

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. 2015-025MC
(Economic Withholding)

Manila Electric Company (MERALCO), and 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 Commission pursuant to its Office Order No. 38, Series of 2013 dated December 26, 2013,

Complainant,

-versus-

ERC Case No. 2015-042MC
(Economic Withholding)

1590 Energy Corporation (1590 EC),

Respondent.

X-----X

D O C K E T E D
Date: JUN 20 2017
By: [Signature]

ORDER

This treats of the motion for consolidation of the two (2) 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).

All three (3) Respondents filed their respective oppositions to Complainant's Omnibus Motion.

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.

On the other hand, MERALCO and 1590 EC submit that mere commonality in questions of law and identical laws supposedly violated will not necessarily warrant a consolidation of cases. MERALCO further argued that "question of law" exists only when there is a "doubt or controversy as to what the law is given a certain state of facts." That, however, is not present in the above-captioned

cases as they involve substantially different parties, contracts, transactions and events. Both MERALCO and 1590 EC proceeded to highlight the differences between their cases: (1) MERALCO and TMO case involves a power supply agreement wherein the former nominates the quantity and price that the latter offers to the market, on the other hand, 1590 EC has no power supply agreement with any party; and (2) the rationale behind MERALCO and TMO's nomination and bidding procedure is to ensure that TMO will not be dispatched during off-peak hours, while, 1590 asserts that is exercised business judgement in the formulation of its bid offers and considered several factors that are specific only to its Bauang Diesel Power Plant.

Given the differences mentioned, all three (3) Respondents, argue that consolidation of the cases will only muddle the issues considering that each respondent has its own peculiar defenses and the Honorable Commission would have to consider facts from one complaint which are not necessary for the resolution of the other complaints.

TMO further maintains that consolidation of the cases will unduly expose TMO (and the other Respondent) to totally unrelated testimonies of the witnesses, and expose it to inconvenient and lengthy legal proceedings in the other complaint against the other Respondent. 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 two (2) 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.

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.

Respondents TMO and MERALCO are being charged for employing a bidding strategy, through their power supply agreement, that resulted to the former's power plant being the marginal clearing plant for a total of seventy-eight (78) times during the period of 26 October 2013 to 25 December 2013.

While, Respondent 1590 EC was charged for consistently offering the price of 62,000/MW during delivery hours of 1 to 7 which became the clearing price for eleven (11) times.

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

As stated, the imputation against TMO and MERALCO arose from their power supply agreement. In contrast, the charge against 1590 EC refers to its conduct of consistently bidding at 62,000/MW during trading intervals of 1 to 7.

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.

As each case is different from another, Complainant's apprehension of an incomplete, incomprehensive and inconsistent determination of all related issues 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 two (2) above-captioned cases, filed by Complainant as well as the Motion to Strike Out filed by respondent TMO.

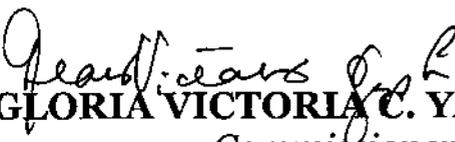
SO ORDERED

Pasig City, 13 June 2017

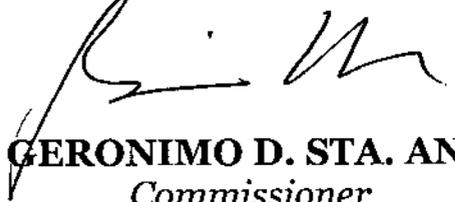
JOSE VICENTE B. SALAZAR*

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/B

* 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.

Copy furnished:

1. **Atty. Alfredo P. Vergara, Jr.**
Engr. Nelson D. Canlas
In their capacity as Investigating Officers
Energy Regulatory Commission
15th Floor, Pacific Center Building
San Miguel Avenue, Ortigas Center,
Pasig City

2. **Atty. Roderico V. Puno**
Atty. Helena Rosales-Calo
Atty. Joseph Vincent B. Alvaera
Atty. Elyrhey Cesar R. Vasig
Atty. Marjorie Ivory S. Fulgueras
Puno and Puno
Counsel for Respondent Therma Mobile, Inc.
12th Floor, East Tower
Philippine Stock Exchange Centre
Exchange Road, Ortigas Center,
Pasig City

3. **Atty. Carlos Roberto Z. Lopez**
Sycip Salazar Henandez & Gatmaitan
Counsel for Respondent Manila Electric Company
SyCip Law Center, 105 Paseo de Roxas,
Makati City

4. **Atty. Joan A. Giduquio-Baron**
J. P. Garcia and Associates
Counsel for Respondent 1590 Energy Corporation
Units 1501-1502, 15th Floor Ayala Life-FGU Center
Mindanao Avenue cor. Biliran Road
Cebu Business Park, Cebu City