

SEVENTEENTH CONGRESS OF THE)
REPUBLIC OF THE PHILIPPINES)
Second Regular Session)



'17 JUN 15 AM 1:19

SENATE

RECEIVED BY: XASUN

Senate Bill No. 1490

Introduced by Sen. Win Gatchalian

AN ACT
ENHANCING THE GOVERNANCE STRUCTURE OF THE ENERGY
REGULATORY COMMISSION

EXPLANATORY NOTE

The enactment of Republic Act 9136 carried with it the unbundling of the power sector. Generation, transmission, distribution, and supply were privatized. Nevertheless, distribution and transmission were declared public utilities. Their regulation, which includes performance, recoverable costs, and allowable margins, fell upon the Energy Regulatory Commission (ERC).

ERC, as the regulator, has a definitive role in safeguarding the interests of the public.¹ As such, its governance structure should foster independence, transparency, and accountability. An evaluation of ERC's governance structure using best practice principles for regulatory policy and even the country's Code of Corporate Governance for Publicly Listed Companies shows areas for improvement. An example is the separation of the Chairperson and Chief Executive Officer functions, which is necessary to "foster an appropriate balance of power, increased accountability, and better capacity for independent decision-making."²

It is in this light that this measure is proposed. This bill aims to enhance the existing governance structure of the ERC by providing (1) additional qualifications and requirements for ERC Commissioners to ensure board diversity; (2) prohibitions and disqualifications for ERC Commissioners and their relatives to prevent conflicts of interest; (3) the separation of the Chairperson and CEO functions to assure a balance of power; (4) defined duties and responsibilities of the Chairperson, the Commission, and the Executive Director to increase individual and board

¹ OECD (2014). *The Governance of Regulators*. OECD Best Practice Principles for Regulatory Policy. OECD Publishing. <http://dx.doi.org/10.1787/9789264209015-en>

² SEC Memorandum Circular No. 19, Series of 2016. Code of Corporate Governance for Publicly-Listed Companies. 22 November 2016.

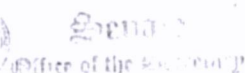
accountability; (5) open meetings during deliberations of the Commission to guarantee public transparency; (6) access to information to enhance knowledge and education on regulatory matters affecting public welfare; and (7) liabilities for violation of, among others, open meeting and access to information provisions.

OECD (2012) recommends that countries “develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial, and consistent basis, without conflict of interest, bias or improper influence.”³ It is the hope of the author that these objectives be fulfilled with the enactment of this bill into law. Thus, the immediate passage of this measure is sought.



WIN GATCHALIAN

³ OECD (2012). *Recommendation of the Council on Regulatory Policy and Governance*. OECD Publishing



'17 JUN 15 AM 1:19

RECEIVED BY: X. A. S. ...

S. B. No. 1490

Introduced by SEN. WIN GATCHALIAN

ENHANCING THE GOVERNANCE STRUCTURE OF THE ENERGY REGULATORY COMMISSION

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

GENERAL PROVISIONS

SECTION 1. Title. – This Act shall be known as the “Energy Regulatory Commission Governance Act of 2017.”

SECTION 2. Declaration of Policy. – The State recognizes the significant role of the Energy Regulatory Commission in ensuring transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency. Likewise, public interest demands the protection of consumers as they are affected by the rates and services of electric utilities and other providers of electric power. Towards this end, the State shall:

- a) Establish a strong, independent, transparent, and accountable regulatory body; and
- b) Institutionalize a system to ensure the efficient and effective performance of the functions and mandates of the regulatory body to enhance competitiveness in the electric power industry.

SECTION 3. Scope. – This Act shall enhance the existing governance mechanisms of the Energy Regulatory Commission to foster independence, transparency, and accountability.

SECTION 4. Definition of Terms. – As used in this Act, the following words or terms shall have the following meaning, unless provided otherwise:

- a) “Career Executive Service Board” refers to the governing body of the Career Executive Service (CES) created under Presidential Decree No. 1 Series of 1972;
- b) “Career Executive Service Eligibility” refers to the eligibility conferred to a person who passes the four-stage CES Eligibility Examination process and meets the other requirements prescribed by the Career Executive Service Board;
- c) “Career Executive Service Officer” refers to a person with CES eligibility appointed by the President to a CES rank upon the recommendation by the Career Executive Service Board;
- d) “Commission” refers to the decision-making body of the Energy Regulatory Commission under Republic Act 9136 composed of one (1) Chairperson and four (4) Commissioners;
- e) “Consumer” refers to all captive and contestable customers who buy electricity either from a distribution utility, a retail electricity supplier, or a generation company;
- f) “Deliberation” refers to a communication between or among members of the Commission in a meeting: *Provided*, That a quorum exists;
- g) “Electric Power Industry Participant” refers to any person or entity engaged in the generation, transmission, distribution, or supply of electricity;

- 1 h) "Energy Regulatory Commission" refers to the regulatory agency
2 created under Republic Act No. 9136;
- 3 i) "Joint Congressional Power Commission" refers to the
4 Commission created under Republic Act No. 9136;
- 5 j) "Key ERC Personnel" refers to employees who hold executive or
6 managerial positions in the ERC;
- 7 k) "Meeting" refers to a deliberation of the Commission with
8 respect to any case, issue, or matter within its jurisdiction; and
- 9 l) "Public Hearing" refers to an official proceeding of a government
10 agency during which the public is accorded the right to express
11 its position on the subject matter at hand.

12

13 **CHAPTER II**

14 **COMPOSITION OF THE COMMISSION**

15

16 **SECTION 5. The Commission.** – The Commission shall be the sole governing
17 body of the ERC, and shall formulate its policies and direct its affairs.

18

19 All executive functions of the ERC shall rest on the Commission:
20 *Provided*, That such executive functions shall be limited to the duties and
21 responsibilities enumerated in Section 11 of this Act.

22

23 **SECTION 6. Qualifications.** – All members of the Commission shall be:

- 24 a) Natural-born citizens and residents of the Philippines;
- 25 b) At least thirty-five (35) years of age;
- 26 c) Of good moral character;
- 27 d) Of recognized probity and independence; and
- 28 e) Of distinguished competence in any of the following fields: energy, law,
29 economics, finance, commerce, engineering, or other experience relevant
30 to the energy sector with at least ten (10) years of active practice in their
31 respective fields of expertise.
- 32

33 No member shall have been a candidate for any elective national or local
34 office in the immediate preceding elections, whether regular or special: *Provided*

1 further, That one (1) shall be a lawyer, one (1) shall be an economist, one (1)
2 shall be an engineer, and one (1) shall be a certified public accountant or have
3 a background in finance.

4
5 **SECTION 7. Requirements.** – The members of the Commission shall, upon
6 assumption of office:

- 7 a) Publicly disclose any employment, consultancy, or any connection with,
8 and any pecuniary interest in an Electric Power Industry Participant;
- 9 b) Publicly disclose if his or her spouse, partner, and any relative by
10 consanguinity or affinity within the fourth civil degree is employed or has
11 a consultancy or any connection with, or has any pecuniary interest in
12 an Electric Power Industry Participant;
- 13 c) Divest through sale or legal disposition any and all interests in an
14 Electric Power Industry Participant; and
- 15 d) Terminate employment or consultancy with any Electric Power Industry
16 Participant.

17
18 **SECTION 8. Prohibited Acts.** – The members of the Commission, within the
19 duration of their term, are prohibited from:

- 20 a) Taking up any employment or consultancy arrangement with any
21 Electric Power Industry Participant;
- 22 b) Holding any connection to and any pecuniary interest in an Electric
23 Power Industry Participant;
- 24 c) Holding any other office or employment; and
- 25 d) Directly or indirectly practicing any profession, participating in any
26 business, or be financially interested in any contract with, or any
27 franchise, or special privileges granted by the government or any
28 subdivision, agency, or instrumentality thereof, including government-
29 owned and controlled corporations or their subsidiaries.

30
31 The members of the Commission, after the cessation of their service, are
32 prohibited from:

- 33 a) Running for office in the election immediately succeeding their cessation
34 from office; and

- 1 b) Personally appearing or practicing as counsel or agent on any matter
2 pending before the Commission for two (2) years following the cessation
3 of their service.
4

5 Any spouse, partner, and relative by consanguinity or affinity within the
6 fourth civil degree of the members of the Commission are prohibited from:

- 7 a) Taking up any employment or consultancy arrangement with an Electric
8 Power Industry Participant during the incumbency of the member of the
9 Commission to whom he or she is related to;
10 b) Holding any connection to and pecuniary interest in any Electric Power
11 Industry Participant during the incumbency of the member of the
12 Commission to whom he or she is related to;
13 c) Appearing as counsel or agent on any matter pending before the
14 Commission or transacting business directly or indirectly therein during
15 the incumbency of the member of the Commission to whom he or she is
16 related to, and within two (2) years from cessation of their service.
17

18 **SECTION 9. The Chairperson.** – The Chairperson shall be from the fields of
19 energy, law, economics, finance, commerce, or engineering with at least ten
20 (10) years of experience in energy and/or public utility regulation: *Provided,*
21 That the qualifications and requirements in Sections 6 and 7 of this Act are
22 complied with.
23

24 **SECTION 10. Duties and Responsibilities of the Chairperson.** – The
25 Chairperson shall:

- 26 a) Provide leadership direction for the Commission in matters such as but
27 not limited to development and determination of strategies and policies
28 in order to effectively comply with its mandate under Republic Act 9136;
29 b) Ascertain that the strategies and policies agreed upon by the
30 Commission are effectively implemented by the Executive Director;
31 c) Promote collaborative relationships and open communication between
32 and among members of the Commission;
33 d) Set, in consultation with other members of the Commission, the
34 Executive Director, and the Secretariat, the Commission's meeting
35 schedule and agenda to take full account of the important issues facing

- 1 the Commission and the concerns of management, and ensure that
2 adequate time is available for thorough discussion of each;
- 3 e) Ensure that the members of the Commission undergo capacity building
4 programs to continuously enhance technical competence, are properly
5 briefed on issues pending before the Commission, and receive, in a timely
6 manner, adequate, accurate, clear, complete, and reliable information to
7 fulfill their duties;
- 8 f) Preside over meetings of the Commission: *Provided*, That the Chairperson
9 has the right to vote on matters pending before the Commission;
- 10 g) Ascertain that all key and appropriate issues are discussed, deliberated
11 upon, and resolved by the Commission in a timely manner;
- 12 h) Create an environment that allows constructive discourse during open
13 meetings, executive sessions, and public hearings;
- 14 i) Ensure that the Commission's decisions are in furtherance of its
15 mandate under Republic Act 9136;
- 16 j) Secure that the Commission avoids acts which unduly influence, impede,
17 or hamper the Executive Director or any ERC employee from effectively
18 fulfilling his or her duties and responsibilities; and
- 19 k) Establish good corporate governance practices and procedures and
20 promote the highest standards of independence, transparency, integrity,
21 and probity.
- 22

23 **SECTION 11. Duties and Responsibilities of the Members of the**
24 **Commission.** – In addition to the functions enumerated in Republic Act 9136,
25 the members of the Commission shall:

- 26 a) Regularly attend and actively participate in the meetings of the
27 Commission where any case, issue, or matter within its jurisdiction is
28 under consideration;
- 29 b) Recommend to the Chairperson the inclusion in the agenda of any case,
30 issue, or matter deemed appropriate in the performance of the
31 Commission's functions;
- 32 c) Be properly informed about and thoroughly analyze cases, issues, and
33 matters pending before the Commission;
- 34 d) Take part in continuous education and capacity building programs of the
35 Commission to enhance technical competence;

- 1 e) Abstain from acts which unduly influence, impede, or hamper the
2 Executive Director or any ERC employee from effectively fulfilling his or
3 her duties and responsibilities;
- 4 f) Appoint the Executive Director of the ERC: *Provided*, That the
5 requirements, prohibited acts, qualifications, and duties and
6 responsibilities stated in Sections 7, 8, 12, and 13 of this Act are
7 complied with;
- 8 g) Act on the selection and appointment of Key ERC Personnel: *Provided*,
9 That the selection process for Key ERC Personnel must be in accordance
10 with ERC's Enhanced Merit Selection Plan and/or other plans related to
11 personnel selection duly approved by the Commission;
- 12 h) Review and act on the endorsement of the proposed ERC budget:
13 *Provided*, That such endorsement must come from the Executive Director
14 and must be substantiated with supporting documents;
- 15 i) Initiate, motu proprio or upon formal complaint, investigations against
16 the Executive Director and act upon these investigations: *Provided*, That
17 such investigation is without prejudice to the filing of administrative or
18 criminal cases against the Executive Director; and
- 19 j) Perform in good faith and to the best of its ability, the functions stated in
20 Republic Act 9136 and the duties and responsibilities specified in this
21 Act.

22 23 CHAPTER III 24 ERC OPERATIONS 25

26 **SECTION 12. The Executive Director.** – The Commission, acting collectively,
27 shall appoint an Executive Director who shall act as the Chief Executive Officer
28 of ERC until resignation, retirement, or unless terminated earlier for cause.
29 The Executive Director who shall be a Career Executive Service Officer of the
30 ERC, shall have relevant experience in any of the fields of law, economics,
31 commerce, management, finance, or engineering for at least ten (10) years, and
32 shall be subject to the same requirements and prohibitions as indicated in
33 Sections 7 and 8 of this Act.
34

1 When an Executive Director who has rendered at least ten (10) years
2 service in such capacity retires, he or she shall receive during the duration of
3 his or her natural life, retirement benefits equivalent to his or her last salary
4 plus representation and other allowances.

5
6 **SECTION 13. Duties and Responsibilities of the Executive Director.** – The
7 duties and responsibilities of the Executive Director shall include but shall not
8 be limited to:

- 9 a) Developing and proposing, for the Commission's approval, the
10 operationalization of the strategies and policies agreed upon by the
11 Commission;
- 12 b) Effectively executing the approved operationalization of the strategies and
13 policies agreed upon by the Commission;
- 14 c) Leading the management of the daily operations of ERC in accordance
15 with the plans and within the budget approved by the Commission;
- 16 d) Assuming full responsibility for the overall supervision and control of all
17 divisions, units, and services of the ERC;
- 18 e) Assigning to each division, unit, and service of the ERC such duties that
19 are considered necessary or expedient;
- 20 f) Coordinating the workings of the divisions, units, and services of the
21 ERC;
- 22 g) Establishing a mechanism for capacity building for all employees of the
23 ERC to continuously enhance technical competence: *Provided*, That such
24 mechanism will based on the principle of meritocracy;
- 25 k) Ensuring compliance with the ERC's Enhanced Merit Selection Plan
26 and/or other plans related to personnel selection duly approved by the
27 Commission when it comes to the hiring and promotion of employees;
- 28 h) Leading the management to ensure effective working relationships with
29 the Commission by regularly communicating with the Chairperson to
30 review key developments, issues, opportunities, and concerns;
- 31 i) Ensuring that the management gives priority to providing documents
32 and reports which contain relevant, accurate, timely, and clear
33 information necessary for the Commission to fulfill its duties;
- 34 j) Maintaining regular dialogue with the Commission while ensuring that
35 the Commission, especially the Chairperson, is alerted to forthcoming
36 complex, contentious, sensitive, or strategic issues facing the ERC;

- k) Advising the Commission on any matter referred to the Executive Director;
- l) Managing the affairs of the ERC in accordance with good corporate governance practices and procedures while promoting the highest standards of independence, transparency, integrity, and probity;
- m) Initiating investigations and recommending administrative sanctions against erring employees, without prejudice to the filing of any criminal action against the concerned employee;
- n) Regularly submitting to the Commission updates on the operations of ERC; and
- o) Performing such other duties as the Commission may assign.

All decisions of the Executive Director involving budgeting and disbursement of funds shall be subject to the approval of the Commission.

CHAPTER IV TRANSPARENCY AND ACCOUNTABILITY

SECTION 14. Open Meeting. – All meetings of the Commission shall be open to the public: *Provided*, That the public may only participate during public hearings: *Provided further*, That a live web streaming or any related technology of the open meeting shall be posted: *Provided finally*, That the transcript of stenographic notes and minutes of the open meeting shall be made available to the public, whether on the website or otherwise, within one (1) week from the date of the open meeting.

The Commission, upon a majority vote, may decide to meet in an executive session: *Provided*, That before going into an executive session, the Commission must convene in an open meeting, identify the reason for the executive session while stating all the subjects that may be revealed without compromising the purpose for which the executive session was called, declare whether the Commission will reconvene in an open meeting at the end of the executive session, and take a roll call vote to enter into executive session.

Executive sessions may be called for the following reasons:

- a) To discuss the discipline or dismissal of or complaints or charges brought against a public officer, employee, or staff of ERC; and
- b) To discuss trade secrets, confidential, competitively-sensitive, or other proprietary information.

SECTION 15. Public Notice of Open Meetings. – The Commission shall provide the public with notice of its meeting and the agenda at least seven (7) working days before the scheduled date of the meeting: *Provided*, That for emergency meetings, the notice may be posted within a reasonable time prior to the meeting: *Provided further*, That public notices shall be posted in a manner easily accessible to the public such as but not limited to actual and web posting.

SECTION 16. Orders, Decisions, and Resolutions. – All orders, decisions, and resolutions shall undergo deliberations and once approved by the required number of votes during open meetings provided a quorum is present, shall forthwith be promulgated within thirty (30) days from date of the open meeting and published online in accordance with Section 18 hereof.

SECTION 17. Support Desk. – A support desk shall be made available to the public which will supply assistance to Consumers for a better understanding of all proceedings and issuances of the Commission as well as any and all matters which affect the electricity rates charged to Consumers: *Provided*, That the matter shall not be confidential information.

A new office may be created for this Support Desk should the Commission deem it necessary.

SECTION 18. Online Publication. – All petitions, applications, and reportorial requirements of Electric Power Industry Participants, including all annexes thereto, except for those considered as confidential information, as well as orders, decisions, and resolutions of the Commission, shall be posted on the

1 ERC website within five (5) days from submission in the case of petitions,
2 applications, and reportorial requirements, or promulgation in the case of
3 orders, decisions, and resolutions.

4
5 **SECTION 19. Access to Information.** – Every Consumer has a right to
6 information and shall, on request, be given access to any information of public
7 concern under the control of the Commission: *Provided*, That the access to
8 information shall not be granted if:

- 9 a) The information is considered confidential information under the ERC
10 Rules of Practice and Procedure;
11 b) The information consists of minutes or records of advice given, or of
12 opinions expressed during decision-making or policy formulation in the
13 course of executive sessions;
14 c) The information requested consists of drafts of orders, resolutions,
15 decisions, or memoranda of the Commission in the exercise of its
16 regulatory function; and
17 d) The information requested pertains to trade secrets, competitively-
18 sensitive, or other proprietary information, whenever the revelation
19 thereof would prejudice the interests of a natural or juridical person in
20 trade, industrial, financial, or commercial competition.

21
22 **SECTION 20. Procedure of Access.** – Any person who desires to obtain
23 information shall submit, free of charge, a request to the Commission
24 personally, by mail, or through electronic means. Within fifteen (15) working
25 days from the receipt thereof or as soon as practicable, the Commission shall
26 comply with the request: *Provided*, That the period may be extended if a
27 fortuitous event occurred, the information requested requires a search of the
28 Commission's field offices or an examination of voluminous records, or other
29 analogous cases.

30
31 **SECTION 21. Access and Processing Fees.** – The Commission may charge a
32 reasonable fee which shall in no case exceed the actual cost of reproduction,
33 copying, or transcription of the information requested: *Provided*, That the

Commission may waive the fees whenever it is satisfied that the person who requested is indigent or that the cost of reproduction is negligible.

SECTION 22. Exemption from Compliance. – The Commission is excused from complying with a subsequent identical or substantially similar request from the same requesting party: *Provided*, That it has previously complied with a similar request for information unless a reasonable interval has lapsed between compliance with the previous request and the making of the current request.

SECTION 23. Administrative Offenses and Penalties. – Any ERC official or employee who refuses to comply with Section 14 of this Act shall be suspended from service for six (6) months and one (1) day to one (1) year without pay on the first offense, and shall be dismissed from service and be perpetually disqualified from re-employment in any government agency or instrumentality on the second offense.

Any ERC official or employee who refuses to comply with, or fails to perform the acts required within the specified period of time in Sections 15, 16, and 18, shall be reprimanded on the first offense, shall be suspended from service for one (1) to thirty (30) days on the second offense, and shall be dismissed from service and be perpetually disqualified from re-employment in any government agency or instrumentality on the third offense.

Any ERC official or employee who refuses to comply with, or fails to act on a request for information pursuant to Sections 19 and 20 of this Act shall be suspended from service for six (6) months and one (1) day to one (1) year without pay on the first offense, and shall be dismissed from service and be perpetually disqualified from re-employment in any government agency or instrumentality on the second offense.

SECTION 24. Criminal Offenses and Penalties. – The penalty of imprisonment of not less than one (1) month but not more than six (6) months and a fine ranging from ten thousand pesos (Php 10,000.00) to one hundred

1 thousand pesos (Php 100,000.00) shall be imposed upon any ERC official or
2 employee who:

- 3 (1) Falsely denies or conceals the existence of information that is a proper
4 subject for disclosure under Section 19 of this Act;
- 5 (2) Destroys, or causes to be destroyed, information and/or documents
6 being requested that is a proper subject of disclosure under Section 19
7 under this Act for the purposes of frustrating the requesting party's
8 access thereto;
- 9 (3) Divulges or releases information covered by confidentiality under
10 Sections 14 and 19 of this Act;
- 11 (4) Divulges or releases information that is altered, tampered, or modified to
12 the extent that the released information materially differs from the
13 original contents of the document: *Provided*, That altering or modifying a
14 document for the purpose of severing an exempt information from non-
15 exempt information in a single document shall not be punishable under
16 this Section.

17
18 If the violation committed in this Act is induced by and/or assisted by a
19 private individual or corporation, partnership, or any kind of judicial entity, the
20 penalty provided herein shall be imposed on its executive officer and/or other
21 officials responsible therefor: *Provided*, That they shall suffer, in addition to the
22 penalties provided herein, the automatic revocation of their license to operate.

23 24 **CHAPTER IV** 25 **GENERAL PROVISIONS** 26

27 **SECTION 25. Transitory Provision.** – The current members of the
28 Commission shall continue to serve in such capacity until the completion of
29 their term.

30
31 The qualifications, requirements, and prohibitions stated in Sections 6,
32 7, and 8 of this Act shall apply to new members of the Commission.
33

1 The current Chairperson shall immediately divest himself of his role and
2 powers as the Chief Executive Officer of the Commission upon the effectivity of
3 this Act.
4

5 The current Executive Director shall assume the duties and
6 responsibilities laid out in Section 13 of this Act upon the effectivity of this Act:
7 *Provided*, That upon such assumption, the current Executive Director shall
8 immediately comply with the requirements and prohibitions stated in Sections
9 7 and 8 of this Act: *Provided further*, That the current Executive Director shall
10 serve as such until his resignation, retirement or termination for cause.
11

12 **SECTION 26. Oversight Committee.** – Upon the effectivity of this Act, the
13 JCPC established under Republic Act No. 9136 or the Electric Power Industry
14 Reform Act of 2001 shall exercise oversight powers over the implementation of
15 this Act.
16

17 **SECTION 27. Separability Clause.** – If for any reason, any provision of this
18 Act is declared unconstitutional or invalid, the other parts or provisions hereof
19 which are not affected thereby shall continue to be in full force and in effect.
20

21 **SECTION 28. Repealing Clause.** – All laws, decrees, orders, rules and
22 regulations or parts thereof which are inconsistent with or contrary to the
23 provisions of this Act are hereby repealed, amended or modified accordingly.
24

25 **SECTION 29. Effectivity.** – This Act shall take effect fifteen (15) days after its
26 publication in at least two (2) national newspapers of general circulation

Approved.