

Assessment of The Electricity (Amendment) Act 2024

On 9th February, 2024, the President of Nigeria, His Excellency Bola Ahmed Tinubu, signed the Electricity (Amendment) Act 2024 ("Amendment Act") which effectively amends some provisions of the Electricity Act 2023 (the "Principal Act") relating to the fund of the National Hydroelectric Power Producing Areas Development Commission ("N-HYPPADEC") (the "Fund") and the allocation of funds for the development of host communities by power generating companies ("GenCos").



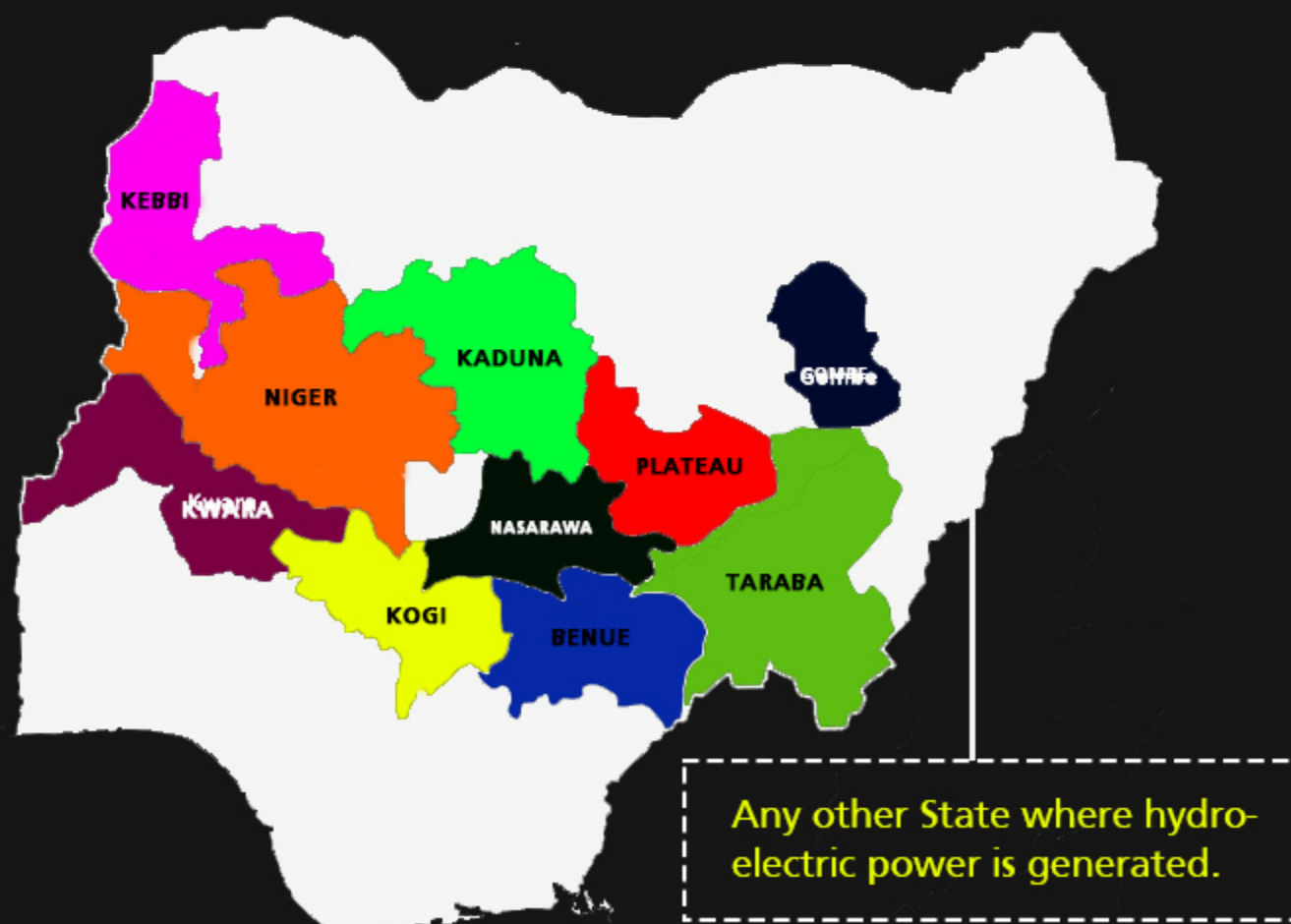
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Member State of the N-HYPPADEC

For the purpose of clarity, section 82(3) of the Principal Act provides that any State where hydro-electric power is generated shall be a member State of the N-HYPPADEC (the "**Member State**").

According to section 84(3) of the Principal Act, the current Member States are:



Section 95(2) & (d) of the Electricity Act 2023

Section 95(2)(c) & (d) provides, as part of the monies to be paid and credited to the Fund, that:

"5% of all revenue accruing from power generated by the various Power Generating Companies in Nigeria (GENCOs) from the member States shall be set aside for the development of the respective host communities."

"5% of all revenue accruing from power generated by the various GENCOs from the member States shall be administered by N-HYPPADEC."

The implication of this is that 5% of the revenue generated by GenCos in Member States from the sale of power (the "Electricity Revenue") must be set aside by such GenCos and paid to the Fund for community development of the respective host communities and the said electricity revenue was to be administered by N-HYPPADEC. However, this provision is vague to the extent there is no specification of the timeline for payment whether quarterly, half-yearly, or annually.



Also, the Principal Act requires that the electricity revenue be paid into the Fund, together with other specified monies and administered by N-HYPPADEC. Considering the differing purposes of the Fund being to primarily cover expenditures incurred by the N-HYPPADEC and the community development of the respective host communities, this approach will inevitably result in co-mingling of monies meant for different purposes. In view of the foregoing, this demonstrates the necessity of the clarification provided in the Amendment Act.

The Amendment Act

All Revenue Accruing vs. Actual Annual Operating Expenditure for Preceding Financial Year

The Amendment Act mandates the various power generating companies in Nigeria (GENCOs) from the Member States to set aside 5% of the actual annual operating expenditure for the preceding financial year ("**Annual Operating Expenditure**") towards the development of their respective host communities. This effectively changes "5% of all revenue accruing from power generated" to "5% of the actual annual operating expenditure for the preceding financial year". This amendment indeed clarified the earlier provision in the Principal Act. The use of the phrase "**actual annual operating expenditure for preceding financial year**" was drawn from section 240(3) of the Petroleum Industry Act 2021 ("PIA") pursuant to which licensees or leaseholders were obligated to make an annual contribution to the applicable host community development trust ("HCDT") of an amount equal to 3% of its actual operating expenditure of the preceding financial year in the upstream petroleum operations affecting the host communities.



Administration by N-HYPPADEC vs. Administration by Trustee

The Amendment Act recognises the distinct purpose of the 5% sum contemplated under section 95(2)(c) of the Principal Act. Accordingly, the Annual Operating Expenditure shall be received, managed and administered by a reputable Trustee jointly appointed by the GenCos and representative of the relevant host communities upon agreement by the GenCos and such host community on one part and the Trustee on the other part to implement infrastructural development projects identified within the said host community.

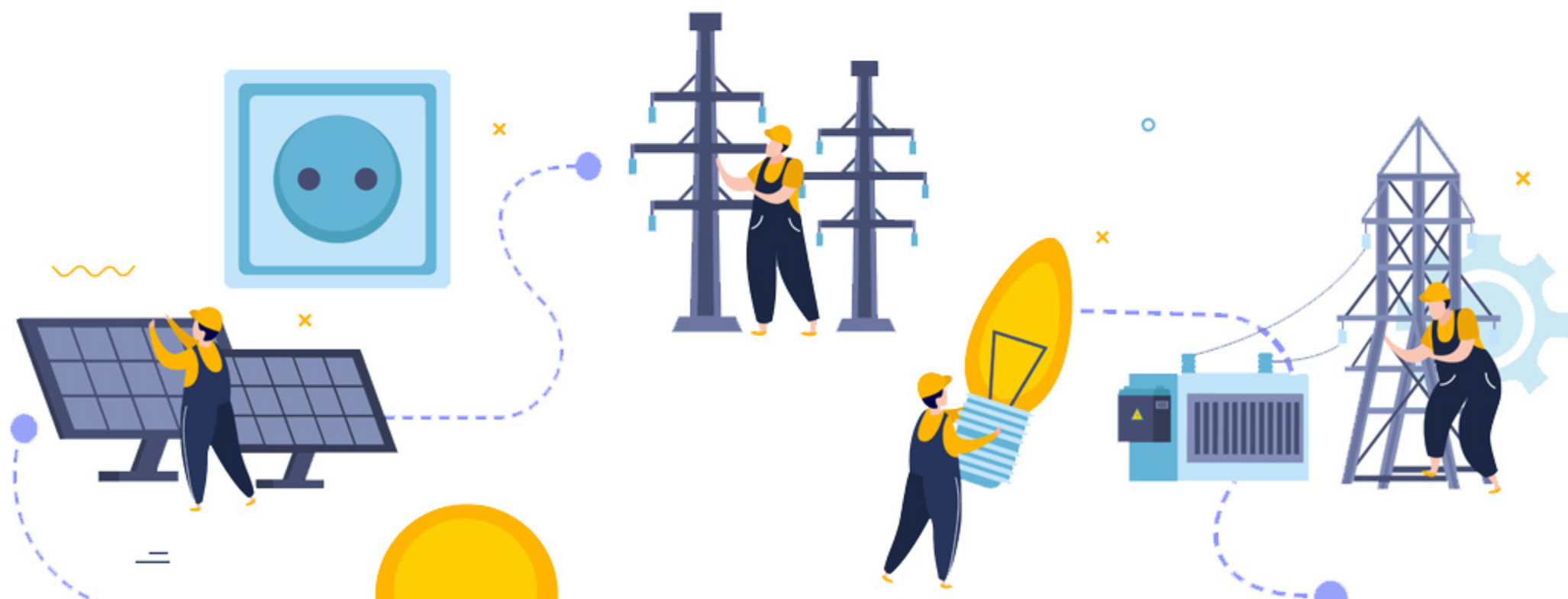
The foregoing not only acknowledges the distinct nature of the monies' purpose but also entrusts it with a distinct Trustee (separate from N-HYPPADEC) to be deployed for a now clearer objective: **implementing infrastructural development projects identified within the said host community** (as against simply "**community development**" being the earlier objective provided in the Principal Act). This structure is similar to HCDDT under the PIA where a licensee or leaseholder ("**Operator**") is obligated to a) incorporate a HCDDT in the community where it carries out petroleum operations b) undertake a needs assessment which will be incorporated into the Community Development Plan and c) determine the specific projects to be undertaken by the HCDDT.



The PIA protects petroleum operations and activities in host communities through an innovative provision to the effect that such community will forfeit its entitlement in the HCDDT in an amount equal to the value of the damage resulting from the disruption due to vandalism, sabotage or any civil unrest which causes damage to any petroleum or designated facilities or disrupts petroleum activities in a host community.

This amendment aims to address the vagueness in the drafting language used in the Principal Act and the injustice which may result to host communities by virtue of such vagueness.

The shift from a percentage of revenue to a percentage of annual operating expenditure marks a strategic move towards ensuring a consistent and reliable source of funding for the socio-economic development of host communities impacted by the activities of the GENCOs. Given the exemption granted to hydro-electric power generating companies under the law, this provision is a boost to Nigeria's energy transition efforts. Whilst the exemption should ideally apply to all renewable electricity generating companies (not just hydro-electric GenCos), we believe that this legal provision offers a viable business case for GenCos in Member States to explore possibility of hydro-electric power generation as a means of preserving 5% of their annual operational expenditures.



Also, the creation of the role of trustees also offers a viable business case of potential partnership for Trustees and Fund Managers with host communities of non-hydropower GenCos in the Member States (as listed above) in connection with the administration of the Annual Operating Expenditures as contemplated under section 95(2)(d) in the Amendment Act.

We envisage that the N-HYPPADEC may issue rules and regulations relating to i) transparency of the joint activities of the Trustees; ii) the representatives of the respective host communities; and iii) eligibility of infrastructure projects.

