

Rule 5 - Misuse of market power

(1) A person that has a substantial degree of power in a market must not misuse that power.

(2) 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 for the purposes of this rule to have a substantial degree of power in that market.

[CLTPSJ: A definition of the term "substantial degree of power in a market" should be inserted here. Note that Section 5.2.5 of the Guidelines defines the word "substantial"]

(3) In determining for the purposes of this rule 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.

(4) In determining for the purposes of this rule 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.

(5) For the purposes of this rule, a person may use or misuse its power in a market by, among other things:

(a) doing an act; or

(b) refusing to do, or refraining (otherwise than inadvertently) from doing, an act; or

(c) making it known that an act will or will not be done; or

(d) refusing to do an act, or to offer to do an act, except on a condition or conditions; or

(e) making it known that an act will not be done, except on a condition or conditions; or

(f) making it known that an act will only be done on a condition or conditions.

(6) In this rule a reference to power is a reference to market power.

(7) 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 of a clearance that has been given, or an authorization that has been granted, under rule 8.

Rule 6 – Acquisitions, mergers and consolidations

(1) 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.

(2) In determining for the purposes of this rule whether an acquisition, merger or consolidation 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 (ie. the degree of power in the market which is exercisable by persons who trade in the market other than as competitors of the persons or corporations referred to in subsection (1));
- (d) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (e) the likelihood that the acquisition, merger or consolidation would result in the removal from the market of a vigorous and effective competitor; and
- (f) the nature and extent of vertical integration in the market.

(3) 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); [CLTPSJ: This may be contrary to Section 6.1.6 of the Guidelines which provides that securing of the clearance/ authorization is not mandatory. The Guidelines specifically provide: "There is no formal requirement that the parties to a proposed merger advise the ERC prior to entering into an agreement to effect that merger (unless they wish to apply for authorization or clearance).....Accordingly, if there is any doubt that a proposed merger might violate the merger prohibition, the relevant parties would be well advised to approach the ERC for either a clearance or an authorization, as appropriate."] and

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(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 for the purposes of these Competition Rules as having taken place in pursuance of the agreement before:

(i) that condition is satisfied or waived; or

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(ii) the agreement otherwise ceases to be subject to that condition, Deleted: (e)

whichever happens first.

(4) 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 a charge 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 and the like) but does not include a reference to an acquisition by way of a charge only or an acquisition in the ordinary course of business.

Rule 7 - Exceptions

(1) In deciding whether a person has violated these Competition Rules, the following must not be taken into account:

(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;

(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 solely for the protection of the purchaser in respect of the goodwill of the business;

(d) the imposition of, or giving effect to, a condition of a licence 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.

(2) For the purposes of subsection (1)(a), 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).

(3) 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, where that agreement, arrangement or understanding is comprised of:

(i) 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

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(ii) the Grid Code as amended from time to time with the approval of the ERC; or

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(iii) the Distribution Code as amended from time to time with the approval of the ERC; or

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(iv) a transition supply contract that is made in accordance with section 67 of the EPIRA and approved by the ERC.

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

Application for clearance

(1) 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(1)(a) (such a determination is referred to in this rule as a **clearance**).

(2) An application for a clearance under subsection (1) must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

(3) A person who has made an application for a clearance under subsection (1):

(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 determining whether or not to grant the application; and

(b) must pay the costs of such external consultants as the ERC engages for the purpose of advising it on matters relating to the application for clearance.

(4) A person who has made an application for a clearance under subsection (1) may, at any time before that application is determined by the ERC under subsection (6), withdraw that application by notice in writing to the ERC.

(5) Unless a person who has applied for a clearance has withdrawn that application under subsection (4), that person must not make the agreement or arrangement, or arrive at the understanding, the subject of that application until that application has been determined by the ERC under subsection (6).

Determination of application for clearance

(6) The ERC must, [CLTPSJ: within 60 days from application date (see: Sec. 4.6.9 of the Guidelines)] in respect of an application for a clearance under subsection (1) which has not been withdrawn under subsection (4), make a determination in writing:

(a) granting the application; or

(b) refusing to grant the application.

(7) The ERC must state in writing its reasons for a determination made by it under subsection (6).

(8) A clearance given under subsection (6):

(a) expires 6 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.

Test for clearance

(9) The ERC must grant an application for a clearance 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, the subject of the application will not violate rule 4(1)(a); and

(b) the giving effect to any provision of that agreement, arrangement or understanding will not violate rule 4(1)(b).

Effect of clearance

(10) While a clearance given by the ERC pursuant to an application under subsection (1) remains in force, the applicant may make the agreement or arrangement, or arrive at the understanding, in accordance with the clearance (in which case the subsequent expiry of the clearance pursuant to subsection (8)(a) will not result in the making of that agreement or arrangement, or the arriving at that understanding, violating rule 4(1)(a)).

Inquiries by ERC

(11) In order to assist the ERC in determining whether or not to grant an application for a clearance, the ERC may consult with such persons as it considers appropriate.

Application for authorization

(12) A person may apply to the ERC for an authorization to make an agreement or arrangement, or to arrive at an understanding, where a provision of the agreement, arrangement or understanding:

(a) would have, or might have, the effect of substantially lessening competition in a market for the purposes of rule 4(1)(a); or

(b) is, or might be, a price fixing provision for the purposes of rule 4(3)(a).

(13) A person may apply to the ERC for an authorization to give effect to a provision of an agreement, arrangement or understanding where the provision:

(a) has, or might have, the effect of substantially lessening competition in a market for the purposes of rule 4(1)(b); or

(b) is, or might be, a price fixing provision for the purposes of rule 4(3)(b).

(14) An application for an authorization under subsection (12) or (13) must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

(15) An application made to the ERC under subsection (12) or (13) 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.

(16) On the receipt of an application for an authorization under subsection (12) or (13) that complies with subsection (14), 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.

(17) A notice given under subsection (16) must specify the manner in which, and the time by which, any comments in relation to the application must be made to the ERC.

(18) A person who has made an application for an authorization under subsection (12) or (13):

(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 the costs of such external consultants as the ERC engages for the purpose of advising it on matters relating to the application for authorization.

(19) A person who has made an application for an authorization under subsection (12) or (13) may, at any time before that application is determined by the ERC under subsection (24), withdraw that application by notice in writing to the ERC.

(20) Subject to subsection (21), unless a person who has applied for an authorization has withdrawn that application under subsection (19), that person must not make the agreement or arrangement, arrive at the understanding or give effect to the provision the subject of that application until that application has been determined by the ERC under subsection (24).

(21) Where a person has applied for an authorization under subsection (13) 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 determined by the ERC under subsection (24) 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.

Determination of application for authorization

(22) Before determining an application for an authorization under subsection (12) or (13):

(a) 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;

(b) the ERC may prepare a draft determination in relation to the application, in which case the ERC must:

(i) publish notice of the draft determination in at least two newspapers of general circulation; and

(ii) give notice of the draft determination, and send a copy of the draft determination, to the applicant and to each person who has made comments to the ERC in relation to the application; and

(c) the ERC must take into account any comments that are made to the ERC by the applicant or by any other person in relation to the application and in relation to any draft determination which is prepared under subsection (22)(b).

(23) A notice given under subsection (22)(b) must:

(a) state the determination of the ERC in relation to the application for authorization as set out in the draft determination; and

(b) specify the manner in which, and the time by which, any comments in relation to the draft determination must be made to the ERC.

(24) The ERC must, in respect of an application for an authorization under subsection (12) or (13) which has not been withdrawn under subsection (19), make a determination in writing:

(a) granting such authorization as the ERC considers appropriate; or

(b) refusing to grant the application.

(25) Any authorization granted pursuant to subsection (24):

(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.

(26) The ERC must state in writing its reasons for a determination made by it under subsection (24).

Test for authorization

(27) The ERC must make a determination granting an authorization pursuant to an application made under subsection (12) or (13) if (and must not grant such an authorization 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, the subject of that 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:

(b.1) all of the provisions of the relevant agreement, arrangement or understanding; and

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(b.2) the provisions of any other agreement, arrangement or understanding where a party to that other agreement, arrangement or understanding is:

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(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.

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(28) In determining what amounts to a benefit to the public for the purposes of subsection (27) 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.

(29) 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 makes a determination in respect of the application for that authorization, but, except as the ERC so permits under subsection (21), nothing in this subsection 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.

Effect of authorization

(30) Where an application for an authorization in relation to a particular agreement, arrangement or understanding is expressed, in accordance with subsection (15), 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.

(31) While an authorization granted by the ERC pursuant to an application under subsection (12) remains in force, the applicant may:

(a) make the agreement or arrangement or arrive at the understanding the subject of that application in accordance with the authorization (in which case the subsequent expiry of the authorization pursuant to subsection (25)(b) will not result in the making of that agreement or arrangement, or the arriving at that understanding, violating rule 4(1)(a) or rule 4(3)(a)); and

(b) give effect in accordance with the authorization to any provision of the agreement or arrangement so made or of the understanding so arrived at.

(32) While an authorization granted by the ERC pursuant to an application under subsection (13) remains in force, the applicant may give effect to the provision of the agreement, arrangement or understanding the subject of that application in accordance with the authorization.

(33) An authorization granted by the ERC to a person pursuant to an application under subsection (12) or (13):

(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

(34) 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 makes a determination in respect of the application for that clearance or authorization.

Revocation or amendment of clearances or authorizations

(35) If, at **any time** after granting a clearance or authorization under this rule, it appears to the ERC that: [CLTPSJ: A time frame within which the clearance or authorization may be revoked or amended, should be provided, i.e. period of time from discovery of the ground for revocation/ amendment. Otherwise, the securing of a clearance/ authorization would lose its significance]

(a) the clearance was given or the authorization was granted on the basis of information that was 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 subsection (27) to grant that authorization,

then the ERC [CLTPSJ: shall (the giving of notice and opportunity to be heard to the person to whose favor a clearance or authorization was granted should be mandatory as a matter of due process)], by notice in writing given to any person who, in the opinion of the ERC, is likely to have an interest in the matter:

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(i) inform that person that it is considering revoking or amending the clearance or authorization;

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(ii) indicate the basis on which it is considering revoking or amending the clearance or authorization; and

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(iii) 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.

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(36) After considering any comments made to it in accordance with subsection (35), the ERC must make a determination in writing:

- (a) revoking or amending the clearance or authorization; or
- (b) deciding not to revoke or amend the clearance or authorization.

(37) The ERC must state in writing its reasons for a determination made by it under subsection (36).

Violations

(38) A person must comply with a condition to which an authorization that is granted under this rule is subject and a failure to do so is a violation of these Competition Rules.

(39) A person must not knowingly provide 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.

(40) A violation of subsection (5), (20) or (39) is a violation of these Competition Rules.

(41) If the ERC determines that a person has violated subsection (5), (20) or (39), 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;
- (b) in the case of a violation of subsection (5) or (20) - 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 subsection (5) or (20) (as the case may be) is a violation of rule 4.

Conditional agreements

(42) For the purposes of this rule 8, an agreement the making of which is not a violation of rule 4(1)(a) or rule 4(3)(a) by virtue of the application of rule 4(8):

- (a) will be treated (for so long as the making of it is not such a violation of rule 4(1)(a) or rule 4(3)(a) by virtue of the application of rule 4(8)) 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(8)(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

Application for clearance

(1) A person who proposes to:

(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,

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

(2) An application for a clearance under subsection (1) must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

(3) A person who has made an application for a clearance under subsection (1) 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 determining whether or not to grant the application; and

(b) must pay the costs of such external consultants as the ERC engages for the purpose of advising it on matters relating to the application for clearance (including in connection with the collection and assessment, prior to the expiry of the period referred to in subsection (11), of information regarding the effect or likely effect of the relevant acquisition, merger or consolidation on competition in a market).

(4) A person who has made an application for a clearance under subsection (1) may, at any time before the application is determined by the ERC under subsection (6), withdraw that application by notice in writing to the ERC.

(5) Unless a person who has applied for a clearance has withdrawn that application under subsection (4), that person must not acquire the shares or assets, or undertake the merger or consolidation, the subject of that application until that application has been determined by the ERC under subsection (6).

Determination of application for clearance

(6) The ERC must, [CLTPSJ: within 60 days from application date (see Sec. 6.4.8 of the Guidelines)] in respect of an application for a clearance under subsection (1) which has not been withdrawn under subsection (4), make a determination in writing:

- (a) granting the application; or
- (b) refusing to grant the application.

(7) The ERC must state in writing its reasons for a determination made by it under subsection (6).

(8) A clearance given under subsection (6):

- (a) expires 6 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.

Test for clearance

(9) 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(1) .

Effect of clearance

(10) While a clearance given by the ERC pursuant to an application under subsection (1) remains in force, the applicant may, subject to subsection (11), acquire shares or assets, merge or consolidate in accordance with the clearance (in which case the subsequent expiry of the clearance pursuant to subsection (8)(a) will not result in that acquisition, merger or consolidation violating rule 6(1)).

(11) 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.

Inquiries by ERC

(12) In order to assist the ERC in determining:

(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 subsection (31)(a),

the ERC may, subject to subsection (13), consult with such persons as it considers appropriate.

(13) 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 subsection (12) where the applicant for the clearance has consented to the ERC consulting with that person for that purpose.

Application for authorization

(14) 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(1).

(15) An application for an authorization under subsection (14) must be made in writing and must contain such particulars (if any) as are required for that purpose by the ERC.

(16) On the receipt of an application for an authorization under subsection (14) that complies with subsection (15), 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.

(17) A notice given under subsection (16) must specify the manner in which, and the time by which, any comments in relation to the application must be made to the ERC.

(18) A person who has made an application for an authorization under subsection (14):

(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 the costs of such external consultants as the ERC engages for the purpose of advising it on matters relating to the application for authorization.

(19) A person who has made an application for an authorization under subsection (14) may, at any time before that application is determined by the ERC under subsection (23), withdraw that application by notice in writing to the ERC.

(20) Unless a person who has applied for an authorization has withdrawn that application under subsection (19), that person must not acquire the shares or assets, or undertake the merger or consolidation, the subject of that application until that application has been determined by the ERC under subsection (23).

Determination of application for authorization

(21) Before determining an application for an authorization under subsection (14):

(a) 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;

(b) the ERC may prepare a draft determination in relation to the application, in which case the ERC must:

(i) publish notice of the draft determination in at least two newspapers of general circulation; and

(ii) give notice of the draft determination, and send a copy of the draft determination, to the applicant and to each person who has made comments to the ERC in relation to the application; and

(c) the ERC must take into account any comments that are made to the ERC by the applicant or by any other person in relation to the application and in relation to any draft determination which is prepared under subsection (21)(b).

(22) A notice given under subsection (21)(b) must:

(a) state the determination of the ERC in relation to the application for authorization as set out in the draft determination; and

(b) specify the manner in which, and the time by which, any comments in relation to the draft determination must be made to the ERC.

(23) The ERC must, in respect of an application for an authorization under subsection (14) which has not been withdrawn under subsection (19), make a determination in writing:

(a) granting such authorization as the ERC considers appropriate; or

(b) refusing to grant the application.

(24) Any authorization granted pursuant to subsection (23):

(a) may be granted subject to such conditions as the ERC considers appropriate;

(b) expires 6 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.

(25) The ERC must state in writing its reasons for a determination made by it under subsection (23).

Test for authorization

(26) The ERC must make a determination granting an authorization pursuant to an application made under subsection (14) if (and must not grant such an authorization 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,

the subject of that 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.

(27) In determining what amounts to a benefit to the public for the purposes of subsection (26) 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 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.

Effect of authorization

(28) While an authorization granted by the ERC pursuant to an application under subsection (14) 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 subsection (24)(b) will not result in that acquisition, merger or consolidation violating rule 6(1)).

Provisions applicable to clearances and authorizations

(29) 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 makes a determination in respect of the application for that clearance or authorization.

(30) 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.

Revocation or amendment of clearances and authorizations

(31) If, at **any time** after granting a clearance or authorization under this rule, it appears to the ERC that: [CLTPSJ: A time frame within which the clearance or authorization may be revoked or amended, should be provided, i.e. period of time from discovery of the ground for revocation/ amendment. Otherwise, the securing of a clearance/ authorization would lose its significance],

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(a) the clearance was given or the authorization was granted on the basis of information that was 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 subsection (30)) has not been complied with,

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

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(c) inform that person that it is considering revoking or amending the clearance or authorization;

(d) indicate the basis on which it is considering revoking or amending the clearance or authorization; and

(e) 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.

(32) After considering any comments made to it in accordance with subsection (31), the ERC must make a determination in writing:

(a) revoking or amending the clearance or authorization; or

(b) deciding not to revoke or amend the clearance or authorization.

(33) The ERC must state in writing its reasons for a determination made by it under subsection (32).

Violations

(34) A person must comply with a 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 by that person pursuant to subsection (30)) and a failure to do so is a violation of these Competition Rules.

(35) A person must not knowingly provide 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.

(36) A violation of subsection (5), (11), (20) or (35) is a violation of these Competition Rules.

(37) If the ERC determines that a person has violated subsection (5), (11), (20) or (35), 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;

(b) in the case of a violation of subsection (5), (11) or (20) - 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 subsection (5), (11) or (20) (as the case may be) is a violation of rule 6.

Rule 10 - Penalties

(1) If the ERC determines that a person:

(a) has violated a primary provision; or

(b) has attempted to violate a primary provision; or

(c) has aided, abetted, counselled or procured a person to violate a primary provision; or

(d) has profited, or assisted another to profit, from a violation of a primary provision; or

(e) 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

(f) has in any way cooperated in the violation of a primary provision; or

(g) 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 subsection (2)).

(2) The orders referred to in subsection (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 rescind an agreement, arrangement or understanding within such time and to such extent as is specified in the order;

(ii) 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;

(iii) 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;

(iv) an order requiring the person to refund money or return property;

(v) an order requiring the person not to carry on a particular business or not to undertake particular operations;

(vi) an order requiring the person to carry on a particular business or to undertake particular operations or to comply with such conditions as are specified in the order in carrying on a particular business or undertaking 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;

(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, licence or permit granted to the person³;

(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.

(3) 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, the order or orders made by the ERC 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).

(4) A person must comply with an order that is made by the ERC under subsection (1) and a failure to do so is a violation of these Competition Rules.

(5) If the ERC has reason to believe that a person is likely to:

(a) violate a primary provision; or

(b) attempt to violate a primary provision; or

(c) aid, abet, counsel or procure a person to violate a primary provision; or

(d) profit, or assist another to profit, from a violation of a primary provision;
or

(e) force or induce, or attempt to force or induce, a person (whether by threats or promises or otherwise) to violate a primary provision; or

(f) cooperate in a violation of a primary provision; or

(g) conspire with others to violate a primary provision,

the ERC may, in accordance with the Complaint Procedure Rules, make an order requiring that person not to engage in that conduct.

(6) A person must comply with an order that is made by the ERC under subsection (5) and a failure to do so is a violation of these Competition Rules.

(7) If the ERC determines that a person has violated subsection (6), 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.