PHILIPPINE COMPETITION COMMISSION
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MERGERS AND ACQUISITIONS OFFICE,
Complainant,

-versus-

PCC Case No. M-2019-001
For: Violation of the Compulsory Notification Requirements Under Section 2.1 of the PCC Rules on Merger Procedure

BASES CONVERSION AND DEVELOPMENT AUTHORITY AND SM PRIME HOLDINGS, INC.,
Respondents.

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COMMISSION DECISION NO. 07-M-047/2019

1. STATEMENT OF THE CASE

1.1. This case involves the alleged violation by Bases Conversion and Development Authority ("BCDA") and SM Prime Holdings, Inc ("SM Prime") (collectively, "Respondents") of the compulsory notification requirement provided under the Philippine Competition Commission's (the "Commission") Rules on Merger Procedure ("Merger Rules") with respect to the proposed joint venture of Respondents for the privatization and development of the Bonifacio South Pointe Property ("Proposed Transaction").

1.1.1. BCDA is a government instrumentality vested with corporate powers, duly organized and existing pursuant to Republic Act No. 7727, as amended. It is mandated to accelerate the sound and balanced conversion into alternative productive civilian uses of the former Clark and Subic Military reservations and their extensions, to raise funds through the sale of Metro Manila camps, and to apply said funds for the conversion and development of the former baselands.[1]

1.1.2. SM Prime is a Philippine corporation that is a subsidiary of SM Investments Corporation. It consolidates all of the SM Group's real estate subsidiaries and real estate assets under one single listed entity. SM Prime has four (4) business units, namely, malls, residential, commercial and hotels and convention centers.[2]

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[1] *See* Bases Conversion and Development Act of 1992, R.A. 9772.

[2] *See* SM Prime's 2017 Definitive Information Statement.

1.2. On 10 September 2018, SM Prime and BCDA attempted to submit their Notification Forms ("Forms") at 6:42 PM, which was well beyond the office hours.[3]

1.3. On the following day, 11 September 2018, representatives of both BCDA and SM Prime appeared before the Commission's Records Department to personally re-submit their respective Forms. Examiners of MAO, however, refused to accept the Forms upon finding that the Forms did not comply with Rule 4, Section 5(b) of the PCC Implementing Rules and Regulations, particularly:

1.3.1. BCDA's Form was not accompanied by an authorization granting Atty. Aileen An R. Zosa authority to file the Form on behalf of BCDA as required by Section 8.2 of the Form;

1.3.2. BCDA did not submit an electronic copy of their submission in USB as required under Section 2.4 of the Merger Rules; and

1.3.3. SM Prime failed to submit an authorization granting it the authority to file the Form on behalf of its Ultimate Parent Entity ("UPE"), SM Investments Corp., as required by Section 8.2 of the Form.[4]

1.4. On 14 and 18 September 2018, the Commission received SM Prime's and BCDA's Forms, which were filed through registered mail, respectively.[5]

1.5. On 5 October 2018, BCDA, attempted to resubmit its Form. As SM Prime did not submit its Form, however, MAO received BCDA's Form on the condition that the determination of its sufficiency will only commence upon the Commission's receipt of SM Prime's Form.[6]

1.6. On 28 December 2018, SM Prime's Form was received by MAO, and thus, the notification for the Proposed Transaction was deemed submitted.[7]

1.7. On 17 January 2019, MAO issued its Final Report ("MAO Report") finding Respondents to have violated Section 2.1 of the Merger Rules (Failure to Notify within the Period for Notification) and recommending the imposition of a fine of Two Million Pesos (PhP2,000,000.00) based on the following grounds:

1.7.1. While the Parties sent out their Forms via registered mail on 10 September 2018, there is no provision in the Merger Rules that allow parties to submit their Forms via registered mail.[8]

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3 Apart from its attempt to personally submit their Notification Forms, SMPHI and BCDA submitted their Notification Forms through registered mail. The Commission was in receipt of BCDA and SM Prime's Forms on 18 September 2018, and 14 September 2018, respectively. MAO Report, par. 1; SM Prime's Comment, par. 1.

4 MAO Report, par. 3; SM Prime's Comment, par. 2.

5 MAO Report, par. 2.

6 *Id.*, par. 7.

7 MAO Report, par. 9; SM Prime's Comment, par. 3.

8 MAO Report, par. 14.

1.7.1.1 In addition, such Forms mailed by Respondents are still not acceptable for not being compliant with the requirements under Section 5.3 of the Merger Rules.[9]

1.7.2. When Respondents personally appeared on 11 September 2018, such date fell outside the Notification Period, and did not comply with the formal requirements prescribed under Section 5.3 of the Merger Rules.[10]

1.7.3. SM Prime's explanation that the late refiling was due to the volume of documents is unsatisfactory. The lack of authority, as the only reason for the non-admission of SM Prime's Form, could hardly be of such volume as to prevent SM Prime from complying with the formal requirements for submission of a Notification Form under Section 5.3.[11]

1.7.4. On 18 January 2019, the Commission, acting on the MAO Report, issued a Notice directing Respondents to file their respective Verified Comments on the MAO Report within fifteen (15) days from receipt of the notice, or until 4 February 2019.

1.8. On 4 February 2019, the Commission received SM Prime's Verified Comment where it raised the following arguments in support of their prayer:

1.8.1. While SM Prime admits that the only lacking requisite in the 10 September 2018 Notification Form was the authorization, their delay in submitting the complete documents was due to SM Prime's intention to submit not only the lacking authorization but also the required information and requisite appendices;[12]

1.8.2. The instant scenario of timely filing albeit late re-filing was supposedly foreseen and allowed, sans any penalty, by the Commission when it promulgated the Merger Rules;[13] and

1.8.3. The signing of the Proposed Transaction was allegedly a direct result of the Competitive Challenge effected in accordance with the National Economic Development Authority (NEDA) JV Guidelines;[14]

1.8.4. Thus, SM Prime prayed that:

> "the Honorable Commission not to impose the penalty as recommended in the Merger and Acquisitions Office's Memorandum dated 17 January 2019 in view of the express provision and clear intent of Section 5.6 of the PCC Rules on Merger Procedure and the good faith compliance of SM Prime."[15]

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9 *Id.*
10 *Id.*. par. 15.
11 *Id.*. par. 18.
12 SM Prime's Comment, par. 9.
13 *Id.*, par. 13.
14 *Id.*, par. 17.
15 *Id.*, p. 5.

1.9. Meanwhile, the Commission did not receive BCDA's Verified Comment upon the expiration of the period.[16] The case was thus submitted for resolution.

2. THE ISSUE

2.1. The issues to be resolved by the Commission are the following:

2.1.1. Whether or not SM and BCDA filed their Notification Forms on time, as required under Section 2.1 of the Merger Rules.

2.1.2. Whether or not a notification that is incomplete constitutes valid notification under Section 5.3 of the Merger Rules.

2.1.3. Whether or not good faith and the volume and extensiveness of the documents required to be submitted constitute valid justifications for the Respondents' belated Notification.

3. DISCUSSION

3.1. *Whether or not SM and BCDA filed their Notification Forms on time, as required under Section 2.1 of the Merger Rules.*

3.1.1. Section 2.1 of the Merger Rules provides that the parties to a merger that meets the compulsory notification thresholds shall notify the PCC within thirty (30) days from the date of execution of the relevant definitive agreement:

> "2.1. Parties to a merger that meets the thresholds in Section 3 of Rule 4 of the IRR are required to notify the PCC within thirty (30) days from signing of definitive agreements relating to the merger ("notified merger"). If deemed necessary, the PCC may likewise investigate mergers by its own initiative ("*motu proprio* review")."

3.1.2. In previous cases,[17] the Commission ruled that a violation of the compulsory notification requirements under Section 2.1 of the Merger Rules is committed upon the concurrence of the following elements:

3.1.2.1 The parties signed a definitive agreement relating to a merger or acquisition;

3.1.2.2 The merger or acquisition is a notifiable transaction under Section 17 of the Philippine Competition Act ("PCA") and Rule 4, Section 3

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[16] Under Section 15.6 of the Merger Rules, a Respondent's failure to file a Verified Comment constitutes a waiver of its right to contest the allegations in the MAO report and to participate in the proceedings. Moreover, such failure authorizes the Commission to find the facts as alleged in the MAO Report.

[17] In the Matter of AXA SA, Camelot Holdings Ltd., and XL Group Ltd.'s Alleged Violation of the Compulsory Notification Requirements Under Section 2.1 of the PCC Rules on Merger Procedure and In the Matter of Macsteel Global SARL B.V., PCC Case No. M-2018-004, 30 August 2018; MSSA Investments B.V.'s Alleged Violation of the Compulsory Notification Requirements Under Section 2.1 of the PCC Rules on Merger Procedure, PCC Case No. M-2018-005, 14 November 2018.

of the Implementing Rules and Regulations ("IRR"), as amended by PCC Memorandum Circular 18-001 ("MC 18-001");

3.1.2.3 The parties notified the Commission of the transaction beyond the 30-day period following the signing of the definitive agreement relating to the merger or acquisition; and

3.1.2.4 The parties have not consummated the transaction prior to the Commission's approval or clearance of the transaction.

3.1.3. Respondents did not dispute the presence of the first, second, and fourth elements.

3.1.4. With respect to the first element, it is a matter of record that on 10 August 2018, Respondents, through their respective authorized representatives, signed the Joint Venture, which sets out the complete and final terms and conditions of the privatization and development of the Bonifacio South Pointe Property, and submitted by Respondents for purposes of compliance with the Commission's notification requirement.[18]

3.1.5. As regards the second element, Respondents' act of filing a notification on the Transaction and their active participation and cooperation with MAO during the review of the Transaction is an admission that the Transaction is a notifiable transaction.

3.1.6. In any case, the Commission finds that the Transaction is a notifiable transaction as it satisfies both the Size of Person Test[19] and Size of Transaction Test.[20]

3.1.6.1 **Size of Person Test:** The aggregate gross annual revenue of BCDA amounts to approximately PhP13.35 Billion.[21] The aggregate gross annual revenue of SMIC amounts to approximately PhP396.15 Billion.[22]

3.1.6.2 **Size of Transaction Test:** The aggregate value of assets to be contributed into the proposed joint venture amounts to

18 Joint Venture Agreement for the Privatization and Development of the Bonifacio South Point dated 10 August 2018 submitted by Respondents.

19 Under PCC IRR, Rule 4, Section 3 (a), as Amended by Clarificatory Note 18-001, to satisfy the Size of Party Test, at least one of the Notifying UPEs, including all entities it controls, directly or indirectly (the UPE and all entities it controls, directly or indirectly, collectively comprise the "Notifying Group") must have either aggregate annual gross revenues "in", "into" or "from" the Philippines or have assets "in" the Philippines exceeding Five Billion Pesos (PhP5,000,000,000.00).

20 Under PCC IRR, Rule 4, Section 3 (d), as Amended by Clarificatory Note 18-001, in a notifiable joint venture transaction, an acquiring entity shall be subject to the notification requirements if either (i) the aggregate value of the assets that will be combined in the Philippines or contributed into the proposed joint venture exceeds Two Billion Pesos (PhP2,000,000,000.00) or (ii) the gross revenues generated in the Philippines by assets to be combined in the Philippines or contributed into the proposed joint venture exceed Two Billion Pesos (PhP2,000,000,000.00).

21 BCDA's Letter to PCC dated 15 January 2019

22 SM Prime's Notification Form, Section 3.2.

PhP51,476,065,000.[23] BCDA will contribute the Property valued at PhP31,476,065,000.[24] SM Prime will contribute [confidential]

3.1.7. With respect to the fourth element, the Commission takes note of Respondent's submission to MAO that they have not committed any act constituting the consummation of the Transaction.[26]

3.1.8. With respect to the third element, records show that Respondents submitted their complete Forms with MAO only on 28 December 2018, or one hundred forty (140) days after the signing of the Joint Venture Agreement on 10 August 2018. In fact, SM Prime expressly admitted in its Verified Comment its delay in submitting the Form:

> "**Admittedly, a substantial period of time lapsed before the re-filing.** This delay was necessarily incurred due to the volume, extensiveness, and sensitivity of the data to be disclosed to the Honorable Commission considering that respondent [SM Prime] is a conglomerate comprised of several subsidiaries and entities where data, information and document collection are governed by sets of rules which must still be complied with even by companies within the conglomerate."[27] (Emphasis supplied.)

3.1.9. However, Respondents contend that their first attempt to file on 10 September 2018, which was thirty (30) days after the signing of the Joint Venture Agreement, should be considered as valid notification and thus filed within the prescribed period.

3.1.10. The Commission however notes that when SM Prime attempted to submit its Form, it was filed after the reglementary period, as it was filed beyond the office hours. Furthermore, it was admitted by SM Prime that what they attempted to submit lacked the requisite authorization.[28] Thus, the Commission was correct in not accepting the Forms.

3.2. ***Whether or not a notification that is incomplete constitutes valid notification under Section 5.3 of the Merger Rules.***

3.2.1. Even assuming that the Forms were timely filed, the Parties submission could not be considered as valid notification.

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23 This breaches the 2 Billion Peso-threshold under Section 3 (d), Rule 4 of the IRR, as amended by PCC Memorandum Circular No. 18-001.

24 BCDA's letter to PCC dated 15 January 2019. Based on the Summary of Appraisal cited by BCDA, the 331,327-square meter property was valued at PHP95,000/sqm (as if free and clear) by Colliers International Phils. Inc.

[confidential]

26 Respondent's respective Forms.

27 SM Prime's Comment, par. 12.

28 SM Prime's Comment, par. 9.

3.2.2. SM Prime argues that they have timely filed their Form on 10 September 2018, despite lacking the requisite authorization, claiming that the requirement of Section 5.6 of the Merger Rules is submission within the Notification Period, without any mention as to the form of determination, sufficiency or otherwise, of the submitted form.[29] SM Prime argued that because registered mail is not a mode expressly prohibited by the Rules on Merger Procedure, they were able to file within the Notification Period.[30]

3.2.3. SM Prime's claim is untenable.

3.2.4. Section 5.6 states:

> "5.6. Once the parties have submitted their Forms to the PCC within the Notification Period, the penalty provided under Sections 3.5 and 16.2 will not apply even if their Forms are subsequently returned. However, the parties must refile the notification prior to any acts of consummation."

3.2.5. Contrary to the allegations by SM Prime, Section 5.6 should not be read in isolation, but must be read together with the preceding paragraph, Section 5.5, which enumerates the instances when the Commission may refuse to accept the Form:

> "5.5. PCC may refuse to accept the Form if it fails to comply with Section 5.3 or 5.4, or if it is not substantially in the prescribed form."

3.2.6. Section 5.5, in turn refers to Section 5.3 in considering whether to refuse or accept the Form submitted by the Parties:

> "5.3. Upon receipt of a notification, the PCC will first determine whether the Form complies with the following formal requirements:
>
> a) The original Form is signed and certified by a general partner of a partnership, an officer or director of a corporation, or in the case of a natural person, the natural person or his/her legal representative, and duly notarized (see Rule 4, Section 5(b) of the IRR);
> b) **In the case of a partnership or a corporation, the Form shall be accompanied by an original Secretary's Certificate or Special Power of Attorney or its equivalent in foreign jurisdictions, naming the authorized signatory of the Form as possessing actual authority to make the certification on behalf of the entity filing the notification, and naming the persons authorized to file and represent them before the PCC;**
> c) Original affidavit attesting to the fact that a definitive agreement has been signed and that each party has an intention of completing the proposed transaction in good faith (see Rule 4, Section 5(c);
> d) Documents executed abroad are duly authenticated by the Philippine embassy or consul in the country of execution;

[29] *Id.*, par. 15.
[30] *Id.*, par. 16.

e) All documents are properly bound, with each attachment labeled with a tab;
f) Electronic version of the completed Form in a secure USB, with each attachment saved as a separate file, and each file name referring to the identifying appendix number;
g) Electronic version of the completed Form saved in searchable PDF, Word or spreadsheet format in two (2) versions, protected and editable." (Emphasis supplied)

3.2.7. For parties to be covered under Section 5.6, their Notification Forms should comply with Section 5.3. Only after the Form is found to be in compliance with Section 5.3 will the the transaction be considered notified.

3.2.8. Once the parties' transaction is deemed notified, the Commission will thereafter conduct a sufficiency determination under Section 5.7 of the Merger Rules.

3.2.9. If the Forms submitted by the Parties are not compliant with Section 5.3, even if Respondents have submitted it within the Notification Period, the submission will not be deemed notified. The return of notification referred to in Section 5.6 contemplates a situation where the Forms were submitted, found to be sufficient in form, accepted, and the parties' transaction was deemed notified. Such contemplated situation does not apply in this case.

3.2.9.1 In this case, the Form was not accepted, and thus was not deemed notified on 10 September 2018 because of Respondents' failure to comply with the requirements under Section 5.3.

3.2.9.2 SM Prime, thus, cannot invoke Section 5.6 as a defense for Respondents' failure to submit their Forms, that are sufficient in form, within the Notification Period.

3.2.10. To reiterate, the Forms, as admitted by SM Prime, lacked the requisite authorization under Section 5.3(b).

3.2.10.1 Such lack of authorization not only makes Respondents' submission non-compliant with Section 5.3 but is fatally defective. The Commission cannot accept such submission when it could not properly verify whether the person/s who submitted the Forms were in fact authorized by the Notifying Parties.

3.2.10.2 In *Pascual and Santos, Inc. v. Members of Tramo Wakas Neighborhood Association, Inc.*,[31] the Supreme Court enunciated that, "[p]hysical acts, like the signing of documents, can be performed only by natural persons duly authorized for the purpose by corporate by-laws or by a specific act of the board of directors." Indeed, it is only through such authorization that the Commission

[31] Pascual and Santos, Inc. v. Members of Tramo Wakas Neighborhood Association, Inc., G.R. No. 144880 (2004).

can determine whether such submission is in fact an act of the entity or corporation that it purports to act on behalf of.

3.2.11. Respondents having filed their Forms in sufficient form only on 28 December 2018, which was well beyond the 30-day Notification Period, the concurrence of the elements below constitutes a violation of the Compulsory Notification Requirements under the Merger Rules:

3.2.11.1 Respondents signed the Joint Venture Agreement, which is the definitive agreement relating to the Proposed Transaction;

3.2.11.2 The Proposed Transaction satisfied the Size of Person and the Size of Transaction Test, and is thus a notifiable transaction under Section 17 of the PCA and Rule 4, Section 3 of the IRR, as amended by MC 18-001;

3.2.11.3 Respondents notified the Commission of the Proposed Transaction only on 28 December 2018, which is One Hundred Forty (140) days beyond the 30-day period following the signing of the Joint Venture Agreement relating to the Proposed Transaction; and

3.2.11.4 Respondents have not consummated the Proposed Transaction prior to the Commission's approval or clearance of the Proposed Transaction.

3.3. ***Whether or not good faith and the volume and extensiveness of the documents required to be submitted constitute valid justifications for the Respondents' belated Notification.***

Good faith is not a valid defense against late notification

3.3.1. The Commission also observed that SM Prime has been invoking good faith in its arguments:

3.3.1.1 In the first argument,

> "To show good faith, compliance to the 04 January 2019 Notice of Deficiency was timely made on 21 January 2019. On the 25 January 2019, a Notice of Return of the same date was received by [SM Prime] advising it of the return of the incomplete Notification Form due to failure to provide the information requested."[32]

3.3.1.2 In the second argument,

[32] SM Prime's Comment, par. 11.

> "In recognition of the possible delay and difficulty of compliance, the PCC Rules on Merger Procedure in fact acknowledged and accepted good faith for timely filing, notwithstanding any subsequent return of the Forms..."[33]

3.3.2. To stress however, the Commission, in its Decisions, has consistently held that good faith is not a valid defense against late notification.

3.3.3. In *AXA SA* for instance, the respondents prayed for the Commission's "leniency," alleging, among others, that they immediately took steps to comply as soon as it had determined its notification obligation and that they have provided all cooperation required to enable MAO to conduct and complete the review of the proposed transaction.[34]

3.3.4. The Commission, however, was not persuaded by these justifications and ruled:

> "Thus, to sustain a finding of a violation of Section 2.1 of the Merger Procedure, all that must be shown is the existence of all the elements of the failure to notify within the period for notification. **Lack of intent to avoid compliance, t**he fact that the delay did not harm public interest, the fact that PCC was not deprived of its ability to review the Transaction, **or the fact that the delay was due to the large-scale global operations are not accepted as defenses**. ...
>
> Whether Respondents [did not] intend to belatedly notify, and whether such late notification has not resulted in public harm or deprivation of PCC's ability to review the Subject Transaction are immaterial insofar as the proceedings under Section 2.1 of the Merger Procedure are concerned. **Once it is determined that transacting parties failed to observe the Notification Period, the liability under Section 16.2 of the Merger Procedure attached to the transacting parties, regardless of the intent or the effects of late notification**."[35] (Emphasis supplied.)

3.3.5. Similarly, SM Prime's claim of good faith could not be taken into consideration, as lack of intent to avoid compliance are not accepted as defenses on violations of the Compulsory Notification Rules.

The volume and extensiveness of the documents required to be submitted is not an excuse for late notification

3.3.6. In its Final Report, MAO alleges that SM Prime's explanation, that the late refiling was due to the volume of the documents required to be submitted, is unsatisfactory:

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[33] *Id.*, par. 15.
[34] *AXA SA*, p. 3.
[35] *Id.*, p. 3.

"The MAO Receiving Form issued on 11 September 2018 indicates the lack of authority as the only reason for the non-admission of [SM Prime's] Form. This could hardly be of such volume as to prevent [SM Prime] from complying with the formal requirements for submission of a Notification Form under Section 5.3 of the Merger Rules."[36]

3.3.7. In its Verified Comment, SM Prime merely reiterated its defenses which it previously raised before MAO. SM Prime alleges that its late refiling was due to the volume of documents required to be submitted and the fact that it is a conglomerate:

> "A review of the information and requisite appendices to be submitted by the Notifying Group showed its comprehensiveness and detailedness, not to mention the scale and number of entities involved within the UPE and Notifying Group, which compliance would unavoidably and necessarily need a substantial period of time.[37] ...
>
> Admittedly, a substantial period of time lapsed before the re-filing. This delay was necessarily incurred due to the volume, extensiveness, and sensitivity of the data to be disclosed to the Honorable Commission considering that respondent [SM Prime] is a conglomerate comprised of several subsidiaries and entities where data, information and document collection are governed by sets of rules which must still be complied with even by companies within the conglomerate."[38]

3.3.8. The rationale for the compulsory notification requirements is necessary to be discussed at this point.

3.3.8.1 The compulsory notification regime of the PCA is provided in its Section 17, which provides:

> "SEC. 17. *Compulsory Notification.* – Parties to the merger or acquisition agreement referred to in the preceding section wherein the value of the transaction exceeds one billion pesos (P1,000,000,000.00) are prohibited from consummating their agreement until thirty (30) days after providing notification to the Commission in the form and containing the information specified in the regulations issued by the Commission: *Provided,* That the Commission shall promulgate other criteria, such as increased market share in the relevant market in excess of minimum thresholds, that may be applied specifically to a sector, or across some or all sectors, in determining whether parties to a merger or acquisition shall notify the Commission under this Chapter."

3.3.8.2 The compulsory notification requirements seek to protect the power and mandate of the Commission to review proposed mergers and acquisitions for possible anticompetitive effects. In order to protect

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36 MAO Report, par. 19.
37 SM Prime's Comment, par. 10.
38 *Id.*, par. 12.

the Commission's power to review proposed mergers, it is imperative that the sanctions for non-compliance with the notification requirement have a real deterring effect. Otherwise, transacting parties may be tempted to disregard the legal requirement with impunity.

3.3.8.3 To operationalize the compulsory nature of merger notification, Section 2.1 of the Merger Rules provides for a period of thirty (30) days, reckoned from the signing of the relevant definitive agreement, within which the transacting parties shall notify the Commission of a proposed merger or acquisition. As clearly stated in the provision:

> "Parties to a merger that meets the thresholds in Section 3 of Rule 4 of the IRR are required to notify the PCC within thirty (30) days from signing of definitive agreements relating to the merger ("notified merger"). If deemed necessary, the PCC may likewise investigate mergers by its own initiative ("*motu proprio* review")."

3.3.8.4 The Notification Period thus provides the transacting parties with sufficient time to complete the notification form and to prepare the documentary requirements to be submitted together with the form. More importantly, **the Notification Period ensures that merger review and investigation is conducted within a specific period and is not left to the parties' discretion.**

3.3.9. The Commission, thus, agrees with MAO that:

> "[SM Prime's] explanation that the late refiling was due to the volume of documents required to be submitted is unsatisfactory. The MAO Receiving Form issued on 11 September 2018 indicates the lack of authority as the only reason for the non-admission of SMPH's Form. This could hardly be of such volume as to prevent SMPH from complying with the formal requirements for submission of a Notification Form under Section 5.3 of the Merger Rules. Deficiencies as to the substance of the Form are made known to the parties through a Notice of Deficiency, issued after the MAO has preliminarily assessed the sufficiency of the documents. As parties are given the opportunity to complete any deficiencies as part of the process, they cannot claim difficulty in gathering documents as an excuse for late notification at this part of the Notification Process."

3.3.10. In the same vein, the Commission cannot accept SM Prime's "large-scale business justification" to excuse it from being penalized for its belated notification.

3.4. Finally, SM Prime's assertion that the Joint Venture Agreement was a direct result of the Competitive Challenge effected in accordance with National Economic Development Authority's Joint Venture Guidelines is irrelevant in determining whether or not Respondents are liable for violating the Merger Rules.

3.5. ***Amount of Fine***

3.5.1. Section 16.2 of the Merger Rules provides a fine equivalent to ½ **of 1% of 1% of the value of transaction,** which in no case shall exceed the statutory limit of Two Million Pesos (PhP2,000,000).

3.5.2. Under Section 16.4 of the Merger Rules, the fine shall be based on the value of transaction. As mentioned above, the value of the transaction is PhP51,476,065,000.

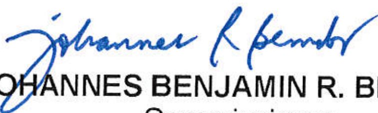
3.5.3. The equivalent of ½ of 1% of 1% of the value of transaction being PhP2,573,803.25 which exceeds the statutory limit of Two Million Pesos (PhP2,000,000), the imposable fine is Two Million Pesos (PhP2,000,000).

4. **DISPOSITIVE PORTION**

4.1. **WHEREFORE**, the Commission finds Respondents Bases Conversion and Development Authority and SM Prime Holdings, Inc. in violation of Section 2.1 of the Rules on Merger Procedure (failure to notify within the period for notification). Respondents are hereby directed to pay a fine of **TWO MILLION PESOS (PhP2,000,000.00)** within forty-five (45) days from the promulgation of this Decision.

5 March 2019, Quezon City, Philippines.

ARSENIO M. BALISACAN
Chairman



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