

Republic of the Philippines
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City



**PETITION FOR THE
APPROVAL OF THE
EXTENSION OF THE
PERIOD FOR LISTING OF
THE SHARES OF THE
STOCK OF THE NATIONAL
GRID CORPORATION OF
THE PHILIPPINES**

ERC CASE NO. 2018-014 MC

**NATIONAL GRID
CORPORATION OF THE
PHILIPPINES (NGCP)**

Petitioner.

X-----X

D O C K E T E D
Date: FEB 01 2019
By: _____

NOTICE OF PUBLIC HEARING

TO ALL INTERESTED PARTIES:

Notice is hereby given that on 13 November 2018, the National Grid Corporation of the Philippines (NGCP) filed a *Petition* dated 06 November 2018, seeking the Commission's approval of its proposed extension of the period for listing of its shares of the stock (*Petition*).

The pertinent portions of the said *Petition* are hereunder quoted as follows:

1. NGCP is a corporation created and existing under the laws of the Republic of the Philippines, with principal office address at NGCP Building, Quezon Avenue corner BIR Road, Diliman, Quezon City. It may be served with notices and other processes of this Honorable Commission through undersigned counsel at its address indicated below.
2. NGCP is the concessionaire that operates and maintains the nationwide transmission system pursuant to Section 21 of Republic Act ("R.A.") No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 ("EPIRA").²³ Relatedly, NGCP was granted a legislative franchise under

²³ Republic Act No. 9136 entitled, "An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes."

R.A. No. 9511 (or the “Franchise”),²⁴ to operate, manage and maintain, and in connection therewith, to engage in the business of conveying or transmitting electricity through a high-voltage backbone system of interconnected transmission lines, substations and related facilities, system operations, and other activities that are necessary to support the safe and reliable operation of the transmission system,²⁵ and is authorized to charge its customers at the rates approved by the Honorable Commission.

3. Under R.A. No. 9511, NGCP “shall list, subject to the requirements of the Securities and Exchange Commission (SEC) and the Philippine Stock Exchange (PSE), and make a public offering of the shares representing at least *twenty per centum* (20%) of its outstanding capital stock or a higher percentage that may be provided by law, within ten (10) years from the commencement of its operations, *Provided*, That the listing in the PSE of any company which directly or indirectly owns or controls at least *thirty per centum* (30%) of the outstanding shares of stock of the Grantee shall be considered full compliance of this listing requirement.”²⁶
4. NGCP commenced operations on 15 January 2009. Hence, and subject to any extension which may be granted by this Honorable Commission as discussed in the following paragraphs, NGCP is required to list and make a public offering of its shares representing at least 20% of its outstanding capital stock on or by 14 January 2019.
5. This Petition is filed pursuant to Section 8 of R.A. No. 9511, which provides that, “the ERC may, upon application of the Grantee, and after notice and hearing, allow such reasonable extension of the period within which the Grantee should list its shares of stock, if the market condition is not suitable for such listing.”
6. There are valid grounds, discussed below, which necessitate the deferment of the public offering of NGCP’s shares and the concomitant extension of the period within which NGCP should list its shares of stock.

Pending Arbitration Case and Delayed Regulatory Reset

7. On 14 February 2018, NGCP filed with the Singapore International Arbitration Centre (“SIAC”) a *Notice of Arbitration* docketed as SIAC Case No ARB044/18/CHB against the Power Sector Assets and Liabilities Management Corporation (“PSALM”) and the National Transmission Corporation (“TransCo”) pursuant to the Arbitration Clause in Section 16 of the Concession Agreement among the parties. NGCP resorted to arbitration after attempts to settle its various claims by mutual discussion failed.

²⁴ An Act Granting the National Grid Corporation of the Philippines a Franchise to Engage in the Business of Conveying or Transmitting Electricity Through High Voltage Back-bone System or Interconnected Transmission Lines, Substations and Related Facilities, and For Other Purposes.

²⁵ *Id.*, Section 1.

²⁶ *Id.*, Section 8.

8. NGCP had earlier sought relief from the Regional Trial Court, Branch 77, Quezon City, through a *Petition for Interim Measure of Protection* under Rule 5 of the Special Rules of Court on Alternative Dispute Resolution, in view of declarations from PSALM and TransCo that NGCP is in default of its obligations or is otherwise in breach of the Concession Agreement. The trial court issued an *Ex Parte Temporary Protection Order* on 12 February 2018, enjoining PSALM and TransCo from, among others, declaring or treating NGCP in default of its obligations under or otherwise in breach of the Concession Agreement thereby terminating the same, and taking actions because of or pursuant to such termination. The trial court further enjoined the parties to mutually and faithfully implement the Arbitration Clause of their Concession Agreement to effectively settle the factual and legal issues in the case. The trial court eventually issued its 26 March 2018 Order granting the *Petition* for Interim Measure of Protection and issuing an injunction effective during the pendency of the arbitration proceedings. PSALM and TransCo have since appealed to the Court of Appeals to assail the issuance of the injunction.
9. In the meantime, the arbitration proceedings before the SIAC are ongoing. The arbitral tribunal has been constituted, and the procedural timetable set.
10. In a paper entitled *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*,²⁷ the Massachusetts Institute of Technology Sloan School of Management made an empirical investigation of the statistical relation between levels of patent litigation and venture capital investment in the United States of America (“US”). Using regression estimates, the paper found that venture capital investment would have been at least \$8.1 billion higher over the course of five years but for litigation brought by frequent patent litigators.²⁸ Further, venture capital investment would have likely been roughly \$109 million higher over the course of five years but for patent litigation brought by firms that did not frequently litigate patents.²⁹
11. The paper presented the case study of Ditto, an eyewear startup, which was forced to lay off four of its 15 employees to pay for legal expenses associated with a patent lawsuit and received a lower valuation from investors as a result of the litigation.³⁰
12. Similarly, private companies, such as NGCP that intend to list their shares, are subjected to intense scrutiny by the SEC and the investing public. The pending arbitration among NGCP, TransCo, and PSALM will weigh

²⁷ Catherine Tucker, *The Effect of Patent Litigation and Patent Assertions Entities on Entrepreneurial Activity*, 15 May 2014, MIT Sloan School of Management.

²⁸ *Id.*, p. 2.

²⁹ *Id.*, p.3

³⁰ Ditto is an eyewear startup founded by Kate Doerksen (based in San Mateo, California) that allows customers to virtually “try on” glasses using a 3D modeling system that replicates the buyers face. The startup had received funding to expand and was raising additional capital when it was sued by Lennon Imaging Technology for patent infringement. Lennon Imaging Technology’s lawsuit against Ditto was filed in the District Court for the Eastern District of Texas, claiming it infringed on its patents covering “customer image capture and use thereof in a retailing system.” While the lawsuit against Ditto was eventually dismissed, investors and potential buyers were still valuing the company \$3 to \$4 million less than they would otherwise. As a result, the company was forced to lay off four of its 15 employees to pay legal expenses. [*Ibid.* Case Studies, p. 6]

heavily against any decision to invest in a public offering of NGCP's shares, considering the materiality of the litigation, and will inevitably have a speculative effect on the valuation of NGCP's shares.

13. The speculative effect will likely be aggravated by the fact that NGCP is bound to keep the arbitration proceedings confidential. Under R.A. No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004, "arbitration proceedings, including the records, evidence and the arbitral award, shall be considered confidential and shall not be published except (1) with the consent of the parties, or (2) for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed (under that law)".³¹ Consequently, NGCP will be unable to respond to the anticipated inquiries of the SEC, the PSE and the investing public on the disputes subject of the arbitration.

14. If the public offering is now undertaken, and NGCP does refrain from responding to questions on the arbitration proceedings (as it is constrained to), a future arbitral award that is unfavorable to NGCP would likely pull the market value of NGCP's shares down. NGCP would then be exposed to lawsuits by disgruntled investors who might fashion a case of fraud out of NGCP's mere compliance with the confidentiality rule in arbitration. In the US, such securities fraud cases are referred to as "stock-drop lawsuits"—when a company announces "bad news" which results in its stock price going down, investors file lawsuits averring that the company should have announced the "bad news" earlier, and that innocent stockholders were "tricked" into buying stocks.³²
 - 14.1 For instance, if ultimately the arbitral tribunal rules that there are grounds for PSALM and TransCo to terminate the Concession Agreement, which would then cause NGCP's market value to significantly drop, its stockholders might sue NGCP and its officers and directors for damages. They would claim in such suit that NGCP failed to disclose material information in the arbitration proceedings, which information, if made public earlier, would have dissuaded the stockholders from investing in a company at risk of losing its concession. The potential damage to the investing public, as well as to NGCP and its officers and directors, could altogether be avoided if NGCP is allowed to defer its initial public offering to a later date, when there would be no arbitration proceedings limiting NGCP's ability to make full disclosures to the public.

15. Moreover, the absence of regulatory revenue for the 4th Regulatory Period (2016-2020) due to the deferment of the 4th regulatory reset may affect the valuation of NGCP's shares.

³¹ Section 23, R.A. No. 9285.

³² See <https://www.bloomberg.com/view/articles/2014-06-23/there-will-always-be-stock-drop-lawsuits>, retrieved on 16 October 2018.

16. NGCP is presently collecting revenue based on the 2016 interim maximum annual revenue (iMAR) of P43.789 billion, which would be lower than the revenue internally computed by NGCP had the Final Determination for the 4th Regulatory Period been released. Such regulatory delay may affect valuation since potential investors do not have visibility as to NGCP's future earnings.
17. The value of shares of common stock, like any other financial instrument, is often understood as the present value of expected future returns.³³ A lack of visibility of future earnings due to the delay in the regulatory reset and any uncertainty as a result of the pending arbitration proceeding will have a huge impact on NGCP's stock valuation.

The Period Provided for Compliance with the Dispersal of Ownership Requirement is Merely Directory; The Case of Pilipinas Shell

18. R.A. No. 8479, otherwise known as the *Downstream Oil Industry Deregulation Act of 1998*, required persons engaged in the oil refinery business to make a public offering of at least 10% of their common stock within a period of three (3) years from the effectivity of the law or the commencement of their refinery operations. The law provides:

Section 22. *Initial Public Offering.* – In compliance with the constitutional mandate to encourage private enterprises to broaden their base of ownership and in recognition of the vital role of oil in the national economy, any person or entity engaged in the oil refinery business shall make a public offering through the stock exchange of at least ten percent (10%) of its common stock within a period of three (3) years from the effectivity of this Act or the commencement of its refinery operations: *Provided*, That no single person or entity shall be allowed to own more than five percent (5%) of the stock offering: *Provided, further*, That any crude oil refining company and any stockholder thereof shall not acquire, directly or indirectly, any share of stock offered by any other crude oil refining company pursuant to his Section: *Provided, finally*, That any such company which made the requisite public offering before the effectivity of this Act shall be exempted from the requirement.

19. To implement R.A. No. 8479, the Department of Energy (“DOE”) issued Department Circular No. (“DC”) 98-03-004, the pertinent section of which states:

Section 25. Initial Public Offering.

³³ <https://users.wfu.edu/palmitar/Law&Valuation/chapter%204/4-3-2.htm>, retrieved on 19 July 2018.

Any person engaged in the oil refinery business shall make a public offering through the stock exchange of at least ten percent (10%) of its common stock within a period of three (3) years from the effectivity of the Act, or the commencement of its refinery operations. Provided, That no single person or entity shall be allowed to own more than five percent (5%) of the stock offered by any other crude oil refining company pursuant to Section 22 of the Act. Provided, finally, that any such company which made the requisite public offering before the effectivity of the Act shall be exempted from the requirement.

20. The DOE later requested an opinion from the Department of Justice (“DOJ”) regarding the validity of the Supplementary Implementing Rules and Regulations (Supplementary IRR) of R.A. No. 8479, which the DOE then intended to issue to amend the provisions of DC No. 98-03-004 relative to the requirement of initial public offering. The relevant provision of the Supplementary IRR provides:

Section 25. Any person engaged in the oil refinery business within the Philippines shall make a public offering through the stock exchange of at least ten percent (10%) of its common stock within a period of three (3) years from the effectivity of the Act, or the commencement of its refinery operations, or such other period as may be determined under this IRR, Provided, That no single person or entity shall be allowed to own more than five percent (5%) of the stock offering; Provided, further, That any crude oil refining company and any stockholder holding a Substantial Interest shall not acquire, directly or indirectly, any share of stock offered by any other crude oil refining company pursuant to Section 22 of the Act; Provided, finally, That any such company which made the requisite public offering before the effectivity of this Act shall be exempted from the requirement. [Underscored portions are from the proposed amendments as presented in the DOJ Opinion]

21. The DOJ phrased the issue as, “whether or not the period fixed in Section 22 of R.A. No. 8479 is mandatory, and therefore, oil companies existing on the date of effectivity of the Act, must make a public offering of their shares within three (3) years from its effectivity, or only directory, such that the IPO must be allowed even after such three-year period under terms and conditions to be determined by DOE”. It opined as follows:³⁴

It has been held that where the statute “directs the doing of a thing in a certain time, without any negative words restraining the doing of it afterwards, the

³⁴ Opinion No. 6, Series of 2001 entitled *Validation of the Supplementary Implementing Rules and Regulations (“Supplementary Rules”) of RA No. 8479 (the Downstream Oil Industry Deregulation Act of 1998), which the Department of Energy (DOE) intends to issue to amend the provisions of Department Circular No. 98-03-004 relative to the requirement of initial public offering (IPO) as provided for in Section 22 of RA No. 8479.*

provision as to time is generally directory, and not a limitation of authority; and in such case, where no injury appears to have resulted and the fact that the act was performed after the time limited will not render it invalid (Phil. Ass'n. of Free Labor Unions vs. Sec. of Labor, 27 SCRA 40; Borkan vs. Beasley, 75 S.E. 341).

It is also settled that where the time or manner of performing action directed by the statute is not essential to the purpose of the statute, provisions in regard to time or method of performance are generally interpreted as directory only. **If the act is performed but not in the precise time or manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized** (Sutherland Statutory Construction, Vol. 2, pp. 216-217).

Examining Section 22, it will readily appear that the three-year period fixed therein does not import mandatoriness but should be regarded as directory only. **There is no sanction provided in the law for non-compliance with the IPO requirement within the period fixed in Section 22. No substantial prejudice to the rights of third persons may be perceived either for failure to conduct the IPO within the said period.** To interpret the period as mandatory would mean that after it has lapsed, oil companies may no longer conduct an IPO, and this is obviously not what the law envisions to happen. **The intention of the law is "to broaden the base of ownership" of oil companies, and this intention or purpose of the law will definitely be served by construing the three-year period liberally.**

It is our considered view, therefore, that the time provision of Section 22 is only directory or permissive and will not prohibit an IPO to be conducted after the lapse of said period. The important thing is that the purpose of the law – which is to broaden the base of ownership of oil companies is achieved, and as to when it shall be accomplished, may, we believe, be the subject of reasonable regulation by the DOE. [Emphasis supplied]

21.1. A copy of DOJ Opinion No. 6, Series of 2011, is attached hereto and made an integral part hereof as **Annex "A."**

22. The DOJ Opinion effectively allowed Pilipinas Shell Petroleum Corporation ("Pilipinas Shell") to extend the period of compliance with the public listing requirement. Pilipinas Shell was eventually listed in the PSE on 3 November 2016, 18 years after the enactment of R.A. No. 8479 and 15

years after the “deadline” provided in the same law for the public offering of its shares.³⁵

23. In the case of NGCP, while its Franchise provides that it “shall list” and make a public offering of its shares representing at least 20% of its outstanding capital stock within ten (10) years from the commencement of its operations, the Franchise also provides that the period for listing of its shares may be subject to extension upon application with this Honorable Commission.
24. In *Gachon vs. Devera*,³⁶ the Supreme Court ruled:

The word "shall" ordinarily connotes an imperative and indicates the mandatory character of a statute. This, however, is not an absolute rule in statutory construction. The import of the word ultimately depends upon a consideration of the entire provision, its nature, object and the consequences that would follow from construing it one way or the other.
[Emphasis supplied]
25. The word “shall” was used to indicate the mandatory character of the listing requirement. However, the language of Section 8, particularly its last sentence that, “[i]n case compliance with this requirement is not reached, the ERC may, upon application of the Grantee, and after notice and hearing, allow such reasonable extension of the period within which the Grantee should list its shares of stock, if the market condition is not suitable for such listing”, manifests a clear intention to make the period for compliance merely directory.
26. Another parallelism that can be drawn between the NGCP Franchise and R.A. No. 8479 is that both laws contain no sanction for non-compliance with the listing requirement within the period fixed in the law.
27. Notably, R.A. No. 8479 does not specifically provide that an extension of the period for listing may be allowed, unlike the NGCP Franchise which empowers the Honorable Commission to grant such an extension. Notwithstanding the seemingly mandatory language of R.A. No. 8479, the DOE itself allowed the extension of the period of compliance, giving due weight to and consideration of the prevailing economic conditions in 2001. With more reason should NGCP be granted an extension, considering the express provision in its Franchise allowing a reasonable extension of the period for its IPO, in consideration of the present “market condition”.
28. The economic milieu in 2001 that prompted the DOE to issue its Supplementary IRR deferring compliance with the listing requirement is comparable to the current economic climate. According to the Bangko Sentral ng Pilipinas (“BSP”) Inflation Report for the 4th Quarter of 2001,

³⁵ RA 8479 took effect on 12 February 1998. <https://www.manilatimes.net/is-doe-helpless-vs-shell/10694/> retrieved on 26 September 2018.

³⁶G.R. No. 116695, 20 June 1997.

average core inflation for that year was 6.5%. The Report also provided the following analysis of financial market conditions at the time:

Despite initial optimism following the political developments in January 2001, trading activity in the equities market was weighed down for most of the year by external and domestic factors, notably generally weak investor appetite for emerging market stocks, weak corporate earnings results, as well as domestic economic and political concerns. These factors contributed to a generally bearish mood among investors at the Philippine Stock Exchange, and the ensuing months of 2001 saw much selling activity in the various sectors. As a result, by the end of October 2001, the average Philippine Composite Index (Phisix) had fallen by 31.4 percent to 993.35 relative to its 2 January 2001 level of 1,448.49 and 979.34 in October 24, the lowest level it reached in 2001.³⁷ [Emphasis supplied]

29. At present, according to the BSP's *Inflation Report Q2 2018*, the domestic financial system in the second quarter of 2018 reflected the volatility stemming primarily from the external environment. The Philippine Stock Exchange Index (PSEi) retreated by 11.1% percent quarter-on-quarter to average 7,618.99 index points during the review period.

During the quarter, a combination of factors pushed the benchmark index lower month-on-month (m-o-m). Concerns over developments overseas, such as the looming trade war between the US and China, geopolitical concerns involving the US, Syria, North Korea, Iran and Italy and rising US Treasury yields, weighed down the main index. **On the local front, the country's higher-than-expected domestic inflation, widening merchandise trade deficit and the peso weakening to a 12-year low also helped push the PSEi lower. Partly tempering the decline were reports of the robust Q1 GDP growth, the BSP's decision to cut reserve requirements for the second time this year effective June 1 and its policy rate hikes in May and June to curb rising inflation. In June, local equities entered bear market territory amid worsening trade tensions between the US and some of its major trading partners and the continued depreciation of the peso.**

Mirroring the index's decline, total market capitalization declined 7.9 percent q-o-q to close at P15.79 trillion in June 2018. Foreign investors also continued to post net sales amounting to P31.78 billion during the period, albeit slightly less than the P34.0 billion net sales posted in the preceding quarter. Meanwhile, the price-earnings ratio for listed issues

³⁷ http://www.bsp.gov.ph/downloads/Publications/2001/IR4qtr_01.pdf

also dropped from 20.65x on 30 March to 18.37x as of end-June 2018.³⁸ [Emphasis supplied]

30. The prevailing volatility in the Philippine stock market is a matter of public knowledge of which the Honorable Commission may take official notice. Section 2, Rule 19 of the ERC Rules of Practice and Procedure (“ERC Rules”) provides that, “[o]fficial notice may be taken of judicially cognizable facts not subject to reasonable dispute in that they are generally known within the jurisdiction of the Commission or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In addition, official notice may be taken of generally recognized facts within the area of the Commission’s specialized knowledge.”
31. In *Candelaria vs. People*, the Supreme Court took discretionary judicial notice of the price of diesel fuel, even if the prosecution had only presented the uncorroborated testimony of the private complainant, since the value thereof may be independently and competently ascertained from price publications of the DOE.³⁹
32. Similarly, the condition of the stock market and the general state of the Philippine economy may be established from the records of the PSE, the BSP and other government agencies, as well as various news reports.

There are no Implementing Rules and Regulations for Compliance with Section 8 of the NGCP Franchise

33. The Dispersal of Ownership clause in the NGCP Franchise is not self-executing. The provision merely sets forth a policy which requires implementing regulations from the Honorable Commission that will provide the means and manner by which the policy shall be effectuated.
34. Under the EPIRA, the Honorable Commission shall promulgate “the rules and regulations under which generation companies, distribution utilities which are not publicly listed shall offer and sell to the public a portion of not less than fifteen percent (15%) of their common shares of stock...” in order to ensure the successful restructuring and modernization of the electric power industry.⁴⁰
35. NGCP is not mentioned in this provision obviously because the privatization of TransCo, as mandated by Section 21 of the EPIRA, had not yet come to fruition then. However, by reasonable extension of the Honorable Commission’s mandate “to ensure the successful restructuring and modernization of the electric power industry”, which perforce includes NGCP as the holder of the franchise to operate, manage, and maintain the nationwide transmission system, the Honorable Commission should likewise issue the rules and regulations with respect to the Dispersal of Ownership clause under the NGCP Franchise.

³⁸ BSP Inflation Report Q2 2018, ISSN 1655-5104, pp. 32-33.

³⁹*Candelaria v. People*, G.R. No. 209386, 8 December 2014.

⁴⁰Section 43(t), EPIRA.

36. In compliance with the EPIRA, the Honorable Commission issued Resolution No. 18, Series of 2005, entitled *Implementing Section 43(t) of Republic Act No. 9136 and Rule 3, Section 4(m) of the Implementing Rules and Regulations (IRR) of the Said Act*,⁴¹ requiring generation companies and distribution utilities which are not publicly listed in the PSE, to offer and sell to the public a portion of not less than 15% of their common shares of stock, and to submit within 30 days from public offering, a report on the extent of their compliance with the Resolution, together with a certification from the PSE showing the number of shares listed, the names of shareholders owning said shares, and other relevant information for monitoring and verification.
37. The effectivity and implementation of this Resolution was suspended in the Honorable Commission's Resolution No. 21, Series of 2006,⁴² pending the conduct and termination of public hearings thereon. The Honorable Commission eventually issued Resolution No. 9, Series of 2011,⁴³ stating that: a. the listing of generation companies and distribution utilities in the PSE; and b. the listing of shares of stock in any accredited stock exchange or direct offer of a portion of registered enterprises' capital stock to the public and/or their employees, when deemed feasible and desirable by the Board of Investments, are the modes of public offering of the common shares of stock of generation companies and distribution utilities.
38. This Resolution was the subject of a letter from the Private Electric Power Operators Association, filed on 4 July 2011, seeking clarification from the Honorable Commission whether the registration of common shares at the SEC was inadvertently omitted as a mode of public offering. A Petition was later filed, praying that registration in the SEC be included among the allowed modes of public offering and that the implementation of Resolution No. 9, Series of 2011 be held in abeyance.
39. In its Resolution No. 18, Series of 2016,⁴⁴ the Honorable Commission extended the period of compliance to 29 June 2017. In its Resolution No. 10, Series of 2017, the Honorable Commission further extended the period of compliance for one (1) year or until the resolution of the petition in ERC Case No. 2015-006RM, whichever is earlier.⁴⁵ Public consultations were

⁴¹Dated 17 August 2005.

⁴² Entitled *A Resolution Suspending the Effectivity and Implementation of Certain Rules Issued by the Energy Regulatory Commission*, dated 10 May 2006.

⁴³Entitled *A Resolution Adopting the Rules Requiring Generation Companies and Distribution Utilities which are not Publicly Listed to Offer and Sell to the Public a Portion of not less than Fifteen Percent (15%) of their Common Shares of Stock Pursuant to Section 43(t) of Republic Act No. 9136 and Rule 3, Section 4(m) of its Implementing Rules and Regulations (IRR)*.

⁴⁴Entitled *A Resolution Extending the Compliance Period Under Resolution No. 09, Series of 2011, for Generation Companies and Distribution Utilities which are not Publicly Listed to Offer and Sell to the Public a Portion of not less than Fifteen Percent (15%) of their Common Shares of Stock, Pursuant to Section 43(t) of Republic Act No. 9136 and Rule 3, Section 4(m) of its Implementing Rules and Regulations (IRR)*.

⁴⁵Entitled *A Resolution Extending the Compliance Under Resolution No. 09, Series of 2011, for Generation Companies and Distribution Utilities which are Publicly Listed to Offer and Sell to the Public a Portion of not less than Fifteen Percent (15%) of their Common Shares of Stock, Pursuant to Section 43(t) of Republic Act No. 9136 and Rule 3, Section 4(m) of its Implementing Rules and Regulations (IRR)*.

thereafter conducted. The Honorable Commission also sought clarification from the SEC on the issue of allowed modes of public offering.

40. Pending clarification from the SEC, the Honorable Commission issued Resolution No. 14, Series of 2018,⁴⁶ further extending the period of compliance for a period of six (6) months or until 29 December 2018. A copy of Resolution No. 14, Series of 2018 is attached hereto and made an integral part hereof as **Annex “B”**.
41. The NGCP Franchise makes the listing and public offering requirement subject to the requirements of the SEC and the PSE, and allows an extension of the listing period if market conditions are not suitable for listing. However, the law leaves it up to the Honorable Commission to formulate rules and regulations that will provide details and/or ascertain facts necessary to bring the law into operation. For instance, similar regulations are required to, among others:
 - a. provide the modes of public offering allowed in light of the intention of the NGCP Franchise to disperse and broaden the base of ownership of the company;
 - b. clarify the proviso in Section 8 of the NGCP Franchise that “the listing in the PSE of any company which directly or indirectly owns or controls at least thirty per centum (30%) of the outstanding shares of stock of the Grantee shall be considered full compliance of this listing requirement,” *vis-à-vis* the Concession Agreement and the PSE’s Rules on Backdoor Listing;⁴⁷ and
 - c. define the Rules that will apply to NGCP’s application for extension of the period for public offering.
42. Notably, the DOE issued DC No. 2002-10-006, empowering the Secretary of Energy “to determine that the socio-economic, political, financial, and technical data, and other conditions warrant the conduct of an IPO, as guided by the assessment and determination of an independent financial adviser mutually acceptable to the DOE and the offeror,” and “to direct the offeror to prepare for and/or conduct an IPO within a reasonable period.” The Circular also provided that, “[a]ny person or entity violating the directive of the Secretary of Energy provided in Section 25-A c. hereof shall be fined in the amount of Fifty Thousand Pesos (P50,000.00) for every day of delay in the conduct of its IPO reckoned from the date determined by the Secretary of Energy for the holding of said IPO.”
43. The issuance by the DOE of supplemental rules implementing the public offering requirement under R.A. No. 8479, as well as the EPIRA,

⁴⁶A Resolution Extending the Compliance Period Under Resolution No. 09, Series of 2011, for Generation Companies and Distribution Utilities which are not Publicly Listed to Offer and Sell to the Public a Portion of not less than Fifteen Percent (15%) of their Common Shares of Stock, Pursuant to Section 43(t) of Republic Act No. 9136 and Rule 3, Section 4(m) of its Implementing Rules and Regulations (IRR).

⁴⁷Supplemental Rule 7 – PSE Memo for Brokers No. 304-2006 dated 21 September 2006 re: Rules on Backdoor Listing.

underscores the need for a corresponding set of rules to be issued by the Honorable Commission to implement the Dispersal of Ownership clause in the NGCP Franchise.

44. It should be mentioned that Section 8 of the NGCP Franchise does not specify in what form the application for extension should be. Section 3, Rule 5 of the ERC Rules defines an *Application* as follows:

By means of an application, the applicant seeks authorization or permission to undertake any matter or activity within the regulatory power of the Commission. It shall contain a concise statement of the authorization applied for and the ultimate facts that would qualify or entitle the applicant to the grant of the authorization being sought.

When the application is predicated on a franchise, sale, lease, mortgage, or any other contract, such franchise or contract shall be referred to in the application by alleging in substance its salient and pertinent provisions and appending to the application a copy of the franchise or contract.

45. On the other hand, Section 4 of the same Rule defines a *Petition* as follows:

By means of a petition, a person, other than an applicant or complainant, petitions the Commission for affirmative relief under any statute or other authority delegated to the Commission. It shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon, and the relief sought, and shall cite by appropriate reference the statutory provision or other authority relied upon for relief. If the relief sought affects the rights of other persons, it shall implead all these other persons as respondents and state their complete names and addresses.

46. NGCP effectively seeks a deferment of the listing of its shares for the period of extension applied for. In that sense, NGCP is an applicant for an authorization or permission to undertake such a deferment within the purview of Section 3, Rule 5 of the ERC Rules. In another sense, it is a petition for affirmative relief within the purview of Section 4 of Rule 5. There is, therefore, an ambiguity as to which rules apply to this case in the first place. NGCP thus implores the Honorable Commission to issue implementing rules and guidelines. In so doing, due consideration should be given to the fact that the present case is *sui generis*, NGCP being the sole grantee of the franchise to operate, manage, and maintain the nationwide transmission system and the sole entity required by R.A. No. 9511 to make a public offering of its shares. The cases of Pilipinas Shell and the generation companies and distribution utilities affected by Resolution No. 9, Series of 2011, while instructive, may not squarely apply.

The timing of public offering is addressed to the discretion of NGCP's Board of Directors in the exercise of sound business judgment

47. Even assuming that implementing rules and guidelines are not required to make the Dispersal of Ownership clause of the NGCP Franchise operable, factors such as – amending the constitutional documents of the corporation, ensuring that financial qualifications of the exchange are met, further shoring up internal processes to meet the reporting and governance standards for public companies, the public offering strategy appropriate for the business and its goals, the other terms under which such a public offering shall be made, including weighing the receptiveness of the market and the timing for the offering – are the exclusive province of a corporation, exercised through its Board of Directors as provided by law.
48. The Board of Directors bears the primary responsibility of reviewing and approving the company's business strategies and objectives, appointing its senior executives, approving the policies, procedures, and organizational structure, monitoring business and financial performance, and overseeing compliance with risk management programs. The decision to make a public offering of its shares is, thus, subject to the sound business judgment of NGCP's Board of Directors, taking into account its capital requirements, the demands of its business, and market conditions on one hand, and the requirements of the law on the other.
49. In the seminal case of *Philcomsat vs. Alcuaz*,⁴⁸ petitioner assailed an Order issued by the National Telecommunications Commission ("NTC") directing the provisional reduction of the rates which may be charged by petitioner primarily based on the NTC's initial evaluation of petitioner's financial statements. While petitioner conceded respondents' thesis that since it is operating its communications satellite facilities through a legislative franchise, petitioner has no vested right therein, petitioner nonetheless asserted that the privilege given to it by franchise cannot be withdrawn arbitrarily or whimsically. The Supreme Court ruled:

There is no question that petitioner is a mere grantee of a legislative franchise which is subject to amendment, alteration, or repeal by Congress when the common good so requires. Apparently, therefore, such grant cannot be unilaterally revoked absent a showing that the termination of the operation of said utility is required by the common good.

The rule is that the power of the State to regulate the conduct and business of public utilities is limited by the consideration that it is not the owner of the property of the utility, or clothed with the general power of management incident to ownership, since the private right of ownership to such property remains and is not to be destroyed by the regulatory power. The power to regulate is not the power to destroy useful and harmless enterprises, but is the power to protect, foster, promote, preserve, and control with due regard for the interest, first and foremost, of the public, then of the utility and of its

⁴⁸G.R. No. 84818, 18 December 1989.

patrons. Any regulation, therefore, which operates as an effective confiscation of private property or constitutes an arbitrary or unreasonable infringement of property rights is void, because it is repugnant to the constitutional guaranties of due process and equal protection of the laws.

Hence, the inherent power and authority of the State, or its authorized agent, to regulate the rates charged by public utilities should be subject always to the requirement that the rates so fixed shall be reasonable and just. A commission has no power to fix rates which are unreasonable or to regulate them arbitrarily. This basic requirement of reasonableness comprehends such rates which must not be so low as to be confiscatory, or too high as to be oppressive.

What is a just and reasonable rate is not a question of formula but of **sound business judgment based upon the evidence, it is a question of fact calling for the exercise of discretion, good sense, and a fair, enlightened and independent judgment.** In determining whether a rate is confiscatory, it is essential also to consider the given situation, requirements and opportunities of the utility. A method often employed in determining reasonableness is the fair return upon the value of the property to the public utility. Competition is also a very important factor in determining the reasonableness of rates since a carrier is allowed to make such rates as are necessary to meet competition. [Emphasis supplied]

50. While the NGCP Franchise requires the company to make a public offering of its shares within 10 years from the commencement of its operations, such requirement is tempered by the imperative of recognizing the exclusive right and discretion of NGCP's Board of Directors to defer such public offering in the exercise of its sound business judgment.
51. No third party will be prejudiced by the deferment of the public offering of NGCP's shares. Moreover, the objectives of the law to disperse and broaden the base of ownership of NGCP will be better served if the public offering is undertaken not only when market conditions are more favorable, but more importantly, when the arbitration case shall have definitively resolved NGCP's rights under the Concession Agreement. To require NGCP to proceed with a public offering of its shares at this time, despite the attendant circumstances discussed in this Petition, is a derogation of the power of the Board of Directors of NGCP to determine strategies that enhance, rather than erode, the value of the Company. It is tantamount to destroying NGCP's private right of ownership by the wielding of regulatory power.
52. Echoing the words of the eminent Mr. Justice Regalado in *Philcomsat vs. Alcuaz*, the power to regulate is not the power to destroy useful and harmless enterprises, but the power to protect, foster, promote, preserve, and control, with due regard to the interest, first and foremost, of the public, then of the utility and of its patrons.

PRAYER

WHEREFORE, premises considered, NGCP most respectfully prays that this Honorable Commission, after due notice and hearing:

1. Approve the Petition for the Extension of the Period for Listing of the Shares of Stock of NGCP; and
2. Accordingly, grant an extension of one (1) year from 14 January 2019 or from the resolution with finality of the arbitration case docketed as SIAC Case No ARBO44/18/CHB and any related appeals, whichever is later, within which NGCP should make a public offering of its shares, unless another reasonable extension is duly granted by the Honorable Commission upon application of NGCP, and after notice and hearing, should market conditions then not be suitable for such listing.
3. Alternatively, suspend the period within which NGCP should make a public offering of its shares, pending the issuance by the Honorable Commission of the implementing rules and guidelines of Section 8 of R.A. No. 9511.

NGCP prays for other equitable reliefs proper under the premises.

Quezon City for Pasig City, 6 November 2018.

The Commission has set the *Petition* for determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on **20 February 2019, (Wednesday) at two o'clock in the afternoon (2:00 P.M.), at 15th Floor, ERC Hearing Room, Pacific Center Building, San Miguel Avenue, Pasig City.**

All persons who have an interest in the subject matter of the instant case may become a party by filing with the Commission a verified Petition to Intervene at least five (5) days prior to the initial hearing and subject to the requirements under Rule 9 of the 2006 ERC Rules of Practice and Procedure, indicating therein the docket number and title of the case and stating the following:

- 1) The petitioner's name and address;
- 2) The nature of petitioner's interest in the subject matter of the proceeding and the way and manner in which such interest is affected by the issues involved in the proceeding; and

- 3) A statement of the relief desired.


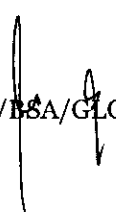
All other persons who may want their views known to the Commission with respect to the subject matter of the case may file their Opposition or Comment thereon at any stage of the proceeding before NGCP rests its case, subject to the requirements under Rule 9 of the 2006 ERC Rules of Practice and Procedure. No particular form of Opposition or Comment is required, but the document, letter, or writing should contain the following:

- 1) The name and address of such person;
- 2) A concise statement of the Opposition or Comment; and
- 3) The grounds relied upon.

All such persons who wish to have a copy of the *Petition* may request from Petitioner that they be furnished with the same, prior to the date of the initial hearing. NGCP is hereby directed to furnish all those making such request with copies of the *Petition* and its attachments, subject to the reimbursement of reasonable photocopying costs. Any such person may likewise examine the *Petition* and other pertinent records filed with the Commission during the standard office hours.

WITNESS, the Honorable Chairperson and CEO, **AGNES VST DEVANADERA**, and the Honorable Commissioners **ALEXIS M. LUMBATAN** and **CATHERINE P. MACEDA**, Energy Regulatory Commission, this 28 January 2019 in Pasig City.


JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Oversight Commissioner for Legal Service



LS/BVG/MCC/ISA/GLO