

MERALCO's Comments on the *Draft Competition Rules*

<b>Rule No.</b>	<b>Page</b>	<b>Topic</b>	<b>Comments/Recommendation</b>
1.		General: Scope of ERC's Authority	During the drafting of Republic Act (RA) 9136 and its Implementing Rules and Regulations (IRR), much debate went into ensuring that what would be penalized would be anti-competitive <b>behavior</b> , not the <b>potential</b> for such behavior. There are some provisions within the Draft Competition Rules that appear to give the ERC a wide degree of discretion to judge and act based on an Electric Power Industry Participant's (EPIP) " <b>likely</b> " actions. This would be going against the intent of the law.
2.		General: Investigator, Prosecutor, and Adjudicator	The Draft Competition Rules and Complaint Procedure Rules empower the Energy Regulatory Commission (ERC) commissioner to investigate and prosecute complaints against an EPIP. This opens up the commission to serious concerns on the fairness and objectivity of the ERC as a quasi-judicial body. We would like to recommend the setting of procedures and parameters to safeguard the integrity of these functions.
3.		General: Employment of a Consultant	In several cases throughout the Draft Competition Rules, the ERC may employ the services of a consultant in coming out with a decision for a specific case of an EPIP. The EPIP is then required to pay for the services of said consultant. Since the specified activities are part of the ERC's normal functions, ERC should share in the cost of the consultant's services. This will also give EPIP's a measure of protection against the abuse of those provisions. Additional safeguards may also be needed, e.g., having a list of accredited consultants, caps on fees and expenses, limits on the scope of an engagement, applicants consent to use a certain company, confidentiality guarantees, etc.
4.	37	Schedule Market Monitoring Indices	The Draft Competition Rules do not contain a detailed explanation as to the choice of the indices as well as the method by which they will be calculated. Will this be contained in the Market Monitoring Indices Guidelines?

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5.		General: “Benefit to the public”	The phrase “benefit to the public” appears several times throughout the Draft Competition Rules. We would like to request for clarification on how the ERC intends to interpret this, possibly in the Guidelines.
6.	4-1-b, 4-3-b	6 Anti-Competitive Agreements	The statement “Give effect to provision.... <b>before</b> or after the commencement of these Competition Rules...” implies that the rules will also be applied retroactively. We recommend that the Competition Rules be applied prospectively.
7.	8	11 Clearances and Authorizations	We would like to recommend that a period of time be specified in the Competition Rules, at the end of which, a request for clearance or authorization that has not been acted upon by the ERC shall be considered approved. Fifteen (15) days should be sufficient.
8.	10-2-(c), (d)	24 Penalties	We would like to seek guidance on how the amount of penalty will be assessed. Also, we believe that paragraph (d) exceeds the authority given to the ERC by RA 9136. The EPIRA does not give the ERC the power to award damages, much less award it to itself.
9.	13	28 Disclosure of Information and Confidentiality	We believe that the Competition Rules should contain policies that will safeguard and provide penalties for the disclosure by ERC employees of information that has been determined to be confidential.
10.	14	31 Entitlement To Installed Generating Capacity and Sourcing of Demand	We would like to request for clarification concerning the treatment of self-generating consumers that are connected to the Grid.

MERALCO's Comments on the *Draft* **Competition Guidelines**

	<b>Section</b>	<b>Page</b>	<b>Topic</b>	<b>Comments/Recommendation</b>
1.	2.3.7	15	Supply-Side Substitutes	There are no guidelines as to the determination of what constitutes “significant capital costs” that will prevent an alternative source of supply from being included in the market. We recommend that such be discussed in the Competition Guidelines for the guidance of EIPs.
2.	3.1.1	20	Assessment of the Level of Competition in a Market	The section provides for the use by the ERC of a “hypothetical comparison” in order to evaluate potential changes in the level of competition within a market. We recommend that the methodology for creating the hypothetical scenario with which the comparisons will be made should be discussed and developed with all EIPs in order to assure transparency and objectivity.
3.	4.2.2	31	Anti-Competitive Agreement Prohibition: Terms and Concepts	We would like to request for clarification on what is meant by the phrase “inferred from the circumstances” as it appears in this section.
4.	4.2.8	32	Anti-Competitive Agreement Prohibition: Given Effect to	We would like to request for clarification as to why the prohibitions set by the Competition Rules will be applied retroactively. We believe that the Competition Rules should be applied prospectively. Please see our comments on Rules 4-1-b and 4-3-b of the Competition Rules.

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5.	4.2.10	33	Anti-Competitive Agreement Prohibition: Substantial Lessening of Competition	We would like to request for clarification concerning the choice of two (2) years as the “relevant period of time”.
6.	4.4.9	38	Conditional Agreements	We would like to request for clarification concerning the setting of the deadline for an application for authorization at twenty-one (21) days.
7.	4.6.6	39	Clearances	We would like to request for clarification as to why the EPIP must fully shoulder the cost of the consultant hired by the ERC to assist in the ERC’s determination of whether or not to grant a clearance for the said EPIP. Please see our general comments on the Competition Rules concerning the Employment of a Consultant (item No. 2).

MERALCO's Comments on the *Draft* **Complaint Procedure Rules**

<b>Rule No.</b>	<b>Page</b>	<b>Topic</b>	<b>Comments/Recommendation</b>	
1.	6-(6)	5	Conduct of Investigation	We recommend that “any officer” be specifically identified as anyone from among the following: President, Treasurer, Management Partner, General Manager, Corporate Secretary and In-House Counsel. Also, in options (b) and (c), delivery must be “with a competent person in charge”. Finally, the procedure must specify that option (b) can only be taken “in lieu” of option (a) and option (c) can only be taken “in lieu” of options (a) and (b).
2.	9-(8)-(b)	10, 11	Initiation of Complaint: Amended Complaint	We would like to recommend that in the interest of due process and fairness, an amended complaint may only be served with the prior approval of the hearing panel.  Also, before a complaint can be amended, the complainant should be given the right to comment on or oppose the proposed amendment.
3.	10-(8)	12	Motions	We recommend that the three (3) day deadline for filing be increased to fifteen (15) days.
4.	11	13	Temporary Restraining Order	We recommend that any TRO issued by the ERC have a life of twenty (20) days, within which a hearing may be conducted towards the issuance of an order to make it permanent.
5.	11-(5)	13	Temporary Restraining Order	We recommend that the three (3) day deadline for opposing a TRO be increased to fifteen (15) days.
6.	12-(6)-(a) & (b), 12-(7)-(a)	14	Filing and Service	We recommend that “Respondent” be modified to read: “Respondent, if the Respondent is not represented by counsel”.

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& (b)				
7.	13	16	Pre-Hearing Conference	We recommend that three (3) unjustifiable non-appearances by the Respondent or the Respondent's attorney at a pre-hearing conference constitute a waiver.
8.	14	17	Hearings	We recommend that three (3) unjustifiable non-appearances by the Respondent or the Respondent's attorney at a hearing constitute a waiver.
9.	14-(6)	17	Hearings	We recommend that the Hearing Panel's determination if a person has violated subsection 5 of Rule 14 of the Complaints Procedure Rule be made after a notice has been served to the person and a hearing has been conducted for such purpose.
10.	15-(5)	18	Provision of Information, Production of Documents and Attendance of Witnesses	Please see comment on Rule 6-(6) of the Complaint Procedure Rules.
11.	19	21	Overriding Power	We recommend the removal of this rule as these provisions are taken care of by Rules 24 (Applicability of the Rules of Court) and 29 (Applications to Other Proceedings).
12.	21-(1)	22	Effectivity of Decisions	We recommend that the last part read "...will take effect upon its finality" so as not to prejudice parties who may still avail of other remedies available under the law, e.g., filing a Motion for Reconsideration.

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13.	22-(5)	22	Motion For Reopening or Reconsiderat ion	We recommend that the three (3) day deadline for filing an opposition to the motion be increased to fifteen (15) days.