THIRTEENTH CONGRESS OF THE REPUBLIC)
OF THE PHILIPPINES)
First Regular Session)

SENATE
P. S. R. No. 176

Introduced by Senator Miriam Defensor Santiago

RESOLUTION

REQUESTING THE OMBUDSMAN TO CONDUCT PRELIMINARY INVESTIGATION ON THE ALLEGED CRIMINAL ACTIVITIES BY SOME PARTIES TO CERTAIN INDEPENDENT POWER PRODUCER (IPP) CONTRACTS, WHICH WERE IDENTIFIED BY THE DEPARTMENT OF FINANCE INTER-AGENCY COMMITTEE AS HAVING LEGAL AND FINANCIAL ISSUES, FOR THE PURPOSE OF FILING, IF PROVEN APPROPRIATE, THE NECESSARY CHARGES AGAINST THE PARTIES TO THE QUESTIONABLE IPP CONTRACTS

WHEREAS, Presidential Decree No. 40 of 1972 provided for the National Power Corporation (NAPOCOR) to be the monopoly company for generation and transmission of electric power in the Philippines;

WHEREAS, Executive Order No. 215 of 1987, which amended PD No. 40, allowed the private sector to participate in power generation development and investment as Independent Power Producer (IPP);

WHEREAS, Energy Regulation No.1-95 mandates NAPOCOR/Utilities to purchase power at "Avoided Cost", which is defined as "the least incremental cost that an electric utility would incur towards meeting its anticipated power demand, if such utility does not buy from a private sector generating facility";

WHEREAS, ER No. 1-95 also states that: "Any proposed electric generating facility should be able to demonstrate its potential for providing net foreign exchange savings to the country by virtue of:

a) Generating electric energy more efficiently or cheaper than otherwise be generated by existing or programmed generation facilities under NAPOCOR's PDP and/or other utilities;

b) Using indigenous and/or renewable energy sources;

c) Accessing lower costs of capital, cheaper plant investment, and/or locally manufactured equipment";

WHEREAS, the NAPOCOR designed and implemented the Philippine IPP Program with the following underlying principles and premises:

a) The IPP Program will address the public financing constraints of the government thereby reducing its exposure in the provision of power infrastructure;

b) The entry of IPPs could introduce competition, which can result in greatly improved operational efficiencies and attain security and stability of supply;

c) The global awareness of IPPs as a model of power generation project in developing countries; and

d) The Build-Operate-Transfer scheme of IPPs, implemented through a competitive process, can lead to reduced costs, increased access to best-practice technology and risk-sharing with private sector;

WHEREAS, the Philippine IPP Program did not achieve its objectives and its implementation; it has resulted in ballooning debts for the NAPOCOR and high rates for the consumers of electricity;

WHEREAS, Republic Act No. 9136, Sec. 68 provides that: "An inter-agency committee chaired by the Secretary of Finance, with the Secretary of Justice and the Director General of the National Economic and Development Authority as members thereof, is hereby created upon the effectivity of this Act. The Committee shall immediately undertake a thorough review of all IPP contracts. In cases where such contracts are found to have provisions which are grossly disadvantageous, or onerous to the Government, the Committee shall cause the appropriate agency to file the action under the arbitration clauses provided in said contracts or initiate any appropriate action under Philippine laws. The PSALM Corporation shall diligently seek to reduce stranded costs, if any";

WHEREAS, Administrative Order No. 14, Series of 2001, organized the Committee to perform the following functions:

a) Undertake a thorough review of all IPP contracts;

b) In cases where such contracts are found to contain provisions which are grossly disadvantageous, or onerous to the Government, cause the appropriate government agency to file the action under the arbitration clauses provided in said contracts, or initiate any appropriate action under Philippine laws;

c) Submit reports to the Office of the President on the results of the review and any action taken thereon, if any, within six months from the effectivity of this Order, and every six months thereafter until the functions of the Committee are fully discharged; and

d) Perform such other functions as may be necessary and appropriate to achieve its objectives;

WHEREAS, the Department of Finance (DFA) Inter-Agency Committee (IAC) has reviewed the thirty-five (35) NPC contracts and their related project documents turned over by NPC to the Committee representing the total "active" contracts that NPC has entered into with different IPPs from 1988 up to 1999;

WHEREAS, the Final Report of the IAC on the review of the IPP contracts dated 5 July 2002 included Legal, Financial and Economic, Technical/Operational, and Buyback/Dispute Resolution;

WHEREAS, the results of the Legal Review of IPP Contracts reveal that "the allocation of project risks between government and private project proponents has been generally favorable to the developers/investors. With the exception of construction risks and aspects of operational efficiency and availability, the government has assumed substantial risks and has provided considerable credit support in the development and implementation of power infrastructure privatization projects";

WHEREAS, the results of the Financial Review of IPP Contracts reveal that seventeen (17) IPPs have base rates that are higher than NPC cost "with the greatest deviations (within the range 73% - 84%) are exhibited by hydro plants (Bakun, San Roque, Casecnan, and Ambuklao).

Comparing the percentage increase from the base case for a particular year of operation, which gives an indication of the reasonableness of the escalation/inflation factors as stipulated in the contracts, the IPPs which exhibited high percentage increases are the folowing:

a) Naga Thermal (CTPP I), Sual Coal and Zamboanga Diesel ranging from 73% to 90% percentage increases in the 3rd year of operation which is much greater than the 32% average increase for all the plants; and

b) Naga Thermal (CTPP I) (146%), Makban Geothermal (102%), and Leyte B Geothermal (90%) percentage increases in the 5th year of operation;

WHEREAS, the historical dispatch of the IPP plants that are substantially lower than the "take-or-pay" provisions of the IPP contracts reveals that "the total Net Present Value of NPC net loss due to low dispatch of IPP plants covering the period 1994-2001 is P 77,875.91 million. The contribution of IPP plants contracted out during power crisis, in terms of net loss, amounted to P 30,468 million or an equivalent of 39% of the total net loss to NPC while the IPP plants contracted out during the power restoration period contributed P 47,407 million in total net loss. The latter is equivalent to 61% of the total net loss to NPC";

WHEREAS, the results of the Technical Review of IPP Contracts reveal the following:

a) *A number of tests show that IPPs failed to meet their guaranteed capacity;*

b) The conduct of Heat Rate Test is not uniform for all IPP power plants. Some IPPs like Malaya Thermal Plants are subjected only to one heat rate;

c) The allowable downtime of the IPP plants providing for the length of time for scheduled maintenance "differs from plant to plant even with the same plant type." Also, Some IPPs have "carry over" provisions of unutilized downtime to the next or succeeding contract years. Some IPP plants increased their downtime over time; and

d) The recorded forced (unscheduled) outages of some IPPs are technically high although a number of them fall within the acceptable limit of not more than 5% of the time;

WHEREAS, the results of the Review of IPP Contracts by the IAC identified legal, and financial issues for the following IPP projects:

a) 100 MW Binga Hydroelectric Power Plant (A16)

The IPP basic rate of P1.2837/kWh is higher than the P0.6051 net generation cost of a similar NPC hydro plant in Luzon at contract signing in 1993 by about P0.6327/kWh.

NPC and BHEPI have claims and counter claims involving delay in operation, differing interpretation of computation for energy fees, alleged defective meters and labor and third party claims.

b) 63 MW Cavite EPZA Diesel Power Plant (A17)

The IPP basic rate of P0.8700/kWh is higher than the P0.4015 net generation cost of a similar NPC oil-based plant in Luzon at contract signing in 1993 by about P0.4685/kWh.

MCI availed of NPC's One Day Power Sales (ODPS) Program in April 2000 through a Memorandum of Agreement (MOA). The MOAS/ODPS contract impliedly amended the NPC-MCA ECA by redefining the power supply and delivery obligations of NPC and MCI in the Energy Conversion Agreement. It also adjusted the Net Contracted Capacity and guaranteed NPC's full availability fees to MCI regardless of inability to meet minimum energy requirements. The ODPS market targeted customers with either self-generating units or those who purchase their power requirements from their own IPPs.

c) 1,000 MW Sual Coal-Fired Thermal Power Plant (A22)

The IPP basic rate of P1.3820/kWh is higher than the P0.8364 net generation cost of a similar NPC coal-fired plant in Luzon at contract signing in 1994 by about P0.5456/kWh.

There is a high level of contracted capacity off take. NPC is able to dispatch barely 60% of purchased energy. High escalation cost, front-loaded fees and high rate of return to IPP question the reasonableness of the cost structure of the IPP contract.

Because the plants constructed were of higher capacity than originally designed, IPP is selling the extra MW thru sale sharing scheme with NPC.

d) 140 MW Casecnan Multipurpose Project and Manablon Powerhouse (A25)

The IPP basic rate of P4.2362/kWh is higher than the P0.8673 generation cost of a similar NPC hydro plant in Luzon during Casecnan's contract signing in 1995. The difference is about P3.3689/kWh.

Casecnan's cost (levelized, Php/kWh) is the highest among IPP contracts which may be attributed to: (1) Short payback period; and (2) subsidizing the irrigation component of the project.

The NIA-Casecnan contract places the minimum water off-take of Casecnan at 801.9 million cubic meters per year. NIA has to pay Casecnan this much water whether or not the Casecan and Denip Rivers can provide such amount.

On NIA-Casecnan contract, Casecnan's complex tax structure results in very high tax payable for NIA.

e) 345 MW San Roque Multipurpose Hydroelectric Power Project (A30)

The IPP basic rate of P6.0773/kWh is higher than the P1.1221 net generation cost of a similar NPC hydro plant in Luzon by about P4.9552.

San Roque has one of the highest levelized cost among IPP contracts despite NG's full performance undertaking in the power component and NPC's direct risk in the non-power component. San Roque has energy rates resulting in stranded costs for NPC that buying out the contract pending its completion might be cheaper.

WHEREAS, a supplement report by the DOF (IAC) identified five (5) IPP contracts which contained questionable financial and legal issues; the contracts and their signatories are the following:

IPP Plant Name	NPC Signatory	IPP Signatories
1) Binga Hydroelectric Plant	Francisco L. Viray President	• Prof. Yu Zhi An President, China Chang Jiang Energy Corp.
2) Cavite EPZA Diesel Plant	Francisco L. Viray President	• Rolando M. Zosa President, Magellan Cogeneration Inc.
3) Sual Coal-Fired Thermal Plant	Francisco L. Viray President	• Gordon Wu/Stewart WG Eliot CEPA, Pangasinan Electric Ltd.
4) Casecnan Multipurpose Project	Guido Alfredo A. Delgado President	• Apolonio V. Bautista Administrator, NIA

5) San Roque Multipurpose Project	Guido Alfredo A. Delgado President	• Haruhiko Saito Director, Marubeni Corporation • Bruce Wrobel Sithe Philippines Holding Inc. • Premchai Karnasuta President, Italian-Thai Development Co. Ltd • Michaela Cella San Roque Power Corporation

WHEREAS, the signatories of these contracts, which have "financial and legal issues," should explain themselves in a preliminary investigation;

WHEREFORE, be it resolved, as it is hereby resolved by the Philippine Senate, that the Ombudsman conduct preliminary investigation on the alleged criminal activities by some parties to these IPP Contracts, which were identified by the DOF (IAC) as having "legal and financial issues," for the purpose of filing, if proven appropriate, the necessary charges against the parties to these questionable IPP contracts.

Adopted,

MIRIAM DEFENSOR SANTIAGO

/rdm/rpc