A Concert of Institutions: Challenges for Power Sector Governance

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Abstract

This paper discusses significant developments in three areas of power sector governance since the enactment of reform legislation in 2001. Improvements in executive-legislative relations as they affect the sector are noted, allowing more initiative on the part of Executive agencies subject to Congressional oversight as delimited by the Court. Hiccups were observed in the relationship between the Department of Energy and the Energy Regulatory Commission at some points in areas where ERC actions under EPIRA impact on policy, particularly in the implementation of retail competition and open access. While alternative administrative relationships were explored, both agencies have the flexibility to fashion a healthy working relationship on policy-related issues. There are more actions needed to be carried out in the case of governance over the spot market to effect the EPIRA's requirement of an independent market operator. These require joint action on the part of the Secretary of Energy as interim chair of the governing board and of the industry participants in formulating a structure that is independent of both industry participants and government while being responsive to legitimate business interests of industry and to the policy and regulatory supervision of government.

Keywords: power reform, governance, legislative-executive relations, DOE, ERC, JCPC, electricity spot market, regulatory agency, EPIRA, market operator, WESM, IMO

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Introduction

The Electric Power Industry Reform Act of 2001 (EPIRA) optimistically projected that five years after the effectivity of the law, retail competition and open access on distribution wires could be brought down to customers with a threshold level of 750 kW monthly average peak demand. Simultaneously, aggregators would be allowed to supply end users within contiguous areas with a combined demand reaching that same level. Over 15 years later, contestability at the initial 1 MW level approaches mandatory implementation, barring any further postponements.

The following discussion touches on issues of governance in the power sector that have influenced the pace and depth of restructuring and reform during that long period: inter-branch relations between the executive and the legislature, synergy and coordination between policy and regulatory agencies in the executive, and electricity market governance with the private sector. How these issues have evolved can be instructive in laying out the final mile of the reforms and in managing future challenges.

The Legislature and the Executive: Finding Balance in Tension

Policy-making in the power sector is a responsibility shared by the legislative and the executive branches of government. Congress established the basic framework and policies for reforms in the power sector through the EPIRA. In the normal course of events, the Executive was expected to formulate the policy details and implementing rules pursuant to or consistent with legislative policies. But underlying tensions between the two branches of government surfaced during the lawmaking process, and manifested themselves in the final legislated outcome. Reflecting its distrust in the Executive branch, Congress encroached upon the Executive's functions by requiring EPIRA's Implementing Rules and Regulations to be approved by the Joint Congressional Power Commission (JCPC),[1] a committee created with members from both houses. Congressional endorsement through the JCPC of the Privatization Plan for the National Power Corporation (NPC)'s generation assets was also required in the EPIRA prior to approval by the President.[2]

Congressional distrust at that time was directed against the earlier Ramos Presidency and the Department of Energy (DOE) as an institution. They were blamed, particularly after the Asian regional economic crisis, for overbuilding power plants and for incurring a heavy debt burden associated with the take or pay provisions in contracts with independent power producers (IPP) under the Build-Operate-Transfer Law. That lack of confidence was constantly present and resulted in the EPIRA's mandating a review of IPP contracts,[3] the renegotiation of power-related agreements between government-owned entities,[4] and the prohibition of payments for certain IPP contracts.[5]

Upon taking over the presidency in 2001, President Arroyo decided to push for fundamental reforms in the power industry as part of her over-all economic program. An electric power reform bill had been passed by both houses of Congress under President Estrada, but remained in a suspended state in the Bicameral Committee of Congress because Estrada's energy secretary felt the reforms did not go far enough and at the same time reduced the powers of the DOE. A number of these points were also raised in the

common position paper adopted by Arroyo's economic managers on issues where there was disagreement with the Bicameral Committee of Congress. While she supported the stand of her economic managers, she finally decided to leave to Congress the final resolution of those contentious provisions, including: mandating retail competition and open access by a definite date, prohibition of cross-ownership between generation and distribution, no grandfathering of bilateral supply contracts between related parties, stronger Executive control over details within the EPIRA framework (particularly in the privatization process), and better coordination by the Department of Energy over the reform and restructuring of the industry.

In hindsight, Congress appears to have been emboldened by these concessions: Most of the items in the common position of the Executive departments were not adopted, and the JCPC extended the EPIRA requirements further by insisting that it approve any amendment to the IRR and all changes in the Privatization Plan. The JCPC and Congress also blocked the approval of a transferable franchise to the National Transmission Corporation (TRANSCO) prior to the privatization of its operations through a concessionaire. Congress insisted on granting a franchise only after a concessionaire was identified by the Power Sector Assets and Liabilities Management Corp. (PSALM). The possibility that Congress would not grant a franchise to the winning bidder discouraged a number of potential bidders from joining and prevented the attainment of a solid privatization milestone early on. This may also have led to a failure to maximize the value of the concession. Executive-legislative tensions became a recurring consequence, especially in the first five years of EPIRA implementation.

Frequent frustrations with legislative second-guessing made it tempting to challenge Congress for its usurpation of executive functions. A 2003 Supreme Court decision raised hopes for a successful judicial challenge against JCPC interference in the purely executive aspects of power reform.[6] *Macalintal v. Comelec* involved the Overseas Absentee Voting Act of 2003 (RA 9189), which created a Joint Congressional Committee empowered to review, revise, amend and approve the IRR promulgated by the Commission on Elections. The Court found that these functions infringed upon the constitutional independence of the Commission on Elections and had them removed.

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But the disadvantages of taking the judicial route were the uncertainty of the length of time it would take for the courts to decide with finality, and the possibility of a judicial case throwing the reform process off course altogether. In addition, since the *Macalintal* case involved the power of congressional oversight in relation to the powers of the Commission on Elections as a constitutional body, it was also possible that the Court would not extend its ruling to a non-constitutional office. Senator Miriam Defensor-Santiago—the JCPC Co-Chair, Chair of the Senate Committee on Energy, and a constitutional law professor—was of the view that the powers of the JCPC that encroached upon those of the Executive branch were unconstitutional. Still, she advised the Executive to live with them in the meantime.

Subsequent developments have tempered Congressional adventurism into the executive domain, and should provide good guidance to the JCPC and the Congressional committees. In 2008, the Supreme Court had the opportunity to clarify the limits of legislative oversight in the case of *Abakada Guro Party List v. Purisima* involving the Attrition Act of 2005.[7] RA 9335 created the Joint Congressional Oversight Committee, which was to approve the implementing rules and regulations (IRR) formulated by several Departments. The Oversight Committee, after approving the IRR on 22 May 2006, ceased to exist. The Court, while recognizing that "the issue of its alleged encroachment on the executive function of implementing and enforcing the law may be considered moot and academic," saw that "this might be as good a time as any for the Court to confront the issue of the constitutionality of the Joint Congressional Oversight Committee created under RA 9335 (or other similar laws for that matter)."

The Court extensively quoted the opinion of then Justice Renato Puno in the *Macalintal* case, parts of which are as follows:

> Broadly defined, the power of oversight embraces all activities undertaken by Congress to enhance its understanding of and influence over the *implementation* of legislation it has enacted. Clearly, oversight concerns *post-enactment* measures undertaken by Congress: (a) to monitor bureaucratic compliance with program objectives, (b) to determine whether agencies are properly administered, (c) to eliminate executive waste and dishonesty, (d) to prevent executive usurpation of legislative authority, and (d) to assess executive conformity with the congressional perception of public interest.

The Puno view, favorably cited by the court, limited Congressional exercise of oversight powers to only two categories: scrutiny, and investigation.

> Congressional *scrutiny* implies a lesser intensity and continuity of attention to administrative operations. Its primary purpose is to determine economy and efficiency of the operation of government activities. In the exercise of legislative scrutiny, Congress may request information and report from the other branches of government. It can give recommendations or pass resolutions for consideration of the agency involved.
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> While congressional scrutiny is regarded as a passive process of looking at the facts that are readily available, *congressional investigation involves a more intense digging of facts*. The power of Congress to conduct an investigation is recognized by the 1987 Constitution under section 21, Article VI.

The Court rejected the exercise of legislative supervision, the "*most encompassing* form by which Congress exercises its oversight power."

> "Supervision" connotes a continuing and informed awareness on the part of a congressional committee regarding *executive operations* in a given administrative area. While both congressional scrutiny and investigation involve inquiry into *past executive branch actions* in order to influence future executive branch performance, *congressional supervision allows Congress to scrutinize the exercise of*

delegated law-making authority, and permits Congress to retain part of that delegated authority.

According to the Court, Congress may not vest itself, any of its committees or its members with either executive or judicial power. A legislative veto "requiring the President or an administrative agency to present the proposed implementing rules and regulations of a law to Congress which, by itself or through a committee formed by it, retains a 'right' or 'power' to approve or disapprove such regulations before they take effect" entrusts to Congress "a direct role in enforcing, applying or implementing its own laws."

In the Court's view, Congress, in enacting legislation to define national policy, can only choose between: (1) formulating the details in the law itself, or (2) assigning to the executive branch the responsibility for making necessary managerial decisions in conformity with standards prescribed in the law. "In the latter case, the law must be complete in all its essential terms and conditions when it leaves the hands of the legislature … what is left for the executive branch or the concerned administrative agency when it formulates rules and regulations implementing the law is to fill up details (supplementary rule-making) or ascertain facts necessary to bring the law into actual operation (contingent rule-making)."

The Court also pointed out that in exercising discretion to approve or disapprove the IRR based on a determination of whether or not the IRR conformed to the provisions of the statute, Congress would be arrogating judicial power, "a power exclusively vested in this Court by the Constitution."

Despite the foregoing clarifications, however, the Court refrained from declaring wholesale all similar provisions of legislative veto unconstitutional. But the legal points were clear.

Perhaps a more positive example of the use of the oversight power of Congress in aid of legislation was seen in late 2014, when Congress deliberated on a proposed law granting emergency powers to the President to contract new generating capacity to meet a projected power shortfall in mid-2015.[8] The proposal partly involved a post-enactment measure as it would trigger EPIRA's Section 71, the "Electric Power Crisis Provision." The DOE and then President Benigno Aquino III convinced the House of Representatives to pass the proposed measure.[9] By asking searching questions to the Executive branch regarding the factual basis and extent of a power shortage, the feasibility of implementing an interruptible load program, and the availability of an additional supply of electricity from existing sources to fill in the expected gap, the Senate Committee on Energy in particular helped to avoid unnecessary government expenditures for additional generation capacity that would have resulted in stranded contract costs, and would have discouraged private investments by undermining the government's commitment to privatization. The emergency measure failed to pass, and the expected shortfalls were sufficiently managed without it.

Toward Enhanced Synergy in the Executive

The restructuring and reform of the power industry required a cohesive institutional effort that would have called for a stronger lead agency within the Executive with a broad and flexible mandate. EPIRA directed the DOE "to supervise the restructuring of

the electricity industry"[10] as well as to formulate "such rules and regulations as may be necessary to implement the objectives of this Act."[11] But, as discussed above, Congress through the JCPC kept the DOE on a tight leash. The authority to exercise "such other powers as may be necessary or incidental to attain the objectives of this Act"[12] did not add anything in law to the powers expressly given.

The Executive's economic managers would have wanted to vest in the DOE the power to define policy details under the EPIRA including the rules on competition, retail competition and open access, the grid and distribution codes. This would have clearly allocated to the Energy Regulatory Commission (ERC) the core regulatory functions and the enforcement of policy-related issuances. In the context of the new regulatory environment under the EPIRA, the delineation would have allowed the ERC to concentrate its resources on its core functions. Congress chose, however, to include policy matters in the ERC's mandate. The bifurcation of policy responsibilities made coordination between the ERC and DOE even more indispensable. But EPIRA was silent on coordination mechanisms.

The ERC was a new, independent, quasi-judicial regulatory body created under EPIRA, although it was essentially built upon its predecessor, the Energy Regulatory Board (ERB).[13] An indication of the degree to which ERC independence was a concern is the absence of detailed provisions in the IRR promulgated by the Secretary of Energy on the ERC. Within the Executive, the ERC remains under the supervision of the Office of the President, as the ERB was. In theory, coordination among agencies within the executive can be carried out with ease. But without some formal mechanism, much depends on the openness of individual officials to direct coordination, or on their perception of its appropriateness to their agency's mandate. The manner in which an "independent" ERC is perceived, for instance, by its officials and by those dealing with it can create complications for coordination efforts. Certainly, "independence" applies to the fullest in ERC's exercise of its quasi-judicial functions, in investigations of violations, or in the setting of rates. But the formulation of rules affecting the entire power industry, its sub-sectors, or the general public pursuant to the broad policies in EPIRA requires a healthy degree of direct interface with other agencies, particularly in the energy sector.

In the case of the ERC and the DOE, the President as Chief Executive can make policy coordination happen. Indeed, the commencement of the commercial operation of the Wholesale Electricity Spot Market required one such crucial intervention. ERC's status as a regulatory agency supervised by the Office of the President (OP) also allows an Executive Secretary to play that role. But not all important matters require intervention at the highest levels. The familiarity of these officials—or rather their lack of it—with the relevant issues can be a limiting factor in their involvement, or in their willingness to be involved.

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A formal alternative that can be considered is the transfer of the ERC from the administrative supervision of the OP to that of the DOE for the purpose of strengthening policy coordination. The legal status of ERC as an independent body will not be any different

from that which it currently enjoys under the OP, regardless of what department exercises administrative supervision over the ERC.

Under the Administrative Code of 1987, administrative supervision (which governs the administrative relationship between a department and regulatory agencies) is limited to the authority of the department "to generally oversee the operations of such agencies and to insure that they are managed effectively, efficiently and economically but without interference with day-to-day activities."

Significantly, the supervising department's authority does not include the power "to review, reverse, revise, or modify" the decisions of regulatory agencies in the exercise of their regulatory or quasi-judicial functions. Also excluded are appointments and other personnel actions and contracts entered into by regulatory agencies in the pursuit of their objectives.

However, better policy coordination can be attained between the DOE and ERC, since the supervising department reviews and approves budget proposals of regulatory agencies and their work plans, which are the basis of their day-to-day operations. The supervising department can "require the submission of reports and cause the conduct of management audit, performance evaluation and inspection to determine compliance with policies, standards and guidelines of the department."

From the perspective of the ERC, it may lose some of the advantages that go with supervision by the OP. One would be the deference that Congress often accords to agencies under the Office of the President during budget deliberations. Another would be the likelihood that political controversies that often involve electric cooperatives, rural electrification or the share of local governments hosting power plants that are under the DOE will drag the ERC into unwelcome territory. A third would be the reality that agencies under the Office of the President are relatively more autonomous than their counterparts under other departments, since the supervising officials in the Office of the President are too busy attending to the priorities of the President.

Regardless of who exercises administrative supervision over the ERC, investor perception of its regulatory independence is vital. Regulatory agencies can just be as vulnerable, if not more, to populist pressure from the OP as they would be from a Department Secretary. But one can also cite regulatory agencies such as those under the administrative supervision of the Department of Transportation and the Department of Public Works which have faced no serious questions about their independence.

At one time or another after the passage of EPIRA, mechanisms were informally established for coordination between the DOE and the ERC. One was the informal participation of the ERC Chair in policy discussions of the DOE Management Committee that had some impact on ERC responsibilities, or that required corresponding ERC action at the policy level. Another was the conduct of informal policy dialogues between the Energy Secretary as the President's alter ego on energy matters and the ERC Commissioners. Coordination at this level can produce positive results, as they minimize surprises on either side, and facilitate work at the staff level.

These informal arrangements were, however, subject to idiosyncratic preferences, and were susceptible to breakdowns every now and then with changes in office personalities.

Retail competition and open access (RCOA) constitute an area of policy under EPIRA in which the mandates and responsibilities of the ERC and DOE converge, requiring a high degree of coordination. As earlier mentioned, this was among the crucial issues in which there was disagreement between Congress and the Executive. The latter favored a date certain at the earliest possible time to introduce competition, as it was aware that government had no control over private sector decisions on acquisition of NPC assets. Congress, on the other hand, was cognizant of private sector concerns that government could suppress power rates artificially for populist reasons, and run private generators to the ground for as long as a sizable portion of NPC generation assets and contracts remained un-privatized. Congress made RCOA commencement dependent on compliance with five preconditions, the two most difficult being the privatization of at least 70 percent of the NPC's generation assets and those of its IPP contracts. Uncertainty was thus made certain, even though the Executive focused on privatization efforts and the ERC took preparatory steps for RCOA as early as 2006.

All of the conditions were only met shortly before the Arroyo administration ended in June 2010. But the overextended waiting period appears to have set back preparations on all sides for RCOA, and slowed down its full implementation up to the time of this writing. The slow march toward mandatory open access has not been characterized by consistently smooth coordination between the DOE and ERC.

Under the EPIRA IRR, ERC was tasked to declare open access after notice and hearing,[14] which were initiated on February 8, 2011. On June 6, 2011, the ERC made a formal declaration and designated December 26, 2011 as the Open Access Date to mark the commencement of the full operations of the competitive retail electricity market in Luzon and the Visayas.[15] But this turned to be a false start.

In June 2011, the DOE created a Steering Committee to review and recommend policies relating to RCOA's commencement.[16] The ERC, conscious of its independence,[17] declined the invitation to act as Co-Chair of the Committee, but expressed full cooperation by confirming participation in the Committee's meetings as a resource agency. By the following month, the ERC suspended the meetings of its Technical Working Group (which was earlier established to resolve issues on accounting, billing and settlement with the opening of the retail market[18]), noting that the same issues would be discussed by the DOE's Steering Committee and would be a duplication of the use of resources.

After issuing a "Circular Prescribing the General Policies for the Implementation of Retail Competition and Open Access" in May 2012,[19] the DOE conducted public consultations and discussions jointly with the ERC. Both agencies agreed on amendments and additional policies and guidelines, which were incorporated in a DOE Circular issued in November 2012.[20] The Circular clarified the responsibilities of the various energy agencies and stakeholders in the implementation of RCOA. It reiterated ERC's mandate under EPIRA, including the declaration of open access date, prescribing qualifications and approving applications for supply of electricity to the contestable market and issuance of relevant licenses, identification of qualified contestable customers, and related matters.[21]

By December 17, 2012, the ERC adopted a resolution setting a new Open Access Date and adopting a set of transitory rules for RCOA.[22] This second declaration pushed back to June 26, 2013 the initial commercial operation for customers with a monthly average peak demand of at least 1 megawatt. Even then, open access was applied on a voluntary basis, at the choice of the contestable customer.

The delays in RCOA implementation had in the meantime encouraged generators to contract with distribution utilities instead of reserving for the contestable market, and, on the other end, lulled contestable customers into complacency by relying on their existing distribution utilities (DU). With a new date for RCOA and an apparent seriousness to implement expressed by both the DOE and ERC, contestable customers were forced to look for retail supply contracts. In this environment, contestable customers raised concerns over "the alleged non-responsiveness of most, if not all, licensed Suppliers and Local Suppliers" who had previously "allocated their capacities and energy volumes to either their affiliate companies or other target customers."[23]

The DOE and the ERC appear to have synchronized their efforts to address the perception that RCOA was a "suppliers' market" characterized by a preference for larger loads with higher load factors, offers higher than existing rates, and contracts of unduly long duration with stringent pre-termination provisions. An ERC resolution in March 2013 required disclosures of capacity and energy allocations by DUs and retail electricity suppliers,[24] which was followed in May 2013 by a DOE circular imposing a reporting and monitoring system.[25] In July 2013, supplemental policies were issued by the DOE,[26] which clarified that contestable customers could source their supply through the WESM or could contract with "prospective generation companies" subject to certain conditions. A contestable customer who had no choice "due to the absence of acceptable offers" could continue to contract with its DU.

The increasingly smoother coordination between the DOE and ERC was upset when in June 2015, the DOE issued a circular unilaterally prescribing timelines for RCOA implementation.[27] While the purpose may have been to accelerate the introduction of competition in the retail market, the circular did not have the full benefit of inter-agency consultations, and blurred the boundaries of jurisdiction between the ERC and DOE. A new DOE Secretary amended the circular in April 2016, citing challenges in adhering to the timelines, including operational limitations such as metering requirements and the need to educate the new contestable customers.[28] The ERC, in turn, subsequently amended these timelines, and "mandatory contestability" for 1 MW and above customers has been pushed back to February 26, 2017.[29]

> The entire incident exposed a gap between the DOE and the regulator, and a lack of consistency in government policies.

This was not the only instance in 2015 when the absence of close coordination between the DOE and ERC caused considerable confusion. The DOE, also in June, issued a circular requiring a competitive selection process for the procurement of the power supply of distribution utilities.[30] The process required a mandatory aggregation of the supply needs of all DUs for their captive market, and mandated a Third Party to conduct the procurement. Eventually, the ERC, after extensive consultations, issued its own Competitive Supply

Process resolution, which did not contain the detailed requirements contained in the DOE circular.[31] The entire incident exposed a gap between the DOE and the regulator, and a lack of consistency in government policies.

The two instances mentioned above are also noteworthy in reflecting a change in the attitude of the DOE in relation to the oversight powers of Congress and the JCPC. With the Supreme Court's decisions against legislative vetoes as context, the DOE asserted itself in the area of policy through the exercise of its rule-making power for the electricity industry sector without having to defer to Congress or the JCPC at every instance. The shift parallels a perceptible turn in the dynamics between the Presidency and Congress—starting with the Aquino III Presidency—toward restoring some balance in the relationship between the two political branches of government with a stronger assertion by agencies in the Executive of their authority.

The exercise of DOE's rule-making powers, however, could have been better carried out in consultation and coordination with other agencies like the ERC and with the various stakeholders in the industry. Where there are no appropriate existing formal coordination mechanisms, it may be necessary to invent them as needed. An example is the WESM (wholesale electricity spot market) Tripartite Committee formed in June 2006 by the DOE and ERC together with the Philippine Electricity Market Corp. (PEMC) to serve as an "interim body for coordination of efforts, monitoring of price volatilities and setting of market mitigation or pre-emptive measures to be implemented" in the WESM. The Tripartite Committee agreed "to set and establish the initial levels of price or formula at or by which market prices shall be capped as a preliminary mitigating measure to be applied during the early operational stages of WESM."[32] In 2013, the Tripartite Committee again convened and recommended a reduction in the offer price cap. The downside of an ad hoc arrangement is that the absence of regularity in its meetings can allow matters to fall between the cracks, as they did during the long interregnum between the 2006 and 2013 meetings. The lack of an identified responsible agency may have been addressed with the ERC taking responsibility for mitigating measures in the market through the issuance of a secondary price cap.[33] The wisdom of imposing a secondary cap is, of course, an entirely separate issue.

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The Electricity Market: Private Governance and Public Regulation

Among the institutions required to be organized almost from scratch in the restructured power industry was the wholesale electricity spot market (WESM).[34] EPIRA recognized the need for a mechanism for trading electricity, including "identifying and setting the price of actual variations from the quantities transacted under contracts between sellers and purchasers of electricity."[35] Specified as a pre-condition for retail competition and open access,[36] the WESM was not created by operation of law under EPIRA. Instead, it directed

that the DOE "shall establish" a WESM "composed of the wholesale electricity spot market participants"[37] referring to "all Generation Companies, Distribution Utilities, Suppliers, Aggregators, End-users, the TRANSCO or its Buyer or Concessionaire, IPP Administrators, and other entities authorized by the ERC to participate in the WESM in accordance with the Act."[38]

Since the restructured industry market was in a nascent stage with state-owned generation and transmission assets still to be privatized, the DOE was tasked to provide leadership in facilitating the organization and initial operations of the WESM. But the primary role of the industry participants as the restructuring proceeded was emphasized even in the preparatory stage for the WESM.[39] Along these lines, EPIRA provided that: "Jointly with the electric power industry participants, the DOE shall formulate detailed rules" for the WESM. The joint responsibility was also extended, under the IRR, to the promulgation of the WESM Rules and in undertaking actions not limited to: organizing and establishing the market design and governance structure; constituting the autonomous group market operator (AGMO), which shall undertake the preparatory work and initial operation of the WESM; and overseeing the development of the WESM organization and necessary supporting infrastructure, including the funding requirements.[40]

EPIRA envisioned the WESM to be established within one year of the law's effectivity. The DOE commenced preparations with the National Power Corp. for the establishment of the WESM in 2001, but the WESM rules were promulgated only in June 2002, after the EPIRA IRR were issued with the approval of the JCPC in February 2002. The Philippine Electricity Market Corp. was registered by the Secretary of Energy and several individuals identified with industry participants in November 2003 as a non-stock, non-profit corporation with the Securities and Exchange Commission under the Corporation Code. The PEMC's primary purpose is to "manage, govern, and administer an efficient, competitive, transparent and reliable market for the wholesale and purchase of electricity and ancillary services in the Philippines."[41]

Two distinct phases of the WESM are apparent in EPIRA and its IRR: First, the preparatory work and 12-month initial operations to be undertaken by the AGMO, and second, regular operations under an Independent Market Operator, or IMO.

In August 2004, the PEMC was designated to serve as the AGMO, and it subsequently absorbed the NPC/TRANSCO market operation personnel. TRANSCO extended a loan to PEMC for its operations until such time that the ERC approved the WESM market fees, from which TRANSCO was to be repaid for its advances. WESM commenced its commercial operations on June 26, 2006, and the end of the transition phase under AGMO should have been a year later. More than 10 years later, the shift to an IMO has yet to take place.

Part of the difficulty in moving toward the IMO phase arises from the requirement in the EPIRA IRR that "no Generation Company, IPP Administrators, Distribution Utility or Supplier, their respective subsidiaries, affiliates, stockholder, directors or officers or other entity engaged in generating and supplying electricity specified by ERC, shall hold any interest, directly or indirectly, in the Market Operator."[42] Yet the same IRR created the AGMO governing body "with equitable representation from Electric Power Industry

Participants" and the WESM Rules specify that in the IMO phase, "Each sector of the electric power industry shall be represented in the PEM Board."[43]

The governance structure for the WESM in the IMO and AGMO phases are largely the same: The PEM Board oversees and monitors the activities of the Market Operator and the System Operator, as well as those of WESM members, to ensure compliance with WESM rules, and it performs related governance functions;[44] the AGMO Board has the same responsibilities.[45] The composition of the current Board of AGMO and of the prospective IMO is the same,[46] with the same criteria for the selection of directors. The only difference is that the AGMO Board is chaired by the DOE Secretary.[47] Thus, the cross-ownership issue will persist even after the shift from AGMO to IMO.

Alternatives have been raised to address the IRR requirement. Principal among them is to provide for a board with members entirely independent of industry participants, but with a Market Committee composed of industry participants to recommend rules changes to the board.[48] Another is for industry participants to nominate independent individuals to represent their sector in the Board. Any of these proposals would require a change in the current WESM Rules and would have to be endorsed jointly by the DOE and industry participants.

Corollary to independence from industry participants is freedom from government diktat on WESM business decisions. The PEM Board structure achieves this by limiting the Secretary of Energy's role as AGMO chair to a transitory period of definite duration. In the IMO phase, the WESM Rules provide that the Board is to be led by a "Chairperson who is one of the four independent Directors of the PEM Board and who is elected by a majority of all members of the PEM Board."[49]

In the Supreme Court hearings on the Meralco price spike case in 2013, the Secretary of Energy gave assurances to the Court on fast-tracking the implementation of the EPIRA provisions on the IMO, cognizant that the DOE will no longer chair the PEM Board.[50] But these basic elements of power reform appear lost on other government agencies. In 2016, after it "took the liberty of evaluating the PEMC,"[51] the Governance Commission for Government-Owned and Controlled Corporations (GOCC) or GCG, concluded that the PEMC is a GOCC.[52] If sustained, this view would reverse the reform directions under EPIRA, turn the governance structure of the WESM into a government one,[53] and alter the objective to impose market discipline among industry participants.

The GCG failed to appreciate that the history and creation of the WESM and its governing board have to be understood in the context of the restructuring and privatization processes that were required by EPIRA. Rather than looking at the designed outcomes of the law, the GCG focused on the status quo ante. It did not see that the privatization of a vertically integrated state-owned power sector would require the state itself to take the initiative and shepherd the change process to a private-led electricity market. Thus, the DOE was tasked "jointly with Electric Power Industry Participants" to undertake actions including to "oversee the development of the WESM organization and necessary supporting infrastructure, including the funding requirements."[54]

The GCG mistook the DOE's leadership role in the establishment of the WESM for an act of the legislature establishing a GOCC. Nowhere in EPIRA is the PEMC (the governing

board of the WESM) nor the WESM itself created as a GOCC. In contrast, TRANSCO and PSALM are explicitly created by EPIRA as GOCCs, while the ERC is established by law as an independent quasi-judicial body. A GOCC is not created by legal implication but by express provision of law. A GOCC is not established "jointly with Electric Power Industry Participants" who include private entities and individuals. Neither does EPIRA provide that the WESM be incorporated as a power sector GOCC under the Corporation Code. Nor is the DOE a corporate entity that can establish a corporate subsidiary with the SEC. Unlike other GOCCs originally established through registration with the SEC, the PEMC is not a sequestered or foreclosed corporation that came under government control. Neither is it a corporate subsidiary of any of the power sector GOCCs. The action of the DOE Secretary in joining industry participants as an initial incorporator of the PEMC under the Corporation Code was made pursuant to the Department's responsibility in the establishment of the WESM and emphasizes, as a contemporaneous interpretation of EPIRA, that the market is private.[55] Since the PEMC's designation as AGMO, it has been consistently recognized by government as a private corporation, and was never classified as a GOCC until the GCG laid claim to it as one.

In examining whether the PEMC performs governmental functions, the GCG could have, with more diligence, looked into the functions of the Philippine Stock Exchange, a private market entity, that has been given specific responsibilities by the Securities Exchange Commission which is the government regulator. Or the GCG could have referred to working examples in other jurisdictions of private entities performing similar functions as the PEMC and whose market fees on a cost-recovery basis are approved by the regulator pursuant to law.[56]

Consistent with the EPIRA framework, a private corporate form was chosen for the WESM to afford it the efficiencies of a privately-run market, as in other jurisdictions that have also undertaken market-oriented power reforms. As a private entity, the PEMC can better attract and maintain professional staff through recruitment based on merit accompanied by compensation levels competitive with the rest of private industry. A private entity can also enjoy sufficient flexibility in its operations to address rapid technological advances unhampered by government rules such as those on appropriations and procurement, as well as avoid the political pressures that undermine market-based decisions.[57]

The GCG argues that the chairmanship of the Secretary indicates that the PEMC is a GOCC since, if it is not, those Secretaries who served as PEMC Chair would be exposed to cases involving the Anti-Graft and Corrupt Practices Act. But this only indicates that the interim arrangement should be speedily ended and the shift to the IMO effected.[58]

The migration to an IMO will require changes to the WESM Rules and would need the full support of the DOE as AGMO Chair. But the IMO and the PEM Board would continue to be subject to government regulation. EPIRA specifies ERC regulatory action over the WESM in a number of areas: approval of the price methodology, market fees, and eligibility for WESM membership; enforcement of the rules

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and regulations governing the operations of the spot market; and monitoring of industry participants, including their actions in the spot market in relation to competition rules.

Beyond the transition phase, the WESM and its governing board are subject to DOE jurisdiction in effecting changes to the WESM rules. Unless revised, the Secretary also appoints the members of the PEM Board. But, most importantly, the WESM and the industry participants are subject to the judicious exercise of the DOE's power to issue rules and regulations pursuant to EPIRA and its power to implement government policies in the electricity sector.

Concluding Remarks

This brief review of selected governance issues over the life of the EPIRA shows aspects of the interaction between checks and balances, on the one hand, and synergy on the other. On the legislative-executive front, there have been positive developments away from the dominant—and at times domineering—role of the Congress and the Joint Congressional Power Commission. There is room for more Executive policy initiatives within the EPIRA framework subject to the reasonable exercise of legislative oversight, as carefully defined by the courts.

Within the Executive, the blurring of policy and regulatory responsibilities over some matters under EPIRA makes coordination a continuing challenge. The working relationship between the DOE and ERC has had its highs and lows, and more needs to be done on both sides to make coordination sustainable.

While new challenges arise, the governance structures in place could adjust or be adjusted within EPIRA's framework to meet those challenges.

Finally, under EPIRA, governance of the electricity market involves industry participants and the government while insuring its independence from both with the transformation of the existing market operator into the Independent Market Operator. The final form of the IMO would require changes to the WESM rules and the full support of the DOE as AGMO chair, with a governance structure that takes into account the legitimate business interests of the industry participants. The DOE and ERC would retain their policymaking and regulatory powers over the market. Once the DOE no longer chairs the Philippine Electricity Market Board, it can better exercise its oversight and rule-making responsibilities, unhampered by the day-to-day concerns of the market and unconstrained by its participation in market decisions.

Over the last 16 years, the adherence of the different actors in the power sector to the fundamental directions and policies of the reform and restructuring program is, in a way, remarkable. Across several administrations, there have been no major departures from EPIRA. But we still need to get to the finish line of the reforms. While new challenges arise, the governance structures in place could adjust or be adjusted within EPIRA's framework to meet those challenges.

Notes

1. EPIRA, Section 77. Unless otherwise indicated, references to sections denote sections in EPIRA.
2. Sec. 47.
3. Sec. 68.
4. Sec. 69.
5. Sec. 32 excluded IPP contracts approved after December 31, 2000.
6. *Macalintal v. Comelec*, G.R. 157013, was decided by the Supreme Court on July 10, 2003.
7. Supreme Court, G.R. 166715, August 14, 2008. The law involved was Rep. Act 9335.
8. "Osmeña: Aquino misled on emergency powers", by Angela Casauay, 14 December 2014, *Rappler*. http://www.rappler.com/nation/77801-osmena-energy-aquino-misled-emergency-powers, accessed January 31, 2017.
9. "House OKs emergency powers for PNoy," December 11, 2014, *ABS-CBN News*. http://news.abs-cbn.com/nation/12/10/14/house-oks-emergency-powers-pnoy, accessed 31 January 2017.
10. Sec. 37.
11. Sec. 37(p).
12. Sec. 37(q).
13. Sec. 38. See Sec. 44 on the transfer of the powers and functions of the ERB to the ERC, and Sec. 38 paragraph 7 on the preference given to qualified ERB personnel in filling up ERC positions.
14. EPIRA IRR, Rule 12 sec. 3.
15. ERC Res. No. 10, series of 2011.
16. DOE Circular DC 2011-06-0006 dated June 27, 2011.
17. See fifth preambular paragraph of ERC Resolution 12, series of 2011.
18. ERC Resolution 19, series of 2011.
19. DOE Circular DC 2012-05-0005 dated May 9, 2012.
20. DOE Circular DC 2012-11-0010 dated November 28, 2012.
21. Id., section 5.
22. ERC Resolution 16, series of 2012.
23. ERC Resolution No. 5, series of 2013 dated March 22, 2013, "A Resolution on Disclosures of Capacity and Energy Allocations by Distribution Utilities in the Luzon and Visayas Grids and Retail Electricity Suppliers".
24. ERC Resolution No. 5, series of 2013 dated March 22, 2013.
25. DOE Department Circular 2013-05-0006 issued May 6, 2013, "Enjoining all generation companies, distribution utilities, supplier and local suppliers to ensure an effective and successful transaction towards the implementation of the RCOA."
26. DOE Department Circular 2013-07-0013 issued July 2, 2013, "Providing Supplemental Policies to Empower the Contestable Customer Under the Regime of Retail Competition and Open Access and Ensure Greater Competition in the Generation and Supply Sectors of the Philippine Electric Power Industry."

27. DOE Department Circular DC2015-06-0010 dated June 19, 2015, "Providing Policies to Facilitate the Full Implementation of Retail Competition and Open Access in the Philippine Electric Power Industry."
28. DOE Department Circular DC 2016-04-0004 issued April 21, 2016, "Providing Timelines for Compliance with the Full Implementation of Retail Competition and Open Access in the Philippine Electric Power Industry."
29. ERC Resolution No. 10, Series of 2016 dated May 12, 2016, "A Resolution Adopting the Revised Rules for Contestability". Amended further by ERC Resolution No. 28, Series of 2016 dated November 15, 2016, "Revised Timeframe for Mandatory Contestability, Amending Resolution No. 10, Series of 2016 Entitled Revised Rules for Contestability." As this paper went to press, the Supreme Court on 21 February 2017 issued an indefinite temporary restraining order on the mandatory implementation of RCOA.
30. DOE Circular No. DC 2015-06-0008 "Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)." As this paper went to press, the Supreme Court on February 21, 2017 issued an indefinite temporary restraining order on the mandatory implementation of RCOA.
31. ERC Res. No. 13, series of 2015, "A Resolution Directing All Distribution Utilities to Conduct a Competitive Selection Process in the Procurement of Their Supply to the Captive Market," dated October 20, 2015.
32. See "Study of Mitigating Measures for the Philippine Electricity Market Corp.," submitted by PEMC at the request of ERC under Resolutions Nos. 8 & 13, series of 2014. No date. Accessed January 30, 2017, http://www.erc.gov.ph/Files/Render/media/PEMCStudyontheInterimMitigatingMeasureintheWESM_FINAL.pdf
33. ERC issued Resolution No. 8, Series of 2014, imposing a secondary price cap limiting the resulting market price.
34. For a description of the WESM in the Philippines, see Maria Joy Abrenica, "Detecting and Measuring Market Power in the Philippine Wholesale Electricity Spot Market," *The Philippine Review of Economics* (46)2, p. 8 (2009).
35. Sec. 30, 1st paragraph.
36. Sec. 31(a).
37. Sec. 30, 1st paragraph.
38. EPIRA IRR, Rule 4 (uuuu).
39. Sec. 30, 2nd paragraph.
40. EPIRA IRR, Rule 9, section 3.
41. Articles of Incorporation of the Philippine Electricity Market Corp.
42. EPIRA IRR, Rule 11, sec. 3.
43. WESM Rules 1.4.2.1.
44. WESM Rules 1.4.5.2.
45. WESM Rules 10.2.3.
46. WESM Rules 1.4.2.
47. EPIRA IRR Rule 9, sec. 7(a).
48. See ADB Project Report "Support for the Establishment of an Independent Market Operator, Philippines," 2012. Highlights presented at the Philippine Electricity Summit, 2015.

49. WESM Rules 1.4.2.4(g).
50. Supreme Court, February 11, 2014, Transcript of Stenographic Notes, pp. 168-170.
51. Letter of the Governance Commission on GOCCs addressed to PEMC Chairman Petilla and President Ocampo dated November 4, 2013.
52. This writer has refrained from characterizing the GCG analysis as a self-serving one under the law creating it, which requires that all appointive directors of GOCCs "shall be appointed by the President of the Philippines from a shortlist prepared by the GCG" (See Rep. Act 10149).
53. Members of the PEMC Board from the private sector would be treated as public officers, and all rules and regulations applicable to GOCCs would be mandatory on the PEMC.
54. EPIRA IRR, Rule 9, sec. 3(c).
55. The membership of GOCCs in the power sector (such as PSALM and NPC) in the PEM Board is by virtue of their being industry participants—for as long as there are state-owned generation assets that are not privatized. The participation of the National Electrification Administration and the TRANSCO in PEM Board meetings as observers facilitates coordination on issues and does not indicate government control.
56. EPIRA, sec. 30.
57. The Secretary's decisions as a political official have at times prevented the PEMC from cutting electricity off from delinquent industry participants, and thus created financial exposures for the PEMC and generators.
58. Note that even if the PEMC is a GOCC, the Secretary of Energy cannot serve as its Board Chair, as there is no law designating him as such in an ex officio capacity.