
**RECENT CONSTITUTIONAL
AMENDMENTS ON
ELECTRICITY GENERATION,
TRANSMISSION AND
DISTRIBUTION - A
SPRINGBOARD FOR
PROGRESS AND HOPE**



Introduction

On 17th March 2023, the President of the Federal Republic of Nigeria, Muhammadu Buhari, (the "President") signed into law 16 Constitutional amendments, one of which is the Fifth Alteration (No.33) Devolution of Powers (National Grid System) Bill (the "Constitutional Amendments").

As a Federation, one of the main sources of Nigerian law is the Constitution of the Federal Republic of Nigeria, 1999 as amended (the "Constitution"). Previously, the enactment of laws on the generation, distribution and transmission of electricity was largely vested in Nigeria's Federal Government, and the powers of a state to make laws on these subjects were limited to areas not covered by the national grid system.

The Constitutional Amendments confer on states, the constitutional powers to make laws which permit each state to generate, distribute and transmit electricity in areas, within each state's boundaries, including areas previously covered only by the national grid.

The reform, harmonisation, and consolidation of Nigeria's power sector began with the enactment of the Electric Power Sector Reform Act in 2005, the unbundling of the erstwhile public monopoly shortly thereafter, and the privatisation of the Nigerian power sector in 2013. While these developments and other steps had been taken to improve the legal and institutional framework for the Nigerian Electricity Supply Industry ("NESI"), the power sector continues to be gripped by a myriad of challenges that threaten its efficiency and, more importantly, decelerate its progress. The keenness to resolve these challenges given the importance of consistent electric power supply to national and economic development, therefore, intensified the clamour for further reforms.

Prior to the Constitutional Amendments, and as far as legislative history goes, the Nigerian Constitution vested powers to legislate on electricity generation, transmission, and distribution, in areas covered by the national grid, on the National Assembly. The state legislatures on the other hand, were empowered to legislate on such matters only in areas not covered by the national grid.

Coming in ten years post-privatisation, the Constitutional Amendments have been hailed by many as a required decentralisation, of some sort, granting eligibility to states to legislate on electricity generation, transmission and distribution, a development which should, hopefully, pave the way for the long-curtailed state-level investments in the Nigerian Electricity Supply Industry.



Summary of the Constitutional Amendments and Brief History on Legislative Powers

Despite the enactment of the Electric Power Sector Reform Act in 2005 and the privatisation of the Nigerian power sector in 2013, the avalanche of challenges which curtailed the sector's advancement persisted, therefore, industry analysts continued to clamour for the legislative reforms now evident in the Constitutional Amendments.

Prior to the recent Constitutional Amendments, the constitutional framework for the enactment of legislation relating to the Nigerian power sector was centralised in the Federal Government of Nigeria, and was, arguably, radical as states were only allowed to generate, transmit and distribute electricity in areas **not covered by a national grid system**.

The legislative powers of the Federation were, in the Constitution, set out in the Second Schedule to the Constitution which includes three key legislative lists (the Exclusive, the Concurrent and the Residual legislative lists) itemising all matters in respect of which each tier of government in Nigeria is empowered to legislate.

Electricity generation, transmission, and distribution were listed in the Concurrent Legislative List of the Constitution, which is a list that is defined under the Constitution as the list of matters which the National Assembly and a (State) House of Assembly may make laws to the extent prescribed in the Concurrent Legislative List.

Specifically, paragraphs 13 and 14 of the Concurrent Legislative List (Part II of the Second Schedule to the Constitution) provide as follows:

- "13.** *The National Assembly may make laws for the Federation or any part thereof with respect to-*
- a. Electricity and the establishment of electric power stations;*
 - b. The generation and transmission of electricity in or any part of the Federation and from one state to another state;*
 - c. The regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation and from one state to another state;*
 - d. The regulation of the right of any person or authority to dam up or otherwise interfere with*

	<p><i>the flow of water from sources in any part of the Federation;</i></p> <p>e. <i>The participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation;</i></p> <p>f. <i>The promotion and establishment of a national grid system; and</i></p> <p>g. <i>The regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment, or work designed for the supply or use of electrical energy.</i></p>
"14.	<p><i>A House of Assembly may make laws for the State with respect to-</i></p> <p>a. <i>electricity and the establishment in that state of electric power stations;</i></p> <p>b. <i>the generation, transmission and distribution of electricity to areas not covered by a national grid system within that state; and</i></p> <p>c. <i>the establishment within that state of any authority for the promotion and management of electric power stations established by the state."</i></p>

The text which reads "*areas not covered by a national grid system*" in Paragraph 14 (b) of the Constitution had, for many years, been the subject of debate concerning whether states were prohibited from legislating on electricity matters (particularly generation) in areas covered by the national grid. On the one hand, an argument can be made that Paragraph 14 of the Concurrent List permits state governments to only generate, transmit and distribute electricity to areas not connected to the national grid (such as rural settlements lacking transmission infrastructure which facilitates the distribution of power from generation stations to end users). If the interpretative rule that the express mention of one thing in a statutory provision automatically excludes any other were to be adopted, this would mean that the Constitution intended for states to make laws permitting them to generate, transmit and distribute electricity if the laws are restricted to areas not covered by the national grid.

Another position, which also has some merit, is that states were not restricted from legislating on the establishment of electric power stations (i.e., electricity generation) given the text of Paragraph 14 (a) of the Concurrent Legislative List. The moral support for this position lies in the scarcity of power generation facilities which would, otherwise, satisfactorily cater to the needs of all residents in a state even where all areas of such state are allegedly covered by the national grid.



With laws such as the Lagos State Electric Power Sector Reform Law, it would appear that the Lagos State government believes that the state's requirements, influenced by its current population, makes it inclined to interpret the legislative intent in Paragraph 14 of the Concurrent List, as accommodative of legislating on state-powered electricity generation (and potentially, transmission, and distribution) to all areas within the states whether or not covered by the national grid.

Be that as it may, the foregoing discussions have now been put to rest by the Constitutional Amendments which altered paragraph 14 (b) of Part II of the Second Schedule of the Constitution reproduced above by deleting the word "areas", and the text which reads: *"not covered by a national grid system"* both at paragraph 14 (b) of Part II of the Second Schedule to the Constitution.

The import of these amendments is the expansion of the legislative powers of states to make laws on the generation, transmission, and distribution of electricity to include areas within the state covered by the national grid thereby completing the processes aimed at liberalising the regulation of the Nigerian power sector which commenced over a decade ago.

Impact on NESI

Reports of the World Bank Group indicate that 85 million Nigerians do not have access to grid electricity. This represents 43% percent of the country's population and makes Nigeria the country with the largest energy access deficit in the world, resulting in annual economic losses estimated at \$26.2 billion (₦10.1 trillion) which is equivalent to approximately 2 percent of GDP¹.

The electricity generation and distribution deficiency in Nigeria is caused mainly by inadequate power transmission infrastructure. Reactionarily, prior to the Constitutional Amendments, some states had begun to contemplate generating and distributing electricity for state consumption rather than relying on the national grid. Lagos State released, in December 2021, an electricity policy which sets out an elaborate framework outlining structures to be adopted in accelerating electricity generation and distribution, to close the gap arising from the disproportionate distribution of electricity to the state from national grid sources.

As previously noted, there was a debate regarding whether state governments were previously prohibited from legislating on matters involving electricity generation, transmission, and distribution within their states or, indeed, the establishment of state-owned and managed electricity utilities.

¹ [Nigeria to Improve Electricity Access and Services to Citizens \(worldbank.org\)](https://www.worldbank.org/en/news/press-release/2021/04/28/nigeria-to-improve-electricity-access-and-services-to-citizens)



Many posited that the Constitution did not prevent state legislatures from legislating on the electricity market within their states, or on the generation, transmission, and distribution of electricity within each state's geographical boundaries. This contention is not without its flaws as it fails to contextualise the distinct nature of the Nigerian national grid system and the absence of operational deregulation of the transmission infrastructure thereby making it difficult for states to be independent of each other in various aspects of the power sector value chain.

Leaving aside the issue of legislation, the absence of the Constitutional Amendments did not prevent states from taking steps towards seeking opportunities for increasing electric power supply in their respective states. There are many examples of state-level investment in the power sector with Akwa Ibom, Lagos, Edo and Ondo states being a few examples of states that have either sponsored or provided guarantees in connection with utility scale generation projects.

The Constitutional Amendments signal a de-centralisation of the Nigerian power sector, and this births an expectation of progress particularly with respect to state-driven investments, the fostering of competition, access to capital, government support and other factors such as regulatory efficiency, private sector participation and sustainable development, all of which are catalysts for exponential growth in the years to come.

The Impact of the Constitutional Amendments

The Role of the Private Sector

Since the privatisation of the Nigerian power sector in 2013, the private sector has been playing a key role in the sector's advancement. The Constitutional Amendments will facilitate discussions that will aid the development of more public-private partnerships and encourage states to engage in capital-intensive utility projects which they would be unable to unilaterally fund.

Competition

With the liberalisation of the electricity market comes improved and healthy competitive practices and, ultimately, service delivery.

Investment in energy infrastructure

State governments should, in addition to passing legislation, prepare blueprints for the improvement, upgrade and construction of generation facilities in accordance with their specific needs. Undoubtedly, one of the impacts of the Constitutional Amendments is that investors will have an opportunity to invest in unserved or underserved communities covered by the national grid.



Increased focus on renewable energy infrastructure

With the global push for energy transition, a shift from fossil-based systems of energy production and consumption to renewable energy sources, private sector investment is inevitable.

Not much has been achieved at the federally regulated level in terms of utility scale renewable energy projects with many large-scale solar projects stalling in the past 5-8 years. The Constitutional Amendments present an opportunity for state governments to harness the potential for conceiving, designing, and implementing state-level utility scale renewable energy projects.

If states provide appropriate incentives, opportunities to build renewable energy infrastructure and generate and distribute electricity under the supervision of the relevant state governed power sector authority or regulator will be sustained.

Investment in transmission infrastructure

Prior to the Constitutional Amendments, Nigeria had just one transmission company – the Transmission Company of Nigeria (“TCN”). With states having the liberty to make laws on transmission, this will present opportunities for the establishment of intrastate, and regional, electricity transmission companies. While investment in transmission infrastructure is expensive, with appropriate incentivisation, public-private partnership projects can be developed, in collaboration with the private sector, to position the sector, and other aspects of the value chain, for exponential growth.

Investment in technical support services

Some level of technical expertise and availability of such expertise will be necessary for the development, and implementation, of projects across various states. The private sector has a role to play in bridging this competence gap by providing requisite support services through available human capital.

Collaboration

With the operational distinction between the national grid and off-grid areas having been removed, companies licensed to operate in areas covered by the national grid can effectively collaborate with companies operating on an off-grid basis thereby harmonising operation. This collaboration will focus on investments in utilising the existing operational framework between the companies, improving electricity generation, transmission, and distribution output and, potentially, increasing profit.



Regulatory Issues

Where state owned regulators are founded, they should be in a position to effectively regulate the generation, transmission, and distribution of electricity in their respective states and, hopefully, streamline the licensing process. The current regulator appears overwhelmed and, understandably, inundated with applications across the Federation and, therefore, the establishment of regulatory bodies that will undertake licensing, at state level, will ease doing business in the sector for participants.

All states of the Federation now have the liberty to make policies to address the inadequacies of electricity regulation that previously affected areas covered by the national grid in their respective states.


Options for State Governments

In a state such as Lagos, Nigeria's commercial hub, the Constitutional Amendments will provide the much-needed catalyst for the implementation of its most recent Electricity Policy (the "Policy") which clarifies the Lagos State Government's approach to constitutional, legal, engineering, and commercial foundations for developing a functional sub-national electricity sector that fully satisfies the needs of its residents.

The Policy recognises the demand placed on the Lagos State government to meet electricity needs while also taking cognizance of the carbon emissions associated with meeting the demands. The Policy is an example of how states can develop frameworks to maximise electricity generation, transmission and distribution prospects, and the Constitutional Amendments have affirmed the achievement of the goals outlined in the Policy.

Worthy of note are some of the impacts, in our view, of the Constitutional Amendments on the Policy:

- i. Lagos State can now enact laws and facilitate investments aimed at distributing energy to areas unconnected to the national grid or unable to afford the cost of off-grid generators, and/or areas covered by the national grid but underserved.
- ii. The opportunity for collaboration between the Federal and Lagos State governments towards ensuring the smooth transition of electricity regulation from the national electricity regulator to a state electricity regulator.

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- iii. Lagos State's eligibility for a state-owned regulatory authority to oversee the generation, transmission, and distribution of electricity within the state should ease doing business in the sector. While this may, potentially, create a problem of dual regulation of entities by both federal and state electricity regulators, the Policy addresses this issue with the proposition of a single regulator – whether federal or state – for any relevant activity.
 - iv. Lagos State government's ambitions of promoting clean energy projects and reducing environmental pollution, whilst implementing the Policy both in off-grid areas and areas previously covered only by the national grid, will come to fruition.

With the example set by Lagos State, we foresee other state governments adopting similar blueprints that will foster the development of the electricity sector in their respective states including the exploration and incorporation of available energy mixes to aid system planning, demand, and supply forecasting.

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