



# **DISPUTE RESOLUTION ADMINISTRATOR 2023 ANNUAL REPORT and 2024 WORK PLAN**

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**January to December 2023**

**JANUARY 2024**

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## **I. 2023 ACCOMPLISHMENTS**

The Dispute Resolution Administrator (DRA) submits this Annual Report covering the activities undertaken and accomplished by the DRA for the year 2023.

### **A. Facilitation of WESM Dispute**

In July 2023, a dispute was filed which saw the application of the WESM Dispute Resolution Framework. Initially, the DRA focused its efforts to guide the parties in the implementation of their respective Dispute Management Protocol (DMP).

Pursuant to the WESM Rules and the WESM Dispute Resolution Manual, the DRA facilitated the exchange of communication between the parties, coordinated with the parties' respective DMP Focal Persons and provided guidance in the negotiation stage between the parties. The DRA likewise resolved queries on the WESM DMP, the procedural aspects and other issues for the parties to consider before proceeding with arbitration in accordance with the Rules.

As the dispute progressed to the mediation and arbitration stages towards December 2024, the DRA continued to focus on its mandate to facilitate the dispute processes effectively. After requiring the parties to submit their respective pleadings and the names of their nominated arbitrators, the DRA commenced the process of appointing the arbitrators who will handle the dispute.

Following the appointment process under the Rules, the DRA verified the statements of impartiality of the nominated arbitrators by requiring them to submit a disclosure as to any potential conflict with the parties and / or the subject matter of the dispute. The DRA also studied their qualifications and expertise to ensure their ability to handle the dispute. Finally, the DRA determined whether they are in good standing or if they complied with the requirements as stated in the Guidelines for the Mandatory Continuing Professional Education (MCPE) including their attendance to the seminars conducted for the past years.

### **B. DRA Proposals for Amendments to the WESM Rules and Dispute Resolution Manual**

As background, the Department of Energy (DOE) on 31 March 2022, directed the PEM Board to conduct further study on the DRA's proposed amendments to the WESM Dispute Resolution Manual. Among others, the DOE required the DRA to revisit the scope of the proposal to ensure that the type of disputes within the Retail Market be limited within the scope of the Retail Rules so as not to encroach on the jurisdiction of the ERC over disputes involving retail supply contracts (i.e. pricing, contract period and early / pre-termination).

On 20 June 2022, the DOE issued DOE Department Circular No. 2022-06-0021 partially approving the DRA's proposed amendments to the WESM Rules and the Dispute Resolution Manual. The approved amendments are as follows:

### **1. Inclusion of Dispute Resolution between Supplier and Customer under the Retail Rules and the use of the Formal Offer Arbitration or Pendulum Arbitration**

The proposal introduces a variant mode of arbitration that is specific to the types of disputes that are contemplated within the "Rules for the Integration of Retail Competition in the Wholesale Electricity Spot Market," otherwise known as the "Retail Rules." This is consistent with the goal to integrate retail competition into the WESM and apply the provisions of the WESM Rules to effectively govern the enforcement and dispute resolution under the Retail Rules.

The variant mode of arbitration proposed and approved by the DOE is the *Pendulum or Formal Offer Arbitration*. The procedures are found in Annex H of the Dispute Resolution Manual, titled, "*Pendulum Arbitration / Formal Offer Arbitration Supplementary Rules*" and were patterned after that of USA's International Center for Dispute Resolution or ICDR]. The process involves simultaneous exchange of settlement offers by the parties, indicating a monetary amount that includes all breaches, controversies and claims arising out of or relating to the contract or transaction between the parties, including without limitation all affirmative claims, defenses, setoffs/offsets, counterclaims and/or crossclaims that are at issue in the arbitration. The final award of the arbitral tribunal is rendered by choosing only one of the final offers submitted by the parties plus any interest, costs, or fees to be awarded pursuant to the governing arbitration rules, applicable law, or the agreement of the parties.

The Rules governing this variant mode of arbitration also provide for an opt-in and opt-out clause meaning that the parties who have filed a dispute covered under the conventional mode of arbitration may choose to use this variant mode of arbitration (opt-in) and those that are bound by the Retail Rules may also choose to use the conventional mode (opt-out).

### **2. Guidelines for Virtual Hearings**

This amendment seeks to streamline the procedures for the conduct of WESM Dispute Resolution proceedings and provide guidelines for virtual hearings and conferences during arbitration. The guidelines are being made available with reference to any dealings during a circumstance that prevents physical meetings between the participants and provide procedural measures that can mitigate the effect of delays to the arbitral process.

### 3. Revision of the Phrase “PEM Board and its Working Groups” to “Governance Arm” as possible impleadable party to a dispute

The original proposal sought to remove the PEM Board and all the WESM Governance Committees from the list enumerating the parties to a WESM dispute under Clause 7.3.1.1 of the WESM Rules. This is under the principle that the actions of the PEM Board and the WESM Governance Committees are mostly, if not all, in performance of their ERC-delegated regulatory or "police" powers therefore, disputes filed against them would question or undermine the enforcement of the regulatory policies of the market.

After deliberation by the RCC and as adopted by the PEM Board and subsequently approved by the DOE, it was resolved that instead of removing the PEM Board and its Working Groups from the list of impleadable parties to a dispute, the same should be reworded to the “*Governance Arm*” to refer to the corporation or the proper entity that has juridical capacity and fitness to be the subject of legal actions or disputes as contemplated under the Rules. This is also to be consistent with the other juridical entities included in the list (i.e. the Market Operator, System Operator and WESM Members).

On 21 June 2023, the DRA submitted its Memorandum dated 16 June 2023 to the Rules Change Committee (RCC), in compliance with the directive of the Department of Energy (DOE) to conduct further study on the scope of disputes covered under the Retail Rules.

In summary, the DRA explained that there are two types of breaches/violations that may trigger disputes the resolution of which may be under either the jurisdiction of the WESM Dispute Resolution Framework (i.e., if “inter-partes” commercial disputes), or under the jurisdiction of regulatory bodies such as the ERC or the DOE (i.e., if disputes on violations of regulatory policies). In the same way, disputes under the Retail Rules may have a commercial aspect to it and may therefore fall within the coverage of an arbitrable dispute under the WESM Dispute Resolution Framework.

With this, the DRA suggested that in clarifying the scope of disputes under the Retail Rules, the proposal under Section 7.3 of the WESM Rules should be reworded as follows:

*Disputes Between Supplier and Customer under the Retail Rules:*

*Unless the parties agree otherwise, resolution of the following **illustrative cases** involving disputes on:*

- (i) The commercial aspect of a Retail Supply Contract that involves fees for its early / pre-termination; which does not include the interest of the public;**
- (ii) The commercial aspect of a Retail Supply Contract involving price, but which does not include the interest of the public; and**
- (iii) The commercial aspect of a Retail Supply Contract involving its period, within the contemplation of the Retail Rules, which does not include the interest of the public;**

The foregoing proposal as reworded, limits the possible scope of Dispute Resolution under the Retail Rules, as it confines the arbitrable disputes to those which may be considered commercial in nature. It also confirms the nature of disputes that fall within the original and exclusive jurisdiction of the ERC, in that it provides that disputes involving “*the interest of the public*” are excluded from the coverage of the WESM Dispute Resolution Framework. By excluding these disputes, that aspect of the WESM Rules that prohibits/ penalizes violations of regulatory policies are clearly delineated to form part of the original and exclusive jurisdiction of the ERC.

The RCC submitted the revised proposal to the PEM Board and on 31 July 2023, the PEM Board submitted the same to the DOE for approval. The DOE solicited comments and recommendations from interested parties and conducted public consultations on 23 August 2023 (for Luzon Stakeholders), 31 August 2023 (for Mindanao Stakeholders) and 06 September 2023 (for Visayas Stakeholders). As of December 2023, the DOE has yet to issue the Circular approving the revised proposal for amendments by the DRA.

### **C. Appointment of Emergency Arbitrators for 2023**

In accordance with the WESM Dispute Resolution Manual<sup>1</sup> (DRMM), the DRA has appointed Emergency Arbitrators for each month for the year 2023.

The Emergency Arbitrators come from the pool of WESM-accredited Arbitrators and were assigned as stand-by emergency arbitrators for each month. This was done to present an alternative but temporary remedy to parties who seek urgent relief and could no longer await the constitution of the arbitral tribunal. They are tasked to handle the disputes and / or resolve the urgent relief prayed for during the specific month they were assigned to.

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<sup>1</sup> ANNEX C. (WESM Dispute Resolution Manual) EMERGENCY ARBITRATORS; Article. 2 Appointment of the Emergency Arbitrator

#### **D. Updated List of Dispute Management Protocol Focal Persons and Alternates**

Pursuant to Section 8.2 of the WESM Dispute Resolution Manual, the DRA requested the Market Participants to submit or update their designated Dispute Management Protocol (DMP) Focal Persons and Alternates who will serve as the first point of contact for the notification of WESM-related disputes.

An updated list as of December 2023 of the DMP Focal Persons and Alternates together with their respective contact information was published in the market information website.

#### **E. Raised Awareness on the WESM and Renewable Energy Market (REM) Dispute Resolution Framework by participating in Trainings and Stakeholder Activities with WESM and REM Members**

##### *(i) Trainings for Dispute Management Focal Persons*

The DRA conducted its training for the WESM and REM Dispute Management Protocol (DMP) Focal Persons last 27 July 2023. The training intended to discuss the WESM Dispute Resolution framework and process with the DMP Focal Persons to facilitate compliance with the WESM and REM Dispute Resolution Manual.

The topics included updates on WESM Governance particularly on the Governance Structure and Market Developments, the WESM Penalty Manual, the WESM Dispute Resolution Framework and the Renewable Energy Market (REM) Dispute Resolution Framework. The DRA likewise discussed the procedures and basic principles surrounding the WESM and REM Dispute Management Protocol.

##### *(ii) Renewable Energy Market (REM) Governance Training*

On 17 August 2023, the DRA participated in the Renewable Energy Market (REM) Governance Training given to all WESM and REM Members. This training includes a review of REM fundamentals and governance structure, the REM Rules Change Process, REM Investigation Procedures and Penalty and for the DRA's part, a review of the REM Dispute Resolution Process, including the procedures during negotiation and mediation.

## **F. Continuous Professional Education of the WESM Accredited Mediators and Arbitrators**

On 27 September 2023, the DRA facilitated the conduct of the second Mandatory Continuing Professional Education for the Accredited WESM and Renewable Energy Market (REM) Mediators and Arbitrators. The course intends to enhance the competence of the WESM and REM Mediators and Arbitrators by upgrading and updating their skills and knowledge of the operations and governance of the WESM. This course included presentations on the important developments in the market specifically on WESM operations and governance as well as the rules governing the WESM and REM Dispute Resolution Process.

All WESM-accredited Mediators and Arbitrators are required to complete at least two (2) hours of continuing professional education activities every two (2) years pursuant to the *Guidelines Addressing Continuing Professional Education Requirements of WESM Accredited Mediators and Arbitrators* dated 01 June 2022. The seminar that was conducted last 27 September 2023 is the second of the two-part series of the initial compliance period that covers calendar years 2022 to 2023.

## **II. ONGOING ACTIVITIES**

- A. Monitoring of WESM Dispute** - Under the careful supervision of the DRA and earnest efforts by the appointed arbitrators, they continue to ensure the efficient conduct of the proceedings and the resolution of the dispute at the soonest possible time within the period prescribed under the Rules.
- B. Monitoring of Rules Change Proposal** - The DRA is awaiting the approval of the DOE on the revisions made in the DRA's proposal relative to the types of disputes covered under the Retail Rules.

## **III. DRA WORK PLAN**

**Annex A** provides details of the DRA's program of activities for 2024 consistent with PEMC's Corporate Strategic Plan for 2023 to 2025 which was approved by the PEM Board on 25 January 2023.

## **IV. THE DISPUTE RESOLUTION ADMINISTRATOR**

The Dispute Resolution Administrator is tasked to facilitate the resolution of disputes between or among the parties in accordance with the dispute resolution process approved for the Wholesale Electricity Spot Market (WESM) and the Retail Competition and Open Access (RCOA). Alternative Dispute Resolution is a process which follows the stages of negotiation, mediation and arbitration.

Atty. Teodoro Kalaw IV, C.Arb. was appointed by the PEM Board on 02 November 2022 as the Dispute Resolution Administrator for the WESM.

## **V. RESPONSIBILITIES**

The main role and responsibilities of the DRA as set out in the WESM Dispute Resolution Manual, consistent with the requirements of the WESM and the Retail Market, are as follows:

- i. Administer and ensure the effective implementation and operation of the dispute resolution provisions of the WESM Dispute Resolution Manual;
- ii. Determine preliminarily if a dispute is one which falls under the dispute resolution process of the WESM and the Retail Market;
- iii. Draft and issue standard forms to help expedite the resolution of disputes;
- iv. Facilitate the accreditation process of mediators and arbitrations;
- v. Update the list of Accredited Mediators and Arbitrators published in the market information website; and
- vi. Maintain data, reports and other information regarding the development and results of the disputes referred to the DRA.

### **Submitted by:**



Note: This signature has been redacted pursuant to PEMC's Documented Information Management Policy. The full version of the file is available with the DRA Secretariat of PEMC.

**Atty. Teodoro Kalaw IV, C.Arb.**  
Dispute Resolution Administrator