

Republic of the Philippines
ENERGY REGULATORY COMMISSION
Pasig City



ATTY. ISABELO JOSEPH P. TOMAS II, in his capacity as the Investigating Officer of the Investigatory Unit constituted by the Honorable Commission pursuant to its Office Order No. 38, Series of 2013 dated December 26, 2013,

Complainant,

-versus-

ERC Case No. 2015-026MC
(Physical Withholding)

Panasia Energy Incorporated (PANASIA),
Respondent.

X-----X

ATTY. ISABELO JOSEPH P. TOMAS II, in his capacity as the Investigating Officer of the Investigatory Unit constituted by the Honorable Commission pursuant to its Office Order No. 38, Series of 2013 dated December 26, 2013,

Complainant,

-versus-

ERC Case No. 2015-027MC
(Physical Withholding)

Therma Mobile Inc. (TMO),
Respondent.

X-----X

ATTY. ISABELO JOSEPH P. TOMAS II, in his capacity as the Investigating Officer of the Investigatory Unit constituted by the Honorable

D O C K E T E D
Date: JUN 20 2017
By: _____

Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,

Complainant,

-versus-

ERC Case No. 2015-033MC
(Physical Withholding)

CIP II Power Corporation
(CIP II),

Respondent.

X-----X

ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,

Complainant,

-versus-

ERC Case No. 2015-034MC
(Physical Withholding)

Power Sector Assets and
Liabilities Management
Corporation (PSALM), for
Malaya Thermal Power
Plant,

Respondent.

X-----X

ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,

Complainant,

-versus-

**ERC Case No. 2015-035MC
(Physical Withholding)**

**Strategic Power
Development Corporation
(SPDC),**

Respondent.

X-----X

**ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,**

Complainant,

-versus-

**ERC Case No. 2015-036MC
(Physical Withholding)**

**Udenna Management and
Resources Corporation
(Udenna),**

Respondent.

X-----X

**ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,**

Complainant,

-versus-

**ERC Case No. 2015-037MC
(Physical Withholding)**

**Power Sector Assets and
Liabilities Management
Corporation (PSALM), for
Casecan Hydroelectric
Power Plant (CHPP),**

Respondent.

X-----X

**ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,**

Complainant,

-versus-

**ERC Case No. 2015-038MC
(Physical Withholding)**

AP Renewables, Inc. (APRI),
Respondent.

X-----X

**ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,**

Complainant,

-versus-

**ERC Case No. 2015-039MC
(Physical Withholding)**

**Trans-Asia Power
Generation Corporation
(Trans-Asia),**

Respondent.

X-----X

**ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,**

Complainant,

-versus-

**ERC Case No. 2015-040MC
(Physical Withholding)**

**Sem-Calaca Power
Corporation (SCPC),**
Respondent.

X-----X

**ATTY. ISABELO JOSEPH P.
TOMAS II, in his capacity as
the Investigating Officer of
the Investigatory Unit
constituted by the Honorable
Commission pursuant to its
Office Order No. 38, Series
of 2013 dated December 26,
2013,**

Complainant,

-versus-

**ERC Case No. 2015-041MC
(Physical Withholding)**

**GNPower Mariveles Coal
Plant Ltd., Co. (GN Power),**
Respondent.

X-----X

ORDER

This treats of the motion for consolidation of the eleven (11) above-captioned cases, embodied in the *Omnibus Motion* filed by

Complainant as well as the *Motion to Strike Out* said Omnibus Motion on the ground of lack of authority of the private counsels to represent Complainant filed by respondent Therma Mobile Inc. (TMO).

In its motion, Complainant seeks the consolidation of the above-captioned cases alleging that there are common questions of law in all of them since respondents' acts pertain to identical violations of the EPIRA and EPIRA IRR, specifically non-compliance with the Must-Offer Rule. Complainant posits that the consolidation of the cases will avoid unnecessary costs or delay and will facilitate the resolution of the cases and avoid different or contradicting findings and resolutions.

The Omnibus Motion was filed by private counsels Anna Rosario V. Paner, Emmanuel S. Ypil and Arnel P. Kho, on behalf of Complainant Atty. Isabelo Joseph P. Tomas II, in his capacity as the Investigating Officer of the Investigatory Unit (IU).

Except for CIP II Power Corporation (CIP), Udenna Management Resources Corporation (UMRC) and Trans-Asia Power Generation Corporation (Trans-Asia) which did not file any opposition to said Motion, all respondents argued against consolidation.

In its Opposition, respondent Panasia Energy Incorporated (PANASIA) contends that consolidation would be improper since the cases did not arise from the same act, event or transaction and thus, would have different issues and evidence. Moreover, these cases do not involve the same parties, nor was there any allegation of conspiracy among them. With regard to the alleged delay, PANASIA points to this Commission's Resolution No. 14, Series of 2016, issued in May 2016 which divides the Commission into two (2) core groups "in order to secure an orderly, efficient and expeditious disposition" of these cases.

For its part, respondent TMO, incipiently moved to expunge the Omnibus Motion on the ground of lack of authority of the private counsels to represent the Complainant. It argues that the Complainant is not authorized to engage the services of, much less delegate its power to investigate and prosecute alleged violations of Competition Rules to, a private counsel. Citing the EPIRA and the ERC Competition Rules and Complaint Procedures, it contends that the authority to investigate and prosecute was merely delegated by the ERC to the Investigating Officer and there has been no power

given to the Investigating Officer to substitute another in his place. Moreover, under the principle of *delegate potestas delegare non potest*, what has been delegated cannot be delegated. It likewise invokes the strong government policy against the hiring of private counsels and cites Commission on Audit Circular (COA) No. 95-011, as amended by COA Circular No. 98-002, which requires the prior written authority of the OSG and the COA before private counsels may be hired.

Nonetheless, in its *ad cautelam* opposition to the Complainant's motion, TMO avers that under the ERC Rules of Practice and Procedure, particularly Rule 18, Section 3 thereof, and relevant jurisprudence, consolidation of the eleven cases of Physical Withholding is not warranted as it would complicate the resolution of these cases, delay the proceedings and cause prejudice to the respondents. Moreover, the cases involve different factual issues and the alleged violations are distinct and separate from each other.

Respondent Power Sector Assets and Liabilities Management Corporation (**PSALM**), pleading for both Malaya Power Plant and Casecanan Hydroelectric Power Plant, argued that respondents are separate and distinct and so are their plant operations; hence, they employ different trading strategies. Moreover, the acts allegedly committed by the eleven (11) respondents pertain to different trading intervals, and as such, would require naturally different or unrelated witnesses.

Respondent Strategic Power Development Corporation (SPDC), for its part, likens the cases to a criminal suit, and applying the doctrine enunciated by the Supreme Court in *Neri vs. Sandiganbayan*, argues that there are no substantial grounds to consolidate not even the trial of these eleven (11) cases. SPDC maintains that while these cases were filed based on the PEMC Report, it would still be incumbent upon the Complainant to prove its case against each and every respondent.

SPDC likewise argues that the cases cited by Complainant in support of its motion are misplaced and insists that for consolidation to be allowed, the cases must not only involve related issues but also the same parties and closely related subject matters. For that matter, SPDC avers that the alleged violations of the EPIRA and its IRR occurred on different trading intervals and on different trading dates and were allegedly committed by different respondents, which have filed different defenses in their answers to the Complaint.

Finally, SPDC questions Complainant's failure to set the motion for hearing considering that the same is a litigious motion which affects the rights of not only SPDC but ten other respondents as well.

Respondent AP Renewables, Inc. (APRI) questions the appearance of the private counsels for and on behalf of Complainant and citing the Administrative Code, posits that only the OSG may represent the Complainant in these proceedings. APRI likewise points to COA Circular No. 95-011, as amended by COA Circular No. 98-002, which prohibits the hiring of private counsels without the written conformity of the OSG and the COA. Thus, in the absence of this written conformity, the private counsels have no authority to file the Omnibus Motion on behalf of Complainant.

Be that as it may, APRI believes that consolidation of these cases is unjustified because (1) the acts and omissions of respondents are different, (2) the issues involved are different, (3) the evidence required for each one is different, and (4) it will prejudice APRI's substantial rights.

Respondent Sem-Calaca Power Corporation (SCPC) echoes the position that the subject cases do not involve common questions of fact and law to justify the consolidation of these cases pursuant to the ERC Rules. Moreover, SCPC submits that consolidating these eleven (11) cases will unduly broaden the issues therein and defeat rather than promote the objective of consolidation.

Respondent SCPC likewise questions the appearance of the private counsels for the Complainant, observing that they do not appear to be signing as deputized lawyers from the OSG. SCPC cites both the Administrative Code and COA Circular No. 95-011, as amended by COA Circular No. 98-002, and, in view thereof, argues that private counsels' appearance for Complainant should not be allowed in the absence of any showing that prior consent has been given by the OSG and the COA.

Respondent GN Power Mariveles Coal Plant Ltd. Co. (GN POWER) counters that the causes of action are based on different events or transactions and will ultimately depend on different evidence. The separate violations allegedly committed by the respondents would necessarily entail the presentation of different evidence relating to their respective transactions. Thus, consolidation would ultimately cause complications and delay.

The Commission's Ruling

The Commission upholds the authority of private counsels to represent the Complainant but denies the motion to consolidate the above-captioned cases filed by it.

Preliminarily, the authority of private counsels to represent the Complainant is settled. The OSG has issued on 16 June 2016 a deputation granting Complainant exemption and authority to engage the services of private counsel.

To be sure, the OSG is the lawyer of the government, its agencies and instrumentalities in any litigation, proceeding, investigation or matter. This is explicit in Section 35(11), Chapter 12, Title III, Book IV of E.O. No. 292, otherwise known as the Administrative Code of 1987, which reads:

Section 35. Powers and Functions. — **The Office of the Solicitor General shall represent the Government of the Philippines, its agencies and instrumentalities and its officials and agents in any litigation, proceeding, investigation or matter requiring the services of a lawyer.** When authorized by the President or head of the office concerned, it shall also represent government-owned or controlled corporations. The Office of the Solicitor General shall constitute the law office of the Government and, as such, shall discharge duties requiring the services of a lawyer.xxx

The above provision expresses the general mandate of the OSG to act as the representative or the law office of the Government in any matter requiring the services of a lawyer. This duty of the OSG does not distinguish as to the nature of the action or proceeding, and extends from the first level courts to the Supreme Court, as well as to administrative bodies or tribunals.

Section 35, however, does not vest any exclusive authority or power on the OSG in this assigned task. The OSG, for justifiable reasons, may recuse from representing government or allow private counsels to represent government or its agencies and

instrumentalities under exceptional circumstances. Hence, in this case, it has issued said Deputation in order to preclude a conflict of interest from arising wherein the OSG actively represents both the Complainant and the Commission in these proceedings.

While Complainant has not yet secured the written consent of the COA, the same is of no consequence. COA's concurrence to the engagement of private counsel is not a jurisdictional requirement. It does not grant any authority to or divest the legal personality of private counsels to represent Complainant. Thus, COA's written consent or lack of it may not be invoked by respondents to question the authority of private counsels to appear for Complainant.

Without demeaning COA Circular No. 95-011 and its amendatory COA Circular No. 98-002, the requirement of a written concurrence by the COA must be read in the light of its functions and authority. The written concurrence of the COA cannot serve as a prerequisite before private counsels may enter their appearance in these proceedings. The OSG has already given its expressed authorization and this authorization suffices to clothe private counsels with the personality to represent Complainant. The OSG, after all, is the one mandated to represent Complainant. Thus, these cases need not wait for COA's written concurrence in order to proceed. At most, the COA requirement is an auditing measure solely intended to countercheck the expenditures of government. The COA's consent therefore is not necessary for this case to proceed.

Having settled that matter, this Commission is convinced that that there are no grounds to allow the consolidation of the above-captioned cases.

The authority of this Commission to allow consolidation is embodied in Section 3, Rule 18 of the ERC Rules of Practice and Procedure, which reads:

Section 3. Consolidation. - The Commission, on its own initiative or upon motion by a party, may consolidate cases involving common questions of fact or law, or may conduct joint hearings thereon. However, upon motion of the interested party, a separate hearing may be held on issues peculiar only to the movant.

This Commission agrees with Respondents that there are no common questions of fact or law in the eleven (11) cases to merit consolidation.

First, the cases do not involve the same parties. While Complainant may be the same for all cases, respondents are different and distinct. Only respondent PSALM is impleaded in two separate cases, but even then, it represents two different power plants - a thermal power plant (Malaya) in one case and a hydroelectric power plant (Casecnan) in another.

Indeed, respondents differ in their power plant operations. Respondent PANASIA is a generation company operating a combined cycle power plant. Respondent CIP II, on the other hand, operates a bunker C-fired power plant.

Second, the cases filed against respondents did not arise from the same act or transaction. In fact, the alleged violations by respondents occurred during different trading intervals.

Respondent APRI is being charged on various trading intervals from October 26 to December 25, 2013, while respondent PSALM for Malaya is being charged for trading intervals from November to December 2013.

Respondent PANASIA is being held administratively liable for a total of 2,010 intervals where it offered less than its total registered capacity, while respondent GN POWER is being held liable for only five (5) intervals.

Third, while all respondents were charged with anti-competitive behavior, the acts imputed to respondents are different and not, in any way, connected.

Respondent PANASIA is being charged with cancelling or withdrawing its offers whenever the marginal clearing price is below the marginal cost. Respondent PSALM for Malaya and for Casecnan, on the other hand, is being tasked to explain why its power plant was not synchronized to the grid.

Verily, there is no allegation in any of these cases that there has been collusion or conspiracy between or among two or more respondents. Each respondent has been charged individually.

Fourth, since respondents are not similarly situated and the imputed acts are different and pertain to different trading intervals, the issues against respondents are different, and each respondent would have its separate defense and offer its own contradicting evidence.

The complaint against respondent TMO hinges on its alleged admission that it can offer up to 100 MW; hence, its defense and evidence cannot be same as with respondent PSALM which has to explain the open breaker status which caused its plant not to be synchronized to the grid.

As each case is different from another, Complainant's apprehension of an incomplete, incomprehensive and inconsistent determination of all related issued is unfounded. One case is not dependent on another and the decision in one naturally depends on the distinct factual circumstance of that case and the evidence presented. That the same law or provision would be applied in all cases does not justify consolidation.

On the other hand, the difference in facts and issues would only serve to delay the resolution of these cases and complicate the work of this Commission. Respondents would be exposed to totally unrelated testimonies and the operationally, it would be difficult to find a date and time common to all respondents.

It may be pertinent to state here that, with the view of orderly, efficiently and expeditiously resolving these cases and save unnecessary costs and expenses, this Commission, in May 2016, has issued Resolution No. 14, Series of 2016, which divided its members into two (2) core groups and pre-designated the Commissioners who will act as presiding officers in each group for the conduct of hearings in these cases.

IN VIEW OF THE FOREGOING, the COMMISSION resolves to **DENY** the motion for consolidation of the eleven (11) above-captioned cases, filed by Complainant as well as the Motion to Strike Out filed by respondent TMO.

SO ORDERED

Pasig City, 13 June 2017

JOSE VICENTE B. SALAZAR*

Chairman and CEO



ALFREDO J. NON
Commissioner




GLORIA VICTORIA C. YAP-TARUC
Commissioner

(on leave)

JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Commissioner



GERONIMO D. STA. ANA
Commissioner

IUdiv2/TB 

* The Chairman was placed on preventive suspension as per Order of the Office of the President (OP-DC Case No. 17-D-094) dated 2 May 2017 and received on 04 May 2017.

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