ORCP-WR-WM-21-02

Date Received: 12 March 2021

**REQUEST FOR MARKET RULES AND MANUALS AMENDMENTS**

Proposals made only under this prescribed form shall be accepted and considered as submitted.

This request for amendments is submitted to the:

**Rules Change Committee**

Attention: WESM Governance Committee Secretariat

Philippine Electricity Market Corporation

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1. **Proponent’s Information**

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1. **Amendment Information**

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  | | --- | --- | | **Proposed Amendments to the** (please tick the box): | | | WESM Rules  Retail Rules | | | Market Manual: | *Dispute Resolution Manual Issue 6.0* | | Topic: | A. Dispute Resolution for the Retail Rules  B. Guidelines on Virtual Hearings  C. Final Settlement of WESM Disputes and its Binding Effect  D. Removal of the PEM Board and the WESM Governance Committees as Impleadable Entities under Clause 7.3.1.1 (c) of the WESM Rules | | **Proposed Classification of Amendments** (please tick the box):  General  Minor  Urgent  If Urgent, reason for urgency: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | | |

1. **SUMMARY OF THE PROPOSED RULES CHANGE**

**A. Dispute Resolution for the Retail Rules**

The first proposal for amendment of the Dispute Resolution Manual (DRM) Issue No. 6 introduces a variant mode of arbitration that is specific to the types of disputes that are contemplated within the “Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market,” otherwise known as the “Retail Rules.” They are consistent with the goal to integrate retail competition into the WESM and apply the provisions of the WESM Rules to effectively govern the enforcement and dispute resolution under the Retail Rules.

**B. Guidelines for Virtual Hearings**

The second proposal for amendment of the DRM seeks to streamline the procedures for the conduct of WESM Dispute Resolution proceedings and provide guidelines for virtual hearings and conferences during arbitration. The guidelines are being made available with reference to any dealings during a circumstance that prevents physical meetings between the participants and provide procedural measures that can mitigate the effect of delays to the arbitral process, including delays caused by the COVID-19 pandemic.

**C. Final Settlement of WESM Disputes and its Binding Effect**

The third proposal seeks to amend provisions of the WESM Rules and the DRM to make them consistent with the provisions of Republic Act No. 9285 and the Special Rules of Court on ADR which recognize the nature of an arbitral award being final and binding among the participants. While the proposed amendments aim to delete the provisions that allow the parties to file a formal complaint with the ERC even after an arbitral award has been rendered by the tribunal, they do not depart from the provisions of the EPIRA nor do they derogate against or encroach upon the jurisdiction of the ERC over disputes between WESM Members. As will be explained further in the discussion, the objective of the proposal is to harmonize the provisions of the WESM Rules and the DRM with Republic Act No. 9285 and the Special Rules of Court on ADR to be consistent with the principles of an agreement-based arbitration and give primacy to party autonomy.

**D. Removal of the PEM Board and the WESM Governance Committees as Impleadable Entities under Clause 7.3.1.1 (c) of the WESM Rules**

Similar to the third proposal on the Final Settlement of WESM Disputes and its Binding Effect, this fourth proposal also intends to align the relevant provisions of the WESM Rules related to WESM Dispute Resolution with the agreement-based or commercial arbitration framework as it was contemplated to be. The proposal seeks to remove the PEM Board and all the WESM Governance Committees from the list enumerating the parties to a WESM dispute under Clause 7.3.1.1 of the WESM Rules. The actions of the PEM Board and the WESM Governance Committees are mostly, if not all, in performance of their ERC-delegated regulatory or "police" powers therefore, disputes filed against them would question or undermine the enforcement of the regulatory policies of the market. Their exclusion as impleadable parties is consistent with the principle that the nature of the disputes involving them are not civil, commercial, or business, making them fall outside the particular definition of a WESM Dispute and inadmissible for resolution through the WESM Dispute Resolution Proceedings.

1. **BACKGROUND**

**A. Dispute Resolution for the Retail Rules**

On 09 January 2013, the Department of Energy issued Department Circular (DC) 2013-01-0002 referred to as the “Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market,” otherwise known as the “Retail Rules,” which aim to promote and integrate retail competition in the operations and governance processes of the WESM. In line with this objective, the Retail Rules expressly state they shall form part of WESM Rules that govern the operations of the WESM,[[1]](#footnote-1) and that certain provisions of the WESM Rules shall apply to the governance of the retail market.

Specifically, in order to effectively manage transactions between the Suppliers and Contestable Customers,[[2]](#footnote-2) the Retail Rules provide that Chapter 7 of the WESM Rules shall apply to enforcement and disputes related to the Retail Rules.[[3]](#footnote-3) Currently, however, the DRM Issue No. 6 which was issued pursuant to Chapter 7 of the WESM Rules covers all related activities and processes regarding dispute administration and dispute resolution on matters related to the WESM Rules, trading and settlement in the WESM[[4]](#footnote-4) but makes no specific mention of disputes between the Supplier and its Customer under the Retail Rules. The proposed amendments therefore seek to incorporate in the DRM Issue No. 6 that not only include disputes between Suppliers and their Customers in its general application but add provisions of special application to such disputes as are more appropriate or responsive to the peculiar nature or dynamics of a Retail Supply Contract or like transaction, hence dispensing with the need to amend the Retail Rules specifically to effect this matter.

**B. Guidelines for Virtual Hearings**

The pandemic of COVID-19 has resulted in injurious repercussions to businesses and professional relationships worldwide. If there is one thing that the pandemic has taught us, it is that resolving disputes by alternative dispute resolution procedures should not be dependent on the surrounding circumstances in the majority of cases. Thus, business operations should not be burdened by unresolved disputes due to the inability of parties to meet physically to resolve disputes. The proposed guidelines would therefore provide parties to existing and future disputes, as well as neutrals, a guide for conducting proceedings in any circumstance where parties to the dispute are unable to meet physically.

**C. Final Settlement of WESM Disputes and its Binding Effect**

The proposed changes to make the provisions in the WESM Rules and the DRM consistent with the relevant provisions of the Republic Act No. 9285 and the Special Rules of Court on ADR are not new. Previously, the defunct Dispute Resolution Group (DRG) as the proponent, submitted its proposal to the Rules Change Committee relative to the legal effect of an arbitral award issued by the dispute resolution panel, among others.

In said earlier proposal, the proponent had already recognized that the WESM Rules and the DRM are inconsistent on what the legal effect of an arbitral award issued by the dispute resolution panel would be. There are provisions in the DRM that say that the award is final, and that all that needs to be done is for the award to be sent to the Market Operator for immediate implementation.1 On the other hand, the WESM Rules provide that that if a party is dissatisfied with an arbitral award, then recourse to the ERC would be possible 2, which would then relegate the arbitral process into just another stage of the litigation process (i.e., complaint to ERC; followed by appeal to CA; followed finally by appeal to the SC).3

To address this inconsistency, the DRG sought to adopt the principles embodied in Republic Act No. 9285, (the Alternative Dispute Resolution Act of 2004), as well as in Republic Act No. 876, (the Arbitration Law of 1953), as well as the Implementing Rules and Regulations of the ADR Act and the Special ADR Rules of Court, both of which were promulgated in late 2009. These laws and issuances govern the law and practice of alternative dispute resolution in the Philippines and cover the dispute resolution processes envisioned under the WESM Rules as well as the DRM. Under these issuances, arbitral awards are treated as final, binding and enforceable, and may no longer be reviewed on their merits either by way of appeal or petition for certiorari to the higher courts.

This item in the previous proposal however, was met with opposition and was not approved perhaps due to the novelty of an agreement-based arbitration and other ADR principles at that time; and a strong tendency to maintain the traditional approach to dispute resolution remained embedded within the usual practices of the authorities who operated strictly under the regulatory structure of the ERC.

However, the recent experience as regards the first agreement-based WESM Arbitration that occurred in the year 2019 between a market participant and the Market Operator has constrained the DRA to consider resubmitting the previously denied proposal with hope that this time or eight (8) years thereafter, the proposal would be met with a more objective view along with the growing satisfaction in the effectiveness of an agreement-based arbitration and the principles of the ADR under RA 9285.

**D. Removal of the PEM Board and the WESM Governance Committees as Impleadable Entities under Clause 7.3.1.1 (c) of the WESM Rules**

Similar to Item C, this proposal for the Removal of the PEM Board and the WESM Governance Committees as Impleadable Entities under Clause 7.3.1.1 of the WESM Rules had previously undergone the Rules Change process as a similar if not exact proposal was submitted to the RCC sometime in August 2016. The proposal was approved by the Committee as well as the PEM Board but was rejected by the DOE apparently based on a wrongful assumption that the Dispute Resolution Administrator, who was the proponent of the amendment, recommended the retention of the PEM Board in the list of impleadable entities. Despite having explained that he was misconstrued as he was in fact the proponent of the amendment to remove the PEM Board as an impleadable entity, the proposal was never reviewed nor submitted for reconsideration after that.

During the discussion for Item C (Final Settlement of WESM Disputes and its Binding Effect), it was determined that this proposal on the removal of the PEM Board and the WESM Governance Committees as impleadable entities is worth revisiting as it was also made pursuant to the same goal to align the provisions of the WESM Dispute Resolution with the agreement-based or commercial arbitration framework. Since the previous proposal was only rejected based on an apparent misinterpretation, it is worthy to restate the same background, discussion and rationale in the previous proposal as follows:

Back in 2011, the WESM Dispute Resolution Process (“WESM-DRP”) was shifted in favor of adopting *agreement-based commercial arbitration* framework from the previous ERC-delegated *regulatory adjudication* framework. The current mode of dispute resolution is contemplated to only admit and settle “*inter-partes*” (between the parties) disputes with subject matters that are civil, commercial or business (as contra-distinguished from penal, administrative or regulatory/policy) in nature. This was stipulated in the WESM Rules under Clause 7.3.1.1 stating that the WESM-DRP shall *“apply to all disputes relating to or in connection with transactions in the WESM"* (e.g., billing and settlement issues). Therefore, a commercial/business/civil dispute among parties to a transaction should have resulted from the operation of the spot market for it to be categorized as a *WESM Dispute*.

Noting the intention of WESM-DRP and having defined what a WESM Dispute is, it is found that Clause 7.3.1.1 (c) is inconsistent with the premise of commercial arbitration and the WESM-DRP. Said provision states that:

*7.3.1.1 The dispute resolution procedures set out in this clause 7.3 apply to all disputes relating to or in connection with transactions in the WESM which may arise between or among any of the following:*

*(a) The* Market Operator*;*

*(b) The* System Operator*;*

***(c) The PEM Board and its Working Groups* except the Dispute Resolution Administrator;**

*(d)* WESM members*;*

*(e) Intending* WESM members;

*xxx*

As the PEM Board is mandated to be the governance body of the WESM, its actions will be mostly, if not all, in performance of its ERC-delegated regulatory or "police" powers. Therefore, disputes filed against the PEM Board would, at their core, question or undermine the enforcement of the regulatory policies of the market. The nature of such disputes is not civil, commercial or business, making them fall outside the particular definition of a WESM Dispute and inadmissible for resolution through WESM-DRP.

**Dual aspects of the WESM Rules and types of breach**

To provide further context to the nature of possible disputes in the WESM, one would do well to be familiar with the dual aspects of the WESM Rules:

**Figure 1**

**Terms & Conditions of Market Transaction**

WESM Rules as providing the essential elements of contract, as follows:

1. Defines the subject (i.e., the ***parties*** – who consent through their membership application);
2. Determines the object (***commodity***; ***service***); and
3. Sets the consideration (i.e., ***prices; pricing parameters/mechanism***), and the conditions thereof

(especially where there is NO CONTRACT tying the parties together).

WESM Rules prohibit/ penalize:

1. Abuse of market power/ position;
2. Cartelization;
3. Anti-Competitive or discriminatory b**e**haviors;
4. Price fixing/manipulation;
5. Economic & physical withholding,
6. Etc.

and provides for their monitoring, investigation, imposition of fines etc., and meting out penalties or mitigating measures therefor.

**Regulatory Policies**

The foregoing diagram shows that the WESM Rules contain both [i] the essential elements of a contract (in the sale of electricity) or the terms and conditions of market transactions, and [ii] regulatory policies. Noting these two aspects, it is possible that a WESM Member could commit a violation against either or both of these. A violation or “breach” of the provisions of the WESM Rules, therefore, can be understood as either a [i] a breach of the terms and conditions of market transactions (with the provisions of the WESM Rules being understood as partaking the nature of a contract between or among the parties), or [ii] a violation of the regulatory policies (with the provisions of the WESM Rules being the repository of regulatory policies). To illustrate:

***Violations*** cases

The two types of breach/violations may trigger disputes that may be resolved under either the jurisdiction of the WESM-DRP (i.e., if “inter-parties” commercial disputes), or under the jurisdiction of regulatory bodies such as the ERC or the DOE (i.e., if disputes on violations of regulatory policies) initially delegated to the PEM Board and/or WESM’s Governance Committees. As far as the PEM Board is concerned, a dispute to its actions/decisions (e.g., imposition of penalties) would fall under the latter jurisdiction as such disputes are not borne out of purely commercial market transactions but are ultimately a challenge to the PEM Board’s enforcement or implementation of market rules and policies. Hence, disputes involving the PEM Board do not raise a WESM Dispute.

**Figure 2**

***Inter partes*** disputes

Impact on that aspect of the WESM Rules that stipulates the terms and conditions of market transactions, relied upon by WESM Participants – in which case, their SETTLEMENT (i.e., NOTICES, PROCEEDINGS, and AWARDS/DISPUTE RESOLUTION) are placed within the Dispute Resolution framework.

**Terms & Conditions of Market Transaction**

***Violations*** cases

Impact on that aspect of the WESM Rules that prohibits/ penalizes violations of regulatory policies – in which case, their MONITORING, INVESTIGATION, and METING OF PENALTIES or OF MITIGATING MEASURES are placed under the authority of the PEM Board or PEMC’s MAG, ECO, MSC, or like Committees/Units, and ERC, as the case may be.

**Regulatory Policies**

The matrix below compares the subject matters of disputes cognizable under the purview of the DOE, ERC and the WESM-DRP:

**Table 1**

| **Department of Energy\*** | **Energy Regulatory Commission\*\*** | **WESM\*\*\*** |
| --- | --- | --- |
| 1. For disputes related to the business of importing, exporting, re-exporting, shipping, transporting, processing, refining, marketing and distributingenergy resources; and 2. For disputes related to the direct supply or connection of electricity.   ------------------------  *\*Mactan Electric Company, Inc. vs. National Power Corporation, et.al (G.R. No. 172960, March 2010):*  *“The subject matter of the dispute between the parties is neither cross-ownership, nor abuse of market power, nor cartelization, nor anti-competitive or discriminatory behavior. Based on the allegations of MECO in its complaint and the essence of the relief it sought, the subject matter of its dispute with MCIAA, NPC and TRANSCO involved the distribution of energy resource, specifically the direct supply of electricity by NPC through TRANSCO to MCIAA, without passing through the distribution system of MECO as the franchise holder in the area. Therefore, their dispute was not within the authority of ERC to resolve.*  *But neither did the RTC have jurisdiction over the dispute. That power belonged to the Department of Energy (DOE).”* | 1. For all cases contesting rates, fees, fines and penalties imposed by ERC in the exercise of its powers, functions and responsibilities; 2. For disputes arising out of violations of regulatory policies, including, but not limited to: 3. Abuse of market power/ position; 4. Cartelization; 5. Anti-Competitive or discriminatory behaviors; 6. Price fixing/manipulation; 7. Economic & physical withholding, 8. Cross-ownership, etc. 9. For all cases involving disputes between and among participants or players in the energy sector.   --------------------------  \*\**Section 43 of R.A. 9136:*  *“(l) Monitor and take remedial measures to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant.*  *xxx*  *(v) The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.”* | 1. For disputes between WESM Members or between participants in a WESM transaction; and 2. For disputes between participants in the Retail Market.   ------------------------  *\*\*\* (1) Section 3.1 of the Dispute Resolution Market Manual and (2) Clause 1.7 of the Retail Rules* |

**Removal of the PEM Board as an impleadable entity**

Given the definition of a WESM Dispute, it is therefore submitted that Clause 7.3.1.1 (c) is incompatible with how the WESM Dispute Resolution framework is contemplated and thus should be removed due to the following reasons:

1. The actions of the PEM Board and its Working Groups (i.e., Governance Committees) are in exercise of their "police" and regulatory powers. The decisions of the PEM Board are mostly administrative or regulatory in nature, as it is responsible for implementing policies prescribed in the WESM Rules and Market Manuals. Since the WESM-DRP was intended to only resolve civil, commercial or businessdisputes out of market transactions, conflicts arising out of the decisions of the PEM Board (and its Working Groups) are not cognizable under the WESM Dispute Resolution Process.
2. The PEM Board does not have a juridical personality. A Board of Directors that can sue and be sued does not exist in law. Even in contexts outside of the WESM, it is unlikely that a party would particularly sue a company's Board of Directors as it is known that the latter is not a juridical person.
3. The administrative and regulatory provisions of the WESM Rules are not arbitrable. But as long as the PEM Board, who implements the administrative and regulatory policies of the WESM, is identified as one of possible impleadable entities, Clause 7.3.1.1 (c) would always be open to interpretation, thereby a perennial cause for confusion.

It should be emphasized, however, that the foregoing proposal to delete the PEM Board and the WESM Governance Committees under the subject clause does not discount the possibility that the body could make decisions detrimental to a certain sector in the industry, and therefore may be appealable to the ERC which ultimately has jurisdiction. However, commercial arbitration, or the Dispute Resolution Process of the WESM in general, is not the proper forum to appeal a policy or regulatory decision.

1. **THE PROPOSED RULES CHANGE**

**A. Dispute Resolution for the Retail Rules**

Under Section 3.1 of DRM Issue No. 6 (Dispute Categories and Parties), the provisions and procedures in the Manual shall apply in the case of disputes that may arise between or among any of the following parties:

##### The MO;

##### The SO;

##### The *PEM Board* and its working groups, except the *Dispute Resolution Administrator*;

##### WESM Members; and

##### Intending WESM Members

For disputes arising under or in connection with or in relation to one or more of the following:

1. The application of any of the provision of the WESM Rules, including its Market Manuals;
2. The interpretation of any of the provisions of the WESM Rules, including its Market Manuals;
3. Any act, omission or behavior by any of the parties mentioned above in a manner inconsistent with the WESM Rules;
4. Any obligation to settle payment under the WESM Rules;
5. Any dispute under or in relation to a contract between two or more persons or entities referred to in Clauses 3.1.1 (a) to (e) where the contract provides that the dispute resolution procedures under the WESM Rules are to apply to any dispute under or in relation to that contract with respect to the application of WESM Rules; or
6. A dispute under or in relation to the rules and regulations issued by the ERC and DOE under the Act, where such rules and regulations provide that the dispute resolution procedures under the WESM Rules are to apply to any dispute under or in relation to those rules and regulations.
7. Any dispute relating to or in connection with a transaction in the WESM.

While the type of disputes between the Supplier and Customer under the Retail Rules may generally be covered under by categories (f) and (g) above, there is still a need to amend the DRM provisions in order to admit the delimited kinds of disputes characteristic of transactions under the Retail Rules and cater to them uniquely. The proposed changes therefore identify these specific disputes, and delimited at that, as follows:

(i) those involving fees for early/pre-termination of a Retail Supply Contract;

(ii) disputes involving the Retail Supply Contract price; and

(iii) disputes related to the Retail Supply Contract period.

In specifically identifying the foregoing predictably limited disputes under the Retail Rules, the proposal for rules change present the need to treat them separately from the more conventional types of disputes contemplated in the DRM and therefore lays the basis for providing for a variant type of dispute resolution i.e., in the section for special provisions, that is more appropriate to the aforementioned disputes.

Currently, the modes of dispute resolution in the DRM are negotiation, mediation and arbitration in its conventional form or that which has been described as a type of adversarial proceeding in which a neutral person or arbitrator renders an award. This is the default mode of arbitration for the disputes that are currently outlined in the DRM. With the proposed delineation of the disputes under the Retail Rules, the proposal now is to make the *“Final Offer Arbitration,”* or *“Pendulum Arbitration”* the default mode of arbitration for said disputes under the Retail Rules not only because it is faster but also because it is more cost-effective when it comes to legal costs. In other words, with the delimited disputes arising from transactions under the Retail Rules, resolution of the same should take advantage of the much-abbreviated (and perhaps less costly) form of arbitration as what *“Final Offer”* or *“Pendulum”* Arbitration promises.

In Final Offer Arbitration (FOA) or Pendulum Arbitration, the parties exchange settlement offers and the arbitral tribunal in the end, chooses only one of the final offers submitted by the parties, thereby abbreviating much of the arbitration process. Unlike in the conventional form of arbitration where the parties completely rely on the tribunal to resolve the issues and render an award in favor of one party, the FOA mode gives a certain freedom to the parties to present their own settlement offer and at the risk of losing entirely, they are constrained to make their settlement offers as reasonable and feasible as possible.

The proposed rules change however maintains the primacy of the parties’ agreement and therefore state that while the FOA is the default mode of arbitration for disputes under the Retail Rules, the parties may still “opt out” i.e., choose to agree otherwise and be bound by the conventional mode of arbitration. This opt-out clause can be found in Annex H (Applicability) as it states that parties who are bound by the FOA Rules have an option to mutually agree to be bound by the conventional rules, i.e. “These *Final Offer Arbitration Supplementary Rules* (“Supplementary Rules”) shall apply to disputes where: (a) parties which are bound hereby have not mutually agreed otherwise.”

On the other hand, parties to disputes under the general application of the DRM and are bound by the conventional mode as their default mode of arbitration may also choose to “opt-out” of the conventional mode and “opt-in” to the FOA Rules in Annex H. Thus, the proposed amendment as to the applicability of the FOA is made a mere insert in the DRM and couched in this language:

*“should the parties determine that their dispute would be better or more expeditiously resolved by FOA, they may elect to be bound by the FOA Supplementary Rules set forth in Annex H”.*

The FOA is therefore not limited to parties with disputes under the Retail Rules as the proposed amendments state that it can be availed by parties who are not bound to it as their default mode but have agreed to be bound by the FOA Rules, i.e. “These *Final Offer Arbitration Supplementary Rules* (“Supplementary Rules”) shall apply to disputes where: (a) xxx xx (b) parties which are not bound hereby have mutually agreed to be so bound.

To further acknowledge the agreement of the parties to “opt in” to FOA, the proposed amendments also adopt the procedure wherein the DRA issues a certification as to the agreement of the parties to “opt in” in order to avoid any party later on claiming that it did not mean what it said in their agreement, perhaps in an attempt to evade having to pay what turns out to be an adverse award.

For easier reference and to dispense with the need to overhaul the processes stated in the DRM, the proposed amendments also presented the specific procedures involved in the FOA as supplementary rules to the DRM and are therefore appended thereto as ANNEX H. These supplementary rules are patterned after that of the USA’s International Center for Dispute Resolution or ICDR and such fact is expressly stated in the proposed amendments to acknowledge the author and avoid being cited for plagiarism. A copy of the proposed ANNEX H is hereto attached for easier reference.

**B. Guidelines for Virtual Hearings**

The guidelines are proposed to be appended to the DRM as ***ANNEX I (GUIDELINES FOR VIRTUAL HEARINGS)*** and would include the following provisions:

Article 1 – Introduction

Article 2 - Application for Conduct of Virtual Hearings

* This article discusses preliminary considerations including the procedures in deciding on the appropriate procedural measures to proceed with the arbitration in an expeditious and cost-effective manner. There are suggested measures as to how the arbitral tribunal should take account of all the circumstances, including those that are the consequence of a pandemic, the nature and length of the conference or hearing, the complexity of the case and number of participants, whether there are particular reasons to proceed without delay, whether rescheduling the hearing would entail unwarranted or excessive delays, and as the case may be the need for the parties to properly prepare for the hearing.
* The article likewise discusses (i) further procedures when the parties agree, or if the arbitral tribunal determines, to proceed with a virtual hearing; (ii) what the parties and the arbitral tribunal should take into account; (iii) directives to openly discuss and plan for special features of proceeding in that manner, including those addressed in the Appendices.
* More importantly, this article provides the legal bases and justifications for the conduct of a virtual hearing when the arbitral tribunal determines to proceed with it without party agreement, or over party objection, pursuant to Clause 9.7.6.2 of the WESM Dispute Resolution Manual and relevant provisions of Republic Act No. 9285, the United Nations Commission on International Trade Law (UNCITRAL) Model Law and Republic Act No. 8792, otherwise known as the “Electronic Commerce Act of 2000.”

Article 3 – Procedural Issues

* This article includes specific procedures relative to the service of documents, and notices as well as other considerations for the arbitral tribunal to ensure that parties are treated with equality and each party is given a full opportunity to present its case during a virtual hearing.

Article 4 – Definition of Terms

Appendix A (Checklist for a Protocol on Virtual Hearings)

Appendix B (Suggested Clauses for Virtual Hearings Protocols and Procedural Orders Dealing with its Organization)

Appendix C (Enhanced Technology and Logistical Considerations/Checklist *(Optional)*

Attached is ANNEX I for reference. These Guidelines are a product of a thorough study and comparison of various Protocols, Guidelines and Checklists from various professional organizations such as the Chartered Institute of Arbitrators, Hong Kong International Arbitration Centre, International Chamber of Commerce and experts from Seoul in coordination with KCAB International and the Seoul International Dispute Resolution Centre (SIDRC), DELOS Dispute Resoltuion and the Singapore International Arbitration Centre (SIAC). These Protocols, Guidelines and Checklists are intended to serve as a guide to best practice for planning, testing and conducting video conferences in arbitration:

* **CIArb Guidance Note on Remote DR Proceedings**
* **Seoul Protocol on Video Conferencing**
* **HKIAC Guidelines for Virtual Hearings**
* **ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic**
* **DELOS (Checklist on Holding Virtual Hearings)**
* **SIAC Guides (Taking Your Arbitration Remote)**

The provisions of the foregoing Protocols, Guidelines and Checklists were compared and eventually, the best provisions were chosen to be included in the attached ANNEX I and reworded or reshaped to conform with the WESM environment specifically the WESM Dispute Resolution Framework and the applicable domestic laws such as the Republic Act 9285,[[5]](#footnote-5) Republic Act 8792 (E-Commerce Act of 2000) and other laws. Attached is the Table of Comparison of the foregoing Protocols, Guidelines and Checklists which became the source or reference for ANNEX I.

**C. Final Settlement of WESM Disputes and its Binding Effect**

1. Change Rule 7.3.1.1. to “x x x a party for **final and binding** settlement by arbitration in accordance with **RA 9285 otherwise known as** the Alternative Dispute Resolution Act of 2004 and the dispute resolution provisions provided herein.”
2. Deletion of WESM Rules Clause 7.3.1.4 (WESM Members shall comply with the dispute resolution process of the WESM Rules before filing a formal complaint to the ERC)
3. Deletion of WESM Rules Clause 7.3.11.4 (If a party to a dispute is not satisfied with the resolution of the dispute resolution panel, the party may file a formal complaint to the ERC).
4. Deletion of Section 3.2.1. of the Dispute Resolution Manual which states:

***3.2. Resort to ERC***

*3.2.1. An entity belonging to any of the categories described in Section 3.1.1 should first comply with the dispute resolution process set out in this Manual before filing a formal complaint with the ERC.*

Under the Implementing Rules and Regulations of the ADR Act as well as the Special Rules of Court on ADR, an arbitral award is deemed to final, binding and enforceable.[[6]](#footnote-6)

While the DRA recognizes that the EPIRA confers upon the ERC exclusive and original jurisdiction to hear and decide disputes involving participants and players in the energy sector (Sec. 43 [u], EPIRA), this is nonetheless without prejudice to the right of disputing parties, consistent with the principle of party autonomy enshrined in Sec. 2 of the ADR Act, to agree by contract to submit the resolution of their dispute to some other person, body or institution by a process that they had mutually agreed upon.[[7]](#footnote-7)

It must also be emphasized that only WESM-related disputes as specified in Sec. 3.1.1 of the DRM are affected by the rule change, since the market participants have all categorically agreed in the Market Participation Agreement (which all intending participants execute as part of their application documents to the WESM) to submit these disputes to the dispute resolution process provided under WESM Rule 7.3, which sets forth the dispute resolution framework to resolve these disputes.[[8]](#footnote-8)

With this, it is clear that under the EPIRA, ERC remains to have jurisdiction over:

* WESM policy matters (in its exercise of police-regulation) – but which is not an issue anyway in Arbitration under the DRM especially since that is the province of the RCC and PEM Board; and
* quasi-judicial matters between WESM Members

The idea being highlighted in the proposal is that the objective to harmonize WESM Arbitration with RA 9285 does not equate to a departure from the mandates of the EPIRA. It is worthy to note in this regard that that Courts in RA 9285 (with RA 876 being about to be repealed already, and in the meantime the pronouncement of the Supreme Court both in recent jurisprudence and in the Special Rules of Court on ADR) do not review the merits of the Arbitral Award but simply oversee if the due process requirements of the arbitration have indeed been satisfied.

It goes to say that the Arbitral Award is the result of the Parties’ (private business) contract {i.e., in the context of “party autonomy} which even the ERC (so long as the dispositive portion of the Arbitral Award) doesn’t spill over to, with adverse impact on, the public that WESM serves) may not encroach into or derogate against.

Stated differently, ERC here is not being disenfranchised of its jurisdiction over disputes between WESM Members (whether originally or appellate) as after all what are brought up, if ever, to the RTCs (by operation of RA 9285) are not the substantive rights and obligations of the WESM Parties who are the parties to a WESM Arbitration, but simply the due process requirements of the arbitration {which, again, is a private dispute resolution mechanism matter, over the parties’ desire to submit to which, are all their own and the protection to which right of contract is guaranteed by the Constitution.

On the other hand, if ERC would deem it fit to tilt the balance in the WESM Members’ substantive rights and obligations with each other, the same can and should well be either imposed in an ERC Regulation or get passed upon by the RCC which has a delegated-only authority from above.

**D. Removal of the PEM Board and the WESM Governance Committees as Impleadable Entities under Clause 7.3.1.1 (c) of the WESM Rules**

Deletion of Clause 7.3.1.1 (c) as follows:

*7.3.1.1 The dispute resolution procedures set out in this clause 7.3 apply to all disputes relating to or in connection with transactions in the WESM which may arise between or among any of the following:*

*(a) The* Market Operator*;*

*(b) The* System Operator*;*

***(c) The PEM Board and its Working Groups* except the Dispute Resolution Administrator;**

*(d)* WESM members*;*

*(e) Intending* WESM members;

*xxx*

For a full appreciation of the proposed amendments, kindly refer to the attached matrices for the proposed changes to the WESM Rules and the Dispute Resolution Market Manual Issue 6.0.

1. **BACKGROUND AND DESCRIPTION OF THE PROPONENT**

The Dispute Resolution Administrator (DRA) is tasked to administer and ensure the effective implementation and operation of the WESM Dispute Resolution Process, as well as facilitate in the resolution of disputes within the objectives established under the WESM Rules.

The current DRA is Atty. Jesusito G. Morallos who received his Juris Doctor degree from the Ateneo de Manila University in 1992 and was admitted to the Philippine Bar in 1993. He received his Bachelor of Science degree in Civil Engineering from the University of Santo Tomas in 1986.

He is affiliated with several professional societies such as the Philippine Institute of Civil Engineers, and the Integrated Bar of the Philippines. He is an accredited arbitrator of the Construction Industry Arbitration Commission, the Intellectual Property Office, the Philippine Dispute Resolution Center, Inc., and a member of the international arbitration institutions such as the Chartered Institute of Arbitrators of United Kingdom (East Asia Branch), the Society of Construction Law, UK, and the Dispute Resolution Board Foundation of France (Philippine Branch). In addition, he is the current President of the the Philippine Institute of Arbitrators and recent-past President of the Philippine Institute of Construction Arbitrators and Mediators.

Because of his extensive experience in construction, property development, environmental, infrastructure, energy and mining, build-operate-transfer, and arbitration laws, Atty. Morallos has been engaged as consultant by various government agencies.

Owing to his expertise in the energy industry, he was also nominated and appointed as an arbitrator in an International Chamber of Commerce arbitration case seated in Singapore involving a geothermal power plant in the Philippines and was made a Chairman in an arbitration case filed with the CIAC involving transmission lines and grid assets.

1. **CONCLUSIONS AND RECOMMENDATIONS**

**A. Dispute Resolution for the Retail Rules**

The approval of the proposed amendments to the DRM is highly recommended since they not only expand the coverage of arbitrable disputes but also present a more sophisticated mechanism for dispute resolution in the WESM. At the same time, they fulfill the objectives of the Retail Rules by addressing the needs of the participants in the Retail Market and contributing to the effective management of their transactions.

**B. Guidelines on Virtual WESM Dispute Resolution Proceedings**

The approval of the Guidelines on Virtual WESM Dispute Resolution Proceedings is likewise highly recommended as they highlight the important role that parties, counsel and tribunals play in ensuring that disputes will continue to be resolved on a fair, expeditious, and cost-effective basis. The Guidelines provide the procedural tools available to parties, counsel and tribunals to mitigate the delays generated by the pandemic and other similar challenges in the future.

**C. Final Settlement of WESM Disputes and its Binding Effect**

**D. Removal of the PEM Board and the WESM Governance Committees as Impleadable Entities under Clause 7.3.1.1 (c) of the WESM Rules**

Adopting the proposed changes (C) and (D) will result to a set of WESM Rules and Dispute Resolution Manual that are relevant and current to the latest practices and legal standards in place in the field of Alternative Dispute Resolution. Moreover, the proposed changes to the WESM Rules and DRMM will result in a transparent and cohesive procedure for the resolution of WESM-related disputes.

1. **REFERENCES**

* Department of Energy issued Department Circular (DC) 2013-01-0002 referred to as the “Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market,” otherwise known as the “Retail Rules.”
* WESM Rules
* Dispute Resolution Manual Issue No. 6
* FINAL OFFER ARBITRATION SUPPLEMENTARY RULES (Also referred to as Baseball or Last Best Offer Arbitration Supplementary Rules) effective January 1, 2015 by the International Center for Dispute Resolution (ICDR) and the American Arbitration Association (AAA)

<https://www.adr.org/sites/default/files/Final%20Offer%20Supplementary%20Arbitration%20Procedures.pdf>

* CIArb Guidance Note on Remote DR Proceedings
* Seoul Protocol on Video Conferencing
* HKIAC Guidelines for Virtual Hearings
* ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic
* DELOS (Checklist on Holding Virtual Hearings)
* SIAC Guides (Taking Your Arbitration Remote)

1. **Proposed Amendments to the WESM Rules**

| **Title** | **Section** | **Provision** | **Proposed Amendment** | **Rationale** | **Comments** | **Proposed Rewording** | **Proponent’s Response** | **RCC Decision** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Enforcement and Disputes | 7.3 Dispute Resolution | **7.3.1 Application and Guiding Principles**  7.3.1.1 The dispute resolution procedures set out in this clause 7.3 apply to all disputes relating to or in connection with transactions in the *WESM* which may arise between or among any of the following:  (a) The *Market Operator*;  (b) The *System Operator*;  (c) The *PEM Board* and its Working Groups except the *Dispute Resolution Administrator;*  (d) *WESM member*s;  (e) Intending *WESM member*s;  (f) Persons who have been notified by the *Market Operator* under clause 2.5.6.1 on the following grounds:  (1) an application for registration as a *WESM member* has been unsuccessful;  (2) the application or interpretation of the *WESM Rules*;  (3) the application under or in relation to a contract between two or more persons or entities referred to in clauses 7.3.1.1 (a) to (f) where that contract provides that the dispute resolution procedures under the *WESM Rules* are to apply to any dispute under or in relation to the contract with respect to the application of the *WESM Rules*;  (4) a dispute under or in relation to the rules and regulations issued by the *ERC* and the *DOE* under the *Act*, where such rules and regulations provide that the dispute resolution procedures under the *WESM Rules* are to apply to any dispute under or in relation to that industry code or rules and regulations; [**(As amended by DOE No. 2005-11-010 dated 11 November 2005)**](file://C:\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\Windows\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\garodriguez\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\hyperlink\7.3.1.1i.doc)  (5) the failure of an entity or entities referred to in clauses 7.3.1.1 (a) to (e) to act or behave in a manner consistent with the *WESM Rules*;  (6) an obligation to settle payment under the *WESM Rules*;  The aforementioned parties shall bind themselves with the effect of submitting any dispute, controversy or claim arising out of or relating to, a *WESM* transaction to which they are or will be a party for settlement by arbitration in accordance with the dispute resolution provisions provided herein.  **(As amended by DOE DC No. 2012-02-0001 dated 15 February 2012)** | **7.3.1 Application and Guiding Principles**  7.3.1.1 The dispute resolution procedures set out in this clause 7.3 apply to all disputes relating to or in connection with transactions in the *WESM* which may arise between or among any of the following:  (a) The *Market Operator*;  (b) The *System Operator*;  (c) The *PEM Board* and its Working Groups except the *Dispute Resolution Administrator;*  (d) *WESM member*s;  (e) Intending *WESM member*s;  (f) Persons who have been notified by the *Market Operator* under clause 2.5.6.1 on the following grounds:  (1) an application for registration as a *WESM member* has been unsuccessful;  (2) the application or interpretation of the *WESM Rules*;  (3) the application under or in relation to a contract between two or more persons or entities referred to in clauses 7.3.1.1 (a) to (f) where that contract provides that the dispute resolution procedures under the *WESM Rules* are to apply to any dispute under or in relation to the contract with respect to the application of the *WESM Rules*;  (4) a dispute under or in relation to the rules and regulations issued by the *ERC* and the *DOE* under the *Act*, where such rules and regulations provide that the dispute resolution procedures under the *WESM Rules* are to apply to any dispute under or in relation to that industry code or rules and regulations; [**(As amended by DOE No. 2005-11-010 dated 11 November 2005)**](file://C:\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\Windows\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\AppData\Local\Microsoft\garodriguez\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\hyperlink\7.3.1.1i.doc)  (5) the failure of an entity or entities referred to in clauses 7.3.1.1 (a) to (e) to act or behave in a manner consistent with the *WESM Rules*;  (6) an obligation to settle payment under the *WESM Rules*;  The aforementioned parties shall bind themselves with the effect of submitting any dispute, controversy or claim arising out of or relating to, a *WESM* transaction to which they are or will be a party ~~for settlement by arbitration in accordance with the dispute resolution provisions provided herein.~~ **for final and binding settlement by arbitration in accordance with RA 9285 otherwise known as the Alternative Dispute Resolution Act of 2004 and the dispute resolution provisions provided herein.**  **(As amended by DOE DC No. 2012-02-0001 dated 15 February 2012)** | To align WESM Dispute Resolution with the law, specifically the Implementing Rules and Regulations of the ADR Act as well as the Special Rules of Court on ADR which states that an arbitral award is deemed final, binding and enforceable.[[9]](#footnote-9) |  |  |  |  |
| Enforcement and Disputes | 7.3 Dispute Resolution | 7.3.1.4 WESM Members shall comply with the dispute resolution process of the WESM Rules before filing a formal complaint to the ERC. | ~~7.3.1.4 WESM Members shall comply with the dispute resolution process of the WESM Rules before filing a formal complaint to the ERC~~. | To align WESM Dispute Resolution with the law, specifically the Implementing Rules and Regulations of the ADR Act as well as the Special Rules of Court on ADR which states that an arbitral award is deemed final, binding and enforceable.[[10]](#footnote-10) |  |  |  |  |
| Chapter 7 Enforcement and Disputes | 7.3 Dispute Resolution | **7.3.11 Effect of Resolution**  7.3.11.4 If a party to a dispute is not satisfied with the resolution of the *dispute resolution panel,* the party may file a formal complaint to the *ERC.* | ~~7.3.11.4 If a party to a dispute is not satisfied with the resolution of the~~ *~~dispute resolution panel,~~* ~~the party may file a formal complaint to the~~ *~~ERC.~~* | To align WESM Dispute Resolution with the law, specifically the Implementing Rules and Regulations of the ADR Act as well as the Special Rules of Court on ADR which states that an arbitral award is deemed final, binding and enforceable.[[11]](#footnote-11) |  |  |  |  |

1. **Proposed Amendments to the Dispute Resolution Manual Issue No. 6**

| **Title** | **Section** | **Provision** | **Proposed Amendment** | **Rationale** | **Comments** | **Proposed Rewording** | **Proponent’s Response** | **RCC Decision** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Definitions, Interpretation and Construction | Section 2.1. Definitions  Sub-sections (kk) to (qq) | 1. Request for Arbitration has the meaning ascribed to it in Section 9 of this Manual. 2. Request for Mediation has the meaning ascribed to it in Section 8 of this Manual. 3. Respondent means a party to a WESM dispute against whom a claim is made. 4. Rules denote the WESM Rules 5. Rules Change Committee refers to the Committee established by WESM Rule 8.2 to review and propose amendments to the WESM Rules. Selection Committee refers to the committee composed of at least three (3) members of the PEM Board, one of whom should be an Independent PEM Board director, which is tasked to review and evaluate the qualifications of all persons nominated to any PEM Committee requiring appointment by the PEM Board. 6. WESM-Accredited Arbitrator, WESM-Accredited Mediator and WESM-Accredited ADR Support Service Center have the meaning ascribed to them, respectively, in Sections 6 of this Manual. 7. WESM dispute means a dispute of a category and between or among parties mentioned in Section 3.1 of this Manual, or ones relating to or in connection with transactions in the WESM within the context of Rule 7.3.1.1 of the WESM Rules. 8. WESM Objectives refers to the objectives of the spot market as defined in Clause 1.2.5. of the WESM Rule 9. WESM Member means a person or entity registered with the MO in accordance with WESM Rules 2.3 and 2.4, which includes Trading Participants (customers, generation companies and suppliers), Metering Services Providers, Network Service Providers, Ancillary Services Providers and the SO. 10. WESM Participant means a WESM Member or an Intending WESM Member participating in a transaction in the WESM. | 1. Request for Arbitration has the meaning ascribed to it in Section 9 of this Manual. 2. Request for Mediation has the meaning ascribed to it in Section 8 of this Manual. 3. Respondent means a party to a WESM dispute against whom a claim is made. 4. **Retail Rules refer to the rules promulgated by the Department of Energy governing the integration of retail competition in the operations and governance processes of the WESM and the management of the transactions of the Suppliers and Contestable Customers in the WESM, and the operations of the Central Registration Body as defined in Department Circular No. DC2013-01-0002.**   **(ll)** Rules denote the WESM Rules  **(mm)** Rules Change Committee refers to the Committee established by WESM Rule 8.2 to review and propose amendments to the WESM Rules. Selection Committee refers to the committee composed of at least three (3) members of the PEM Board, one of whom should be an Independent PEM Board director, which is tasked to review and evaluate the qualifications of all persons nominated to any PEM Committee requiring appointment by the PEM Board.  **(nn)** WESM-Accredited Arbitrator, WESM-Accredited Mediator and WESM-Accredited ADR Support Service Center have the meaning ascribed to them, respectively, in Sections 6 of this Manual.  **(oo)** WESM dispute means a dispute of a category and between or among parties mentioned in Section 3.1 of this Manual, or ones relating to or in connection with transactions in the WESM within the context of Rule 7.3.1.1 of the WESM Rules.  **(pp)** WESM Objectives refers to the objectives of the spot market as defined in Clause 1.2.5. of the WESM Rule  **(qq)** WESM Member means a person or entity registered with the MO in accordance with WESM Rules 2.3 and 2.4, which includes Trading Participants (customers, generation companies and suppliers), Metering Services Providers, Network Service Providers, Ancillary Services Providers and the SO.  **(rr)** WESM Participant means a WESM Member or an Intending WESM Member participating in a transaction in the WESM. | To include Retail Rules in the Definitions and refer to them as the rules under DOE Department Circular No. DC2013-01-0002. |  |  |  |  |
| General Procedural Provisions | Section 7.1. Disputes Between WESM Members and the System Operator and the Market OperatorSection 7.1.1. | 7.1.1. When a dispute regarding one of the matters described in this Manual arises between and/or among WESM Members including the System Operator and Market Operator, the parties must go through the following steps:Subject to Section 8.3, the parties in dispute should make good faith efforts to amicably settle their dispute between and/or among themselves pursuant to their respective Dispute Management Protocols.Should the negotiation fail, any of the parties may refer the matter in dispute to the DRA in accordance with Section 8.4. Such submission shall set in motion the WESM dispute resolution process established in this Manual. If the DRA determines that the dispute is a *WESM dispute* under Section 2.1(nn) of this Manual, he shall initiate the selection of a mediator under Section 8.5 of this Manual.Should mediation efforts fail, the Claimant(s) may file with the DRA a Request under Section 9 to resolve the dispute by arbitration.Should the parties decide to dispense with mediation and, provided that there has been a determination by the *Dispute Resolution Administrator* within ninety (90) calendar days from receipt of the dispute that the same is a WESM dispute under Section 2.1(oo) of this Manual, directly proceed to arbitration, the parties may elect to do so subject to the issuance by the *Dispute Resolution Administrator* of a certification stating that mediation is no longer a viable option for the parties. | 7.1.1. When a dispute regarding one of the matters described in this Manual arises between and/or among WESM Members including the System Operator and Market Operator, the parties must go through the following steps:Subject to Section 8.3, the parties in dispute should make good faith efforts to amicably settle their dispute between and/or among themselves pursuant to their respective Dispute Management Protocols.Should the negotiation fail, any of the parties may refer the matter in dispute to the DRA in accordance with Section 8.4. Such submission shall set in motion the WESM dispute resolution process established in this Manual. If the DRA determines that the dispute is a *WESM dispute* under Section 2.1 **(oo)** of this Manual, he shall initiate the selection of a mediator under Section 8.5 of this Manual.Should mediation efforts fail, the Claimant(s) may file with the DRA a Request under Section 9 to resolve the dispute by arbitration.Should the parties decide to dispense with mediation and, provided that there has been a determination by the *Dispute Resolution Administrator* within ninety (90) calendar days from receipt of the dispute that the same is a WESM dispute under Section 2.1(oo) of this Manual, directly proceed to arbitration, the parties may elect to do so subject to the issuance by the *Dispute Resolution Administrator* of a certification stating that mediation is no longer a viable option for the parties.**Should the parties determine that their particular dispute would be better or more expeditiously resolved by Final Offer Arbitration, they may elect to be bound by the Final Offer Arbitration Supplementary Rules set forth in Annex H hereto subject to the issuance by the *Dispute Resolution Administrator* of a certification of the parties such agreement.** | The additional provision lays the foundation for the use of the Final Offer Arbitration or the Pendulum Rules for parties who agree to be bound by said Supplementary Rules subject to the issuance by the *Dispute Resolution Administrator* of a certification of the parties to such agreement.The certification by the DRA as to the parties’ election will avoid future contests and refusal to recognize the arbitral award on the ground that the mode of arbitration was not mutually agreed upon by the parties. |  |  |  |  |
| New provision | New provision |  | **7.3. Disputes Between Supplier and Customer under the Retail Rules**  **7.3.1. Unless the parties agree otherwise, resolution of disputes on:**   1. **fees for early/pre-termination of a Retail Supply Contract;** 2. **Retail Supply Contract price; and** 3. **Retail Supply Contract period, within the contemplation of the Retail Rules shall be subject to the Final Offer Arbitration Supplementary Rules set forth in Annex H hereto.** | The additional provision defines the disputes specific to those between the Supplier and Customer under the Retail Rules and makes the Final Offer Arbitration under the Supplementary Rules in Annex H the default mode for these types of disputes. To give primacy to the agreement of the parties, the proposed provision retained the caveat, *“unless the parties agree otherwise”* to give them the option to choose the conventional mode of arbitration instead. |  |  |  |  |
| Application | *3.2. Resort to ERC* | 3.2.1. An entity belonging to any of the categories described in Section 3.1.1 should first comply with the dispute resolution process set out in this Manual before filing a formal complaint with the ERC. | ~~3.2. Resort to ERC~~    ~~3.2.1. An entity belonging to any of the categories described in Section 3.1.1 should first comply with the dispute resolution process set out in this Manual before filing a formal complaint with the ERC.~~ | To align WESM Dispute Resolution with the law, specifically the Implementing Rules and Regulations of the ADR Act as well as the Special Rules of Court on ADR which states that an arbitral award is deemed final, binding and enforceable.[[12]](#footnote-12)  While the DRA recognizes that the EPIRA confers upon the ERC exclusive and original jurisdiction to hear and decide disputes involving participants and players in the energy sector (Sec. 43 [u], EPIRA), this is nonetheless without prejudice to the right of disputing parties, consistent with the principle of party autonomy enshrined in Sec. 2 of the ADR Act, to agree by contract to submit the resolution of their dispute to some other person, body or institution by a process that they had mutually agreed upon.[[13]](#footnote-13) |  |  |  |  |
| DISPUTE RESOLUTION  Application and Guiding Principles | 7.3.1.1 | The dispute resolution procedures set out in this clause 7.3 apply to all disputes relating to or in connection with transactions in the *WESM* which may arise between or among any of the following:  (a) The *Market Operator*;  (b) The *System Operator*;  (c) The *PEM Board* and its Working Groups except the *Dispute Resolution Administrator;*  (d) *WESM member*s;  (e) Intending *WESM member*s; | The dispute resolution procedures set out in this clause 7.3 apply to all disputes relating to or in connection with transactions in the *WESM* which may arise between or among any of the following:  (a) The *Market Operator*;  (b) The *System Operator*;  **~~(c) The~~ *~~PEM Board~~* ~~and its Working Groups except the~~ *~~Dispute Resolution Administrator;~~***  ~~(d~~**~~)~~(c)** *WESM Member*s;  ~~(e)~~**(d)**Intending *WESM Member*s; | To make the list of possible parties more consistent with the design of the WESM Dispute Resolution Process, and/or with the State/statutory policy and legal philosophy of *commercial arbitration* of only resolving disputes that are civil, commercial or business in nature. (see Figures 1, 2 and Table 1 in the Discussion Paper) |  |  |  |  |
| New Annex | New Annex | **Please see attached ANNEX H - FINAL OFFER ARBITATION SUPPLEMENTARY RULES** (also referred to as PENDULUM ARBITRATION SUPPLEMENTARY RULES) |  | To outline the rule and processes applicable to Dispute Resolution for Retail Rules |  |  |  |  |
| New Annex | New Annex | **Please see attached ANNEX I – GUIDELINE FOR VIRTUAL HEARINGS** |  | To provide for the guidelines for the conduct of virtual hearings |  |  |  |  |

1. Section 1.2.4.3 Department Circular (DC) 2013-01-0002 referred to as the “Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market,” [↑](#footnote-ref-1)
2. Section 1.2.2.2 Department Circular (DC) 2013-01-0002 referred to as the “Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market,” [↑](#footnote-ref-2)
3. Section 1.7 Department Circular (DC) 2013-01-0002 referred to as the “Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market,” [↑](#footnote-ref-3)
4. Section 1.2.1 Dispute Resolution Manual Issue No. 6 [↑](#footnote-ref-4)
5. Otherwise known as the Alternative Dispute Resolution Act of 2004 [↑](#footnote-ref-5)
6. Under the Special ADR Rules:

   Rule 19.7. *No appeal or certiorari on the merits of an arbitral award.*—An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award. [↑](#footnote-ref-6)
7. Sec. 2 of the ADR Act provides:

   “SECTION 2. *Declaration of Policy*. — It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or xx xx [↑](#footnote-ref-7)
8. Section 5.01 of that agreement provides that:

   “WESM Rule 7.3 applies to any dispute that arises under this Agreement and is incorporated by reference herein, with such modifications as the context may require.” [↑](#footnote-ref-8)
9. Under the Special ADR Rules:

   Rule 19.7. *No appeal or certiorari on the merits of an arbitral award.*—An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award. [↑](#footnote-ref-9)
10. Under the Special ADR Rules:

    Rule 19.7. *No appeal or certiorari on the merits of an arbitral award.*—An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award. [↑](#footnote-ref-10)
11. Under the Special ADR Rules:

    Rule 19.7. *No appeal or certiorari on the merits of an arbitral award.*—An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award. [↑](#footnote-ref-11)
12. Under the Special ADR Rules:

    Rule 19.7. *No appeal or certiorari on the merits of an arbitral award.*—An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award. [↑](#footnote-ref-12)
13. Sec. 2 of the ADR Act provides:

    “SECTION 2. *Declaration of Policy*. — It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or xx xx [↑](#footnote-ref-13)