

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



**SPC ISLAND POWER
CORPORATION AND SPC
POWER CORPORATION,
Complainants,**

-versus-

ERC CASE NO. 2020-001 DR

Promulgated:
September 1, 2020

**PHILIPPINE ELECTRICITY
MARKET CORPORATION
AND INDEPENDENT
ELECTRICITY MARKET
OPERATOR OF THE
PHILIPPINES,
Respondents.**

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NOTICE OF VIRTUAL HEARING

TO ALL INTERESTED PARTIES:

Notice is hereby given that on 20 January 2020, SPC Island Power Corporation and SPC Power Corporation (Complainants) filed a *Complaint* dated 06 December 2019 against Philippine Electricity Market Corporation (PEMC) and Independent Electricity Market Operator of the Philippines (IEMOP).

In the said *Complaint*, Complainants alleged, among others, the following:

1. Complainants are corporations duly organized and existing under Philippine law, with business address at 7th Floor, Citibank Center, 8741 Paseo de Roxas, Makati City. Complainants are power generation companies that own and operate Facilities 3 and 1 of Panay Diesel Power Plant, the Bohol Diesel Power Plant, Cebu Diesel Power Plant 1, and Power Barge 104 (collectively, the “**Power Plants**”).
2. Respondent Philippine Electricity Market Corporation (“**PEMC**”) is a non-stock and non-profit corporation duly organized and existing under Philippine law, with principal

address at 18th Floor, Robinsons Equitable Tower, ADB Avenue, Ortigas Center, Pasig City.

3. Respondent Independent Electricity Market Operator of the Philippines, Inc. (“**IEMOP**”) is a non-stock and non-profit corporation duly organized and existing under Philippine law, with principal address at 19th Floor, Robinsons Equitable Tower, ADB Avenue, Ortigas Center, Pasig City.
4. On January 18, 2018, the Department of Energy (“**DOE**”) issued Department Circular No. DC2018-01-002, directing the formation of an independent market operator to assume all functions of Respondent PEMC related to market operations as provided under Section 30 of the Electric Power Industry Reform Act (“**EPIRA**”), Sections 6 and 9 of the EPIRA Implementing Rules and Regulations, Wholesale Electricity Spot Market (“**WESM**”) Rules and Market Manuals and other relevant issuances. To implement this, Respondent IEMOP was incorporated to become the independent market operator.

II. THE RELEVANT FACTS

5. Complainants are Trading Participants on the WESM.
6. Upon review of the Dispatch Deviation Report and System Operator Report (the “**System Operator’s Reports**”) of Must Run Unit (“**MRU**”) events, Complainants discovered several discrepancies in the reporting of the System Operator for the billing periods covering June 2016 to July 2017. Complainants found that the Power Plants were not included in the MRU reports of the National Grid Corporation of the Philippines – Visayas System Operator (“**NGCP-VSO**”). Thus, Complainants applied for additional compensation with Respondent PEMC beginning on March 2017 for the 120th billing period (May 26 - June 25, 2016) of the Power Plants.
7. A list and copies of the letters sent by Complainants are attached as Annex "A" and series. In support of the applications for additional compensation, Complainants also submitted to PEMC copies of NGCP-VSO signed Summaries of Undeclared MRUs attached as Annex "B" and series. A summary of the total Undeclared MRU claims is attached as Annex “C”.
8. In an email dated July 10, 2017, Respondent PEMC, represented by Mr. Edward I. Olmedo, informed Complainants that it did not know how to go forward with the issue of undeclared MRUs. A copy of the email is attached as Annex “D”.
9. On February 19, 2018, Complainants filed a Notice of Dispute with the Dispute Resolution Administrator (“**DRA**”) for the claim for Undeclared MRUs. A copy of the Notice of Dispute is attached as Annex “E”.

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10. On February 21, 2018, Complainants and Respondent PEMC, as represented by Atty. Rachel Angela P. Anosan, met to discuss the feasibility of a voluntary and amicable settlement of the dispute.
11. On April 23, 2018, a second meeting was held between the Respondent PEMC and Complainants. During this meeting, Respondent PEMC categorically denied Complainants' claims on the ground that since Complainants did not submit any notice of discrepancy on the System Operator's Reports within the two-week period allotted under Section 9.2.2 of the WESM Manual on Management of Must-Run and Must-Stop Units Issue 8.0 ("**WESM Manual 8.0**"), the MRU data as to Complainants were already deemed final.
12. On June 8, 2018, Complainants filed a Request for Mediation with the DRA. A copy of the said Request for Mediation is attached as Annex "F". On July 30, 2018, the DRA held a meeting with the parties to discuss the selection of Mediators for the pending claims and to raise any clarificatory questions regarding the mediation process. Complainants, after discussing their concerns with the DRA, proposed that the parties dispense with mediation and undergo arbitration.
13. The DRA issued a Certification on September 5, 2018, which reads, in part:

Pursuant to Section 7.1.1 (d) of the WESM Manual on Dispute Resolution issue 6.0, this letter is to certify that SPC Island Power Corporation/ SPC Power Corporation ("Complainant") and the Philippine Electricity Market Corporation ("Respondent"), as Parties to the subject disputes, shall per their mutual agreement dispense undergoing WESM Mediation to proceed directly to WESM Arbitration in resolving their disputes.

A copy of the Certification is attached as Annex "G".
14. On February 11, 2019, the parties met with the Arbitration Tribunal to finalize the Terms of Reference for this case and DRA Case No. WESM- ARB-18-01 (Claims for RTD Underpayment). A copy of the Terms of Reference is attached as Annex "H".
15. Complainants submitted their Exhibits to the Arbitration Tribunal on March 11, 2019. A copy of the Compliance showing receipt by the Respondents of the Exhibits is attached as Annex "I".
16. Complainants submitted their Memorandum to prove its claims for Undeclared MRUs on April 26, 2019. A copy of the Memorandum is attached as Annex "J" and series.

17. The Arbitration Tribunal rendered its Arbitral Award on August 13, 2019. A copy of the Award is attached as Annex “K”.
18. Complainants now submit this Complaint to prove its claims for Undeclared MRUs. The filing of the formal Complaint is consistent with Section 3.2.1 of the WESM Dispute Resolution Manual which provides that:

An entity belonging to any of the categories described in Section 3.1.1 **should first comply with the dispute resolution process set out in this Manual before filing a formal complaint with the ERC.** (Emphasis supplied.)

19. Since the parties have gone through the dispute resolution process as mandated under Section 3.2.1 of the WESM Dispute Resolution Manual, filing of this Complaint with this Honorable Commission is proper considering that this Honorable Commission has the competence and technical understanding of how the WESM works, particularly how price is properly determined given the demand, supply and constraints.

III. CAUSES OF ACTION

A. FIRST CAUSE OF ACTION

Complainants ran and produced power as MRU and should be compensated as such, regardless of whether it was able to file a Notice of Discrepancy under Section 9.2.2 of the WESM Manual 8.0.

20. Under the WESM Manual 8.0, a must-run generating unit, referred to as a MRU, is a generating unit identified and instructed, on real time or scheduled basis, by the System Operator to either a) come on-line, or b) provide additional energy on a particular Trading Interval but the dispatch of which is said to be Out of Merit, to address System Security requirements. MRUs shall be utilized only after the System Operator has exhausted all available Ancillary Services.
21. MRUs are classified as follows:
 - a) Scheduled MRU – MRU designated by the System Operator before the trading interval and included in the Real Time Dispatch schedule through the imposition of Security Limit as defined in the WESM Dispatch Protocol Manual.

- b) Real Time MRU – MRU designated by the System Operator during the trading interval.
- 22. The Power Plants of Complainants complied with NGCP-VSO's instructions to run as MRU in many instances. The documents that will prove that Complainants' Power Plants were run as MRU are attached as Annex "A" and series and Annex "B" and series.
 - 23. Complainants cannot be deprived of payment on the ground of their supposed failure to comply with the condition under WESM Rules Clause 3.5.13.1 which provides that "[f]or proper settlement of must-run units and must-stop units, Trading Participants shall review the information and notify the Market Operator of any discrepancies no later than two (2) weeks from the date of publication, otherwise the information contained in the report shall be deemed final for use in the settlement of must-run units and must-stop units".
 - 24. The two-week period given in Section 9.2.2 of the WESM Manual 8.0 reckoned from date of publication of the Dispatch Deviation Reports and the System Operator's Reports is simply not enough time to file a Notice of Discrepancy. The information necessary to discover the discrepancy is only received seven (7) days after the end of the billing period for a preliminary statement to as long as eighteen (18) days after the end of the billing period. The end of the billing period happens after two (2) weeks from publication of the Dispatch Deviation Reports and the System Operator's Reports. As such, there will be instances when the generator will not even have its preliminary statement after two (2) weeks, and without such preliminary statement, the generator will not be able to determine if there is a discrepancy in its billing.
 - 25. Complainants' failure to comply with the condition of filing a Notice of the Discrepancy in the Dispatch Deviation Reports and the System Operator's Reports within two (2) weeks from date of publication was not due to their fault. Such condition should be deemed fulfilled since Respondent PEMC also voluntarily prevented such fulfillment. Article 1186 of the New Civil Code provides that "[t]he condition shall be deemed fulfilled when the obligor voluntarily prevents its fulfillment."
 - 25.1. Complainants were unable to comply with the condition to notify Respondent PEMC within two (2) weeks because latter changed the procedure for correction of the System Operator's Report. The previous procedure was that the System Operator would countercheck the MRU events as recorded by Complainants. If there were discrepancies between the reports, Complainants would then use the daily reports that were countersigned by the System Operator to prove to Respondent PEMC that there was under-declaration of MRU by the System Operator. This practice was agreed upon by NGCP-VSO (c/o Mr. Reggie F. Albano and Mr. Roberto A. Uy), Respondent

PEMC (c/o Mr. Millan H. Libongco), and Complainants during the Coordination Meeting held on June 26, 2012 at the Panay Diesel Power Plant. A sample of the usual procedure of validation of MRU data by the NGCP-VSO is attached as Annex "L".

25.2. This procedure changed when the System Operator introduced the electronic log system. Thus, the System Operator no longer countersigned the daily reports. Complainants were constrained to calculate their MRU vis-à-vis the Dispatch Deviation Reports and the System Operator's Reports only after the WESM Final Settlement Data and Ancillary Services Procurement Agreement ("ASPA") reconciliation data were released by the Respondent PEMC.

25.2.1. Prior to the introduction of the electronic log system, power plant personnel of Complainants would prepare the daily reports for signing by the System Operator. The System Operator would either sign the daily reports or direct the Complainants to revise the daily reports, after which the System Operator would sign them. The signed daily reports would then be transmitted to Complainants' head office in Makati for consolidation and comparison with the WESM Final Settlement Data and ASPA reconciliation data.

25.2.2. Upon the availability of the WESM Final Settlement Data and ASPA reconciliation data, the head office of the Complainants prepares the **consolidated MRU reports or events** (based on WESM Final Settlement Data and ASPA reconciliation data) for submission to the head of the NGCP-VSO for their signature. The head of the NGCP-VSO would either sign the consolidated MRU reports or events or direct the Complainants to revise them before he signs. The signed consolidated MRU reports or events is then submitted to the Market Operator for MRU Settlement.

25.2.3. After the introduction of the electronic log system, the System Operator no longer signed the daily reports. Due to the lack of the WESM Final Settlement Data and ASPA reconciliation data, Complainants'

personnel in the head office could only prepare the consolidated MRU reports or events upon the availability of the WESM Final Settlement Data and ASPA reconciliation data. The consolidated MRU reports or events is then submitted to the NGCP-VSO head for his signature.

- 25.3. In subsequent filings of MRU claims made by Complainants, the daily dispatch reports countersigned by the NGCP-VSO were still honored by the PEMC-Billing Settlements and Metering Department (PEMC-BSMD) (i.e., until the May 2016 billing period).
- 25.4. Respondent PEMC did not formally inform Complainants that the said protocol previously practiced between NGCP-VSO and Complainants will no longer be honored (starting June 2016) upon the effectivity of the WESM Manual 7.0. Thus, Complainants were caught by surprise by this change.

B. SECOND CAUSE OF ACTION

Even assuming that Complainants had the obligation to give a Notice of Discrepancy the timeframe of two (2) weeks, Complainants are deemed released from this obligation because of the impossibility to comply with this obligation pursuant to Article 1266 and 1267 of the New Civil Code.

26. Article 1266 of the New Civil Code states that “[t]he debtor in obligations to do shall also be released when the prestation becomes legally or physically impossible without the fault of the obligor.”
27. The Supreme Court has consistently held that when an obligor has done everything he could to perform an obligation, but he does not fulfill the same, the obligor should be released from said obligation. In Tabora v. Lazatin,¹ the Supreme Court held that:

This Court finds that despite his efforts to secure the necessary building permit for the reconstruction, he failed because of the disapproval or unfavorable attitude of the Urban Planning Commission toward

¹ G.R. No. L-5245, May 29, 1953.

reconstruction unless they conformed to the plan of widening the city streets. **Finding that defendant had done all he could to secure the permit and to comply with his obligations, but because of the refusal of the government authorities to issue said permit, he failed to fulfill his undertaking, he should be absolved and released from said obligation.** (Emphasis supplied.)

28. Complainants' failure to comply with its supposed obligation to notify Respondents of the discrepancies in the Dispatch Deviation Reports and System Operator's Reports within two (2) weeks was only because it was physically impossible to do so.
- 28.1. The process of checking and validating the System Operator's Reports has, historically, taken longer than two (2) weeks as the process requires meticulous review and coordination with the NGCP-VSO.
- 28.2. This period is not sufficient because computation, evaluation or determination of MRU claims can only be correctly and accurately made once the WESM final settlement data and the ASPA reconciliation data are final and made available to the generators.
- 28.3. Meticulous review of the data and Complainants' own internal logs as compared to the Dispatch Deviation Reports and System Operator's Reports is necessary because of the System Operator's undeniable history of failure to report Complainants' MRU to Respondents.
- 28.4. As discussed above, Complainants could calculate their MRU claims only after the WESM Final Settlement Data and ASPA reconciliation data have been made available to the generators, which is released beyond the 2- weeks period from the time of publication of the Dispatch Deviation Reports and System Operator's Reports. Complainants, thus, have to wait for the end of the relevant billing period and receipt of the final statements which can range from seven (7) days after the end of the billing period for a preliminary statement to as long as eighteen (18) days after the end of the billing period.

C. THIRD CAUSE OF ACTION

Given that the impossibility of notifying Respondent PEMC of the discrepancies in the Dispatch Deviation

Reports and System
Operator's Reports within
two (2) weeks from
publication rendered such
condition fulfilled or
absolved, Complainants
timely filed their claims for
additional compensation
within the required period of
(1) one year.

29. Complainants filed several claims for additional compensation as early as March 2017. Rule 9.3.2 of the WESM Manual 8.0 provides that:

9.3.2 Additional Compensation

A Trading Participant which has complied with dispatch instructions as MRU may be entitled to additional compensation. Additional compensation is allowed in cases where the Trading Participant submits sufficient proof that the MRU settlement amount calculated in accordance with this Manual is not sufficient to cover the following costs that are incurred in complying with the MRU call –

- a) fuel costs
- b) variable operating and maintenance costs, which may include start-up cost and shut-down costs

The additional compensation will not be more than the aggregate of the above costs less the amount of the MRU settlement amount already paid or payable, subject to the determination and approval of the Market Operator.

The affected Trading Participant will submit to the Market Operator a claim for additional compensation with supporting documents justifying the requested additional compensation. **The claim for additional compensation shall filed within one (1) year** from the time the affected Trading Participant **complied with dispatch instructions as MRU**. Any claims not filed within such period shall be deemed waived.” (Emphasis supplied.)

30. The claims were filed well within one (1) year from the time Complainants complied with the dispatch instructions as MRU in June 2016.

31. Assuming arguendo that the period provided in the WESM Manual 8.0 should be strictly complied with, the Respondents are deemed to have approved Complainants' claim for failure to act on the same within fourteen (14) working days from receipt of Complainants' complete documents.
32. Section 9.3.2 of the WESM Manual 8.0 reads in part:
- The affected Trading Participant will submit to the Market Operator a claim for additional compensation with supporting documents justifying the requested additional compensation. The claim for additional compensation shall be filed within one (1) year from the time the affected Trading Participant complied with the dispatch instructions as MRU. Any claims not filed within such period shall be deemed waived.
- The Market Operator shall inform the requesting Trading Participant of the **approval or disapproval of the claim within fourteen (14) working days from receipt of the complete documents** from the Trading Participant. **Any claim not decided within fourteen (14) working days shall be deemed approved** and shall be allocated and billed immediately in the succeeding billing period. (emphasis supplied)
33. Complainants filed the claims for additional compensation for the undeclared MRUs as early as March 2017, which is within one (1) year from the time Complainants complied with the dispatch instructions as MRU in June 2016.
34. While Complainants complied with the 1-year period to file claims for additional compensation, Respondents failed to inform Complainants on the approval or disapproval of the claims within fourteen (14) working days from receipt of the complete documents from Complainants.
35. It was only in an email dated July 10, 2017, or after four (4) months, that Respondent PEMC, as represented by Mr. Edward I. Olmedo sent a letter informing Complainants that PEMC did not know how to go forward with the issue of the undeclared MRUs. This is way beyond the 14-day requirement set by WESM Manual 8.0.
36. Rule 9.3.2 of the WESM Manual 8.0 cited above clearly states that any claim for additional compensation not decided upon within fourteen (14) working days shall be deemed approved, and shall be allocated and billed immediately in the succeeding billing period. Hence, Complainants are entitled to the claims for additional compensation.

PRAYER

WHEREFORE, it is respectfully prayed that this Honorable Commission rule that:

1. Complainants are entitled to receive payment for the Undeclared MRUs from the Respondents covering the period between June 2016 to July 2017 amounting to Php13,296,076.05; and
2. Respondents should pay Complainants the amount corresponding to the Undeclared MRUs.

Complainants pray for such other just and equitable relief.

In the *Order* dated 27 February 2020, the Commission has set the instant case for the determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on 02 April 2020 at the ERC Hearing Room, 15th Floor, Pacific Center Building, San Miguel Avenue, Pasig City.

However, due to the declaration of the entire Luzon as covered by the Community Quarantine where a strict work from home arrangement is being implemented in the Executive Branch², all hearings during the said period have been cancelled.

In view of the foregoing, the Commission cancelled the hearing scheduled on 02 April 2020 pursuant to the *Order* dated 27 February 2020.

On 18 May 2020, SIPC and SPC submitted *via* electronic mail their *Manifestation and Motion for Resetting of Hearing* wherein they prayed for issuance of a new *Notice of Public Hearing*.

On 25 June 2020, SIPC and SPC filed their *Manifestation and Motion (to Rule on the Manifestation and Motion for Resetting for Hearing dated 18 May 2020)*.

Relative thereto, the Commission, in its *Order* dated 03 July 2020, has set the instant *Complaint* for the determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on 10

² Memorandum from the Executive Secretary dated 16 March 2020 (Community Quarantine Over the Entire Luzon).

September 2020 at the ERC Hearing Room, 15th Floor, Pacific Center Building, San Miguel Avenue, Pasig City.

However, due to the continuous threat to public health and safety brought about by the coronavirus disease 2019 (COVID-19), the Commission deemed it necessary to conduct all previously scheduled physical hearings through virtual hearings.

IN VIEW OF THE FOREGOING, the Commission hereby sets the instant *Complaint* for the determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on **10 September 2020 (Thursday) at ten thirty in the morning (10:30 A.M.)**, through a virtual hearing using the **Microsoft Teams** as the online platform for the conduct thereof.

Any interested stakeholder may submit its comments and/or clarifications at least one (1) calendar day prior to the scheduled virtual hearing, via electronic mail (e-mail) at records@erc.gov.ph and records.erc.gov.ph@gmail.com, copy furnish the Legal Service through legal.erc.gov.ph@gmail.com. The Commission shall give priority to the stakeholders who have duly submitted their respective comments and/or clarifications, to discuss the same and propound questions during the course of the expository presentation.

Moreover, all persons who have an interest in the subject matter of the instant case may become a party by filing with the Commission via e-mail at records@erc.gov.ph and records.erc.gov.ph@gmail.com, copy furnish the Legal Service through legal.erc.gov.ph@gmail.com, a verified Petition to Intervene at least five (5) calendar days prior to the date of the initial virtual 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, mailing address, and e-mail 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.

Likewise, all other persons who may want their views known to the Commission with respect to the subject matter of the case may

likewise file through e-mail at records@erc.gov.ph and records.erc.gov.ph@gmail.com, copy furnish the Legal Service through legal.erc.gov.ph@gmail.com, their Opposition or Comment thereon at least five (5) calendar days prior to the initial virtual hearing and 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, mailing address, and e-mail 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 *Complaint* may request from Complainants that they be furnished with the same, prior to the date of the initial hearing. Complainants are hereby directed to furnish all those making such request with copies of the *Complaint* and its attachments, through any of the available modes of service, upon their agreement, subject to the reimbursement of reasonable photocopying costs. Any such person may likewise examine the *Complaint* and other pertinent records filed with the Commission during the standard office hours. In the alternative, those persons who wish to have an electronic copy of the *Complaint* may request the Commission for the e-mail addresses of the Complainants by sending an e-mail to records@erc.gov.ph and records.erc.gov.ph@gmail.com, copy furnish the Legal Service through legal.erc.gov.ph@gmail.com. Nonetheless, any person may also access the *Complaint* as posted by the Commission in its official website at www.erc.gov.ph.

Finally, all interested persons may be allowed to join the scheduled initial virtual hearing by providing the Commission, thru legal.virtualhearings.erc.gov.ph@gmail.com, with their respective e-mail addresses and indicating therein the case number of the instant *Complaint*. The Commission will send the access link/s to the aforementioned hearing platform within five (5) working days prior to the scheduled hearing.

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WITNESS, the Honorable Commissioners **ALEXIS M. LUMBATAN**, **CATHERINE P. MACEDA**, **FLORESINDA BALDO-DIGAL**, and **MARKO ROMEO L. FUENTES**, Energy Regulatory Commission, this 17th day of August 2020 in Pasig City.

FOR AND BY AUTHORITY
OF THE COMMISSION:


AGNES VST DEVANADERA
Chairperson and CEO