

DRA-ANREP-2017

Dispute Resolution Administrator 2017 Annual Report

January to December 2017

This report is prepared by the Philippine Electricity Market Corporation-Market Assessment Group for the Dispute Resolution Administrator

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A. 2017 ACCOMPLISHMENTS

The Dispute Resolution Administrator (DRA) submits this Annual Report covering the activities undertaken and accomplished by the DRA for the year 2017. This report also presents the proposed activities of the DRA for 2018.

1. Publication of Updated List of Dispute Management Protocol Focal Persons and Alternates

Pursuant to Section 8.2 of the WESM Dispute Resolution Manual, the DRA requested Market Participants to submit or update their designated Dispute Management Protocol (DMP) Focal Persons and Alternates who will serve as the first point of contact for the notification of WESM-related disputes. The DRA's request was posted in the market website on 31 March 2017.

An updated list as of June 2017 of DMP Focal Persons and Alternates together with their respective contact information was published in the market information website.

2. PEM Board Approval of the Proposed New Schedule of WESM Arbitration Fees and Costs

The proposed new Schedule of WESM Arbitration Fees and Costs, as initiated by the DRA, was approved by the RCC on 05 October 2016¹, and was presented before the PEM Board on 10 November 2016. On 29 November 2016, the PEM Board ruled that the proposal be remanded to the Rules Change Committee (RCC) for further study on the reasonableness of the proposed new Schedule of WESM Arbitration Fees and Costs².

The DRA hence assisted the RCC in its further assessment of the proposal. As requested by the RCC, the DRA obtained samples of actual arbitration cases on a no-names basis to evaluate how the proposed WESM Arbitration fees and costs fares compared with other arbitration institutions. On 04 September 2017, the DRA provided the RCC with three (3) sample cases from the Construction Industry Arbitration Commission and the Philippine Dispute Resolution Center, Inc., which are both active institutions that facilitate commercial arbitration.³

¹ RCC Resolution No. 2016-12 – *Proposed Amendments to the WESM Rules and WESM Manuals on Dispute Resolution and Registration, Suspension and De-registration Criteria and Procedures*

² PEM Board Resolution No. 2016-40 dated 29 November 2016

³ COR-INT-DRA-17-03 – Letter to RCC regarding Justification for the Proposed New Schedules of WESM Arbitration Fees and Costs

In consideration of the supplementary information from the DRA, the RCC re-affirmed its approval of the proposed new Schedule of WESM Arbitration Fees and Costs. The body re-submitted its decision through a letter to the PEM Board dated 27 September 2017⁴.

The proposed WESM Arbitration Fees and Costs was again presented to the PEM Board on 26 October 2017 and was approved and thereafter endorsed to the DOE.

3. Submission of the Proposed Amendments to the WESM Manual on Dispute Resolution regarding WESM Mediation and Arbitration Procedures

On 04 September 2017, the DRA submitted to the RCC a new set of proposed amendments to the WESM Manual on Dispute Resolution, which intends to fill-in procedural gaps in the WESM Mediation and Arbitration processes. The proposed amendments specifically sought to amend and/or add provisions related to the following:

- procedures to be undertaken if a dispute is filed for arbitration without first going through mediation
- parties' payment of advances on mediation and arbitration fees and costs
- procedures for the selection and appointment of mediator
- selection and appointment of ADR Support Service Centers

These new proposed amendments were integrated into the previous amendments to the WESM Manuals on (i) Dispute Resolution and (ii) Registration, Suspension and De-registration Criteria and Procedures that were approved by the PEM Board for endorsement to the DOE on 29 November 2016⁵.

The proposal received comments from the DOE and MERALCO to which the DRA responded and made clarifications, which were altogether considered by the RCC during the deliberation of the proposal on 10 November 2017. The RCC approved the endorsement of the proposal as amended to the PEM Board on 08 December 2017 per RCC Resolution No. 2017-12.

The proposal is set for deliberation by the PEM Board in the first quarter of 2018 for approval and endorsement to the DOE.

⁴ COR-INT-RCC-17-13 – *Confirmation of Approval of the Proposed New Schedule of WESM Arbitration Fees and Costs*

⁵ PEM Board Resolution No. 2016-40 dated 29 November 2016

4. Finalization of the Guidelines for Alternative Dispute Resolution (ADR) Support Service Centers and Administrative Secretaries to the Arbitral Tribunal

Section 6.1 of the WESM Dispute Resolution Manual provides that the administrative and logistical tasks required to facilitate WESM Mediation and Arbitration shall be outsourced to a WESM-accredited ADR Support Service Center (ASSC). For arbitration, the Arbitral Tribunal may opt to, with the consent of the parties, engage the services of an Administrative Secretary tasked to provide assistance to the Tribunal in the resolution of a dispute.

Beginning in 2015⁶, the DRA developed guidelines for the appointed ASSC and Administrative Secretaries to the Arbitral Tribunal to provide clear, practical and methodical instructions in their assistance to the mediator and the Arbitral Tribunal, as applicable.

Throughout the covered period, the DRA worked on finalizing the following *Guidelines*:

- (i) Guidelines for ADR Support Service Centers in the Conduct of Their Duties in Respect of WESM Mediation Proceedings
- (ii) Guidelines for ADR Support Service Centers in the Conduct of Their Duties in Respect of WESM Arbitration Proceedings
- (iii) Guidelines on the Appointment, Duties and Remuneration of Administrative Secretaries to the Arbitral Tribunal

The *Guidelines* were revised and refined to be consistent with the proposed amendments to the WESM Dispute Resolution Manual (see item #3) to enhance the WESM Mediation and Arbitration procedures.

The three *Guidelines* will be published in the market information website for information.

5. Participation in Training on Retail Competition and Open Access (RCOA or “Retail Market”)

Clause 1.7 of the Retail Rules stipulates that the Dispute Resolution process in the WESM Rules shall likewise apply to the Retail Market. To properly assess how the Retail Market can best be served concerning the resolution of disputes between or among its participants, the DRA participated in the RCOA Training provided by

⁶ Further background on the development of the *Guidelines* may be found in the 2015 and 2016 DRA Annual Reports.

PEMC on 03 October 2017. The specific objective for the DRA's attendance to said training is to understand the overall dynamics in the Retail Market and the relationship of its participants, based on which the kinds and subjects of disputes that could possibly arise may be evaluated.

The information acquired from the training afforded the DRA to consider the mode of arbitration that might best suit the resolution of disputes in the Retail Market. Preliminary discussions on the matter were already conducted during subsequent regular meetings of the DRA and shall be continued in the coming year as part of the DRA's activities for 2018. It is envisioned that these discussions would result to the introduction of new procedures to the WESM Dispute Resolution Manual exclusively applicable for the Retail Market.

B. ON-GOING ACTIVITIES

The DRA initiated the following activities in 2017 to be carried-over to 2018:

1. Development of WESM Disputes Databank

The development of a databank of WESM disputes was suggested by the DRA to conveniently summarize any dispute lodged under the WESM Dispute Resolution Process. The databank, which is contemplated to take the form of a checklist, would contain a comprehensive list of all the possible parties involved, cause of action, circumstances of the case, and claims or relief sought. The output would be particularly useful for nominated mediators and arbitrators to easily assess if they have the competence and the time required to mediate or arbitrate a dispute.

The databank might have the following information:

Parties involved:

- Generator
- Distribution Utility
- Metering Services Provider
- System Operator
- Market Operator
- Etc.

Claim/Relief sought:

- Liquidity damages
- Payment with interest
- Contractual penalty
- Etc.

Cause of action:

- Non-payment of settlement amount
- Delayed payment of settlement amount
- Inaccurate meter reading
- Etc.

This activity entails consulting with other PEMC units to more fully assess the variations and circumstances of WESM disputes.

2. Benchmarking of WESM Mediators' Fees

Per Annex B of the WESM Dispute Resolution Manual, a mediator appointed to facilitate the resolution of a dispute shall be paid by the parties based on his/her hourly rate. It was recognized that this payment scheme may seem arbitrary although this has generally been the custom in the mediation practice. The DRA thus recommended formulating a benchmark for the mediator's fees intended to serve as the default hourly rates in the event the parties and the appointed mediator fail to agree on the amount of fees. Having default hourly rates was deemed to minimize the arbitrariness in setting the mediator's fees.

It was agreed that the benchmark will be developed based on the most recent billed hourly rate of all thirty-six (36) WESM-accredited mediators. Their respective hourly rates are intended to be confidentially kept on record and will be used as the default hourly rate of the appointed mediator. This activity will be undertaken in 2018.

3. Possible Mode of Arbitration in the Retail Market

Arising from the DRA's attendance to the Retail Competition and Open Access Training provided by PEMC on 03 October 2017 (see Part A, #5 above), preliminary discussions were held as to the mode of arbitration that might suit the dynamics and legal relationships of participants in the Retail Market. The DRA's evaluation was predicated on the fact that the Retail Market, unlike the wholesale market, is generally governed by bilateral contracts, specifically Retail Supply Contracts, between Retail Electricity Suppliers (RES) and Contestable Customers (i.e., one party versus another). If any dispute would arise, it would usually only be between two parties in the contract, unless a party in the contract changes as what happens when a Contestable Customer switches RES.

In this case, the DRA opined that the mode of arbitration apt for the Retail Market is 'pendulum arbitration' or 'final offer arbitration' in which the arbitrator, based on his own assessment, would simply decide in favor of one party or another over each or all disputed issues. This mode is simpler and faster than conventional arbitration adopted for the wholesale market as the conventional mode requires arbitrators to make a well-reasoned decision and craft an award based on some at-length discussion of relevant evidences. Moreover, the particular retail contract parameters of RESs make any possible disputes between Retail Market Participants limited in

scope and also the grounds for disputes few, hence making pendulum arbitration all the more appropriate for the Retail Market.

For the coming year, the DRA shall continue to flesh out the appropriate dispute resolution arrangements and procedures for the Retail Market.

C. UPDATES ON DRA ACTIVITIES FROM THE PREVIOUS YEAR

DOE Decision on the Proposed Amendments to the WESM Rules and WESM Manuals on Dispute Resolution and Registration, Suspension and De-registration Criteria and Procedures

In July 2016, the DRA proposed two (2) sets of amendments to the WESM Rules and WESM Manuals on (i) Dispute Resolution and (ii) Registration, Suspension and De-registration Criteria and Procedures in order to enhance and refine the dispute resolution processes of the WESM and further clarify the kinds of disputes within its jurisdiction.⁷

These proposals were deliberated upon and approved by the RCC per RCC Resolution No. 2016-12 dated 05 October 2016, and were thereafter approved by the PEM Board for endorsement to the DOE on 29 November 2016 per PEM Board Resolution 2016-40, except the provisions on the proposed new Schedule of WESM Arbitration Fees and Costs, which was remanded to the RCC for further study.

In April 2017, the DOE provided its decision on the proposed amendments endorsed to it as follows:

Topic of Proposal	DOE Decision⁸
Removal of the PEM Board as an impleadable entity in WESM disputes	Disapproved
Process enhancements, including emergency arbitration and its corresponding procedures	Approved, but deferred promulgation of corresponding Department Circular pending the RCC's re-study of the proposed new Schedule of WESM Arbitration Fees and Costs
Removal of rejection/disapproval of WESM Membership application as subject of WESM disputes	Approved: <ul style="list-style-type: none"> ▪ Deferred promulgation of corresponding Department Circular for the approval of relevant amendments to the WESM

⁷ ORCP-WM-16-20 – *Proposed Amendments to the WESM Rules, Dispute Resolution Market Manual and Registration, Suspension and De-registration Criteria and Procedures Manual regarding WESM Disputes*
ORCP-WM-16-21 – *Proposed Amendments to the WESM Rules and Dispute Resolution Market Manual regarding Dispute Resolution Process*

⁸ DOE Letter to PEMC dated 04 April 2017 – *Proposed Amendments to the WESM Rules and Market Manuals Concerning Dispute Resolution*

Topic of Proposal	DOE Decision ⁸
	Dispute Resolution Manual pending the RCC's re-study of the proposed new Schedule of WESM Arbitration Fees and Costs <ul style="list-style-type: none"> ▪ Promulgated through Department Circular No. DC2017-04-0004 dated 20 April 2017 the relevant amendments to the WESM Registration, Suspension and De-registration Criteria and Procedures Manual

The proposed new Schedule of WESM Arbitration Fees and Costs was approved by the PEM Board for endorsement to the DOE on 26 October 2017 (see Part A, item #2). It is expected that the deferred DOE-approved amendments in Table 1 will be promulgated within 2018.

D. 2018 WORK PLAN

The Annex provides the details of the DRA's program of activities for 2018.

E. THE DISPUTE RESOLUTION ADMINISTRATOR

The Dispute Resolution Administrator is tasked to facilitate the resolution of disputes between or among the parties in accordance with the dispute resolution process approved for the Wholesale Electricity Spot Market (WESM) and the Retail Competition and Open Access (RCOA). Alternative Dispute Resolution is a process which follows the stages of negotiation, mediation and arbitration.

Atty. Jesusito G. Morillos, Senior Partner from Follosco Morillos and Herce Law Offices was appointed by the PEM Board on 01 September 2011 as the Dispute Resolution Administrator for the WESM.

The Market Assessment Group (MAG) acts as the technical and administrative Secretariat of the DRA.

F. RESPONSIBILITIES

The main role and responsibilities of the DRA as set out in the WESM Dispute Resolution Manual, consistent with the requirements of the WESM and the Retail Market, are as follows:

- A. Administer and ensure the effective implementation and operation of the dispute resolution provisions of the WESM Dispute Resolution Manual;
- B. Determine preliminarily if a dispute is one which falls under the dispute resolution process of the WESM and the Retail Market;
- C. Draft and issue standard forms to help expedite the resolution of disputes;
- D. Facilitate the accreditation process of mediators and arbitrations;
- E. Update the list of Accredited Mediators and Arbitrators published in the market information website;
- F. Maintain data, reports and other information regarding the development and results of the disputes referred to the DRA.

Submitted by:

Note: This signature has been redacted pursuant to PEMC's Documented Information Management Policy. The full version of the file is available with the DRA Secretariat of PEMC.

Jesusito G. Morallos, C.E., J.D., MCI Arb

Dispute Resolution Administrator

ANNEX – DRA 2018 WORK PLAN

Item	Activity	Target	Deliverables	Remarks
1	Annual Publication of Updated Directory of DMP Focal Persons and Alternates	Q1	publication of updated directory of DMP Focal Persons and Alternates	annual activity
2	Development of WESM Dispute Databank	Q2	databank in checklist format	
3	Exploration of possible secure and cost-efficient electronic communication and files exchange platform for the use of WESM-accredited private neutrals and multiple parties during mediation or arbitration proceedings	Q2	options for possible files exchange platforms	
4	Acquisition of a roster/directory of case stenographers and their respective rates	Q2	roster/directory of stenographers	
5	Research on literature of procedures for dispute avoidance for the Dispute Management Protocol Focal Persons	Q2	informative/ facilitative materials	
6	Conduct of Mediation Seminar for Accredited WESM Mediators	Q3	training/seminar	
7	Proposed Further Amendments to the WESM Dispute Resolution Manual regarding Dispute Resolution for the Retail Market	Q3	proposed amendments	

Item	Activity	Target	Deliverables	Remarks
8	Benchmarking of WESM Mediator's Fees	Q3	record of default fees for WESM Mediators	
9	Awareness campaign for the WESM Dispute Resolution Process among Market Participants	as necessary/ as scheduled	continuous update of FAQs in the Market website, seminar, lectures, etc.	
10	Dissemination of schedules of ADR-related programs, lectures or events organized by external strategic partners (i.e., PI Arb, PDRCI, DOJ-OADR) for the continuing education of WESM-accredited Mediators/Arbitrators	as offered/ as scheduled	advisories/notifications/ invitations to WESM Mediators/Arbitrators	<ul style="list-style-type: none"> • regular activity • subject to the schedule of relevant programs or events
11	Facilitation of training for WESM-accredited Mediators/Arbitrators on the WESM, the Retail Market and the Reserve Market; update on changes WESM Dispute Resolution Process	as scheduled	training(s)/seminar(s)	subject to the availability of trainings offered
12	Submission of report(s) on dispute case(s)	monthly or as applicable	Dispute Report(s), as needed	