

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



**WESTERN MINDANAO  
POWER CORPORATION  
(WMPC),**  
*Petitioner*

*-versus-*

**ERC CASE NO. 2019-003 DR**

**ZAMBOANGA CITY  
ELECTRIC COOPERATIVE,  
INC. (ZAMCELCO),**  
*Respondents.*

Promulgated:  
APR 12 2019

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**NOTICE OF PUBLIC HEARING**

TO ALL INTERESTED PARTIES:

Notice is hereby given that on 27 March 2019, Western Mindanao Power Corporation (WMPC) filed a *Petition for Dispute Resolution (With Urgent application for Provisional Relief)* against Zamboanga City Electric Cooperative, Inc. (ZAMCELCO). On 04 April 2019, WMPC filed a *Motion to Admit Amended Petition* citing Rule 7, Section 2 of the Energy Regulatory Commission's Rules of Practice and Procedure (ERC RPP) which provides that petitions filed before the Commission that implead a respondent "may be amended once as a matter of right before the respondent files a responsive pleading thereto."

The pertinent allegations of the said *Amended Petition* are hereunder quoted as follows:

**Nature of the Petition**

This is a petition for dispute resolution ("Petition") under sec. 43(u) of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 ("EPIRA"), in connection with the sec. 17.2 of the Power Supply Agreement dated May 27, 2015 ("PSA") between WMPC and respondent Zamboanga City Electric Cooperative, Inc. ("ZAMCELCO"). In this Petition, WMPC seeks a judgment (a) confirming that the PSA has been effective as between the parties since December 13, 2015, and (b) directing ZAMCELCO to pay the amount of PhP467,762,147.81, inclusive of interest, which corresponds to ZAMCELCO's unpaid obligations for the months of September 26, 2018 to February 25, 2019, which have long been final and indisputable. WMPC also prays for provisional relief, in particular, immediately upon

the filing of this Petition, a preliminary mandatory injunction be issued to compel ZAMCELCO to (a) pay the amount of PhP467,762,147.81, inclusive of interest, which corresponds to ZAMCELCO's unpaid obligations for the months of September 26, 2018 to February 25, 2019, which have long been final and indisputable, pursuant to secs. 7.3.1 and 7.3.2 of the PSA, and (b) implement the PSA, pending this Petition and its final resolution.

### **The Parties**

1. WMPC is a corporation duly organized and existing under the laws of the Republic of the Philippines, with office address at the 4th Floor, Alphaland Southgate Tower, EDSA corner 2258 Don Chino Roces Avenue Extension, Makati City.<sup>1</sup> WMPC may be served pleadings, orders, and other legal processes through the undersigned counsel at the address indicated below.
2. ZAMCELCO is a non-stock, non-profit electric cooperative organized and existing under Presidential Decree No. 269, otherwise known as the "National Electrification Administration Decree", as amended, with office address at MCLL Highway, Putik, Zamboanga City, where it may be served pleadings, orders, and other legal processes. ZAMCELCO has a franchise to distribute electricity in the City of Zamboanga.

### **Statement of Facts**

#### *The WMPC Power Station*

3. WMPC owns and operates a 100-megawatt ("MW") diesel power facility (the "WMPC Power Station") in Sangali, Zamboanga, which was originally the subject of an Energy Conversion Agreement ("ECA") with the National Power Corporation ("NPC"). The ECA expired on December 12, 2015.
4. NPC dispatched the WMPC Power Station as part of its portfolio of plants to provide power to various areas of Mindanao. The WMPC Power Station is critical to the security and stability of the Mindanao Grid because it produces the reactive power support necessary to maintain the voltage level required in the Zamboanga peninsula, particularly in Zamboanga City. This means that if the WMPC Power Station is not in operation, the voltage level in Zamboanga City will drop, leading to frequent power outages.
5. The location of the WMPC Power Station is peculiar since it is located at the high load end point from a long radial 138 KV transmission line of the National Grid Corporation of the Philippines ("NGCP") from its nearest power source in the Agus Plant Complex. The line has a load of up to 273 MW at its

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<sup>1</sup> Copies of WMPC's Certificate of Incorporation, Articles of Incorporation and By-Laws, and General Information Sheet are attached as **Annexes "B", "B-1", "B-2", and "B-3"**, respectively.

current peak demand. It is expected that voltage drop is significant along its route.

6. There is a need for a local generator to support the voltage in the area. In this regard, in a letter dated February 4, 2019 to the Industrial Group of Zamboanga, Inc.,<sup>2</sup> NGCP emphasized that ZAMCELCO is served by double circuit radial transmission lines spanning around 400 km from the central source of power due to its peculiar geographical location. With higher demand of the area and considerable distance from the generators, voltage drop is significant along the transmission route, hence the low-voltage in Zamboanga especially during peak hours.
7. The WMPC Power Station is also strategically located to provide power to the Zamboanga peninsula. ZAMCELCO's location at the end of the long transmission line exposes it to power supply interruptions caused by line sabotage, line faults, line maintenance, or power supply deficiency in the grid. Historically, these have been experienced in the Western Mindanao Area. Any transmission line fault or sabotage could easily cripple Zamboanga City. As the WMPC Power Station is located in Zamboanga City, it can provide power to ZAMCELCO even if transmission line interruptions isolate the city from the Mindanao Grid.

*Execution and Implementation of the PSA*

8. As mentioned, WMPC and ZAMCELCO signed the PSA on May 27, 2015. Under the PSA, WMPC is obligated to, among other things, provide a contracted capacity of 50 MW to ZAMCELCO. ZAMCELCO is obligated to pay for the full contracted capacity of 50 MW in each billing month.<sup>3</sup>
9. Article 3, sec. 3.1 of the PSA provides that the PSA shall become effective on the date (the "Effective Date") when all of the following conditions have been satisfied:
  - (a) the ERC shall have approved the PSA, including the pricing structure as set out therein (or as otherwise acceptable to WMPC), and the orders approving the PSA and such pricing structure shall have become final and not subject to reconsideration or appeal;
  - (b) the Energy Conversion Agreement between WMPC and the NPC dated March 28, 1996 shall have expired;

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<sup>2</sup> A copy of the NGCP's February 4, 2019 letter is attached as **Annex "C."**

<sup>3</sup> "Upon the terms and subject to the conditions set out herein, commencing on the Commencement Date and until the Termination Date, the Seller shall make available, reserve, guarantee and deliver to the Buyer the contracted electric power in MW, and the Buyer shall pay for, in each Billing Month throughout the Term, such quantity of electric power [i.e., 50 MegaWatts]. The capacity to be provided by the Seller shall always be the Contracted Capacity. In case the actual capacity delivered by the Seller as per dispatch order or limitation of the Buyer for a given Billing Month is less than the Contracted Capacity, the difference between the actual capacity utilized by the Buyer and Contracted Capacity for that Billing Month shall be deemed delivered to and utilized by the Buyer in accordance with Section 9.1." (PSA, Article 6, sec. 6.1(a), (b))

- (c) ZAMCELCO shall have awarded an investment management contract (“IMC”) to a qualified private utility for the enhancement of the technical and financial condition of ZAMCELCO leading to ZAMCELCO’s attainment of a rating of “A” from the National Electrification Administration (“NEA”) under its official rating procedure and standards for electric cooperatives;
  - (d) ZAMCELCO shall have delivered to WMPC a duly executed Assignment of Bank Account in the form attached as Schedule J of the PSA; and
  - (e) the NGCP shall have found the WMPC Power Station sufficient and in accordance with the Grid Impact Study, as applicable, which shall have been commissioned by WMPC.
10. On August 25, 2015, ZAMCELCO and WMPC filed an application<sup>4</sup> for the approval of the PSA with this Honorable Commission. At the time, however, there was already an urgent need for sufficient power to be supplied to Zamboanga City. Thus, on December 1, 2015, the Sangguniang Panlungsod of Zamboanga City issued Resolution No. 1369 dated December 1, 2015<sup>5</sup>, where it urgently and strongly requested this Honorable Commission to expedite the issuance of a provisional authority to allow ZAMCELCO and WMPC to implement the PSA in order to stabilize the power situation in Zamboanga City.
11. On December 3, 2015, Hon. Maria Isabella G. Climaco, the Mayor of Zamboanga City, wrote a letter<sup>6</sup> requesting this Honorable Commission to take appropriate action on the Sanggunian Panglungsod’s Resolution No. 1369.
12. On December 12, 2015, ZAMCELCO and WMPC received this Honorable Commission’s Order<sup>7</sup> dated October 22, 2015 granting the parties a provisional authority to implement the PSA. This allowed ZAMCELCO to source 50 MW of power from WMPC, thereby averting massive power outages. For the first time in a long time, after having suffered through the prolonged Mindanao power crisis earlier in the decade, Zamboanga City had stable power, and there was no more need for load curtailment as ZAMCELCO was nominating from WMPC the necessary power to maintain quality and reliable power in its franchise area.
13. Thus, from December 13, 2015 to December 31, 2018, WMPC and ZAMCELCO actively implemented the PSA. More particularly, in accordance with the terms of the PSA: (a) ZAMCELCO nominated its required capacity to WMPC on a daily basis, and (b) WMPC delivered the capacity nominated by

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<sup>4</sup> ERC Case No. 2015-157 RC.

<sup>5</sup> A copy of the Sanggunian resolution is attached hereto as **Annex “D”**.

<sup>6</sup> A copy of the letter is attached hereto as **Annex “E”**.

<sup>7</sup> A copy of the said Order is attached hereto as **Annex “F”**.

ZAMCELCO. Further, on December 28, 2015, WMPC sent ZAMCELCO a letter to remind ZAMCELCO of the requirement, under sec. 7.1 (a) of the PSA, for ZAMCELCO to deliver a Payment Security in favor of WMPC. On December 29, 2015, ZAMCELCO informed WMPC that it has already submitted the requirements for a Stand-by Credit Facility to the NEA to comply with the Payment Security requirement under sec. 7.1 (a) of the PSA.

*WMPC's billings and ZAMCELCO's payments under the PSA*

14. Considering that the parties actively implemented the PSA by, among others, ZAMCELCO's daily nomination of its required capacity to WMPC and WMPC's supply of power to ZAMCELCO, WMPC issued invoices to ZAMCELCO pursuant to sec. 7.3.1 of the PSA, which states:

"7.3.1 At the end of each Billing Month, the Seller shall deliver to the Buyer an invoice in respect of the Monthly Payment for such Billing Month, and the Buyer shall pay to the Seller the amount of such invoice within thirty (30) days after the receipt by the Buyer of such invoice."

15. Thus, under sec. 7.3.1 of the PSA, ZAMCELCO is obligated to pay WMPC within (30) days after its receipt of an invoice (the "Payment Due Date"). Further, under sec. 7.3.2 of the PSA, ZAMCELCO may notify WMPC if it disputes the amount stated in any invoice within fourteen (14) days from ZAMCELCO's receipt of such invoice. ZAMCELCO's failure to notify WMPC of a dispute "shall be deemed absolute and unconditional acceptance by [ZAMCELCO] of the accuracy of such invoice"<sup>8</sup> and shall therefore obligate ZAMCELCO to settle payment within the Payment Due Date referred to above. In this regard, sec. 7.4(a) of the PSA provides that "[a]ny amounts not paid on or after the Payment Date shall earn interest at the 91-day T-Bill Rate plus three percent (3%) per annum, from the day after the Payment Due Date until the date upon which such amount was received by [WMPC]."
16. Since WMPC and ZAMCELCO began implementing the PSA in December 13, 2015, ZAMCELCO had never sent WMPC any notice of dispute on any invoice issued by WMPC under the PSA. In fact, from December 2015 until September 2018, ZAMCELCO consistently paid for the amounts billed by WMPC. However, the invoices issued by WMPC to ZAMCELCO for the period from September 26, 2018 to February 25, 2019 (the "Outstanding Invoices") remain unpaid. To be sure, ZAMCELCO also did not dispute the accuracy of the Outstanding Invoices within fourteen (14) days as provided for in sec. 7.3.2 of the PSA. Thus, ZAMCELCO is deemed to have

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<sup>8</sup> PSA, Section 7.3.2.

absolutely and unconditionally accepted the accuracy of the Outstanding Invoices.

17. However, ZAMCELCO refused to pay the amounts covered by the Outstanding Invoices. ZAMCELCO, through its investor-manager, a joint venture of Crown Investment Holdings, Inc. ("Crown") and DESCO, Inc. ("DESCO") (collectively, the "Investor-Manager")<sup>9</sup>, claimed, for the first time, that the PSA was not in effect when the Outstanding Invoices were issued because at the time, some the conditions for the effectivity of the PSA under Article 3 have yet to be fulfilled. On this basis, ZAMCELCO refused to pay for the amounts covered by the Outstanding Invoices. To date, ZAMCELCO's outstanding obligation to WMPC amounts to PhP467,762,147.81. Out of this amount: (a) PhP450,654,665.84 represents the amount covered by the Outstanding Invoices for power delivered by WMPC to ZAMCELCO, and (b) PhP17,107,481.97 corresponds to the interest due on the Outstanding Invoices pursuant to sec. 7.4(a) of the PSA.
18. Because of ZAMCELCO's refusal to settle the Outstanding Invoices, WMPC sent letters to ZAMCELCO on January 18 and 29, and February 1, 2019<sup>10</sup>. In the letters, WMPC notified ZAMCELCO that it would be constrained to suspend the supply of power should ZAMCELCO fail to settle the Outstanding Invoices because WMPC would be unable to defray the costs of operating the WMPC Power Station. WMPC also informed ZAMCELCO that its supply of fuel needed to operate the WMPC Power Station would run out by February 4, 2019.
19. On February 4, 2019, WMPC received a letter dated February 1, 2019<sup>11</sup> from the Investor-Manager. In the letter, the Investor-Manager alleged that based on its initial review of the documentation of ZAMCELCO's past dealings with WMPC, "there is an indication that ZAMCELCO may have over-paid WMPC as a result of an over-billing in past invoices[.]" Thus, according to the Investor-Manager, it would be putting any payments to WMPC on hold pending the completion of its review of the relevant documents. However, the Investor-Manager did not cite any reason or basis for the purported over-billing issue. To be sure, at no point did the Investor-Manager allege that ZAMCELCO is financially incapable of settling the Outstanding Invoices.
20. Considering that ZAMCELCO failed to settle the Outstanding Invoices, WMPC could not defray the costs associated with the operation of the WMPC Power Station. WMPC was therefore

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<sup>9</sup> WMPC understands that in September 2018, ZAMCELCO awarded the Investor-Manager with the investment management contract and that the Investor-Manager took over the management of ZAMCELCO beginning January 2019. See <https://www.philstar.com/business/2018/09/04/1848352/new-management-takes-over-p25-billion-bid-zamcelco> last accessed on March 22, 2019; see also <http://www.pna.gov.ph/articles/1054845> last accessed on March 22, 2019.

<sup>10</sup> Copies of the letters dated January 18 and 29, and February 1, 2019 are hereto attached as **Annexes "G," "H," and "I"** respectively.

<sup>11</sup> A copy of the Investor-Manager's letter dated February 1, 2019 is hereto attached as **Annex "J."**

constrained to suspend its operation as of February 4, 2019 at 1:30 p.m. To be clear, the Outstanding Invoices remain unpaid to date.

21. ZAMCELCO's refusal to pay its outstanding obligations to WMPC resulted in a power crisis in Zamboanga City and has caused instability in the Mindanao Grid. The power crisis has even adversely affected the security, water supply, telecommunications, and livelihood of Zamboanga City residents.
22. Sec. 17.1 of the PSA provides that "any dispute arising out of relating to [the PSA] (the "Dispute") shall, as much as practicable, be settled amicably x x x within thirty (30) days after the service by one Party to the other Party of written notice of the existence of a Dispute[.]" If a settlement is not reached within this period, the dispute may be referred to the parties' "respective chief executive officers or... person(s) authorized by such chief executive officers" for another thirty (30) days of settlement discussions, pursuant to secs.17.1 and 17.2 of the PSA. If a settlement is still not reached, the dispute may be referred to this Honorable Commission, pursuant to sec. 17.2 of the PSA.
23. In this regard, since the suspension of the operations of the WMPC Power Station, ZAMCELCO (acting purportedly through the Investor-Manager) and WMPC met several times to discuss the foregoing issues. In particular, meetings between the parties were held on February 8, 27, and March 1, 2019. Despite these meetings, however, WMPC and ZAMCELCO failed to reach an amicable settlement. In fact, on March 12, 2019, WMPC received ZAMCELCO's "formal notice of dispute and demand" dated March 8, 2019<sup>12</sup> ("Formal Notice") where ZAMCELCO demanded that WMPC "promptly refund the amounts overpaid by ZAMCELCO, in the full amount of PhP441,152,972.16 plus legal interest[.]" According to ZAMCELCO, this amount represents amounts "overbilled" by WMPC by charging a capital recovery fee and operations and maintenance fee based on the contracted capacity of 50MW which could not be collected by WMPC because the PSA has not yet taken effect. ZAMCELCO's issuance of the Formal Notice shows that further settlement discussions between the parties, as set out in sec. 17.1 and 17.2 of the PSA, would no longer be practicable and would in fact be futile. Accordingly, on March 26, 2019, WMPC sent a letter dated March 25, 2019 to ZAMCELCO in response to the Formal Notice (a) disputing ZAMCELCO's claim for a refund, (b) reiterating its demand for the payment amounts due under the Outstanding Invoices plus interest, and (c) notifying ZAMCELCO that further settlement discussions between the parties would no longer be practicable and that it would not consent to further settlement discussions.<sup>13</sup>

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<sup>12</sup> A copy of the ZAMCELCO letter dated March 8, 2019 is hereto attached as **Annex "K."**

<sup>13</sup> A copy of WMPC's letter to ZAMCELCO dated March 25, 2019 is hereto attached as **Annex "L."**

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24. Accordingly, the dispute between the parties may already be referred to this Honorable Commission for resolution. Hence, the present Petition.

**ISSUES**

**I**

**Whether or not the PSA is effective.**

**II**

**Whether or not ZAMCELCO is liable to WMPC for the unpaid amounts covered by the Outstanding Invoices.**

**III**

**Whether or not ZAMCELCO is liable to WMPC for attorney's fees and legal expenses.**

**DISCUSSION**

**I. The PSA is effective.**

25. In its Formal Notice, ZAMCELCO claims that the PSA has not yet taken effect because:

(a) the PSA, which has only been provisionally approved by this Honorable Commission, requires that it shall have been approved by the ERC, and the order approving the same is final;

(b) ZAMCELCO should have awarded an IMC to a qualified private utility for the enhancement of the technical and financial condition of the ZAMCELCO leading to the ZAMCELCO's attainment of a rating of "A" from NEA, which rating it has yet to attain; and

(c) ZAMCELCO and WMPC have yet to jointly certify the occurrence of the PSA's effective date.

26. However, contrary to ZAMCELCO's assertions and as discussed below, the PSA has already taken effect and is, in fact, effective.

*A. ZAMCELCO and WMPC have impliedly waived the conditions for the effectivity of the PSA.*

27. Article 6 of the Civil Code of the Philippines ("Civil Code") states that "[r]ights may be waived, unless the waiver is contrary to law, public order, public policy, morals, or good customs, or prejudicial to a third person with a right recognized by law." In this regard, in a contract of sale (such as the PSA) where the obligation of either party to a contract of sale is subject to any condition which is not performed, such party may (a) refuse to



proceed with the contract or (b) waive performance of the condition.<sup>14</sup>

28. It is settled that the waiver of a right or condition need not be express, and may be implied from a party's actions. Thus, the Supreme Court has ruled that a waiver may be shown either by express stipulation or acts admitting no other reasonable explanation.<sup>15</sup> In *Silahis International Hotel, Inc. v. Soluta*<sup>16</sup>, the Supreme Court ruled that there is an implied waiver when the following elements are present:

- (a) it must appear that the right exists;
- (b) the person involved had knowledge, either actual or constructive, of the existence of such right; and
- (c) such person had an actual intention to relinquish the right.

29. Here, the actions of the parties from December 13, 2015 clearly and unequivocally show that both ZAMCELCO and WMPC impliedly waived the fulfillment of the conditions for the effectivity of the PSA under Article 3.

30. Specifically, from December 13, 2015, or the day immediately after ZAMCELCO and WMPC received this Honorable Commission's provisional approval of the PSA:

- (a) ZAMCELCO nominated its required capacity to WMPC on a daily basis;
- (b) WMPC delivered the contracted capacity to ZAMCELCO, pursuant to its obligations under the PSA;
- (c) WMPC issued invoices to ZAMCELCO for each billing month;
- (d) ZAMCELCO never disputed the invoices that it received from WMPC; and
- (e) ZAMCECLO (sic) consistently settled the invoices that it received from WMPC, except the Outstanding Invoices that remain unpaid to date.

31. Certainly, the foregoing actions, taken together, undeniably show that the parties had (a) waived the conditions set out in Article 3 of the PSA and (b) considered the PSA effective since December 13, 2015.

*B. ZAMCELCO is estopped from assailing the effectivity of the PSA.*

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<sup>14</sup> See Civil Code, Art. 1545. See also *Catungal v. Rodriguez*, G.R. No. 146839, March 23, 2011.

<sup>15</sup> *Arrieta vs. National Rice and Corn Corp.*, 10 SCRA 79

<sup>16</sup> G.R. No. 163087, February 20, 2006.

32. Assuming for argument that the parties have not impliedly waived the conditions for the effectivity of the PSA (which WMPC does not admit), ZAMCELCO is estopped from assailing the effectivity of the PSA.
33. Article 1431 of the Civil Code provides that “[t]hrough estoppel an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon.” In this connection, Rule 131, sec. 2(a) of the Rules of Court provides that “[w]henver a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing is true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.”
34. As mentioned, ZAMCELCO has actively implemented the PSA since December 13, 2015 by (a) submitting daily capacity nominations to WMPC, (b) receiving the capacity delivered by WMPC, (c) not disputing the invoices issued by WMPC, and (d) settling such invoices. Accordingly, ZAMCELCO has led WMPC to believe that it was treating (as it did in fact treat the PSA) as effective since December 13, 2015. WMPC had relied on ZAMCELCO’s representations and, on that basis, continued to supply power and issue invoices to ZAMCELCO from December 13, 2015 to December 2018. ZAMCELCO’s representations are therefore conclusive upon ZAMCELCO and cannot be denied or disproved as against WMPC.
35. Further, in *Angeles v. Calasanz*<sup>17</sup>, the Supreme Court ruled that that a party is estopped when it has accepted the benefits from his initial course of action, and cannot be permitted to act otherwise. Thus:
- “We agree with the plaintiffs-appellees that when the defendants-appellants, instead of availing of their alleged right to rescind, have accepted and received delayed payments of installments, though the plaintiffs-appellees have been in arrears beyond the grace period mentioned in paragraph 6 of the contract, the defendants-appellants have waived and are now estopped from exercising their alleged right of rescission.” (emphases supplied)
36. Here, ZAMCELCO cannot deny that it benefited (as it in fact benefited) from its active implementation of the PSA. To be sure, for three (3) years since December 13, 2015, ZAMCELCO accepted the capacity supplied by the WMPC Power Station, which ZAMCELCO used to distribute electricity to its customers. Such customers, in turn, paid for the electricity supplied by ZAMCELCO and accounted for a portion of the revenues generated by ZAMCELCO from its operations.
37. Clearly, ZAMCELCO generated revenues from the distribution of the electricity to its customers, which it derived from the

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<sup>17</sup> G.R. No. L-42283, March 18, 1985.

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power supplied by WMPC under the PSA. By accepting the benefits from the implementation of the PSA, ZAMCELCO should therefore be estopped from assailing the PSA's effectivity.

**II. ZAMCELCO is liable to WMPC for the unpaid amounts covered by the Outstanding Invoices.**

38. Considering that the PSA has taken effect and is, in fact, effective, ZAMCELCO is liable to WMPC for the unpaid amounts covered by the Outstanding Invoices.
39. To recall, WMPC issued invoices to ZAMCELCO pursuant to sec. 7.3.1 of the PSA, which provides that shall pay WMPC within (30) days after its receipt of an invoice. While ZAMCELCO has the right, under sec. 7.3.2 of the PSA, to dispute the amount in any invoice, it may only exercise such right within fourteen (14) days from its receipt of an invoice, failing which, ZAMCELCO "shall be deemed absolute and unconditional acceptance by [ZAMCELCO] of the accuracy of such invoice." As mentioned, sec. 7.4(a) of the PSA provides that "[a]ny amounts not paid on or after the Payment Date shall earn interest at the 91-day T-Bill Rate plus three percent (3%) per annum, from the day after the Payment Due Date until the date upon which such amount was received by [WMPC]."
40. Since WMPC and ZAMCELCO began implementing the PSA in December 13, 2015, ZAMCELCO had never sent WMPC any notice of dispute on any invoice issued by WMPC under the PSA, including the Outstanding Invoices. Therefore, ZAMCELCO should be (a) deemed to have absolutely and unconditionally accepted the accuracy of the Outstanding Invoices and, (b) on this basis, directed to settle payment of PhP467,762,147.81, which is the amount covered by the Outstanding Invoices, PhP17,107,481.97 of which is the interest due on the Outstanding Invoices computed pursuant to sec. 7.4(a) of the PSA, without further delay.
41. To be sure, if ZAMCELCO would be allowed to avoid payment for the electricity supplied to it by WMPC, ZAMCELCO would be unjustly enriched at the expense of WMPC. There is unjust enrichment when (a) a person is unjustly benefited, and (b) such benefit is derived at the expense of or with damages to another.<sup>18</sup> In this case, it is undisputed that ZAMCELCO benefitted from the electricity supplied by WMPC, which ZAMCELCO in turn delivered to and consequently received payments from its own customers. Certainly, this Honorable Commission cannot sanction ZAMCELCO's unjust enrichment at the expense and to the detriment of WMPC.

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<sup>18</sup> See *Grandteq Industrial Steel Products, Inc. v. Margallo*, G.R. No. 181393, July 28, 2009.

*AS*

**III. ZAMCELCO is liable to WMPC for attorney's fees and legal expenses.**

42. ZAMCELCO's refusal to pay the amounts covered by the Outstanding Invoices, which, to emphasize were never disputed by ZAMCELCO and should therefore be final and indisputable, compelled WMPC to engage the services of counsel for a fee and incur legal expenses. Thus, in accordance with Article 2208 (2) of the Civil Code<sup>19</sup>, ZAMCELCO should be held liable to WMPC for attorney's fees and legal expenses amounting to at least Php1,000,000.

**URGENT APPLICATION FOR PROVISIONAL RELIEF**

43. WMPC re-pleads, by reference, all the foregoing allegations.
44. This Honorable Commission has the power to grant provisional relief, pursuant to Section 44 of the EPIRA,<sup>20</sup> in relation to sec. 8 of Executive Order No. 172.<sup>21</sup> This is settled.<sup>22</sup>
45. Pursuant to such authority, WMPC respectfully requests that the Honorable Commission issue a preliminary mandatory injunction to compel ZAMCELCO to (a) pay the amount of PhP467,762,147.81, corresponding to the amount owed by ZAMCELCO to WMPC under the Outstanding Invoices, PhP17,107,481.97 of which corresponds to the interest due on the Outstanding Invoices computed pursuant to sec. 7.4(a) of the PSA, and (b) implement the PSA, while this Petition is pending.
46. To be sure, ZAMCELCO's refusal to honor its obligations under the PSA irreparably damaged WMPC. More particularly, ZAMCELCO's refusal to pay the amounts owing to WMPC forced it to suspend the WMPC Power Station's operation because WMPC did not have the sufficient resources necessary to run the WMPC Power Station. The suspension of the WMPC Power Station has undeniably been detrimental to the interests of WMPC considering the several hundreds of millions of pesos that WMPC had invested on the power station to set-up it up

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<sup>19</sup> "In the absence of stipulation, attorney's fees and expenses of litigation other than judicial costs, cannot be recovered except: x x x (2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest[.]" (Civil Code, Article 2208 (2))

<sup>20</sup> Section 44. Transfer of Powers and Functions. – The powers and functions of the Energy Regulatory Board not inconsistent with the provisions of this Act are hereby transferred to the ERC. The foregoing transfer of powers and functions shall include all applicable funds and appropriations, records, equipment, property and personnel as may be necessary.

<sup>21</sup> "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 provisional 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." (emphases supplied)

<sup>22</sup> See *BF Homes, Inc., et al. v. Manila Electric Co.*, G.R. No. 171624, December 6, 2010.

and maintain it in its peak condition. Further, because of ZAMCELCO's refusal to honor its obligations under the PSA, Zamboanga City has fallen into a power crisis that seriously and adversely affects all residents of Zamboanga City on a daily basis. More importantly, the power outages pose an immense risk to the upcoming national elections in May 2019, as well as the safety and security of the region where the Western Mindanao Command of the Armed Forces of the Philippines is based.

47. The continued implementation of the PSA remains, by far, the most beneficial solution to ZAMCELCO and its customers. Supply from the WMPC Power Station will ensure stable and reliable power to ZAMCELCO's customers, and adequate voltage to prevent power outages.
  
48. In addition, the continued implementation of the PSA will ensure that ZAMCELCO's customers will enjoy a stable and reliable supply of electricity at the lowest possible cost. WMPC understands that ZAMCELCO has deployed 8MW generator sets ("GenSets") to address the lack of power supply brought about by ZAMCELCO's refusal to comply with its obligations under the PSA. However, the GenSets are technically inadequate to address the voltage issues in the Zamboanga peninsula, as they do not provide the necessary Megavolt-ampere reactive for grid stability. Further, they are not designed for sustained operations and will trip frequently if run continuously. More importantly, the GenSets run on diesel fuel, which is far more expensive than the bunker fuel needed to operate the WMPC Power Station. Consequently, the power generated by the GenSets will cost significantly more than the power generated by the WMPC Power Station. Considering that the deployment and operation of the GenSets is clearly prejudicial to ZAMCELCO's customers, it is imperative that this Honorable Office compel ZAMCELCO to instead implement the PSA and draw power from the WMPC Power Station.

#### **PRAYER**

WHEREFORE, WMPC respectfully prays that this Honorable Commission:

1. Immediately upon the filing of this Petition, ISSUE a preliminary mandatory injunction to compel ZAMCELCO to (a) pay the amount of PhP467,762,147.81, corresponding to the amount owed by ZAMCELCO to WMPC under the Outstanding Invoices, and (b) implement the PSA, pending this Petition and its final resolution; and
  
2. After appropriate proceedings, RENDER JUDGMENT (a) declaring the PSA effective and directing its continued implementation thereof, (b) confirming the propriety of the payment by ZAMCELCO of the amount of PhP467,762,147.81,

under the preliminary mandatory injunction prayed for by WMPC or, if such preliminary mandatory injunction is not issued, directing ZAMELCO to pay the amount of PhP467,762,147.81 corresponding to the amount due under the Outstanding Invoices, inclusive of interest, and (c) directing ZAMCELCO to pay [i] further interest computed at the 91-day T-Bill Rate plus three percent (3%) per annum, from the day after the Payment Due Date of the amounts covered by the Outstanding Invoices until the date WMPC receives full payment from ZAMCELCO, and [ii] at least PhP1,000,000 in attorney's fees and legal costs.

Petitioner prays for other just and equitable relief.

The Commission has set the *Petition* for determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on **25 April 2019 (Thursday), at ten o'clock in the morning (10:00 A.M.), at the ERC Hearing Room, 15<sup>th</sup> Floor Pacific Center Building, San Miguel Avenue, Pasig City.**

All persons who have an interest in the subject matter of the instant case may become a party by filing with the Commission a verified Petition to Intervene at least five (5) days prior to the initial hearing and subject to the requirements under Rule 9 of the 2006 ERC Rules of Practice and Procedure, indicating therein the docket number and title of the case and stating the following:

- 1) The petitioner's name and address;
- 2) The nature of petitioner's interest in the subject matter of the proceeding and the way and manner in which such interest is affected by the issues involved in the proceeding; and
- 3) A statement of the relief desired.

All other persons who may want their views known to the Commission with respect to the subject matter of the case may file their Opposition or Comment thereon at any stage of the proceeding before Applicant rests its case, subject to the requirements under Rule 9 of the 2006 ERC Rules of Practice and Procedure. No particular form of Opposition or Comment is required, but the document, letter, or writing should contain the following:

- 1) The name and address of such person;




- 2) A concise statement of the Opposition or Comment; and
- 3) The grounds relied upon.

All such persons who wish to have a copy of the *Application* may request from Applicant that they be furnished with the same, prior to the date of the initial hearing. WMPC is hereby directed to furnish all those making such request with copies of the *Application* and its attachments, subject to the reimbursement of reasonable photocopying costs. Any such person may likewise examine the *Application* and other pertinent records filed with the Commission during the standard office hours.

**WITNESS**, the Honorable Commissioners **ALEXIS M. LUMBATAN**, **CATHERINE P. MACEDA**, and **PAUL CHRISTIAN M. CERVANTES**, Energy Regulatory Commission, this 10<sup>th</sup> day of April 2019 in Pasig City.

  
**AGNES VST DEVANADERA**  
*Chairperson & CEO*

  
LS: EEO/GLO

