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| TO: | Ms. Maria Corazon Gines<br>Energy Regulatory Commission | DATE: | March 7, 2003 |
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Dear Marizon:

Thank you again for the opportunity to provide comments on the draft competition rules of the Energy Regulatory Commission ("ERC"). As you advised us, you sent to us, and we acknowledge having received, the competition rules as originally drafted by the ERC consultants (the "Consultants' Version") and the "sanitized" version prepared by the ERC (the "ERC Version").

Although we are still in the process of reviewing these drafts, we are sending to you, at your request, certain *preliminary* comments that we have. These preliminary comments will, however, be in reference specifically to the Consultants' Version although it appears that these general and preliminary comments would be applicable as well to the ERC Version.

<u>Preliminary Comments</u>

1. *Rule 3(1); definition of "agreement"* – We note that the proposed definition includes agreements whether or not having equitable force. We are not too clear about what is intended by the phrase "whether or not having equitable force" (e.g., would "agreement" include void contracts?) and accordingly, you may wish to consider restricting the term "agreement" to those that are actually binding and enforceable (except to the extent that such agreement might be deemed unenforceable or prohibited under the competition rules).

2. *Rule 3(1); definition of "Market"* – Perhaps the definition of "market" could be made more specific. The broadness of the definition, including activities *indirectly* related to the generation transmission, distribution or sale of electricity might be challenged as overreaching. It may be asserted that it was not the intent of Congress in granting the authority to the ERC pursuant to the Electric Power Industry Reform Act ("EPIRA") for the ERC to regulate activities pertaining to goods and services that may merely be *indirectly* related to the generation transmission, distribution or sale of electricity.

3. *Rule 3(3)* – The implementing rules of the EPIRA (Rule 11(8)) contemplates the regulation of activities that "*unreasonably*" restrict competition. Perhaps this "unreasonableness" qualification should also be reflected in the competition rules' concept of "lessening of competition." In other words, the prohibition should apply to arrangements that might result in an *unreasonable* lessening of competition rather than mere lessening of competition.

4. *Rule 4(1)(d)* – As currently drafted, this clause would prohibit an entire agreement even if an alleged anti-competitive clause is merely one of the provisions of an otherwise valid agreement. As you know, it is typical for agreements to contain severability clauses that would maintain the validity of provisions that are otherwise valid. The ERC might consider revising this clause to read as follows:

> ***"make an agreement or arrangement, or arrive at an understanding that would be or be likely to be, the effect of substantially lessening competition in a market."***

We believe that this language, rather than the one in the draft competition rules, would arguably enable the parties to an agreement to isolate a prohibited provision in a larger agreement that could stand alone even without the anti-competitive clause.

While we make the above comments in relation to Rule 4(1)(a), there are other provisions in the draft competition rules where the above comments would also be relevant.

In addition, the ERC may consider already setting out general classes of typical agreements that should not be considered as lessening competition in the market. For instance, it is quite standard for a company to require departing directors or withdrawing shareholders, not to compete with the company for a specified period of time. The validity of these type of non-competition clauses have been upheld by the Supreme Court provided that the restriction applies only to a limited period.

5. *Rule 4(4)* – With respect to prohibition on price fixing, we wish to note that in Rule 11(8)(b) of the IRR of the EPIRA, the contemplation seems to be to regulate price fixing arrangements between persons *that are competitors.* On the other hand, the draft competition rules expand these to cover arrangements between and among persons whether or not they are competitors. We are not certain whether this expansion was deliberate.

6. *Rule 5(1)* – We believe that the regulations should provide clearer standards on what constitute the prohibited activity of misusing market power. Although we appreciate the objective apparently being sought by the ERC, we believe the broadly formulated provisions may be challenged for being vague and ambiguous.

7. *Rule 6(1)* – We reiterate our previous comment that the resulting, or potential, lessening of competition in the market referred to in the clause should be one which is unreasonable as is the contemplation under the IRR of the EPIRA.

It would also be preferable if clearer guidelines and standards are incorporated in order to more clearly define the prohibited acts.

8. *Rule 6(4)* – We are not too clear on the exemption in the last portion of Rule 6(4)(a) and (b) although we assume that it seeks to exclude the acquisition of security interest in shares or assets.

9. *Rule 8(1)* – In relation to our comments regarding the broadness of the prohibited acts, we think that if the very broad language is maintained then the ERC may find itself deluged with applications for clearances/authorizations.

10. *Rule 8(3)(b)* – At any time when the ERC desires to engage an external consultant, there should be a condition that the applicant be notified thereof considering that the applicant would shoulder the cost for such an external consultant. The applicant should be allowed to comment of the need to appoint an external consultant as well as the cost involved. This comment will be relevant to all the other provisions in the draft competition rules that permit the ERC to incur cost that are to be passed on the applicant.

10. *Rule 8(35)(c)* – We feel that this clause, in the way we understood it, might impact on vested rights concepts. As a general matter, a person who has been given a clearance or authorization should be able to pursue the matter for which the clearance/authorization was given particularly where the change of circumstances was not as a result of its actions. We note, however, that there is a procedure giving that person an opportunity to be heard.

11. *Rule 9(11)(a)* – We are not clear about the reason for imposing a waiting period as well as a requirement to make the proposed acquisition merger or consolidation public. We envision that there might be situation involving non-public companies that may not be subject to public disclosure requirement. This clause seems to impose a public disclosure requirement.

12. *Confidentiality concerns* – There are a number of provisions in the draft competition rules (particularly those that pertain to the application for a clearance/authorization) that may raise concerns from persons who desire or have a need to keep information confidential. For example, there are provisions that require publication of an application for authorization as well as hearings of application. We are, of course, aware that Rule 13(3) restricts the ERC from disclosing information identified to them as confidential. However, the requirement for publication of an application as well as the disclosure of the ERC determination might unduly infringe upon the confidential requirements of applicants.

Although the foregoing are merely initial thoughts (we may provide more general comments subsequently), we hope you find them useful in any case.

Best regards,

J.M.G. Hofileña