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# ENERGY REGULATORY COMMISSION

## COMPETITION RULES

# Competition Rules

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# Competition Rules

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## Rule 1 - Preamble

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Section 45 of the Electric Power Industry Reform Act (the **EPIRA**) provides that no participant in the electricity industry or any other person may engage in any anti-competitive behaviour including, but not limited to, cross-subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.

For this purpose, the EPIRA and the Implementing Rules and Regulations issued pursuant to the EPIRA (the **IRR**) require the Energy Regulatory Commission (the **ERC**) to promulgate rules that prohibit, and that specify appropriate penalties and remedies for, among other things, anti-competitive behaviour and abuse of market power.

These Competition Rules are made pursuant to Section 45 of the EPIRA and Rule 11, Section 8 of the IRR.

## Rule 2 - Object of Competition Rules

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The object of these Competition Rules is to ensure and promote competition, to encourage market development and customer choice, and to discourage or penalize anti-competitive or discriminatory behaviour and the abuse of market power, in order to further the intent of the EPIRA and to protect the public interest.

In addition to making these Competition Rules, the ERC has also made a Competition Guideline, the purpose of which is to provide non-binding guidance to participants in the electric power industry, their advisers and the public as to the approach that the ERC will generally adopt in administering and enforcing these Competition Rules. While these Competition Rules should be read in conjunction with the Competition Guideline, the Competition Guideline is merely intended to be explanatory of these Competition Rules and the concepts contained in them, and is not a substitute for these Competition Rules. These Competition Rules will prevail to the extent there is any inconsistency between the Competition Guideline and these Competition Rules.

## Rule 3 - Definitions

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**Section 1. Definitions of terms.** In these Competition Rules, unless the contrary intention appears:

“**Acquire**” includes:

- (a) in relation to goods – acquire by way of succession, purchase, barter or exchange, donation or taking on lease, lease with an option to purchase and the like;
- (b) in relation to services – accept or avail of; and
- (c) in relation to goods and services – acquire property in, or rights in relation to, goods or services;

“**Affiliate**”, in relation to a person (the **subject person**), means any person who, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the subject person and “**affiliates**” include:

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(a) a subsidiary company and a parent company; and

(b) subsidiaries, directly or indirectly, of a common parent;

“**Agreement**” includes an agreement that is (in whole or in part) written or oral, regardless of its effectivity or enforceability;

“**Arrive at**”, in relation to an understanding, includes reach or enter into;

“**Assets**” includes immovables and movables, whether tangible or intangible<sup>1</sup>;

“**Authorization**” means an authorization to engage in conduct as referred to in Rule 8, Section 11 or in Rule 9, Section 12 (as the case may be);

“**Business Separation Guideline**” means the guideline of that name made by the ERC pursuant to Rule 10, Section 1 of the IRR;

“**Clearance**” means a determination referred to in Rule 8, Section 1 or in Rule 9, Section 1 (as the case may be);

“**Complaint Procedure Rules**” means the rules of that name made by the ERC pursuant to Section 45 of the EPIRA and Rule 11, Section 7(e) of the IRR;

“**Control**” means the power to direct or cause the direction of the management policies of a person by contract, agency or otherwise;

“**Distribution Code**” means the Distribution Code promulgated by the ERC under Section 43(b) of the EPIRA;

“**Document**” includes:

(a) any material on which there is writing or printing;

(b) any information recorded or stored by means of any tape recorder, computer or other device, and any material subsequently derived from information so recorded or stored;

(c) any book, map, plan, graph or drawing; and

(d) any photograph, film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced;

“**Distribution utility**” has the meaning given in the EPIRA;

“**ERC**” means the Energy Regulatory Commission created by Section 38 of the EPIRA;

“**EPIRA**” refers to Republic Act No.9136, otherwise known as the Electric Power Industry Reform Act;

“**Give effect to**”, in relation to a provision of an agreement, arrangement or understanding, includes:

(a) do an act or thing in pursuance of or in accordance with that provision; or

(b) enforce or purport to enforce that provision;

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<sup>1</sup> Intangible assets include assets such as intellectual property rights and goodwill.

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“**Grid Code**” means the Grid Code promulgated by the ERC under Section 43(b) of the EPIRA;

“**Intellectual Property Code**” refers to Republic Act No. 8293, otherwise known as the Intellectual Property Code of the Philippines, as amended;

“**IRR**” refers to the Implementing Rules and Regulations issued pursuant to the EPIRA;

“**Made public**”, in relation to an acquisition, merger or consolidation for the purposes of Rule 9, Sections 9(a) and 11 and Rule 13, Section 4, does not include making an application for a clearance under Rule 9, Section 1 in respect of that acquisition, merger or consolidation;

“**Market**” means a market in the Philippines in which electricity or other goods or services that are directly or indirectly related to or used in connection with the generation, transmission, distribution or sale of electricity are or may be supplied or acquired;

“**Person**” means a natural or juridical person including an individual, a corporation, a partnership or an association to which the law grants a juridical personality, a trustee, a government-owned or government-controlled corporation, a local government unit, an electric cooperative organised pursuant to Presidential Decree No. 269, or an entity of any other kind whatsoever, which has a separate legal personality, and whether or not that person is a Philippine National;

“**Philippine National**” has the meaning given in Section 3(a) of Republic Act No. 7042, otherwise known as the Foreign Investments Act, as amended;

“**Price**”, in relation to goods or services, includes:

- (a) a charge of any description for those goods or services or a component of any such charge; and
- (b) a discount, allowance, rebate or credit for or in relation to those goods or services or a component of any such discount, allowance, rebate or credit;

“**Price-fixing provision**” means a provision that has the effect of fixing, controlling or maintaining a price as described in Rule 4, Section 3;

“**Primary provision**” means:

- (a) Rule 4, Section 1, Rule 5, Section 1, Rule 6, Section 1, Rule 8, Section 30(a), Rule 9, Section 28(a) or Rule 10, Section 4; or
- (b) a prohibition referred to in Rule 14, Section 1 and deemed to be incorporated in these Competition Rules by virtue of Rule 14, Section 7; or
- (c) a requirement referred to in Rule 15 and deemed to be incorporated in these Competition Rules by virtue of Rule 15;

“**Provision**”, in relation to an arrangement or understanding, means any matter forming part of or relating to the arrangement or understanding;

“**Services**” includes any rights, benefits or privileges (whether provided, granted or conferred under a contract or otherwise) and includes:

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(a) rights conferred under derivatives, futures contracts, hedge contracts or other financial instruments; and

(b) firm and non-firm transmission rights,

but does not include the performance of work under an employment contract;

“**Supply**” includes:

(a) in relation to goods – supply (including re-supply) by way of sale, barter or exchange, donation or lease, lease with an option to purchase and the like; and

(b) in relation to services – provide, grant or confer;

and terms used in these Competition Rules which are defined in the EPIRA or the IRR (not being terms which are otherwise defined in this Section 1) have the meaning given to them in the EPIRA or the IRR (as the case may be).

**Section 2. Market.** A reference to a market in which goods or services are or may be supplied or acquired includes a market in which those goods or services, and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services, are or may be supplied or acquired.

**Section 3. Substitution and competition.** The substitutability of, or competitiveness between, goods or services must be determined having regard to the nature of those goods or services, the geographic area over which they are substitutable for or competitive with each other, the nature of the suppliers and buyers of those goods or services, and changes to these matters that are likely to occur over time.

**Section 4. Lessening of competition.** References to the lessening of competition are to be read as including references to preventing, restricting or hindering competition.

**Section 5. Substantial lessening of competition in a market.** In determining whether a provision of an agreement, arrangement or understanding, or an acquisition, merger or consolidation, has or is likely to have, or would have, or would be likely to have, the effect of substantially lessening competition in a market, the following matters must be taken into account (without limiting any other matters that may be taken into account for those purposes):

(a) the level of concentration in the market;

(b) the nature and effect of barriers to entry to the market;

(c) the degree of countervailing power in the market;

(d) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(e) the nature and extent of vertical integration in the market; and

(f) the behaviour of competitors in the market.

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## Rule 4 - Anti-competitive agreements, arrangements and understandings

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**Section 1. Prohibitions.** Subject to Rule 8, a person must not:

- (a) make an agreement or arrangement, or arrive at an understanding, if a provision of the agreement, arrangement or understanding -
  - (i) would have, or would be likely to have, the effect of substantially lessening competition in a market; or
  - (ii) is a price-fixing provision; or
- (b) give effect to a provision of an agreement, arrangement or understanding if that provision -
  - (i) has, or is likely to have, the effect of substantially lessening competition in a market; or
  - (ii) is a price-fixing provision:

*Provided, however,* That within one year from the effectivity of these Rules, any contract, agreement, arrangement or understanding entered into prior to the effectivity of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act, containing provisions or stipulations violative of the Competition Rules, must be renegotiated and amended to conform with these Rules.

**Section 2. Provision which substantially lessens competition in a market.** For the purposes of the application of Section 1(a)(i) or 1(b)(i) in relation to a particular person, a provision of an agreement, arrangement or understanding is deemed to have, or be likely to have, the effect of substantially lessening competition in a market if that provision and any one or more of the following provisions, namely:

- (a) the other provisions of that agreement, arrangement or understanding; and
- (b) the provisions of any other agreement, arrangement or understanding to which that person or any affiliate of that person is a party,

together have, or are likely to have, that effect.

**Section 3. Price-fixing provision.** A “*price-fixing provision*” is a provision that has the effect of fixing, controlling or maintaining the price at which any party to the agreement, arrangement or understanding or any of its affiliates:

- (a) may supply, agree to supply, offer to supply or accept an invitation to supply goods or services to a person who is not a party to the agreement, arrangement or understanding or who is not an affiliate of such a party; or
- (b) may acquire, agree to acquire, offer to acquire or accept an invitation to acquire goods or services from a person who is not a party to the agreement, arrangement or understanding or who is not an affiliate of such a party.

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For these purposes, “**goods or services**” are goods or services (including electricity) that are directly or indirectly related to or used in connection with the generation, transmission, distribution or sale of electricity.

Without limiting the first paragraph, a provision is deemed to have the effect of fixing, controlling or maintaining a price in respect of goods or services if that provision:

- (a) states the price in respect of those goods or services; or
- (b) specifies the price in respect of those goods or services by reference to a price specified by another person in respect of those goods or services or in respect of goods or services of a like description; or
- (c) specifies or refers to a set form, method or formula by which or by reference to which the price in respect of those goods or services is to be calculated; or
- (d) specifies the price in respect of those goods or services by reference to a set form, method or formula specified by another person in respect of those goods or services or in respect of goods or services of a like description; or
- (e) specifies the price in respect of those goods or services by reference to a price range, a maximum amount that the price is not to exceed or a minimum amount that the price is not to be below.

**Section 4. When Rule not applicable.** This Rule does not apply to or in relation to an agreement, arrangement or understanding:

- (a) in so far as the agreement, arrangement or understanding provides for -
  - (i) the acquisition of any shares in the capital stock of a corporation or the acquisition of any assets of a person (whether directly or indirectly); or
  - (ii) the merger of two or more corporations; or
  - (iii) the consolidation of two or more corporations to form a new corporation<sup>2</sup>;  
or
- (b) the only parties to which are affiliates of each other.

**Section 5. When not a violation of Section 1(a).** The making by a person of an agreement to which Section 1(a) applies is not a violation thereof if:

- (a) the agreement is subject to a condition that the relevant provision will not come into force unless and until -
  - (i) in the case of Section 1(a)(i) - a clearance has been given in respect of the making of that agreement in accordance with Rule 8; or
  - (ii) in the case of Section 1(a)(i) or (ii) - an authorization has been granted in respect of the making of that agreement in accordance with Rule 8; and
- (b) an application for that clearance or for the grant of that authorization has been made in accordance with Rule 8 within 21 days after the agreement is made,

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<sup>2</sup> The reason for this is that such matters are dealt with in Rule 6.

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but nothing in this Section prevents the giving effect to such a provision from constituting a violation of Section 1(b).

## **Rule 5 - Misuse of market power**

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**Section 1. Prohibition.** A person that has a substantial degree of power in a market must not misuse that power.

**Section 2. Degree of power; Factors.** If:

- (a) an affiliate of a person has, or two or more affiliates of a person together have, a substantial degree of power in a market; or
- (b) a person and an affiliate of that person, or a person and two or more affiliates of that person, together have a substantial degree of power in a market,

that person is to be taken to have a substantial degree of power in that market.

In determining the degree of power that a person or persons has or have in a market, regard must be had to the extent to which the conduct of the person or any of those persons in that market is constrained by the conduct of:

- (a) competitors, or potential competitors, of that person or any of those persons in that market; or
- (b) persons to whom or from whom that person, any of those persons or any of their affiliates supply or acquire goods or services in that market.

**Section 3. Misuse of power; Factors.** In determining whether a person has misused its power in a market, the following matters must be taken into account (without limiting any other matters that may be taken into account for those purposes):

- (a) whether, if the person did not have a substantial degree of power in the market, that person would have acted in the way it did; and
- (b) whether, in all the circumstances, the person was reasonably justified in using its power in the way it did.

**Section 4. Use/Misuse of power; How done.** The circumstances in which a person uses or misuses its power in a market may include where that person:

- (a) does an act; or
- (b) refuses to do, or refrains (otherwise than inadvertently) from doing, an act; or
- (c) makes it known that an act will or will not be done; or
- (d) refuses to do an act, or to offer to do an act, except on a condition or conditions; or
- (e) makes it known that an act will not be done, except on a condition or conditions; or
- (f) makes it known that an act will only be done on a condition or conditions.

**Section 5. Market power.** In this Rule, a reference to power is a reference to market power.

**Section 6. When Rule not applicable.** Nothing in this Rule applies to the making of an agreement or arrangement, the arriving at an understanding or the giving effect to a provision of an agreement, arrangement or understanding where that is permitted by virtue

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of a clearance that has been given, or an authorization that has been granted, under Rule 8.

## **Rule 6 – Acquisitions, mergers and consolidations**

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**Section 1. Prohibitions.** Subject to Rule 9, a person must not:

- (a) directly or indirectly acquire shares in the capital stock of a corporation; or
- (b) merge with another corporation; or
- (c) consolidate with another corporation to form a new corporation; or
- (d) directly or indirectly acquire assets of a person,

if the acquisition, merger or consolidation would have, or would be likely to have, the effect of substantially lessening competition in a market.

**Section 2. Acquisition of shares or assets; Merger; Consolidation - when deemed not to have taken place.** Where:

- (a) a person has entered into an agreement to acquire shares in the capital stock of a corporation or assets of a person, to merge with another corporation, or to consolidate with another corporation to form a new corporation;
- (b) the agreement is subject to a condition that the provisions of the agreement relating to the acquisition, merger or consolidation will not come into force unless and until the person has been given a clearance, or granted an authorization, under Rule 9 to acquire the shares or assets, to merge with that other corporation, or to consolidate with that other corporation to form a new corporation (as the case may be); and
- (c) the person applied for the grant of such a clearance or authorization before the expiration of 21 days after the agreement was entered into,

the acquisition of the shares or assets, the merger or the consolidation (as the case may be) shall not be regarded as having taken place in pursuance of the agreement before:

- (a) that condition is satisfied or waived; or
- (b) the agreement otherwise ceases to be subject to that condition,

whichever happens first.

**Section 3. Meaning of acquisition.** In this Rule:

- (a) a reference to the acquisition of shares in the capital stock of a corporation is to be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares (including by way of succession, purchase, barter or exchange, or donation) but does not include a reference to an acquisition by way of the taking of a lien or encumbrance only; and
- (b) a reference to the acquisition of assets of a person is to be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such assets (including by way of succession, purchase, barter or exchange, donation or lease, lease with an option to purchase

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and the like) but does not include a reference to an acquisition by way of the taking of a lien or encumbrance only or an acquisition in the ordinary course of business.

## Rule 7 - Exceptions

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**Section 1. Matters not constituting violations of Competition Rules.** The following matters do not constitute a violation of these Competition Rules and must not be taken into account in deciding whether these Competition Rules have been violated:

- (a) anything that is, or is of a kind, specifically authorized or required by law or the rules and regulations issued implementing such a law - any law or the rules and regulations issued implementing such a law are not to be taken to specifically authorize a thing if it only provides in general terms for that thing (notwithstanding that the thing requires or may be subject to approval or authorization by any person);
- (b) anything done in relation to, or any provision of an agreement, arrangement or understanding that relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;
- (c) in the case of an agreement for the sale of a business (whether by the sale of assets or shares or through a merger or consolidation) – any provision of the agreement that is for the reasonable protection of the purchaser in respect of the goodwill of the business;
- (d) the imposition of, or giving effect to, a condition of a license of a patent, a published patent application, a utility model registration, an industrial design registration, a layout-design of integrated circuits registration or a copyright (as those terms are used in the Intellectual Property Code) to the extent that the condition relates to the subject of the patent, patent application, registration or copyright;
- (e) the inclusion in an agreement, arrangement or understanding relating to:
  - (i) the use of a registered trademark, service mark or collective mark (as those terms are defined in the Intellectual Property Code); or
  - (ii) the use of a trademark, service mark or collective mark which is the subject of an application for registration under the Intellectual Property Code, of a provision to the extent that the provision relates to the kinds, qualities or standards of goods or services that may be produced or supplied under the trademark, service mark or collective mark, or the giving effect to the provision to that extent; and
- (f) anything done (otherwise than in the course of trade or commerce) in concert by consumers of goods or services against the suppliers of those goods or services.

**Section 2. Matters not prohibited by Rule 4.** Rule 4 does not prohibit a person from:

- (a) making an agreement or arrangement, or arriving at an understanding; or
- (b) giving effect to a provision of an agreement, arrangement or understanding,

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where that agreement, arrangement or understanding is comprised of:

- (a) the rules for the wholesale electricity spot market created under Section 30 of the EPIRA in the form in which those rules were first promulgated by the Department of Energy; or
- (b) the Grid Code as amended from time to time with the approval of the ERC; or
- (c) the Distribution Code as amended from time to time with the approval of the ERC; or
- (d) a transition supply contract that is made in accordance with Section 67 of the EPIRA and approved by the ERC.

## **Rule 8 – Clearances and Authorizations: Anti-competitive agreements, arrangements and understandings**

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### **Clearances**

**Section 1. Who may apply.** A person who proposes to make an agreement or arrangement, or arrive at an understanding, may apply to the ERC for a determination that making that agreement or arrangement, or arriving at that understanding, will not violate Rule 4, Section 1(a)(i) (such a determination is referred to in this Rule as a **clearance**).

**Section 2. Form.** An application for a clearance must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

**Section 3. Additional requirements.** The applicant:

- (a) must provide to the ERC, within such time as the ERC may specify, such documents and information as the ERC may require in relation to the application for the purpose of deciding whether or not to grant the application; and
- (b) must pay to the ERC an application fee as determined by the Commission.

**Section 4. Withdrawal of application.** An applicant may, at any time before its application is decided by the ERC, withdraw the application by notice in writing to the ERC.

**Section 5. Prohibition.** Subject to Rule 4, Section 5, unless an applicant has withdrawn its application under Section 4, the applicant must not make the agreement or arrangement, or arrive at the understanding, the subject of the application until that application has been decided by the ERC.

**Section 6. Form of decision.** The ERC's decision on an application for a clearance must be in writing and must set out the various issues involved, the ERC's factual findings and the legal reasons for the decision made.

**Section 7. Duration of clearance.** A clearance:

- (a) expires 12 months after the date on which it is given or on such later date as the ERC determines; and
- (b) comes into force on the day it is given.

**Section 8. Test for clearance.** The ERC must grant an application for a clearance if (and must not grant such an application unless) it determines that:

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- (a) the making of the agreement or arrangement, or the arriving at the understanding, the subject of the application will not violate Rule 4, Section 1(a)(i); and
- (b) the giving effect to any provision of that agreement, arrangement or understanding will not violate Rule 4, Section 1(b)(i).

**Section 9. Effect of clearance.** While a clearance given by the ERC remains in force, the applicant may make the agreement or arrangement (or bring into force any provision of the agreement which is the subject of a condition under Rule 4, Section 5(a)(i)), or arrive at the understanding, in accordance with the clearance (in which case the subsequent expiry of the clearance pursuant to Section 7(a) will not result in the making of that agreement or arrangement, or the arriving at that understanding, violating Rule 4, Section 1(a)(i)).

**Section 10. Inquiries by ERC.** In order to assist the ERC in deciding whether or not to grant an application for a clearance, the ERC may consult with such persons as it considers appropriate.

## Authorizations

**Section 11. Who may apply.** A person may apply to the ERC for an authorization:

- (a) to make an agreement or arrangement, or to arrive at an understanding, where a provision of the agreement, arrangement or understanding -
  - (i) would have, or might have, the effect of substantially lessening competition in a market for the purposes of Rule 4, Section 1(a)(i); or
  - (ii) is, or might be, a price-fixing provision for the purposes of Rule 4, Section 1(a)(ii); or
- (b) to give effect to a provision of an agreement, arrangement or understanding where the provision -
  - (i) has, or might have, the effect of substantially lessening competition in a market for the purposes of Rule 4, Section 1(b)(i); or
  - (ii) is, or might be, a price-fixing provision for the purposes of Rule 4, Section 1(b)(ii).

**Section 12. Form.** An application for an authorization must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

**Section 13. Extent of application.** An application made to the ERC under Section 11 for an authorization in relation to a particular agreement, arrangement or understanding may be expressed to be made also in relation to:

- (a) another agreement, arrangement or understanding that is or will be; or
- (b) two or more other agreements, arrangements or understandings that are or will be, in similar terms to the first-mentioned agreement, arrangement or understanding.

**Section 14. Notice of application.** On the receipt of an application for an authorization that complies with Section 12, the ERC:

- (a) must publish notice of the application in at least two newspapers of general circulation; and

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- (b) may separately give notice of the application to any person who, in the ERC's opinion, is likely to have an interest in the application.

The notice must specify the manner in which, and the time by which, any comments in relation to the application must be made to the ERC.

**Section 15. Additional requirements.** The applicant :

- (a) must provide to the ERC, within such time as the ERC may specify, such documents and information as the ERC may require in relation to the application for the purpose of enabling the ERC to exercise its functions under this Rule; and
- (b) must pay to the ERC an application fee as determined by the Commission

**Section 16. Withdrawal of application.** An applicant may, at any time before its application is decided by the ERC, withdraw the application by notice in writing to the ERC.

**Section 17. Prohibition.** Subject to Rule 4, Section 5 and Section 18, unless an applicant has withdrawn its application under Section 16, the applicant must not make the agreement or arrangement, arrive at the understanding or give effect to the provision the subject of the application until that application has been decided by the ERC.

**Section 18. Relief from ERC prior to its decision.** Where a person has applied for an authorization to give effect to a provision of an agreement, arrangement or understanding, and that agreement, arrangement or understanding was made or arrived at prior to the date on which the application for authorization was made to the ERC, the ERC may permit that person to give effect to that provision before that application has been decided by the ERC if the ERC determines that the person would, or would be likely to, suffer exceptional hardship if it were not able to give effect to that provision.

**Section 19. Hearing.** Before deciding an application for an authorization, the ERC may hold a hearing in relation to the application, in which case that hearing must be conducted in such manner, and in accordance with such rules, as may be determined by the ERC.

**Section 20. Extent of decision.** An authorization:

- (a) may be granted subject to such conditions as the ERC considers appropriate;
- (b) may be expressed to be in force for a period specified in the authorization and, if so expressed, remains in force for that period only; and
- (c) comes into force on the day specified for that purpose in the authorization, which may be earlier than the day on which the authorization is granted.

**Section 21. Form of decision.** The ERC's decision on an application for an authorization must be in writing and must set out the various issues involved, the ERC's factual findings and the legal reasons for the decision made.

**Section 22. Test for authorization.** The ERC must grant an application for an authorization if (and must not grant such an application unless) it determines that:

- (a) the making of the agreement or arrangement or the arriving at the understanding;  
or
- (b) the giving effect to the provision of the agreement, arrangement or understanding,

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the subject of the application, will in the circumstances result, or be likely to result, in a benefit to the public which would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, from it. For these purposes the ERC must take into account:

- (a) all of the provisions of the relevant agreement, arrangement or understanding; and
- (b) the provisions of any other agreement, arrangement or understanding where a party to that other agreement, arrangement or understanding is -
  - (i) a party to the relevant agreement, arrangement or understanding; or
  - (ii) an affiliate of a person who is a party to the relevant agreement, arrangement or understanding.

**Section 23. Public benefit.** In determining what amounts to a benefit to the public, the ERC must regard as a benefit to the public:

- (a) any efficiencies that the ERC considers will result, or will be likely to result, from the making of the agreement or arrangement, the arriving at the understanding or the giving effect to the provision of the agreement, arrangement or understanding to the extent that those efficiencies will benefit the public; and
- (b) where one or more of the parties to the agreement, arrangement or understanding is a distribution utility or an affiliate of a distribution utility - improved reliability of service by, reduction of costs of, and compliance with any performance standards prescribed in the IRR by, that distribution utility.

Nothing in this Section limits in any way the other matters that the ERC may regard as a benefit for the public for the purpose of Section 22. By way of example only, such matters may include enhanced economic development, increased economic efficiency, more efficient resource allocation, growth in employment, improvements in the quality and safety of goods or services, the expansion of, and more informed, consumer choice, and contained or lower prices to consumers.

**Section 24. Authorization to give effect to a provision.** The ERC may grant an authorization to a person to give effect to a provision of an agreement, arrangement or understanding even though the provision has been given effect before the ERC decides the application for that authorization, but, except as the ERC so permits under Section 18, nothing in this Section prevents the giving effect to such a provision before an authorization was granted in respect of it from constituting a violation of these Competition Rules.

**Section 25. Extent of authorization.** Where an application for an authorization in relation to a particular agreement, arrangement or understanding is expressed, in accordance with Section 13, to be made also in relation to another agreement, arrangement or understanding, the ERC may grant:

- (a) a single authorization in respect of all the agreements, arrangements or understandings; or
- (b) separate authorizations in respect of any one or more of the agreements, arrangements or understandings.

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**Section 26. Effect of authorization.** While an authorization granted by the ERC remains in force, the applicant may:

- (a) if the authorization is an authorization to make an agreement or arrangement or to arrive at an understanding -
  - (i) make the agreement or arrangement (or bring into force any provision of the agreement which is the subject of a condition under Rule 4, Section 5(a)(ii)) or arrive at the understanding the subject of the authorization in accordance with the authorization (in which case the subsequent expiry of the authorization pursuant to Section 20(b) will not result in the making of that agreement or arrangement, or the arriving at that understanding, violating Rule 4, Section 1(a)); and
  - (ii) give effect in accordance with the authorization to any provision of the agreement or arrangement so made or of the understanding so arrived at;  
or
- (b) if the authorization is an authorization to give effect to a provision of an agreement, arrangement or understanding - give effect to the provision of the agreement, arrangement or understanding the subject of the authorization in accordance with the authorization.

An authorization which is granted by the ERC to a particular person:

- (a) has effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the authorization as a party to the agreement, arrangement or understanding; and
- (b) may be expressed so as to apply to or in relation to another person who -
  - (i) in the case of an authorization to make an agreement or arrangement or to arrive at an understanding - becomes a party to the proposed agreement or arrangement at a time after it is made or becomes a party to the proposed understanding at a time after it is arrived at; and
  - (ii) in the case of an authorization to give effect to a provision of an agreement, arrangement or understanding - becomes a party to the agreement, arrangement or understanding at a time after the authorization is granted.

## **Provisions applicable to clearances and authorizations**

**Section 27. Clearance; Authorization-when should not be granted.** The ERC must not give a clearance or grant an authorization to a person to make an agreement or arrangement, or to arrive at an understanding, if the agreement or arrangement has been made, or the understanding has been arrived at, before the ERC decides the application for that clearance or authorization.

**Section 28. Grounds/Procedure for revocation or amendment.** If, at any time after granting a clearance or authorization under this Rule, it appears to the ERC that:

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- (a) the clearance was given or the authorization was granted on the basis of information that was, when given, false or misleading or incomplete in a material particular; or
- (b) a condition to which the authorization is subject has not been complied with; or
- (c) there has been a material change of circumstances since the authorization was granted as a result of which, if an application for that authorization were made to the ERC after that change of circumstances, the ERC would not be permitted by Section 22 to grant that authorization,

then the ERC must, by notice in writing given to any person who, in the opinion of the ERC, is likely to have an interest in the matter:

- (a) inform that person that it is considering revoking or amending the clearance or authorization;
- (b) indicate the basis on which it is considering revoking or amending the clearance or authorization; and
- (c) invite that person to make comments in relation to the revocation or amendment of the clearance or authorization within a period specified by the ERC.

**Section 29. Form of decision.** A decision by the ERC to revoke or amend a clearance or authorization, or not to revoke or amend a clearance or authorization, following the giving of a notice under Section 28 must be in writing and must set out the various issues involved, the ERC's factual findings and the legal reasons for the decision made.

**Section 30. Violations.** The following constitute violations of these Competition Rules:

- (a) a failure to comply with any condition to which an authorization that is granted under this Rule is subject; and
- (b) knowingly providing information to the ERC that is false or misleading or incomplete in a material particular where such information is provided in relation to any application in respect of a clearance or authorization under this Rule.

**Section 31. Penalties.** If the ERC determines that a person has committed a violation referred to in Section 30(b), or has violated Sections 5 or 17, the ERC may, in accordance with the Complaint Procedure Rules, make all or any of the following orders:

- (a) an order requiring the person to pay to the ERC a fine or penalty of not more than P5,000,000.00; and
- (b) in the case of a violation of Sections 5 or 17 - an order requiring the person to do, or not to do, an act or thing specified in that order until the ERC has determined whether or not the conduct that constitutes the violation of Sections 5 or 17 (as the case may be) is a violation of Rule 4.

**Section 32. Conditional agreements.** For the purposes of this Rule, an agreement the making of which is not a violation of Rule 4, Section 1(a) by virtue of the application of Rule 4, Section 5:

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- (a) will be treated (for so long as the making of it is not such a violation of Rule 4, Section 1(a) by virtue of the application of Rule 4, Section 5) as if it had not been made; and
- (b) will be treated as being made from the time (if any) at which the relevant clearance or authorization (as the case may be) is given or made, the condition referred to in Rule 4, Section 5(a) is waived or the agreement otherwise ceases to be subject to that condition (whichever happens first).

## **Rule 9 - Clearances and Authorizations: Acquisitions, mergers and consolidations**

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### **Clearances**

**Section 1. Who may apply.** A person who proposes:

- (a) to directly or indirectly acquire shares in the capital stock of a corporation; or
- (b) to merge with another corporation; or
- (c) to consolidate with another corporation to form a new corporation; or
- (d) to directly or indirectly acquire assets of a person,

may apply to the ERC for a determination that the acquisition, merger or consolidation will not violate Rule 6, Section 1 (such a determination is referred to in this Rule as a **clearance**).

**Section 2. Form.** An application for a clearance must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

**Section 3. Additional requirements.** The applicant must:

- (a) provide to the ERC, within such time as the ERC may specify, such documents and information as the ERC may require in relation to the application for the purpose of deciding whether or not to grant the application; and
- (b) must pay to the ERC an application fee as determined by the Commission;

**Section 4. Withdrawal of application.** An applicant may, at any time before its application is decided by the ERC, withdraw the application by notice in writing to the ERC.

**Section 5. Prohibition.** Unless an applicant has withdrawn its application under Section 4, the applicant must not acquire the shares or assets, or undertake the merger or consolidation, the subject of the application until that application has been decided by the ERC.

**Section 6. Form of decision.** The ERC's decision on an application for a clearance must be in writing and must set out the various issues involved, the ERC's factual findings and the legal reasons for the decision made.

**Section 7. Duration of clearance.** A clearance:

- (a) expires 12 months after the date on which it is given or on such later date as the ERC determines; and

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(b) comes into force on the day it is given.

**Section 8. Test for clearance.** The ERC must grant an application for a clearance if (and must not grant such an application unless) it determines that the acquisition, merger or consolidation the subject of the application will not violate Rule 6, Section 1.

**Section 9. Effect of clearance.** Where the ERC has granted an application for a clearance, the applicant must not directly or indirectly acquire the relevant shares or assets, or undertake the relevant merger or consolidation, until the expiry of:

- (a) the period ending 60 days after the proposed acquisition, merger or consolidation has been made public; or
- (b) such shorter period as is permitted by the ERC.

While a clearance given by the ERC remains in force, the applicant may, subject to the preceding paragraph, acquire shares or assets, merge or consolidate in accordance with the clearance (in which case the subsequent expiry of the clearance pursuant to Section 7(a) will not result in that acquisition, merger or consolidation violating Rule 6, Section 1).

**Section 10. Inquiries by ERC.** In order to assist the ERC in deciding:

- (a) whether or not to grant an application for a clearance; or
- (b) if it has granted an application for a clearance, whether or not to revoke that clearance under Section 26(a),

the ERC may, subject to Section 11, consult with such persons as it considers appropriate.

**Section 11. Consultation with third parties.** Until a proposed acquisition, merger or consolidation is made public, the ERC may only consult with a person (other than the applicant for the clearance) for the purposes of Section 10 where:

- (a) the applicant for the clearance has consented to the ERC consulting with that person for that purpose; or
- (b) that person is an external consultant who is engaged by the ERC for the purpose of advising it on matters relating to the application for clearance and such external consultant has given a written undertaking to the ERC to keep confidential the information disclosed to it for that purpose.

## Authorizations

**Section 12. Who may apply.** A person may apply to the ERC for an authorization:

- (a) to acquire shares in the capital stock of a corporation; or
- (b) to merge with another corporation; or
- (c) to consolidate with another corporation to form a new corporation; or
- (d) to acquire assets of a person,

where the acquisition, merger or consolidation would have, or might have, the effect of substantially lessening competition in a market for the purposes of Rule 6, Section 1.

**Section 13. Form.** An application for an authorization must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

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**Section 14. Notice of application.** On the receipt of an application for an authorization that complies with Section 13, the ERC:

- (a) must publish notice of the application in at least two newspapers of general circulation; and
- (b) may separately give notice of the application to any person who, in the ERC's opinion, is likely to have an interest in the application.

The notice must specify the manner in which, and the time by which, any comments in relation to the application must be made to the ERC.

**Section 15. Additional requirements.** The applicant:

- (a) must provide to the ERC, within such time as the ERC may specify, such documents and information as the ERC may require in relation to the application for the purpose of enabling the ERC to exercise its functions under this Rule; and
- (b) must pay to the ERC an application fee as determined by the Commission.

**Section 16. Withdrawal of application.** An applicant may, at any time before its application is decided by the ERC, withdraw the application by notice in writing to the ERC.

**Section 17. Prohibition.** Unless an applicant has withdrawn its application under Section 16, the applicant must not acquire the shares or assets, or undertake the merger or consolidation, the subject of the application until that application has been decided by the ERC.

**Section 18. Hearing.** Before deciding an application for an authorization, the ERC may hold a hearing in relation to the application, in which case that hearing must be conducted in such manner, and in accordance with such rules, as may be determined by the ERC.

**Section 19. Extent of decision.** An authorization:

- (a) may be granted subject to such conditions as the ERC considers appropriate;
- (b) expires 12 months after the date on which it is granted or on such later date as the ERC determines; and
- (c) comes into force on the day specified for that purpose in the authorization, not being a day earlier than the day on which the authorization is granted.

**Section 20. Form of decision.** The ERC's decision on an application for an authorization must be in writing and must set out the various issues involved, the ERC's factual findings and the legal reasons for the decision made.

**Section 21. Test for authorization.** The ERC must grant an application for an authorization if (and must not grant such an application unless) it determines that:

- (a) the acquisition of the shares; or
- (b) the merger; or
- (c) the consolidation; or
- (d) the acquisition of the assets,

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the subject of the application, will in the circumstances result, or be likely to result, in such a benefit to the public that the acquisition, merger or consolidation should be allowed to take place.

**Section 22. Public benefit.** In determining what amounts to a benefit to the public, the ERC must regard as a benefit to the public:

- (a) any efficiencies that the ERC considers will result, or will be likely to result, from the acquisition, merger or consolidation to the extent that those efficiencies will benefit the public; and
- (b) where the acquisition is a direct or indirect acquisition of shares in or assets of a distribution utility or an affiliate of a distribution utility or where one of the corporations being merged or consolidated is a distribution utility or an affiliate of a distribution utility – improved reliability of service by, reduction of costs of, and compliance with any performance standards prescribed in the IRR by, that distribution utility or its successor.

Nothing in this Section limits in any way the other matters that the ERC may regard as a benefit to the public for the purpose of Section 21. By way of example only, such matters may include enhanced economic development, increased economic efficiency, more efficient resource allocation, growth in employment, improvements in the quality and safety of goods or services, the expansion of, and more informed, consumer choice, and contained or lower prices to consumers.

**Section 23. Effect of authorization.** While an authorization granted by the ERC remains in force, the applicant may acquire shares or assets, or undertake the relevant merger or consolidation, in accordance with the authorization (in which case the subsequent expiry of the authorization pursuant to Section 19(b) will not result in that acquisition, merger or consolidation violating Rule 6, Section 1).

## **Provisions applicable to clearances and authorizations**

**Section 24. Clearance; Authorization-when should not be granted.** The ERC must not give a clearance or grant an authorization to a person:

- (a) to acquire shares in the capital stock of a corporation; or
- (b) to merge with another corporation; or
- (c) to consolidate with another corporation to form a new corporation; or
- (d) to acquire assets of a person,

if that person directly or indirectly acquires those shares or assets, or undertakes that merger or consolidation, before the ERC decides the application for that clearance or authorization.

**Section 25. Undertaking as a condition of clearance or authorization.** In giving a clearance or granting an authorization under this Rule, the ERC may accept a written undertaking given by the applicant to dispose of assets or shares specified in the undertaking, in which case the undertaking is deemed to be a condition of the clearance or authorization.

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**Section 26. Grounds/Procedure for revocation or amendment.** If, at any time after granting a clearance or authorization under this Rule, it appears to the ERC that:

- (a) the clearance was given or the authorization was granted on the basis of information that was, when given, false or misleading or incomplete in a material particular; or
- (b) a condition to which the clearance or authorization is subject (being, in the case of a clearance, any undertaking that is given pursuant to Section 25) has not been complied with,

then the ERC must, by notice in writing given to any person who, in the opinion of the ERC, is likely to have an interest in the matter:

- (a) inform that person that it is considering revoking or amending the clearance or authorization;
- (b) indicate the basis on which it is considering revoking or amending the clearance or authorization; and
- (c) invite that person to make comments in relation to the revocation or amendment of the clearance or authorization within a period specified by the ERC.

**Section 27. Form of decision.** A decision by the ERC to revoke or amend a clearance or authorization, or not to revoke or amend a clearance or authorization, following the giving of a notice under Section 26 must be in writing and must set out the various issues involved, the ERC's factual findings and the legal reasons for the decision made.

**Section 28. Violations.** The following constitute violations of these Competition Rules:

- (a) a failure to comply with any condition to which a clearance or authorization that is given or granted under this Rule is subject (being, in the case of a clearance, any undertaking that is given pursuant to Section 25); and
- (b) knowingly providing information to the ERC that is false or misleading or incomplete in a material particular where such information is provided in relation to any application in respect of a clearance or authorization under this Rule.

**Section 29. Penalties.** If the ERC determines that a person has committed a violation referred to in Section 28(b), or has violated Sections 5, 9 or 17, the ERC may, in accordance with the Complaint Procedure Rules, make all or any of the following orders:

- (a) an order requiring the person to pay to the ERC a fine or penalty of not more than P5,000,000.00; and
- (b) in the case of a violation of Sections 5, 9 or 17 - an order requiring the person to do, or not to do, an act or thing specified in that order until the ERC has determined whether or not the conduct that constitutes the violation of Sections 5, 9 or 17 (as the case may be) is a violation of Rule 6.

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## Rule 10 - Penalties

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**Section 1. Violations.** If the ERC determines that a person:

- (a) has violated a primary provision; or
- (b) has aided, abetted, counselled or procured a person to violate a primary provision; or
- (c) has profited, or assisted another to profit, from a violation of a primary provision; or
- (d) has forced or induced, or attempted to force or induce, a person (whether by threats or promises or otherwise) to violate a primary provision; or
- (e) has in any way knowingly and intentionally cooperated in the violation of a primary provision; or
- (f) has conspired with others to violate a primary provision,

the ERC may, in accordance with the Complaint Procedure Rules, make such order or orders against that person as it considers appropriate (including all or any of the orders mentioned in Section 2).

**Section 2. Orders that may be made by ERC.** The orders referred to in Section 1 are:

- (a) an order requiring the person to stop engaging in the conduct that constitutes the violation;
- (b) an order requiring the person to do any act or thing to rectify the violation or to remedy or mitigate the consequences of the violation including -
  - (i) an order requiring the person to vary an agreement, arrangement or understanding within such time and in such manner as is specified in the order;
  - (ii) an order requiring the person not to enforce an agreement, arrangement or understanding or such provisions of that agreement, arrangement or understanding as are specified in the order;
  - (iii) an order requiring the person to refund money or return property;
  - (iv) an order requiring the person not to carry on a particular business or not to undertake particular operations;
- (c) an order requiring the person to pay to the ERC a fine or penalty of not less than P50,000.00 and not more than P50,000,000.00;
- (d) an order requiring the person to pay to the ERC an amount not exceeding the ERC's estimation of the amount of any monetary, financial or economic benefits acquired by the person, or accrued or accruing to the person, as a result of the violation;
- (e) where the person is an electric power industry participant, an order requiring the separation of the business activities of that person into different juridical entities;

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- (f) an order fixing or controlling the price at which the person may supply or acquire electricity or goods or services that are directly or indirectly related to or used in connection with the generation, transmission, distribution or sale of electricity;
- (g) an order revoking or modifying a certificate of public convenience and/or necessity, license or permit granted to the person<sup>3</sup>;
- (h) an order requiring the person to dispose of assets or shares in the capital stock of a corporation within such period (not exceeding 12 months from the date of the order) as is determined by the ERC.

**Section 3. Factors in making orders.** In determining the appropriate order or orders to be made against a person the ERC must have regard to all relevant matters including:

- (a) the nature and extent of the violation and of any loss or damage suffered by any person as a result of the violation;
- (b) the nature and extent of any commercial gain arising from the violation;
- (c) the effect or likely effect of the violation on competition in any market;
- (d) the circumstances in which the violation took place;
- (e) whether the person has previously violated a primary provision in similar circumstances;
- (f) if the conduct constituting the violation also constitutes a violation of another primary provision or of another law, the order or orders made by the ERC, any other agency or body or a court as a result of the second-mentioned violation;
- (g) the conduct of the person since the violation occurred; and
- (h) where the person is a corporation, whether the corporation exercised due diligence to prevent the violation (including through the creation and maintenance of a corporate culture that requires compliance with these Competition Rules).

**Section 4. Consequence of non-compliance with ERC's order.** A person must comply with an order that is made by the ERC under Section 1.

**Section 5. Pre-emptive order.** If the ERC has reason to believe it likely that a person is about to:

- (a) violate a primary provision; or
- (b) aid, abet, counsel or procure a person to violate a primary provision; or
- (c) profit, or assist another to profit, from a violation of a primary provision; or
- (d) force or induce, or attempt to force or induce, a person (whether by threats or promises or otherwise) to violate a primary provision; or
- (e) knowingly and intentionally cooperate in a violation of a primary provision; or
- (f) conspire with others to violate a primary provision,

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<sup>3</sup> EPIRA, s.43(p). The ERC cannot revoke a franchise but can only recommend to Congress the revocation of such a franchise (EPIRA, s.46).

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the ERC may, in accordance with the Complaint Procedure Rules, make an order requiring that person not to engage in that conduct. Such order expires on the date for its expiry (if any) specified in the order and may be revoked by a subsequent order of the ERC.

That person must comply with the order and, if the ERC determines that the person has violated the order, the ERC may, in accordance with the Complaint Procedure Rules, make an order requiring the person to pay to the ERC a fine or penalty of not more than P5,000,000.00.

**Section 6. Prerequisites for pre-emptive order.** The ERC must not make an order requiring a person not to engage in conduct under Section 5 unless it determines that the prejudice that is likely to be suffered by that person, or any other person, as a result of the order is outweighed by:

- (a) the loss or damage that is likely to be suffered by any person; and
- (b) the detriment that is likely to be caused to competition in any market,

if the order is not made and the conduct that would be the subject of the order is engaged in.

## **Rule 11 - Conduct by directors, trustees, officers, employees or agents<sup>4</sup>**

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**Section 1. Intent, act of a corporation.** To establish the intent of a corporation in relation to conduct engaged in by that corporation, it is sufficient to show that a director, trustee, officer, employee or agent of the corporation, being a director, trustee, officer, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that intent.

Any conduct engaged in on behalf of a corporation:

- (a) by a director, trustee, officer, employee or agent of the corporation within the scope of the person's actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, trustee, officer, employee or agent of the corporation, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, trustee, officer, employee or agent,

is deemed to have been engaged in also by the corporation.

**Section 2. Intent, act of a person other than a corporation.** To establish the intent of a person (other than a corporation) in relation to conduct engaged in by that person, it is sufficient to show that an employee or agent of the person, being an employee or agent by whom the conduct was engaged in within the scope of the employee's or agent's actual or apparent authority, had that intent.

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<sup>4</sup> This provision is particularly relevant to some of the provisions of Rule 10(1)(b)-(f).

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Any conduct engaged in on behalf of a person (other than a corporation):

- (a) by an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent,

is deemed to have been engaged in also by the first-mentioned person.

## Rule 12 - Information gathering

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**Section 1. Power to gather information.** If the ERC has reason to believe that a person is capable of providing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a violation of these Competition Rules, the ERC may, by notice in writing to that person, require the person:

- (a) to provide that information to the ERC, by writing signed by that person or (in the case of a corporation) by a director or officer of that corporation, within the time and in the manner specified in the notice; or
- (b) to produce those documents to the ERC in accordance with the notice; or
- (c) to appear before the ERC at a time and place specified in the notice to give that evidence.

**Section 2. Form of notice.** A notice under Section 1:

- (a) must indicate the nature of the violation or possible violation which the ERC believes the information, documents or evidence relates to; and
- (b) where the notice requires the production of documents, may identify those documents specifically or by description or by reference to a category within which those documents fall.

**Section 3. Power to make, retain copies of documents.** The ERC, with respect to the document/s produced pursuant to a notice given under Section 1, may:

- (a) make copies of, or take extracts from, the document/s; and
- (b) take, and retain for as long as is necessary, possession thereof, but the ERC must, as soon as practicable, supply the person otherwise entitled to possession of the document/s with a copy thereof.

Until a copy of a document is supplied to a person under paragraph (b), the ERC must, at such times and places as it considers appropriate, permit that person, or a person authorized by that person, to inspect and make copies of or take extracts from the document.

**Section 4. Power to administer oath.** The ERC may require the evidence referred to in Section 1(c) to be given on oath or affirmation.

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**Section 5. Prohibitions.** A person must not:

- (a) refuse or fail to comply with a notice given by the ERC under Section 1 to the extent the person is capable of complying with it unless that person has a lawful excuse for that refusal or failure; or
- (b) in purported compliance with such a notice, knowingly provide information or give evidence that is false or misleading; or
- (c) destroy or otherwise dispose of, conceal or alter or falsify documents that are required to be produced pursuant to such a notice or cause or permit such destruction, disposal, concealment, alteration or falsification; or
- (d) where that person appears before the ERC, refuse or fail to be sworn or affirmed or refuse or fail to answer a question when required to do so by the ERC unless that person has a lawful excuse for that refusal or failure.

If the ERC determines that a person has violated any of the above prohibitions, the ERC may, after due notice and hearing, make an order requiring the person to pay to the ERC a fine or penalty of not more than P5,000,000.00.

## **Rule 13 - Disclosure of Information and Confidentiality**

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**Section 1. Matters that may be disclosed.** Subject to Section 4, the ERC may disclose to any person all or any of the contents of:

- (a) any application for a clearance or authorization that is made under Rule 8, Sections 1 or 11 or Rule 9, Sections 1 or 12; or
- (b) any document or information that is provided to the ERC under Rule 8, Sections 3(a) or 15(a) or Rule 9, Sections 3(a) or 15(a); or
- (c) any comments that are made to the ERC in relation to an application referred to in paragraph (a) or that are made to the ERC in accordance with Rule 8, Section 28 or Rule 9, Section 26.

**Section 2. Matters that must be made available to the public.** Subject to Section 4, the ERC must make available to the public, in such manner as it considers appropriate:

- (a) copies of all decisions made by it granting an application for a clearance under Rule 8 or Rule 9, deciding an application for an authorization under Rule 8 or Rule 9, or revoking or amending (or deciding not to revoke or amend) a clearance or authorization under Rule 8 or Rule 9; and
- (b) details of all undertakings accepted by it under Rule 9, Section 25.

**Section 3. Confidential matters that may be disclosed.** Subject to Section 4, if any contents of any application, document, information or comments are confidential, the ERC may nevertheless disclose those contents in a decision of the ERC made under these Competition Rules, or in its reasons for that decision, where the ERC considers that the disclosure is necessary to enable the decision, and the reasons for it, to be properly understood.

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**Section 4. When consent of applicant is required.** Subject to Section 5, until the time (if any) at which the relevant acquisition, merger or consolidation is made public, the ERC must not:

- (a) disclose to any person the contents of -
  - (i) any application for a clearance that is made under Rule 9; or
  - (ii) any document or information that is provided to the ERC under Rule 9, Section 3(a); or
  - (iii) any comments that are made to the ERC in relation to the revocation or amendment of a clearance in accordance with Rule 9, Section 26; or
- (b) make available to the public -
  - (i) copies of any decision granting an application for a clearance under Rule 9, or of any decision relating to the revocation or amendment of a clearance under Rule 9, or the reasons for any such decision; or
  - (ii) details of any undertaking that is deemed to be a condition of a clearance under Rule 9, Section 25,

except to the extent the person who made or provided the relevant application, document, information, comments or undertaking consents to that disclosure.

**Section 5. Disclosure to consultant.** Nothing in this Rule precludes the ERC from disclosing the contents of any application, document, information or comments to an external consultant who is engaged by the ERC for the purpose of advising it on those matters, providing that such external consultant has first given a written undertaking to the ERC to keep those contents confidential.

## **Rule 14 – Entitlement to installed generating capacity and sourcing of demand**

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**Section 1. Prohibitions.** To promote true market competition and prevent harmful monopoly and market power abuse:

- (a) Section 45(a) of the EPIRA and Rule 11, Section 4 of the IRR (subject to certain exceptions) prohibit a company, related group or IPP administrator, singly or in combination, from owning, operating or controlling more than -
  - (i) 30% of the installed generating capacity of a grid (as defined therein or otherwise determined pursuant thereto); or
  - (ii) 25% of the national installed generating capacity;
- (b) Section 45(b) of the EPIRA and Rule 11, Section 5(b) of the IRR (subject to certain exceptions) prohibit a distribution utility from sourcing from bilateral power supply contracts more than 50% of its total demand from an associated firm engaged in generation; and
- (c) Section 45(c) of the EPIRA and Rule 11, Section 6 of the IRR prohibit a distribution utility, for the first 5 years from the establishment of the wholesale electricity spot

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market, from sourcing more than 90% of its total demand from bilateral power supply contracts.

**Section 2. Installed generating capacity.** For the purposes of the prohibition referred to in Section 1(a)(i), the installed generating capacity of a grid is the sum of the installed generating capacities of the generation facilities which are connected to a transmission system or distribution system that forms part of that grid. For these purposes:

- (a) the installed generating capacity of a generation facility is the sum of the generating capacities of the installed generating units that comprise the generation facility;
- (b) the generating capacity of an installed generating unit is the MW rated capacity of that generating unit as provided under clause 6.4.3.3 of the Grid Code from time to time, except that -
  - (i) the generating capacity of an installed generating unit will be deemed to be reduced to the extent that there is a permanent reduction in its MW rated capacity and details of that reduction are provided under clause 6.4.3.3 of the Grid Code; and
  - (ii) the generating capacity of an installed generating unit will be deemed to be zero where the generating unit is temporarily closed, but only if the generating unit cannot reasonably be returned to service within 12 months at a cost of less than 10% of the full cost of constructing and commissioning a similar generating unit; and
- (c) a generating unit will be deemed to be installed only if it has been physically connected to the transmission system or distribution system that forms part of the grid and has injected energy into that system (even if it has not generated electricity at its MW rated capacity as provided under clause 6.4.3.3 of the Grid Code).

**Section 3. National installed generating capacity.** For the purposes of the prohibition referred to in Section 1(a)(ii), the national installed generating capacity is the sum of the installed generating capacities of each grid (as defined in Section 45(a) of the EPIRA and Rule 11, Section 4 of the IRR or otherwise determined pursuant thereto).

**Section 4. Installed generating capacity, to whom attributed.<sup>1</sup>** For the purposes of the prohibitions referred to in Section 1(a):

- (a) the installed generating capacity of a generation facility will be attributed to the entity that controls the terms and conditions on which the output of such capacity is sold in the market (in which case, such entity is referred to as controlling the installed generating capacity of that generation facility);
- (b) where the terms and conditions of the sale in the market of the output of the capacity of the installed generating units that comprise the generation facility are

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<sup>1</sup> The term "credited" is used in IRR, Rule 11, Section 4(b). However, for the purposes of these Competition Rules, "credited" and "attributed" have the same meaning.

# Competition Rules

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controlled by different entities (in which case, each such entity is referred to as controlling the generating capacity of the relevant installed generating unit) – the installed generating capacity of the generation facility will be attributed as between those entities such that each entity is attributed with the generating capacity of the installed generating unit which it controls; and

- (c) where the entity which controls the installed generating capacity of a generation facility or the generating capacity of an installed generating unit is an incorporated or unincorporated joint venture, partnership or association, that capacity will be attributed as between the entities that are parties to the joint venture, partnership or association as follows -
  - (i) where one of those entities has greater than a 50% equity interest (or the equivalent) in the joint venture, partnership or association, all of that capacity will be attributed to that entity; and
  - (ii) in any other case, that capacity will be attributed as between those entities in proportion to their equity interest (or the equivalent) in the joint venture, partnership or association.

**Section 5. Bilateral power supply contract.** For the purposes of the prohibitions referred to in Section 1(b) and (c):

- (a) a bilateral power supply contract is a contract for the physical supply of electricity and, for the avoidance of doubt, does not include a financial derivative contract or a contract for the sale of electricity from a distribution utility to a person who requires the supply and delivery of that electricity for its own consumption;
- (b) the total demand of a distribution utility is determined for each trading interval and is the aggregate of the gross ex-post settlement quantities of electricity for all customer nodes for which the distribution utility is financially responsible as a customer under the WESM Rules; and
- (c) the quantities of electricity which are sourced by a distribution utility from a bilateral power supply contract will be the quantities of electricity, expressed in MWh, which are purchased by the distribution utility pursuant to that bilateral power supply contract in each trading interval.

For the purposes of paragraphs (b) and (c), words which are defined in the WESM Rules have the same meaning in those paragraphs.

**Section 6. Isolated grid.** For the purposes of the prohibitions referred to in Section 1, an isolated grid is a transmission system or a distribution system which is not connected to a grid (as defined in Section 45(a) of the EPIRA and Rule 11, Section 4 of the IRR or otherwise determined pursuant thereto) and:

- (a) for the purposes of the prohibition referred to in Section 1(a), the generating capacity of a generation facility that is connected to an isolated grid will not be included in calculating the installed generating capacity of a grid, the national installed generating capacity or the percentage of such capacity that is owned, operated or controlled by a company, related group or IPP administrator;

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- (b) for the purposes of the prohibition referred to in Section 1(b), such part of the demand of a distribution utility which is sourced from a generation facility that is connected to an isolated grid will not be included in calculating either the total demand of that distribution utility or the percentage of that total demand which is sourced from any associated firms engaged in generation; and
- (c) for the purposes of the prohibition referred to in Section 1(c), such part of the demand of a distribution utility which is sourced from a generation facility that is connected to an isolated grid will not be included in calculating either the total demand of that distribution utility or the percentage of that total demand which is sourced from bilateral power supply contracts.

**Section 7. Prohibitions, violations of Competition Rules.** The prohibitions referred to in Section 1 are deemed to be incorporated in these Competition Rules as if they were set out in full in these Competition Rules, and a violation of any of these prohibitions is a violation of these Competition Rules.

### Rule 15 – Cross-subsidies

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Section 5.3 of the Business Separation Guideline:

- (a) requires TRANSCO (or its buyer or concessionaire) and distribution utilities to ensure that the only costs that are included in the prices charged by them for the provision of regulated services are costs which are properly allocated to those services; and
- (b) requires TRANSCO (or its buyer or concessionaire) and distribution utilities to ensure that, subject to certain exceptions set out in that section 5.3, the assets comprising the networks operated by them are not encumbered.

The requirements referred to above are deemed to be incorporated in these Competition Rules as if they were set out in full in these Competition Rules, and a violation of any of these requirements is a violation of these Competition Rules.

### Rule 16 – Reportorial requirements

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**Section 1. Power of ERC to require information.** The ERC may, from time to time and by written notice, require a person to provide it with information relating to that person's compliance with a condition of a clearance or authorization given or granted under these Competition Rules or with an order made by the ERC under these Competition Rules, and that person must comply with that request within such time as the ERC specifies in that notice (being a time period which is reasonable in all the circumstances).

**Section 2. Generation companies, what must be filed.** In order to enable the ERC to monitor compliance with the prohibitions referred to in Rule 14, Section 1(a), each generation company must file the following information with the ERC on or before 30 January of each year:

## Competition Rules

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- (a) a list, current as at the preceding 31 December, of all of the generating units of the generation company which are commissioned and connected, and their rated installed capacity, fuel type and location;
- (b) a list, current as at the preceding 31 December, of all of the generating units of the generation company which will be commissioned and connected during that year, and their proposed rated capacity, fuel type and location;
- (c) for each of the generating units referred to in paragraph (a) or (b) -
  - (i) the entities which will operate the generating unit;
  - (ii) the entities which will control the generating unit;
  - (iii) the entities which will own the generating unit; and
- (d) for each of the entities referred to in paragraph (c) -
  - (i) the names and addresses of its current directors and corresponding officers;
  - (ii) the name and registered office of any holding company, and the name and registered or principal office of any parent undertaking; and
  - (iii) a list of all its affiliates and their addresses and of the names and addresses of their current directors and corresponding officers.

**Section 3. Distribution utilities, what must be filed.** In order to enable the ERC to monitor compliance with the prohibitions referred to in Rule 14, Section 1(b) and (c), each distribution utility must file the following information with the ERC on or before 31 March, 30 June, 30 September and 31 December of each year (such information to be current as at the seventh day preceding each such date):

- (a) the names and addresses of its current directors and corresponding officers;
- (b) the name and registered office of any holding company, and the name and registered or principal office of any parent undertaking;
- (c) a list of all its affiliates and their addresses and of the names and addresses of their current directors and corresponding officers;
- (d) a copy of each bilateral power supply contract to which the distribution utility is a party or (if a copy of such contract has previously been filed with the ERC under this Section) a copy of any subsequent variation to that contract;
- (e) a report containing the following information -
  - (i) for each trading interval occurring during the relevant calendar quarter, the aggregate of the quantities of electricity, expressed in MWh, which are purchased by the distribution utility from any of its affiliates during that trading interval pursuant to a bilateral power supply contract;
  - (ii) for each trading interval occurring during the relevant calendar quarter, the aggregate of the quantities of electricity, expressed in MWh, which are purchased by the distribution utility during that trading interval pursuant to a bilateral power supply contract;

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- (iii) the total demand of the distribution utility for each trading interval occurring during the relevant calendar quarter; and
- (iv) the percentage of (i) to (iii) and the percentage of (ii) to (iii)  
(for the purposes of this paragraph (e), words which are defined in or for the purposes of Rule 14, Section 5 have the same meaning in this Section); and
- (f) a letter from the market operator certifying that the total demand data used for the purposes of paragraph (e) are consistent with the gross ex-post settlement quantities of electricity determined by the market operator or a copy of the final settlement statements issued to the distribution utility by the market operator that are used to calculate that total demand.

**Section 4. Market operator, what must be filed.** In order to enable the ERC to monitor potential anti-competitive behaviour, the market operator must file its calculation of the market monitoring indices specified in the schedule to these Competition Rules with the ERC in accordance with the guideline promulgated by the ERC and entitled "Market Monitoring Indices Guideline".

**Section 5. Distribution utilities, additional requirement.** In order to enable the ERC to monitor compliance with Section 28 of the EPIRA, each distribution utility which:

- (a) is not an electric co-operative; and
- (b) is not listed on the Philippine Stock Exchange or a holding company of which is not listed on the Philippine Stock Exchange,

must file the following information with the ERC on or before 30 January of each year:

- (a) the name and address of each shareholder in the distribution utility and in any holding company of the distribution utility who holds 25% or more of the voting shares in that distribution utility or holding company (as the case may be);
- (b) the number of voting shares held by each person referred to in paragraph (a) and the percentage of the total voting shares in the distribution utility or holding company (as the case may be) which is represented by the relevant voting shares held by that person; and
- (c) whether or not each person referred to in paragraph (a) is listed on the Philippine Stock Exchange.

**Section 6. Penalties.** If the ERC determines that a person has violated any of the above Sections, the ERC may, after due notice and hearing, make an order requiring the person to pay to the ERC a fine or penalty of not more than P5,000,000.00.

## Rule 17 - Amendment

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Subject to the provisions of any other applicable law:

- (a) these Competition Rules may be amended from time to time by the ERC but no such amendment may operate retrospectively; and

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- (b) an amendment to these Competition Rules takes effect 15 days after its publication in a newspaper of general circulation in the country.

## Rule 18 – Interpretation and Application

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**Section 1. Interpretation.** In these Competition Rules, unless the contrary intention appears:

- (a) the singular includes the plural and conversely;
- (b) where a term is defined, its other grammatical forms have a corresponding meaning;
- (c) a reference to any law or the rules and regulations issued implementing such a law or to any particular provision of a law or of any rules and regulations issued implementing such a law is taken to include any modification, consolidation, amendment, re-enactment, replacement or codification of the law, rules and regulations, or provisions; and
- (d) mentioning anything after include, includes or including does not limit what else might be included.

**Section 2. Extraterritorial application.** These Competition Rules extend to things done, or omitted or refused to be done, outside the Philippines to the extent that the doing of, or the omitting or refusing to do, those things affects a market. Without limiting the foregoing, Rule 6 extends to:

- (a) the acquisition outside the Philippines of shares or assets, whether or not such shares are shares in the capital stock of a corporation that is a Philippine National or such assets are assets of a Philippine National;
- (b) the merger outside the Philippines of two or more corporations, whether or not any of those corporations is a Philippine National; and
- (c) the consolidation outside the Philippines of two or more corporations to form a new corporation, whether or not any of those corporations is a Philippine National or the new corporation is a Philippine National,

to the extent that the acquisition affects a market.

**Section 3. Policies of Department of Energy.** The ERC must apply these Competition Rules consistently with such policies relating to the electric power industry as may be promulgated from time to time by the Department of Energy.

## Rule 19 – Separability

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If, for any reason, any rule or part of a rule of these Competition Rules is declared unconstitutional or invalid, those provisions which are not thereby affected will continue to be in full force and effect.

## Rule 20 – Effectivity

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These Competition Rules take effect 15 days after their publication in a newspaper of general circulation in the country.

# Competition Rules

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Pasig City, Philippines, [        ], [        ]

**MANUEL R. SANCHEZ**

Chairman

**MARY ANNE B. COLAYCO**

Commissioner

**OLIVER B. BUTALID**

Commissioner

**LETICIA V. IBAY**

Commissioner

**CARLOS R. ALINDADA**

Commissioner

## Schedule - Market Monitoring Indices<sup>5</sup>

Index description	Independent variable	By	Measure(s)	Report frequency
<b>Market Efficiency</b>				
offer price ratio (final offers only) MWh in merit at SRMC vs MWh in merit at offer	trading interval	station, company	ratio	weekly
SMP vs SMC	trading interval	grid	ratio	weekly
stack error ratio: spot price vs stack price	trading interval	grid	ratio	weekly
ex-post price vs ex-ante price	trading interval	grid	ratio	weekly
redispatch activity	trading interval	grid	TBD	weekly
other dispatch efficiency [TBD]				
day-ahead demand forecast error	lead time	grid	bias, standard error, outliers	weekly
week-ahead demand forecast error	lead time	grid	bias, standard error, outliers	weekly
day-ahead price forecast error	lead time	grid	bias, standard error, outliers	weekly
week-ahead price forecast error	lead time	grid	bias, standard error, outliers	weekly

<sup>5</sup> For a more detailed description of each indice, see Energy Regulatory Commission, Market Monitoring Indices Guideline.

## Competition Rules

Index description	Independent variable	By	Measure(s)	Report frequency
day-ahead supply (in-merit volume) forecast error	lead time	grid	bias, standard error, outliers	weekly
week-ahead supply (in-merit volume) forecast error	lead time	grid	bias, standard error, outliers	weekly
stack price day-ahead forecast error	lead time	grid	bias, standard error, outliers	weekly
stack price week-ahead forecast error	lead time	grid	bias, standard error, outliers	weekly
spot-price vs LRMC	baseload, mid-merit, peaking	grid	time-weighted average	annually
annual congestion price: price difference across constraint boundaries	year	major constraint	summed difference (\$/kW/year)	annually
<b>Market Compliance</b>				
Various measures [see table in section 3.1 of the Market Monitoring Indices Guideline]				
Check data changes	offer parameter	station, company	count of changes	annual
Non-scheduled generation forecast error (week ahead and day ahead)	lead time	station, company	bias, standard error, outliers	weekly
locational market activation	hourly	sub-zone	average nodal spot price	weekly

## Competition Rules

Index description	Independent variable	By	Measure(s)	Report frequency
probability of adverse changes [see section 3.5 of the Market Monitoring Indices Guideline]				
breach of dispatch tolerances	week	unit, company	count	weekly
SO recommended constraints	n/a	event	description	weekly
<b>Market Structure</b>				
locational market concentration: for energy (CRN and HHI only) and capacity; for competitive and monopolistic interconnect	trading interval	active sub-zone	CR1, CR4, HHI, RD1, RD2	weekly
average locational market concentration during active periods	weekly:	sub-zone	CR1, CR4, HHI, RD1, RD2	weekly
temporal market concentration	trading interval	active temporal market	CR1, CR4, HHI, RD1, RD2	weekly