

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



IN THE MATTER OF THE PETITION
FOR THE RECOVERY OF NATIONAL
POWER CORPORATION'S
STRANDED CONTRACT COSTS
PORTION OF THE UNIVERSAL
CHARGE FOR THE LUZON GRID

ERC CASE NO. 2009-046 RC

POWER SECTOR ASSETS AND
LIABILITIES MANAGEMENT
CORPORATION (PSALM),

Petitioner,

x-----x

D O C K E T E D

Date: FEB 02 2010

By: _____

ORDER

The Commission takes note of the "*Motion for Clarification*" filed on November 5, 2009 by Manila Electric Company (MERALCO) and the "*Motion to Resolve (Re: Intervention and Formal Appearance)*" filed on December 3, 2009 by Freedom from Debt Coalition (FDC).

MERALCO's Motion for Clarification

In the said motion of MERALCO, it alleged, among others, that:

1. In relation to the Pre-trial Order dated October 1, 2009 issued by the Commission, it seeks clarification from the Commission on the extent of its pronouncement regarding judicial notice in line with the Power Sector Assets and Liabilities Management Corporation's (PSALM) refusal to furnish it with copies of the Independent Power Producer (IPP) contracts;
2. PSALM asserts that the presentation of the IPP contracts is no longer necessary because of the judicial notice taken by the Commission of the approval of the said IPP contracts. It posits otherwise;

3. Judicial notice can be taken of the official acts of the government. Thus, the Commission can take cognizance of the fact that the then Energy Regulatory Board (ERB) issued Decisions approving the said IPP contracts. Hence, the fact that the said contracts were approved by the Commission need not be proven by PSALM;
4. Judicial notice, however, should not mean that the consumers and interveners will simply accept, hook, line and sinker that the amounts being claimed by PSALM as Stranded Contract Costs (SCCs) are fair and reasonable because the IPP contracts were approved by the then ERB. It is essential to determine whether the contract costs as alleged in the instant are the same contract costs approved by the then ERB. PSALM must establish that no additional costs not covered by the PPA or approved by the then ERB are being passed on and included in the computation of the SCCs. PSALM, likewise, needs to establish that these IPP contracts are still valid and subsisting and that no subsequent agreements were executed to supplement or replace the original agreements approved by the then ERB;
5. The fact that the IPP contracts were subject to judicial notice only implies that the genuineness and due existence of these IPP contracts cannot now be made an issue in the instant petition. However, the issue with regard to the substance or the content thereof is a totally different matter as judicial notice may not be taken of facts which are in dispute. The reasonableness of PSALM's calculations of the SCCs is in issue in the instant petition, hence, the same may not be taken judicial notice of;
6. PSALM needs to establish whether NPC complied with all the conditions imposed by the then ERB for the recovery of contract costs;
7. PSALM has to prove that its calculations are in accordance with applicable laws and rules and regulations of the Commission. Section 68 of Republic Act No. 9136 (R.A. 9136) mandates PSALM to diligently seek to reduce SCCs of NPC, thus, to determine if PSALM has actually complied with its mandate to reduce SCCs, the terms and conditions of the IPP contracts must be examined to establish if there are any onerous or disadvantageous provisions of the contract, what PSALM has done to renegotiate the said onerous provisions and compare the same with the standard provisions appearing in other IPP contracts. Under Article IV, Section 3 of the Rules for Recovery, PSALM is required to calculate the "aggregate actual cost obligations of the National Power Corporation (NPC) as per the terms and conditions of its live and enforceable contracts with all IPPS and/or other private producers for the applicable year for each major grid", it must show compliance with the actual terms and conditions of its IPP contracts to be entitled to recovery. R.A. 9136 prohibits the pass-through of costs arising from inefficiency on the part of NPC. The only way to determine if there is inefficiency is to examine the terms of the contract to determine which of these were complied with;
8. There is no other verifiable manner by which to determine the reasonableness of the costs it is seeking to recover unless compared



with the actual costs and expenses agreed upon between NPC and its IPP under the contracts they executed;

9. It maintains that the production of these documents is still necessary as it is imperative that the contents thereof must be reviewed for an examination of, among others, the existence, amounts, purpose and the terms and conditions upon which these contracts were executed, for the Commission and interveners to be able to verify and determine the reasonable amount of the SCCs being claimed by PSALM. It is only through these documents that PSALM's claim may be established or refuted;
10. The terms and conditions of the IPP contracts and whether NPC complied with the same are not matters capable of judicial notice. While the Commission can take judicial notice of its approval of the IPP contracts, it could not have intended to extend the said judicial notice to the determination of the reasonableness of the SCCs which can only be determined by an analysis of the terms and conditions of the IPP contracts in question. Nor can the Commission take judicial notice that PSALM's proposed methodology and computation of its SCCs are in accordance with applicable laws and rules;
11. Despite the standing directive of the Commission during the September 15, 2009 hearing for PSALM to provide all interveners with copies of the IPP contracts as well as the pertinent decisions, PSALM has refused to comply with the same;
12. Since the IPP contracts are already public documents, there is no legal impediment for PSALM to present them to the public as their evidence in the instant case to enable the Commission to have a transparent, fair and reasonable evaluation of the amount of SCCs being claimed in the instant petition; and
13. It prays that an Order be issued clarifying that the judicial notice it had taken with respect to the IPP contracts as enumerated in its Pre-trial Order dated October 1, 2009 does not exempt PSALM from the previous directive of the Commission to submit the aforesaid contracts and to furnish the interveners.

During the hearing held on November 13, 2009, MERALCO moved for the early resolution of its motion. Relative thereto, PSALM was directed to file its comment thereon within five (5) days from receipt thereof while MERALCO was, likewise, given the same period to file its reply thereto.



In compliance therewith, on December 21, 2009, PSALM filed its "Position Paper (To MERALCO's Motion for Clarification dated November 5, 2009)" alleging, among others, that:

1. Judicial notice is based upon convenience and expediency. Judicial notice is the cognizance of certain facts which judges may properly take and act on without proof because they are already known to him. Judicial notice is thus a substitute for detailed evidence;
2. The object of the judicial notice is to save time, labor and expense in securing and introducing evidence on matters which are not bona fide disputed. It would certainly be superfluous, inconvenient, and expensive both to the parties and the court to require proof, in the ordinary way, of facts which are already known to courts;
3. It is not difficult to understand the reason and wisdom of the Commission in taking judicial notice of the said seven (7) eligible IPP contracts. The Commission is competently knowledgeable and familiar with said IPP contracts as approved by its predecessor, the ERB, including the contents and substance thereof as a consequence of the Commission having assumed the role and function of the ERB. In other words, judicial notice entails not only the acceptance and knowledge of the existence and regularity of the terms and conditions of the IPP contracts but also the regularity of the acts of the then ERB;
4. There is no justifiable reason for the production of these IPP contracts as the same have been the subject of judicial notice by the Commission, lest submission thereof be superfluous, inconvenient and expensive as these undisputed facts are already known to the Commission;
5. The Pre-trial Order controls the subsequent course of the proceedings. MERALCO argues that PSALM will need to establish that (a) the IPP costs are the same costs derived under the formula or computation set forth in the Power Purchase Agreement (PPA) between NPC and its IPPs and the Decisions of the ERB; (2) no additional costs not covered by the PPA or approved by the ERB are being passed on and included in the computation of the SCCs; (3) the IPP contracts are still valid and subsisting and that no subsequent agreements were executed to supplement or replace the original agreements approved by the ERB; and (4) NPC complied with all the conditions imposed by ERB for the recovery of contract costs;
6. MERALCO's proposed issues are not among the agreed issues in the Pre-trial Order. It is belatedly attempting to introduce additional issues in the Pre-trial Order even after the same have been effectively considered by the Commission when it took judicial notice of the eligible IPP contracts;



7. It is not for it to establish MERALCO's proposed issues, after all, it enjoys the presumption of regularity in the performance of official duty. MERALCO has to rebut such presumption by the presumption of its own witnesses at the proper time. It should not be allowed to shift its responsibility to PSALM in proving its position in the instant petition; and
8. It prays that MERALCO's motion be denied and that it be excused from producing and submitting copies of the eligible IPP contracts since these have been the subject of judicial notice by the Commission.

On January 20, 2010, MERALCO filed its "Reply (To PSALM's Position Paper dated December 17, 2009)" alleging, among others, that:

1. PSALM failed to appreciate, if not comprehend, the true issue it raised for clarification. Its motion is far from being a belated attempt to seek reconsideration of the judicial notice taken by the Commission. It filed the said motion to seek guidance from the Commission on the construction of its Pre-trial Order, particularly as to the extent and intent of the judicial notice, due to the contradicting interpretations of the parties and the refusal of PSALM to produce the documents in question;
2. The judicial notice taken by the Commission cannot mean that the production of the IPP contracts is no longer necessary. On the contrary, the presentation of the said documents is very vital for the same is indispensable for the determination of the issues presented in the instant petition. The examination of the same is the only possible way or means for the Commission to verify the amount and the reasonableness of the SCCs claimed by PSALM, which is the very purpose of the entire proceedings;
3. MERALCO is not raising or proposing any additional issues not found in the Pre-trial Order. The issues referred to by PSALM as additional issues being proposed by it are, in fact, already subsumed by the two (2) major issues in the Pre-trial Order, namely: (1) reasonableness of the calculations of PSALM of the SCCs; and (2) whether the proposed SCC complies with all the pertinent laws and rules;
4. PSALM must present the IPP contracts for the determination of its claim in the instant petition since there is no other verifiable manner by which to determine the reasonableness of the costs it is seeking to recover than to compare the same with the actual costs and expenses agreed upon between NPC and its IPPs under the contracts they executed. The IPP contracts are already public documents, hence, there is no legal impediment on the part of PSALM to present the same to the Commission; and



5. It prays that PSALM's Position Paper be denied for utter lack of merit and an Order be issued clarifying that the judicial notice it had taken with respect to the power purchase contracts does not exempt PSALM from the previous directive of the Commission to submit the subject contracts and to give copies thereof to the interveners.

Accordingly, MERALCO's Motion for Clarification is deemed submitted for resolution.

As stated in the Pre-trial Order dated October 1, 2009, the Commission took judicial notice of the various IPPs that were approved by the then ERB prior to December 31, 2000. Pursuant to *Section 1, Rule 129 of the Revised Rules of Court of the Philippines* states that "a court shall take judicial notice, without the introduction of evidence, of the x x x, official acts of the executive department of the Philippines, x x x." Thus, the Commission, as an administrative agency which forms part of the executive department of the Philippines, may take judicial notice of its own official acts.

The Commission hereby clarifies that it took judicial notice of the approval of the IPP contracts by the ERB for the purpose of establishing the eligibility of the said contracts since under *Section 32 of R. A. 9136*, only contracts duly approved by the then ERB as of December 31, 2000 shall be entitled for cost recovery through the Universal Charge (UC). This being the case, PSALM need not prove that said contracts are eligible or that they have been approved by the then ERB. Simply put, the Commission dispenses with the need to prove the approval of the subject IPP contracts. This does not necessarily mean however that PSALM should no longer be probed as to the reasonableness of the amount of the SCCs sought to be recovered by it.



Inasmuch as SCCs refer to the excess of the contracted cost of electricity under the eligible contracts of NPC over the actual selling price of the contracted energy output of such contracts in the market, the eligible contracts may be inquired into to determine the contracted cost of electricity.

Pursuant to *Section 5, Rule 3 and Section 4 (b), Rule 17 of the Implementing Rules and Regulations of R.A. 9136*, PSALM shall calculate the amount of the SCCs of NPC which shall become the basis of the Commission in determining the approved level of NPC SCCs in the UC.

Under *Section 6, Article IV of the Rules for Recovery of NPC Stranded Contract Costs and Stranded Debts Portion of the Universal Charge (Rules for Recovery)*, the annual NPC SCCs shall be computed as the difference between the gross annual contract costs and the combined amounts derived from revenues from the sale of contracted energy of eligible IPPs and privatization of IPP contracts and the surplus funds or shortfall in the Special Trust Fund (STF) from the UC.

In the calculation of the gross annual contract costs, PSALM shall calculate the actual aggregate eligible contract cost obligations of NPC as per the terms and conditions of its existing and enforceable contracts with all IPPs and/or other private producers for the applicable year for each major grid which shall take into account several components, including but not limited to the following:

(a) amortization payments including principal and interest payments of eligible IPP contracts incurred by NPC to finance the buy-out and/or buy-down of eligible IPP contracts as approved by the ERC pursuant to *Section 4 of Rule 17 of the*

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IRR, if any; and (b) other costs and expenses related to the buy-out and/or buy-down of IPP contracts under *Section 3 (c)* thereof, if applicable.

Thus, in the discharge of its mandate to calculate for the SCCs, PSALM needs to look into the terms and conditions of NPC's IPP contracts. It has to present in evidence said IPP contracts to support its calculation. Given the said calculation, the Commission shall then verify the reasonable amounts and determine the manner and duration for the full recovery of SCCs. To effectively discharge its mandate, the Commission shall verify whether PSALM's calculation is in accordance with the terms and conditions of the IPP contracts, R.A. 9136, its IRR and the Rules for Recovery.

Accordingly, PSALM is hereby directed anew to submit to the Commission the seven (7) IPP contracts and the Decisions of the ERB approving the same and to furnish all the interveners with the same, within ten (10) days from receipt hereof.

Freedom from Debt Coalition's (FDC) Motion to Resolve its Intervention and Formal Entry of Appearance

During the initial hearing held on September 8, 2009, the Commission provisionally accepted FDC as an intervenor subject to the filing of a formal petition for intervention by FDC within five (5) days from said date of hearing.

On September 18, 2009, FDC belatedly filed its "*Formal Entry of Appearance and Motion*".

On December 3, 2009, FDC filed a "*Motion to Resolve (Re: Intervention and Formal Appearance)*" alleging, among others, that:



1. It had been in active and diligent participation of all the proceedings before the Commission to assert its claim even before the services of counsel was retained;
2. However, in order to fully substantiate and formally present its legal interest before the Commission, the services of counsel was required;
3. Its interest is yet to be formally recognized before the Commission despite the lapse of almost two (2) months from the time it filed its "Formal Entry of Appearance";
4. The instant petition would necessarily have a direct adverse effect on its material and legal interests as an electricity end-user in the event that it is granted by the Commission; and
5. It is left with no other recourse to protect its interest other than to intervene and present its claim in the instant petition.

The Commission finds no sufficient excuse for FDC's failure to file the required petition within the prescribed period. The Commission has already liberally construed its Rules of Practice and Procedure in favor of FDC when it allowed FDC as an intervenor during the initial hearing even without a formal petition for intervention having been filed as required in the Commission's rules. It was given already an ample time and opportunity to file the said petition but it failed to do so.

Sections 1 and 2 of Rule 9 of the Commission's Rules of Practice and Procedure (Rules) state that:

"Any person having an interest in the subject matter of any hearing or investigation pending before the Commission may become a party thereto by filing a verified petition with the Commission giving the docket number and title of the proceeding and stating: (1) the petitioner's name and address; (2) the nature of petitioner's interest in the subject matter of the proceeding, and the way and manner in which such interest is affected by the issues involved in the proceeding; and (3) a statement of the relief desired.

Petitions under this rule shall be served on the original parties with the Commission not less than five (5) days prior to



the time the proceeding is called for hearing, unless the notice of hearing fixes the time for filing such petitions, in which case such notice shall govern. A petition, which for good cause shown was not filed within the time herein limited, may be presented to and allowed or denied by the Commission or the presiding officer at the time the proceeding is called for hearing."

In the case of *Guy v. CA*, 539 SCRA 584, the Supreme Court held that "when a party was afforded an opportunity to participate in the proceedings but failed to do so, he cannot complain of deprivation of due process for by such failure, he is deemed to have waived or forfeited his right to be heard without violating the constitutional guarantee".

Accordingly, the Commission hereby considers FDC merely as an Oppositor. As such, FDC may file an opposition to the instant petition or comment thereon at any stage of the proceedings before PSALM rests its case, if it so desires.

Meantime, the continuation of the hearing is hereby set on **February 23, 2010 (Tuesday)** at ten o' clock in the morning (10:00 A.M.) at the ERC Hearing Room, 15th Floor, Pacific Center Building, San Miguel Avenue, Pasig City.

SO ORDERED.

Pasig City, January 26, 2010.

FOR AND BY AUTHORITY
OF THE COMMISSION:


ALEJANDRO Z. BARIN
Commissioner


MVA/NJS

Copy Furnished:

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