

NEPA'S UNDERTAKER: The Electric Power Sector Reform Act.

You have not heard of the Electric Power Reform Act 2001? Then you must have heard about NEPA (Nigerian Electric Power Authority) which is one of the first words Nigerian toddlers add to their vocabulary. So what is the relationship? The Act was recently signed into law by Mr. President and in doing so he signed Nepa's death warrant. The Act has a primary role of being Nepa's hangman rather belatedly by popular opinion. What is the exact method of execution? Not a firing squad, an electric chair or a lethal injection. None of these! The Act has rather chosen an unusual tool used with success in other countries to put vertically integrated monopolies to sleep. It is called "**unbundling**". Thereafter where would Nepa's interment take place? The Act has procured a large tract of land at the privatization cemetery - a public cemetery owned by the Bureau of Public Enterprise. It follows that after the interment Nepa's will and last testament has to be read to bequeath its assets which barring any challenges to the will shall herald the entry of the "new players" – Nepa's heirs and successors-in-title.

WHAT EXACTLY IS THE UNBUNDLING OF NEPA?

Physically unbundling may sound like tearing a person into pieces limb by limb. You may be right in a sense. Unbundling simply means the subdivision of a vertically integrated process so that each new segment becomes a distinct whole. By way of explanation the current NEPA is a single entity that is in control of 3 aspects of electricity: Generation; Transmission and Distribution. Unbundling will treat these three aspects as separate sectors (different bundles) with different unrelated companies handling each aspect. Understanding the unbundling process prescribed by the Act may be easier if we follow the steps sequentially. The Act seems to prescribe 3 major steps:

STEP 1 – INITIAL HOLDING COMPANY Sections 2, 3, 4 & 6.

The Act specifies that the National Council on Privatization shall set up a company to be known as "Initial holding company" whose shares would be 100% owned by the Federal Ministry of Finance on behalf of the Federal Government. Thereafter on a specified date called the "initial transfer date" NEPA will transfer all employees, assets, liabilities, rights and obligations to the holding company. (The company has been registered as duly publicized and is called Holding Company of Nigeria) The final transfer of liability or obligation under this Act releases Nepa of that obligation or liability. The Act transfers in unequivocal terms all obligations: contractual; pending proceedings etc. The current employees of Nepa are taken over by the holding company on "terms not less favourable than those enjoyed immediately prior to the transfer". The proposed lifespan of the holding company is a maximum of 18 months.

STEP 2 – FORMATION OF SUCCESSOR COMPANIES Sections 10-16

Within 8 months after the incorporation of the Initial Holding Company the National Council on Privatization shall incorporate such number of successor companies as are necessary to be formed which shall be the successor companies for assuming the assets and liabilities of the initial holding company. The functions of these companies shall include but shall not be limited to generation, transmission, trading, distribution, and bulk supply and resale of electricity. The shares in these companies shall be held jointly in the name of the Ministry of Finance Inc and the Bureau of Public Enterprise. The initial holding company shall not later than 1 year from the initial transfer date by order of the National Council on Privatization "transfer employees, assets, liabilities, rights and obligations to one or more successor companies." The National Council on privatization shall specify the terms and conditions of each transfer order. For avoidance of doubt this is the second time these effects are being transferred. First was from Nepa to the initial holding company and now from the initial holding company to the successor companies. Upon the completion of the transfer the National Council on Privatization shall issue interim licences to the successor companies.

STEP 3 – PRIVATIZATION Section 17

After step two, the successor companies that are holders of generation, distribution or transmission licences shall be privatized by the National Council on Privatization in accordance with the Public Enterprises (Privatization & Commercialisation) Act, No. 28 of 1999 and the Bureau of Public Enterprise shall organize the sale of the shares of the successor companies to the public.

WHO ARE THE NEW PLAYERS? Sections 61 - 65

It would be easier to find out who the new players are by previewing the different types of licences permitted under the Act. Let us first deal with those who are exempted from licences. In this regard it should be noted that S59 of the Act permits Nigeria's most common form of power generation (the private power generator) to operate without a licence as in "a person who generates electricity not exceeding an aggregate of 1 megawatt at a site and/or a distribution capacity not exceeding 100 Kilowatts." I was informed by the engineers that 1 megawatt is 1 million watts. For clarity you may note that 1 megawatt should power approximately 16,666 electric bulbs of 60 watts. Another exception to the licensing requirement is "captive generation" which the Act defines as electricity generated for "purpose of consumption by the generator itself and not sold to a third party". The combined effect of these two exceptions seem to imply that one who generates electricity not in excess of 1 megawatt or 100Kw distribution capacity may sell electricity on that site without a licence. This may cover the some residential or industrial estates with independent generation capacity. It would seem also that electricity generated for personal consumption (captive generation) does not require a licence and it should follow that captive generation even if above 1 megawatt does not require a licence. Having dealt with the exceptions, the Act seems to introduce holders of 6 types of licences: (1) Generation Licence (2) Transmission Licence (3) System Operator Licence (4) Distribution Licence (5) Trading Licence (6) Temporary Bulk Purchase & Resale Licence. Another player introduced by the Act is the Independent Power producer (IPP) who will invariably have a generation licence side by side with the successor companies. The IPP'S will likely be privately held companies (it is still in contention whether state owned companies would be included) and they would undoubtedly play a major role in increasing the amount of power generated nationwide and in boosting the natural gas utilisation efforts of the Federal Government. The National Electricity Regulatory Commission is another new creation of the Act. This Commission shall basically regulate access, structures, competition, consumers, and other aspects of the new electricity industry. Part IX of the Act creates the "Power Consumer Assistance Fund" to be used to subsidise underprivileged power consumers as specified by the minister. Part X also creates the Rural Electrification Fund which is supposed to be a public and private sector programme aimed at paying attention to rural electrification. One of the sources of income for the rural electrification fund is the fines and penalties collected by the Commission.

INFRASTRUCTURE OWNERSHIP UNDER THE ACT

Generation Facilities

As regards generation, it is clear that the current NEPA facilities would devolve to the successor generation companies whilst the Independent Power Producers will establish and own new generation plants or take over existing NEPA plants.

Transmission Lines

With Transmission it is not as explicit because the question of "open access" to the national grid (the existing national power transmission lines) needs to be addressed. To put it in layman's terms it is clear that each major power generator/producer needs to transmit electricity through the existing transmission lines. What rights do they have to do so? Who operates and manages the transmission lines? This is a usual issue with unbundling in the electricity market. In the US the Federal Energy Regulatory Commission Orders 888 & 889 obliges owners of transmission lines to allow open access. In Nigeria the Act in S 19 mentions the Minister's power to make market rules for operation of national grid by the system operator and S 68 (2) (a) states that "the

terms of a licence may require a licensee to enter into agreements with other persons for the provision of or use of electric lines and equipment operated by the licensee." Invariably one of the successor companies would take over the duties of overseeing the transmission lines and may metamorphose into the Independent system operator when full competition is emplaced in accordance with S 19 of the Act.

Land – S68 (10) and S 74

During the period within which the licence is in operation (30-50 years subject to renewal a Licensee may request the Commission for acquisition of any land required. Such land may be acquired by the Commission as required for public purpose. This is subject to the following rules: It applies only to generation, transmission or distribution companies; landowner must have a right to fair hearing; must be compensated if acquired; has right of first refusal to repurchase if licensee decides to relinquish; any repurchase shall be at a price the equivalent of compensation paid. If the doctrine of *quic quid plantatur solo solo credit* (whatever is on the land belongs to the land) is applied to some of these compulsory acquisitions at the expiry of the licence some landowners may by default become power station owners.

CONTRACTING FRAMEWORK UNDER THE ACT

The emergence of the Act will see new contracting modes in our legal landscape these include but are not limited to: Transmission line utility contracts; Sale, mortgage, or lease or licences S66; Electricity Distribution Contracts; Novation Contracts S 18 (e); Long term electricity purchase and supply contracts; End User Contracts for bulk energy use; Gas supply contracts; Brokerage contracts; Build Operate and Transfer Schemes (BOT); Long term Infrastructure Finance Schemes; Royalty Agreements; Right of Way Agreements and a host of others. Lawyers are positioning themselves and rolling up their sleeves.

CONCLUSION

By way of commentary it should be noted from the timings specified in the Act that the steps towards the entire unbundling process should take a minimum of 2 years (if the time-table is followed strictly with no delays) Given the extremely urgent need to "regenerate" our electric power system in Nigeria, my thinking is that we can achieve this in a shorter time. How? Perhaps we can cut out the double transfer of the effects of NEPA: first from Nepa to initial holding company and again from initial holding company to successor companies. A concise road map as to which assets (infrastructural, human and material) would eventually be transferred to the respective successor companies should see a direct transfer of those specific effects to the particular successor company leaving out the initial holding company. As they say: "cut out the middleman". Going the hog of two regimes of transfers on the same asset seems to me one too many at a time like this when the power situation is crippling our industries. It is an emergency! The second thing that comes to mind as regards the process of privatization is the need to avoid a situation where we have unbundled a vertically integrated government monopoly and used the instrumentation of the law to create related company monopolies (albeit in private hands). A situation where several companies in different segments are owned by a group of people will surely be the antithesis to the Act. It is for this reason that S 67 (3) specifies disclosure to the Electricity Commission by an applicant for a licence who owns more than 10% of another company who has applied for or owns another licence. This in my opinion can be circumvented and only scratches the surface. We look to the Commission to come up with strong regulations in this regard.

Finally, I see two streams of thought on the impact of the bill on our electricity industry: The sceptic school wonders if Nepa would actually be interred for good or Lazarus would come forth? The optimists (permit me to belong here) hope that creativity and flexibility in implementing the Electric Power Reform Act should see the emergence of a workable electricity sector. If the optimists are proved right, Nigerians will more than deserve it. We shall see!