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| 1. | General Comment | IRR reference | References to the IRRs should be Rule 11, Section 4 and not Rule 11.4 |
| 2. | General Comment | Definition of certain terms | Terms are defined within the Rules should instead be defined in the definitions section and should be capitalized e.g.: "price fixing provision" (page 6); "substantial degree of power in a market" (page 7) |
| 3. | General Comment | | All references to rule of the Competition Rules should be capitalized eg: "Rule 4 (1) Subject to rule 8, a person . . ." Should be Rule 4 (1) Subject to Rule 8, a person . . ." |
| 4. | General Comment | EPIRA requirements | Sec 45 of EPIRA requires that the competition rules define the relevant markets. Although the Competition Guideline adequately describes the parameters for determining a relevant market, the Competition Rules are silent. It is suggested that the parameters in determining the relevant markets (as provided in the Guideline) be included in the Competition Rules in order to give legal effect thereto. |
| 5. | General Comment | Coverage | How do the rules affect existing contracts and rights vested therein? |
| 6. | General Comment | Other laws | The law should be read in conjunction and made consistent with the following laws; Revised Penal Code on unfair competition; the Civil Code; the Consumer Act of the Philippines; Securities Regulation Code; Intellectual Property Code; Oil Deregulation Law. |
| 7. | General Comment | SEC and ERC jurisdiction | For the trading of derivatives, future contracts, hedge contracts, and other financial instruments, there may be a conflict with regard to the jurisdiction of the ERC (EPIRA) and SEC (Securities Regulation Code). How will this apparent overlap be resolved? Who will be the primary regulatory agency and which rules will apply (Competition Rules or SRC Rules) |
| 8. | General Comment | | breaches of rules not clear on length of time - market hourly, does every hourly breach constitute an offence how does this relate to fines. No clear definition of breach. Could be breached every hour. Does this mean a fine will be assessed at each occurrence? |
| 9. | General Comment | | Several references to bilateral limits need to be evaluated. The 90% limit is only for physical delivery contracts, not financial instruments. This can be circumvented with options and CFDs. Should refer to net position with respect to supplier. |

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| 10. | General Comment | | What about retailers, can these be combined with distributors? Could a distributor buy-out a retailer? | |
| 11. | 1 | 3 | Preamble | Insert the phrase "Republic Act No. 9136" after the phrase "(the EPIRA)" |
| 12. | 3 | 3 | Definition of "Affiliate" | In the Rules it is defined as "affiliate" in relation to . . . directly or indirectly controls, is controlled . . ." In the IRRs it is defined as "affiliate" in relation to . . . directly or indirectly, THROUGH ONE OR MORE INTERMEDIARIES, controls, is controlled . . ." Recommendation: follow the IRRs |
| 13. | 3 | 4 | Definition | Add definition of Competition Rules. " Competition Rules " shall mean these rules which are being promulgated pursuant to Section 45 of the EPIRA and Rule 11, Section 8 of the IRRs." |
| 14. | 3 | 4 | Definition of "market" | Capitalize the defined term and do a global change in the documents |
| 15. | 3 | 5 | Definition of "Philippine National" | "Philippine National" has the meaning . . . Republic Act No. 7042, AS AMENDED, otherwise known as the Foreign Investments Act; |
| 16. | 3 | 5 | Definition of "primary provision" | Capitalize the defined term and do a global change in the documents |
| 17. | 3(1) | 3 | Definition of "acquire" in relation to services | It is suggested that subsection (b) of the definition of "acquire" be amended to read as "in relation to services – accept <u>or avail of</u> ". (e.g., ancillary services) |
| 18. | 3 | 3 | Definition of "affiliate" | Phrase "alone or with any other person" is troublesome, and potentially circular. Consider a joint venture with three 33% owners, structured so that no one of them "controls" the joint venture entity; under this definition, any two of them could be deemed to "control" the joint venture. Moreover, some combination of persons would control any entity, rendering the definition too broad. |

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| 19. | 3 | 4 | Definition of "document" | Consider simplifying the examples to "any data compilation from which information can be derived, translated, if necessary, through detection devices into reasonable usable form," or words to that effect. |
| 20. | 3 | 4 | Definition of "market" | This is not really a definition, but a statement of the scope of the Rules, and is potentially confusing in the context of defining relevant markets. Consider moving this concept to a separate section stating the scope of the Rules: "These Rules apply to any market in the Philippines in which ..." |
| 21. | 3 | 5 | Definition of "services" | Why does the definition exclude "work under a contract of service"? What if several entities conspired to fix the price of transformer repair services? Or any other of a variety of services related to electric markets? |
| 22. | 3(2) | 5 | goods or services in a "market" | Rework to make clear that goods or services that are substitutes are in the same market, not different markets. |
| 23. | 4(1)(a) | 6 | | Add: "(a) PROPOSE, ENTER INTO OR make any agreement . . ." |
| 24. | 4(1)(b) | | "Give effect to" | Does this apply to persons, not parties to the agreement, but who perform acts which have the effect of implementing the agreement? (e.g., sub-contractors, agents) |
| 25. | 4(8)(b) | 7 | | This implies that even if you enter into an act prohibited under 4 (1)(a) or 4 (3)(a) as long as you apply for a clearance within 21 days, then it is acceptable. This does not take into account instances wherein the application will be rejected. |
| 26. | 4(1)(b) | 6 | Definition of "give effect to" in relation Rule 4(1)(b) | With regard to "giving effect to" agreements before the commencement of the Competition Rules, what is the effect on existing agreements, which may be anti-competitive? Does "give effect to" refer to future acts that have been agreed upon, but not yet implemented? What about those that are already being implemented at the commencement of the Competition Rules? Will the Competition Rules override vested rights in existing contracts? |

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| 27. | 4(4) | 6 | "price fixing provision" | This needs to make clear that horizontal price fixing requires an agreement between actual or potential competitors. A separate definition may be needed for vertical price fixing, rather than make one definition do double duty for different concepts. The phrase "who is not a party to the agreement" is not sufficient. Two competitors could agree on the price to be charged a customer, and make the customer a party to the agreement, and technically escape this definition. |
| 28. | 4(5) | 6 | list of price fixing arrangements | Should make clear that the list of examples that follows is not exclusive. |
| 29. | 4(7) | 7 | Anti Competitive agreements with affiliates | Why do rules on anti-competitive agreements not apply to agreements between affiliates? Must at least be qualified subject to the misuse of market power, cross ownership and cross subsidy provisions of Section 45 of EPIRA. |
| 30. | 4(8)(b) | 7 | Anti competitive agreements | Insertion: "an application for that clearance or for the grant of that authorization has been made <u>in accordance with Rule 8 and</u> within 21 days after the agreement is made." |
| 31. | 5(3) | 8 | | It is not clear what constitutes "substantial degree of power in a market" |
| 32. | 5(4) | 8 | | It is not clear what constitutes "misuse" of power |
| 33. | 5(6) | 8 | | This rule of interpretation makes things complicated. Why not just refer to "power" as "market power" in the whole Rule 5 instead of inserting clause 6. This results in a situation wherein the meaning of power in Rule 5 is different from the remainder of the Rules. It is defined in the guidelines (5.2.4) but not in the rules. |
| 34. | 5 | 7 | Misuse of Market Power | The Competition Rules consistently use " <u>misuse</u> of market power". Is this the same or a separate standard from "market power abuse" as used in the EPIRA? While "abuse" would connote some degree of bad faith (and thus requires a higher standard of proof), "misuse" as explained in the Guideline does not look into the intent of the party. |

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| 35. | 5(2) | 8 | determination of market power | Consider simplifying this to say that "Market power will be determined on the basis of a person and its affiliates." |
| 36. | 5(4) | 8 | determination of misuse of market power | <p>Consider rephrasing the first standard to make clear that an economic analysis is intended, and to make clear that the operative standard is conduct in a workably competitive market: "Whether the conduct was profit maximizing [or: economically rational], or reasonably calculated to be profit maximizing [or: economically rational], in a workably competitive market."</p> <p>Query what the second standard is meant to exclude from market power abuse that would not be encompassed by the first standard?</p> |
| 37. | 6 | 9 | (3) (c) | This implies that even if you enter into an acquisition, merger or consolidation, as long as you apply for a clearance within 21 days, then it is acceptable. This does not take into account instances wherein the application will be rejected. |
| 38. | 6 | 9 | Acquisitions, Mergers and Consolidations | Will a clearance/authorization be a prerequisite for the release of merger documents considering that the SEC may not release them without ERC approval? Or will the SEC be allowed to approve the merger without ERC clearance? |
| 39. | 6(1) in relation to EPIRA | 9 | Acquisitions, Mergers and Consolidations | EPIRA states that the NEA shall make programs to strengthen the viability of Electric Cooperatives (Sec. 58). If viability of ECs will be strengthened by their merger, will this program fall under Rule 6? See also Section 8 of the EPIRA regarding joint takeovers by DUs of common sub-transmission assets. |
| 40. | 6(4)(a) | 10 | scope of merger rule | What is meant by "an acquisition by way of a charge only"? |
| 41. | 6(4)(b) | 10 | scope of merger rule | The Rules should exclude interests held by financial institutions solely in connection with financing a generation or other facility. Consider other exclusions for acquisitions of interests that will be of no competitive significance - otherwise the ERC will be deluged with clearance requests that it really has no interest in. We can provide some specific suggestions. |
| 42. | 7 | 11 | Exceptions | An exception to this Rule is when various connected DUs form a joint venture company to acquire sub-transmission assets in accordance with Section 8 of EPIRA. |

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| 43. | 7(1) | 10 | scope of exceptions | It is not clear what “must not be taken into account” means. Consider wording like: “Conduct based solely on the following shall not be deemed a violation of these Competition Rules” |
| 44. | 7(1)(B) | 10 | employee exemption | This would allow, for example, employers to agree on how much they will pay electrical workers. Is this intended? Exemption should be limited to legitimate multi-employer labour bargaining units? |
| 45. | 7(1)(c) | 10 | goodwill exemption | This is very broad. Also, the meaning of “goodwill” may not clearly apply to legitimate restrictions. Consider wording like: “Restrains reasonably ancillary to the sale of a business, and reasonably related to preserving the legitimate value of the business.” |
| 46. | 7(1)(d) | 10 | IP exemption | This is very broad. Intellectual property rights can certainly be used in an anticompetitive manner. Is a broad exemption intended? If this provision is meant to avoid duplication of the Intellectual Property Code, that should be made clear? |
| 47. | 7(1)(f) | 11 | consumer exemption | This is very broad, and would exempt commercial “consumers” of goods and services, as well as individuals. This could be read to sanction monopsony power. |
| 48. | 7(3) | 11 | Exceptions | Please clarify the intent of the Rule. Would agreements entered into pursuant to these regulations (WESM, Grid Code, Distribution Code) and provisions (EPIRA on TSCs) be exempt from the Competition Rules? Please clarify the term “comprised of”. What agreements will this include? Generally, agreements do not obtain from a single set of regulations but must be in accordance with an entire legal or regulatory framework at any given time. |
| 49. | 8 | 11 | Define terms | “Clearance” and “Authorization” under Rule 8 should both be defined terms to be defined at the definitions section |
| 50. | 8(16) | 13 | | It is advisable to also publish or post the application in the locality where the applicant resides or does its business |
| 51. | 8(34) | 16 | | The sentence is awkward. Does this provision relate to Rule 4 (8) (b) [see # 26 above] |

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| 52. | 8 and 9 | 11 | Clearances and Authorizations | Distinction between clearance and authorization: If one applies for a clearance, but the ERC determines that it is more suited for the issuance of an authorization (and vice versa), can the application be converted without having to apply again? Is there an option given to the applicant to make a conversion? Or will the ERC come out with separate rules on the application and prosecution of clearances and authorizations? |
| 53. | 8 and 9 | 11 and 18 | Clearances and Authorizations | We suggest that a general timeframe for the ERC to render determination on applications should be provided. The timeframe in the Guideline may be used. |
| 54. | 8 and 9 | 11 and 18 | Clearances and Authorizations | We suggest that the provision in the Guideline on the non-issuance of declaratory reliefs, such as "informal" approvals or "letters of comfort", be included in the Competition Rules. |
| 55. | 8(8) | 12 | Clearances | Is the ERC precluded from ordering a clearance period shorter than 6 months? May the ERC extend the clearance period after the expiry of the original six-month period? |
| 56. | 8(9) | 12 | Clearances | Explain inclusion of item (b). Rule 8(1) provides that clearances are only given for violation of Rule 4(1)(a). Section 4.6.3 of the Guideline also states that a clearance is not available in respect of giving effect to any provision of an existing agreement, arrangement or understanding. |
| 57. | 8(13) | 13 | authorization of price fixing | What sort of justification would be sufficient to authorize price fixing? As noted in 4.1.2 of the Guidelines, price fixing agreements "are considered in themselves to be so antithetical to competition that it is unnecessary to consider their actual or likely effect on competition." What policy considerations would offset a clear anticompetitive effect? An example would be helpful in understanding the policy bases on which authorization authority will be exercised. |
| 58. | 8(25) and 8(29) | 14,15 | Authorizations | Other than exceptional hardship under Rule 8(21), for what other instances will the ERC grant an authorization with retroactive effect? Should be sighted only in relation to Rule 8(21), otherwise briefly cover other circumstances. |
| 59. | 8(42) and 6(3)(d) | 17 and 9 | Conditional Agreements | In whose favor is the waiver in these provisions constituted? The ERC or the parties to the agreement? Should explicitly state that waiver is given to ERC, assuming that is the intention. |
| 60. | 9 | 18 | Define terms | "Clearance" and "Authorization" under Rule 9 should both be defined terms to be defined at the definitions section and ensure distinction from definition in Rule 8. |

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| 61. | 9 | 18 | Clearances and Authorizations | Are acquisitions over the stock market covered by the prohibition? Will there be a threshold amount as to when to ask for a clearance or authorization? |
| 62. | 9 | 13 | Clearance for mergers | See comments above on exemptions from the merger rules. Consider also an automatic clearance for mergers or acquisitions below a specified size, to avoid ERC being deluged with clearance requests for deals of little or no competitive significance. |
| 63. | 9(1)(a) | 18 | indirect acquisitions | <p>The Guidelines indicate that “indirect” acquisitions refers to acquisitions through an agent, but the larger issue would be an acquisition by a parent company “indirectly” through an acquisition made by a subsidiary or affiliate. What is the intended scope here? See also comment above re scope of the “affiliate” definition.</p> <p>Consider requiring that a clearance or authorization be sought by the “ultimate parent entity” of the acquiring entity, the UPE being an entity that is not controlled by any other entity. This would also provide a means for assessing the market position of the affiliates of the acquiring entity.</p> |
| 64. | 9(8)(a) | 19 | effective period of clearance | Consider a minimum effective period of 1 year; six months is quite short. Compare the time periods used in relevant market determinations in the Guidelines. |
| 65. | 9(11)(a) | 19 | 60 day waiting period | In other jurisdictions, mergers are frequently announced prior to the commencement of the antitrust review process. This provision should be reworded to contemplate that public announcement may occur prior to the grant of clearance, so that a merger or acquisition can be closed as soon as clearance or authorization is granted. |
| 66. | 10(1) | 23 | | What is a “primary” provision? Rule 10 uses the term “primary provision” and “provision”, but does not specify which one the violations apply to. |
| 67. | 10(1)(f) | 24 | cooperation in a violation | This provision should be limited to persons who “in any way knowingly and intentionally cooperated ...” |
| 68. | 10(2)(e) - (h) | 24 | divestiture and pricing remedies | These provisions should be included as additional subsections under (2)(b) to make clear that they are limited to divestiture or pricing provisions that are necessary to remedy a violation. |

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| 69. | 10(2) (d) | 24 | Penalties | EPIRA does not expressly grant the ERC the power to award damages. Need to verify if this power is inherent under its quasi-judicial functions. One suggestion is to reclassify "damages" as "penalties" or "fines". |
| 70. | 10(5) | 25 | Penalties | Please clarify the extent of the injunctive power of the ERC in this rule. If the ERC issues an order requiring the person not to engage in a particular conduct, it is suggested that a period be stipulated within which the order shall be effective. |
| 71. | 10(6) | 26 | violation of a ERC order | This should be included in the definition of a "primary provision"? |
| 72. | 11(1) - (4) | 26 | imputed intent and implied authority | These provisions seem quite broad, and may warrant further thought. Consider at a minimum providing an affirmative defence for the corporation or person to which intent or action is be imputed that it legitimately had no knowledge of, and did not authorize or direct, the actions of the subordinate person. |
| 73. | 12(7) and (8) | 27 | Inspections | <p>There are constitutional requirements for the issuance of a search warrant. However, Rule 12(8) states that a warrant is not necessary if the person in charge consents to such entry and inspection. A clearer definition of the persons authorized to consent must be included.</p> <p>The Rule should specify the right of the person or entity being searched to be assisted by counsel. See Guidelines.</p> <p>"Warrant" refers to a requirement for a search warrant issued by a court of competent jurisdiction? This protection should be made clear.</p> |
| 74. | 12 (9) | 26 | | Persons should be given Miranda rights, rather than incriminating oneself. This is covered in the Guidelines. Suggestion is to include in the Rules. |
| 75. | 13(4)(a) | 29 | ERC disclosure of confidential information | Disclosure of competitively sensitive information, or intellectual property, could have serious commercial consequences. The person or entity the information of which is to be disclosed should at least have an opportunity to be heard on the consequences of disclosure, and to propose the use of redacted documents, or modifications to the data, that may serve both the disclosure needs and the commercial interest of the person or entity to which the information relates. |

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| 76. | 13(4)(b) | 29 | ERC disclosure of confidential information | What recourse does a person or entity the information of which is about to be disclosed have during the 10 day notice period? See also comment above. |
| 77. | 14(1)(a) | 30 | Capacity attribution rules | Please clarify how this relates to the tariff ruling. The tariff ruling defines Luzon and Visayas as the Grid, so will the 25 – 30% capacity restructuring apply to each grid separately or both as one? |
| 78. | 14(2)(b)(ii) | 30 | | Should not be based on a financial criteria. Should only be based on technical criteria. Suggestion is to remove the “10% of construction cost”. |
| 79. | 14(4)(c) | 31 | joint venture capacity attribution | Is the term “equity interest” sufficient to encompass limited partnerships, limited liability companies, etc.? Need to say “equity interest or the equivalent”? Something more? |
| 80. | 14 (4)(b) | 31 | | Statement “generation facility will be credited as between...which it controls” is confusing - suggest rewording |
| 81. | 14(2)(ii) | | | (5) This should include NET derivatives of the entities |
| 82. | 14(5) | 31 | Bilateral PSAs | The provision limits the scope of “bilateral power supply contracts” to a contract for the physical supply of electricity as opposed to a financial instrument. Note that the EPIRA does not define or qualify bilateral contracts as limited to physical supply. This has the effect of adding another exception to the limitations in Sec 45(b) and (c) of the EPIRA (i.e. financial instruments). |
| 83. | 18(1)(c) (i) & (ii) | 35 | Revised rules | These provisions would appear to include Rule 7(3)(c); is that intended? Suggestion is to make an exception for the WESM rules referenced to in 7(3)(c). |