

Republic of the Philippines
ENERGY REGULATORY COMMISSION
Pasig City



**VIVANT-STA. CLARA
NORTHERN RENEWABLES
GENERATION
CORPORATION
(VSCNRGN),**

Petitioner,

-versus-

ERC Case No. 2016-006 DR

**POWER SECTOR ASSETS
AND LIABILITIES
MANAGEMENT
CORPORATION (PSALM),
LUZON HYDRO
CORPORATION (HLC), AND
NATIONAL POWER
CORPORATION (NPC),**

Respondents.

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D O C K E T E D
Date: MAY 09 2018
By: [Signature]

ORDER

On 24 November 2016, Vivant-Sta. Clara Northern Renewables Generation Corporation (VSCNRGC) filed the above-captioned Petition for Dispute Resolution dated 20 October 2016 against Power Sector Assets And Liabilities Management Corporation (PSALM), Luzon Hydro Corporation (HLC), and National Power Corporation (NPC).

In the said Petition, VSCNRGC alleges the following:

PREFATORY STATEMENT

The production and supply of energy is undoubtedly one of national interest and is a basic commodity expected by the people.¹ Any dispute arising from the electric power industry is deemed nothing more than a matter of national interest that needs to be resolved in the most speedy course available. The longer the period of time we wait to settle a prudent issue raised by the parties in the

¹ Enrique U. Beto vs. The Board of Directors, National Power Corporation, G.R. Nos. 156556-57, October 4, 2011.

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electric power industry, the greater the chance to cause havoc in a vital industry.

In this case, the more prudent and speedy course of action is a Petition for Dispute Resolution with a Prayer for Cease and Desist Order before this Honorable Commission.

PARTIES

1. Petitioner **VIVANT-STA. CLARA NORTHERN RENEWABLES GENERATION CORPORATION** (formerly, Amlan Hydro Power, Inc.) is a corporation duly organized under the laws of the Philippines, with mailing address at Unit 107 First Midland Office Condominium Building, Gamboa Street, Legaspi Village, Makati City. Petitioner may be served with processes of this Honorable Commission at J.P. Garcia & Associates at Suites 1501-1502, Ayala Life FGU Center, Mindanao Avenue corner Biliran Road, Cebu Business Park, Cebu City. *(A copy of the Secretary's Certificate is hereto attached as "Annex A" and made an integral part hereof.);*

2. Respondent **POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION** ("Respondent PSALM") is a government-owned-and-controlled corporation created by virtue of Section 49 of the Republic Act No. 9136 with principal office at the 7th Floor, Bankmer Building, 6756 Ayala Avenue, Makati City.

3. Respondent **LUZON HYDRO CORPORATION** ("Respondent LHC") is a private corporation duly organized under the laws of the Philippines, with mailing address at 6th Floor, 110 Legaspi Bldg., Legaspi St., Legaspi Village, Makati City.

4. Respondent **NATIONAL POWER CORPORATION** ("Respondent NPC") is a government-owned-and-controlled corporation created by virtue of Republic Act No. 6395, with principal office at BIR Road corner Quezon Avenue Diliman, Quezon City, Philippines.

STATEMENT OF FACTS

1. On June 8, 2001, Congress enacted Republic Act 9136, also known as **Electric Power Industry Reform Act of 2001** (the "EPIRA"). The EPIRA provided a framework for the restructuring of the electric power industry, including the privatization of the assets of the National Power Corporation ("*Respondent NPC*"), the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities.²

2. Pursuant to Section 49 of the EPIRA, Respondent PSALM was created to take ownership of all existing NPC generation assets, liabilities, Independent Power Producer ("IPP")

² Enrique U. Beto vs. The Board of Directors, National Power Corporation, G.R. Nos. 156556-57, October 4, 2011.

contracts, real estate and all other disposable assets of Respondent NPC. Section 51 (c) thereof further gave Respondent PSALM the power to take title to and possession of the IPP Contracts entered into and signed by Respondent NPC and to appoint, after a competitive and transparent public bidding, qualified independent entities who shall act as the **Independent Power Producer Administrators** ("Administrators") of identified generation capacities.

3. Further, Section 31(c) of the EPIRA requires the transfer of the management and control of at least seventy percent (70%) of the total energy output of power plants under contract with NPC to the IPP Administrators as one of the conditions for retail competition and open access.³

4. Respondent LHC is an IPP that built and operates the **Bakun Hydro Electric Power Plant** ("BHEPP"). Respondent LHC has an IPP Agreement with Respondent NPC, known as the **Power Purchase Agreement** ("PPA") dated November 24, 1996. This PPA governs the relationship between Respondent LHC and Respondent NPC.

5. In compliance with the aforecited provisions of the EPIRA, a competitive public bidding was conducted by Respondent PSALM on September 14, 2009, with the conformity of NPC, for the appointment of an **Administrator** for the 70 MW generating capacity of the BHEPP.

6. In accordance with the bidding procedures and supplemental bid bulletins thereto, Respondent PSALM awarded the **Administrator Agreement** ("IPPA Agreement") to Petitioner. Since Respondent PSALM took over the assets of Respondent NPC, and in fact, was the agency conducting the public bidding, both Respondent PSALM and Respondent NPC (as "counter party" therein) are signatories to the IPPA Agreement with Petitioner.

6.1. The IPPA Agreement is a back-to-back contract of Respondent PSALM and Respondent NPC. On the one hand, Respondent PSALM and Respondent NPC bound themselves with Respondent LHC (through the 1996 PPA), while on the other hand Respondent PSALM and Respondent NPC bound themselves with Petitioner (through the IPPA Agreement).

6.2. The 1996 PPA between Respondent NPC and Respondent LHC will continue to be in effect, at the same time that the IPPA Agreement between Respondent NPC and Petitioner will be effective. Hence, pursuant to the back-to-back nature of the IPPA Agreement, Petitioner dispatches Respondent LHC's BHEPP to generate and sell electricity it pursuant to the Respondent LHC's commitment to

³ Paragraph E, Section 3, Rule 12 of the Implementing Rules of the EPIRA.

generate under the PPA with Respondent PSALM and Respondent NPC.

6.3. Under the IPPA Agreement, as IPPA Administrator of the generating capacity of the BHEPP, Petitioner shall be entitled to trade, sell or otherwise deal with for its own account and at its own cost and risk all electricity generated by the BHEPP from the Capacity and delivered to the Grid.⁴

6.4. At the end of the cooperation period, Petitioner has the right to receive and own the BHEPP. Ownership of the BHEPP will, thus, be turned over by Respondent LHC to Respondent PSALM, which, in turn, will turn over the same to the IPP Administrator, Petitioner. *(A copy of the IPPA Agreement is hereto attached as "Annex B" and made an integral part hereof)*

7. In consideration for the right to be the Administrator, Petitioner pays Respondent PSALM a monthly fee, (the "Monthly Payments") in accordance with a schedule of payments⁵, and a generation payment (the "Generation Payments") at the rate of Php 0.80 per kilowatt-hour generated by the BHEPP. These Monthly Payments and Generation Payments collectively constitute the financial bid of Petitioner that won the IPPA Agreement.

8. Under Clause 4, Annex 2 to Schedule I of the IPPA Agreement, in relation to Article 6.2 of the PPA, Respondent LHC is entitled to a specified number of days for the **scheduled maintenance** of the BHEPP.

8.1. Article 6.2 of the PPA states:

"6.2 Scheduled Maintenance

The Administrator acknowledges and agrees that in order to undertake **necessary overhaul, maintenance, inspection and repair** the IPP shall be entitled to periods of Scheduled Maintenance as provided in the Sixth Schedule (*Electricity Delivery Procedures*) to the IPP Agreement. Without prejudice to Clause 4.3 (*Dispatch and Liaison*), on an annual basis, the Administrator, as representative of the IPP Counterparty, shall agree with the IPP and PSALM shall ensure that the IPP shall agree with the Administrator an annual schedule for Scheduled Maintenance during the course of the succeeding year which shall be revised as provided in Annex 2 (*Electricity Delivery Procedures*) to this Schedule B (*Administration Rights and Obligations*) and in accordance with the requirements of Applicable Law. The Administrator shall be notified of the occurrence

⁴ Schedule B, Clause 2.10 (Electricity Delivery) of the IPPA Agreement.

⁵ Schedule I of the IPPA Agreement.

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of any unscheduled Scheduled Maintenance and the IPP's best estimate of the probable duration of such outage." (*Emphasis supplied.*)

8.2 Annex 2 to Schedule B of the IPPA Agreement (Electricity Delivery Procedures) provides:

"1. DEFINITIONS

xxx

"Scheduled Maintenance" means the number of days of downtime per Contract Year allowed Operator under Annex 2 of this Schedule B for **inspection, maintenance, and repair**, including any emergency work and required overhaul

"Forced Outage" means the inability due to the fault of the IPP to meet Contracted Capacity at any time, provided that any failure to meet the Contracted Capacity at any time is not the result of Scheduled Maintenance or an event or occurrence of Force Majeure, or a condition caused solely by the IPP Counterparty or by the Grid

"Allowable Downtime" means the occurrence of the Scheduled Maintenance and/or outages (ie inability to meet Contracted Capacity) other than Forced Outage.

xxx" (*Emphasis supplied.*)

9. In a meeting on August 29, 2010 Respondent LHC informed Respondent NPC, Respondent PSALM, and Petitioner that it will undertake a 6-month rehabilitation of the BHEPP tunnel. The purpose of which is **to address certain construction-inherent defects of the tunnel** that may have existed from the time it was originally constructed.

9.1. To emphasize, during the 6-month period, Respondent LHC will not be producing a single kilowatt of electricity for Petitioner to sell as the IPP Administrator.

10. Corollarily, Respondent LHC wrote Respondent NPC on September 20, 2010 informing of its intention to undertake a rehabilitation of the BHEPP Tunnel, specifically indicating that the repair will last for a period of six (6) months starting from November 23, 2011 up to May 2012. (*A copy of the September 20, 2010 letter is hereto attached as "Annex C" and made an integral part hereof.*)

11. Having been informed of this matter, Respondent PSALM wrote Petitioner on November 15, 2010 of the scheduled rehabilitation of the BHEPP Tunnel. (*A copy of the November 15,*

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2010 letter is hereto attached as “Annex D” and made an integral part hereof)

12. Respondent LHC likewise directly wrote Petitioner on September 29, 2010 of its intention to undertake the rehabilitation of the BHEPP Tunnel. (A copy of the September 29, 2010 letter is hereto attached as “Annex E” and made an integral part hereof)

13. In view of said rehabilitation, Respondent LHC, in its letters to both Respondent NPC and Petitioner, said that it will “avail” of the period for Scheduled Maintenance allowed under Clause 4, Annex 2 to Schedule B of the IPPA Agreement.

13.1. According to Respondent LHC, it will conduct Scheduled Maintenance for 15 days from January 22 – February 5, 2012, and for another 60 days from February 6 – April 5, 2012, or a total of 75 days. In other words, for the 6-month rehabilitation, Respondent LHC wanted to deduct the regular 15-day Scheduled Maintenance downtime and the extraordinary Schedule Maintenance of 60 days. Clause 4, Annex 2 to Schedule B states:

“4. DOWNTIME

The Administrator shall, in consultation with the Market Operator and System Operator and the IPP, prepare annual, monthly and weekly systems operating plans and in so doing shall coordinate with the IPP to agree on downtime. It is acknowledged and agreed that, in terms of the IPP Agreement, the IPP is to be granted allowable **Scheduled Maintenance** to undertake all regular **inspection and maintenance** in accordance with the manufacturer's recommendations.

It is acknowledged and agreed that the IPP will be allowed a total of fifteen **(15) days Scheduled Maintenance** per Contract Year. If in any Contract Year total available period of Scheduled Maintenance is not utilized the excess shall be carried forward and added to the allowance for the next year, provided that the excess, unutilized Scheduled Maintenance carried forward from the preceding Contract Year and added to the Scheduled Maintenance of the succeeding Contract Year shall not exceed five (5) days per Contract Year. Notwithstanding the foregoing, the IPP shall be entitled to designate by notice to the Administrator two (2) Contract Years during which the IPP shall have **sixty (60) days of Scheduled Maintenance** for each designated Contract Year.” (Emphasis and underscoring supplied.)

14. With the intention of Respondent LHC to consider the 75-day downtime (out of the 6-month rehabilitation period) as part

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of its allowed Scheduled Maintenance, it intends to exclude and exempt this 75-day period from falling under the definition of "Non Delivering Days" under Clause 3 of Schedule I of the IPPA Agreement.

14.1. Clause 3 of Schedule I of the IPPA Agreement provides the definition of "Non Delivering Days" and its consequences:

"3. Any day (being a 24 hour period commencing at 00.00 hours and ending at 23.59 hours) in a Month during which the Power Station is, for the whole of such day, unable to or fails to generate at its Contracted Capacity attributable to:

- 3.1. **The IPP, its agents, authorized representatives or contractors,**
- 3.2. Forced Outage (determined in accordance with Annex 2 to Schedule B);
- 3.3. Force Majeure;
- 3.4. Change in Applicable Law;
- 3.5. Failure or constraint in the Transmission System and/or the Transmission Line; or
- 3.6. Breach by the IPP Counterparty of the IPP Agreement,

and in each case only to the extent **not arising from or attributable to a breach** of this Agreement or **any act or inaction by the Administrator** (each a "Qualifying Event") shall be a "**Non Delivering Day**".

If the number of **Non Delivering Days** in respect of the Power Station in any Month exceeds three (3) days, the sum payable pursuant to this Schedule I (*Monthly Payments*) in respect of such Month shall be reduced to the total adjusted sum calculated in accordance with the following formula:

$$\text{TAS} = \text{BS} \times (1 - [\text{RD}/\text{D}])$$

provided that should the operation of this formula result in a TAS that is **less than 0.2** x BS, the TAS shall be 0.2 x BS.

Where:

TAS is the total adjusted USD amount and the total adjusted peso amount payable in respect of that Month

BS is the USD amount and the peso amount for that Month, in each case as set out in Annex 1 to this Schedule I (*Monthly Payments*)

RD is the number of Non Delivering Days in such Month in respect of the Power Station;

and

D is the number of days in such Month.” (*Emphasis and underscoring supplied.*)

15. Based on the foregoing Clause 3 of Schedule I of the IPPA Agreement, Non Delivering Days in excess of 3 days will result in a proportionate reduction in the Monthly Payment. But such reduction should not result in the payment of less than 20% of the Monthly Payment due.

15.1. In other words, the greater the number of Non Delivering Days (in excess of three days), the greater the reduction in the Monthly Payment.

16. The inability of Respondent LHC to generate its contracted capacity can be attributed to Respondent LHC or its agents, authorized representative or contractors as a result of an inherent defect in the tunnel that required the rehabilitation. **Hence, this instance falls under Sub-Clause 3.1 of Schedule I of the IPPA Agreement.**

17. Petitioner formally and in writing expressed its stand that the 75-day avilment should be considered as Non Delivering Days.

18. In its reply to Respondent PSALM in a letter dated January 21, 2011, Petitioner stated that Clause 3 of Schedule I (Monthly Payments) of the IPPA Agreement provides that the Monthly Payments to Respondent PSALM must be reduced by a maximum of 80% if the Non-Delivering Days of the IPP (i.e., Respondent LHC) exceeds 3 days in a month. Petitioner requested Respondent PSALM that pursuant to Schedule “I” it should be allowed a reduction in Monthly Payments of up to 80% for the duration of the 6-month repair of the BHEPP Tunnel because the instance that Respondent LHC was unable to generate and deliver electricity for at least three days should be considered as “Non-Delivering Days”. (*A copy of the January 21, 2011 letter is hereto attached as “Annex F” and made an integral part hereof*)

PSALM Billing Reference No. IPP-2012-02-0136 (For the Billing Period December 26, 2011 – January 25, 2012)

19. Unfortunately, on February 6, 2012, Respondent PSALM sent Petitioner Billing Reference No. IPP-2012-02-0136 in the amount of Thirty Eight Million Four Hundred Thousand Pesos (Php 38,400,000.00) and One Million Two Hundred Thousand United States Dollars (USD 1,200,000.00). This Bill covered a portion of the Non Delivering Days but did not reduce the Monthly Payments, even with the position of Petitioner in its January 21, 2011 letter which insisted on a reduction in Monthly Payments for

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up to 80% due to Non-Delivering Days. *(A copy of the Billing Reference No. IPP-2012-02-0136 is hereto attached as "Annex G" and made an integral part hereof)*

20. On the same day, Petitioner replied to Respondent PSALM (which letter was confirmed received by Respondent PSALM on February 17, 2012) **disputing** Billing Reference No. IPP-2012-02-0136 and invoked Article 8.4 of the IPPA Agreement. Article 8.4 of the IPPA Agreement states:

"If the Administrator **disputes** the amount specified in any demand or invoice under this Clause 8, it shall so inform PSALM within three (3) days of any demand specified in Clause 8.1 and within seven (7) days of receipt of such demand or invoice in all other cases. If the dispute is not resolved by the due date of the demand or invoice, the dispute shall be resolved within fourteen (14) days after the due date of such demand or invoice." *(Emphasis and underscoring supplied.)*

(A copy of the February 6, 2012 Dispute Letter is hereto attached as "Annex H" and made an integral part hereof)

21. It is Petitioner's stand that for Billing Reference No. IPP-2012-02-0136 it should pay as Monthly Payment the amount of only Seven Million Six Hundred Eighty Thousand Pesos (Php 7,680,000.00) and Two Hundred Forty Thousand United States Dollars (USD 240,000.00), which excludes deduction for the Non Delivering Days.

PSALM Billing Reference No. IPP-2012-03-0145 (For the Billing Period January 26, 2012 - February 25, 2012)

22. On March 6, 2012, Petitioner received another bill from Respondent PSALM, i.e., Billing Reference No. IPP-2012-03-0145, for the payment of the full Monthly Payment for the billing period January 26, 2013 - February 25, 2013. Again, PSALM disregarded the previous outstanding dispute of Petitioner for the same issue. *(A copy of Billing Reference No. IPP-2012-03-0145 is hereto attached as "Annex I" and made an integral part hereof)*

23. On the following day, March 7, 2012, Petitioner wrote Respondent PSALM disputing Billing Reference No. IPP-2012-03-0145. Petitioner insisted that it should only be required by Respondent PSALM to pay Seven Million Six Hundred Eighty Thousand Pesos (Php 7,680,000.00) and Two Hundred Forty Thousand United States Dollars (USD 240,000.00) as Monthly Payment for this billing period because the Non Delivering Days must be deducted therefrom. *(A copy of the March 7, 2012 Dispute Letter is hereto attached as "Annex J" and made an integral part hereof)*

23.1. In this same letter, Petitioner also requested for a conference with Respondent PSALM to discuss the matter in dispute.

24. Respondent PSALM replied on March 22, 2012 (which was received by Petitioner on April 2, 2012). Respondent PSALM referred to the 75 days of downtime as falling under the definition of "Scheduled Maintenance." (*A copy of the March 22, 2012 letter is hereto attached as "Annex K" and made an integral part hereof*)

24.1. Respondent PSALM contends that the period of downtime caused by the rehabilitation of the power tunnel cannot be considered as "Non Delivering Days" since Clause 3 of Schedule I contains an **exclusive enumeration** and Scheduled Maintenance is not among them.

24.2. In addition, Respondent PSALM contends that based on Sub-Clause 3.2 of Schedule I of the IPPA Agreement, the tunnel rehabilitation cannot be considered a "Forced Outage" because forced outage is defined by the IPPA Agreement as follows:

"Forced Outage" means the inability due to the fault of the IPP to meet Contracted Capacity at any time, provided that any failure to meet the Contracted Capacity at any time is not the result of Scheduled Maintenance or an event or occurrence of Force Majeure, or a condition caused solely by the IPP Counterparty or by the Grid."

24.3. In other words, Respondent PSALM claimed that since the 75 days of downtime is Scheduled Outage, it cannot be forced outage.

25. On May 30, 2012, Petitioner replied to the March 22, 2012 letter of Respondent PSALM reiterating its contention. With the differences in their respective interpretation of the IPPA Agreement, Petitioner submits that there is a *bona fide* dispute which must be resolved amicably and in good faith within twenty one (21) days from written notification pursuant to Sub-Clause 38.2 (Dispute Resolution) of the IPPA Agreement. (*A copy of the May 30, 2012 letter is hereto attached as "Annex L" and made an integral part hereof*)

26. Consequently, Petitioner notified Respondent PSALM that its May 30, 2012 letter should be deemed a written notification of the existence of a dispute or difference under Clause 38.2 of the IPPA Agreement which provides:

"38. DISPUTE RESOLUTION

xxx xxx xxx

38.2 The Parties shall at all times endeavour to resolve any dispute or difference that may arise in connection with or arising out of this Agreement amicably and in good faith. In the event that an amicable settlement is not reached within twenty one (21) days of either Party notifying the other in writing that they consider a dispute has arisen to which this Clause 38 applies, either Party may bring a legal action or proceeding to resolve any such dispute or difference arising out of this Agreement against the other Party in the courts of proper jurisdiction of the Republic of the Philippines.”

PSALM Billing Reference No. IPP-2012-03-0154 (For the Billing Period February 26, 2012 – March 25, 2012)

27. Instead of resolving the dispute, on April 2, 2012, Respondent PSALM sent Petitioner its Billing Reference No. IPP 2012-04-0154 in the amount of Thirteen Million Six Hundred Twenty Five Eight Hundred Five and 45/100 (Php 13,625,805.45) and Four Hundred Twenty Five Thousand Eight Hundred Six and 45/100 United States Dollars (USD 425,806.45). Again, this Bill represents the full Monthly Payment without deduction for Non Delivering Days. *(A copy of Billing Reference No. IPP-201203-0154 is hereto attached as “Annex M” and made an integral part hereof)*

28. In a letter dated April 10, 2012, Petitioner again disputed Billing Reference No. IPP 2012-04-0154 for the same reason that the downtime should be considered as “Non Delivering Days.” Petitioner insisted that it should pay only Seven Million Six Hundred Eighty Thousand Pesos (Php 7,680,000.00) and Two Hundred Forty Thousand United States Dollars (USD 240,000.00). *(A copy of the April 10, 2012 Dispute Letter is hereto attached as “Annex N” and made an integral part hereof)*

PSALM Billing Reference No. IPP-2012-03-0166 (For the Billing Period March 26, 2012-April 25, 2012)

29. On May 9, 2012, Billing Reference No. IPP 2012-05-0166 was received by Petitioner in the amount of Twelve Million Eight Hundred Thousand Pesos (Php 12,800,00.00) and Four Hundred Million United States Dollars (USD 400,000.00). *(A copy of Billing Reference No. IPP-2012-03-0166 is hereto attached as “Annex O” and made an integral part hereof)*

30. In a letter dated May 15, 2012, Petitioner disputed Billing Reference No. IPP 2012-05-0166 for the same reason that the downtime should be considered as Non Delivering Days. Petitioner insisted that the Non Delivering Days should be deducted from the Monthly Payment, hence, it should pay only Seven Million Six Hundred Eighty Thousand Pesos (Php 7,680,000.00) and Two

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Hundred Forty Thousand United States Dollars (USD 240,000.00).
(A copy of the May 15, 2012 Dispute Letter is hereto attached as
"Annex P" and made an integral part hereof)

**Summary of Disputed Billing
Periods**

31. In summary, the following are the disputed bills and the corresponding period covered, each of which contain Non Delivering Days that should merit a reduction in the Monthly Payments:

Billing Month	Period Covered	PSALM Billing Reference No.
January 2012	December 26, 2011 – January 25, 2012	2012-02-0136
February 2012	January 26, 2012 – February 25, 2012	2012-03-0145
March 2012	February 26, 2012 – March 25, 2012	2012-04-0154
April 2012	March 26, 2012 – April 25, 2012	2012-05-0166

32. To date, Petitioner has not received a demand letter from Respondent PSALM nor has it been cited in default. However, it is clear that there exists a *bona fide* dispute under the **IPPA Agreement**.

**ALLEGATIONS IN SUPPORT
OF THE PETITION FOR DISPUTE RESOLUTION**

33. The IPPA Agreement provides the parties the right to raise a **DISPUTE** on the amounts payable as monthly payments. Clause 8.4 thereof provides:

"8.4 If the Administrator disputes the amount specified in any demand or invoice under this Clause 8, it shall so inform PSALM within three (3) days of any demand specified in Clause 8.1 and within seven (7) days of receipt of such demand or invoice in all other cases. If the dispute is not resolved by the due date of the demand or invoice, the dispute shall be resolved within fourteen (14) days after the due date of such demand or invoice."

34. In addition, Clause 38.2 of the IPPA Agreement which provides:

"38. DISPUTE RESOLUTION

38.2 The Parties shall at all times endeavour to resolve any dispute or difference that may arise in connection with or arising out of this Agreement amicably and in good faith. In the event that an amicable settlement is not reached within twenty one (21) days of either Party notifying the other in writing that they consider a dispute has arisen to which this Clause 38 applies, either Party may bring a legal action or proceeding to resolve any such dispute or difference arising out of this Agreement against the other Party in the courts of proper jurisdiction of the Republic of the Philippines.”

35. It is undeniable that Petitioner has been consistently raising a dispute with Respondent PSALM.

36. It is the stand of Petitioner that for the Billing Months of January, February, March and April 2012, deductions should be made in the Monthly Payments for Non Delivering Days resulting from the downtime caused by the rehabilitation works. Since these works do not amount to a mere repair, the resulting downtime could never fall under Scheduled Maintenance.

37. While Section 38.2 of the IPPA Agreement refers a dispute to the courts of proper jurisdiction, **Section 43 (u) of the EPIRA provides the Honorable Commission “shall have the original and exclusive jurisdiction xxx over all cases involving disputes between and among participants or players in the energy sector.”**

38. This is the power invoked upon by Petitioner to resolve this *bona fide* dispute.

All The Elements of a Bona Fide Dispute Are Present.

39. **FIRST**, an IPPA Agreement was executed between Respondent PSALM and Petitioner, where Petitioner was given the right to trade, sell or otherwise deal with for its own account and at its own cost and risk all electricity generated by the BHEPP from the Capacity and delivered to the Grid⁶ following a competitive public bidding. In consideration for the rights of administration, Petitioner is obligated to pay Monthly Payments and Generation Payments to Respondent PSALM. Consequently, Petitioner has a clear legal interest in the IPPA Agreement.

40. **SECOND**, there exists a dispute because there is a definite and concrete dispute touching on the legal relations of parties having adverse legal interests, which may be resolved by a court of law through the application of a law.⁷

⁶ Schedule B, Clause 2.10 (Electricity Delivery) of the IPPA Agreement.

⁷ Cutaran v. Department of Environment and Natural Resources, G.R. No. 134958, January 31, 2001, 350 SCRA 697, 704-705.

40.1. With the undeniable existence of a dispute, a justiciable controversy exists in the facts provided or a controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.⁸

40.2. The terms of the IPPA Agreement are doubtful and require judicial construction.⁹ The determination of whether or not the rehabilitation of the tunnel will be deemed Non-Delivering Days exists as a justiciable controversy because Petitioner and Respondent PSALM have conflicting interpretations on the definition of "Non-Delivering Days." Petitioner consistently asserts that the 26th and 27th months must be considered as Non-Delivering Days, while Respondent PSALM, on the contrary, disagrees with such assertion.

40.3. Through Billing References IPP 2012-02-0136, IPP 2012-03-0145, IPP 2012-04-0154, and IPP 2012-05-0166 Respondent PSALM has been insisting on the full payment of the Monthly Payments without any reduction on account of Non Delivering Days pursuant to Schedule I of the IPPA Agreement. On the other hand, Petitioner has likewise been consistently disputing the billed amounts on the ground that these billings were inconsistent with the interpretation of the IPPA Agreement.

40.4. Clearly, there is a need for the Honorable Commission to interpret and issue an authoritative statement of the rights and obligations of the parties in the contract and determine whether or not the repair due to construction inherent defects should be deemed as Non-Delivering Days.

41. **THIRD**, Respondent PSALM stands as an adverse party¹⁰ in this case with an interest that is conflicting with that of Petitioner.

41.1. Petitioner's interest is to seek a reduction in the Monthly Payments pursuant to the exceptions provided for in Clause 3, Schedule I of the IPPA Agreement (i.e., those situations not attributable to the breach of the IPPA Agreement). Petitioner asserts that its Monthly Payments for the Billing Months of January until April 2012 must be reduced on account of the Non Delivering Days.

41.2. On the other hand, Respondent PSALMS's interest in the matter is to collect the full

⁸ Bro. Mariano "Mike" Z. Velarde vs. Social Justice Society, G.R. No. 159357, April 28, 2004.

⁹ Honesto V. Ferrer, Jr. vs. Mayor Sulpicio S. Roco, Jr., G.R. NO. 174129, July 5, 2010.

¹⁰ Adverse Party is defined in the Black's Law Dictionary, Fifth Edition as follows: A party to an action whose interests are opposed to or opposite the interests of another party to the action.

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amount of the Monthly Payments for the Billing Months of January until April 2012 without reduction for the Non Delivering Days.

The Honorable Commission Must Determine the Meaning of “Non Delivering Days”.

42. As discussed, Respondent PSALM’s interpretation of the IPPA Agreement differs from Petitioner’s.

43. Respondent PSALM rejected Petitioner’s interpretation of “Non Delivering Days” vis-à-vis Schedule I of the IPPA Agreement in its letter dated March 22, 2012. It firmly took the position that the downtime shall not be considered as Non Delivering Days because the rehabilitation of the BHEPP’s power tunnel falls squarely within the meaning of “Scheduled Maintenance.”

44. Respondent PSALM is of the position is that the downtime should be considered as Scheduled Maintenance even if the downtime was for the rehabilitation and repair of the BHEPP Tunnel due to the inherent defects of the tunnel that may have existed from the time it was originally constructed.

45. The IPPA Agreement between Petitioner and Respondent PSALM defines “Scheduled Maintenance.” Annex 2 to Schedule B of the IPPA Agreement states:

45.1. “**Scheduled Maintenance**’ means the number of days of downtime per Contract Year allowed Operator under Annex 2 of this Schedule B for **inspection, maintenance, and repair**, including any emergency work and required overhaul.

45.2. Black’s Law Dictionary, Fifth Edition, defines the words “inspection,” “maintenance” and “repair” as follows:

45.2.1. *Inspection:* To examine, scrutinize, investigate, look into, check over.

45.2.2. *Repair:* to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.

45.2.3. *Maintenance:* the upkeep, or preserving the condition of property to be operated.

45.3. Article 1370 of the Civil Code provides the cardinal rule in the interpretation of contracts: if the terms of a contract are clear and leave no doubt

upon the intention of the contracting parties, the literal meaning of its stipulations shall control.¹¹

45.3.1. In the case of *Norton Resources and Development Corporation vs. All Asia Bank Corporation* (G.R. No. 162523, November 25, 2009), the Supreme Court elucidates on this cardinal rule:

45.3.1.1. “This provision is akin to the **‘plain meaning rule’** applied by Pennsylvania courts, which assumes that the intent of the parties to an instrument is embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement.”

45.3.1.2. “It also resembles the **‘four corners rule,’** a principle which allows courts in some cases to search beneath the semantic surface for clues to meaning. A court’s purpose in examining a contract is to interpret the intent of the contracting parties, as objectively manifested by them.

45.3.1.3. “The process of interpreting a contract requires the court to make a preliminary inquiry as to whether the contract before it is ambiguous. A contract provision is ambiguous if it is susceptible of two reasonable alternative interpretations. Where the written terms of the contract are not ambiguous and can only be read one way, the court will interpret the contract as a matter of law. If the contract is determined to be ambiguous, then the interpretation of the contract is left to the court, to resolve the ambiguity in the light of the intrinsic evidence.”
(*Emphasis and underscoring supplied.*)

45.4. In defining the term “Scheduled Maintenance”, the parties intended a situation where it requires merely a repair, inspection or maintenance. The words should be read and considered in their natural, ordinary, commonly accepted and most obvious signification, according to good and approved

¹¹ Art. 1370. If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control. If the words appear to be contrary to the evident intention of the parties, the latter shall prevail over the former. (1281)

usage without resorting to forced or subtle construction. For words are presumed to have been employed by the parties in their ordinary and common use and acceptance.

45.4.1. The terms usually used to define scheduled maintenance contemplates of a situation where an object that was once in good condition, due to normal wear or tear, needs to have some work done.

45.4.2. The interpretation of Respondent PSALM that the BHEPP tunnel rehabilitation was for “repair, inspection, and maintenance” does not hold water. The so-called “rehabilitation” lasted long due to the fact that it was not merely a maintenance, repair, or inspection, but rather, it was more of a remedy due to a defect in the tunnel. **It should be emphasized that the 6-month downtime was further extended to ten (10) consecutive months, a fact that runs contrary to what can be defined merely as a “repair”.**

45.4.3. Contrary to Respondent PSALM’s contention, such situation could not be covered under scheduled maintenance but rather it should be deemed as a circumstance brought by the “IPP (i.e., Respondent LHC), its agents, authorized representatives or contractors¹²”. Definitely, it cannot be attributable to the IPP Administrator, Petitioner.

45.5. It is noteworthy that Clause 3 of Schedule 1 in further defining the circumstances constituting Scheduled Maintenance, Clause 3 of Schedule I of the IPPA Agreement: to constitute a Scheduled Maintenance, each of which **“not arising from or attributable to a breach of this Agreement or any act or inaction by the Administrator.”**

45.5.1. The rehabilitation of the BHEPP tunnel was not caused by an act of Petitioner or resulting from a breach to the IPPA Agreement.

45.5.2. In fact, the extension of the said rehabilitation from six (6) to ten (10) months only bolsters the fact that it was not merely a “repair” but one to remedy a flaw that was there from the inception.

¹² Clause 3.1 of Schedule “I” of the IPP Agreement.

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46. Given that the dispute between Petitioner and Respondent PSALM on the interpretation of whether or not the downtime caused by the repair of the BHEPP tunnel should be deemed "Non Delivering Days" under the IPPA Agreement, the Honorable Commission must resolve the same.

47. During the downtime brought by the BHEPP tunnel rehabilitation, the BHEPP generated zero kilowatt-hours of electricity, thereby depriving Petitioner of its right to sell and trade the electrical output of the power plant for 10 consecutive months – in other words, the very reason of Petitioner for participating in the bid.

48. Since this inability to generate electricity for ten (10) consecutive months did originate from or attributed to a breach of the IPPA Agreement or to any act or inaction by Petitioner, with more reason is there for this Honorable Commission to resolve the dispute once and for all.

**ALLEGATIONS IN SUPPORT OF THE PRAYER
FOR A CEASE AND DESIST ORDER**

49. Pending the resolution of the dispute, Petitioner seeks for a Cease and Desist Order under Section 43 of the EPIRA which provides:

"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."

50. The power to issue a Cease and Desist Order is strengthened by Section 8 of Executive Order No. 172 Creating the Energy Regulatory Board. It provides:

"Sec. 8. Authority to Grant Provisional Relief. The Board may, upon the filing of an application, petition or complaint or at any stage thereafter and without prior hearing, on the basis of supporting papers duly verified or authenticated, grant provincial relief on motion of a party in the case or on its own initiative, without prejudice to a final decision after hearing, should the Board find that the pleadings, together with such affidavits, documents and other evidence which may be submitted in support of the motion, substantially support the provisional order: Provided, That the Board shall immediately schedule and conduct a hearing thereon within thirty (30) days thereafter, upon publication and notice to all affected parties."

51. The above provision remains in effect by virtue of Section 80 of the EPIRA:

“SEC. 80. Applicability and Repealing Clause – The applicability provisions of Commonwealth Act No. 146, as amended, otherwise known as the “Public Service Act”; Republic Act 6395, as amended, revising the charter of NPC; Presidential Decree 269, as amended, referred to as the National Electrification Decree; Republic Act 7638, otherwise known as the “Department of Energy Act of 1992”; **Executive Order 172, as amended, creating the ERB**; Republic Act 7832 otherwise known as the “Anti-Electricity and Electric Transmission Lines / Materials Pilferage Act of 1994”, **shall continue to have full force and effect except insofar as they are inconsistent with this Act.**

The provision with respect to electric power of Section 11(c) of Republic Act 7916, as amended, and Section 5(f) of Republic Act 7227, are hereby repealed or modified accordingly.

Presidential Decree No. 40 and all laws, decrees, rules and regulations, or portion thereof, inconsistent with this Act are hereby repealed or modified accordingly.”
(Emphasis supplied.)

***There Is An Impending Risk of
Petitioner Being Cited in Default.***

52. Under Clause 19.1.1 of the IPPA Agreement, Respondent PSALM can terminate the IPPA Agreement in case of an Administrator Default by the mere service of a Termination Notice to Petitioner. Clause 19.1.1 provides:

“19. TERMINATION

19.1 Administrator Default Termination

19.1.1 On the occurrence of an Administrator Default, PSALM may terminate this Agreement by serving a Termination Notice on the Administrator, specifying the Administrator Default in respect of which the notice is given. This Agreement will terminate:

(a) immediately on service or deemed service of the notice in the case of Administrator Defaults under paragraphs (b), (c), (d), (e), (f) or (l) of the definition thereof;

xxx”

53. Relative thereto, the IPPA Agreement defines the phrase “Administrator Default” as follows:

“1.1 Definitions

xxx

Administrator Default means any of the following events:

- (a) the Administrator commits a material breach of any of its obligations under this Agreement and, in the case of material breaches capable of remedy, fails to remedy the breach within thirty (30) days of notice from PSALM requiring it so to do;

xxx

(f) the Administrator fails to pay any sum due under this Agreement (excluding sums which are the subject of a bona fide dispute, notified in accordance with Clause 8.4) on the due date and such failure continues for a period of fourteen (14) days or more following service of a **formal written demand** by PSALM served not earlier than the due date; (*Emphasis supplied.*)

xxx”

54. From the foregoing provisions, the consistent stand of Petitioner not to pay in full the Monthly Payments as a result of the Non Delivering Days can be invoked by Respondent PSALM as an “Administrator Default.” Consequently, Respondent PSALM/Respondent NPC can send a Termination Notice to Petitioner.

55. Petitioner participated in a competitive public bidding conducted by Respondent PSALM in accordance with the EPIRA to be awarded the IPPA Agreement.

56. However, all may be put to naught should Respondent PSALM demand from Petitioner the full Monthly Payment under Billing References Nos. IPP 2012-02-0136, IPP 2012-03-0145, IPP 2012-04-0154, and IPP 2012-05-0166, and subsequently declare Petitioner in default.

57. Even with the dispute of Petitioner of the amounts under these Billing References, Respondent PSALM can still demand the payment of the unadjusted amount. And with the consistent stand of Respondent PSALM, the IPPA Agreement can be terminated by mere Termination Notice to Petitioner.

58. In addition, the performance bond posted by Petitioner in favor of Respondent PSALM under the IPPA Agreement can be forfeited as a result of an Administrator Default.

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The Issuance of a Cease and Desist Order Will Preserve the Rights of Petitioner Pending Resolution of the Dispute.

59. Article 1159 of the Civil Code provides that “obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.”

59.1. Under Clause 3.1 of Schedule I of the IPPA Agreement, if the Power Station (i.e., BHEPP) is unable or fails to generate at its Contracted Capacity attributable to the IPP (i.e., Respondent LHC), its agents, authorized representative or contractors, the Monthly Payments to be paid by Petitioner must be reduced to the total adjusted sum calculated in accordance with the formula provided in Schedule I, provided, that the reduction must not be more than 80% of the Monthly Payment due.

59.2. Petitioner respectfully submits that Respondent PSALM should comply with the IPPA Agreement in good faith, by giving Petitioner the opportunity to dispute the Monthly Payments, and not cite Petitioner in default and issue a Termination Notice.

60. Petitioner will suffer damages should it be compelled to pay the total unadjusted Monthly Payments prior to or a resolution of this dispute.

60.1. Respondent PSALM sent Petitioner Billing Reference Nos. IPP-2012-02-0136, IPP 2012-03-0145, IPP 2012-04-0154, and IPP 2012-05-0166 each amounting to the full Monthly Payment of One Hundred Three Million Two Hundred Twenty Five Thousand Eight Hundred Six and 45/100 Pesos (Php 103,225,806.45) and Three Million Two Hundred Twenty Five Thousand Eight Hundred Six and 46/100 United States Dollars (USD 3,225,806.46.00).

60.2. On the other hand, Petitioner contends that it should pay the reduced Monthly Payments of a total of Thirty Million Seven Hundred Twenty Thousand Pesos (Php 30,720,000.00) and Nine Hundred Sixty Thousand United States Dollars (USD 960,000.00) for the 4 Billing Reference Nos.

60.3. This variance of **Seventy-two Million Five Hundred Five Thousand Eight Hundred Six and 45/100 Pesos (Php 72,505,806.45) and Two Million Two Hundred Sixty-five Thousand and 46/100 United States Dollars (USD 2,265,806.46)** is not, by any measure, a small amount.

60.4. Worse, Petitioner can lose the IPP Agreement and forfeit its performance bond for its position on the Monthly Payments.

61. It must be stressed that this case involves players in an industry that is indispensable to national interest. Contract terminations and breaches by any party on its agreements could greatly affect the power supply. Petitioner is seeking a Cease and Desist Order from this Honorable Commission pending adjudication of the parties' rights and obligations, precisely to avert adverse consequences.

62. After trial on the merits, Petitioner prays that this Cease and Desist Order be made permanent.

PRAYER

WHEREFORE, premises considered, it is most respectfully prayed that this Honorable Commission:

1. ISSUE A CEASE AND DESIST ORDER enjoining Respondent PSALM from demanding payment and issuing Termination Notice in relation to *Billing Reference No. IPP-2012-02-0136*, *Billing Reference No. IPP-2012-03-0145*, *Billing Reference No. IPP-2012-04-0154*, and *Billing Reference No. IPP-2012-05-0166*, and subsequent billings or statements of account for Petitioner, pending hearing of this Petition;

2. After hearing, ISSUE A PERMANENT CEASE AND DESIST ORDER permanently enjoining Respondent PSALM from demanding payment and issuing Termination Notice in relation to *Billing Reference No. IPP-2012-02-0136*, *Billing Reference No. IPP-2012-03-0145*, *Billing Reference No. IPP-2012-04-0154*, and *Billing Reference No. IPP-2012-05-0166*, and subsequent billings or statements of account for Petitioner, for the duration of the trial; and

3. RENDER JUDGMENT as follows:

3.1. Declare the entire 10-month downtime caused by the BHEPP tunnel rehabilitation as "Non Delivering Days" pursuant to the IPPA Agreement;

3.2. Ordering Respondent PSALM to amend *Billing Reference No. IPP-2012-02-0136*, *Billing Reference No. IPP-2012-03-0145*, *Billing Reference No. IPP-2012-04-0154*, and *Billing Reference No. IPP-2012-05-0166*, subsequent billings or statements of account for Petitioner, and implement the maximum reduction of 80% in the Monthly Payments covered therein;

Petitioner also prays for such other measures of relief as this Honorable Court may deem just and equitable within the premises.

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Finding the said Petition to be sufficient in form and substance, with the required fees having been paid, pursuant to Section 4, Rule 5 of the Energy Regulatory Commission's 2006 Rules of Practice and Procedure (2006 ERPP), the same is hereby set for determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on **25 July 2018 at two o'clock in the afternoon (2:00 P.M.) at the ERC Hearing Room, 15th Floor, Pacific Center Building, San Miguel Avenue, Pasig City.**

Petitioner is hereby directed to cause the publication of the attached Notice of Public Hearing at its own expense, once (1X) in a newspaper of nationwide circulation, at least ten (10) days before the scheduled hearing.

Moreover, pursuant to Section 6, Rule 5 of the 2006 ERPP, Respondents is likewise directed to file their Answer to the Petition within fifteen (15) days from receipt of the instant Order.

On the date of the initial hearing, Petitioner must submit to the Commission its written Compliance with the foregoing requirements attaching therewith the affidavit of the Editor or Business Manager of the newspaper where the said Notice of Public Hearing was published, together with the complete issue of the said newspaper.

Petitioner and Respondents, as well as all interested 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 therefore; 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 the Petitioner 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

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resetting of which shall be six (6) months from said date of cancellation.

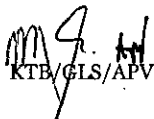
As part of the pre-trial conference, Petitioner must also be prepared to make an expository presentation of the instant Complaint, aided by whatever communication medium it may deem appropriate for the purpose, in order to put in plain words and explain, for the benefit of the other concerned parties, what the Complaint is all about and the reasons and justifications being cited in support thereof.

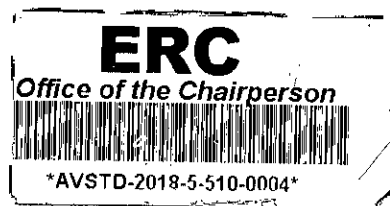
SO ORDERED.

Pasig City, 24 April 2018.

FOR AND BY THE AUTHORITY
OF THE COMMISSION


AGNES VST DEVANADERA
Chairperson & CEO


KTB/GLS/APV



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Copy Furnished:

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