

Privatization of Nigeria's power Sector from the Perspectives of the General Agreement on Trade in Services (GATS)

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Abstract: The main objective of privatization of the Nigeria's power sector was to attract private investment and higher efficiency in service delivery. The hope was that the entry of investors into the sector would improve power generation and distribution across the country. More than three years after privatization, the sector now faces a major setback as liquidity, manpower and other challenges have continued to haunt the sector. Improvement in power supply chain has become almost impossible. Majority of the Nigerian population do not have access to electricity grid and self-generation is estimated to be at least twice as expensive as the cost of generation. Stakeholders are worried that if nothing is done to remedy the situation, the system may not witness any major growth in years to come.

Keyword: Nigeria, Privatization, Power Sector, Trade, Services

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I. INTRODUCTION

One of the primary motivations for the negotiation of General Agreement on Trade in Services (GATS) was to complement the General Agreement of Tariff and Trade (GATT) during the run-up to the creation of the World Trade Organization (WTO) in the mid-1990s; along with it, was the privatization and deregulation movements that swept many countries in the West during the 1970s and 1980s. While a number of key industries were highly regulated during the post-war period, the popularity of government policies¹ for the elimination of state monopolies in industries like telecommunications and transportation exposed many more industries to domestic and international competition.²

The objectives of the GATS is essentially to create credible and reliable system of international trade rules in order to stimulate economic activity through guaranteed policy bindings; and promote trade and development through progressive liberalization³ in services, with the believe that it would result in increased competition, lower prices, more innovation, technology transfer, employment creation, and greater transparency and predictability in trade and investment flows. It is also believed that trade liberalization in services would have beneficial implications for long run economic growth and development⁴ for all member states.

However, this is not true in the real life situation of the Nigeria's power sector reform as it only succeeded in entrusting the collective wealth of the people in the hands of few elites, with retrenchment of workers, high electricity bills without commensurate services among other negative impacts.⁵ With high energy loses from generation to billing, low collection rate and low access to electricity by the population, insufficient cash generation as a result of value-chain inefficiencies and a large proportion of the public currently relying on self-generation, the sector is indeed in dire strait.⁶ The sad reality is that the reform failed to deliver the

¹ Associated primarily with Ronald Reagan in the United States and Margaret Thatcher in the United Kingdom led to regulatory reforms.

² Narlikar, A., *The World Trade Organization: A Very Short Introduction*, Oxford, Oxford University Press, 2005, P. 96.

³ WTO, "The General Agreement on Trade in Services (GATS): Objectives, Coverage and Discipline", <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed on 12/02/16, p. 1.

⁴ Mkubwa, H. M. et al, "The Impact of Trade Liberalization on Economic Growth in Tanzania", *International Journal of Academic Research in Business and Social Sciences*, Vol. 4, No. 5, May 2014, p. 514.

⁵ Aminu, I., et al, "The Impact of Privatization of Power Sector in Nigeria: A Political Economy Approach", *Mediterranean Journal of Social Sciences*, Vol. 5, No. 26, 2014, p. 111.

⁶ Niger Delta Power Holding Company Ltd., *The Guardian Newspaper*, Tuesday, August 8, 2017, p. XIII.

economic goal of efficiency and improved productivity, largely due to inadequate regulatory and institutional frameworks, and the poor mode of privatization.⁷

Various attempts by successive governments at industrialization and rapid economic growth have been hampered by energy infrastructure deficit gap. The privatization of the sector, pursuant to the Power Sector Reform⁸ was aimed at tackling the myriads of problems. However, there are issues and challenges that confront the sector after privatization.⁹ Twelve years after the implementation of the reform, liberalization of the power sector has not enjoyed the predicted success.¹⁰ The problem is not one dimensional, as over the years many factors have intermingled to impose a multidimensional burden on the country's power generation, distribution and transmission potentials. With all the natural resources Nigeria is blessed with, it is pathetic why the country is still at the megawatts generation stage, and why it hasn't entered the terawatts realm, or even into the business of selling electricity to other African nations?¹¹

As a WTO member, Nigeria is an emerging market with expanding financial services, communications and technology and energy sectors. Investment opportunities abound with incentives provided by the government.¹² In spite of its endowment with abundant renewable and non-renewable energy resources like solar, wind, biomass, crude oil, coal, natural gas and bitumen, Nigeria has one of the lowest levels of energy use in the world. The history of Nigeria's power sector was one of inefficient monopolies; missteps and corruption,¹³ with power outages assuming a very high embarrassing dimension.¹⁴ This has significantly contributed to the skyrocketing prices of commodities.¹⁵

Understanding privatization of the power sector and several other implications for Nigeria in the context of GATS poses not only a challenge, but also an opportunity to formulate new strategies with regard to domestic regulations and policy options. It is in this regard that this paper intends to carry out a comprehensive review of the sector and proffer solutions.

II. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

GATS entered into force on January 1, 1995; with a set of binding rules and disciplines to govern services trade was the outcome of the pressure from the service sector lobby in developed countries to liberalize services trade and investment that prompted the Uruguay Round to broaden the scope of multilateral trade negotiations to include services for trade negotiations. This also reflected the growing recognition among the WTO member countries of the important role of the service sector in the global and national economy. The aim was to establish a multilateral framework that would promote orderly and transparent trade and investment liberalization in services.¹⁶

When considering barriers to trade in services, domestic regulations governing their supply and consumption are more important than border measures (such as tariffs), unlike trade goods, where border measures play a significant role. These domestic regulations are put in place for a variety of reasons. Sometimes they are put in place solely to protect domestic industries or to protect consumers' interests.¹⁷ GATS apply in principle to all service sectors, with two exceptions. It excludes services supplied in the exercise of

⁷ Barnabas, S., "The Political Economy of Privatization in Nigeria: A Case Study of Nigeria Telecommunications Limited (NITEL)", *Journal of Sociology*, Vol. 2, No. 11, 2014, p. 2.

⁸ Electricity Power Sector Reform Act, Cap P10, Laws of the Federation of Nigeria, 2005.

⁹ Olorunkanmi O. J., "Issues and challenges in the Privatized Power Sector in Nigeria", *Journal of Sustainable Study Development*, Vol. 6, No. 1, 2016, p.76.

¹⁰ Ayanruoh, F., "The Challenges of the Nigerian Electric Power Sector Reform (1)", *Vanguard Newspaper*, available at <<http://www.vanguardngr.com/2013/02/the-challenges-of-the-nigerian-electric-power-sector-reform-1/>> accessed on 17/03/17.

¹¹ Ifedobi, I., "Political Solutions to Nigeria's Electricity Crisis", *Vanguard Newspaper*, July 24, 2016, available at <<http://www.vanguardngr.com/2016/07/practical-solutions-nigerias-electricity-crisis/>> accessed on 07/03/17.

¹² Adefuye, A., "A Stable and Secure Nigeria: An Asset to America", Text of an address delivered at the meeting with U.S. Council on Foreign Relations at the Embassy of Nigeria, Washington, D.C., by the Nigeria's Ambassador of to the United States of America on Monday, November 10, 2014.

¹³ Werker, E., *et al*, "Privatization of the Power Sector in Nigeria", Harvard Business School, available at <<http://www.hbs.edu/faculty/Pages/item.aspx?num=43266>> accessed on 14/03/17, p. 2.

¹⁴ Oluwole, A., *et al*, "Electric Power Outage in Nigeria: History, Causes and Possible Solutions", *Journal of Energy Technology and Policy*, Vol. 2, No. 6, 2012, p. 18.

¹⁵ Gazette No. 34 of 2006.

¹⁶ Mkubwa, H. M., *et al*, *op cit*, p. 515.

¹⁷ WTO, "Chapter 11 Trade in Services", available at <<http://www.meti.go.jp/english/report/data/gCT9911e.html>> accessed on 17/03/17, p.

governmental authority.¹⁸ Further, the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.¹⁹ It is a comprehensive legal framework of rules and disciplines covering 161 service activities across 12 classified sectors.²⁰

GATS applies to measures taken by members at the central, regional, and local government levels as well as by non-governmental bodies to whom powers have been delegated by governments or authorities. Trade in service is defined as the supply of service:²¹

- a. From the territory of one member into the territory of the other member;
- b. In the territory of one member to the service consumer of any other member;
- c. By a service supplier of one member through the commercial presence in the territory of any other member;
- d. By a service supplier of one member, through presence of a natural person of a member in the territory of any other member.

This classification of services trade into four modes of supply reflects a novel approach. It addresses the complex nature of international transactions in services and the diverse forms in which services are embodied, in consumption, production, and distribution-related activities and in the form of goods, human capital, and information. This model definition of services trade also brings into the purview of GATS, regulatory issues concerning investment policies and immigration and labour market legislation, hitherto outside the domain of the multilateral trading system.²²

GATS consist of three main elements, namely: general rules and principles; commitments in specific sectors and across sectors; and sectoral annexes and various attachments to the agreement. The most important feature of the GATS is a set of general concepts, principles, and rules that are largely applicable across the board to measures affecting trade in services: Most-Favoured-Nation(MFN) treatment;²³ transparency;²⁴ Domestic Regulation;²⁵ Monopolies and Exclusive Service Suppliers;²⁶ Emergency Safeguard Measures;²⁷ Balance of Payments Safeguards;²⁸ Government Procurement;²⁹ General Exceptions;³⁰ and Subsidies.³¹

The most generally applicable provisions are those of MFN and transparency. Countries are required to accord MFN treatment to other member countries, i.e., not discriminate among member countries of the WTO in terms of their treatment of foreign services and service suppliers. There is, however, a provision to take an MFN exemption for a period of 10 years, subject to meeting specified conditions in the GATS Annex on MFN exemptions. Under the transparency provision, countries are required to provide information on all relevant rules and measures with bearing on the agreement and on their commitments under the GATS.³²

When the idea of bringing rules on services into the multilateral framework of the WTO was discussed in the 1980s, many countries were opposed to it because it was felt rules on services penetrate far deeper into economic policymaking than rules on goods, because services tend to be more heavily regulated than goods. In order to assuage these concerns from the WTO members, GATS was designed with a very high degree of flexibility, unlike the GATT.³³

It resembles the GATT in reliance on non-discrimination as its first and foremost principle. But due to the preference of the EU and developing countries for an agreement with softer obligations, non-discrimination

¹⁸These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and any other public service, such as health or education that is provided at non-market conditions. See Article 1 (3) GATS.

¹⁹Mkubwa, H. M., *et al*, *op cit*, p. 517.

²⁰These include activities as wide ranging as telecommunications, financial, maritime, energy, business, education, environmental, and distribution services. See also Article 1 GATS.

²¹Article 1 (2) GATS

²²Hufbauer, G., *et al*, "Services Trade: Past Liberalization and Future Challenges", *Journal of International Economic Law*, Vol. 10, Issues 3, 2007, p. 605.

²³Article II, GATS.

²⁴Article III, *Ibid*.

²⁵Article IV, *Ibid*.

²⁶Article VIII, *Ibid*.

²⁷Article X, *Ibid*.

²⁸Article XII, *Ibid*.

²⁹Article XIII, *Ibid*.

³⁰Article XIV, *Ibid*.

³¹Article XV, *Ibid*.

³²Appendix "F".

³³Collins, D., *The World Trade Organization: A Beginner's Guide*, London, Oneworld Publications, 2015, P. 97.

in the GATS is more circumscribed than non-discrimination in the GATT. MFN is a general obligation,³⁴ but members are allowed to list MFN exemptions. National treatment³⁵ is a specific obligation rather than a general one, which means that it applies to only those services specified in Members' schedules as per the listed qualifications. Several of the other GATS provisions are not really general, as their applicability is conditional upon the commitments filed by member countries. For instance, the Article on domestic regulation is applicable only to sectors where specific commitments have been taken.³⁶

Governments remain free to set standards and qualification requirements, so long as the same regulations apply to foreign suppliers as national ones. GATS also operate through appositive list. This means that disciplines apply only in the specific areas and extent made by each individual member.³⁷ Similarly, there is a requirement for establishing enquiry points to provide specific information to other member countries and to respond promptly to any requests for information on relevant rules and regulations affecting trade in services.³⁸

The agreement is binding on governments to keep their trade policies within agreed limits as they form the legal ground-rules for international trade. Through negotiating rounds, countries choose the sectors and modes of services trade they wish to include in their schedules as well as the limitations to market access and national treatment (NT) they wish to maintain. It is only by reference to the individual country schedules that one can know not only the service sector(s) that will be committed, but also the extent of commitment a country is prepared to make. There is no minimum requirement as to its coverage, WTO members are free to leave entire sectors out of their GATS commitments, or they may choose to grant market access only in specific sectors, subject to the limitations they wish to maintain. Moreover governments may limit commitments to one or more of the four recognized modes of supply and commitments may also be withdrawn or renegotiated.³⁹

At the negotiation, many countries had attempted keeping their major industries e.g. maritime, financial services, aviation, etc, out of GATS coverage in order to limit the scope of the agreement,⁴⁰ but could not succeed due to pressure from the developed countries. Although GATS stipulates special treatments for developing countries,⁴¹ which developed countries are enjoined to negotiate specific commitments to strengthen domestic service capacity, improve access to distribution network and information network that will give developing countries market access in sectors which are of export interest to them. Developed countries are to establish contact points within two years from entry into force of WTO, to facilitate the access of developing country members' service suppliers to information on their markets:⁴² The hope is that these concessions will enhance the chances of developing country members to break into the closed markets of developed country members so that international trade in service will not remain the one way flow of trade from North to South which it is up till now.⁴³

GATS have drawn a lot of attention and diverse comments since its inception in 1995. One of the prime concerns is governments' continued ability to ensure adequate supplies of socially-relevant services such as health and education, etc. The fact that the agreement expressly excludes such services could prove an element of comfort. This is not the case, if all remaining services are erroneously deemed to be destined for quasi-automatic liberalization and deregulation, regardless of national preferences and institutional conditions. The fears are intensified by the fact that the definition of 'governmental services'⁴⁴ is not only relatively narrow, but subject to uncertainties. GATS does not use such terms as 'public services' or 'services of general interest'.⁴⁵

Since domestic regulations, not border measures, influence services trade, the GATS contains provisions mandating that such measures of general application should be administered in a reasonable, objective and impartial manner. Also, there is a requirement that parties establish the means for prompt reviews of administrative decisions relating to the supply of services. GATS also contains transparency requirements, among them the publication of all relevant laws and regulations. Furthermore, the provisions to facilitate the

³⁴ Article II, GATS

³⁵ Article XVII, *ibid.*

³⁶ Aldung, R., "Public Services and the GATS", WTO Working Paper ERSD-2995-03, July 2005, p. 3.

³⁷ Narlikar, A., *op cit*, p. 97.

³⁸ Aldung, R., *op cit*, p. 3.

³⁹ "GATS Overview Documents", available at < http://www.aic.lv/rec/Eng/new_d_en/gats/GATS_ovw.html > accessed on 15/03/17, p. 5.

⁴⁰ Article IV GATS Agreement

⁴¹ Article IV GATS Agreement

⁴² Commercial and technical aspects of the supply of services, registration, recognition and obtaining professional qualifications and availability of technology services. Also, See Article iv (2) GATS Agreement.

⁴³ Ladan, M. T., *Materials and Cases on Public International Law*, Zaria, ABU Press, 2007, p. 355.

⁴⁴ Article 1 (3), GATS.

⁴⁵ Aldung, R., *op cit*, p. 2.

increased participation of developing countries in world services trade envisage negotiated commitments on access to technology, improvements in access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest. It contains obligations with respect to recognition requirements (educational background, for instance) for the purpose of securing authorizations, licenses or certification in the services area.⁴⁶

GATS encourage recognition requirements achieved through harmonization and internationally-agreed criteria. Further provisions state that parties are required to ensure that monopolies and exclusive service providers do not abuse their positions. While parties are normally obliged not to restrict international transfers and payments for current transactions relating to commitments under the Agreement, there are provisions allowing limited restrictions in the event of balance of payments difficulties. However, where such restrictions are imposed they would be subject to conditions; including that they are non-discriminatory, that they avoid unnecessary commercial damage to other parties and that they are of a temporary nature.⁴⁷

III. LEGISLATIVE HISTORY OF THE NIGERIA'S POWER SECTOR

Electricity generation activities started in Nigeria in 1896 when the first power plant was built in Lagos. However, it was not until 1929 when the Nigeria Electricity Supply Company (NESCO) was established as an electric utility company that the phenomenon spread as the Public Works Department (PWD) was empowered to build plants in different parts of the country. This resulted in the construction of a hydroelectric power station at Kuru near Jos, Plateau State, among others. Electricity supply at that time was mainly for government offices and quarters as well as for the very influential. There was a twist in 1951 when the Electricity Corporation of Nigeria (ECN) was established as it had the directive to facilitate adequate supply of electricity to as many Nigerians as were willing to have and able to pay for it. The first 132KV line was constructed in 1962 linking Ijora Power Station to Ibadan Power Station. The establishment of the Niger Dams Authority (NDA) in 1962 with a mandate to develop the hydropower potential of the country was the real breakthrough in power generation and transmission. However, ECN and NDA were merged in 1972 to form the National Electric Power Authority (NEPA), which solely and exclusively became responsible for electricity generation and distribution in Nigeria.⁴⁸

The NEPA Act⁴⁹ gave NEPA the mandate to maintain, co-ordinate an efficient and economic system of electricity supply for all part of the federation. The reason offered for the merger was that it would result in the vesting of the production and the distribution of electricity power supply throughout the country in one organization which will assume responsibility for the integration of the ECN and NDA for more effective utilization of human, financial and other available resources for the electricity supply throughout the country.⁵⁰

Despite the various efforts of government to manage the sector to provide electricity, it became clear by the late 1990s that the electricity system has failed to meet Nigeria's power needs. In 1998, NEPA ceased to have an exclusive monopoly over electricity generation, transmission, distribution and sales as the government amended the NEPA Act to accommodate private sector participation in the sector. In the late 2000s, the company became a public limited company (NEPA Plc), the name was changed from NEPA Plc to the Power Holding Company of Nigeria (PHCN).⁵¹

Despite the change of name from NEPA to PHCN the problem of declining electricity generation from domestic power plants still continues. While the Nigerian electricity sector is agreeably liberalized, the consumers as the end users of the current trends in electricity generation, transmission and distribution have remained hopeful for a new dawn, notwithstanding the generic problems that has become recurrent decimals.⁵² The dissatisfaction with the performance of PHCN symptomized by its low capacity generation; high costs; inadequate distribution of electric power; inability to finance new or expanded infrastructure; and

⁴⁶ *Ibid.*

⁴⁷ WTO E-Learning, "Trade in Services in the WTO", available at <https://ecampus.wto.org/admin/files/Course_627/CourseContents/GATS-R8-E-Print.pdf> accessed on 27/04/17, p. 49.

⁴⁸ Nigeria Electricity Hub, "Road to GenCos and Discos", available at <<http://www.nigeriaelectricityhub.com/2014/08/01/road-to-gencos-and-discos/>> accessed on 07/03/17, p. 1.

⁴⁹ No. 24 of 1972

⁵⁰ Ogelle, O., *et al*, "The Implication Legal Reform in the Nigeria Power Sector", African Research Review, Vol. 10 (3), No. 42, June 2016, pp. 279 – 280.2, June 2016, pp. 279 – 280.

⁵¹ Nigeria Electricity Hub, "Road to GenCos and DisCos", available at <<http://www.nigeriaelectricityhub.com/2014/08/01/road-to-gencos-and-discos/>> accessed on 07/03/17, p. 1.

⁵² Ogelle, O., *et al*, *op cit*, p. 279.

inadequate machinery for effective billing and collection of bills became the driving force behind liberalization.⁵³

The unsustainability of the process saw the need for a radical reform programme that will change the shape and scope of power provision in Nigeria,⁵⁴ making adequate power supply an unavoidable prerequisite to its development in the prevailing circumstances.⁵⁵ This led to a wave of new regulatory regimes across the sector. In consonance with the global trends in the electricity sector, the government enacted the Electric Power Sector Reform (EPSR) Act 2005.⁵⁶ Under the new regime, the Nigerian Electricity Regulatory Commission (NERC) is to serve as the main regulatory body of the electricity power sector.⁵⁷

The EPSR Act unbundled the PHCN into a series of 18 successor companies: six generation companies (GenCos), 12 distribution companies (DisCos) and a national power transmission company (TCN) covering the whole country. Nigeria now has different successor companies⁵⁸, generating, transmitting and distributing electricity as well as an independent Commission responsible for regulating the sector. The individual managers of the unbundled segments are expected to enjoy some level of autonomy, with TCN being government owned and managed by System Operators (SO) and Transmission Operators (TO).⁵⁹

Out of the 18 successor companies scheduled for privatization, AFAM Power GenCo is the only PHCN successor company whose privatization is yet to be completed. It remains with the Federal Government. The privatization of Kaduna DisCo was re-advertised and concluded in 2014. Yola DisCo, privatized in 2013 is back within government control again. There were actually a number of international power firms such as Aldwych, Globeleq, Actis, Metropolitan Electricity Authority of Thailand, TATA of India, AYDEM of Turkey, MERALCO of Philippines, Copperbelt of Zambia, and several other international power firms who participated, either as technical partners to Nigerian controlled consortiums or as actual investors.⁶⁰ But none of them was considered successful in the bidding process due to Nigerian factor and were edged out.

The Nigerian Power Sector Privatization is reputed to be one of the boldest privatization initiatives in the global power sector over the past decade, with transaction cost of about \$3.0bn. The Federal Government has been able to complete the privatization process and retains the ownership of the transmission assets (management under concession) with the generation and distribution sectors fully privatized.⁶¹

IV. IMPLICATION OF GATS ON PRIVATIZATION OF NIGERIA'S POWER SECTOR

The increasing interdependence of nation states continues to put issues which hitherto were domestic affairs on the international agenda. No country can claim to be fully sovereign in the regulation of its international trade. Trade practice is influenced by multilateral treaties to which Nigeria is a signatory and trade practices accepted worldwide also binds Nigerian businessmen.⁶²

In order to facilitate and protect Foreign Direct Investment (FDI) and enhance the protections which may be available under national law, a number of standards or measures have evolved and have become an intrinsic element of several trade and investment treaties whether bilateral or multilateral. These standards include the MFN standard, the fair and equitable treatment (FET) standard, and the national treatment (NT)

⁵³ Ayanruoh, F., "The Challenges of the Nigerian Electric Power Sector Reform (1)", *Vanguard Newspaper*, available at <<http://www.vanguardngr.com/2013/02/the-challenges-of-the-nigerian-electric-power-sector-reform-1/>> accessed on 17/03/17, p. 7.

⁵⁴ Dikki, B., "Power Sector Privatization: Process and Prospects – BPE", available at <<http://energybizdigest.com.ng/power-sector-privatization-process-and-prospects-bpe/>> accessed on 17/03/17.

⁵⁵ Sambo, A., *et al*, "Electricity Generation and the Present Challenges in the Nigerian Power Sector", available at <https://www.researchgate.net/publication/228399732_Electricity_Generation_and_the_Present_Challenges_in_the_Nigerian_Power_Sector> accessed on 07/03/17.

⁵⁶ Repealed the Electricity and NEPA Act.

⁵⁷ Ogelle, O., *et al*, *op cit*, p. 280.

⁵⁸ Appendix "E"

⁵⁹ Ajumogobia & Okeke, "Nigerian Energy Sector: Legal and Regulatory Overview", available at <<http://www.ajumogobiaokeke.com/assets/media/2b13946e4257859eb7988150d1c620a2.pdf>> accessed on 01/04/17.

⁶⁰ Omonfoman, O., "Privatization of the Power Sector: What Went Wrong?" available at <<https://opinion.premiumtimesng.com/2017/05/30/privatisation-of-the-power-sector-what-went-wrong-by-odion-omonfoman/>> accessed on 26/09/17.

⁶¹ Nigerian Power Sector Guide, December 2013, P. 6.

⁶² Ladan M. T., *op cit*, 357.

standard derogation from which would give rise to liability and may trigger international dispute resolution mechanisms outside of the municipal judicial system and the uncertainties which may be associated with submission to its jurisdiction.⁶³

GATS provides for national treatment as follows:

*In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*⁶⁴

The NT obligations of each country are determined by the commitments made in its schedules. Such commitments may be subject to conditions and qualifications determined by the relevant country. These conditions are expected to be progressively enlarged through further negotiations. Nigeria's schedule includes commitments in relation to four sectors and 28 subsectors: telecommunications, financial services, tourism & travel related services and transportation services.⁶⁵ The country has considerable export potential and becomes an important destination for investment, due mainly to availability of skilled and abundant labour, huge capital and technology requirements in these areas.⁶⁶

Since the first production of electricity in Nigeria in 1896, the electricity sector has gone through a number of reforms but is yet to achieve effective and reliable supply of electricity. The present reform embarked on took a new dimension with the government shifting from its monopoly over the power sector to inviting private sector participation with the intent of eventual divestiture to the private sector either by concession, privatization or management contracts. Nigeria's power sector constitutes an all-important area of government economic reform strategy aimed at propelling Nigeria's growth to greater heights in the 21st century and beyond.⁶⁷

To achieve these purpose, government started a process of privatization and commercialization since 1988. The government-owned PHCN, which had responsibility for the generation, transmission and distribution of electricity, was sold out to private investors to increase efficiency and profitability. The programme was to ensure the inflow of investment, management and technology that would improve and grow the nation's infrastructure services and industries for the benefit of the people.⁶⁸ In furtherance to this, the Bureau of Public Enterprises (BPE) with the authority to prepare public enterprises approved by the National Council on Privatization (NCP) commenced the privatization exercise.⁶⁹

The ESPR Act seeks to achieve the following primary objectives: Unbundle the various aspects of NEPA's businesses namely generation, transmission, distribution, supply, etc; Privatize the unbundled entities of NEPA; Establish a Regulatory Commission for Electric Power in Nigeria; Establish a Rural Electrification Power Agency & Fund for Nigeria; Establish Power Consumer Assistance Fund; Develop competitive electricity markets in Nigeria; and provide for the determination of power electric tariffs.⁷⁰

In accordance with the reform, the Government registered and finally constituted the Board of Directors of PHCN Plc, a public limited liability company mandated to take over all the assets and liabilities of NEPA, unbundle, license, etc the various private sector-led players that will privately manage all aspects of electric power business in Nigeria.⁷¹ The National Electric Power Regulatory Commission (NERC) was also

⁶³ Adefulu, A., *op cit*.

⁶⁴ Article XVII (1) GATS.

⁶⁵ Mkubwa, H. M., *et al, op cit*, p. 515.

⁶⁶ Orafu, P., "The Economic Implications of the Privatization of the Power Sector in Nigeria", available at <<https://15projects.com/projects/the-economic-implications-of-the-privatization-of-the-power-sector-in-nigeria-198602/>> accessed on 17/03/17, p. 6.

⁶⁷ *Ibid*.

⁶⁸ "The Implication of Privatization of Nigeria Economy", available at <<https://www.grossarchive.com/upload/1429880308.htm>> accessed on 17/03/17, p. 9.

⁶⁹ Ogelle, O., *et al*, p. 279.

⁷⁰ As a result of the recent reforms and the privatization exercise, the different stages of electricity production (generation, transmission and distribution) are now separate. See also the Preamble.

⁷¹ Oserogho & Associates, "Electric Power Sector Reforms Law", available at <<http://www.oseroghoassociates.com/articles/101-electric-power-sector-reforms-law>> accessed on 18/03/17.

established to ensure the orderly development of a competitive power market, safe and adequate production of electricity and to promote competitive private sector participation.⁷²

In order to adequately calculate their risks in securing finance, information as to the assets and liabilities were made available to the investors. The Nigeria Electricity Liability Management Company (NELMCO) was established as a government Special Purpose Vehicle on the understanding that it would assume and manage extant assets, liabilities and other obligations that could not be easily transferred from PHCN to the successor Companies. The envisioned role is that NELMCO would inherit PHCN's liabilities on condition that members of staff of PHCN have the right to purchase their place of abode after their tenure of office. This would give the potential acquirers a degree of certainty as to the size of the PHCN legacy.⁷³ The core assets (only on generating machines) were made available to investors to improve electricity capacity in the country, while they were advised to transfer all the liabilities left behind to NELMCO for settlements which the companies signed in the Memorandum of Understanding (MOU) with BPE in April 2011.⁷⁴

GenCos were granted generation license authorizing them to construct, own, operate and maintain a generation station for purposes of generation and supply of electricity in accordance with the reform. Subject to this Act, the license holder may sell power or ancillary services to any of the classes of persons specified in the license. This is needed for any power generation activity beyond 1MW.⁷⁵

DisCos were granted distribution license authorizing them to construct, operate and maintain distribution systems and facilities, including, but not limited to, the following activities as may be specified in the license: the connection of customers for the purpose of receiving a supply of electricity; the installation, maintenance and reading of meters, billing and collection; and such other distribution service. The license holder may also have the obligation to provide electricity to its distribution customers, pursuant to the terms of a trading license issued to the licensee.⁷⁶

Following the unbundling of the sector, TCN was managed by a Management Contractor, Manitoba Hydro International (Canada), whose contract expired in July 2016. The Company was responsible for revamping TCN to achieve technical and financial adequacy in addition to providing stable transmission of power without system failure.⁷⁷

Other licenses granted are Trading License and System Operation License: Trading license authorizes the license to engage in the purchasing, selling, and trading of electricity. NERC determines the terms and conditions of trading licenses as may be appropriate in the circumstances. The Commission may also issue temporary bulk purchase and resale license, giving the licensee, the ability to purchase electrical power and ancillary services from independent power producers and successor generation companies for the purpose of resale to one or more other licensees, or to an eligible customer. The licensed trading entity in Nigeria is the Nigerian Bulk Electricity Trading (NBET).⁷⁸

System operation license, on the other hand authorizes the licensee to carry on system operation, including, generation scheduling, commitment and dispatch; transmission scheduling and generation outage co-ordination; transmission congestion management; international transmission co-ordination; procurement and scheduling of ancillary services and system planning for long term capacity; administration of the wholesale electricity market, including the activity of administration of settlement payments, in accordance with the market rules; and such other activities as may be required for reliable and efficient system operation.⁷⁹

However, periodic review of these licenses is important for accountability, record, and monitoring purposes within the sector to check against the gaming of the provisions of the various Orders and Rules by the operators.⁸⁰

In line with GATS,⁸¹ citizens are to take priority over foreigners, firms to give first consideration to made in Nigeria goods in contracts award, utilities to submit yearly localization plan. A local content law⁸² with

⁷² Detail, "The Impact and Challenges of the Power Sector Reforms", available at <<http://www.detailsolicitors.com/?section=news&cmd=details&newsid=30>> accessed on 19/03/17.

⁷³ *Ibid.*

⁷⁴ Gazette No 85 Volume 97

⁷⁵ Section 64 Power Reform Act

⁷⁶ Section 67, *Ibid.*

⁷⁷ Power Sector Guide, p. 7.

⁷⁸ Section 68 Power Reform Act.

⁷⁹ Section 66, *Ibid.*

⁸⁰ A Guide to the Nigerian Power sector", available at <<https://assets.kpmg.com/content/dam/kpmg/ng/pdf/tax/a-guide-to-nigerian-power-sector.pdf>> accessed on 01/04/17.

⁸¹ Article VIII.

far-reaching provisions for prioritization of employment of Nigerian workers, technologies and consultants was put in place. Among other things, the law mandates the electricity power utilities to first give consideration to goods and services of Nigerian origin in the award of contracts and specifically mandates all operators in the sector to first give consideration to suitably qualified Nigerians for employment and training. The policy requires NERC to establish, maintain and administer a Joint Qualification System (JQS) in consultation with the Nigerian Content Consultative Forum (NCCF) in accordance with provisions of the content law. The JQS is to constitute an industry databank, a source for information in the review of applications of Nigerian content, and the data bank for national skills development pool.⁸³

All operators and companies operating in the Nigerian Electricity Supply Industry (NESI) shall employ only Nigerians in their junior and intermediate cadre or any other corresponding grades designated by the operator or company. All unskilled labour should be locally sourced. In the area of maintenance of employment and training plan, the regulation directs that Nigerians should be given first consideration for training and employment in the work programme for which the plan was submitted. The employment and training plan shall make provision for succession planning to enable Nigerians assume positions that may be occupied by expatriates. The training plan shall take into cognizance the full involvement of Nigerians in any research and development activity undertaken by the company. Any collective agreement entered into by the licensees with any Association of employees regarding their terms and conditions of employment shall contain provisions consistent with this section.⁸⁴

NERC adopted the Multi Year Tariff Order (MYTO) methodology to regulate wholesale and retail electricity prices in line with the provisions of the EPSR Act.⁸⁵ MYTO sets generation, transmission and distribution tariffs based on a number of tariff setting principles and assumptions developed and agreed between NERC and the licensees. MYTO provides for certainty of tariffs to licensees and investors in the power sector. The MYTO methodology was first introduced in 2008 and has undergone several revisions over time.⁸⁶

Despite the good intentions of the EPSR Act in instituting independent regulation of the power sector, the sector is still faced with regulatory risks arising from regulatory uncertainties, government's continued influence in the affairs of the regulator and ineffective regulation of the sector by NERC. Several instances abound: Regulatory risks can also be attributed to the behaviour of MO and licensees. A situation whereby MO, Licensees and interested stakeholders seek to circumvent regulatory orders or do not agree with regulatory orders issued by the regulator, but approach the Presidency or the Minister of Power to seek redress or circumvent such orders, increases regulatory risks to the sector.⁸⁷

NERC also succumbed to pressure from investors in the NESI to increase the tariff regime in the absence of steady power supply and at a time of economic downturn. Consumers, organized labour and affected stakeholders have expressed dissatisfaction. In every regulated electricity business, the price of electricity as a commodity needs to be cost-reflective. This among other requirements means that price must cover the cost of efficient delivery of electricity through the value chain. Before now, the price or electricity tariff in Nigeria is one of the lowest in the world and one of the lowest in West Africa.⁸⁸

The increased tariff regime exempts consumers in the R1 and R2 categories who make up the largest number of residential consumers (albeit for six months only) whose consumption of electricity is strictly for non-commercial, but regular day-to-day home use. Most homes and therefore the bulk of workers and citizens are therefore unaffected for now. However, it must be stated that consumers who engage in commercial activities either in their residence or in a separate facility along with industrial consumers who consume a significant amount of electricity (high end users) have been directly targeted by the increased tariffs. Estimated bills and fixed rate that is charged consumers whether electricity is consumed or not is abolished. This of course varies from place-to-place but it is about 750 Naira on the average. Also, DisCos have been mandated to meter

⁸² Cap P10 Laws of the Federation of Nigeria 2004.

⁸³ Anuforo, E., "Nigeria Gets Local Content Law for Power Sector, Others". *The Guardian Newspaper*, Saturday, 18 March, 2017, p. 15.

⁸⁴ *Ibid.*

⁸⁵ Section 76

⁸⁶ Omonfoman, O., "Ensuring Regulatory Independence in the Power Sector," *Premium Times*, available at <<http://opinion.premiumtimesng.com/2016/01/11/ensuring-regulatory-independence-in-the-power-sector-by-odion-omonfoman/>> accessed on 01/04/17.

⁸⁷ *Ibid.*

⁸⁸ "Nigeria: A Swot Analysis of the New Electricity Tariff in Nigeria", available at <<http://iwin.org.ng/index.php/news/item/1761-http-allafrica-com-stories-201601130038-html>> accessed on 12/03/17, p. 9.

all customers so that consumers will only pay for electricity they have used. Consumers can technically insist on settling payments only if they have meters.⁸⁹

DisCos undertook to provide meters and they are not fulfilling their promises. With so many excuses like vandalization, low tariff and former PHCN staff are sabotaging them. So when government solves one problem, they come up with another. Government gave them intervention fund worth one hundred and twenty billion Naira (N120b) only out of two hundred and thirteen billion Naira (N213b) only, the next complain is short fall in revenue collection.⁹⁰

However, the transaction has been regarded as a landmark for many reasons, not least because it is one of the world's largest privatizations, and also because 70 percent of the transaction was debt financed solely by local banks, a first of its kind. Other interesting features of the transaction were that government sold 100 percent of its equity stake in some of the successor companies and the African Development Bank (ADB) supported the process with the provision of a partial risk guarantee of up to one hundred and eighty million dollars (US\$180m) to guarantee the obligations of the NBET under its power purchase agreements with selected independent power projects.⁹¹

In order to address Nigeria's persistent power shortage, government set up a special purpose vehicle called National Integrated Power Projects (NIPPs) using private sector best practices in 2004. The privatization of the NIPPs has attracted interest from international investors unlike for the GenCos. However, eight months later, the average Nigerian does not feel the impact of the privatization due to a number of issues being faced by the successor companies, which include: insufficient gas supply. Despite holding the ninth largest gas reserves in the world, domestic gas supply in Nigeria has always been a challenge due to poor gas infrastructure. Energy companies are reluctant to incur large investment costs unless a cost-reflective tariff is put in place.⁹² In response to the gas supply shortfall, the government has recently approved temporary intervention measures.⁹³

Although Nigeria is known for its crude oil production, the country is believed in energy circles to be a gas province with only a little pool of oil. This is because a lot of the major oil and gas producers have been reluctant to invest in gas production and processing facilities. One key reason is that the gas industry has been highly regulated. Producers of gas, under the current regime, are given domestic supply quotas with a fixed price. Therefore, considering the prohibitive cost of investment required, most producers may not be able to recoup their investment unless the price regulation is lifted and off takers of the gas made to pay commercial rates. Also, the current Petroleum Industry Bill (PIB) before the National Assembly contains provisions that may be considered inimical to the growth of gas production. If the PIB is passed 'as is' the incentives that are currently available to companies which invest in gas production may no longer apply. This may further discourage the production of gas with its attendant impact on the power sector since the country relies heavily on gas-fired plant. There is also the issue of gas transportation constraint as a result of the vandalization of gas pipelines.⁹⁴

Unfortunately, as years progressed the objective to privatized the sector where to come to nothing as the companies were riddled with corruption, obsolete facilities, mismanagement, over-dependences on the treasury for funding, poor service accounting and insensitivity of the managers of these companies, resulting in poor service delivery huge debt of salaries and wages pension and so on.⁹⁵ Other problems are poor policy initiatives, poor town and urban planning and downstream activities thus overloading the current grid, a non-existing asset protection mechanism for the safety of power generation/distribution equipment like pipelines and plants and poor maintenance culture.⁹⁶

⁸⁹ *Ibid.*

⁹⁰ Okonkwo, C. N., "Privatization of Power Assets, a Great Mistake", *Labour Events Magazine*, Issue 10, 2016, p. 9.

⁹¹ Oni, M., "Power Sector Privatization in Nigeria: Opportunities and Challenges", available at <<http://www.mondaq.com/Nigeria/x/364664/Oil+Gas+Electricity/Power+Sector+Privatisation+in+Nigeria+Opportunities+and+Challenges>> accessed 07/03/17.

⁹² *Ibid.*

⁹³ Increase gas price to cover transportation costs for new capacity; (ii). A regulatory requirement for gas suppliers to commit to supply agreed gas quantities (iii). Allocate additional gas to the power plants to increase generation capacity (iv). Set up a special purpose vehicle structure of accumulated debts owed to gas suppliers.

⁹⁴ Power Sector Guide, p. 17

⁹⁵ "The Implication of Privatization of Nigeria Economy", available at <<https://www.grossarchive.com/upload/1429880308.htm>> accessed on 17/03/17.

⁹⁶ Ifedobi, I., "Political Solutions to Nigeria's Electricity Crisis", *Vanguard Newspaper*, July 24, 2016, available at <<http://www.vanguardngr.com/2016/07/practical-solutions-nigerias-electricity-crisis/>> accessed on 07/03/17.

The efficiency and service delivery in the Nigeria's power sector is low and no matter the unit price given, DisCos cannot deliver on the product they are selling because they have to be sure to recover value for the product. So, if the efficiency and service delivery is too low you cannot justify higher tariff. With so many factors interplaying; vandalism going on in the Niger Delta, gas supply being distorted and capacity of generating companies, financial in-capabilities militating against power supply. Government cannot solve the problems in the power sector by asking banks to grant credit facilities or give other palliatives to the companies. Other sources of power generation are very expensive, for instance, solar technology. The low technology that is available are gas, coal and water are not maximally used. Sun is available but what you need to convert the sun to electricity is far higher than what you need to the scale of power.⁹⁷

NEPA was unbundled and divided into eighteen new companies and semi-autonomous business units. NEPA was divested of its wholly government interests, with a view to ensuring adequate generation, distribution and utilization of efficient and stable electricity nationwide. Indeed, the journey from ECN through NEPA to PHCN has been tortuous and bumpy for Nigerians.⁹⁸

V. POST-PRIVATIZATION CHALLENGES

Generally, the main aim of the reform was to effectively utilize the financial, human and other resources for the development of the electricity industry and to spread the electricity supply across the country. The government aimed at attracting foreign investments into the electricity sector. Moreover, the quality of electricity services was expected to improve and government would be able to provide employment opportunities in the sector.⁹⁹

The situation of poor performance resulting in unstable electricity supply and frequent blackouts has not improved much since the privatization of the power sector, even with continued government subsidies for some users.¹⁰⁰ The challenges in the industry are enormous ranging from militancy in the Niger Delta region to lack of access to foreign exchange to import refined petroleum products by downstream operators, end user tariffs, workers' liabilities and lots more. However, the sector is facing the classic dilemma of privatization, public interest versus profit motive. Government has a vital job to ensure that consumers get value for their money and overall public interest are safe-guarded.¹⁰¹

Militancy in the Niger Delta

Industry experts have identified absence of critical gas infrastructure as the key factor responsible for the poor gas supply, as the country had over the years, failed to expand on its existing facilities and infrastructure. Another major factor, which is currently giving the authorities cause for concern is the resurgence of violence in the Niger Delta region. The attacks on gas pipelines in the Niger Delta had made it impossible to evacuate gas from the production fields to the various power plants across the country, especially in the first half of this year. The shortage in gas supply, according to stakeholders in the sector, had negatively impacted the growth of the country's power sector and is gradually plunging the sector further into a state of total collapse.¹⁰² The challenges of pricing and payment have made the entire gas-to-power value chain in Nigeria risky and unattractive to investors. Gas prices in Nigeria had been relatively low compared to markets around the world, making the gas business unattractive compared to the oil business especially for International oil companies. Gas prices are still below the levels that will make gas projects attractive and readily bankable and gas off-takers are still not paying for gas consumed as and when due.¹⁰³

The rising operational costs in the industry, among other challenges, have been limiting the industry's growth and the sector is also affected by inadequate finance, poor policy implementation, professional knowledge gaps

⁹⁷ Okonkwo, C. N., *op cit*.

⁹⁸ Ogelle, O., *et al*, "The Implication Legal Reform in the Nigeria Power Sector", *African Research Review*, Vol. 10 (3), No. 42, June 2016, pp. 279 – 280.2, June 2016, pp. 279 – 280.

⁹⁹ World Finance, "Power Sector Reforms in Nigeria", available at <<http://finance.mapsofworld.com/economy-reform/nigeria/power-sector.html>> accessed on 16/02/17, p. 2.

¹⁰⁰ "Challenges Facing the Nigerian Power Sector", *The Economist*, available at <http://country.eiu.com/article.aspx?articleid=1003980684&Country=Nigeria&topic=Economy_1> accessed on 02/04/17.

¹⁰¹ Government faces dilemma over power sector privatization, *The Guardian Newspaper*, Thursday, 25th August, 2016, P. 16.

¹⁰² Obasi, S., *et al*, "Power Sector Reels under Gas Shortage, Niger Delta Militancy", *Vanguard Newspaper* available at <<http://www.vanguardngr.com/2016/11/power-sector-reels-under-gas-shortage-niger-delta-militancy/>> accessed on 03/04/17.

¹⁰³ Okere, R., "How to Resolve Gas-to-Power Challenges in Nigeria", *The Guardian Newspaper*, available at <<https://guardian.ng/energy/how-to-resolve-gas-to-power-challenges-in-nigeria/>> accessed on 02/04/17.

and low capacity building. One other challenge facing the sector was the noticeable delay in the contracting processes, funding and security problems. High tax regime existing in the sector, it posed a threat to the sector's growth. Some of the challenges as crude oil theft, pipeline vandalism and the need for the sector to surmount the challenges and maintain its position as Africa's leading gas and oil producer. Factors that would facilitate the realization of the desired goals in oil and gas production were policy implementation and partnership between oil companies and the industry's regulators. Apart from inadequate infrastructure, the capacity of small gas producing companies was constrained by factors such as funding, limited assets and inadequate technical resources. Priority attention was given to oil to the detriment of gas production, insisting that this posed a serious challenge to the nation's gas production and income projections.¹⁰⁴

Lack of Access to Foreign Exchange to Import Refined Petroleum Products

Companies importing fuel in Nigeria have been hindered by lack of access to foreign exchange following the plunge in the price of oil. This has resulted in widespread supply shortages across the country. Getting the upstream companies to intervene and matching them to downstream business lines for the provision of foreign exchange is an ingenious move. Government have been able to convince the upstream oil companies to provide foreign exchange buffers over the next one year for those who are bringing in products. Thus, International energy companies in Nigeria have agreed to provide about \$200 million to help fund fuel imports amid a foreign-currency shortage. Although this is a short-term strategy, it would mitigate the current challenges faced by major marketers with regards to access to foreign exchange, while plan for a long-term solution to ensure availability of petroleum products should be put in place, including ensuring existing refineries are operating at full capacity and new facilities are built, and liberalizing access to foreign exchange.¹⁰⁵ In the same vein, GenCos lamented the acute shortage of Foreign Exchange (FOREX) to acquire spare parts to service their heavy duty equipment.¹⁰⁶

End User Tariffs

The Multi-Year Tariff Order (MYTO) reviews saw consumers pay as much as 45percent increase in their electricity bill from February 1, 2016. The objective of the new tariff is to enable prudent consumers to save money on electricity bill as they can now control their consumption and not pay monthly fixed charges. DisCos had promised to provide pre-paid meters for their consumers within 18 months, but had not met the expectations of the people. Consumers are not metered in line with the signed privatization Memorandum of Understanding (MOU) of November 1, 2013 which stipulates that within 18 months gestation period, all consumers are to be metered. In an attempt to facilitate adequate and prompt deployment of prepaid meters to customers' premises, NERC has abolished the connection of new electricity customers without meters. It also discourages bulk metering of communities and estimated billing which have been adopted by most of DisCos without regards to the regulation on methodology for estimation of electricity consumption, as approved by the NERC.¹⁰⁷

NERC's decision to increase electricity tariffs without ensuring availability of meters to promote social justice where consumers would pay for exactly the amount of electricity they consume is illegal, unfair, and unjustifiable and a further exploitation of already exploited Nigerians as it is inconsistent with the provision of Power Sector Reforms Act.¹⁰⁸ There is also a subsisting Court order of the Federal High Court Lagos, in the case of *Toluwani Yemi Adebisi v. NERC & Ors*¹⁰⁹ where the Court described NERC's action as "procedurally ultra vires, irrational, irregular and illegal," and awarded the sum of N50, 000 in the plaintiff's favour. In deciding the substantive suit, the court relied on Sections 31, 32 and 76 of the EPSRA, and held that NERC "acted outside the powers conferred on it by the Act and failed to follow the prescribed procedure." Tariff increase without bridging the 70% metering gap in the sector is indirect license to defraud customers. Apart from commercial efficiency that has crashed, technical efficiency which measured the degree to reliability of supply of service has nosedived. These Discos are cheating the sector by under remitting revenue collection for energy sold and there is no improvement in service delivery. An aggravation of the poor

¹⁰⁴ Aregbesola, I., "Nigeria's Oil and Gas Industry: The Challenges and Prospects", available at <<http://www.peoplesdailyng.com/nigerias-oil-and-gas-industry-the-challenges-and-prospects/>> accessed on 03/04/17.

¹⁰⁵ Gbogbo, E. B., "Nigeria Says Companies to Give \$200 Million for Fuel Imports", available at <<https://www.bloomberg.com/news/articles/2016-04-07/nigeria-says-companies-to-provide-200-million-for-fuel-imports>> accessed on 03/04/17.

¹⁰⁶ Usim, U., "Forex Shortage, Debt Crippling Our Operations – GenCos", Daily Sun Newspaper, Thursday, April 27, 2017, p. 39.

¹⁰⁷ Obasi, S., et al, *op cit*.

¹⁰⁸ Section 76 Electric Power Sector Reform Act

¹⁰⁹ Dated May 28, 2015 (*Per Justice Mohammed Idris*)

service delivery is the rejection of load and overestimation of low energy taken to maximize collection. What was the weight of efficiency improvement in the tariff agreement with government? Already, commercial and residential consumers are groaning under huge estimated bills, incessant outages, and lack of prepaid meters and ageing equipment, among others which the 11 DisCos have linked to the long years of neglect of the electricity sector. They claimed the new tariff regime is cost reflective and would enable them to fix the existing problems. What is the relation between tariff reviews and investment in the sector, which one comes first? What are the contracts between government and the companies? What was the value of the assets sold to the companies and what was the real value of the assets as at the time of sells?¹¹⁰

Lack of Adequate Finance

The power industry is barely able to generate enough revenue to cover its operating costs let alone meet its considerable capital expenditure needs. This results in the investors having to seek funds from the Government to be able to meet its recurrent expenditure. Without a pricing regime that supports financial viability in the sector private investor would not be interested in the market. To address this issue, NERC has been charged with the dual function of ensuring that the prices charged by licensees are fair to the consumers and sufficient to allow the licensees to finance their activities and to allow for reasonable earning and profits for efficient operation. This approach is aimed at ensuring the necessary support for operating and capital expenditure of the various sub sections (i.e. generation, transmission and distribution) and at the same time end user tariffs are fair. In addition to the above, to ensure adequate returns on investment for the investor in the Generation Companies, the Federal Government established the NBET to serve as the 'middle man' between the GenCos and DisCos for the purpose of power sales. The aim of setting up the Bulk Trader is to ensure payment for the power produced by the generation company. The Bulk Trader is a transitional entity that will exist for as long as it takes for the distribution companies to establish their credit-worthiness.¹¹¹

There has not been significant improvement in the power supply situation since it was privatized and one is tempted to ask what level of revenue improvement has the companies attend before the new tariff proposals? How does new tariff go well with income and standard of living of citizens to guarantee revenue collection? What is the comparison between tariff and efficiency before privatization and after? Now, faced by dwindling income due mainly to the collapse of global oil prices, the administration has the challenge of convincing frustrated electricity consumers that they must accept substantial increases in energy tariffs if Nigeria is to achieve constant, stable and nationwide electricity supply.¹¹²

On the 25th March, 2016, the federal government via the Central Bank of Nigeria, CBN provided a bailout to the tune of N213 billion, through the Nigeria Electricity Sector Intervention (NESI) to the investors. In spite of that intervention, the shortfall, instead of being wiped out, has continued to escalate at the rate of about N15 billion per month (equivalent to N500 million daily). It rose to a total-market shortfall of N400 billion as at Dec. 31, 2015. It is completely irrational that such sum was offered to the companies but such was never offered PHCN before it was given a bad name and hanged. Assuming that borrowing is one of the tools that governments have to fill the financing gap with funds from the bond market, should government secure fund to finance sector it has already sold out to private investors? Issuance of bonds in this circumstance, would amount to not only spoon-feeding the operators in their inefficiency, but also at great cost to Nigerians as the risk of default would cause the crystallization of the Federal Government Sovereign Guarantee and lead to national energy crisis in future. The Nigeria's electricity market is not so matured enough and the people who manage the sector are not so confident that government could risk securing bond to finance the outrageous shortfall in the sector caused by their recklessness and greed.¹¹³

The situation is further aggravated by the absence of a definite roadmap, to keep the operators on their toes and ensure financial sustainability for the growth of the sector. The operators are currently seeking a Federal Government sovereign guarantee, to enable them approach global lenders to secure the facility.¹¹⁴ The

¹¹⁰Memorandum Submitted to the House of Representatives Joint Committee on Power by Senior Staff Association of Electricity and Allied Companies (SSAEAC) an Affiliate of the Trade Union Congress of Nigeria (TUC) to Halt Federal Government Secured Bond Of N309 Billion to Finance the Outrageous Shortfall in the Nigerian Electricity Market on 5th December, 2016.

¹¹¹ Detail, *op cit*

¹¹² "Challenges Facing the Nigerian Power Sector", The Economist, available at <http://country.eiu.com/article.aspx?articleid=1003980684&Country=Nigeria&topic=Economy_1> accessed on 02/04/17.

¹¹³Obasi, S., et al, *op cit*.

¹¹⁴ "Saving Of Power Sector through Escrowing of DisCos' Collection Accounts and Declaration of Eligible (132/330 Kv) Customers" Letter submitted to President Muhammadu Buhari by the Senior Staff Association of Electricity and Allied Companies (SSAEAC) on Wednesday, 26/04/17.

fact is that politicians and officials in government jostled for shares in the power GenCos and DisCos that were privatized in 2013. Most of the transactions principles often included and followed in the privatization of government's assets were sidestepped during the sale. The outcome of the power privatization was heavily influenced by political considerations against economic or technical capacities of the eventual preferred bidders.¹¹⁵

Workers' Liabilities

The employees of PHCN have been averse to the privatization of the sector as they are uncertain as to the future of their employment and all out standings (arrears in salaries, pensions, severance and other benefits) owed to them. In an effort to resolve these issues, the government has engaged the labour union in dialogue with emphasis on the following: Investors would need experienced workers in various aspects of the business and would most likely re-absorb those who know their job and understand their territory, intends not to create/cause job loss but to improve the sector, Faithful implementation would result in a larger, more dynamic sector with industry players enjoying significant profits, consumers enjoying better delivery and employees enjoying better conditions of service.¹¹⁶

The efficiency and service delivery in the Nigeria's power sector is low and no matter the unit price given, DisCos cannot deliver on the product they are selling because they have to be sure to recover value for the product. So, if the efficiency and service delivery is too low you cannot justify higher tariff. With so many factors interplaying; vandalism going on in the Niger Delta, gas supply being distorted and capacity of generating companies, financial in capabilities militating against power supply. Government cannot solve the problems in the power sector by asking banks to grant credit facilities or give other palliatives to the companies. Other sources of power generation are very expensive, for instance, solar technology. The low technology that is available are gas, coal and water are not maximally used. Sun is available but what you need to convert the sun to electricity is far higher than what you need to the scale of power.¹¹⁷ Indeed, the journey from ECN through NEPA to PHCN has been tortuous and bumpy for Nigerians.¹¹⁸

VI. CONCLUSION

In recent times, there have been strident calls for the privatization of the power sector to be revisited or reversed. The latest to join the call is the Nigerian Senate, which debated the privatization and seeming failure of the power sector, particularly the DisCos. It is crystal clear that the Nigeria power sector is underperforming and there is an urgent need for proper policy towards achieving a quality and continuous well-functioning electricity market in the country.

Nigerians have suffered for decades from the inadequate electricity service. These lack of a reliable supply and the constant blackouts cause severe economic damage. Government must understand the gravity of the power crisis and how detrimental it is to the economy. The issues must be seen as the number one priority, simply because in the modern world, everything runs on electricity, and to have zero MW per capita simply means to operate a dead domestic economy.

The ruling elites conveniently carried out one of the biggest fraud in the history of this country under the guise of power sector privatization, with over twenty thousand workers still have their entitlement unpaid while their jobs already terminated.

Without a doubt if the reforms are properly implemented the benefits would be numerous and would outweigh by far any challenges and costs that come with implementation. It would promote growth and efficiency not only in the electricity sector but also other industries such as the manufacturing, agriculture and construction industries which are heavily dependent on electricity. The Nigerian market would open up thereby encouraging private sector participation from both local and foreign investors which would greatly improve the quality, efficiency and ensure reliability of power supply. In addition to FDI, a key benefit is the transfer of technology especially in generation and distribution as the current technology is obsolete. There would be more employment opportunities across disciplines as the sector (and various others) expand and become more competitive.

Privatization has failed and any attempt to patch it would mean one of the reasons for inefficiencies productive crash, since privatization is the unwholesome labour practices by the companies which led to dismissal without due process of skilled and experience workers in the sector for profit maximization.

¹¹⁵Dr. Shamsuddeen Usman, Former Minister of National Planning Commission in the administration of former President Goodluck Jonathan on Thursday, 26th October, 2017 Lecture of the Nigerian Society of Engineers AT Abuja.

¹¹⁶Detail, *op cit*

¹¹⁷Okonkwo, C. N., *op cit*, p. 9.

¹¹⁸Ogelle, O., *et al*, *op cit*, pp. 279 – 280.

The power sector seems to be in a dilemma, as no clear-cut plan to remedy the situation, seems to be on the table. Privatization has led to private monopoly with very low efficiency ever recorded under government ownership. The investors have neither technical know-how nor financial capacities. Instead they have become experts in articulating reasons why they cannot deliver on service and efficiency despite illegal tariff adjustments. The privatization of the Nigeria's power sector is a complete failure and should be reviewed to adequately address the challenges. Power sector investors clearly have no interests in building new power plants or upgrading them, or investing in better distribution systems. They are, for all intents and purposes interested only in plundering PHCN further by stripping it of its assets.

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