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ENERGY REGULATORY COMMISSION COMPETITION RULES

Rule 1 - Preamble

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 11.8 of the IRR.

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Rule 2 - Object of Competition Rules

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.

Rule 3 - Definitions

(1) 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; and
- (c) in relation to goods and services – acquire property in, or rights in relation to, goods or services;

“assets” includes immovables and movables, whether tangible or intangible 1 ;

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

- (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, whether or not having legal or equitable force;

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

“Business Separation Guideline” means the guideline of that name made by the ERC pursuant to rule 10.1 of the IRR;

“Complaint Procedure Rules” means the rules of that name made by the ERC pursuant to section 45 of the EPIRA and rule 11.7(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;

“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;

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

“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;

“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;

“primary provision” means:

- (a) rule 4(1), 4(3), 5(1), 6(1), 8(38), 9(34) or 10(4); or
- (b) a prohibition referred to in rule 14(1) and deemed to be incorporated in these Competition Rules by virtue of rule 14(7); or
- (c) a requirement referred to in rule 15(1) and deemed to be incorporated in these Competition Rules by virtue of rule 15(2);

“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:

- (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 a contract of service;

“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;

~~(2) Other~~ terms used in these Competition Rules which are defined in the EPIRA or the IRR (not being terms which are otherwise defined in this subsection (1)) have the meaning given to them in the EPIRA or the IRR (as the case may be).

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~~(3) In these Competition Rules, 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.~~

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~~(4) For the purposes of these Competition Rules, references to the lessening of competition are to be read as including references to preventing, restricting or hindering competition~~

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Rule 4 - Anti-competitive agreements, arrangements and understandings

(1) Substantially Lessening Competition. No person shall:

(a) make an agreement or arrangement, or arrive at an understanding, if a provision of the agreement, arrangement or understanding would have, or would be likely to have, the effect of substantially lessening competition in a market, subject to paragraph 8 herein; or

(b) give effect to a provision of an agreement, arrangement or understanding, whether the agreement or arrangement was made, or the understanding was arrived at, before or after the commencement of these Competition Rules, if that provision has, or is likely to have, the effect of substantially lessening competition in a market.

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(2) Other provisions in the same agreement, arrangement or understanding, as well as provisions of any other agreement, arrangement or understanding to which a person or any affiliate of a person is a party, shall be considered in determining whether a provision has, or is likely to have, the effect of substantially lessening competition in a market.

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 (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

(3) Price Fixing. No person shall:

(a) make an agreement or arrangement, or arrive at an understanding, if a provision of the agreement, arrangement or understanding is a price fixing provision, subject to paragraph 8 herein; or

(b) give effect to a provision of an agreement, arrangement or understanding (whether the agreement or arrangement was made, or the understanding was arrived at, before or after the commencement of these Competition Rules) if that provision is a price fixing provision.

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(4) 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:

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- (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.

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.

(5) Prima Facie Evidence of Price Fixing. A provision shall be deemed to have the effect of fixing 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 and a minimum amount that the price is not to be below.

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(6) This rule [refers to price fixing?] does not apply to or in relation to an agreement, arrangement or understanding in so far as the agreement, arrangement or understanding provides for:

- (a) 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
- (b) the merger of two or more corporations; or
- (c) the consolidation of two or more corporations to form a new corporation.

(7) This rule does not apply to or in relation to an agreement, arrangement or understanding the only parties to which are affiliates of each other. [Presumably, this refers to price fixing. The definition of price fixing, however, has specified "or who is not an affiliate of such a party." It is rather redundant.]

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(8) The making by a person of an agreement shall not be violative of rule 4(1)(a) or rule 4(3)(a) above, as the case may be, if:

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(a) the agreement contains a suspensive condition that the relevant provision will not come into force unless and until:

(i) in the case of rule 4(1)(a) - a clearance or authorization¹ has been given in respect of the making of that agreement in accordance with Rule 8; or

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(ii) in the case of Rule 4(1)(B)(a) - an authorization¹ has been granted in respect of the making of that agreement in accordance with Rule 8; and

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(b) the application for clearance or for authorization has been made within 21 days after the agreement is made.

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¹ The granting of authorization as provided in Rule 8 may not be supported by the EPIRA. The said authorization is issued by ERC and allows a person to give effect to a provision of an agreement, arrangement or understanding where the same: (i) has or might have the effect of substantially lessening competition; or (ii) is or might be a price fixing provision. Rule 8 gives the ERC discretion to weigh on the basis of "public benefit test" whether to allow any provision that would otherwise be violative of the law.

Section 45 of the EPIRA upon which the Competition Rules derives authority provides that:

SECTION 45. Cross Ownership, Market Power Abuse and Anti-Competitive Behavior. — No participant in the electricity industry or any other person may engage in any anti-competitive behavior 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.

There appears to be no provision in the EPIRA empowering ERC to make exceptions, even on the basis of a "public benefit test" as elaborated in Rule 8.

Rule 11 Section 8 of the IRR of the EPIRA may have expanded the authority of ERC. It states:

Section 8. Anti-Competitive Behavior and Other Unfair Trade Practices.

The ERC shall promulgate Competition Rules prohibiting, and specifying appropriate penalties and other remedies for, any contract, combination or conspiracy that unreasonably restricts competition in any market for electricity, or any conduct that constitutes an abuse of market power or an attempted monopolization of any market for electricity, including but not limited to the following: x x x

The use of the word "unreasonably" in the above IRR provision may be interpreted to mean that if the restriction on competition is reasonable, the contract, combination or conspiracy may be allowed. The same, however, may also not find basis in the EPIRA.

However, should the agreement be given effect in violation of the foregoing, there is nothing in this subsection that would prevent the a finding of violation under Rule 4(1)(A)(b) or Rule 4(1)(B)(b).

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