CRP REQUEST NO. 2011/1 – REQUEST ON THE VISAYAS BASE-LOAD POWER DEVELOPMENT PROJECT (LOAN NO. 2612-PHI)

Terms of Reference for Compliance Review

I. Introduction

1. These Terms of Reference (TOR) have been prepared by the Compliance Review Panel (CRP) for undertaking a compliance review of the Visayas Base-load Power Development Project pursuant to a request for compliance review (the Request) (Appendix 1)

2. On 20 June 2011, the CRP determined the Request eligible, and recommended to the ADB Board of Directors (Board) to authorize a compliance review. On 11 July 2011, the Board authorized the compliance review.

3. Under paragraph 122 of the Accountability Mechanism policy¹ and paragraph 37 of the CRP Operating Procedures, these TOR, which cover the scope of review, methodology and timeframe, are submitted for clearance to the Board Compliance Review Committee (BCRC). Following clearance by BCRC, the CRP will provide the TOR to the Board and all stakeholders, and post them on the CRP website within 14 days from receipt of Board authorization of a compliance review.

II. The Request for Compliance Review

4. Brief particulars of the Request and the Project are summarized below:

<table>
<thead>
<tr>
<th>Project Name</th>
<th>Visayas Base-Load Power Development Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Philippines</td>
</tr>
<tr>
<td>Borrower</td>
<td>KEPCO SPC Power Corporation (KSPC)</td>
</tr>
<tr>
<td>Requesting parties</td>
<td>The requesters, who are residents of Naga City, authorized Mr. Jose Aaron Pedrosa of Freedom from Debt Coalition Cebu Chapter (FDCCC) and Engr. Vicente Obando, a resident of Naga City, to file the complaint on their behalf.</td>
</tr>
<tr>
<td>Allegations</td>
<td>Non-compliance with ADB policies and procedures including Safeguard Policy Statement, Public Communication Policy, policy on clean energy, proper and participative public consultation, and conduct of the Environmental Impact Assessment</td>
</tr>
<tr>
<td>ADB operations department responsible</td>
<td>Private Sector Operations Department</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Project categorization</strong></th>
<th>Category A following the ADB Environment Policy (2002)²</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Project Description</strong></td>
<td>The ADB loan is supporting the construction of a 200 MW power plant in Naga City. Construction of the plant has been substantially completed, and the plant was commissioned on 31 May 2011 and has commenced commercial operations.</td>
</tr>
<tr>
<td><strong>Project Status</strong></td>
<td>The ADB loan for the Project was approved by the Board on 11 December 2009; became effective on 4 March 2010 and is scheduled to be financially closed on 31 May 2012. Approximately 87% of the ADB loan has been disbursed.</td>
</tr>
<tr>
<td><strong>Project Implementation Arrangement</strong></td>
<td>The borrower and implementer of the project is a joint-venture company, KSPC. KSPC is owned 60% by KPHI Philippines, a wholly owned subsidiary of the Korea Electric Power Corporation (KEPCO), and 40% by SPC Power Corporation (SPC), a Philippine company.</td>
</tr>
<tr>
<td><strong>CRP</strong></td>
<td>Mr. Rusdian Lubis, CRP Chair is taking primary responsibility for the compliance review. The CRP will be supported by the Office of the Compliance Review Panel.</td>
</tr>
</tbody>
</table>
| **Contact person:**       | Mr. Rusdian Lubis, Chair, CRP  
Mr. Geoffrey R. Crooks, Officer-in-Charge, OCRP  
Email: crp@adb.org   Tel: (02) 632 4149 |

### III. Purpose and Scope of Compliance Review

5. The purpose of the CRP is to investigate alleged violations by ADB of its operational policies and procedures in the Project that directly and materially harm project affected people in the course of the formulation, processing, or implementation of the Project. The purpose of the compliance review is to focus on ADB's accountability in determining whether ADB has or has not complied with its operational policies and procedures in connection with the Project, and not to investigate the borrower or the executing agency. The conduct of these other parties will be considered only to the extent directly relevant to an assessment of ADB's compliance with its operational policies and procedures. After carrying out a compliance review, CRP will issue to the Board its findings and recommendations, including recommendations, if appropriate, for any remedial changes to be implemented by Management in the scope or implementation of the Project.

### IV. Allegations of Non-compliance with ADB Policies

6. The requesters claim that ADB failed to follow its policies and procedures in regards to the Safeguard Policy Statement, Public Communication Policy, policy on clean energy, proper and participative public consultation, and conduct of the Environmental Impact Assessment and its subsequent disclosure including details on coal ash disposal.

---

7. Based on the allegations by the requesters of non-compliance with specific provisions of ADB policies, and CRP's findings in its eligibility review of the Request, the CRP will consider ADB's operational policies and procedures that were in effect at the time of Board approval, and any staff instructions relating to the formulation, processing, or management of the Project.

V. Conduct of Compliance Review and Methodology

8. The CRP will carry out its work expeditiously, transparently and in a manner to ensure that there is engagement with Management and staff, the requesters, project-affected people, the Government of the Philippines, the Cebu Provincial Government and its implementing agencies, and the Board, including the Executive Director representing the Philippines.

9. The compliance review will include the following:

(i) review of ADB files and other documents related to the Project;
(ii) conduct of site visits with the prior consent of KSPC;
(iii) consultation with all concerned stakeholders, including interviews with:
   - ADB Management, staff and consultants,
   - staff from the Office of the Special Project facilitator (OSPF) on its engagement at the consultation phase of the Accountability Mechanism,
   - requesters, project-affected people,
   - officials from the KSPC,
   - officials from the Cebu Provincial Government,
   - the Board, including the Executive Director representing the Philippines,
(iv) use of consultants as appropriate, to assist the CRP in carrying out its work; and
(v) apply any other review methods that the CRP considers appropriate in complying with its mandate.

10. The CRP will exercise discretion and maintain a low profile in conducting the compliance review. The CRP will not give any media interviews at any stage of the compliance review. CRP members will be subject to ADB's confidentiality and disclosure of information policy, including those provisions aimed at ensuring that confidential business information is not disclosed. Any material or information submitted to any CRP members or the OCRP on a confidential basis from any party will not be released to any other parties without the consent of the party that submitted it. Compliance review is not intended to provide judicial-type remedies and the CRP's findings and recommendations are not adjudicative. The Chair and members of the CRP will be subject to the CRP's protocols on conflicts of interest that mandates disclosure of all potential conflicts of interest so that the Chair (or CRP members if the Chair has a potential conflict of interest) can decide the appropriate course of action.

11. After conducting its compliance review, the CRP will issue a draft report of its findings and recommendations to the Management and the requesting parties for comments. Both the Management and the requesters will have 30 days to comment on the draft report. Within 14 days from receipt of the comments on the draft report, CRP will consider the comments and finalize the report, and issue its final report to the Board, including its findings and recommendations. If appropriate the recommendations may include any remedial actions for ADB Management to implement, in order to bring the Project back into compliance with ADB policies.
VI. Timeframe

12. The CRP will carry out the compliance review in accordance with the compliance review phases set out in the Policy on the Accountability Mechanism, the corresponding Operations Manual (OM Section L1/BP) and the CRP Operating Procedures.

<table>
<thead>
<tr>
<th>Step</th>
<th>Event</th>
<th>Timeframe</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>CRP Draft report. CRP will issue its draft report of its findings and recommendations to the Management and the Requesters for comments.</td>
<td>Not time-bound</td>
</tr>
<tr>
<td>7</td>
<td>Management’s and Requesting parties’ responses to CRP draft report</td>
<td>30 days from submission of the draft report</td>
</tr>
<tr>
<td>8</td>
<td>CRP’s Final Report. CRP finalizes its Report, based on comments received, and issues CRP’s final Report to the Board, with responses from Management and the Requesters as attachments.</td>
<td>14 days from receipt by CRP of comments from the Management and from the Requesters</td>
</tr>
<tr>
<td>9</td>
<td>Board Decision: Board consideration of the CRP’s Final Report</td>
<td>21 days from submission of CRP final report.</td>
</tr>
<tr>
<td></td>
<td>Release of the Board Decision and CRP’s Final Report</td>
<td></td>
</tr>
</tbody>
</table>

13. This timeline does not take into account any additional time requested for filing responses. If the CRP deems it necessary to alter the above timeframe, the CRP will first seek BCRC’s clearance.

/S/ Rusdian Lubis
Chair, Compliance Review Panel
28 July 2011

Appendix:

Request for Compliance Review
Confidentiality

In accordance with ADB's policy on the Accountability Mechanism, the Compliance Review Panel will conduct the compliance review as transparently as possible, and in line with ADB's public communications policy, including those provisions aimed at ensuring confidential business information is not disclosed. In the present case, a number of requesting parties have exercised their right under the policy on the Accountability Mechanism to request that their identities should remain confidential. Therefore, the Compliance Review Panel will not disclose the names of those parties, nor any material or information supplied on a confidential basis, without the consent of those requesting parties or the party that submitted the material or information.

May 23, 2011

MR BRUCE PURDUE
Secretary
Compliance Review Panel
Asian Development Bank
6 ADB Avenue, Mandaluyong City
1550 Philippines

Dear Mr Purdue,

We, residents of Barangay [redacted] in the attached document, are affected by the ADB-funded Visayas Base Load Project (Proj. No. 43906).

We authorize Mr. Jose Aaron Pedrosa Jr. of the Freedom from Debt Coalition-Cebu and Engr. Vic Obando, a resident of Brgy. Central Poblacion, City of Naga, Cebu to file this request for compliance review on our behalf.

We would like to request the Compliance Review Panel to help our community by investigating the Asian Development Bank's compliance with its own policies and procedures with regard to the Visayas Base Load Project (Proj No. 43906) that has given way to the construction, operation, and maintenance of a 200-Megawatt coal-fired power plant in Naga, Cebu, Philippines. We understand that the CRP must first determine whether our request is eligible.

We believe the Asian Development Bank (ADB) has failed to follow its policies and procedures, specifically with regard to its Safeguard Policy Statement, Public Communication Policy, policy on clean energy, proper and participative public consultation, and conduct of environmental impact assessment.

The ADB has failed to conduct consultation with affected people informing them about the project at the earliest stage of the project. Residents of Brgy. Colon, the project site, were not consulted or made part of the consultation on the development of the project. Likewise, the ADB failed to consult with local communities to ascertain the project's social acceptability.

The ADB also failed to disclose relevant project documents such as the Environmental Impact Assessment (EIA), preliminary project information were not disclosed to the local community prior the construction of the project and during its public scoping.

The ADB also failed to include in the EIA details on coal ash disposal. The present assigned coal ash dumpsite, a submerged land fronting the sea, will result in seepage/leakage of metallic elements¹ (such as arsenic, lead, mercury, and others) into the sea which are identified harmful elements to marine life resources². We direct your attention to relevant national laws which prohibits dumping of solid wastes on or near bodies of water.

¹ Dr. Romy Guijano’s findings, pp.11-12, Financing Naga’s Coal-fired Power Plant, FDC Cebu Study, September 2010
² Round Table Discussion (RTD) Narrative, Index III. Appendices, ibid. Also see attached Department of Health (DOH) Memorandum 2010-0184.
As a result of ADB's failure to comply with its policies and procedures, our communities are and will be suffering the following adverse impacts:

- Operation of the project will result in adverse impacts on the health of residents and nearby communities. Proliferation of skin and respiratory illness is expected among residents upon the operation of the coal power plant based on historical data. Specifically:
  - The circulating fluidized bed combustion (CFBC) technology that will be used in the operation of the project will not be able to prevent the emission of carbon monoxide, sulfur oxide, carbon dioxide and nitrogen oxide that are responsible for respiratory illness.
  - Transport, handling and disposal of coal containing metallic elements relative to the operation of the coal plant pose several health risks to communities. Based on experience, incidental spillage of coal by land and sea transport will expose residents and the environment to such hazardous and toxic elements.
  - The Balili property as coal ash disposal site will result in seepage of harmful elements which will lead to contamination of marine life resources for human consumption.

- The ADB assured that the project will make use of clean coal technology to lessen/mitigate the impact of the plant's operation on climate. However, the use of Circulating Fluidized Bed Combustion (CFBC) Technology will not prevent carbon dioxide among emissions which are responsible for global warming. CFBC plants produce about four (4) times more coal combustion waste per megawatt of electricity than conventional coal burning plants.

We would like ADB to remedy the harm in the following manner:

- Withholding of the remaining appropriated funds for the implementation and completion of the project up until resolution of the above-mentioned issues.
- The conduct of a comprehensive review of the EIA on the project with the active and meaningful participation by the public at large: local communities, civil society organizations, local government units and agencies, academe, and the legal community.
- The conduct of a comprehensive review of the EIA on the proposed/identified coal ash disposal site with the participation of the public at large pertaining to the above mentioned sectors.
- Disclosure of all project-related documents that will enable communities to participate meaningfully in the project development such as feasibility studies, socio-economic impact assessment and EIA, among others.
- Conduct of a due diligence by the ADB regarding the track record of Salcon Power Corporation (SPC) as a partner in the joint venture undertaking with the Korean Electric Power Corporation (KEPCO). A number of violation of environmental and labor laws have been attributed to SPC in its operation of the existing 100-MW coal-fired power plant.
- Should there be a determination of actual health hazards brought about by the project, the ADB should provide immediate relief in the form of compensatory...
Appendix: Request for Compliance Review

damages, considering the long-term effects of the project, to the affected communities.
Should there be a determination that the project was poorly designed and implemented (proven violation of national and local laws), ADB should withdraw its funding support from the project without prejudice to the compensation by way of damages caused by the project to the communities and the environment.

We have raised our concerns with ADB staff and with the Office of the Special Project Facilitator in the following manner:

- Meeting with Mary Abad by the NGO Forum on ADB on behalf of FDC-Cebu on 23 September 2009 requesting for a monitoring visit by the project officer regarding the identified site for coal ash disposal and indiscriminate dumping by SPC.

- Meeting with Mary Abad and her team with a number of residents regarding the issue on the identified coal ash disposal site, non-disclosure of project information, EIA, among others, lack of consultation in the beginning of the project, and other adverse impacts of the project.

- A letter sent to President Kuroda dated December 9, 2009 outlining the issues raised by the community regarding the project.

- Meeting with Ms. Kurumi Fukaya, ADB’s principal investment specialist, together with other specialists. Petitioners on the environmental case were present. The meeting was about the issue of coal ash disposal, specifically the identified Ballili property.

- We filed a case against the project before the OSFP on 28 February 2011 and received acknowledgment from the SPF on 1 March 2011.

- Our complaint was declared eligible by the OSFP on 17 March 2011.

- On 11 April 2011, the OSFP together with the CoRE Group Foundation (the mediator) met with the complainants. During the meeting, the mediators admitted not reading the documents that we have submitted supporting our complaint before the OSFP. Likewise, complainants have determined the bias of the mediator towards the local government unit and KEPCO for meeting them prior to the affected people.

- On 13 April 2011, complainants wrote to the OSFP expressing their decision to forego the mediation process.

We now request the CRP to investigate whether ADB has complied with its operational policies and procedures because we do not believe that the attempts to solve the problems have been purposeful and we believe that there is an issue of ADB’s non-compliance with its policies and procedures.

We are not satisfied with the outcome of the complaint procedure to date because the consultation phase, specifically the intended mediation process, is biased towards the ADB, KEPCO and the local government unit.

---

5 See annex
6 See attached minutes of the said meeting.
7 See attached letter to Mr. Robert May, OSFP.
Aside from the information provided above, there are other documents that may help the CRP in assessing our request for compliance review. We attach a list of those documents and their sources:

1. Financing Naga's Coal-fired power plants: FDC Cebu Study, September 2009
3. Notice to Sue
4. Department of Health (DOH) Memorandum
5. Philippine Earth Justice Center Petition Against Coal Ash Disposal
6. Temporary Environmental Protection Order Against Coal Ash Dumping
7. Letter to ADB President Haruhiko Kuroda
8. Letter to ADB President Kuroda from Bacolod Bishop Vicente Navarra
9. Minutes of the Meeting with Ms. Kurumi Fukaya
10. Letter to Mr. Robert May
11. Signatures gathered from Naga supporting our request.

Our names, addresses, and contact information are provided below.

Engr. Vicente Obando  
Address: 046, Brgy. Central Poblacion, Naga, Cebu  
Telephone Number: (032)489-8027  
Email Address: vicobando2@gmail.com

We, Mr Jose Aaron Pedrosa, Jr and Engr. Vicente Obando, represent the above-named requesters. Please contact us through the following:

Jose Aaron Pedrosa, Jr.  
Secretary General  
Freedom from Debt Coalition Cebu
Appendix: Request for Compliance Review

Address: 125 V. Rama Ave., Calamba, Cebu City
Telephone Number: (032)505-4382
Mobile number: 0906-371-4811
Email Address: aaronpedrosa@yahoo.com.ph

Eng. Vicente Obando
Address: 046, Brgy. Central Poblacion, Naga, Cebu
Telephone Number: (032)489-8027
Email Address: vicobando2@gmail.com