

Dual Regulatory Agencies in the Nigerian Electricity Supply Industry: An Overkill or Finding the Balance

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Chukwu^{***} **Abstract**

The implication of the establishment of a seemingly parallel regulatory agency with overlapping responsibilities for the Nigerian Electricity Supply Industry (NESI) which has been generally described as struggling due to incessant power outages and inefficient electricity power supply is the focus of this paper. The paper adopts a comparative analysis of the functions of the two regulatory agencies that is the Nigerian Electricity Regulatory Commission (NERC) and the National Electricity Management Services Authority (NEMSA) against the background of the principles and philosophy behind regulation and seeks to determine the effects of duplication of responsibilities on operators, (generating, transmitting or distributing) and consumers of electricity supply in the country and its impact on the overall growth and development of the sector. The paper is divided into six parts. Part 1, provides an introductory background, part 2 deals with the principles and philosophy of regulation. Part 3 gives an overview of both the NERC and NEMSA while part 4 compares and contrasts both agencies. Part 5 examines the implications of the overlapping responsibilities on operators, consumers and development of the electricity industry while part 6 concludes with recommendations.

Introduction

Although electric power generation and supply in Nigeria started as far back as 1896¹ with the installation of the first power generating plant in the then Lagos colony,² the Nigerian Electricity Supply Industry is still largely characterised as energy deficient due to incessant power outages and electricity supply disruptions. To reposition the Nigerian electricity sector, with its “myriads of challenges...such as [include] limited access to infrastructure, low connection rates, inadequate generation and usage of power capacity, ineffective regulation, high technical losses and vandalism, insufficient transmission and distribution facilities”,³ the current democratic dispensation starting with the President Olusegun Obasanjo administration in 1999 opted for a policy direction to encourage private sector participation in order to achieve effective and efficient electricity supply in the country.⁴ To this effect, the

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¹ KPMG Nigeria, A Guide to the Nigerian Power Sector, December 2013 www.kpmg.com/Africa/en/IssuesAndInsights/ArticlesPublications/Documents/Guide%20to%20the%20Nigeria%20Power%20Sector.pdf Last visited 07/09/2015

² Osideinde, A.A. *Strategic Electricity Marketing Activities in Distribution Companies of Nigeria*, Imade Publishing Company (2011) p. 1

³ IseOlorunkanmi O. J. Issues and challenges in the Privatized Power Sector in Nigeria, *Journal of Sustainable Development Studies* ISSN 2201-4268 Volume 6, Number 1, 2014, 161- 174

⁴ The National Electric Power Policy (NEPP) 2001

Electric Power Sector Reform Act (EPSRA) 2005 was enacted to provide the required legal framework for the development of a competitive electricity market.⁵ Against the backdrop of encouraging and promoting private participation as well as developing competitive electricity market, the EPSRA made provisions for the unbundling⁶ of the now defunct National Electricity Power Authority⁷ and created the Nigerian Electricity Regulatory Commission(NERC)⁸ as the sole regulator of the Nigerian Electricity Industry, a position that was maintained until the recent establishment of National Electricity Management Services Authority (NEMSA) by the immediate past Federal Government administration led by President Jonathan, at the twilight of his administration in May, 2015. The establishment of NEMSA, which was created among other things to carry out the functions of enforcement of technical standards and regulations, technical inspection, testing and certification of all categories of electrical installations, electricity meters and instruments⁹ has generated controversy with divided opinions that it amounts to over-regulation of the electricity sector on the one hand and on the other hand, that it is a necessity to balance noticeable regulatory gaps for standardization and safety of operators activities. It is for this reason that this paper adopts the comparative assessment especially of the functions of NERC and NEMSA against principles and best practices in regulatory effectiveness to determine whether the existence of the two regulatory agencies is an over-kill or a necessity to find the balance needed for the promotion and development of the sector.

The Philosophy/Principle of Regulation

Regulation according to the Black's Law Dictionary is "the act of regulating, that is a rule or order prescribed for management or government,... it is a rule or order prescribed by superior or competent authority relating to action of those under its control. Regulation is [therefore] rule or order having force of law issued by executive authority of government."¹⁰ In the United Kingdom, for example, the Better Regulation Task Force (BRTF) on the principles of good regulation defined regulation widely as "any government measure or intervention that seeks to change the behaviour of individuals or groups."¹¹ By this definition, regulation can confer right(s) and restrict certain behaviour or action(s). In conferring rights and restricting

⁵ The preamble to the Electric Power Sector Reform Act (EPSRA) 2005 states that the EPSRA is enacted for the formation of companies to take over the functions, assets, liabilities and staff of NEPA; to develop competitive electricity markets; to establish the Nigerian Electricity Regulatory Commission; to provide for the licensing and regulation of the generation, transmission, distribution and supply of electricity; to enforce such matters as performance standards, consumer rights and obligations; and to provide for the determination of tariffs and related matters.

⁶ Section 8 of EPSRA provides that "the National Council on Privatisation shall, not later than eight months after the formation of the initial holding company under section 1 of this Act, shall take such steps as are necessary under the Companies and Allied Matters Act to incorporate such number of additional companies, limited by shares, as the National Council on Privatisation shall deem appropriate, which shall be the successor companies for assuming the assets and liabilities of the initial holding company including, but not limited to, companies with functions relating to the generation, transmission, trading, distribution and bulk supply and resale of electricity.

⁷ National Electric Power Authority Act (2004), Cap. N33, Vol. 10, Laws of the Federation Nigeria, repealed by section 99, EPSRA, 2005

⁸ S. 31(1) EPSRA, 2005

⁹ See preamble to NEMSA Act

¹⁰ Nolan J.R. et al, *Black's Law Dictionary with Pronunciation*, Sixth Edition, St. Paul Minn West Publishing Co. (1990) p. 1286

¹¹ The Better Regulation Task Force. Principles of Good Regulation. London. 2003. Available at www.bruf.uk accessed on 20/07/2015

certain actions, regulation must be balanced and proportionate if the proper protection and impact on those being regulated must be felt, otherwise, it becomes overly complicated, excessively costly and inhibit productivity.¹² It is to this effect, that BRTF in 1997¹³ devised five principles that will receive a broad degree of public confidence as the parameter for determining the necessity of any particular regulation. The five principles are: (i) **Proportionality**, which implies, for the purpose of this paper, that regulation should only be made when necessary. In which case, the remedy should be appropriate to the risk posed, while taking into consideration the cost implication. (ii) **Accountability**, this suggests that the justification for the decision of the regulation(s)/regulator(s) should be subject to public scrutiny. (iii) **Consistency**, as a hallmark of fairness requires that regulations should be predictable in order to give stability and certainty to those being regulated (iv) **Transparency**, basically implies openness and the need for regulation to be clearly defined and effectively communicated to all interested parties and finally (v) **Targeting**, which suggest that regulation should be focused on the problem, while minimizing side effects.¹⁴

The foregoing principles set the context for the evaluation of NERC and NEMSA's functions in order to determine whether there are duplications in their functions and if there are, whether they are sufficient to create an unnecessary bureaucratic burden on the Nigerian Electricity Supply Industry.

Overview of the Functions of the Nigerian Electricity Regulatory Commission

Mrs Bolanle Onagoruwa, a former Director-General of the Bureau for Public Enterprises (BPE) while presenting a paper on the Nigerian Power Sector Reforms and Privatisation in June, 2011 was emphatic on the fact that:

The Electric Power Reform Implementation Committee (EPIC) [which] was inaugurated by BPE {and} resulted in [the] Federal Executive Council approving the National Electric Power Policy (NEPP) in September 2001, which recommended the establishment of a sector regulator; privatization of the electric power sector; [and] a market trading design and new rules, codes and processes.¹⁵

It is on the basis of the said EPIC recommendation for a sector regulator as provided for in the Nigerian Electric Power Policy¹⁶ that the Nigerian Electricity Regulatory Commission

¹²*Ibid*

¹³*Ibid*

¹⁴*Ibid*

¹⁵Onagoruwa, B. The Nigerian Power Sector Reforms and Privatisation, June 2011 www.sec.gov.ng/files/Bolanle%20Onagoruwa%20Presentation%20to%20DG%20SEC.pdf last visited 07/09/2015

¹⁶The National Electric Power Policy 2001, in chapter three provides for policy and regulatory institutions that will support the reform of the Nigerian Electricity Supply Industry by "updating the role of Government and the Ministry of Power and Steel and to establish an effective regulatory framework, based on an independent regulatory agency". Under the policy framework, "Nigeria's Power Sector shall consist of the following components (a) Federal Government; (b) Ministry of Power and Steel; (c) State Governments; (d) Nigerian Electricity Regulatory Commission; (e) Competing Generation Companies; (f) a single Transmission Company; (g) A Special Purpose Entity; (h) On-grid Distribution Companies; (i) Off-grid generation and distribution companies and (j) Grid connected auto generators". Specifically, with regard to the Nigerian Electricity

was established in the Electric Power Sector Reform Act, 2005 as the regulator of the Nigerian Electricity Supply Industry. Specifically, section 31 of the EPSRA provides that

There is established a commission to be known as the Nigerian Electricity Regulatory Commission, which shall be a body corporate with perpetual succession which can sue and be sued in its corporate name and subject to the EPSRA perform all acts that bodies corporate can perform.¹⁷

Consequent upon the establishment of NERC, the EPSRA in section 32(1) provides for its principal objects, which are:

- (a) To create, promote and preserve efficient industry and market structures, and to ensure the optimal utilization of resources for the provision of electricity services;
- (b) To maximize access to electricity services, by promoting and facilitating consumer connections to distribution systems in both rural and urban areas;
- (c) To ensure that an adequate supply of electricity is available to consumers;
- (d) To ensure that prices charged by licenses are fair to consumers and are sufficient to allow the licensees to finance their activities and to allow for reasonable earnings for efficient operation;

Regulatory Commission, the policy provides that “a privatised electricity industry with competition over monopoly transmission and distribution grids, requires an effective regulatory agency that is independent both of Government and of all the companies operating in the industry. The Ministry of Power and Steel will therefore provide in a new Electricity Law for an independent regulatory body that: (i) has a clear appointment and dismissal rules; (ii) has a source of independent funding; and (iii) faces appropriate checks and balances to ensure that regulation not only operates in a fair and transparent way but is also seen to operate in a fair and transparent way.” The policy provides further that “ there will therefore be **an independent agency for electricity in the form of a Regulatory Commission**, which shall be called the Nigerian Electricity Regulatory Commission (NERC), based on the following regulatory arrangements: (i) NERC will be **an independent Federal agency** and electricity for grid connected services; (ii) **NERC will have decision making powers on the key aspects, technical and economic regulation** (viz; tariff regulation, approval of capacity expansion plans and regulated company business plans, oversight of capacity, tendering, competition, **standards, quality of service**, service obligation etc; (iii) NERC will be properly established with its powers, duties, constitution etc, laid down in a new Electricity Act; (iv) NERC will have the main responsibility for issuing licenses to the companies operating in the Nigerian ESI. These regulatory licenses will specify the rights and obligations of each business and company and will provide the basis under which NERC will monitor and enforce **the economic and technical regulation of the sector** . There will be separate licenses for: (a) Transmission (including dispatch); (b) Generation; (c) Distribution; and (d) Retail sales; (v) NERC will have all the necessary regulatory functions for electricity. In particular, it will, through the licences, have the responsibility for decisions on regulatory approval for: (a) electricity tariffs and prices, wholesale and retail; (b) business and capacity expansion plans for transmission, generation and distribution; (c) the enforcement of competition over the transmission network, including the regulation of (i)transmission connections, (ii) transmission access rights and (iii) fair cost reflective use-of-system prices; (d) enforcement of competition over electricity generation, distribution and sales; (e) **setting and enforcing quality standards** and (f) enforcing the legal rights of consumers. (vi) NERC will also be responsible for (a) ensuring that all major investments in generation capacity expansion are carried out by competitive tender; and (b) agreeing on the rules for supervising such competitive tenders, including acting as an appeals body in the case of accusations or complaints over the conducts of tenders. (vii) NERC will act as an appeals agency over regulatory decisions taken at state level. The policy framework on NERC concludes with the provision that “appeals procedure against any faults in the regulatory process committed by NERC shall be defined in the new electricity law”.

¹⁷EPSRA, S.31

- (e) To ensure safety, security, reliability and quality of service in the production, and delivery of electricity to consumers;
- (f) To ensure that regulation is fair, and balanced for licenses, consumers, investors and other stakeholders; and
- (g) To present quarterly reports to the President and National Assembly on its activities.¹⁸

It is important for the purposes of this paper to flag off section 32(1) (e) and (f) which is explicit on the objectives of NERC as a regulator to ensure safety, security, reliability and quality of service in the production and delivery of electricity to consumers and in the same vein ensure that regulation is fair, and balanced for licenses, consumers, investors and other stakeholders.

In furtherance of the objectives of NERC as enunciated above, the Electric Power Sector Reform Act stipulated in section 32(2) the Commission's functions are to:

- (a) promote competition and private sector participation, when and where feasible; (b) establish or, as the case may be, approve appropriate operating codes and safety, security, reliability, and quality standards; (c) establish appropriate consumer rights and obligations regarding the provision and use of electricity services; (d) license and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity; approve amendments to the market rules; (f) monitor the operation of the electricity market; and (g) undertake such other activities which are necessary or convenient for the better carrying out of or giving effect to the objects of the Commission.¹⁹

Again it is imperative to also note here for the purposes of this discussion, the significance of the combined effect of the provisions of section 32(2) (b) to (g). Details of the significance will be emphasized subsequently while drawing a comparison between the functions of NERC and NEMSA.

From the foregoing, it is not in doubt that NERC is established by law as the Nigerian Electricity Supply Industry regulator and as a sector regulator, NERC seems to be empowered to undertake technical and economic regulation of the sector. Thus, it would appear that NERC can undertake these regulations through major instruments of regulatory control²⁰ such as primary legislation (EPSRA); subsidiary legislations (regulations made pursuant to EPSRA); licences, (Interim licence to PHCN, licenses to Successor Companies; [Generation licence, Transmission licence, System Operations licence, Distribution licence, Trading licence, Temporary bulk purchase and resale licence]); Price regulation; and Industry Codes, Rules and Orders (the Grid Code, Distribution Code and Metering Code etc.), most of which have been made and are in place for the regulation of the Nigerian Electricity Supply

¹⁸ *Ibid*, S.32(1) (a) to (g)

¹⁹ *Ibid*, S. 32(2) (a) to (g)

²⁰ See generally, EPSRA, S. 96 which empowers the Commission to make regulations prescribing all matters which by [the] Act are required or permitted to be prescribed or which in the opinion of the Commission, are necessary or convenient to be prescribed for carrying out or giving effect to [the] Act

Industry. To this end, it is submitted that NERC's regulatory powers which is substantially extensive can significantly drive the objectives for which it was established.

Overview of the Functions of the Nigerian Electricity Management Services Authority

NEMSA was established pursuant to the signing into law of the NEMSA Bill by President Jonathan on the 26th of May, 2015 exactly seventy-two hours to the completion of his tenure as President.

Similar to the establishing provision of NERC under EPSRA, section 1(1) of the Nigerian Electricity Management Services Authority Act, 2015 (the "Act") established NEMSA as a body corporate with perpetual succession and common seal, which may sue and be sued in its corporate name and can subject to the Act, perform all acts that bodies corporate may by law perform.²¹ Under the Act, "the Electricity Management Services Plc²² (EMS) incorporated in 2007 is to be taken over by NEMSA for the purposes of the Act, and the personnel thereof shall be deemed to have been appointed under the Act and they shall continue to hold office on the same terms and same conditions on which they were appointed in EMS."²³ Some of the powers, functions and responsibilities of NEMSA as provided for in section 6 of the NEMSA Act include electrical inspectorate services for the NESI;²⁴ enforcement of all statutory technical electrical standards and regulations²⁵ as well as specification of safety requirements for construction, operation and maintenance of electrical power plants, transmission systems, distribution networks and electric lines.²⁶ NEMSA is also empowered to carry out the duties of inspecting engineers for inspection testing, and certification of all categories of electrical installation in the NESI²⁷ as well as provide comprehensive TECHNICAL SUPPORT SERVICES that will guarantee the efficient production and delivery of safe and reliable power supply and enhance efficient service delivery industry.²⁸ Still on NEMSA's responsibilities, it is important to mention that the Authority is also mandated to regularly monitor the compliance level with the regulations, standards and specification used in the NESI.²⁹

²¹Nigerian Electricity Services Management Authority Act, S. 1(1)

²² The Electricity Management Services Plc (EMS) is one of the companies incorporated pursuant to the Supplementary Regulations to Part 1 of the Electric Power Sector Reform Act on the Transfer of Assets, Employees, Liabilities, Rights and Obligations of Power Holding Company of Nigeria Plc, 2010. By virtue of section 2 of the Supplementary Regulations, any company formed pursuant to these regulations is [shall] deemed as formed under section 8 of EPSRA. Specifically, the Electricity Management Services Plc, is one of the companies set out together with the National Power Training Institute of Nigeria Ltd/Gte; Nigeria Electricity Liability Management Ltd/Gte and the Nigerian Bulk Electricity Trading Plc, in respect of which the National Council on Privatisation issued an Order on the 23rd of September, 2010 for the Transfer of Assets, Employees, Liabilities, Rights and Obligation of Power Holding Company of Nigeria Plc.

²³NEMSA Act, S. 1(3)

²⁴*Ibid*, S.6 (a)

²⁵*Ibid*, S.6 (b)

²⁶*Ibid*, S.6 (f)

²⁷*Ibid*, S.6 (h)

²⁸*Ibid*, S.6 (i)

²⁹*Ibid*, S.6(p)

Functions of NERC and NEMSA Compared

Following a comparison of the functions of NEMSA as highlighted above with those of NERC, it is observed that the combined effect of sections 32(1) (e) to (f) and 32(2) (b) to (g) of EPSRA empowers NERC amongst others to: establish or, as the case may be, approve appropriate operating codes and safety, security, reliability and quality standards; license and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity³⁰ as well as monitor the operation of the electricity market.³¹ These mandate of NERC, though broad and generic, are in the light of the grid code, metering code, health and safety code, electricity health and safety manual, standards and regulations³² already put in place by NERC are for all intent and purposes adequate to govern the carrying out of technical inspection; monitoring of the compliance level of the regulations, standards and specifications used in the NESI as well as other functions and responsibilities vested in NEMSA. In view of the fact that the primary function of NEMSA has been argued to be the carrying out of electrical Inspectorate Service and Technical Regulation for the NESI, it is important to point out that with regards to inspectorate services, section 95 of the EPSRA, empowers NERC to appoint Inspectors, who shall have power to examine, inspect, and inquire for the purpose of ascertaining whether compliance has been made into various activities across the value chain of the Nigerian Electricity Supply Industry.³³ In the light of this observation, it can be reasonably submitted that but for issues of research and manpower development and the advancement of the skill of persons engaged in the NESI,³⁴ which now forms part of NEMSA's responsibilities, practically all the other functions of NEMSA are similar and overlapping with those of NERC, thus, leading to the conclusion that the establishment of NEMSA is a duplication of regulatory roles for NESI. Although, issues of manpower capacity development has been identified as specifically vested in NEMSA, it must nevertheless be mentioned that this can also be subsumed under the omnibus provision contained in section 32(2) (g) which empowers NERC to "undertake such other activities which are necessary or convenient for the better carrying out of or giving effects to the objects of the Commission."³⁵ Besides the fact that NERC can carry out responsibilities of manpower development for NESI, it is important to note that with the existence of National Power Training Institute of Nigeria (NAPTIN),³⁶ the inclusion of manpower development and advancement of personnel skills for NESI as a function of NEMSA is not only a duplication but a flashpoint of confusion in an industry characterised as inefficient due to limited access to infrastructure, low connection rates, inadequate generation and high technical losses. For purposes of emphasis, NAPTIN was conceived and established in 2009 by the National Council on Privatisation (NCP), and registered by the Bureau of Public Enterprises, specifically for capacity building and training of both technical and non-technical workers in NESI.

³⁰EPSRA, S.32(2)(d)

³¹*Ibid*, S.32(2)(f)

³²For details of the codes, standards and regulation see generally Nigerian Electricity Regulatory commission <http://www.nercng.org/>

³³*Ibid*, S. 95

³⁴NEMSA, S.6 (s)

³⁵EPSRA, S. 32(2)(g)

³⁶ The National Power Training Institute of Nigeria Ltd/Gte (NAPTIN) was incorporated pursuant to the Supplementary Regulations to Part 1 of the Electric Power Sector Reform Act on the Transfer of Assets, Employees, Liabilities, Rights and Obligations of Power Holding Company of Nigeria Plc, 2010.

Argument for and against Dual Regulation for NESI

Due to the nature and importance of NESI to the overall economy of Nigeria, quite a reasonable number of stakeholders and concerned citizens have expressed their respective views on the establishment of an additional regulatory body for the sector. Some proponents for the establishment of NEMSA, have argued that its establishment was necessary as it “would help remedy and ensure technical standardization which in turn would curb domestic fires.”³⁷ Truly, any regulation that will help curb domestic fire incident is a necessity that must be encouraged, however, while there is no empirical basis to conclude that domestic fire incidences are largely attributed to electrical installation and the fact also that the possibilities cannot be discountenance, it must be emphasised that the Standard Organisation of Nigeria (SON) is the country’s regulatory body for standardization and regulation of quality for all product³⁸ as established by the Standard Organization of Nigeria, Act No. 51 of 1971 which has undergone three amendments in 1976, 1984 and 1990.

SON as a corporate body has the sole responsibility for National Policy on Standards, Standards Specification, Quality Control of manufactured, industrial, and imported products and services.³⁹ For the performance of these responsibilities, SON is an active member of African Regional Organization for Standardization (ARSO), member of the International Organization for Standardization (ISO). It is also a member of the International Telecommunications Union (ITU) and an associate member of the International Electro-Technical Commission.⁴⁰ SON in furtherance of its functions in sections 4 and 5, as well as the provision of section 12 requiring it to establish industrial standards issued a mandatory industrial standards order in 1989.

Against the background of SON’s statutory responsibilities and the setting of mandatory industrial standards which in scope covers the activities of NEMSA, it thus appear that the argument of some of the proponents of NEMSA, that it will curb domestic fire incidence is untenable. Advocates for the creation of NEMSA argued that the existence of monopoly of regulation and enforcement functions/responsibilities normally deters progress and growth in any sector, and that if this is allowed especially in the power sector, that it will have attendant consequences on sector transformation.⁴¹

Putting forward their argument, NEMSA’s proponents stated that “as it can be seen in the present set up in the Nigerian power sector, NERC serves as the regulator, the inspector, police, the prosecutor, investigator, enforcer and judicial officer”⁴² and reasoned that “this monopoly will deter the required growth and that the arrangement is clearly against the rule of separation of power and equity.”⁴³ The argument of monopoly of a regulator that is not expected to be in competition but to ensure the smooth and effective running of the sector,

³⁷Overview: Nigerian Electricity Management Authority (NEMSA) Act, available online at www.businessdayonline.com/2015/08/overview-nigerian-electricity-management-services-authority-nemsa-act last visited 03/09/2015

³⁸About SON-Standards Organization of Nigeria, available at www.exports2Nigeria.Com/about. Last visited 01/09/2015

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹Aneke, U. Power Sector, a Case for NEMSA Bill, The Sun Newspaper, available at www.sunnewsonline.com/new/power-sector-case-nemsa-bill last visited on 15/07/2015

⁴² *Ibid*

⁴³ *Ibid*

sounds rather unfounded and untenable and perhaps would have been more persuasive, if it was canvassed in respect of operators and not a regulator. Furthermore, the point must be made that the economies of scale of having a sole regulator may permit cost savings on infrastructure, administration and support systems as well as mitigate the costs which operators in the sector may bear if they have to deal with multiple regulators. In the same vein, the complexity of a multiple regulatory system with its competitive inequalities could lead to lack of clarity of roles and consequently lack of accountability especially in a developing economy like Nigeria with its peculiar bureaucratic challenges notwithstanding the current move towards liberalisation of the electricity sector in the country. It is therefore disturbing that advocates for NEMSA believed that “in a well-established/ organized power sector..., it is always better to have an enforcement agency of government separated from those who make the regulations and standards for the industry... This will obviously allow for checks and balances as the regulator will make and approve the standards and regulations while another agency of the government ... will enforce these codes, regulations, standards, etc. with no conflict of any sort.”⁴⁴

The proponent for dual regulatory body gives the impression that this is “internationally known best practice of countries with stable electricity and [that] long term planning for the sector follow the best practices of separating... technical regulation from the economic/commercial regulation and /or enforcement from regulation to avoid monopoly of regulations.”⁴⁵ Examples of India which has the Central Electricity Regulatory Commission (commercial), Central Electricity Authority and Chief Electrical Inspectorate (under Ministry of Power) and Ghana, which has Energy Commission of Ghana (technical) and public utilities Regulatory Commission (Commercial/Economic) were cited.⁴⁶ The logic of this, argument seems to overlook or deliberately ignore the confusion, distraction and disharmony caused by dual or multiple regulatory bodies for a particular sector of an economy. In fact, according to Ediri Ejoh, the Chairman of NERC, Sam Amadi said NEMSA “is capable of distracting the Commission from its core mandates, causing disharmony and derailing the progress made in the power sector.”⁴⁷

However, the then Permanent Secretary of the Federal Ministry of Power, Ambassador Godknows Igali was quoted as saying that “section 8 of EPSRA provided for the creation of other bodies to take care of new areas of need in the sector [and that this provision] led to the creation of the EMSL among others.”⁴⁸ Granted that EMSL was created pursuant to section 8 of EPSRA, the original conception of the EMSL was not that of a parallel regulatory body to NERC but as a government owned, independent and technically based company with the mandate to ensure safety and quality of services in the value chain of the NESI.⁴⁹ This role of EMSL was aptly emphasized by Uche Aneke, the General Manager, Public Affairs of EMSL

⁴⁴ *Ibid*

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ Ejoh E. NEMSA is unhealthy rivalry – NERC, Vanguard Newspaper, available at www.vanguardngr.com/NEMSA%20is%20unhealthy%20rivalry last visited 10/08/2015

⁴⁸ Alohan, J. NEMSA Bill: Avoiding Regulatory Conflict in Power Sector LEADERSHIP Newspaper, available at www.leadership.ng/business/382260/nemsa-bill-avoiding-regulatory-conflict-power-sector last visited 03/09/2015

⁴⁹ Aneke U. How to reposition electricity management services in the power sector, Vanguard Newspaper, available at <http://www.vanguardngr.com/2014/04/reposition-electricity-management-services-power-sector/> last visited 14/03/2016

in his article “How to reposition electricity management services in the power sector” where he wrote that:

A lot of activities are ongoing in the power sector to reposition the Electricity Management Services Limited (EMSL) in order for the company to play its unique and crucial role in facilitating safe and qualitative power supply to Nigerians. EMSL which is a government owned, independent and technically- based company has been mandated to ensure safety and quality of services in the value chain of the Nigerian Electricity Supply Industry (NESI). Contrary to speculations that EMSL is being established as a parallel regulatory body to National Electricity Regulatory Commission (NERC), EMSL is established by government to carry out technical inspection, testing and certification of all electrical equipment/materials used in the industry and all electrical installations along the power supply value chain. These functions were hitherto being performed by the Electrical Inspectorate Services (EIS) of the Federal Ministry of Power for over 50 years before transferring its functions, the 15 Zonal Offices, Engineers/Technical staff, materials and equipment to EMSL. NERC remains the only regulator in the Nigerian power sector, while EMSL, with core technical competence and expertise is established to enforce and ensure compliance with technical standards, inspection, testing and certification of plants, materials, equipment, networks etc in the NESI.⁵⁰

Aneke noted further in the same article that during the inauguration of the EMSL, the then Minister of Power, Professor Chinedu Nebo, tasked the management team of EMSL led by Engr. Peter Ewesor, to reposition EMSL into a technically and financially efficient, sustainable and commercially viable company stating that “It must be able, after today to provide the needed technical services to drive, support and sustain the emerging private sector-led electricity industry in Nigeria”.⁵¹

As can be observed from both Aneke and the Minister’s submission, the idea of creating EMSL does not in any way suggest the establishment of a parallel regulatory body but rather an entity to assist in the optimization of NESI operational activities. EMSL was therefore created to be an efficient world class technical services provider in ensuring quality, standardisation, safety and competence required for the competitive electricity market and not for a regulatory role that NEMSA which took over its functions is now established to perform, which is clearly a situation not contemplated by the sector’s reform policy and legal framework.⁵² Specifically, Azinge Terhemen, a Deputy Director in the Bureau of Public Enterprises was quoted as saying that:

This sector [NESI] has a policy and laws that follow the policy. In the policy, the roles of institutions were delineated with their legalities.

⁵⁰ Ibid

⁵¹ Ibid

⁵² Abdulhamid, Y. Electricity: One Industry, Two Regulators, DAILY TRUST Newspaper available at www.dailytrust.com.ng/news/feature/electricity-one-industry-two-regulators/104676.html last visited 03/09/2015

Our concern at the BPE is that the law didn't create an agency but a company in EMSL registered under our country's company law and in crafting the sector, the policy and law requested for one regulator for the sector as practiced globally because regulation include both technical and commercial. There was no envisage of a tripod in the sector; setting up this agency [NEMSA] will distort the architecture of the power sector.⁵³

So far, NERC seems to be performing these economic and technical regulatory functions satisfactorily through the seven divisions created within the Commission namely – the NERC's Chairman's Office; Market Competition and Rates; Legal, Licensing and Enforcement; Finance and Management Services; Government and Consumer Affairs; Research and Development; Engineering, Standards and Safety. In particular, the Engineering Safety and Standards Division has the task of developing and monitoring compliance of technical codes and standards for all operators in the industry as well as the technical evaluation of licence applications submitted to the Commission.

It may therefore be premature at this stage when the EPSRA and NERC created pursuant to it has been barely tested to now create another budget gulping agency when a unit or department of the existing agency can perform the function for which NEMSA has been created especially now that the country is facing one of its toughest economic challenges with the plunge in the prices of crude oil, which is the country's economic mainstay.⁵⁴

Implications of Overlapping Regulatory Responsibilities for NESI, Investors, Operators and Consumers

Against the Nigerian government's objective of achieving efficient power/electricity delivery and addressing the fundamental weaknesses in the structure of NESI, the implications of dual regulatory bodies for NESI as is the case with the establishment of NEMSA, which as earlier noted have overlapping responsibilities with NERC is the erosion of investors' confidence because of the likelihood of confusion as to who does what, with the existence of two parallel regulators. In fact according to Mr. Faloseyi Michael, the Head of the Media Unit of NERC:

The existence of two regulatory agencies besides creating confusion in the system, especially when EPSRA, 2005 that created NERC has not been reviewed is at a cost on the consumers of electricity. Ghana as an example of countries with two regulators has no good story to tell on the ground tuff protection and fight for space. I don't think that is what Nigerians are asking for. Nigerians want electricity like yesterday, not creation of agencies that end up fighting for space while the job is left undone.⁵⁵

The implication of the existence of a parallel regulatory body for NESI in a country like Nigeria with the problem of huge recurrent expenditure in her national budget which is

⁵³ *Ibid*

⁵⁴ *Ibid*

⁵⁵ Faloseyi, M. NEMSA Act, Regulatory Certainty and President Buhari, THISDAY Newspaper available at www.thisdaylive.com/articles/nemsa-act-regulatory-certainty-and-president-buhari/211514 last visited 03/09/2015

against international best practices according to Yunus Abdulhamid “will only add to the burden the government has to bear and by extension the traumatized Nigerian consumers who have suffered decades of failed promises by successive governments.”⁵⁶ To this end therefore, it must be mentioned that the concomitant effect of eroding investors’ confidence and the cost implication of setting up and sustaining the structure and staffing of NEMSA will on the one hand, deny NESI, the much needed capital injection from both local and foreign investors and on the other hand, duplicate operational cost of meeting the respective requirements and criteria of both regulatory bodies by operators in the sector. In both situations, particularly, the latter, it is the consumers as the end user that will bear the brunt of the increasing cost of providing electricity supply services.

Conclusion

The Nigeria Electricity Regulatory Commission was established pursuant to the Electric Power Sector Reform Act, 2005 as an independent body to undertake technical and economic regulation of the Nigeria Electricity Supply Industry in line with the sector’s reform policy. Primarily, the function of NERC is to ensure adequate, safe, reliable and affordable electricity to Nigerians by acting as an independent regulator and watchdog of the power industry. To this effect, NERC amongst other things, determines operating codes and standards, establish customer rights and obligations, set cost reflective industry tariffs, and the development of market rules for the electric power sector. With these responsibilities which encompasses the enforcement of technical standards and regulations, technical inspection, testing and certification of all categories of electrical meters and instruments expected to be performed by the recently established NEMSA, raises the critical question on whether or not the existence of two regulatory bodies is an overkill or a necessity to find the balance which may have been created by a vacuum or gap by the hitherto existing regulator. In answering this question, the prevalence of needless duplication of statutory bodies with their attendant high cost which inhibit against infrastructure development is borne in mind in submitting that the establishment of NEMSA is not in any manner imperative but rather superfluous. It is not even complementary. It is inherently full of conflicts that will clog progress and inhibit investments in the sector. It is also respectfully submitted that the “ingenuity” in the NEMSA Act, particularly section 6, finds eloquence only in verbosity and grandiose repetition perhaps, to cloak it with importance instead of finding the balance which a necessary regulation will achieve if its enactment is based on clear assessments of the likely impact of regulations to reconcile contradictory objectives and be of benefits to the public and operators in the sectors.

From all ramification therefore, the existence of two regulatory bodies can amount to excessive regulation and be described as an overkill if in seeking to remove all the risks in the sector, critical trade-offs between costs and benefits are not taken into consideration but rather creating additional problems such as confusion and disharmony in the sector. In this respect therefore, it is submitted that rather than establishing NEMSA to perform overlapping responsibilities with NERC, the EPSRA should be revisited and amended with a view to strengthening the inspectorate and technical department of NERC if it is considered deficient. It would appear that NERC at the moment is poorly staffed in terms of number and sufficiency of requisite personnel perhaps owing to funding constraints, the response to this is

⁵⁶Abdulhamid, Y. *Op Cit*

not in duplication. Consequently, it is submitted that NEMSA Act should be repealed, while NERC is strengthened to effectively regulate the Nigerian Electricity Supply Industry.