BRIDGEFORTE ATTORNEYS

AN OVERVIEW OF THE PETROLEUM INDUSTRY ACT, 2021

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Introduction

"...the PIA having been signed into Law will usher in a new vista of opportunities within Nigeria's petroleum industry. "

On 16th August, 2021, the President of the Federal Republic of Nigeria signed the Petroleum Industry Bill into law as the Petroleum Industry Act, 2021 (PIA). The Bill which has been pending at the National Assembly since the early 2000s was passed by the Senate and House of Representatives on the 15th and 16th of July respectively and is set to provide a legal, administrative and fiscal framework for the Nigerian Petroleum Industry as well as a conceptual structure for the development of host communities and related matters[1]. It is our view that the PIA having been signed into Law will usher in a new vista of opportunities within Nigeria's petroleum industry.

The Act comprises of 319 sections, divided into 5 chapters with provisions on: governance and institutions, administration, host communities' development, petroleum industry fiscal framework and miscellaneous provisions respectively, and 8 schedules. It is worthy to note that the Bill had to surmount factors such as ownership interest, misalignment of interest between the National Assembly and the Executive Arm of Government, stiff opposition by host communities, perceived erosion of ministerial powers and push back by investors as a result of what is considered to be uncompetitive provisions in the Bill.

Salient sections of the Act will be examined below:

[1] This is stated in the Preamble to the Act

Governance, Institutions and Administration under the PIA

Section 1 of the PIA vests the property and ownership of petroleum within Nigeria and its territorial waters, continental shelf and exclusive economic zone in the government of the Federation of Nigeria. The objective of this chapter of the Act is noted to create efficient and effective governing institutions, establish a framework for the creation of a commercially oriented and profit-driven National Petroleum Company, promote transparency and good governance in the administration of the nation's petroleum resources and foster a business environment conducive for petroleum operations[2].

Section 3 of the PIA retains the oversight and supervisory powers of the Minister of Petroleum ("The Minister"). However, notable changes were made in sub-section 1(g-k) which requires that the newly created Nigerian Upstream Regulatory Commission ("The Commission") provides recommendation to the Minister before the latter exercises some of his powers including: granting petroleum prospecting licenses and petroleum mining leases, revoking and assigning interests in the licenses and leases and suspending petroleum operations in some areas. Section 68 of the PIA reinforces this when it places the administration of upstream petroleum operations under the purview of the Commission. This is a departure from the procedure under the Petroleum Act where the Minister had the absolute discretion on the grant of the petroleum licenses. This, therefore, affords a limitation to the Minister's formerly unfettered powers in these areas although it is not certain whether the Minister is bound by the recommendations of the Commission.

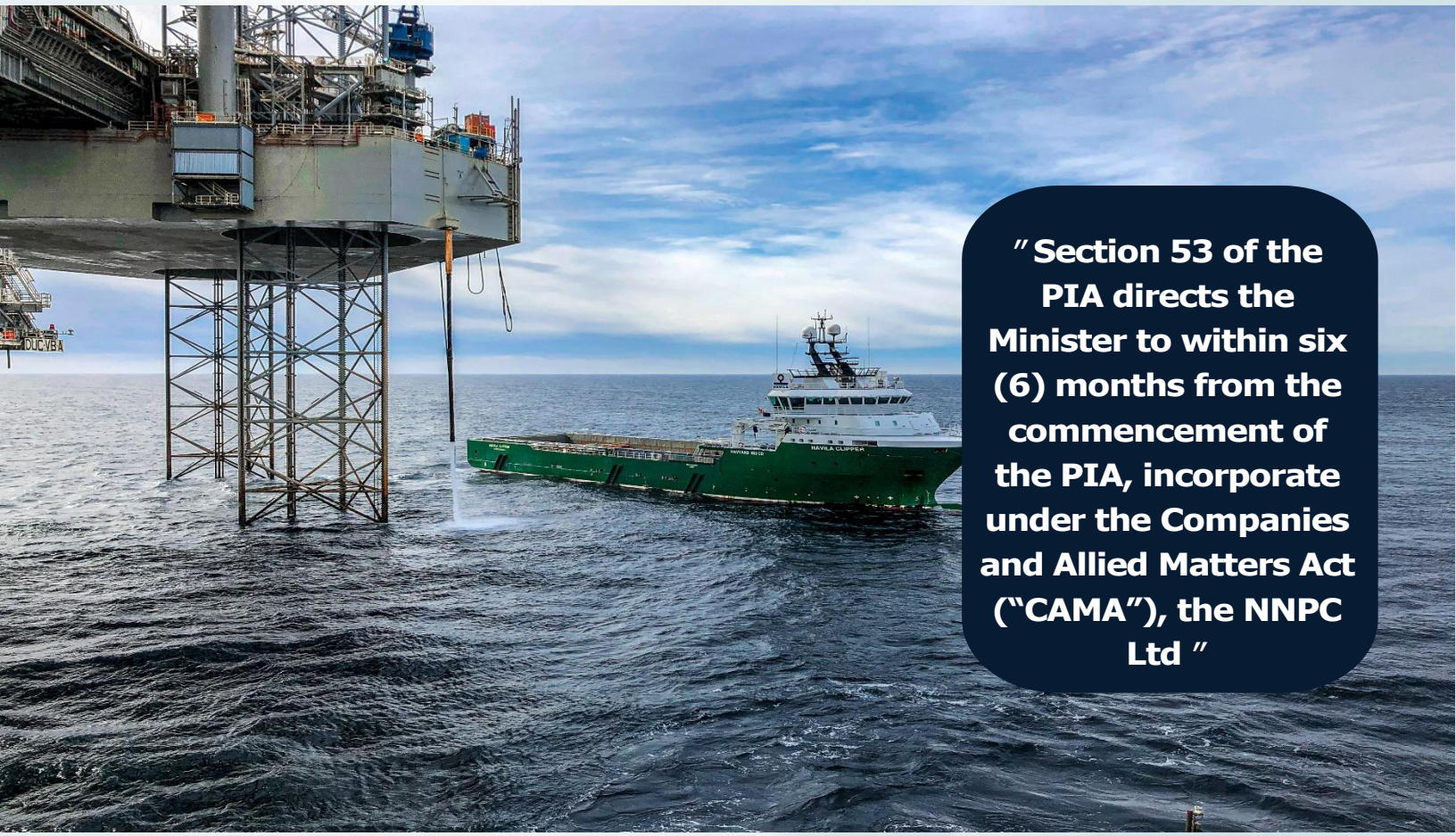
Section 4 of the PIA establishes the Commission, as a legal person and makes it responsible for the technical and commercial regulation of upstream operations by administering, enforcing and implementing all laws, regulations and policies relating to upstream petroleum operations and ensuring compliance to applicable national and international petroleum industry policies, standards and practices. It can be inferred that the Commission will be undertaking some of the regulatory functions undertaken by the Department of Petroleum Resources (DPR). Section 9 of the PIA sets out the functions of the Commission in respect of frontier basins[3] including the promotion of exploration of the frontier basins and development of exploration strategies and portfolio management for the same. It also establishes a Frontier Exploration Fund, comprised of 30% of the Nigerian National Petroleum Company (NNPC) Ltd.'s profit oil and profit gas accruing from production sharing, profit sharing and risk service contracts and same shall be dedicated for the development of frontier acreages. Mention must be made that the PIA states that the "frontier acreage" referred to above will be defined in a Regulation to be made by the Commission and it is thus expected that to the Frontier Exploration Fund will engender the development of the petroleum industry across various parts of Nigeria.

[2] Section 2 of PIA

[3] The inland basins in Nigeria consist of the Anambra basin, the lower, middle, and upper Benue trough, the south-eastern sector of the Chad basin, the mid-Niger (Bida) basin, and the Sokoto basin.

As a part of its duty, the Commission has a regulatory role to ensure compliance with the provisions of the Act, with respect to environmental sustainability and environmental degradation that might result out of the operations of licensees and lessees. Accordingly, section 104 of the PIA, licensees and lessees whose operations result in gas flaring are mandated to pay the fine prescribed by the Commission in Regulations under the Act except where it occurs in cases of emergency, pursuant to an exemption granted by the Commission or as an acceptable safety practice under established Regulations.

In similitude, Sections 29 to 34 of the PIA establish the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("The Authority") and grant it same powers attributable to a corporate entity. The Authority also has the power to make technical and commercial Regulations on several enlisted areas relating to midstream and downstream operations. This power is however subject to the requirement to consult with stakeholders which we posit will ensure that the regulatory powers conferred on the Authority are not exercised arbitrarily. It is also exempted from the provisions of any enactment relating to the taxation of companies or Trust Funds just like the Commission above.



" Section 53 of the PIA directs the Minister to within six (6) months from the commencement of the PIA, incorporate under the Companies and Allied Matters Act ("CAMA"), the NNPC Ltd "

By Section 45 of the PIA, the Authority is mandated to prepare and present before the National Assembly, a Statement of Estimated Income and Expenditure for the next financial year, not later that 30th September of each year or such other date as the Minister of Budget and National Planning may determine. This is a welcome development and will serve as evidence of stewardship, enhance the appraisal of the efficiency of management, identify the sources of funding for capital projects and highlight the various sources of revenue and expenditure incurred. Also, considering that it is always difficult to measure costs and benefits

as well as financial terms in the public sector, this mandate will make a cost-benefit analysis of the economic and social advantages and disadvantages of alternative courses of actions easy. We also submit that this will ensure that well mapped-out strategic plans are developed capable of preventing the entity from drowning in the tide of risks and uncertainties or deviating unnecessarily from the pursuit of its original objectives is available.

A Midstream Gas Infrastructural Fund is established by Section 52 of the PIA, as a body corporate with legal personality and a governing Council to supervise and make investment decisions on its behalf. Its major source of funding includes not more than 1% levy derived from wholesale price of petroleum products and natural gas sold in Nigeria, funds and grants accruing from multilateral agencies, bilateral institutions dedicated to the development of infrastructure for midstream operations in Nigeria, interest payable in respect of money in the Midstream Gas Infrastructure Fund and other donations.

Importantly, Section 53 of the PIA directs the Minister to within six (6) months from the commencement of the PIA, incorporate under the Companies and Allied Matters Act ("CAMA"), the NNPC Ltd. The Minister is also mandated to consult with the Minister of Finance to determine the number of shares and nominal value of the shares allotted. Ownership of the shares is vested in the government but to be held by the Ministry of Finance on its behalf. The Minister and the Minister of Finance are to determine which assets, interests and liabilities are to be transferred to the NNPC Limited, those not transferred to NNPC Limited shall remain that of NNPC until they become extinguished. Both Ministers are also to outline a framework for payment of liabilities not transferred to NNPC Ltd. Overall, the Act directs the NNPC Ltd to run as a commercial entity like any incorporated company with 20% of its profits retained for its own growth while the rest is remitted to the Government as its shareholder. Pursuant to section 58 of the Act, there shall be a Board of the NNPC Ltd which shall perform its duties in accordance to the provisions of CAMA and its Articles of Association.

An important issue of concern at this juncture is the anticipated success of NNPC Ltd in the light of previous experiences in Nigeria regarding the commercialisation of Government owned entities. An example is the now defunct Nigerian Telecommunications Limited (NITEL) which was commercialised to become M-TEL, Its failure to generate enough profit as envisaged led to its assets being sold to private telecommunication firms.

Commercialisation is an attempt to make an organisation profitable and lift the attendant financial burden on the Government, as it enables the government to divert the available revenue to other important projects. However, when this burden ends up not be lightened as a result of the continued loss on the part of the commercialised entities, the Government resorts to privatising them. Based on the fact that NNPC has not been generating profit in recent years[4], if the trend continues, can we say that we might get to witness a privatisation of parts of the commercialised NNPC Ltd?

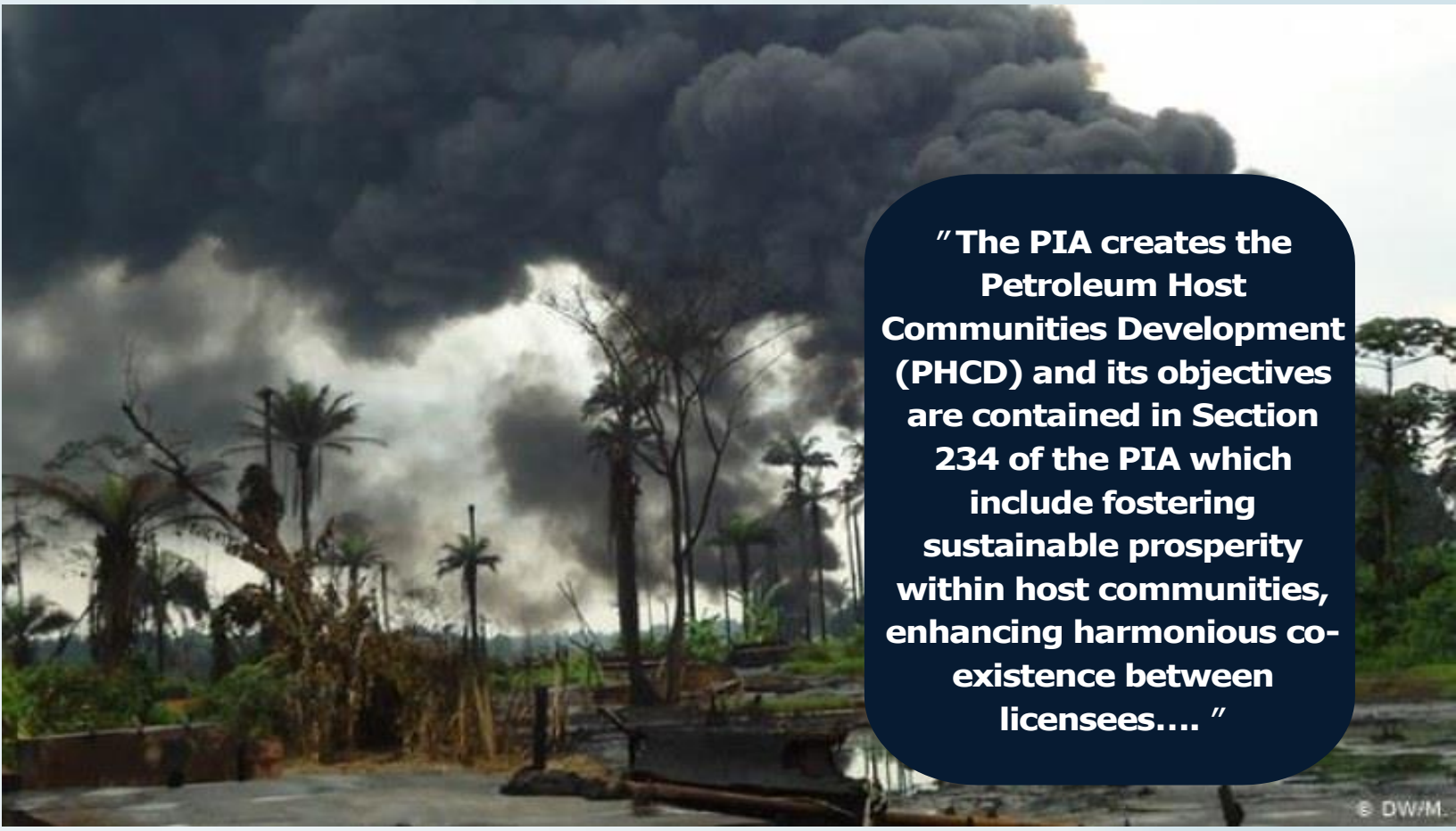
[4] https://www.premiumtimesng.com/news/headlines/421652-nnpc-lost-over-n20-billion-in-2019-audit-report.html accessed on 25th August, 2021. However, NNPC declared a profit of 287 Billion Naira after tax in 2020, https://guardian.ng/news/buhari-announces-n287bn-as-profit-after-tax-by-nnpc/ accessed on 26th August, 2021.

Host Communities Development

The Act also made provisions for the host communities which is very important as the agitations of these communities was one of the factors that led to the delay in passing previous versions of the Petroleum Industry Bill for years. The tension between the host communities, International Oil Companies (IOCs) and the Government over better environmental conditions and mitigation of the effects of oil operations on their environment influenced this part of the PIA.

The PIA creates the Petroleum Host Communities Development (PHCD) and its objectives are contained in Section 234 of the PIA which include fostering sustainable prosperity within host communities, enhancing harmonious co-existence between licensees and the host and ensuring a direct social and economic benefit from petroleum operations to the host communities.

To achieve these objectives, Section 235 of the PIA provides for the incorporation of Host Communities' Development Trusts (HCDT) The objectives of HCDT include the financing and execution of projects for the benefit and sustainable development of host communities, facilitation of economic empowerment opportunities in host communities, promotion of educational development for the benefit of members of host communities, support of local initiatives and assistance in any other developmental purpose deemed beneficial to the host communities.



To fund the HCDT fund, Section 240(2-4) of the PIA provides that:

- each settlor shall where applicable through an operator make an annual contribution to the applicable HCDT fund of an amount equal to 3% of its annual operating expenditure in the immediately preceding calendar year in respect of all petroleum operations affecting the host community;

- each HCDT may receive donations, gifts, grants or honoraria provided to them for the attainment of its objectives;

- profits and interest accruing to the reserve fund of a HCDT shall also be contributed to the applicable HCDT fund.

The funds generated must be used exclusively for the implementation of the host community development plan, hence, section 234 of the Act grants the Commission and Authority power to make Regulations within their areas of competence and jurisdiction, which shall govern the implementation of the host community development plan. The formular for allocation of funds is contained in Section 244 of the PIA viz: 75% of annual contribution shall be used to fund capital projects, 20% for investment in the community whenever there is a cessation in the contribution payable by the settlor and a maximum of 5% of the annual contribution shall be utilized solely for administrative cost of running trust and special projects.

The introduction of the HCDT fund has raised questions as to the relevance of the contribution to the Niger Delta Development Commission (NDDC). The Act is however not clear as to whether the HDCT fund's contribution will be together with the 3% NDDC levy. Nonetheless, the framework for HDCT is a laudable initiative which if implemented, will reduce the grievances of members of host communities known to be a headliner in previous years. A fact that cannot however be denied is that, the 3% being calculated as part of operating expenses for the previous year will make Oil Firms to be conscious of their activities and reduce pollution to the barest minimum in order to keep their cost down, overall. This is commendable, when one considers that the contribution is exclusive of other Corporate Social Responsibility projects that the Firms execute in the various communities.

Section 258 of the PIA provides for a fiscal framework which aims to be progressive in order to encourage investment in the industry, simplify the administration of petroleum tax, expand the revenue base of the government and promote transparency.

Fiscal Framework for the Petroleum Industry

Sections 259-261 of the PIA provide that the Federal Inland Revenue Service (FIRS) is responsible for the collection of hydrocarbon tax and enforcement of the provisions of the Act in relation to hydrocarbon tax assessment and revenue collection as well as determination and collection of rents and royalties, related payments and production shares, where the model contract includes provisions related to production sharing.

The tax will be levied on the profits of any company engaged in upstream petroleum operations in relation to crude oil payable and each and every petroleum mining lease payable during each accounting period in accordance to the provisions of the Act The subjection of companies carrying out upstream petroleum operations to hydrocarbon tax however, does not exonerate them from company income tax under the Company Income Tax Act[5].

The PIA pursuant to Section 263 also allows for deduction of expenses wholly, reasonably, exclusively and necessarily incurred during that period in computing the adjusted profit of a company in upstream petroleum operations. However, it still left the term 'reasonable' undefined, and this portends that the Court will continue to exercising its discretion whenever it comes up for interpretation. The PIA also imposed a cost price ratio limit of 65% of gross revenue for hydrocarbon tax deduction purposes and any excess cost incurred may be carried forward.

Section 264 of the PIA provides for non-deductible expenses including: expenditure for the purchase of information relating to the extent and existence of petroleum deposits, penalties for natural gas flaring, financial or bank charges, arbitration or litigation costs, tax inputted into a contract on an agreement or net tax basis and rent or cost of repairs to any premises or part of the premises not incurred for the purposes of those operations etc.

Significant modifications were also made to the calculation of chargeable profits and allowances such as the removal of restriction on capital allowance, deletion of petroleum investment allowance, introduction of production allowance to replace investment tax allowance and tax credits etc.

Section 267 of the PIA sets out the formular for determining chargeable tax for any accounting period and by Section 292 of the PIA, failure to pay the hydrocarbon tax or any instalment of tax within the prescribed time limit attracts penalties including an additional 10% sum on the tax payable, interest on tax, demand notice from the FIRS in which case failure to pay one month after service will result in enforcement of payment under the PIA, which includes the power by FIRS to sue for the hydrocarbon tax. Another important provision is that gas utilization incentive will apply to midstream petroleum operations and large-scale gas utilization industries. An additional 5 years tax holiday is granted to investors in gas pipelines.

[5] Section 260(6) of the PIA 2021

Legal Proceedings

According to the provisions of section 307 of the PIA, no action shall lie against the Commission, Authority, Chief Executive, Director or other employee of the Commission or Authority for any act done or attempted to be done in default of this Act or other law unless it is commenced within 3 months after the accrual of any cause of action in respect of such act, neglect or default and provided such act or omission was not done in good faith. The Act also requires that the Commission or Authority be served a pre-action notice one month before commencement of the action.

Conclusion

In conclusion, the commencement of the Act has the effect of repealing certain provisions in a number of Acts listed in section 310 of the PIA including the: Petroleum Profit Tax Act, Associated Gas Re-injection Act, Hydrocarbon Oil Refineries Act, Motor Spirits (Returns) Act, Nigerian National Petroleum Corporate (NNPC) Act etc. Overall, the Petroleum Industry Act 2021 contains many provisions that could transform the industry and although some of its provisions have raised questions yet unanswered, it is hoped that the laudable ones will stimulate investments across the oil and gas value chain as it is expected that such will birth a more competitive and resilient petroleum industry, bring real and lasting benefits to the host communities, bring gas flaring to a halt, and serve as a pace setter to achieve the goals of the industry.

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ABOUT BRIDGEFORTE ATTORNEYS

Bridgeforte Attorneys is the product of a merger of three Law Firms: Brickfield LP, Brookwood Associates and Raregem Solicitors. The Firm is peopled with Lawyers that have acquired decades of experience. We are a Client-centered, industry-focused Law Firm, uniquely positioned to assist our Clients' to achieve their business objectives in Nigeria.

From a legal and regulatory perspective, we help our Clients structure energy and infrastructure developments transactions, be it concession agreements, power projects etc. We have the requisite experience and competence to navigate and guide investments within the energy sector.

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