EXPROPRIATION OR DISREGARD FOR THE RULE OF LAW IS NOT THE ANSWER TO NESI'S CHALLENGES

Regrettably, there continues to be all manner of recent events undermining an already fragile Nigerian Electricity Supply Industry (NESI). In particular, a long history of policy and regulatory inconsistency, significant contributory factors to the poor performance of sectoral operators, is being worsened by a resort to violations of the rule of law – expropriation of electricity distribution companies (DisCos) outside the framework of the agreements reached under the privatization of these assets, with a more recent example of the thuggish “apprehension” or attempted abduction of the MD-CEO of the BEDC Electricity PLC (BEDC) by, purportedly, rogue elements of the law enforcement apparatus, in enforcement of this expropriation, on Monday, August 15th, 2022. And the most recent related issue, a tussle between the federal government and BEDC on whether the restraining or Ex Parte order issued by a Federal High Court against the government on the expropriation, in favor of BEDC, has expired.

A continued absence of the respect for the rule of law, the lack of policy and regulatory consistency cannot be what was envisioned under the National Electricity Power Policy, 2001 (NEPP), the foundation of the Electric Power Sector Reform Act, 2005 (EPSRA), the statutory basis for the privatization. NEPP envisioned an enabling environment that would encourage the mammoth private sector investment necessary to reverse historical government underinvestment in NESI, coupled with the injection of private sector ingenuity and expertise. Alas, the nine (9) years since the privatization have largely been deficient of this enabling environment, resulting in the limited performance of the DisCos and the larger NESI.

DisCo performance cannot be divorced from the presence of an enabling environment or, particularly, a partnership with the federal government. Indeed, the shining moments in the evolution of the privatization have come out of collaboration between the DisCos and the agencies of government. The Central Bank of Nigeria (CBN)'s loan initiative to the DisCos, in collaboration with the Ministry of Finance (MOF), Bureau for Public Enterprises (BPE), Nigerian Electricity Regulatory Commission (NERC) and the Ministry of Power (MOP) established a successful template for addressing the thorny and difficult issues of the DisCos' lack of access to capital and addressing the metering gap. Additionally, NERC, in tandem with CBN, worked with the DisCos to address and reverse some of the historical regulatory challenges that have adversely impacted DisCo performance. Truly, a commendable partnership by all the parties.

Expropriation or forcible removal of investor interest or persons from the DisCos will not address the need to resolve the key fundamental deficiencies of the sub-sector. These deficiencies include a misalignment or misallocation of risk (government-owned risk of gas pipeline vandalization, limited gas pipeline network and commercial framework, limited or constrained government-owned transmission network, government policy/regulatory inconsistencies have all been wrongly passed on to the DisCos – undermining a core predicate of the electricity business that risk should be borne by the party that can best bear it.), non-payment of electricity liabilities by the Ministries, Departments and Agency (MDA), inconsistent and unsustainable electricity tariff modelling and implementation, electricity theft, etc. As a matter of fact, it was the federal government's acknowledgement of its role in the non-performance of the DisCos that resulted in the determination or declaration of the two years of mutual non-performance by the government and the DisCos (2017 and 2018) under MYTO-2015.

BPE's **“Performance Assessment of 9 Nigerian Electricity Distribution Companies (DisCos) Comprehensive Report of December 2021” further states that “Government: Several commitments and investments have not been executed timely, leading to continuous structural issues impacting DisCos.”** The same report further highlights, specifically, the following areas of government failure to meet its obligations and commitments –

1. Misallocation of liabilities on the books of DisCos as market shortfall; 2. Inadequate electricity supply; 3. Insufficient investment to address 30 years of historical under-investment in the sector; 4. Apparent misalignment between assets (meters, number of customers) communicated to the DisCos pre-privatization; 5. Clarification of roles between BPE and NERC not done at the time of privatization; 6. Persistent security breaches impact DisCos' collection capacity; 7. No minor reviews from 2015-2019 despite dynamic variables, resulting in ₦2.4 Tn of tariff shortfall accumulating between 2015-2020; and 8. Unfavorable regulatory guidelines negatively impacting DisCos source of revenue.

Significantly, these challenges were similarly identified in the final report issued by the National Economic Council (NEC)'s Ad Hoc Committee on the Review of the Ownership Structure of the Partially-Privatised Electricity Distribution Companies (March 2020).

It is important to also highlight that the Director General, BPE, as a board member who represents the federal government's 40 percent minority share in each of the DisCos, is an integral participant in the board decisions that guide the operations of the DisCos. **How then is the “restructuring” or expropriation of the five DisCos justified, given the government's contribution to the challenges that have bedeviled DisCo operations?**

The DisCos cannot reasonably be exempted from the issue of non-performance, admittedly. The DisCos take and own responsibility for falling short of their performance objectives, thereby depriving their valued electricity customers a key contributor to improved quality of life. However, DisCo investors and operators remain totally committed to improving service delivery to their customers. Evidence of this commitment has been progress in the following areas, as of Quarter 1, 2022 –

a. Establishment of a new revenue collection level of N777 billion;
b. Reduction of average Aggregate Technical Commercial & Collection Losses (ATC&C), estimated in excess of 56%, pre-privatisation to 46.3%;
c. Increase in the number of registered customers from an estimate of less than 2 million customers, pre-privatisation, to 10.2 million;
d. 1,035 customer centers established;
e. 32,573 jobs created versus 23,515 at privatization;
f. Increased metering from 2.3 million in 2013 to 4.7 million, a 100% increase;
g. The installation of 129,352 distribution transformers as of 2020 versus 75,041, in 2013, a 72% increase; and
h. Increase of electricity distribution capacity from 15GW to 30GW, post privatisation.

The DisCos still have a long way to go, to meet the service delivery requirements that will ensure consistent and stable electricity to their customers. However, this journey is a direct function of the level of investment that is attracted to the sub-sector, necessary for the capital expenditure that is critical for increased efficiency and performance. Such investment is not likely to come into an environment in which there is no respect for sanctity of contract or ready expropriation of largely private assets is the norm. And there is no greater affirmation of this fact than the paucity of capital importation into the power sector, as indicated by the National Bureau of Statistics' data, since the privatisation. The CBN's commendable loan initiative to the DisCos was a clear recognition of the financing or access to capital constraint that is a product of the unfavourable operating environment of the DisCos. A related casualty of this environment was the departure of some of the technical partners that were part of the DisCo operations, post-privatisation.

The federal government's “Power Sector Reform Policy (PSRP)” was supposed to be the basis of a reset of the subsector, by way of the implementation of the relatively recently approved Performance Improvement Plans (PIP). Unfortunately, the recent “restructuring” or expropriation of the five DisCos not only fails to acknowledge the complicity of the government in the performance challenges of the DisCos but amounts to, seemingly, the jettisoning of the tenets of the PSRP. Unless there is good faith engagement and partnership with the DisCo investors and operators who, in spite of the myriad of challenges, have committed extensive resources to the subsector, the notion or thinking that reselling the expropriated DisCos or handing the DisCos to new investors is nothing more than a fantasy or a proverbial exercise in futility.

The core issues of the lack of a cost reflective and sustainable tariff, inadequate gas supply, inconsistent regulatory and policy determinations, transmission grid constraint, non-payment of MDA electricity debt, electricity theft, lack of respect for sanctity of contract, etc. must be addressed, if the electricity distribution subsector, in particular, and NESI, in general, is to make progress. Expropriation, “restructuring” or disregard for the rule of law is not and cannot be the solution. Nor is the federal government's disregard for, or disobedience of court orders or its unilateral dissolution and appointment of DisCo Boards of Directors, consistent with the Companies and Allied Matters Act, 2020 (CAMA). All of which constitute one more nail in the coffin that is private investment in the Nigerian economy, specifically, the power sector. is becoming.

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