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NIGERIA

LAW AND PRACTICE:

p.3

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Law and Practice

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CONTENTS

1. General Structure and Ownership of the Power Industry	p.4	4. Generation	p.13
1.1 Principal Law Governing the Ownership and Structure of the Power Industry	p.4	4.1 Principal Laws Governing the Construction and Operation of Generation Facilities	p.13
1.2 Principal State-Owned or Investor-Owned Entities	p.5	4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities	p.13
1.3 Foreign Investment Review Process	p.5	4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities	p.13
1.4 Principal Law Governing the Sale of Power Industry Assets	p.9	4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights	p.14
1.5 Central Planning Authority	p.9	4.5 Requirements for Decommissioning	p.14
1.6 Material Changes in Law or Regulation	p.10	5. Transmission	p.14
1.7 Announcements Regarding New Policies	p.10	5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities	p.14
1.8 Unique Aspects of the Power Industry	p.11	5.2 Regulation of Transmission Service, Charges and Terms of Service	p.15
2. Market Structure, Supply and Pricing	p.11	6. Distribution	p.16
2.1 Structure of the Wholesale Electricity Market	p.11	6.1 Regulation of Construction and Operation of Electric Distribution Facilities	p.16
2.2 Imports and Exports of Electricity	p.11	6.2 Regulation of Distribution Service, Charges and Terms of Service	p.18
2.3 Supply Mix for the Entire Market	p.11		
2.4 Principal Laws Governing Market Concentration Limits	p.11		
2.5 Agency Conducting Surveillance to Detect Anti-Competitive Behaviour	p.11		
3. Climate Change Laws and Alternative Energy	p.11		
3.1 Principal Climate Change Laws and/or Policies	p.11		
3.2 Principal Law and/or Policies Relating to the Early Retirement of Carbon-Based Generation	p.12		
3.3 Principal Law and/or Policies to Encourage the Development of Alternative Energy Sources	p.12		

NIGERIA LAW AND PRACTICE

Contributed by Banwo & Ighodalo **Authors:** Stella Duru, Akindeji Oyeboode

Banwo & Ighodalo is a mid-size Nigerian law firm, currently comprising 12 partners and almost 80 additional lawyers. The energy & natural resources practice groups comprise oil & gas, power and mining. The team has advised on matters such as a loan facility of up to USD15,000,000 to be advanced to an off-grid electricity provider, to scale up a

business that provides solar electricity to homes and small businesses throughout Nigeria and advising an American multinational corporation that specialises in electric vehicles, energy storage and solar panel manufacturing, on the legal and regulatory framework for the sale and importation of utility-scale batteries in Nigeria.

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1. General Structure and Ownership of the Power Industry

1.1 Principal Law Governing the Ownership and Structure of the Power Industry

The principal legislation regulating the Nigerian Electricity Supply Industry (“NESI”) is the Electric Power Sector Reform Act (“EPSRA”) No. 6 of 2005. The EPSRA provides for the structure of and ownership in generation, transmission, distribution and supply segments within the NESI. The EPSRA establishes the Nigerian Electricity Regulatory Commission (“NERC”), which is the primary regulator of the NESI and provides for the licensing of participants in the NESI. Please note that the EPSRA can be downloaded from the following address: [http://www.nercng.org/index.php/library/documents/Regulations/Electric-Power-Sector-Reform-Act-\(EPSR\)-2005/](http://www.nercng.org/index.php/library/documents/Regulations/Electric-Power-Sector-Reform-Act-(EPSR)-2005/)

Historically, the Federal Government of Nigeria (“FGN”) through the state-owned utility corporation, the National Electric Power Authority (“NEPA”), undertook the generation, transmission and distribution of electricity in Nigeria. However, following the enactment of the EPSRA in March 2005, the vertically integrated NEPA was unbundled and its employees, assets, liabilities, rights and obligations were first transferred into a holding company incorporated for that purpose, the Power Holding Company of Nigeria Plc (“PHCN”). Subsequently, PHCN’s assets, employees, liabilities, rights and obligations were then transferred to its successor companies (six generation, one transmission

and 11 distribution companies). Save for the transmission company, Afam Power Plc and Yola Electricity Distribution Company Plc, the successor companies have been fully or partially privatised or concessioned. Thus, in the current climate, there is largely a combination of state-owned/private investor-owned generation, transmission, distribution and supply companies in the NESI.

Generation

Currently, the key operators in the generation sector of the NESI comprise:

- the six successor generation companies (the “Gencos”) previously solely owned by the FGN but which have been fully or partially privatised or concessioned;
- the Niger Delta Power Holding Company Limited (“NDPHC”), which is a company incorporated by the Federal Government which owns and manages the National Integrated Power Project (“NIPP”) consisting of ten power generation plants; and
- the independent power companies licensed by NERC to generate power (some of which are owned by State Governments, some of which are solely private-owned and some of which are owned under private-public partnerships).

Transmission

Presently, the transmission sector of the NESI is a monopoly business undertaken by the Transmission Company of Nigeria Plc (“TCN”), the owner and operator of the national elec-

tricity transmission grid (“National Grid”). TCN was carved out of the defunct PHCN and is solely owned by the FGN.

However, private companies are currently permitted to establish and operate mini-grids in Nigeria, which may be isolated or connected to distribution networks in Nigeria.

Distribution

The key operators in the distribution sector of the NESI comprise:

- the 11 successor distribution companies (the “Discos”), which have been partially privatised, with the FGN retaining minority equity in the Discos; and
- Independent Electricity Distribution Network (“IEDN”) operators, which are licensed by NERC and owned by private investors.

Bulk Trader

The Nigerian Bulk Electricity Trading Plc (“NBET”) is a company owned by the FGN, which purchases electricity from the Gencos and on-sells to the Discos.

The NESI currently consists of disaggregated (unbundled) entities for the each of its different segments, even though, as mentioned above, it was originally vertically integrated.

1.2 Principal State-Owned or Investor-Owned Entities

The principal generation companies in Nigeria include:

- the Gencos:
 - (a) Afam Power Plc;
 - (b) Egbin Power Plc;
 - (c) Kainji Hydro Electric Plc;
 - (d) Sapele Power Plc;
 - (e) Shiroro Hydro Electric Plc; and
 - (f) Ughelli Power Plc;
- the NIPP companies:
 - (a) Alaoji Generation Company Limited;
 - (b) Calabar Generation Company Limited;
 - (c) Omoku Generation Company Limited;
 - (d) Benin Generation Company Limited;
 - (e) Egbema Generation Company Limited;
 - (f) Gbarain Generation Company Limited;
 - (g) Geregu Generation Company Limited;
 - (h) Ogorode Generation Company Limited;
 - (i) Olorunshogo Generation Company Limited; and
 - (j) Omotosho Generation Company Limited;
- State Government-owned companies such as Ibom Power Company Limited;
- independent power producers (“IPPs”):
 - (a) Nigerian Agip Oil Company Limited (on behalf of the Nigerian Agip Oil Company Limited/Nigerian National Petroleum Corporation Joint Venture);

- (b) Shell Petroleum Development Company Limited (on behalf of the Shell Petroleum Development Company Limited Joint Venture);
- (c) Azura Power; etc;

- NBET, which is the primary bulk electricity trading company in Nigeria and is owned by the FGN;
- TCN, which is a company owned and controlled by the FGN, and which owns and operates the National Grid through which electricity is transmitted within Nigeria; and

- the principal distribution companies:

- (a) Abuja Electricity Distribution Company Plc;
- (b) Benin Electricity Distribution Company Plc;
- (c) Eko Electricity Distribution Company Plc;
- (d) Enugu Electricity Distribution Company Plc;
- (e) Ibadan Electricity Distribution Company Plc;
- (f) Ikeja Electricity Distribution Company Plc;
- (g) Jos Electricity Distribution Company Plc;
- (h) Kaduna Electricity Distribution Company Plc;
- (i) Kano Electricity Distribution Company Plc;
- (j) Port Harcourt Electricity Distribution Company Plc;
- (k) Yola Electricity Distribution Company Plc); and
- (l) IEDN licensees.

Until such time that the NESI develops the settlement, accounting, managerial and governance systems required for successful bilateral contracting, NBET currently bulk-buys electricity from the grid-connected power generation companies (including Gencos and IPPs) and vests same in the Discos. The Discos then on-sell to the end-use customers.

However, following the issuance of the NERC Eligible Customer Regulations 2017, electricity generation companies can now sell electricity directly to end-use consumers that are eligible customers as provided for in the ESPRA and the aforementioned Regulations.

1.3 Foreign Investment Review Process

The Foreign Investment Review Process

Requirement for the Incorporation of a Nigerian Company

Section 54 of the Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria (“LFN”) 2004 (“CAMA”) mandates every foreign entity seeking to do business in Nigeria to incorporate a separate entity in Nigeria. However, a foreign entity may, pursuant to Section 56 (1) of CAMA, apply to the Federal Executive Council of the FGN to waive the requirement to register a separate entity in Nigeria where it is:

- engaged by, or with the approval of, the FGN to execute specific projects;
- undertaking approved loan projects in Nigeria on behalf of donor foreign countries or international organisations;

- owned by foreign governments and is engaged wholly in export promotion activities; or
- a firm of engineering consultants or technical experts and is working on a specialist project under contract with any government of the Federation of Nigeria or a department of such government.

Consequently, foreigners seeking to engage in business in the NESI will be required to incorporate a company in Nigeria.

Certificate of Business Registration

By virtue of the Nigerian Investment Promotion Commission (“NIPC”) Act, Cap N117 LFN 2004, a foreigner is permitted to freely invest or participate in the operation of any enterprise (excluding those specifically listed in the NIPC, such as arms and ammunition, narcotic drugs, military and paramilitary wares, etc), in Nigeria.

However, the NIPC Act stipulates that any company in which non-Nigerians participate must register with the NIPC and obtain a Certificate of Business Registration before carrying on business in Nigeria. Therefore, where a foreigner holds shares in a company doing business in the NESI, the company must register with the NIPC.

Business Permit

Further, pursuant to the Immigration Act, Cap I1 LFN 2004, a non-citizen shall not establish a business or register a company without the consent of the Minister responsible for immigration matters. The Minister’s consent is issued in the form of a Business Permit from the Federal Ministry of Interior.

Consequently, where a foreigner holds shares in a company doing business in the NESI, the company must obtain a Business Permit from the Federal Ministry of Interior.

Importation and Repatriation of Investment Capital

The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap F34 LFN 2004 (“FEMM Act”) provides that any person may invest in a Nigerian enterprise with foreign currency imported into Nigeria through an authorised dealer (usually a bank licensed to deal in foreign exchange) by telegraphic transfer, cheques or other negotiable instruments converted into naira. At the point of exporting investment capital to Nigeria, a foreign investor is required to specify the Nigerian beneficiary of the investment funds and the purpose therefor. An authorised dealer is required to issue a Certificate of Capital Importation (“CCI”), evincing receipt of investment capital within 24 hours of receipt of imported funds.

The FEMM Act further provides that foreign currency imported into Nigeria for investment purposes shall be guaranteed unconditional transferability through an authorised

dealer in freely convertible currency. Unconditional convertibility and repatriation will also apply to yields on investment funds (dividends, profits, loan repayments, etc), and in the event of a divestment. Thus, a CCI assures the unhindered remittance of investment capital and yields thereon, in any convertible currency. Remittance of these monies is usually at the prevailing official exchange rate of the naira on the relevant date.

On 11 September 2017, the Central Bank of Nigeria (“CBN”) deployed the Electronic Certificate of Capital Importation (“e-CCI”) platform and directed all Nigerian banks to migrate to issuing e-CCIs in place of physical CCIs, in order to facilitate the tracking of investments across banks, eradicate the risks of loss of physical CCIs and wear and tear, and eradicate fraud associated with the forgery of physical CCIs, while enhancing transparency and fostering efficient processing of the CCIs.

Local Content Requirements

NERC issued the Regulations on the National Content Development for the Power Sector 2014 (the “Local Content Regulations”) to promote the deliberate utilisation of Nigerian human and material resources, goods and services in the NESI. The Local Content Regulations contain a number of provisions that are applicable to licensees and operators in the NESI.

Please note that the Local Content Regulations do not restrict a foreigner from operating in the NESI. However, the Local Content Regulations stipulate that foreigners can only hold 5% of the management positions in a licensee in the NESI. Additionally, all junior and intermediate cadre in the licensee must be held by Nigerians. Furthermore, licensees in the NESI are required to give first consideration to goods made in Nigeria and services provided by Nigerian firms in the awarding of contracts.

Expatriate Quota

Where a Nigerian company intends to employ non-Nigerian personnel, it must obtain an expatriate quota approval for the relevant position. Expatriate approvals are typically valid for a specified period and are renewable for consecutive terms. Upon the company securing expatriate quota approval(s), foreign employee(s) must obtain Combined Expatriate Residence Permit and Alien Card(s), which permit(s) the employee(s) to reside and work in Nigeria and is/are typically valid for two years.

Tax Registration

The Companies and Income Tax Act, Cap C21 LFN 2004 (“CITA”) provides for the taxation of profits of companies (other than oil and gas exploration and production companies). For this reason, all companies assessable to tax under CITA must register with the Federal Inland Revenue Service

(“FIRS”) and obtain a tax identification number (“TIN”) immediately after incorporation.

Protections That Apply to Foreign Investment in the Power Industry

Seizure, Confiscation and Expropriation

Section 25 of the NIPC Act guarantees that foreigners can freely invest in Nigeria and such investments are preserved from expropriation or compulsory acquisition by any government of the Federation, except when such acquisition is in the national interest or for a public purpose and under a law which makes provision for (a) payment of fair and adequate compensation and (b) a right of access to the courts for the determination of the investor’s interest or right and the amount of compensation to which the investor is entitled.

Other than the aforementioned statutory provision, parties are generally free to contractually agree the terms that will govern their relationship. Hence, a foreigner seeking to invest in the NESI may contractually establish security structures that will seek to protect the foreigner’s investment from expropriation or compulsory acquisition or in any event guarantee that adequate compensation is paid to the foreigner where such events occur. One of such contractual protections currently available in the NESI is the Put Call Option Agreement (“PCOA”), which is entered into with the FGN. Under the PCOA, where the FGN expropriates or compulsorily acquires the investment of a foreign investor in the NESI the foreign investor is guaranteed adequate compensation in line with the terms agreed thereunder which typically cover any outstanding debt obligations in connection with the power project, outstanding shareholder contributions and an agreed rate of return on investment.

Additionally, Nigeria has negotiated Bilateral Investment Promotion and Protection Agreements/Treaties (“BITs”) with several countries, as part of efforts to foster foreign investors’ confidence. BITs which are currently in force include those with France, the Netherlands, Romania, South Africa, Spain, Sweden, Serbia, the Republic of Korea, Taiwan Province of China, Italy, Germany, China, Finland, Switzerland and the United Kingdom. Where a foreign investor routes its investment through a special purpose vehicle incorporated in one of the countries with which Nigeria has executed a BIT, its investment in Nigeria will be protected from expropriation, and the investor will be guaranteed the transfer of interests, dividends, profits and other incomes, as well as adequate compensation for any non-discriminatory disposition, in addition to the protection granted by Section 25 of the NIPC Act.

Access to Domestic Courts

By virtue of the provisions of Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, the judicial powers of the Nigerian courts extend to all matters between persons,

or between government or authority and any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. Consequently, save where parties may have agreed to the contrary, a foreign investor is guaranteed access to the Nigerian courts.

Applicability of International Law and Availability of International Arbitration

Regarding the applicability of international law, parties are generally permitted to agree on the law that will govern their transaction and Nigerian courts are bound to honour the intention of the parties on their choice of law provided the choice of law is not contrary to law or public policy.

Similarly, parties to a contract are typically allowed to choose international arbitration as the means of resolving any dispute arising from the contract, and Nigerian courts typically honour the parties’ intention in that regard. Additionally, Section 26 of the NIPC Act guarantees a foreign investor the option of recourse to international arbitration machinery for the settlement of investment disputes with any government of the Federation.

The NIPC Act further provides that where there is a disagreement on the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply. Please note that Sections 4 and 5 of the Arbitration and Conciliation Act, Cap A18 LFN 2004 (“Arbitration Act”) permit the courts in Nigeria to grant a stay of court proceedings where a matter which is subject to an arbitral proceeding is brought before a Nigerian court.

Furthermore, arbitral awards will be enforced by the Nigerian courts if rendered by an arbitral institution rendering an award under the auspices of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (“the Convention”). Pursuant to Section 54 of the Arbitration Act, an arbitral award made in a country that is a party to the Convention will be enforced by the Nigerian courts subject to the provisions of the Convention and the following conditions:

- that the country in which the award is made has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention; and
- that the Convention shall apply only to differences arising out of a legal relationship which is contractual.

Notwithstanding Section 54 of the Arbitration Act (and regardless of whether the country is a party to the Convention or not), an arbitral award may, pursuant to Sections 51 and 52 of the Arbitration Act, be enforced by the Nigerian courts irrespective of the country in which it is made, upon writ-

ten application to the Nigerian courts by the party seeking enforcement of the award and the application being accompanied by the relevant documents.

Notwithstanding the foregoing, please note that Section 6(2)(r) of the National Office for Technology Acquisition and Promotion Act, Cap N68 LFN 2004 (“NOTAP Act”) provides that the National Office for Technology Acquisition and Promotion Council (“NOTAP”) shall not register a contract or agreement where the transferee is obliged to submit to a foreign jurisdiction in any controversy arising for decision concerning the interpretation or enforcement of the contract or agreement in Nigeria. Consequently, where an agreement entered into by the foreign investor in connection with the NESI is one that requires the approval of NOTAP then parties may be unable to procure the requisite registration where a party to the contract is subject to foreign law. Please note, however, that Section 6(3) of the NOTAP Act adds that Section 6(2)(r) of the NOTAP Act may be dispensed with where NOTAP is satisfied that it would be in the national interest to do so.

Incentives for Foreign Investment

The key incentives available to companies engaged in activities in the power sector are summarised below:

Pioneer Status

Pioneer status confers a tax holiday that affords relief from payment of income tax for a period of up to five years (that is, an initial three-year period beginning from their date of first production, which may then be extended for a further period of up to two years), for companies carrying on business in sectors of the Nigerian economy that are considered to be vital to Nigeria’s development.

Businesses in the NESI that can benefit from Pioneer status include independent power generation companies utilising gas, coal and renewable energy sources.

Special Incentives

Section 22 of the NIPC Act empowers the NIPC to negotiate, in consultation with appropriate government agencies, special incentives for strategic or major investments.

Protection From Double Taxation

Nigeria currently has double taxation treaties (“DTTs”) with a number of countries including Belgium, Canada, China, France, the Netherlands, Pakistan, Philippines, Romania, South Africa, the United Kingdom and the Republic of Korea.

Generally, the DTTs seek to minimise the impact of double taxation by Nigeria and treaty countries, on income from a single source. For instance, the WHT rate for dividend,

interest, rent and royalty, which is typically 10%, is reduced to 7.5% where the recipient is from a treaty country.

Incentives for Gas Utilisation

- After any tax-free period, an annual capital allowance of 90% with 10% retention for investment in plant and machinery;
- An additional investment allowance of 15% (uplift on the cost of the asset) which does not reduce the value of the asset;
- Tax-free dividends during the tax-free period where the investment for the business was made in foreign currency or the introduction of imported plant and machinery during the period should not be less than 30% of the equity share capital of the company; or
- An additional investment allowance of 35% (uplift on the cost of the asset) which shall not reduce the value of the asset.
- Interest payable on any loan obtained for a gas project with the prior approval of the Minister of Finance is tax deductible;
- The Value Added Tax Act, Cap VI LFN 2004 exempts certain goods and services from the application of VAT and these include “*plant, machinery and equipment purchased for gas utilisation in the downstream petroleum operations*”.
- The Customs, Excise Tariff, etc. (Consolidation) Act exempts from custom duties, any machinery, equipment or spare part imported into Nigeria by an industrial establishment engaged in power generation through the utilisation of Nigerian gas for its operations.

Incentives for Renewable Energy

NERC issued the Regulation on Feed-In Tariff for Renewable Energy Sourced Electricity in Nigeria (“REFIT”) 2015 (which became effective in February 2016) to stimulate investment in renewable energy. It specifies that a total of 1,000 MW by 2018 and 2,000 MW by 2020 should be generated through grid-connected renewables, such as biomass, small hydropower, wind and solar.

Pursuant to REFIT:

- Discos are obliged to source at least 50% of their total procurement from renewables; and
- The feed-in tariff stipulated thereunder supersedes the tariff provided for in the Multi-Year Tariff Order (“MYTO”) in relation to IPPs that meet the minimum and maximum specified capacities. The feed-in tariff is not applicable for wind power plants below 1 MW and above 10 MW; hydropower plants below 1 MW and above 30 MW; biomass power plants below 1 MW and above 10 MW; as well as solar photovoltaic power plants below 1 MW and above 5 MW.

1.4 Principal Law Governing the Sale of Power

Industry Assets

The Nigerian legislations that currently govern the sale of electricity assets are:

- The EPSRA;
- NERC Order on the Procedure for Obtaining Approval of the Commission for the Assignment/Ceding of a Licence, Transfer of Undertaking, or Change in Shareholding of Licenced Entities under Section 69 of the Electric Power Sector Reform Act, 2005 (“NERC’s Order”);
- The Investment and Securities Act, Cap I LFN 2004 (“ISA”);
- The Companies and Allied Matters Act, Cap C20 LFN 2004; and
- The Securities and Exchange Commission (“SEC”) Rules and Regulations 2013.

The regulators and other details are as follows:

NERC

Section 69 (1) of the EPSRA provides that a licensee shall not assign or cede his licence or transfer his undertaking or any part thereof, by way of sale, mortgage, lease, exchange or otherwise, without the prior consent of NERC.

NERC’s Order provides the procedure for the transfer of licence (“Transfer”), an assignment/ceding of undertakings of a licensee (“Assignment”) or any change in shareholding of a licensee (“Change”).

For any of the applications, an applicant will submit an application to NERC for approval supported by the accompanying documents stipulated in NERC’s Order, ensure that all outstanding indebtedness owed to NERC such as the Annual Operational Fees, Fines, Penalties, etc are settled, and pay all relevant fees in connection with the application.

NERC will thereafter conduct a legal due diligence on the transferee/assignee/new shareholder. Where this is successful, NERC will grant its approval of the transaction.

The timeline for the completion of the application is between three and six months.

NERC typically requires that the purchaser of assets or an acquirer of a licensee must have sufficient technical and financial capability to participate in the NESI. There are no stated thresholds used in determining whether a purchaser or an acquirer is technically or financially capable to participate in the NESI. NERC’s decision in this regard is subject to its discretion.

SEC

The prior review and approval of the SEC (the apex regulatory body in Nigeria for the regulation of capital markets,

mergers, acquisitions and other forms of business combinations) is required for transactions involving any merger, acquisition or external restructuring between or among companies. However, in order for a transaction to be subject to the SEC’s prior review and approval, the transaction must involve the acquisition of a company with assets or turnover above NGN500 million.

The general procedure for obtaining the SEC’s consent includes:

- Submission of relevant documents at the office of the Director General of the SEC;
- Review of documents and communication of deficiencies (if any) to the applicant. Where deficiencies are communicated, the timeline for the grant of the approval resets; and
- In the absence of any deficiency, grant of approval and communication to the applicant.

The process will typically take between three and six months.

1.5 Central Planning Authority

The National Grid, which is utilised for the transmission of electricity in Nigeria, is owned and operated centrally by TCN, which currently acts as the system operator. However, NERC regulates the affairs of all participants in the NESI including TCN. NERC issued the Grid Code to regulate entities that have their facilities connected to the National Grid. Please note that NERC has also issued the Distribution Code to regulate the electricity distribution companies and other users of distribution networks in Nigeria.

Additionally, NERC also has a role to play in enforcing standards and regulations in the NESI. In that regard, NERC issued the Nigerian Electricity Supply and Installation Standards (“NESIS”) Regulation, which regulates the engineering, installation, commissioning and maintenance of electric systems in the NESI.

Additionally, the Nigerian Electricity Management Service Agency (“NEMSA”) Act of 2015 (“NEMSA Act”) establishes the NEMSA and grants it the responsibility to enforce technical standards and regulations, as well as inspect, test and certify all electrical installations used in the NESI.

TCN performs the following functions:

- provision of transmission services, that is, the construction and maintenance of the grid, the procurement of ancillary services and the wheeling or conveying of electric power form generation points to load centres over high tension wires;
- independent system operation, that is, the activities required to maintain the integrity of the National Grid such

as scheduling, congestion management and system planning; and

- market operation, that is, the administration of the wholesale electricity market and the promotion of efficiency and competition.

Regarding generation planning and development, please note that one of the principal objects for the establishment of NERC is to create, promote and preserve efficient industry and market structures and to ensure optimal utilisation of resources for the provision of electricity. Another objective of NERC is to ensure that an adequate supply of electricity is available to consumers. Lastly, please note that NERC has the powers to monitor and operate the NESI and issue and regulate persons engaged in the generation, transmission, system, operation, distribution and trading of electricity.

NERC, by virtue of the Grid Code, establishes the reliability standards in connection with the National Grid. However, by virtue of TCN's rights and responsibility to operate the National Grid, TCN is empowered to implement such reliability standards.

1.6 Material Changes in Law or Regulation

The Mini-Grid Regulations

The Mini-Grid Regulations were adopted on 24 May 2017 by NERC. The Mini-Grid Regulations: (a) were issued to accelerate electrification in areas without existing distribution infrastructure, as well as areas with existing but poorly electrified or non-functional distribution facilities; and (b) are expected to act as a catalyst for stimulating the desired improvements along the electricity value chain.

The Eligible Customer Regulations

NERC issued the Eligible Customer Regulations on 1 November 2017. The objectives of the Eligible Customer Regulations include the facilitation of competition in the supply of electricity, allowing electricity generation companies with uncontracted capacity access to unserved and underserved customers, with the aim of improving financial liquidity in the sector and encouraging third party access to transmission and distribution infrastructure, as a precursor to full retail competition in the NESI.

The Eligible Customer Regulations are expected to enhance competition in the NESI and enable bilateral arrangements between multiple willing sellers and buyers of bulk electricity. This will in turn lead to generating companies having the opportunity to supply electricity to bankable entities that have the capacity to pay for the electricity supplied, which will result in substantially tackling the liquidity challenge affecting the electric power value chain in the country.

Issuance of Regulation on Meter Assets Providers

NERC issued this year the Regulation on Meter Assets Providers to regulate meter asset providers who would on a competitive basis provide for the financing, procurement, installation and maintenance of meters as a means of fast-tracking the metering of all electricity customers in the NESI. The objectives of the Regulation include the provision of standard rules for the emergence and participation of independent and competitive meter assets providers, the elimination of estimated billing practices and the acceleration of meter rollout.

Lagos State Electric Power Sector Reform Law 2018

In line with the Lagos State Government's desire to improve electricity supply in Lagos State (arguably the most financially vibrant state in Nigeria and the economic hub of the country), the Lagos State Electric Power Sector Reform Law seeks to, among other things: provide for the development and management of sustainable power supply in Lagos State; facilitate the development and management of electricity infrastructure and facilities within Lagos State; ensure the availability of cost-effective electric power supply; and provide support in the collection of tariffs and revenue from embedded power end-users.

1.7 Announcements Regarding New Policies

The Power Sector Recovery Implementation Plan ("PSRIP")

The PSRIP was approved by the Federal Executive Council ("FEC") on 22 March 2017. The PSRIP, which was developed in consultation with the World Bank Group ("WBG"), is a set of policy actions and operational and financial interventions to be implemented by the FGN to attain financial viability of the NESI. If properly implemented, the PSRIP aims among other things to eliminate the payment deficit which had accumulated in 2015 and 2016, fund the deficit, ensure performance and implementation of credible business continuity plans by the Discos and TCN, ensure cost-reflective tariffs and increase electricity access by implementing off-grid renewable power solutions.

The implementation of the PSRIP is expected to introduce significant additional funding to ensure liquidity in the NESI. Thus, one of the key anchors of the PSRIP is to secure through, or from the WBG, financial support of up to USD2.5 billion for the NESI which is in addition to a NGN701 billion Central Bank of Nigeria ("CBN") facility which the FGN approved for NBET on 1 March 2017.

DFID Solar Nigeria Programme

The Solar Nigeria Programme is a GBP13 million funding programme designed and funded by the United Kingdom's Department for International Development ("DFID"). The programme aims to provide grants to companies involved in providing household solar energy and technologies.

1.8 Unique Aspects of the Power Industry

- *Encouragement of off-grid power generation and renewable energy sourced IPPs:* There is a general trend towards defocusing on-grid power generation. Some of the recent developments in the NESI, including the issuance of the Mini-Grid Regulations, the IEDN Regulations, the DFID Solar Nigeria Programme and the African Development Bank's proposed investment of USD12 billion in renewable energy, as well as the advantage presented by REFIT, are all aimed at spurring significant investment opportunities in these off-grid and renewable energy projects.
- With the issuance of the Regulation on Meter Assets Providers, opportunities have opened up for manufacturers and suppliers of metering equipment in the NESI.
- *Rural electrification:* There are also incentives in the sector that encourage the development of IPPs for unserved areas in Nigeria. These include liberalisation of regulatory requirements under the Mini-Grid Regulations, as well as the FGN's NGN2 billion fund for the electrification of rural areas in Nigeria, included as part of the 2017 budget. These are in addition to the Rural Electrification Fund, established to promote, support and provide rural electrification programmes through public and private sector participation.

2. Market Structure, Supply and Pricing

2.1 Structure of the Wholesale Electricity Market

The EPRSAs is the principal legislation regulating the wholesale electricity market.

Electricity prices are currently regulated in Nigeria based on the methodologies adopted by NERC for such purpose, pursuant to Sections 32 and 76 of the EPSRA. This culminated in NERC's issuance of the MYTO, which is the pricing framework for the NESI.

Generally, the wholesale electricity market involves the sale of both capacity and energy, with template power purchase agreements currently being utilised for on-grid supply of electricity providing for both capacity and energy payments.

However, recent template power purchase agreements used for on-grid solar power projects provide for only energy payments.

Please note that there is no nodal pricing in the NESI.

2.2 Imports and Exports of Electricity

There is currently no framework for the importation of electricity in Nigeria. However, with regard to exportation, Nigeria through TCN currently exports about 200 MW of electricity to Communauté Electrique du Bénin (which is a binational electric utility owned by Benin Republic and

Togo); as well as about 100 MW of electricity to the Niger Republic, under a legacy obligation of NEPA (and later PHCN).

2.3 Supply Mix for the Entire Market

We understand that the energy mix for on-grid power generation as at April 2018 was approximately 81% thermal and 19% hydro.

2.4 Principal Laws Governing Market Concentration Limits

There are currently no market concentration limits imposed by the EPSRA. However, NERC has the responsibility under the EPSRA to monitor the NESI and to determine its potential for additional competition. NERC is also required to prevent or mitigate abuses of market power in its decisions and orders.

Additionally, the EPSRA requires any licensee that wishes to acquire by purchase or otherwise, or affiliate with, the licence or undertaking of any other licensee, to obtain the prior written consent of NERC.

2.5 Agency Conducting Surveillance to Detect Anti-Competitive Behaviour

While no specific anti-competition legislation is applicable to the NESI, by virtue of the EPRSAs NERC is required to ensure that the regulation of the NESI is fair and balanced for licensees, consumers, investors and other stakeholders.

Additionally, NERC is required to promote competition and private sector participation, where feasible. Consequently, NERC may at a subsequent time provide for specific anti-competition regulation.

3. Climate Change Laws and Alternative Energy

3.1 Principal Climate Change Laws and/or Policies

There are no specific climate change laws in effect in Nigeria. However, the FEC in 2012 approved a National Adaptation Strategy and Plan of Action on Climate Change for Nigeria ("NASPA-CCN") as a national document for implementing climate change activities in Nigeria.

There are also a number of legislations that regulate the environment and they include:

- The Environmental Impact Assessment ("EIA") Act, Cap E12 LFN 2004;
- The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (the "NESREA Act") and Regulations issued pursuant thereto;

- The Harmful Waste (Special Criminal Provisions etc.) Act; and
- The Nuclear Safety and Radiation Protection Act.

Further, Nigeria is a signatory to the Kyoto Protocol and has in place a National Policy on Climate Change and Response Strategy for implementing climate change activities in the country. Please note that even though the protocol has not been domesticated, the NESREA Act mandates NESREA to enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment and such agreements as may from time to time come into force.

Lastly, please note that there is currently a bill before the National Assembly seeking to establish a legal framework for climate change policy formulation and implementation. The bill also seeks to establish a council to coordinate climate change governance as well as support the adaptation and mitigation of the adverse effects of climate change in Nigeria.

Section 2 of the EIA Act provides that no project or activity in the public or the private sector of the economy shall be undertaken without prior consideration, at an early stage, of the environmental effects of such project or activity. In addition, where the extent, nature or location of a proposed project or activity is likely to significantly affect the environment, an EIA report must be prepared and submitted to the Federal Environmental Protection Agency (or in practice the Federal Ministry of Environment) and a certificate obtained authorising such project. One of such activities is the construction of steam-generated power stations burning fossil fuels (such as gas and coal) and having a capacity of more than 10 MW. An EIA report and certificate are also required by NERC in an application for a generation licence, where the capacity of the power plan is 10 MW or more.

Further, the NESREA Act prohibits the discharge or harmful quantities of hazardous substances into the air, land, water and shorelines of Nigeria except as permitted by law. Hazardous wastes include any chemical, physical, biological or radioactive materials that pose a threat to human health and the environment. A corporate offender is liable on conviction to a fine not exceeding NGN1 million and an additional fine of NGN50,000 for each day the violation subsists.

Further, NESREA, pursuant to the NESREA Act and regulations issued thereto, requires project developers to obtain a number of permits such as:

- Waste and Toxic Substances Permit (the National Environmental (Sanitation and Wastes Control) Regulations 2009); and
- Noise Permit (National Environmental (Noise Standards and Control) Regulations 2009).

In particular, NESREA requires project developers to obtain an air quality (atmospheric emission) permit, pursuant to (a) the National Environmental (Ozone Layer Protection) Regulations, 2009; (b) the National Environmental (Electrical/Electronic Sector) Regulations, 2011; and (c) the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, 2011.

The National Environmental (Ozone Layer Protection) Regulations generally prohibit the release of and working with ozone-depleting substances, which include chlorofluorocarbons, halons, hydrochlorofluorocarbons and hydrofluorobromide.

NESREA possesses broad enforcement powers that include the powers to enter and search with a warrant any premises, to seize environmental substances considered harmful, to suspend activities, and to seal and close down premises pursuant to court orders.

3.2 Principal Law and/or Policies Relating to the Early Retirement of Carbon-Based Generation

There are currently no specific legislations that encourage early retirement of carbon-based generation, such as coal.

3.3 Principal Law and/or Policies to Encourage the Development of Alternative Energy Sources

Please see our responses in relation to incentives for renewable energy in **1.3 Foreign Investment Review Process** and **1.8 Unique Aspects of the Power Industry**. The laws and policies include:

- The Renewable Electricity Policy Guidelines 2006 and the Renewable Electricity Action Programme 2006 (which appears to have been abandoned);
- The National Biofuel Policy and Incentives;
- The Renewable Energy Master Plan, 2005 and 2012;
- The National Renewable Energy and Energy Efficiency Policy (“NREEEP”), 2015;
- The National Renewable Energy Action Plan for 2015–30, as adopted by the National Council on Power on 14 July 2016; and
- REFIT.

The NREEEP declares that the proportion of Nigeria’s electricity generated from renewable energy sources shall increase to a level that meets or exceeds the ECOWAS regional policy targets for renewable electricity generation and energy efficiency for 2020.

The NREEEP therefore targets for:

- Large hydro plants (100 MW and above), a capacity of 4,549 MW by 2020 and 4,626.96 MW by 2030;

- Small hydro plants (1 MW–30 MW), a capacity of 1,607 MW by 2020 and 8,173.81 MW by 2030;
- Solar plants, a capacity of 1,343.17 MW by 2020 and 6,830.97 MW by 2030;
- Biomass, a capacity of 631.41 MW by 2020 and 3,211.14 by 2030; and
- Wind, a capacity of 57.40 MW by 2020 and 291.92 by 2030.

There is currently no specific competitive procurement process for alternative energy sourced power generation. Please see our responses in relation to incentives for renewable energy in **1.3 Foreign Investment Review Process** and **1.8 Unique Aspects of the Power Industry**. Pursuant to the FGN's commitment to developing renewable energy, NBET signed Power Purchase Agreements with 14 solar independent power producers. However, parties are still negotiating the PCOA and certain commercial terms.

The incentives provided under REFIT are funded through rates paid by end-use consumers.

4. Generation

4.1 Principal Laws Governing the Construction and Operation of Generation Facilities

The EPSRA is the principal law that governs the construction and operation of generation facilities in Nigeria. Section 62 of the EPSRA provides that no person except in accordance with a licence issued pursuant to the EPSRA shall engage in any of electricity generation, transmission, system operation, distribution or trading, or operate an undertaking for such businesses. Thus, a power generation licence must be obtained prior to the construction and operation of generation facilities.

4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities

The primary licence that an applicant seeking to construct and operate a power generation facility will require is the generation licence issued by NERC. An applicant seeking to construct and operate a generation facility will be required to apply to NERC for a generation licence together with accompanying documents.

Upon the submission of an application for the relevant generation licence and supporting documents and the payment of a non-refundable application fee, the receipt of the application will be acknowledged by NERC. NERC may also require additional information within a month of submission. Upon ascertaining that all supporting documents have been submitted, NERC will issue a notice of completeness of application to the applicant with a requirement that the application be published in a newspaper within 30 days from

receipt of the notice. Members of the public are invited via the publication to object to the grant of the licence within 21 days of the publication. Where there is an objection, a panel of inquiry is set up by NERC to consider the validity of the grounds for such objections.

Further, each application for a licence is evaluated by three main divisions of NERC, which are:

- *The Legal, Licensing and Enforcement Division* – which will ensure that the applicant is properly established, verify all corporate details of the applicant submitted and verify the criminal records (if any) of the directors and other persons associated with the applicant;
- *The Engineering Standards and Safety Division* – which will review the documentation on the technical (engineering and environmental) aspects of the IPP, confirm the technical details of the project including the arrangements for the procurement and construction of the IPP, its operation and management and the evacuation of the power generated from the plant; and
- *The Market Competition and Rates Division* – which will evaluate the commercial viability of the project, confirm offtake and intake arrangements and the pricing mechanism for the project and the ability of the promoters to finance the project.

Upon full consideration, NERC may either grant or refuse to grant the relevant licence. NERC is required to notify the applicant of its decision no later than six months from the acknowledgement of receipt of submission of application.

In relation to the environmental review or assessment process, please note that a power plant with a capacity of 10 MW or more is required as part of the licensing process to submit a Certificate of Environmental Impact Assessment issued by the Federal Ministry of Environment. Power plants with less than 10 MW capacity are required to submit details of how effluents and discharges will be managed.

4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities

The typical terms and conditions that govern the grant of industry licences include:

- restrictions on generating beyond the capacity for which the licence was issued and restrictions on generating outside the specific site in relation to which the licence was issued;
- requirement to pay annual operating charges as specified in the regulations for licence and operating fees at the end of each month and imposition of the prevailing inter-bank lending rate +1% interest charged on delayed payments;
- requirement to notify NERC of any material changes in the licensee's corporate, business and registration details;

- requirement to prepare accounts for the applicant's licensed business separate from other businesses it engages in;
- prohibition from assigning or transferring the licence or its generation business to another entity without NERC's prior written consent;
- restriction on the transfer of any relevant asset of the generation business without notifying NERC and obtaining NERC's consent to such disposal;
- prohibition of changes to ownership structure exceeding 5% of authorised share capital without notifying NERC at least 30 days ahead of the proposed changes and obtaining NERC's consent to such changes;
- requirement to insure all generating station equipment and facilities; and
- requirement of compliance with Affiliate Code of Conduct Regulations, the Market Rules, the Grid and Distribution Codes and other regulations and directives as may be approved by NERC.

Please note that some terms and conditions of the licence can be amended by application to NERC, such as an amendment of the licence to increase the capacity of the power plant. However, where the terms and conditions are based on a statutory obligation, such as the consent requirements, the requirement to pay annual operating charges and the requirement of compliance with applicable laws and regulations, same may not be varied.

4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

The Land Use Act ("LUA") is the principal legislation governing land acquisition rights in Nigeria. Under the LUA, legal title to all lands in a State vests in the State Governor, who holds same in trust for the people of the State. The State Governor then grants a right of occupancy (leasehold interest) for a maximum period of 99 years to anybody seeking interest in land in the State. The grant of a right of occupancy is typically evidenced by the issuance of a Certificate of Occupancy by the Governor of the State within which the land is situate.

Please note that the Constitution of the Federal Republic of Nigeria (as amended) guarantees a person's right against compulsory acquisition of its interest in property, except for purposes of overriding public interest as prescribed by a law; and in those instances, prompt payment of compensation to the title holder is required. In line with the provision of the Constitution, where an applicant for a generation, transmission or distribution licence requires a parcel of land held (which other party/ies have interest in) in connection with such generation, transmission or distribution of electricity, the EPSRA empowers NERC to make a declaration that land is required by a licensee for use in connection thereto. However, the EPSRA provides that NERC shall not make any such declaration without granting to the person(s) having

an interest in such land an adequate opportunity to make representations against such declaration.

Upon such declaration by NERC:

- the President is expected to issue a notice in the Gazette to the effect that such land is required by the Government of the Federation for the public purpose of the Federation;
- the Governor of the State where the land is situated shall thereafter in accordance with the provisions of Section 28 (4) of the LUA, revoke the existing right of occupancy in respect of the land and vest the right in the licensee to the exclusion of the previous holder(s); and
- the previous holder(s) shall be entitled to claim compensation in accordance with the provisions of LUA.

Alternatively, a party seeking to develop a power project can through an assignment or lease obtain interest in land where the power project will be developed, from an existing holder of a right of occupancy.

4.5 Requirements for Decommissioning

By virtue of paragraph 1.5.1 of the NESIS, any generation licensee that is decommissioning a generation facility is required to comply with the EPSRA, the NESIS and all regulations, codes and standards made pursuant to the EPSRA. Save for this there is no specific legal framework for the decommissioning of power generation facilities in Nigeria.

5. Transmission

5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities

5.1.1 Principal Laws Governing the Construction and Operation

The EPSRA is the principal law regulating the construction and operation of transmission lines and associated facilities.

5.1.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Transmission Facilities

While the EPSRA provides for the licensing of transmission activities, please note that the transmission business is currently a monopoly in Nigeria carried out by TCN. Please refer to **1.1 Principal Law Governing the Ownership and Structure of the Power Industry**.

However, TCN permits developers of power projects in Nigeria to build and construct transmission line projects on behalf of TCN and the private developers are then repaid through an uplift in the tariff.

5.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate Transmission Facilities

The transmission business is currently a monopoly in Nigeria. TCN currently holds the only licence issued by NERC to a transmission service provider, and the terms of this licence are not in the public domain. However, the process for the amendment of any term or condition of a licence is as provided for under NERC's Regulation for the Application for a Licence. Please see **4.3 Terms and Conditions Imposed in Approvals to Construct and Operate** in relation to generation facilities.

5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Please see **4.4 Proponent's Domain, Condemnation or Expropriation Rights**.

The LUA is the principal legislation governing land acquisition rights in Nigeria. Under the LUA, legal title to all lands in a State vests in the State Governor, who holds same in trust for the people of the State. The State Governor then grants a right of occupancy for a maximum period of 99 years to anybody seeking interest in land in the State. The grant of a right of occupancy is typically evidenced by the issuance of a Certificate of Occupancy by the Governor of the State within which the land is situate.

Please note that the Constitution of the Federal Republic of Nigeria (as amended) guarantees a person's right against compulsory acquisition of its interest in property, except for purposes of overriding public interest as prescribed by a law; and in those instances, prompt payment of compensation to the title holder is required. In line with the provision of the Constitution, where an applicant for a generation, transmission or distribution licence requires a parcel of land held (which other party/ies have interest in) in connection with such generation, transmission or distribution of electricity, the EPSRA empowers NERC to make a declaration that land is required by a licensee for use in connection thereto. Alternatively, a party seeking to develop a transmission project can by virtue of an assignment, lease or right of way, obtain interest over such land where the transmission project will be developed.

5.1.5 Transmission Service Monopoly Rights

TCN currently has a monopoly over transmission facilities in Nigeria.

5.2 Regulation of Transmission Service, Charges and Terms of Service

5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service

The EPSRA is the primary legislation regulating the operation of transmission services in Nigeria. The MYTO 2015 for TCN governs transmission charges. The Grid Code and the Market Rules are also applicable subsidiary legislations regulating this sector of the NESI.

5.2.2 Establishment of Transmission Charges and Terms of Service

Transmission charges are determined by NERC in accordance with the provisions of MYTO. The MYTO is based on a set of principles designed to provide tariffs for each sector of the NESI.

The tariff methodologies should, among others:

- allow licensees that operate efficiently to recover the full costs of business activities and earn a reasonable return on the capital;
- provide incentives for improvement of technical and economic efficiency;
- provides incentives for the continued improvement of quality of services;
- avoid undue discrimination between consumers and consumer categories; and
- phase out or substantially reduce cross-subsidies.

The MYTO for Transmission incentivises and assumes a steady continuous reduction in transmission retail losses. Revenue earned by TCN is dependent on achieving specified performance improvements.

The EPSRA grants NERC the ultimate discretion in adopting methodologies for price determination in the NESI. Section 50 of the EPSRA grants any person aggrieved by NERC's decision with respect to prices and tariffs or by any of its other decisions, the right to apply to NERC for a review of that decision. Further, NERC has the power to call for objections or representations in connection with proposed methodologies, before adoption. Consequently, anyone with reservations on the rates proposed to be adopted may make representations to NERC, which will be duly considered by the regulator, before adoption.

Only a question of law which arises from a decision of NERC may be reserved by NERC (on its own initiative or at the request of any person affected) for the decision of the High Court.

5.2.3 Open Access Transmission Service

Transmission services can be obtained by users who according to the Grid Code are any persons or a party using the transmission system as agreed and permitted by the TSP and NBET. Users who are eligible to obtain transmission services must make an application to the TSP for connection to a new substation or an existing one. The applicant will be required to submit an application form to TCN that contains, among other things:

- description of plant or apparatus to be connected to the transmission system;
- confirmation that the user's plant and apparatus at the connection point will meet the required technical standards in the Grid Code and will be agreed with the TSP where appropriate;
- confirmation that the user's plant, apparatus and procedures will meet the safety provisions in the Grid Code;
- technical data specifying the load characteristics and other data of the plant or apparatus;
- the desired connection date and operational date of the proposed user's development; and
- a proposed commissioning schedule, including commissioning tests, for the final approval of the system operator and TSP.

The underpinning agreements for obtaining transmission services are:

- *Grid Connection Agreement*: this defines how a user is to be connected to the transmission system;
- *Ancillary Services Agreement*: this is for the provision of defined ancillary services by the Genco to TCN;
- *The Transmission Line Agreement or Transmission Project Agreement*: this provides for the construction by the project company and transfer to TCN, of additional transmission infrastructure, where applicable; and
- *Transmission Use of System (TUOS) Agreement*: this sets out the commercial terms for the transmission and delivery of electricity by TCN from the generation facility to the distribution system.

6. Distribution

6.1 Regulation of Construction and Operation of Electric Distribution Facilities

6.1.1 Principal Laws Governing the Construction and Operation of Electric Distribution Facilities

The EPSRA, the IEDN Regulations and the Mini-Grid Regulations are the principal laws governing the construction and operation of distribution facilities in Nigeria. Section 62 of

the EPSRA provides that no person except in accordance with a licence issued pursuant to that Act shall engage in any of electricity generation, transmission, system operation, distribution or trading, or operate an undertaking for such businesses. NERC is the relevant regulator.

6.1.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Distribution Facilities

The primary licence that an applicant seeking to construct and operate a distribution facility will require is the distribution licence issued by NERC. An applicant seeking to construct and operate a distribution facility will be required to apply to NERC for a distribution licence (pursuant to the IEDN Regulations and NERC's Regulation for the Application of a Licence).

Upon the submission of an application for the distribution licence and supporting documents and the payment of a non-refundable application fee, the receipt of the application will be acknowledged by NERC. NERC may also require additional information within a month of submission.

After ascertaining that all supporting documents have been submitted, NERC will issue a notice of completeness of application to the applicant with a requirement that the application be published in a newspaper within 30 days from receipt of the notice. Members of the public are invited via the publication to object to the grant of the licence within 21 days of the publication. Where there is an objection, a panel of inquiry is set up by NERC to consider the validity of the grounds for such objections.

Subsequently, after full consideration, NERC may either grant or refuse to grant the relevant licence. NERC is required to notify the applicant of its decision no later than six months from the acknowledgement of receipt of submission of application.

In relation to environmental review or assessment process, please note that an applicant for a distribution licence is required, as part of the licensing process, to submit a Certificate of Environmental Impact Assessment issued by the Federal Ministry of Environment.

6.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate

The typical terms and conditions that govern the grant of industry licences include:

- restrictions on distributing beyond the capacity for which the licence was issued and restrictions on distributing outside the specific site in relation to which the licence was issued;

- requirement to pay annual operating charges as specified in the regulations for licence and operating fees at the end of each month and imposition of prevailing inter-bank lending rate + 1% interest charged on delayed payments;
- requirement to notify NERC of any material changes in the licensee's corporate, business and registration details;
- requirement to prepare accounts for the applicant's licensed business separate from other businesses it engages in;
- prohibition from assigning or transferring the licence or its distribution business to another entity without NERC's prior written consent;
- restriction on the transfer of any relevant asset of the distribution business without notifying NERC and obtaining NERC's consent to such disposal;
- prohibition of changes to ownership structure exceeding 5% of authorised share capital without notifying NERC at least 30 days ahead of the proposed changes and obtaining NERC's consent to such changes;
- requirement to insure all distribution equipment and facilities; and
- requirement of compliance with Affiliate Code of Conduct Regulations, the Market Rules, the Grid and Distribution Codes and other regulations and directives as may be approved by NERC.

Please note that some terms and conditions of the licence can be amended by application to NERC. However, where the terms and conditions are based on a statutory obligation, such as the consent requirements, the requirement to pay annual operating charges and the requirement of compliance with applicable laws and regulations, same may not be amenable.

6.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

The LUA is the principal legislation governing land acquisition rights in Nigeria. Under the LUA, legal title to all lands in a State vests in the State Governor, who holds same in trust for the people of the State. The State Governor then grants rights of occupancy for a maximum period of 99 years to anybody seeking interest in land in the State. The grant of a right of occupancy is typically evidenced by the issuance of a Certificate of Occupancy by the Governor of the State within which the land is situate.

Please note that the Constitution of the Federal Republic of Nigeria (as amended) guarantees a person's right against compulsory acquisition of its interest in property, except for purposes of overriding public interest as prescribed by a law; and in those instances, prompt payment of compensation to the title holder is required. In line with the provision of the Constitution, where an applicant for a generation, transmission or distribution licence requires a parcel of land held (which other party/ies have interest in) in connection with

such generation, transmission or distribution of electricity, the EPSRA empowers NERC to make a declaration that land is required by a licensee for use in connection thereto. However, the EPSRA provides that NERC shall not make any such declaration without granting to the person(s) having an interest in such land an adequate opportunity to make representations against such declaration.

The process is as described under **4.4 Proponent's Domain, Condemnation or Expropriation Rights** and **5.1.4 Proponent's Domain, Condemnation or Expropriation Rights**.

Alternatively, a party seeking to develop a distribution project can by virtue of an assignment, lease or right of way, obtain interest over land where the distribution projects will be developed.

6.1.5 Distribution Service Monopoly Rights

As indicated above, the Discos currently provide the bulk of the distribution of power from the TCN grid to the end users in the NESI. Pursuant to the industry agreements with the Discos (the Vesting Contracts between NBET and the Discos on the one hand; and the Performance Agreements between the Bureau of Public Enterprises and the Discos on the other hand), each Disco is effectively a monopoly provider within its franchise area.

However, in March 2012, NERC issued the IEDN Regulations. Under the Regulations, IEDNs may or may not be connected to the network of the Disco operating in the relevant area. Even prior to issuing the IEDN Regulations, NERC had licensed two non-successor Disco power distribution companies, as follows:

- *Aba Power Limited in Aba, Abia State* – in relation to a project that pre-dates the EPSRA; and
- *Ikorodu Industrial Power Limited* – in relation to a project to undertake "Distribution for Ewekoro Cement" in Ikorodu, Lagos State.

The Mini-Grid Regulations also provide for the licensing of mini-grids in Nigeria. A mini-grid as defined under Section 3(1) of the Mini-Grid Regulations is "any electricity supply system with its own power generation capacity, supplying electricity to more than one customer and which can operate in isolation from or be connected to a distribution licensee's network." The Mini-Grid Regulations also restrict the definition of the term to "any isolated or interconnected mini-grid generating between 0 kW and 1 MW of generation capacity".

6.2 Regulation of Distribution Service, Charges and Terms of Service

6.2.1 Principal Laws Governing the Provision of Distribution Service, Regulation of Distribution Charges and Terms of Service

The EPSRA is the primary legislation regulating the operation of distribution services in Nigeria. The MYTO 2015 issued by NERC is the basis for the distribution charges paid to the Discos.

6.2.2 Establishment of Distribution Charges and Terms of Service
Distribution charges are determined by NERC in accordance with the provisions of MYTO. The MYTO is based on a set of principles designed to provide tariffs for each sector of the NESI.

The tariff design in place for Discos is intended to ensure that a distinction is made among the users with regard to electricity pricing and is dependent on the customer's class, including residential, commercial, industrial, special class and streetlights. Each Disco's tariff reflects its uniqueness in terms of cost, location and customer profile. The MYTO methodology combines the positive attributes of regulating the rate of return and a price cap, which changes by region and type of electricity customer.

Additionally, the MYTO methodology factors in the following components among others: ATC&C losses (the loss component of the Discos' verified aggregate technical, commercial and collection ("ATC&C") loss value was reinstated in end-user tariffs); the Disco's ten-year tariff plan; and changes in macro-economic indices such as inflation, exchange rate and gas price.

Please note that NERC, pursuant to its powers under the EPSRA, determines the rates for the provision of distribution services, based on the projections given by each of the Discos for the reduction of its ATC&C losses. However, where a Disco is aggrieved by the methodology adopted by NERC for the determination of its charges, it has the right to apply to NERC for a review of that decision. Only a question of law which arises from an order or decision of NERC may be reserved by NERC (on its own initiative or at the request of any person affected) for the decision of the High Court.

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