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LATIN AMERICAN COMPETITION FORUM

**Session II - Electricity Markets in Latin America: Regional Integration
and Competition Issues**

-- Contribution from Brazil --

16-17 September 2014, Montevideo, Uruguay

The attached document from Brazil is circulated to the Latin American Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 16-17 September 2014 in Uruguay.

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Session II - Electricity Markets in Latin America: Regional Integration and Competition Issues

-- CONTRIBUTION FROM BRAZIL --

1. The electricity sector in Brazil has undergone two great moments, which, throughout the latest years, have impacted both its institutional framework and its competition environment.
2. The first occurred in the 1990s decade, after more than 50 (fifty) years of state control. At this time, following a movement of denationalization and privatization in the country, a recasting process of the electricity sector began. Until then, the sector's acting companies were completely controlled by the State (federal and state governments), and presented vertical characteristics, with control not only in the power generation, but also in its transmission and distribution. The electric energy provision was considered an indivisible service that could not accept a competitive environment due to issues related to technical and economic impossibilities.
3. At that point, besides the denationalization process, the beginning of the energy sector recasting involved the split of the main companies into smaller ones individually responsible for the generation, transmission and distribution of energy.
4. The sector was also reinforced by the creation of a regulatory agency¹, the National Electrical Energy Agency (ANEEL), responsible for the regulation and supervision of the functioning of the market's agents. The National System Operator (ONS) became responsible for coordinating the functioning of the power plants and transmission networks of the National Interconnected System (SIN), and a Wholesale Energy Market (MAE – revoked subsequently)² was also created, directly related to the constitution of a “free market” to purchase of energy.

¹ Law no. 9.427/1996.

² Law no. 9.648/1998.

5. Therefore, this first moment showed a gradual reduction of the state intervention and the promotion of the entrance of new private agents in the sector. The activities regarding the transmission and distribution continued to be entirely regulated. However, the reduction of vertical features allowed, for example, the production of generation plants to be commercialized in the “free market”, in which both parties, seller and buyer, could establish between themselves the purchase conditions.

6. This movement did not remain unnoticed by the antitrust authorities. In early 2000, the Administrative Council for Economic Defense – CADE, issued an opinion on the subject with the following statement:

(...) In the 1990s, the restructuring of the electric energy sector began and allowed the entrance of private investors in this sector. Among the objectives of this reorganization there was the reduction of the risk of deficits; the increase of competition and assurance of the system's efficiency; the assurance of the improvement in the quality of services with fairer prices to the consumer; and the implementation of an energy generation matrix more diverse. For this purpose, competition regulation in this sector became of utmost importance. (Merger file no. 08012.005832/2001-84).

7. The second movement that significantly changed the regulatory and competition environment in the sector began in 2004, after the introduction of the “New Institutional Model for the Electric Power Sector”. The main objectives of the model were to assure a reliable supply of energy, to stimulate lower rates, and to promote the social insertion through programs of universalization (for example, the program “Light for all”)³.

8. At this point, the sector was divided into energy generation, transmission, distribution and trading. Besides the competition for energy generation, the commercialization environment revealed new challenges, especially in face of the possibility of trading in several sources. Along the dealer responsible for the generation of energy were the independent producer, whose goal was to trade and the self producer, who aimed at producing for its own consumption.

9. Furthermore, the “MAE”⁴ was revoked and the system of electric energy trading began to operate (i) through an environment of free contracting (bilateral contracts), and (ii) through an environment of regulated contracting (energy purchase by a public procurement).

10. Currently, there is still a wide participation of state owned companies in the sector, but there is also the presence of private agents. Along the last years, there was also an effective movement towards the opening of determined market segments to the participation of private companies, and, especially, an important movement of introduction and promotion of competition in the electricity market as a whole, what brought relevance and highlighted CADE's activities.

11. It is important to highlight that, in Brazil, the Antitrust Law does not grant any kind of exemption or immunity to state owned companies. This was foreseen by Law no. 8.884/1994 and remains in the new Competition Law⁵, as it can be seen in its Article no. 31: “This Law applies to individuals or legal entities of public or private law, as well as to any associations of entities or individuals, whether de facto or de jure, even temporarily, incorporated or unincorporated, even if engaged in business under the legal monopoly system”.

³ Programa Luz para Todos. Law no. 10.848/2004.

⁴ The MAE was replaced for the Chamber of Commercialization of Electric Energy (CCEE).

⁵ Law no. 12.529/2011.

12. In addition, CADE has analyzed several mergers in the sector and operates under a perspective of preventive measures. Thus, in its decisions, the Council has distinguished the relevant market under the approach of the product generation, transmission, distribution, and commercialization.

13. However, until the present moment, there is not consolidated antitrust case law regarding the definition of relevant market in the energy generation market. In some cases, CADE has chosen to segment the market under the perspective of the products by energetic matrix, especially in face of the asymmetry regarding the costs of its sources (hydroelectric, thermoelectric, wind energy, among others). In other cases, the Council has chosen to segment the market according to the geographical prism, considering its subsystems or the National Interconnected System (SIN)⁶.

14. In general, the matter of an accurate definition of the relevant market has been left unclear, since, in most cases, no risks to competition in the sector were identified in any of the possible scenarios analyzed: one broader scenario with no segmentation by subsystem or by energy matrix, or a more conservative scenario with geographic market segmentation according to its subsystems.

15. From a repressive point of view, CADE has also acted and currently has at least two administrative proceedings under investigation to verify practices in the sector. Furthermore, in 2007, CADE signed a Cease and Desist Agreement (TCC for its acronym in Portuguese) with *Construtora Norberto Odebrecht S/A*, which directly and relevantly impacted the national electric energy sector. In the TCC signed with CADE, the company waived certain rights of exclusivity requirement that may affect auctions for the concession of hydroelectric plants that may be carried out by the federal government.

16. At last, it is important to stress that competition defense in this sector is also supported by an important interface derived from the regulatory agency's performance. Both CADE and ANEEL have the competence to operate in the sector: CADE's competences regarding the competition analysis are determined by Law no. 12.529/2011, and ANEEL is responsible for the regulatory analysis according to the Resolution no. 484/2012. At present, there is a cooperation agenda among the authorities, which operate independently, to face the challenges to the consolidation of the benefits derived from the existence of a competition environment in this sector.

⁶ See Merger files no. 08012.012945/2007-21, no. 08012.000109/2008-85, no. 08012.000682/2010-11, among others.