

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



IN THE MATTER OF THE
PETITION FOR DISPUTE
RESOLUTION TO DIRECT
PALAWAN ELECTRIC
COOPERATIVE, INC. (PALECO)
TO CEASE AND DESIST FROM
CONDUCTING THE SWISS
CHALLENGE PROCEEDINGS
FOR ADDITIONAL 20 MW
GUARANTEED DEPENDABLE
CAPACITY, WITH PRAYER
FOR STATUS QUO ANTE
ORDER PENDING FINAL
RESOLUTION

ERC CASE NO. 2015-052 MC

DMCI POWER CORPORATION
(DPC),

Petitioner.

x ----- x

DOCKETED
Date: SEP 24 2015
By: M

ORDER

On August 24, 2015, DMCI Power Corporation (DPC) filed a petition for dispute resolution to direct Palawan Electric Cooperative, Incorporated (PALECO) to cease and desist from conducting the Swiss Challenge proceedings for additional 20 MW Guaranteed Dependable Capacity (GDC), with prayer for status quo ante order pending final resolution (*copy hereto attached*).

In the said petition, DPC alleged, among others, that:

Parties

1. DPC is a corporation duly organized and existing under the Philippine laws, engaged primarily in power generation business, which includes the distribution of power supply, designing, construction, investing in, and operating power plants. It has principal office at 3rd Floor,

DMCI Plaza Building, 2281 Chino Roces Avenue, Makati City;

2. PALECO is a non-stock, non-profit electric cooperative, organized and existing by virtue of Presidential Decree No. 269, as amended, and duly registered with the Cooperative Development Authority (CDA) by virtue of Republic Act No. 6938, as amended. It is authorized to provide and distribute electricity services to the City of Puerto Princesa and the Municipalities of Aborlan, Narra, Brookes' Point, Española, Cuyo, Magsaysay, Quezon, Roxas, Taytay, El Nido, Araceli, San Vicente, Bataraza, Rizal, Balabac, Cagayancillo, Agutaya and Dumarán, all in the Province of Palawan. It has principal address at Km. 7, North National Highway, Puerto Princesa City, Palawan;

Statement of Facts

3. **On 25 July 2012, DPC entered into a Power Supply Agreement (PSA) with PALECO effective for a period of fifteen (15) years with a GDC of 25 MW;**
4. On 11 February 2013, PALECO filed an application with the Commission for approval of said PSA with DPC, docketed as ERC Case No. 2013-022 RC. **The PSA was provisionally approved pursuant to the Order issued by the Commission on April 15, 2013;**
5. Although the PSA of DPC and PALECO involves a 25 MW GDC, PALECO, however, merely dispatches DPC only up to an average of 15.61 MW (2014) and 17.22 MW (2015)¹, which are a far cry from the 25 MW contracted capacity;
6. At present, PALECO's power requirements are being supplied by Palawan Power Generation, Incorporated (PPGI) for 12 MW, Delta P, Incorporated (Delta P) for 12 MW and DPC for 25 MW, with a Total Available Capacity of 49 MW, vis-à-vis PALECO's peak demand of 35 MW;

¹ Including the demand in the Municipality of Roxas in 2015

7. On 24 July 2015, PALECO caused the publication in the Manila Bulletin of an *Invitation to Bid for Comparative Proposal for Power Supply in Palawan Main Grid*. PALECO, through its Bids and Awards Committee (BAC) stated that it is conducting a Competitive Selection Process (CSP) through Swiss Challenge Method for the supply of an additional 20 MW GDC, with a Minimum Energy Off-Take (MEOT) of 10,750,000 kWh/month for a period of 15 years. A copy of the *Invitation to Bid* is attached to the petition as **Annex "A"** to form an integral part thereof;

8. Pursuant to the Bidding Schedule in **Annex "A"**, interested parties are directed to submit Pre-qualification Requirements until August 24, 2015, while PALECO's BAC shall evaluate the same from August 25, 2015 until September 8, 2015. The announcement of the Pre-qualified Comparative Proponents shall ensue forthwith;

9. Wary that the current Swiss Challenge proceedings of PALECO has apparent prejudice to their 15-year PSA, DPC, in its letter dated July 27, 2015, a copy is attached to the petition as **Annex "B"** to form an integral part thereof, requested that PALECO reconsider its decision to bring in a fourth supplier considering that under *Section 4.10.2 of the PSA between DPC and PALECO on the matter of "Dispatch and Additional Power Supply Capacity"*, PALECO shall procure additional power only when its Contingency Reserve² is diminished, to wit:

*"OFFTAKER may take the necessary and timely steps including the procurement of additional power supply when it becomes imminent that all available power supply capacity which OFFTAKER may nominate the dispatch as Contingency Reserve will become **less than ten percent (10%) of the system peak**." [Emphasis ours.]*

² "Contingency Reserve" - Generating Capacity that is intended to take care of the loss of the largest Synchronized Generating Unit or the power import from a single-Grid interconnection, whichever is higher. Contingency Reserve includes Spinning Reserve and Backup Reserve. (Section 1.1 of the PSA)

10. DPC sent another correspondence to PALECO on August 5, 2015, requesting for a meeting with the Board of Directors to discuss the propriety of the Swiss Challenge proceedings subject of the Invitation to Bid and the effects of the implementation thereof to DPC's existing PSA. A copy of the aforesaid letter is attached to the petition as **Annex "C"** to form an integral part thereof. As DPC failed to receive any response from PALECO, it was prompted to file the instant petition;

Nature of the Case

11. This petition is filed pursuant to Chapter IV, Section 43 (u) of Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA), which pertinently provides the following:

"SEC. 43. Functions of the ERC. – The ERC shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:

X X X

(u) The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the above mentioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector. [Emphasis ours]

Issue

12. The lone issue to be resolved in this case is whether PALECO's conduct of a CSP through Swiss Challenge Method to procure additional 20 MW power supply is violative of the existing PSA between DPC and PALECO. In the affirmative, a *Cease and Desist Order* from the Commission directing PALECO to refrain from conducting said CSP is warranted;

Arguments/Discussion

13. PALECO's power requirements are currently being supplied by the following providers with their respective Contracted Capacity:

NPP	Contracted Capacity
PPGI	12 MW
Delta P	12 MW
DPC	25 MW
Total	49 MW

14. As the third power provider, DPC shall supply the remaining energy requirement of PALECO only after PPGI and Delta P has satisfied, or when they are unable to satisfy, their contractual commitments under their respective PSAs;
15. Since 2014, PALECO's highest recorded demand even during the driest summer months is only at **36.61 MW**. Thus, even if DPC's contracted supply to PALECO is at 25 MW GDC, only a monthly average peak dispatch of 15 MW is being taken from DPC's capacity. As a result, PALECO has a reserve capacity of at least **14 MW**. Attached as **Annex "D" and series** to the petition and to form integral parts thereof are sample load nominations and dispatch for random periods in 2014-2015;
16. Clearly, PALECO already has an *excessive* contingency reserve that negates any necessity for PALECO to procure at this time an *additional* 20 MW supply from a fourth power provider through the conduct of the subject Swiss Challenge proceedings. To do so will bring

PALECO's reserve capacity to 34 MW, which is almost equivalent to its highest demand;

17. Due to PALECO's dispatch of DPC **below** its 25 MW GDC, PALECO is **not meeting** the Net Expected Energy (NEE) provided under their PSA because the demand is simply insufficient. Worthy of note is that during the bidding conducted by PALECO, which resulted in the selection of DPC as its new power provider, in the computation of the NEE allocated for DPC, PALECO's forecasted demand for fifteen (15) years less contracted energy from its other suppliers, PPGI and Delta P, was already factored in. This, notwithstanding, PALECO is still unable to meet DPC's NEE at present;

18. **Meanwhile, the original proposal being subjected to Swiss Challenge has a MEOT of 10,750,000 kWh per month, thus, is a "take or pay" arrangement.** As such, PALECO will compensate the supplier *irrespective* of non-delivery of the required capacity. **Considering that DPC's PSA with PALECO does not provide for a MEOT and DPC is paid for actual energy delivered, PALECO can easily take away DPC's demand allocation and apportion the same to the fourth supplier, if only to satisfy the MEOT and prevent payment of MEOT charges. This effectively eases out DPC and renders the PSA inutile;**

19. **Worse, the proposed additional supply contract has a term of fifteen (15) years. This only makes DPC's PSA with PALECO essentially useless for the entire duration of the agreement;**

20. The PSA between DPC and PALECO, likewise, provides that an additional power supplier shall **only** be resorted to when its Contingency Reserve becomes **less than ten percent (10%) of the system peak**³;

³ Sec. 4.10.2 of the PSA. "OFFTAKER may take the necessary and timely steps including the procurement of additional power supply when it becomes imminent that all available power supply capacity which OFFTAKER may nominate the dispatch as Contingency Reserve will become less than ten percent (10%) of the system peak. If and when OFFTAKER decides to procure additional power supply and has chosen a new supplier ("New Supplier") through

21. With a system peak of 35 MW, 10% of which is 3.5 MW, PALECO may procure an additional power supplier *only* when its Contingency Reserve is **below** 3.5 MW. However, since DPC is currently being under-dispatched, **PALECO has an actual Contingency Reserve of 14 MW;**
22. Thus, PALECO's procurement of an *additional* power supplier when its Contingency Reserve has NOT reached the threshold amount, is not in accordance with the provisions of its PSA with DPC;
23. Another condition provided by the PSA in procuring additional power supply under Section 4.10.3 states that:

"In procuring the additional power supply to avert the Contingency Reserve from becoming less than ten percent (10%) of the system peak, OFFTAKER shall ensure that such additional power supply capacity and SUPPLIER's Guaranteed Dependable Capacity shall not cause the island grid to have a Contingency Reserve available for dispatch by the OFFTAKER to be **more than thirty percent (30%) of the peak demand.**"

[Emphasis ours]

24. Assuming, *arguendo*, that PALECO's procurement of additional power supply is necessary to avert a severe decline of its Contingency Reserve, **the additional power supply must not be more than 30% of PALECO's peak demand;**
25. If the Swiss Challenge will push through, the additional 20 MW supply will bring PALECO's Contingency Reserve to 34 MW, which is equivalent to 97% of the system peak of 35 MW, therefore, in clear violation of the PSA;
26. Hence, it is apparent from the foregoing that the conduct of the Swiss Challenge proceedings for the additional 20 MW GDC for a period of fifteen (15) years negatively affects, if not violates the PSA's provisions on dispatch and additional power supply capacity;

27. Thus, in order to protect its interests, DPC was prompted to seek relief from the Commission to direct PALECO to explain and to cease and desist from the conduct of the CSP through Swiss Challenge Method for the procurement of additional 20 MW power supply;

Prayer for Status Quo Ante Order Pending Final Resolution

28. DPC repleads the foregoing allegations in support of its prayer for the issuance of a *Status Quo Ante Order*, pending final resolution of the petition;
29. Pursuant to the Invitation to Bid, attached to the petition as **Annex "A"**, interested parties have until August 24, 2015 to submit their Pre-qualification Requirements. From August 25, 2015 to September 8, 2015, PALECO's BAC shall evaluate the pre-qualification requirements and announce the pre-qualified comparative proponents;
30. Between now and these periods, PALECO can either on to issue the Bid Documents to the pre-qualified parties, or, if no one submits the requirements until the deadline on August 24, 2015, proceed with the execution of the 15-year supply agreement with the original proponent for the additional 20 MW;
31. In any case, each of the foregoing circumstances would prevent DPC from fully benefiting from the relief prayed for in the petition. Thus, so as not to render trivial and nugatory whatever action the Commission shall take in herein petition, it is necessary to maintain the current situation between the parties;
32. DPC argues that it is important to preserve the *status quo* between the parties until the merits of the petition can be heard. Otherwise, the execution of a supply contract that violates PALECO's existing contractual obligations with DPC, in addition to being unnecessary for resulting in over-contracting, shall be permitted;

33. Thus, due to the urgency of the matter at hand considering the August 24, 2015 deadline for submitting the pre-qualification requirements, it prays to the Commission to immediately issue a *Status Quo Ante Order* to maintain the prevailing state of affairs between the parties pending final resolution of the instant petition; and

Prayer

34. It prays that the Commission:

34.1 Immediately issue a *Status Quo Ante Order* to maintain the current status of the Parties, thereby preventing PALECO from further conducting the Swiss Challenge Proceedings to procure additional 20 MW GDC; and

34.2 After due notice and hearing, convert the *Status Quo Ante Order* into a *Cease and Desist Order*.

Finding the said petition to be sufficient in form and in substance with the required fees having been paid, the same is hereby set for initial hearing, expository presentation, pre-trial conference and evidentiary hearing on **October 5, 2015 (Monday) 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.**

DPC is hereby directed to cause the publication of the attached Notice of Public Hearing, at its own expense, once (1x) in a newspaper of general circulation in the Philippines, at least ten (10) days before the scheduled date of initial hearing.

PALECO is hereby directed to submit its comment to the petition within ten (10) days from receipt hereof.

The parties are directed to submit, at least five (5) days before the date of initial hearing and pre-trial conference, their respective Pre-trial Briefs containing, among others:

- (a) a summary of admitted facts and proposed stipulation of facts;
- (b) the issues to be tried or resolved;
- (c) the documents or exhibits to be presented, stating the purposes and proposed markings thereof; and
- (d) the number and names of the witnesses, with their written testimonies in an individual affidavit form, to be attached to the Pre-trial Brief.

Failure of DPC to submit the required Pre-trial Brief and Judicial Affidavits of its witnesses within the prescribed period shall be a ground for cancellation of the scheduled hearing, and the resetting of which shall be six (6) months from said date of cancellation.

SO ORDERED.

Pasig City, September 1, 2015.

FOR AND BY AUTHORITY
OF THE COMMISSION:


JOSE VICENTE B. SALAZAR
Chairman

ERC
Office of the Chairman



1-2015-015-00403

Copy Furnished:

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