

Republic of the Philippines
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City

**GUIDELINES FOR THE DETERMINATION OF INSTALLED GENERATING
CAPACITY IN A GRID AND THE NATIONAL INSTALLED GENERATING
CAPACITY AND ENFORCEMENT OF THE LIMITS ON CONCENTRATION OF
OWNERSHIP, OPERATION OR CONTROL OF INSTALLED GENERATING
CAPACITY UNDER SECTION 45 OF REPUBLIC ACT NO. 9136**

ERC CASE NO. 2005-017RM

Pursuant to Section 45 of Republic Act No. 9136 and Part II, Rule 11, Section 4 of the Implementing Rules and Regulations (IRR) of the Act, the Energy Regulatory Commission (ERC) hereby adopts and promulgates the following Guidelines for the determination of installed generating capacity in a grid and the national generating capacity and enforcement of the limits on concentration of ownership, operation or control of installed generating capacity:

ARTICLE I

GENERAL PROVISIONS

Section 1. Purpose/Objectives

The following are the objectives of these Guidelines:

- a. To promote free and fair competition in the generation and supply of electricity to achieve greater operational and economic efficiency;

- b. To ensure consumer protection and enhance the competitive operation of the markets for generation and supply of electricity

Section 2. Guiding Principle

No Person, Company, Related Group or IPP administrator, singly or in combination, can own, operate or control more than thirty percent (30%) of the installed capacity of a grid and/or twenty-five percent (25%) of the national installed generating capacity.

Section 3. Scope

These Guidelines shall apply to all Persons, such as Generation Companies, subsidiaries and Affiliates of Generation Companies, stockholders and officials of Generation Companies, Related Group or IPP Administrators, and other Electric Power Industry Participants.

Section 4. Definition of Terms.

Act refers to Republic Act No. 9136, otherwise known as “Electric Power Industry Reform Act of 2001”;

Affiliate refers to any person which, 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 another person. Affiliates shall include a subsidiary company and parent company and subsidiaries, directly or indirectly, of a common parent;

Control	generally refers to the exercise of a directing, operating, managing, superintending, restricting, regulating, governing, administering, or overseeing influence over an affair, business, or activity; when used in the context of the definition of “Affiliate” and “Related Group”, refers to the power to direct or cause the direction of the management policies of a Person by contract, by agency, or otherwise;
Electric Power Industry Participant	refers to any person or entity engaged in the generation, transmission, distribution or supply of electricity;
Energy Regulatory Commission or ERC	refers to the regulatory agency created under the Act;
Generation Company	refers to any person or entity authorized by ERC to operate facilities used in the generation of electricity;
Generation Facility	refers to a facility for the production of electricity;
Generation of Electricity	refers to the production of electricity by a generation company or co-generation facility pursuant to the provisions of the Act;

Grid refers to the high voltage backbone system of interconnected transmission lines, substations and related facilities, located in each of Luzon, Visayas and Mindanao, or as may otherwise be determined by the ERC;

Installed Generating Capacity in a Grid refers to the sum of the maximum capacity of the generation facilities which are connected to a transmission system or distribution system that forms part of a particular Grid;

Self-generation facilities (SGFs) shall be excluded in the capacity computation until such time that the ERC shall have approved an appropriate program for their participation in the market.

IPP Administrators refers to qualified independent entities appointed by the Power Sector Assets and Liabilities Management Corporation who shall administer, conserve and manage the contracted energy output of the National Power Corporation-Independent Power Producer (NPC-IPP) contracts, including selling the contracted energy output of these contracts and offering ancillary services, where applicable;

Maximum Capacity refers to the maximum capacity that a unit can sustain over a specified period of time as established during formal demonstration through testing based on manufacturers approved procedure or any internationally accepted testing such as but not limited to

the American Society of Mechanical Engineers (ASME) and American National Standards Institute (ANSI): Provided, That the initial submission thereof shall be the maximum capacity over the period of twelve (12) months as provided in the operational report.

National Power Corporation or NPC

refers to the government corporation created under Republic Act No. 6395, as amended;

Ownership

refers to that relation in law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by law or the concurrence with the rights of another; covers both equitable or legal ownership;

Person

refers to a natural or juridical person;

Power Sector Assets and Liabilities Management Corporation or PSALM Corp. or PSALM

refers to the corporation created pursuant to Section 49 of the Act;

Related Group

refers to a person and any business entity controlled by that person, along with the Affiliates of such business entity, and the directors and officers of the business entity or its Affiliates, and relatives by consanguinity or affinity, legitimate or common law, within the fourth civil degree, of the person or any of the foregoing directors or officers.

ARTICLE II

Limitations and Determination of Ownership, Operation or Control of Installed Generating Capacity

Section 1. Limits on Concentration of Ownership, Operation or Control of Installed Generating Capacity.

No Person, Company, Related Group or IPP Administrator, singly or in combination, can own, operate or control more than thirty percent (30%) of the installed generating capacity of a Grid and/or twenty-five percent (25%) of the national installed generating capacity.

Section 2. Determination of the Installed Generating Capacity

To determine the installed generating capacity of a Grid, for the purpose of applying the Limits on Concentration of Ownership, Operation or Control of Installed Generating Capacity:

- a. the installed generating capacity of a generation facility is the sum of the maximum capacity of the generating units that comprise the generation facility;
- b. the generating capacity of a generating unit is the maximum capacity of that generating unit, except that:
 - i. the generating capacity of a generating unit will be deemed to be reduced to the extent of any permanent reduction in its maximum capacity;
 - ii. the generating capacity of a generating unit will be deemed to be zero when it is temporarily shut down and cannot reasonably be energized for connection to the Grid for a period longer than 12 months; and

- c. a generating unit, even if it has not generated electricity at its maximum capacity, will be deemed to be installed only if it has been physically and electrically connected to the transmission system or distribution system that forms part of the Grid and has injected energy into that system.

Section 3. Fixing of the Installed Capacity per Grid, National Grid and the Market Share Limitation per Grid and the National Grid

In accordance with the foregoing Sections, the initial setting of the installed generating capacity per grid, national grid and the market share limitations per grid and the national grid shall be contained in a separate and appropriate document to be issued by the ERC to that effect.

The foregoing installed generating capacity per grid and national installed generating capacity, and market share limitations will be adjusted by the ERC on or before the 15th day of March of the succeeding years and/or as often as may be necessary based on the maximum capacity of the power plants as submitted by the Generation Companies and other entities that are required to submit reports under oath with the ERC pursuant to these Guidelines on their compliance with the market share limitations set in the Act and the Guidelines on the Issuance of Certificates of Compliance.

Section 4. Crediting of Generating Capacity

In crediting generating capacity of a generation facility in favor of one or more persons or entities, which own, operate, or control such generation facility, the following rules shall be observed:

- a. If different entities own the same generation facility, the capacity of such facility shall be credited to the entity controlling the terms and conditions of the prices or quantities of the output sold in the market.
- b. If an entity own the generation facility and some other entity or entities operate or exercise control over such facility, pursuant to a maintenance or operating contract, lease, assignment, joint venture agreement, or any other similar arrangement, the entire capacity of such facility shall be credited to the entity controlling the capacity of the generation facility and not to the entity owning the generation facility.

- c. Consistent with the foregoing, in the case of NPC and its Independent Power Producers (IPPs), it is the control and not the ownership of the power plants which determines who should be credited with the total capacity under contract as it is NPC that actually controls the quantity (dispatch level) generated from the subject power plants and the price of electricity offered to the market. Thus, NPC will be credited the contracted capacity while the remaining capacity not under contract will be credited to the owner of the plant or the entity exercising control over such facility, in accordance with the preceding rules.

In the case of Distribution Utilities (DUs), however, they shall not be considered in control of the capacity, which they have contracted under bilateral supply contracts executed with generation companies for the purpose of serving their customers, provided that such contracted capacity is not, in the determination of the ERC taking into account all relevant considerations such as the DU's forecasted demand, unreasonably excessive. In such cases, the DU shall, after due proceedings, be credited with the capacity in excess of what the ERC deems to be reasonable for such DU.

- d. The preceding rules notwithstanding, if, in ERC's determination, the owners have resorted to a particular maintaining or operating contract, lease, assignment, joint venture agreement, or any other similar arrangement, that would have the effect of defeating the rule on the limits on concentration of ownership, operation or control of installed generating capacity or circumventing the provisions of the Competition Rules, the ERC may deem any or all the parties to such contracts or arrangement to be in control of the capacity of the generation facility and thus in their favor will be individually credited the capacity of such facility to the extent covered by their contracts.

Section 5. Exemption from the Market Share Limitations

Section 1 hereof shall not apply to PSALM or NPC during the time that its assets are being privatized and isolated grids that are not connected to the high voltage transmission system.

Section 6. Breach of the Market Share Limitations

In the event that a Person or entities covered by the Market Share Limitations should exceed the limits as periodically determined and set by the ERC in accordance with these Guidelines, there should be a duty on their part to report this fact and the reason therefor to the ERC within fifteen (15) days from start of occurrence.

Upon determination by the ERC that a Person or entities covered by Market Share Limitations have breached the prescribed limits, the ERC shall issue an order for the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits or other market power mitigating measures which are reasonably known and generally accepted within the electric power industry that the ERC may implement. Such person or entities shall comply with such limits within a reasonable period, without prejudice to the imposition of the fines and penalties as provided under Article III of the "Guidelines to Govern the Imposition of Administrative Sanctions in the Form of Fines and Penalties Pursuant to Section 46 of the Act" and institution of administrative cases against the erring parties for violation of the Competition Rules and the imposition of the penalties thereunder.

If the reason for exceeding the limits is the increase or improvement in the technical capacity of the existing generation facilities of such Person or entities due to plant rehabilitation and other improvements or for any other factors beyond the control of such Person or entities and there is no unfair competition that is created thereby, the ERC may excuse the same until its next determination of the installed generating capacity in a grid and the national installed generating capacity and only after then will the ERC issue an order for appropriate market power mitigating measures or divestment, if still warranted, to such extent as would make such Person or entities compliant with the market share limitations based on the updated installed generating capacity in a grid and the national installed generating capacity. If such breach constitutes a benefit to the public, the ERC may likewise grant authorization under the Competition Rules, after due notice and hearing and subject to such conditions it may impose, for the breach of the market share limitations.

ARTICLE III

Reportorial Requirements

Section 1. Information

1. To enable the ERC to monitor compliance with the market share limitations, each generation company must file with the ERC, on or before 30 January of each year, a statement under oath containing the following information:
 - a. a list, current as of the preceding 31 December, of all of the generating units of the generation company which are commissioned and connected, and their maximum capacity, fuel type, and location;
 - b. a list, current as of the preceding 31 December, of all of the generating units of the generation company which will be commissioned and connected during the filing year, and their proposed maximum capacity, fuel type, and location;
 - c. for each of the generating units referred to in paragraph (a) or (b), if ownership and control is vested in or shared with another or some other entities other than the generation company, the persons or entities which have equitable or legal title thereto and those which exercise control over the capacity thereof, pursuant to whatever arrangement entered into by and between them;
 - d. for each of the entities referred to in paragraph (c):
 - i. the names and addresses of the stockholders and their respective shareholdings, the current directors and 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 the affiliates and their addresses and of the names and addresses of their current directors and officers.

- iv. the statement under oath shall be jointly filed by the entities; and
 - v. the latest Audited Financial Statements and General Information Sheet shall likewise be submitted to validate the information referred to in paragraphs i, ii, and iii.
2. To enable the ERC to monitor the actual generating capacity in the system, it shall be the obligation of all generation companies and/or entities which exercise control over the capacity of such generation companies to inform the ERC through electronic mail of any changes in their available capacity on a per unit basis, within five (5) days from the occurrence thereof.

Section 2. Power of ERC to Require Information.

The ERC may, upon written notice, require any Person covered by these Guidelines to provide it with any information or documents under oath relating to the enforcement and monitoring of compliance with these Guidelines.

ARTICLE IV

SANCTIONS

Any Person covered by these Guidelines that fails to comply with any of the above Sections, after due notice and hearing, shall be liable for such appropriate fines and penalties as provided under Article III of the "Guidelines to Govern the Imposition of Administrative Sanctions in the Form of Fines and Penalties Pursuant to Section 46 of the Act." Failure to comply with any of the above Sections or to any order issued by the ERC pursuant thereto shall also be a ground for revocation of Certificate of Compliance issued to the erring generation company.

ARTICLE V

SEPARABILITY

If for any reason any provision of these Guidelines is declared unconstitutional or invalid by final judgment of a competent court, the other parts or provisions hereof which were not affected thereby shall continue to be in full force and effect.

ARTICLE VI

EFFECTIVITY

These Guidelines shall take effect on the fifteenth (15th) day following its publication in a newspaper of general circulation.

Pasig City, _____.

RODOLFO B. ALBANO
Chairman

OLIVER B. BUTALID
Commissioner

JESUS N. ALCORDO
Commiossioner

RAUF A. TAN
Commissioner

ALEJANDRO Z. BARIN
Commissioner