



**Memorandum submitted
to the House of
Representatives on the
Petroleum Industry Bill**

By Oando Plc

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1. INTRODUCTION

This Memorandum has been prepared by Oando Plc (“Oando”) on behalf of itself and its subsidiaries on behalf further to the request for submission of memoranda issued by the House of Representatives Committees on Petroleum Resources (Upstream) and (Downstream), Gas Resources and Justice and published in the Thisday Newspapers on Thursday, July 23, 2009. The Memorandum is a brief analysis of critical issues arising from the Petroleum Industry Bill. We have reviewed a draft of the Bill dated 2008 (HB 159), which we believe was submitted to the National Assembly in December 2008 and was published on the National Assembly website (<http://www.nassnig.org/legislation.php?page=9>) and our Memorandum is based on this document.

2. SPECIFIC COMMENTS

2.1 UPSTREAM PROVISIONS

Section 2.1.1

Sections 4, 257 and 270: Ownership and Licensing of Petroleum

Under Section 4, the Bill grants the Minister the power to grant licences and leases on the recommendation of the Directors General of the Institutions¹. Section 257 however indicates that the Minister may grant the relevant licenses on the recommendation of only the Directorate. There thus appears to be a conflict between the provisions of Section 4 and Section 257, in that the former

¹ The Institutions are defined as the National Petroleum Directorate, the Nigerian Petroleum Inspectorate, the Petroleum Products Regulatory Authority, the National Petroleum Assets Management Agency, the Nigerian Petroleum Research Centre, the National Frontier Exploration Service, the Petroleum Equalisation Fund and the Petroleum Technology Development Fund.

requires recommendation on the part of the DGs of more than one Institution, whilst the latter only requires recommendation from a single Institution.

We would suggest that this inconsistency be rectified.

Additionally, the provisions of Section 270 read alongside Sections 4 and 257 also introduce ambiguities into the licensing process. It provides that the grant of a license or lease must be by a bidding process conducted by the Directorate, in consultation with the Inspectorate. Whilst it is not explicitly stated, it appears that the bidding process should form the basis of the Directorate's recommendations to the Minister. The Minister is not however bound by the terms of the Bill to accept the recommendations of the Directorate. Therefore, under these provisions, it is possible for the Minister to refuse to grant the winner of the bid process a license.

It would thus be suggested that the Bill be amended to mandate the Minister to accept the recommendations of the Directorate in relation to bids which have duly followed the process laid out under the Bill.

2.1.2

Section 257 – Licenses, Leases & Contracts

The Bill introduces two licenses; the Petroleum Prospecting License (“PPL”) and the Petroleum Mining Lease (“PML”).

A key distinction from the provisions of the Petroleum Act is the fact that licences may now be granted in respect of either crude oil or natural gas and not in respect of both.² A company granted a license for either crude oil or natural gas which desires to engage in operations not covered by its current license must make a separate application to the Minister, which shall not be

² Section 257(2)

unreasonably refused. The objective appears to be aimed at ensuring that natural gas is treated not just as a by product, but as a resource which by itself could be a major income source. The challenge however is that crude oil and natural gas are often found together, thus the requirement to apply for different licenses may create an absurdity. Additionally, these provisions provide an opportunity for ministerial discretion in the licensing process. Whilst the Bill states that the application for an additional license is not to be unreasonably refused, the Minister's reasons for refusal need not correlate with the applicant's qualifications to exploit the field or indeed anything connected thereto.

It is therefore recommended that this dichotomy be expunged from the Bill.

2.1.3

Sections 262 – 266: Petroleum Mining Leases

The PML replaces the Oil Mining Lease (“OML”) under the Petroleum Act. The Bill provides for a term of not more than 20 years, which may be renewed for further terms of not more than 20 years for each term of renewal.³

The PML ‘may’ be granted to the holder of a PPL who has satisfied the conditions imposed by the PPL or under the Bill and has made a commercial discovery of crude oil or natural gas or both.

The use of the word “may” permits ministerial discretion in the grant of the PML and does not provide a guarantee of security of tenure. We therefore recommend that “may” should be changed to “shall”. There is also a question as to how this process of conversion sits alongside the requirement under Section 270(1) that the grant of all PMLs shall be by a bidding process.

³ Section 264

The Bill defines “commercial discovery” as including the discovery of “tar sands” & “bitumen”. These natural resources have been traditionally treated under the minerals regime in Nigeria as opposed to oil & gas. **If there is no valid reason to retain the provisions, it is suggested that “tar sands” and “bitumen” be deleted from the definition of “commercial discovery” accordingly.**

2.1.4

Section 275 – Consent to assignments

Section 275 provides for the requirement for the consent of the Minister in relation to assignments, mergers and acquisitions and the relevant conditions for consent. The provision of a mandate on the Minister to consent where these conditions are met provides a useful legal basis upon which a challenge can be made where the Minister refuses to provide his consent.

We would suggest as a further protection that a specific timeframe be provided within which the Minister must grant his consent to the assignment or indicate refusal. The failure to meet this deadline would be deemed as consent. Such a provision has been employed with respect to the Nigerian Electricity Regulatory Commission under the Electric Power Sector Reform Act⁴. It would enable quicker decision making and encourage commercial transactions. Additionally, it is noted that the Bill provides no exemptions in relation to assignments between related parties. We would suggest that the requirement for ministerial consent in those circumstances should be dispensed with.

2.1.5

Section 256 – Production Sharing Contracts

The Bill provides for the transfer of all licences and leases previously held by NNPC including OPLs and OMLs in respect of which PSCs have been awarded,

⁴ Section 69(7) Electric Power Sector Reform Act

to the Directorate on behalf of the Federal Government⁵. The effect of this provision is that NNPC Ltd. would not be a party to the subsisting PSCs and the ownership rights, responsibilities and liabilities under these arrangements would be transferred to the Directorate.

Whilst it is recognised that the current PSCs have a regulatory flavour and responsibilities, which should not be held by a private company, it is suggested that the holding of these rights by the Directorate, which is expected to be primarily a policy-making and implementation body would negate the fundamental principles of the Bill which is to separate government functions in the oil and gas industry.

Section 256 provides that upon attainment of commerciality as defined by the relevant PSCs, the contractor is required to meet with the Directorate to discuss the terms and conditions for the establishment of a company to manage the PSC.

The Bill is silent on whether the newly incorporated company would be held jointly by the contractor and the Directorate or whether it would be owned principally by the Directorate. In the case of the former, this would effectively change the PSC to a joint venture arrangement. It is therefore suggested that provisions be included in the Bill to clear any ambiguity.

2.1.6

Section 283 – 288 Environmental Provisions

The Bill makes provisions with respect to environmental matters in the upstream oil and gas industry and introduces some concepts which hitherto had not existed in the industry.

⁵ Section 255(2)

Section 283(1) of the Bill requires all licensees and lessees to submit an environmental programme (“EP”) or an environmental quality management programme (“EQMP”) to the Inspectorate for approval within 3 months of the passage of the Bill. **The Bill does not clearly distinguish between the EP & the EQMP. We would suggest that the concepts be appropriately defined or if they serve the same purpose, one of the concepts should be deleted from the Bill.**

The contents of the EP or EQMP as provided under section 283(1a) are very similar to the requirements with respect to the environmental impact assessment (“EIA”) as provided for under the Environmental Impact Assessment Act. The Bill does not acknowledge the EIA Act nor does it seek to distinguish the circumstances under which the provisions of the Act would apply and when the provisions of the Bill regarding EP & EQMP would apply. The effect is that there is likely to be a duplication of efforts. Additionally, as the EP & EQMP on the one hand, and the EIA are submitted to different bodies, i.e., the Inspectorate and the Federal Ministry of Environment respectively, this could lead to a situation where one body approves while the other declines. We note that the Bill requires that the Inspectorate should consult with the Ministry of Environment in approving an EP & EQMP⁶, this does not however bind the Inspectorate to follow the decision of the Ministry. **We therefore recommend that the conflicts between the EP & EQMP regime on the one hand and the EIA regime on the other hand are rectified appropriately.**

The Bill provides for the **payment** of a “financial provision” in accordance with guidelines issued by the Inspectorate, prior to the approval of the EP or EQMP.⁷ The purpose of the payment according to the Bill is for the rehabilitation or management of negative environmental impacts.⁸ The “financial provision” would be accessed in the position that there is any environmental damage

⁶ Section 283(2)

⁷ Section 285(1)

⁸ *Ibid.*

which the licensee fails or is unable to remedy by itself.⁹ The Bill also requires that a licensee annually assess its environmental liability and increase the financial provision to the satisfaction of the Minister.¹⁰

We note that this is not a financial provision on the books of the company, but the payment of cash to be managed by the Inspectorate. Depending on the amount required, this may have significant implications on the cashflow of upstream companies and would have the effect of tying down capital which could be utilised more effectively. Additionally, we note that the Bill is silent on the mechanism for reimbursement of the money where environmental damage does not occur. The "financial provision" would thus operate effectively as an additional levy on upstream companies. Further the requirement to annually increase the financial provision does not reflect realities as an assessment of environmental effects of a company could very well show a decrease in the potential environmental liability. It may also have the effect of stifling innovation as there is no incentive to develop better processes and use more environmentally-efficient equipment in operations. We would therefore recommend that these provisions be either reworded to reflect the issues above or expunged.

The Bill provides that the Inspectorate shall enter into an agreement with every licensee regarding the abandonment and decommissioning of oil and gas installations at the commencement of petroleum operations¹¹. It is not clear what such an agreement would address.

⁹ Section 285(2)

¹⁰ Section 285(3)

¹¹ Section 288

2.2. DOWNSTREAM PRODUCTS PROVISIONS

3.2. 1 General

Under the current regime, petroleum products trading and marketing companies are authorized to import petroleum products by virtue of a tender process which is managed by the Petroleum Products Marketing Company ("PPMC"). The Bill anticipates the transformation of PPMC to the National Transport Logistics Company ("NTLC"), which would act as an asset holder/manager and would no longer have the power to manage the fuel importation process. We are concerned that the PIB does not make express provisions for transfer of this duty to another entity nor does it explicitly suggest a new system under which fuel importation is to take place.

2.2.2

Sections 289-307: Technical Licensing.

Sections 308-345: Commercial Licensing.

The Bill provides the National Petroleum Inspectorate (NPI) and the Petroleum Products Regulatory Authority (PPRA) with the power to resolve technical and commercial disputes respectively. From a practical perspective disputes arising in the course of downstream products transactions would often involve technical and commercial matters. The Bill therefore appears to leave room for dispute between the two entities in relation to who has jurisdiction to resolve certain disputes. Any potential conflict between these institutions could result in significant difficulties for licensees.

We suggest that the Bill include methodology by which such disputes between the relevant institutions can be resolved in a speedy fashion.

2.2.3

Section 77(1)(d)(vii): Functions of the PPRA.

Section 77 provides for, amongst others, the function of the PPRA to issue commercial licences and specifically section 77(1)(d)(vii) provides that the Authority will be responsible for issuing commercial license for any activity connected with 'transmission'. Traditionally, "transmission" is not universally linked with a specific phase of activities in relation to the downstream products or downstream gas sector.

We recommend that if the intention remains to retain the power to license activities under 'transmission', it would be useful to include a definition of this word to avoid misinterpretation.

2.2.4

Section 213: Bridging and Equalization Allowance.

The Bill provides for remittance of bridging and equalization allowances to the Petroleum Equalization Fund Management Board. The Bill does not however define 'bridging' nor 'equalization' allowances. These words do not have universal acceptance and as such will be subject to differing definitions.

We recommend that, to avoid ambiguity, it would be useful to define 'bridging' and 'equalization' allowances.

2.2.5

Section 216 (2): Prescribed dates for payment and penalty for non-payment.

The Bill provides for a penalty where payments due to the PEF Management Board are not made within 21 days of a specified date. We believe that it is important to also provide incentives for public bodies to take ownership of their responsibilities and in this light would suggest that a corresponding obligation on the part of the PEF Board be provided for where it fails to pay money it owes.

2.2.6.

Section 350 (2) & (5): Facility Management Companies (FMCs)

The Bill provides for a significant restructuring of the downstream products sector by the creation of the NTLC and the provision for Facility management companies ("FMCs") to manage the assets of NTLC. The FMCs are to operate regional storage depots owned by the National Transport Logistics Company. The Bill prohibits FMCs from engaging, directly or 'indirectly', in any other operational activity in the petroleum sector except bulk transportation. The potential impact of the use of the word 'indirectly' is that this may be interpreted to exclude companies in a subsidiary, affiliate or related company relationship with another company operating in the petroleum sector. The effect would be to preclude major companies, who have developed years of experience operating in the Nigerian petroleum industry from establishing subsidiaries, affiliates or related companies to operate as FMCs. This would be a great disservice to Nigeria.

We suggest that the word 'indirectly' be deleted in this section.

2.2.7

Section 352 (2) (a):

The provision states that the existing capacity in jetties and storage depots shall be shared amongst licensed oil marketing and refining companies in proportion to their needs. The Bill does not elaborate on how such needs are to be determined.

We suggest that this provision be expunged or replaced with specific criteria detailing the manner in which the needs would be determined.

2.2.8.

Section 355: Rights to uncommitted capacity in private facilities.

This section provides that all oil marketing companies shall have access to 'uncommitted capacity' in pipelines and storage facilities which are owned by private operators and deemed to be strategic to the 'national interest'. The section does not elaborate on the duration of said access or what amounts to 'uncommitted capacity' and "national interest".

We suggest that specific criteria for access be provided and the provision should properly define the words or be deleted.

2.2.9.

Section 289: Technical Licences.

Section 289 provides for a technical license to be issued by the NPI to operators in the downstream sector. This would be in addition to Commercial Licences issued by the PPRA under section 308. The activities to be licensed, under the technical license regime, are specifically listed in Section 289(1). A review of those activities suggests that they are primarily related to the commencement of a project and apart from maintenance responsibilities, do not span the lifetime of the project. It is thus our view that a permitting process rather than a licensing process is required with respect to the activities listed in Section 289(1). Any maintenance responsibility can be appropriately dealt with by regulation. Further, under the Bill, operators in the downstream sector would be required to obtain both the technical and the commercial licenses. The fact that these licenses are provided by different regulatory authorities may pose a challenge for applicants. Firstly, it creates an additional bureaucratic hurdle for applicants to go through. Secondly, it raises the possibility that a licensee may be granted one license by one authority whilst refused by another, leaving the earlier obtained license ineffective.

We recommend that the requirement for a Technical License should be substituted for a requirement for a technical permit. In the alternative, the Bill could adopt the issuance of one license to cover both commercial and technical terms and issued jointly by the two relevant authorities.

2.2.10

Section 290 (7): Modification of licence application

This section relates to technical licences issued by the NPI and provides that an applicant shall be informed if its application has been declined and reasons for the refusal. This is a good initiative as it provides a legal basis for challenging any refusal. We note that there is no corresponding obligation in terms of commercial licenses issued by PPRA. Such an obligation should be included.

We further suggest that the NPI and/or PPRA be required to accept or refuse to license an applicant within a specific period of time, with failure to do so being deemed as acceptance. Such a provision would ensure the speedy resolution of license applications and ensure discipline in the licensing process.

2.2.11.

Section 308(1): Commercial Licence

Section 308 generally provides for the power of the PPRA to issue commercial licenses. Specifically, section 308(1) lists the range of activities under which these licenses would be required. In our view the activities listed under section 308(1) do not comprehensively cover the range of activities in the downstream products and gas sectors.

We suggest that the activities be properly spelt out to reflect the full range of current licensable activities in the downstream industry.

2.2.12.

Sections 309 – 325: Types of Commercial Licenses

Sections 309 – 325 detail various types of commercial licenses and specifies conditions relevant to the licenses and licensees. It should be noted that of the licenses details only one – Transportation Pipeline Owner License covers downstream products activities. The rest apply to downstream gas activities. This is a significant oversight.

We would recommend very strongly that all identifiable commercial license activities should be specifically detailed in the Bill and given the same treatment as the activities detailed under sections 309 -325.

2.2.13

Section 329(1): Separation of certain licensed activities.

PPRA, upon the approval of the Minister, may impose conditions requiring commercial licensees to separate licensed activities and prohibit a licensee from holding commercial licenses of another type, if it is deemed necessary to facilitate competition.

We suggest that the Bill be amended to reduce this arbitrary element perhaps by specifying which activities may be so restricted and/or laying out the criteria to be used in taking this decision.

2.2.14

Sections 72 & 107: Judicial Review of NPI & PPRA decisions

We are concerned as to grounds for appeal being on points of law and process alone. Sections 72 & 107 of the Bill provide that an aggrieved person shall have a right to appeal to the Federal High Court for a **judicial review** on questions of law and process pertaining to the actions of the NPI & PPRA. We believe that there should be a right of appeal on the determination of **matters of fact**.

We would recommend that the provisions be amended to allow for appeals on matters of fact.

2.3 DOWNSTREAM GAS PROVISIONS

2.3.1

Section 374 : Third Party Access.

Third party access in relation to distribution network licensees appear to appear to be inconsistent with the provision relating to exclusivity rights holders of a distribution license appear to be entitled to, it is necessary that this inconsistency is clarified. In a related note we would suggest that wholesale customers be properly defined in the Bill

2.3.2

Section 378: Power of the PPRA to regulate prices for Downstream Gas.

The Bill empowers the PPRA to introduce and implement transitional pricing arrangements vis-à-vis allowing for a gradual transition towards the pricing arrangements which comply with the principles detailed in Section 378. It is however not clear how long the transitional pricing arrangements are to apply.

We propose that the period for said transitional pricing arrangements be defined.

2.3.3

Section 321(e): Distribution Licenses.

Section 321 generally provides for the obligations of a Distribution Licensee. Specifically, 321(e) requires a licensee to connect all customers within its local distribution zone. In its current form, this provision may lead to ambiguities, which may impose an obligation to connect even those within the zone who do not require a direct gas connection.

We would therefore suggest that this section be amended to allow this obligation to arise upon a specific and formal request from a customer to be connected to the distribution licensee within its local distribution zone.

2.3.4

Section 312 (1): Transportation Network Operator License. Under section 312(1) a 'qualified person' may apply for a TNO license. The Bill does not however define who an applicable person is.

For the purpose of clarity we will suggest a proper definition of "qualified person" should be included in the Bill.

2.3.5

Section 387(c): Customer Service.

The reference made to the Inspectorate in this section appears to be a mistake as it has no pricing regulation powers under the Bill.

We would suggest that the reference to the Inspectorate be changed to the Authority.

2.3.6

Section 316: Supply License.

Section 316(2) defines a 'qualified person' as a producer of gas intending to supply gas into the downstream sector. By the definitions of 'downstream sector' and 'downstream gas sector' in the Bill, we suggest that it would be more appropriate to substitute references to "downstream sector" in section 316(2) with "downstream gas sector".

2.3.7

Section 377 (1c): Power of the Authority to Regulate Gas Prices.

The Bill provides that one of the situations wherein the Authority shall have the powers to regulate the prices charged by operator(s) in the downstream sector of the industry is where "a particular licensee is a dominant provider". We will suggest a proper definition of "dominant provider" in the Bill to avoid ambiguities.

2.4 Certain Institutional Provisions

2.4.1

Section 64: Powers of the Investigating Unit of the Nigerian Petroleum Inspectorate (the "Inspectorate").

The Bill provides that the Investigation Unit shall have the powers to investigate and prosecute offences. However, it is not clear why the Investigation Unit has the power to also prosecute offences as this appears to be a duplication of functions.

Hence, we would recommend that any prosecutorial powers of the Investigation Unit be expunged from the Bill.

2.4.2

Section 68: The Inspectorate's Power to Resolve Disputes

The provisions of the Bill regarding the dispute resolution powers of the Inspectorate appear to override any arbitration agreement, which may be subsisting between the parties to the dispute. The effect of these provisions is that the referral of the dispute by just one of the parties is sufficient to subject the dispute to the arbitral powers of the Inspectorate.

It is our suggestion that the Bill be amended to subject these powers to the agreement of the parties.

2.4.3

Section 93: Funds of the Authority.

It is provided in the Bill that Authority shall derive its funds from amongst others "an administrative charge of 0.3% of the price of a litre of annual average consumption of white products per day to be inserted into the template". It should be noted that "template" is not defined in the Bill.

We would suggest that 'template' be properly defined to avoid any ambiguities.

2.5 General Issues

We have provided below a bullet list of some of the issues we have identified across the Bill.

- There are several references to tasks to be carried by either the "Directorate or the Inspectorate" (for example see Sections 257(1), 258(1), 272(1) and 400). This can lead to a duplication of duties by these entities and to double regulation with respect to the matters involved.

We would suggest that tasks should be appropriately assigned to the relevant government agency, in accordance with the relevant government function for which they are responsible.

- We would suggest that wherever the Minister's or any other agency's approval or consent is required, such approval/consent should be granted or refused within a specific period. Similar provisions were utilised in relation to the electricity licensing process under the Electric Power Sector Reform Act (see Section 69(7) of that Act).
- The reference to Section 250 in Section 277(h) should be changed to Section 275.
- The Bill does not distinguish between an environmental programme and environmental quality management plan (Section 283(1)).
- Sections 283(2) (3) & (5) as well as Sections 284(1) and 285(1) refer to environmental management plan and environmental management programme as opposed to environmental programme and environmental quality management plan referred to in Section 283(1). The Bill should consistently reflect the appropriate wording.
- The Bill continually uses the gender specific pronouns "his or her" in referring to a licensee or lessee. As licensees and lessees are required to be companies, we

would suggest the use of the non-gender specific "it" is more appropriate.

- The reference to Section 379 in Section 377 should be changed to Section 378.
- Reference to National Electricity Regulatory Authority in Section 384(2) to be changed to Nigerian Electricity Regulatory Commission.
- References to "indigenous company" should be changed to "indigenous oil company" in Sections 403(2), 430(1) and any other places it may be found in the Bill.
- Section 419(1)(c)(ii) should be deleted as the "income derived from upstream gas operations" is already excluded because of the reference to "petroleum operations".
- Section 419(2)(d)(ii) should be deleted as the "income derived from petroleum operations" is already excluded because of the reference to "upstream gas operations".
- Section 419(2)(d) should be changed to Section 419(2)(c).
- Subsection (1) should be added to Section 420.
- As the section reflects only one provision, Section 452(1) should be changed to Section 452.

- Insert “in” before “dispute” on the last line of Section 455.
- The reference to “paragraph (b)” should be changed to “paragraph (c)” in Section 457(2).
- Remove reference to “petroleum exploration licence” from Section 411(1) and any other place in the Bill as Section 257(1) does not create such a licence.
- References to “transportation pipeline licence” in Section 350 and any other place in the Bill, to be changed to “transportation pipeline owner licence” in accordance with Section 309(1).
- The Bill does not define “fiscalised natural gas”.
- It is not clear why the Investigation Unit has the power to also prosecute offences. This is a duplication of functions and we recommend that any prosecutorial powers of the Investigation Unit be expunged from the Bill. (Section 65).
- “Asw” in Section 400 should be changed to “as”.
- The reference to Inspectorate in Section 387 should be changed to Authority.
- Section 350(1) does not state the relevant Schedule.

- Although the Bill refers to several schedules, no schedules are included in the current draft of the Bill.

2.6 Concluding Remarks

In conclusion, we believe that the draft Bill provides a useful framework for the regulation of the Nigerian Petroleum Industry. We do believe that the incorporation of our initial comments above will strengthen the Bill and facilitate its effectiveness in achieving its objectives. We do however believe that the process of debating the Bill is one which must continue and that much more discussions must be held on the details of the Bill.