

# Anti-competitive Behavior

# Generation

- Production of electricity by a generation company (Section 4[y])
- Affected with public interest, competitive and open (Section 6)
- NPC to execute Transition Supply Contracts with DUs at TSC rates [regulated NPC tariff] (Section 67)
- Establishment of WESM, which provides for the mechanism for the pricing of the DUs' spot purchases (Section 30)
- Upon implementation of RCOA, generation prices not subject to regulation by ERC (Section 6)
- However, bilateral power supply contracts executed between GenCos and DUs with remaining captive market shall continue to be subject to ERC review (Section 45[b])

# ERC Mandate in relation to Retail Rate

- **Retail Rate** – total price paid by end-users consisting of the charges for **generation, transmission** and related ancillary services, **distribution, supply** and **other related charges** for electric service
- The retail rates charged by distribution utilities for the supply of electricity in their **captive market** shall be **subject to regulation** by the ERC based on the principle of **full recovery of prudent and reasonable economic costs incurred**, or such other principle that will promote efficiency as may be determined by the **ERC**. (Section 25)

# ERC Mandates in relation to WESM

- Approve PDM and market fees
- Authorize who may become eligible for WESM membership
- Declare market suspension or temporary market failure in cases of “national and international security emergencies or natural calamities” (Section 30)  
(Under Resolution 15, S. 2007, ERC adopted a set of procedures relative to the declaration of suspension of WESM)

# ERC Mandates in relation to Generation and Supply

- Enforce WESM Rules
- Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition
- Act against any participant or player in the energy sector for violations of any law, rule and regulation governing the same, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts (Section 43)

# ERC Mandates in relation to Generation and Supply

- Monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior by any participant; and stop and redress the same
- Resort to remedies such as price controls, injunctions, divestment, disgorgement of excess profits, and imposition of fines and penalties (Section 45)

# Anti-competitive Behavior in EPIRA (Rule 11, Sec. 8, IRR)

Any **contract, combination or conspiracy** that unreasonably restricts competition in any market for competition, or any **conduct** that constitutes an abuse of market power or an attempted monopolization, such as:

- Fixing prices of products or services
- Fixing output of products or services
- Customer, Product, Service or Territorial Divisions
- Tying
- Physical or economic withholding
- Discriminatory provision or regulated distribution or transmission services
- Misrepresentation or false advertising of a Distribution Utility
- Cross-subsidization

# Competition Commission: Powers and Functions



- Original and primary jurisdiction over the enforcement and implementation of the provisions of RA 10667 and its IRR
- Conduct inquiry, investigate, and hear and decide on cases involving any violation of RA 10667 and other existing competition laws *motu proprio* or upon receipt of a verified complaint from an interested party or upon referral by the concerned regulatory agency, and institute the appropriate civil or criminal proceedings;
- Review proposed mergers and acquisitions, determine thresholds for notification, determine the requirements and procedures for notification, and upon exercise of its powers to review, prohibit mergers and acquisitions that will substantially prevent, restrict, or lessen competition in the relevant market;
- Upon finding, based on substantial evidence, that an entity has entered into an anti-competitive agreement or has abused its dominant position after due notice and hearing, stop or redress the same, by applying remedies, such as, but not limited to, issuance of injunctions, requirement of divestment, and disgorgement of excess profits
- Conduct administrative proceedings, impose sanctions, fines or penalties for any noncompliance with or breach of RA 10667 and its IRR
- Intervene or participate in administrative and regulatory proceedings requiring consideration of the provisions of RA 10667 that are initiated by government agencies such as the Securities and Exchange Commission, the Energy Regulatory Commission and the National Telecommunications Commission



# Anti-competitive Behavior in RA 10667

It shall be prohibited for one or more entities **to abuse their dominant position** by engaging in conduct **that would substantially prevent, restrict or lessen competition**:

- Selling goods or services below cost with the object of driving competition out of the relevant market
- Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner
- Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction
- Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially
- Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially:
- Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied
- Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers
- Limiting production, markets or technical development to the prejudice of consumers

# Market Dominant Position

## Considerations –

- The share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market;
- The existence of barriers to entry and the elements which could foreseeably alter both said barriers and the supply from competitors;
- The existence and power of its competitors;
- The possibility of access by its competitors or other entities to its sources of inputs;
- The power of its customers to switch to other goods or services;
- Its recent conducts; and
- Other criteria

Rebuttable Presumption – Presumption of market dominant position if the market share of an entity in the relevant market is at least fifty percent (50%), unless a new market share threshold is determined by the Commission for that particular sector.

MS Limits under EPIRA – 30% of installed generating capacity in a grid; 25% of installed generating capacity nationwide

# Competition Commission and the ERC



*Sec. 32. Relationship With Sector Regulators.* – The Commission shall have original and primary jurisdiction in the enforcement and regulation of all competition-related issues.

The Commission shall still have jurisdiction if the issue involves both competition and noncompetition issues, but the concerned sector regulator shall be consulted and afforded reasonable opportunity to submit its own opinion and recommendation on the matter before the Commission makes a decision on any case.

Where appropriate, the Commission and the sector regulators shall work together to issue rules and regulations to promote competition, protect consumers, and prevent abuse of market power by dominant players within their respective sectors.

# Repeal of EPIRA Provisions on ERC Jurisdiction over Competition

Sec. 55. *Repealing Clause.* – The following laws, and all other laws, decrees, executive orders and regulations, or part or parts thereof inconsistent with any provision of this Act, are hereby repealed, amended or otherwise modified accordingly:

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X X X

(c) **Section 43(u)** on Functions of the ERC of Republic Act No. 9136, entitled “An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes”, otherwise known as the “Electric Power Industry Reform Act of 2001”, insofar as the provision thereof is inconsistent with this Act;

# Repeal of EPIRA Provisions

Express repeal of Section 43 (u) - The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of **the abovementioned powers, functions and responsibilities ...**

- Enforce WESM Rules
- Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition
- Act against any participant or player in the energy sector for violations of any law, rule and regulation governing the same, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts (Section 43)

Implied repeal of inconsistent provisions – Section 45 (?)

- Monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior by any participant; and stop and redress the same
- Resort to remedies such as price controls, injunctions, divestment, disgorgement of excess profits, and imposition of fines and penalties (Section 45)

Thank you