricity Market Stabilization Facility, and on the team that advised Africa Finance Corporation on its investment in and divestment from the acquirer of a 45 per cent participating interest in an OML. Okechukwu J Okoro was also on the team that advised on a US$1.2 billion 'gas-to-power' project financing and a US$1.5 billion refinancing of NNPC petroleum product import receivables. He is currently advising the Transmission Company of Nigeria on the Eligible Customer Regulation 2017.

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