

ASSESSING THE INDEPENDENCE OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION IN FORM AND SUBSTANCE

¹Terhemen Andzenge

Email: terhemen.andzenge@alumni.uct.ac.za / andzenge@gmail.com

+2348033810899

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Abstract

Three mutually exclusive interests converge on the independent regulatory model of governance table: the desire of consumers for affordable and sustainable power supply; the quest of investors of sunk and immovable resources to have a return of their investments; and finally the desire of government for peace and social harmony devoid of exploitation and market abuse. In balancing these competing interests, an umpire, the Nigerian Electricity Regulatory Commission, was established to moderate the competing interests. It is designed to be and be seen to be independent of all the players in the value chain in its decision-making processes in order to ginger credibility, accountability, legitimacy and transparency and is also required to act objectively, impartially, and consistently, without conflict of interest, bias or undue influence—in other words, independently. This paper problematizes the institutional design of the Nigerian Electricity Regulatory Commission to ascertain its alignment with the conceptual benchmarks of independence in both form and substance. The paper finds that while the enabling law largely captures the essence of the model, the de facto landscape under which the Nigerian Electricity Regulatory Commission operates is dotted with distortions, misalignments characterized by state and regulatory capture thus betraying its weak independent status and proffers veritable mitigating pathways out of the challenges.

Introduction

Before the 1990s, electricity provision in most parts of the world was a natural monopoly and was considered a social service that required government ownership.² The tide began to turn in the 1990s with the introduction of liberalization and privatization of the electricity sector as a policy tool for economic reform in many countries around the world. Several forces have accounted for this reform direction. These include the poor performance of state-owned power utility operating as a State-Owned Enterprises (SOE), the global re-definition of the role of the state in the market place, inadequate expansion of access to electricity service for the population, and/or unreliable supply. Other reasons implicated in this shift have been the inability of the state to finance needed expenditures on new investment and/or maintenance of power assets while being preoccupied with budgetary constraints; the need to remove subsidies to the sector in order to release scarce resources for other pressing public expenditure needs; and the desire to raise immediate revenue for the government through the sale of assets from the sector.³ In addition, major changes in global capital markets and opportunities for cross-border investment

¹ Cosmopolitan University, Abuja

² Oni, A., (2013). *The Nigerian Electric Power Sector: Policy. Law. Negotiation. Strategy. Business*, AuthorHouse, UK

³ Bacon R. W. and Besant-Jones, J., (2002). Global Electric Power Reform, Privatization and Liberalization of the Electric Power Industry in Developing Countries, Energy & Mining Sector Board Discussion Paper Series, The World Bank Group, Paper No.2

and technological advances shrunk activities hitherto considered natural monopolies.⁴ All these combined to make alternative approaches to funding the provision of electricity both attractive and feasible.⁵

In the Nigerian context, the poor performance of the state-owned vertically integrated monopoly electricity utility,⁶ National Electric Power Authority “NEPA” which was engaged in electricity generation, transmission, and distribution, resulted in the stunted growth of Nigeria’s economy given the ubiquity of electricity to socioeconomic development.⁷ To ameliorate this, the government, at the prompting of International Financial Institutions, instituted a set of sectoral reforms that led to the enactment of a new law, the Electric Power Sector Reform Act in 2005, to reform the electric power sector.⁸ This piece of legislation ushered in an independent regulatory mode of governance into the electricity sector and was followed by the establishment of a sectoral regulator, the Nigerian Electricity Regulatory Commission “NERC” in October 2005 to regulate the entire sector. The Electric Power Sector Reform Act of 2005 was repealed and replaced by the Electricity Act of 2023 (EA 2023).

The setting up of NERC as an independent regulatory agency followed a familiar path that has been taken globally, with more than 200 countries establishing similar agencies in the past three decades.⁹ As of 2013, more than 26 independent regulatory agencies charged with overseeing the electric power sector were established in sub-Saharan Africa.¹⁰ The key feature and principal motivation for the evolution of the independent regulatory model of governance was to make the agencies “independent” and insulate them from external influences in critical areas, such as tariff-setting and other regulatory decisions.¹¹

Given the peculiar political economy of Nigeria that is characterized by fragile institutions and weak political institutions¹², an overbearing Executive branch of government¹³ and wobbling judiciary¹⁴, this paper interrogates the *de jure* concept of independence in the context of NERC as opposed to its *de facto* status when mirrored against its original conceptual origins. This consideration is germane given that electricity supply has only

<https://documents1.worldbank.org/curated/en/226491468780869282/pdf/280850Global0electric0power0EMS0no-02.pdf>; Kosmo M. (1987). *Money to Burn? The High Costs of Energy Subsidies*. New York: World Resource. Inst.68

⁴ Künneke, R. W. (1999). Electricity networks: How ‘natural’ is the monopoly? *Utilities Policy*, 8(2), 99-108. [https://doi.org/10.1016/S0957-1787\(99\)00013-2](https://doi.org/10.1016/S0957-1787(99)00013-2)

⁵ OECD (2000). *Privatization, Competition and Regulation*. OECD Publishing, Paris. <https://doi.org/10.1787/9789264180581-en>.

⁶ Andzenge, T. (2015). *Legal Issues in the Contextual Diffusion of Independent Regulatory Agencies in Nigeria*, an unpublished thesis presented for the Degree of Doctor of Philosophy in the Department of Public Law, University of Cape Town, at 11

⁷ Corder, H. and Andzenge, T. (2018). ‘*Regulation as a Catalyst for the Electrification of Africa*’ in Yinka Omorogbe and Ada Ordo (eds), *Ending Africa’s Energy Deficiand the Law: Achieving Sustainable Energy for All in Africa*, Oxford University Press, 71, DOI: [10.1093/oso/9780198819837.003.0005](https://doi.org/10.1093/oso/9780198819837.003.0005)

⁸ Dubash, N., (2012). *Regulation through the Back Door: Understanding the Implications of Institutional Transplantation*, *Working Paper No. 42, Jerusalem Papers on Regulation and Governance* at 4

⁹ Brown, A. et al., (2006). *World Bank Handbook for Evaluating Infrastructure Regulatory Systems*, The World Bank (Washington, DC, USA)

¹⁰ Kapika, J, Eberhard, A., (2013). *Power Sector Reform and Regulation in Africa: Lessons from Kenya, Tanzania, Uganda, Zambia, Namibia, and Ghana* <<https://www.law.cornell.edu/wex/quasi-judicial>> (HSRC Press, Cape Town, South Africa)

¹¹ Brown, note 9.

¹² Anyaegbunam, E. O., (2012). *Law Making and the Enabling Legal Framework in Nigeria: Critical Overview*, *NAJLS International Journal of Legislative Drafting* (NIJLD). 1(1), 54-72; Lewis, P. & Alemika, E. (2005). *Seeking the Democratic Dividend: Public Attitudes and Attempted Reform in Nigeria*, *Afrobarometer Working Paper* No. 52; Yagboyaju, D.A., (2011). *Nigeria’s Fourth Republic and the Challenge of a Faltering Democratization*, *African Studies Quarterly*, Volume 12, Issue, 95

¹³ Kalu, U.C, (2018). *Separation of Powers in Nigeria: An Anatomy of Power Convergences and Divergences*, *African Journals Online*, NAUJILJ 9 (1); Baba, Y.T, (2018). *Executive Dominance and Hyper-Presidentialism in Nigeria*’, in Carl Levan, and Patrick Ukata (eds), *The Oxford Handbook of Nigerian Politics*, Oxford Handbooks (2018) online edn, Oxford Academic (2018), <https://doi.org/10.1093/oxfordhb/9780198804307.013.14>

¹⁴ Arewa, J.A., (2012). *Judicial Integrity in Nigeria: Challenges and Agenda for Action*, *Judicial Reform and Transformation in Nigeria: A tribute to Hon. Justice Dahiru Musdapher*, eds Azinge, E and Dakas, C.J., Nigerian Institute of Advanced Legal Studies; Changwak, E.J, and Ityonzughul, T.T., (2018). *Nigeria’s Judiciary and the Challenges of Nation-Building in the Post-independence era*, *FUDMA Journal of Arts*, Volume 1, Number 1, 2018

marginally improved in the 19 years of NERC's establishment.¹⁵ This is with a view to ascertain whether NERC's institutional design (de jure status) matches what is being obtained in practice, its de facto state.

Theoretical Framework of Independence

The concept of independence of IRAs has received various scholarly definitions. Fesler¹⁶ defined it as independence from control by the government, legislature, and regulated utility companies and harps at the concept as connoting integrity and impartiality. In conceptualizing IRA independence, Greve¹⁷ lists five questions that, if answered in the negative, indicate that an IRA possesses a high degree of regulatory independence. These include the following questions: First, can the government interfere and overrule the decisions made by the IRA in specific cases? Second, can the government make strategic decisions regarding the regulation? Third, does the same personnel policy and management rules apply to central administration in general? Fourth, can the government develop policy independently of the IRA? Fifth, is the IRA financed by the government and parliament through the ordinary state budget?

Smith¹⁸ contextualizes the independence of IRAs as consisting of three essential elements: An arm's-length relationship with regulated firms, consumers, and other private interests, an arm's-length relationship with political authorities, and the possession of organizational autonomy that includes earmarked funding and exemption from civil service remuneration, pointing out that all these are meant to insulate regulators from external political pressure and allow for decision-making without fear or favor.

The African Forum for Utility Regulators Guidelines on Regulatory Independence and Accountability defines independence as the "right and freedom of regulators to make decisions such as tariff determinations without the prior approval of government and no other entity (other than a court or pre-designated appellate panel) can overrule the regulator's decision."¹⁹

Gleaning from the above definitions, independence envisages four main objectives: protection of consumers from abuse by firms with substantial market power; support for private sector investment by protecting investors from arbitrary government actions; the promotion of economic efficiency and competition; and to allow investors to recover investments with a reasonable return.²⁰

The imperativeness of independence of IRAs is underlined by their central role in the provision of electric power. First, investments in the electricity sector are sunk, long term, and immobile; hence, credible commitments are needed before entry to allow for the recovery of investments with reasonable returns thereon. Credible commitments from regulators are considered best practice because they nurture trust, boost investments, and guarantee a level playing field for stakeholders, ultimately leading to better outcomes for service provision and the consumer.²¹ Without it, private sector participation would be hampered, given the attendant uncertainties²²

¹⁵Charlotte Remteng, et al. (2021). Nigerian Energy Situation, Energypedia, Open Africa Power Fellowship Programme (2021) Accessed online on 4/23/25 at https://energypedia.info/wiki/Nigeria_Electricity_Sector#:~:text=Actual%20electricity%20supply%20has%20been,Babatunde%20and%20Shaiibu%2C%202011).

¹⁶ Fesler, quoted in Mitnick, B. (1980). The Political Economy of Regulation, [American Political Science Review](#), 1981, vol. 75, issue 3, 778-779

¹⁷ Greve, C. (2002). Privatisering, regulering og demokrati. Telestyrelsens funktion som uafhængig reguleringsmyndighed. Aarhus Universitetsforlag, Århus, (Magtudrednings skriftserie).

¹⁸Smith, W., (1997). Utility Regulators—The Independence Debate, Viewpoint, Note No. 127, The World Bank Group. Finance, Private Sector, and Infrastructure Network1

¹⁹ <https://afurnet.org/>

²⁰ Smith, note 18

²¹ Amadi, S., (2012). Challenges of Transparency: Relationship Between Regulators and Stakeholders, a paper at the NSE/IEEE International Conference & Exhibition on Power & Telecommunication 2012, themed; "Transformation in Power & Telecommunications through Public Private Partnership" accessed online at <https://nerc.gov.ng/wp-content/uploads/2014/04/Challenges%20of%20Transparency-%20Relationship%20between%20regulators%20and%20stakeholders.pdf>

²² Badran, A., (2010). Steering the Regulatory State: The Rationale Behind the Creation and Diffusion of Independent Regulatory Agencies in Liberalized Utility Sectors in the Developing Countries: Initial Thoughts and Reflections on the Egyptian Case, A Paper

and a weak credible commitment regime gives rise to four inter-related negative outcomes: higher costs of entry and provision of services, smaller yields from the sale of power assets, higher financing costs, which translates to higher tariffs, invites instability and uncertainty in the market place, thereby eroding public trust and confidence in the government.²³

Second, the ubiquitous nature of electricity and its pricing, which, though economic, is overly political, calls for an independent umpire that would, through regulation, insulate the vital aspect of tariffs from political influence and considerations. Political actors usually have their eyes firmly fixed on electoral cycles and seek to influence favorable regulatory determinations that would avert electoral backlash and social unrest. All this happens at the expense of somber and informed technical economic considerations in the regulation of tariffs, with private investors left carrying the can and injuring consumers in the long term. Thus, as Brown notes, the main motivation for clothing IRAs with independence toga is to “depoliticize tariff-setting and other regulatory decisions by insulating the regulatory entity from day-to-day political considerations.”²⁴

The third incentive for the independence of IRAs is the intentional need to move away from the often unpredictably anachronistic, old-style ministerial regulation which revolved around the Minister—a political actor, driven principally by political considerations and superintended over by a crop of civil service advisers that have an ever present motivation to preserve the status quo and protect institutional vested interests.

Institutional Design of NERC

The institutional design of NERC, which is tailored after the conceptual origins of the independent regulatory agency governance model, contemplates that NERC would have the full authority to make final determinations within its jurisdictional domain without having to obtain approval of any other agency of government or external entity. Conceptually, NERC as an IRA, has embedded functions and powers to undertake the following without let or hindrance:²⁵

- a) Regulate tariffs to benefit consumers and regulated entities
- b) Stipulate standards in such appropriate areas as technical and commercial service quality
- c) Establish regulations within its legal authority that enable it to carry out its duties
- d) Perform routine but necessary administrative, financial, and operational functions in order to operate optimally
- e) Enforce its decisions, standards and rules possessing in the process a range of sanctions, powers and tool remedies, including penalties
- f) Compel the production and provision of the information necessary to perform regulatory functions
- g) Adopt procedures to give effect to its functions
- h) Mediate disputes between regulated entities and consumers
- i) Promote competition, protect consumers from uncompetitive practices, and prevent abuse of monopoly or market power
- j) Monitor to ensure the healthy functioning of the electricity market.

This Paper proceeds to present in a tabular form, the *de jure* concepts of the IRA model of regulatory governance as contained in the EA 2023 and then extrapolates key findings from that *de jure* status that point to the *de facto* landscape within which NERC exists and has operated in the past 19 years.

submitted for the 3rd Biennial Conference “Regulation in the Age of Crisis”, European Consortium for Political Research, Standing Group on regulatory Governance, 17-19 June 2010, Dublin.

²³ Keefer, P. (2008). Insurgency and Credible Commitment in Autocracies and Democracies. *The World Bank Economic Review*, 22(1), 33–61. <http://www.jstor.org/stable/40282263>; Eti, C.E, Audu, S.D., Osah, G., (2024). Credibility Commitment and Peace Building in The Niger Delta Region of Nigeria, *Wukari International Studies Journal*, Vol. 8 (2), 2024 65

²⁴ Brown, note 9.

²⁵ Ibid.

S/N	DE JURE DESIGN PRESCRIPTIONS of IRAs	ELECTRICITY ACT 2023 PROVISIONS
1	<p>Explicit Provisions Granting Independence: The independent regulator model espouses decision-making Independence requiring that the IRA’s decisions are made without the prior approval of any other government entity or regulated entity with the exception of courts of law or a pre-established appellate panel that has the power to review the IRA’s decisions.</p>	<p>Section 33(3) states that NERC “shall be an independent body in the perform of its functions and exercise of its powers under the Act” (sic)</p>
2	<p>Powers of the Minister: The institutional design requires a clear delineation of roles and responsibilities between all the players in the value chain, with the Minister taking up the role of stipulating policy guidelines for the sector devoid of being involved in the running of the affairs of the IRA.</p>	<p>Section 5 grants the Minister broad powers to issue general policy directions to NERC.</p>
3	<p>Appointment and Discipline of Regulators: Given the wide breath of powers exercised by regulators that even though are of economic nature, possess overtly political fallouts, it is important to securely insulate regulators from political actors in three ways, first by requiring the appointment and discipline processes to reside in more than one branch of government and their terms of office to overlap electoral cycles.</p>	<p>Section 35 subjects the appointment of Commissioners by the President to confirmation by the Senate. However, in cases of removal, only the simple majority concurrence of the Senate is required (Section 39(2). This weakens the neutrality of regulators as the process leading to their discipline is weakened. Hypothetically, a regulator can be removed from office by any number of the Senators in session once they constitute a simple majority as opposed to approval of appointment by the Senate as in S. 35.</p>
4	<p>Financial Autonomy: Provisions should be made in the enabling legislation for a dedicated source of funding from charges and levies on and from regulated firms or consumers as against state budgetary appropriations to avoid state capture. The level of funding of the agency should be adequate to enable it to meet all its responsibilities competently, professionally and in a timely manner.</p>	<p>Section 53 provides for dual funding streams from fees and charges accruable form regulated entities and appropriations from the state treasury, while Section 52 (1)(2) mandates that the Commission submit a budget of its intended expenditure and any supplements thereto to the Minister every year.</p>
5	<p>Tariffs: Tariff regulation is at the heart of electricity provision regulation given its ubiquity.</p>	<p>Section 116 grants the Commission unfettered powers to determine methodologies for fixing electricity prices across the NESI.</p>
6	<p>Remuneration: The remuneration of the Commissioners and staff of the Commission should be adequate, benchmarked against industry wide standards in order to achieve two purposes: first, to attract and retain qualified and competent staff and, second, to mitigate the capture of regulated entities.</p>	<p>Section 43 allows the Commission to pay its remuneration subject to the recommendations of the National Income Salaries and Wages Commission, which shall, in making the recommendations, consider the unique nature of the NESI.</p>

Key Findings

When mirrored against the institutional design of the IRA model, utilizing the independence yardstick, the existence and work of NERC as the IRA for the NESI has been fraught with major challenges, distortions, serial incidences of state overreach and capture, regulated entities capture and the abridging and appropriation of the functions and powers of NERC by the National Assembly and the Executive.

Provisions Granting Independence to NERC

Although Section 33(3) of the EA 2023 states that NERC “shall be an independent body in the perform of its functions and exercise of its powers under the Act” (sic), there is/are no express provision(s) outlining the above declaratory status. In legal jurisprudence, power is never inferred or assumed but is granted. Exercisable authority and power are not automatically possessed but must be explicitly conferred or recognized, rather than simply assumed or implied.²⁶ The barren nature of this declaratory independence of NERC as contained above has been laid bare by de facto reality since its establishment. It is the submission of this paper that Section 33(3) by its wording is declaratory in nature, and the verbalization of the independence purportedly granted is missing.

Even though Section 33 (3) as a bare minimum, ought to clothe NERC with an adequate independent toga and insulate it from external influences in its decision making and in the discharge of its functions of regulating the electric power sector in Nigeria, the implementation has not been as designed. There has been a discernable pattern of subversion of the well-intentioned legal framework through vicissitudes by the political economy of the nation. The well-crafted powers of appointment and discipline in the law have over years been serially sidestepped by a pattern of impunity that elevated men over institutions.

Appointment and Discipline of Regulators

Even though the institutional design encapsulated in the EA 2023 and its predecessor, the Electric Power Sector Reform Act, 2005 sought to insulate regulators from external pressures and control by giving them secured tenures, the Executive Arm has since inception subverted clear provisions of the enabling law by abridging the terms of Commissioners without just cause²⁷, failing to appoint Commissioners or appointing persons that are not Commissioners (either as Sole Administrator²⁸ or Chief Executive Officer)²⁹ to run the Commission without deference to the enabling law. This has the intended effect of hamstringing the independence of the Commission.

Remuneration

Section 43 of the EA 2023 allows the Commission to pay its remuneration subject to the recommendations of the National Income Salaries and Wages Commission (NSIWC), which shall, in making the recommendations, take into consideration the unique nature of the NESI. The remuneration of the Commissioners and staff of the Commission should be adequate, benchmarked against industry wide standards in order to achieve two purposes: first, to attract and retain qualified and competent staff and, second, to mitigate their capture by regulated entities.³⁰ Therefore, subjecting the remuneration structure to the recommendations for the NSIWC subverts the independence design the EA 2023 seeks to enthrone and unduly bureaucratize the process and ties it to civil service nuances.

Regulation of Tariffs

The core function of a regulator—regulation of tariffs—which is to be exercised by the regulator independently and fairly is meant to meet the yearnings of consumers, the expectations of investors and the relief of government. In addition, it is designed to “depoliticize” the setting of tariffs and other day-day regulatory decisions by

²⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (per Chief Justice John Marshall)

²⁷ *Suit No. FHC/ABJ/CS/295/09, Dr. Muhammed Alimi Abdul-Razaq and the Attorney General of the Federation and 7 others*

²⁸ <https://allafrica.com/stories/200902190568.html> accessed online on 14/03/23 at 11.14 am

²⁹ <https://punchng.com/fg-inaugurate-new-nerc-commissioners-without-chairman/> accessed online on 14/03/23 at 11.10am

³⁰ Brown, note 9.

insulating the regulatory entity from day-to-day political considerations. This core function of NERC has been serially take over and openly influenced on several occasions by the Executive and Legislative arms of government, a scenario that the legal, regulatory, and institutional design of the IRA mode worked hard to avert. In 2017, the government reversed an approval given granted by NERC for an increase in tariffs toward a cost-reflective threshold because of impending elections, as they feared a voter backlash.³¹ Appropriating those powers from the regulator impacted negatively on sustained investments in the sector because of non-reflective prices. Reliable and adequate provision of electricity thrives on a cost reflective tariff regime that is essentially a per unit cost of electricity, which mirrors the actual cost of producing, transmitting and distributing power and removes the reliance on the state or any other subsidies to cover the difference between the prevailing tariff and the actual cost of the electricity. Tariffs offer investors the incentive and comfort to depend on steady revenue streams to run reliable electricity supply and modernize the sector. This, in turn, allows for the recovery of investments and a reasonable return on investments, which in turn allows them to invest in infrastructure and improve service quality.³²

Although tariff setting is a core economic decision, it has major has political implications. Electricity tariffs and politics in developing countries, including Nigeria, are intertwined, with tariffs influenced by social, political, and economic factors rather than solely economic efficiency.³³ This is the main rationale for the independent regulation model for electricity provision. The mode of regulation is critical in ensuring fair, efficient, and reliable power supply. By delineating and severing regulatory functions away from the state and market participants, an independent regulator is then best positioned to objectively develop and enforce rules, protect consumers, and promote a level playing field for all market actors, thus fostering a more transparent and accountable electricity industry devoid of conflicts of interest.³⁴

Thus, it has been a major distortion of the electricity reform trajectory for the Executive³⁵ and the Legislature³⁶ since the commencement of reforms, with an eye on the electoral cycle, to continually interfere and overrule regulatory determinations of NERC on tariffs. This has the unintended effect of depressing investments, ultimately leading to poor service availability and delivery.

State Capture

Contrary to the design of the IRA model and in direct violation of the provisions of the EA 2023 and its predecessor the EPSRA 2005, instances abound where the government directly intervened to reverse regulatory decisions and determinations of NERC.³⁷ These included the freezing of the residential class of tariffs (R2) in 2015 for 18 months, the removal of Collection Losses in 2015, the non-implementation of five Minor Tariff

³¹ President Goodluck Jonathan's administration shortly before the presidential elections in 2015 ordered the reversal of tariffs approved by NERC; FG Rules Out Electricity Tariff Hike for Now, ThisDay Newspaper, Nigeria, January 10, 2017

³² Ayansola OA, Ogundunmade TP, Adedamola AO. (2023). Statistical Analysis of Cost Reflective Electricity Tariff and Distribution in Nigeria (A Study for Southwest States). *Mod Econ Manag*, 2023; 2: 5. DOI: 10.53964/mem.2023005.

³³ Muralee Krishnan C, Santanu Gupta (2018). Political pricing of electricity—Can it go with universal service provision?, *Energy Policy*, Volume 116, 373-381, <https://doi.org/10.1016/j.enpol.2018.02.009>. (<https://www.sciencedirect.com/science/article/pii/S030142151830079X>)

³⁴ Andzenge, note 5.

³⁵ <https://allafrica.com/stories/200902190568.html> accessed online on 14/03/23 at 11.14am; President Goodluck Jonathan's administration shortly before the presidential elections in 2015 ordered the reversal of tariffs approved by NERC; FG Rules Out Electricity Tariff Hike for Now, ThisDay Newspaper, Nigeria, January 10, 2017

³⁶ <https://www.channelstv.com/2016/02/16/senate-orders-reversal-of-electricity-tariff-increase/>; <https://nairametrics.com/2020/06/30/tariff-hike-postponed-till-first-quarter-of-2021/>; <https://www.thedaily-ng.com/national-assembly-new-electricity-tariff/>; <https://tribuneonlineng.com/rep-halt-proposed-hike-of-electricity-tariff/>

³⁷ Vanguard Newspaper, Nigeria, accessed online on 8/3/23 at 3.29 pm from <https://punchng.com/nerc-and-burden-of-power-sector-regulation/>

Reviews, the N72bn investment in Distribution Companies under regulator's purview and supervision by government, and finally, government pronouncement that the advocacy body of the Discos, the Association of Nigerian Electricity Distributors, should be disbanded contrary to stipulations by NERC.

Another instance of state capture was when the then NERC Chairperson, during the run-up to the 2015 national general elections, appeared on TV to defend the policies of the ruling party in the power sector at an interparty live debate between the PDP and the APC. The optics and perception of this singular act showed NERC as partisan, willing to defend and argue the case for the ruling party that appointed him against the opposing party.³⁸

Legislative Overreach

The National Assembly on several occasions passed resolutions ordering NERC to reverse tariff increase approvals, notwithstanding the clear powers of the latter to do so and without any legal support from the former to passing those resolutions.³⁹ By the combined reading and meaning of Sections 88 (2) (a) (b) 89(1) of the 1999 Constitution as amended, the National Assembly lacks the power to direct or suspend the implementation of an order made by a government agency, particularly under the EPSRA, 2005 and its successor, the EA 2023.

Regulatory Capture

Regulation requires the maintenance of an arms-length relationship between the regulated entities and the regulator to avoid bias or compromise. In a departure from this rudimentary design requirement of the IRA model, NERC situated their Forum Offices within the same premises as Distribution Companies in some states. This called to question its impartiality and independence. With the rampant cases of extortionist estimated billing methods, NERC displayed at the onset a clear reluctance to sanction regulated entities for these regulatory infractions, which may have been a result of regulatory capture.⁴⁰

Powers of the Minister

Section 5 of the EA 2023 Act grants the Minister broad powers to give "general policy directions to the Commission on matters concerning electricity, including directions on overall system planning and coordination" of the sector and requires the Commission to mandatorily take those policy directions into consideration before performing its functions. The inelegant employment of language in that provision leaves room for government overreach as opposed to the acceptable language employed by the legislature in granting the Nigerian Communications Commission independence under the Nigerian Communications Act.⁴¹ Without the express independent clause, the Ministry has, in several instances, overreached its mandate of "general policy directions" to interfere in matters that are substantively operational and relate to the core functions of the Commission, such as tariffs.

Financial Autonomy

The institutional design of the IRA model contemplates that the enabling legislation would institute a dedicated source of funding from charges and levies on and from regulated firms or consumers as against state budgetary

³⁸<https://opinion.premiumtimesng.com/2016/01/11/ensuring-regulatory-independence-in-the-power-sector-by-odion-omonfoman/?tzt=1>: In the run up to the 2015 general elections, the former NERC Chairman attended and participated in interparty live debate between the two major political parties on the power sector organized by the Center for Democracy and Development (CDD) and spoke for and on behalf of the policies of the ruling party and defended them.

³⁹ <https://www.channelstv.com/2016/02/16/senate-orders-reversal-of-electricity-tariff-increase/>; <https://nairametrics.com/2020/06/30/tariff-hike-postponed-till-first-quarter-of-2021/>; <https://www.thedaily-ng.com/national-assembly-new-electricity-tariff/>; <https://tribuneonline.ng.com/rep-halt-proposed-hike-of-electricity-tariff/>

⁴⁰Fidelis Soriwei, Power Firms Exploiting Nigerians with Estimated Billing – NLC *Punch Newspapers* (Lagos, 23 January 2017) <<http://punchng.com/power-firms-exploiting-nigerians-estimated-billing-nlc/>> accessed online on 10/03/23 at 12.24pm; Idris Ibrahim, 'AEDC Exploiting Us, Abuja Residents Lament' *Premium Times Newspaper* (Abuja, 15 October 2017) <<https://www.premiumtimesng.com/regional/north-central/246171-aedc-exploiting-us-abuja-residents-lament.html>> accessed 10/03/23 at 12.24pm

⁴¹ Section 25 (1&2) states that "...the Minister shall, in writing, from time to time notify the Commission or and express his views on the general policy direction of the Federal Government in respect of the communications sector " and "In the execution of his functions and relationship with the Commission, the Minister shall at all times ensure that the independence of the Commission, in regard to the discharge of its functions and operations under this Act, is protected and not compromised in any manner whatsoever".

appropriations to avoid state capture. The level of funding of the agency should be adequate to enable it to meet all its responsibilities competently, professionally and in a timely manner.⁴² Under Section 53 of the EA 2023, there is provision for dual funding streams from fees and charges accruable from regulated entities and appropriation from the state treasury, while Section 52 (1) (2) mandates the Commission to submit a budget of its intended expenditure and any supplements thereto to the Minister every year. This negates the institutional design of the IRA model, as it directly answers the adage “he who pays the piper dictates the tune”. Furthermore, it hampers NERC’s independence

Recommendations

1. The Nigerian political economy is replete with weak and fragile institutions and there is the need, in seeking to safeguard the independence of a key institution like NERC, the enabling legislation should be expressly clear on its autonomy status. This paper recommends the adoption of the Nigerian Communications Act model that specifically details the nature and extent of the Minister’s relationship with the Nigerian Communications Commission (NCC) and requires the former to ensure that independence is secured and maintained in all his dealings with the NCC.
2. The culture of elevating men over institutions in legal and regulatory template of laws should be downplayed. The NESI has not functioned optimally because political actors decided as a norm to sidestep the enabling law provisions to achieve short-term political ends that are not sustainable long-term and end up corroding the development of the NESI.
3. For the Nigerian power sector to operate in accordance with de jure provisions calls for a mitigation of the challenges that have trailed the regulatory landscape in the past 19 years. Government must overcome the malaise of elevating strong men over institutions by abiding by the letter of the legal, regulatory and institutional designs of the IRA model as enshrined in enabling law, appointing competent and qualified people as Commissioners in NERC as and when due, following the provisions of the law in the appointment and discipline of Commissioners in addition to respecting and abiding by regulatory commitments made and entered into by governments.

Conclusion

IRA independence is a means to an end and not an end in itself. The central aim of regulation of electricity provision is to ensure the availability of power at sufficient quality and quantities at affordable levels. This calls for regulators to intelligently incentivize utility providers to raise capital to deploy appropriate technologies that are financially viable and improve efficiencies while simultaneously reducing costs and maintaining supply demands and quality. The government, on the other hand, looks to the availability to propel development and promote social harmony given the ubiquity of electric power and its political dynamics. This leaves the third player in the value chain, the consumer, satisfied. For this to be achieved, faith must be maintained in the legal framework. The enabling law that governs the sector, the EA 2023, is a unique piece of legislation that seeks to reform the sector structurally and has set for itself very high and noble objectives. This calls for commitment, consistency and adherence to the enabling law by all parties in the value chain, particularly the government.

⁴² Brown, note 9.