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MERGERS AND ACQUISITIONS OFFICE,

Complainant,

- versus -

JUST SOLAR CORPORATION, PURE ENERGY HOLDINGS CORPORATION, DYT EQUITIES CORPORATION, SPARC-SOLAR POWERED AGRI-RURAL COMMUNITIES CORPORATION, JJ SAMUEL A. SORIANO, MARIE HERMINIA C. SORIANO, RACQUEL F. RESURRECCION-TANYAG, MARIA MICHELLE MICHIKO C. SORIANO and JOSE MIGUEL LORENZO C. SORIANO,

Respondents.

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PCC Case No. M-2019-008
For: Violation of Section 17 of the Philippine Competition Act, and Rule 4, Section 3 (g) of the Rules and Regulations to Implement Republic Act No. 10667

COMMISSION DECISION NO. 05-M-008/2021

THE CASE

This case involves a complaint for violation of Section 17[1] of Republic Act No. 10667 or the Philippine Competition Act[2] ("PCA") and Rule 4, Section 3(g)[3] of the Rules and Regulations to Implement the Provisions of Republic Act No. 10667 ("PCA IRR") for failure to comply with the compulsory notification requirement in the acquisition of shares of stock.

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1 SEC. 17. *Compulsory Notification.* – Parties to the merger or acquisition agreement referred to in the preceding section wherein the value of the transaction exceeds one billion pesos (₱1,000,000,000.00) are prohibited from consummating their agreement until thirty (30) days after providing notification to the Commission in the form and containing the information specified in the regulations issued by the Commission: *Provided,* That the Commission shall promulgate other criteria, such as increased market share in the relevant market in excess of minimum thresholds, that may be applied specifically to a sector, or across some or all sectors, in determining whether parties to a merger or acquisition shall notify the Commission under this Chapter.

An agreement consummated in violation of this requirement to notify the Commission shall be considered void and subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction. xxx

2 Enacted on 21 July 2015.

3 Rule 4, Section 3(g). A transaction that meets the thresholds and does not comply with the notification requirements and waiting periods set out in Section 5 shall be considered void and will subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction.

THE PARTIES

The Complaint dated 25 October 2019 was filed by the Mergers and Acquisitions Office ("the MAO"), which is the office in the Philippine Competition Commission ("PCC") tasked, among others, to monitor, review or investigate, and evaluate mergers and acquisitions for possible violations of Section 17 of the PCA.

Respondent JJ Samuel A. Soriano, Marie Herminia C. Soriano, Racquel F. Resurreccion-Tanyag, Maria Michelle Michiko C. Soriano, and Jose Miguel Lorenzo C. Soriano (collectively, "Respondent Soriano Group") comprise the individual owners-sellers of 1,500,000 common and 5,166,667 preferred shares of SPARC-Solar Powered Agri-rural Communities Corporation ("SPARC") ("shares of stock"),[4] which constitute 60% of the issued and outstanding shares of SPARC.

Respondent Just Solar Corporation ("Just Solar"), the acquiring entity, is a domestic corporation engaged in the development and generation of renewable energy resources such as, but not limited to biomass, biogas, hydropower, wind, and solar energy.[5] It is a subsidiary of Pure Energy.[6]

Respondent Pure Energy Holdings Corporation ("Pure Energy") is a domestic corporation incorporated as a holding company of entities engaged in renewable energy generation and water system management distribution.[7] Pure Energy owns 100% of Just Solar.[8]

Respondent DYT Equities Corporation ("DYT Equities") is a domestic corporation incorporated as an investment holding company, which holds 76% interest in Pure Energy.[9] It is the ultimate parent entity ("UPE") of Just Solar.[10]

Respondent SPARC is a domestic corporation engaged in the business of generating power from solar energy and other viable sources of renewable power.[11] Before the transaction subject in this case, 60% of SPARC's shareholdings were owned by Respondents Soriano Group with the remaining 40% owned by Astronergy Solar Philippines, Pte. Ltd. ("Astronergy"), a corporation organized and existing under Singapore law.[12]

(Respondents Just Solar, Pure Energy, DYT Equities, and SPARC shall be collectively referred to as "Respondent Corporations.")

THE FACTS

The controversy stemmed from the acquisition by Just Solar from the Soriano Group of 1,500,000 common shares and 5,166,667 preferred shares of SPARC ("Transaction"), which is equivalent to 60% of SPARC's issued and outstanding shares of stock.[13]

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4 Verified Comment by Respondents JJ Samuel A. Soriano, Marie Herminia C. Soriano, Racquel F. Resurreccion-Tanyag, Maria Michelle Michiko C. Soriano, and Jose Miguel Lorenzo C. Soriano [Verified Comment by Respondent Soriano Group], 29 November 2019, ¶ 6.

5 Verified Comment by Respondents DYT Equities Corporation, Pure Energy Holdings Corporation, Just Solar Corporation, and SPARC-Solar Powered Agri-Rural Communities Corporation, [Verified Comment by Respondent Corporations], 27 November 2019, ¶ 9.

6 Final Report by the Mergers and Acquisitions Office [Final Report by the MAO], 17 October 2019, ¶ 2.

7 Verified Comment by Respondent Corporations, ¶ 9.

8 *See* Annex "H" of the Final Report by MAO.

9 Verified Comment by Respondent Corporations, ¶ 9.

10 *Id*. ¶ 39.

11 *Id*. ¶ 10.

12 *Id.*

13 Final Report by the MAO, ¶ 6.

On 15 January 2018, Respondent Soriano Group and Just Solar executed a Share Purchase Agreement ("SPA")[14] in relation to Respondent Soriano Group's shares of stock in SPARC. On 17 January 2018, they executed a Deed of Absolute Sale[15] over the said shares of stock for a consideration of Two Hundred Five Million Eight Hundred Thousand Pesos (Php 205,800,000.00). Consequently, on 18 February 2018, SPARC filed with the Securities and Exchange Commission a general information sheet[16] reflecting the change in ownership over the said shares of stock.

On 26 June 2018, the MAO received a Complaint[17] dated 25 May 2018 from Astronergy alleging the Respondents' failure to notify the Transaction to the Commission. Acting on Astronergy's Complaint, the MAO conducted its investigation on the Transaction by sending requests for information to Astronergy and the Respondents. The Respondents duly complied with said requests.

On 4 June 2019, the MAO issued Notices to Explain[18] to the Respondents requiring them to explain why they should not be penalized for violating Section 17 of the PCA and Rule 4, Section 3 (g) of the PCA IRR.[19]

On 20 June 2019, the MAO conducted a clarificatory conference with Astronergy.[20] On even date, Mr. JJ Soriano filed a written explanation for and on behalf of the Soriano Group.[21] On 27 June 2019, DYT Equities filed its written explanation.

On 24 October 2019, the MAO filed the present Complaint, including its Final Report, before the Commission. In its Final Report, the MAO alleged that based on Pure Energy's 2016 Audited Financial Statement ("AFS"), the Size of Party Test was satisfied as the aggregate value of Pure Energy's assets as of 31 December 2016 amounted to Php 1,601,403,288.00[22] while under SPARC's 2016 AFS and Re-issued AFS, the aggregate value of its assets amounted to Php 1,078,161,531.00 and Php 1,077,996,909, respectively. Thus, the Size of Transaction Test was met.[23] Both figures exceeded the prevailing thresholds of Php 1,000,000,000.00. Accordingly, Respondents were allegedly required to file a notification pursuant to Section 17 of the PCA in relation to Rule 4, Section 3 (g) of the PCA IRR.[24]

On 29 November 2019, Respondent Corporations and Respondent Soriano Group filed their respective verified comments.[25]

In their Verified Comment, Respondent Corporations alleged the following in their defense:

1. Astronergy's Complaint was a mere harassment suit;[26]

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14 *See* Annex "E" of the Final Report by the MAO.
15 *Id.* Annex "F".
16 *Id.* Annex "G".
17 *Id.* Annex "B".
18 *See* Annex "A", "A-1", "A-2" & "A-3" of the Verified Comment by Respondent Corporations.
19 Final Report by the MAO, ¶ 9.
20 *Id*. ¶ 10.
21 *Id.*
22 *Id.* ¶¶ 22-23.
23 *See* Final Report by the MAO, ¶ 31.
24 *See* Final Report by the MAO, ¶ 44.
25 Verified Comment by the Respondent Soriano Group dated 29 November 2019 and Verified Comment by Respondent Corporations dated 27 November 2019.
26 Astronergy alleged that Just Solar initially intended to purchase 100% of SPARC's shares and already paid the Soriano Group and Astronergy jointly, Php 35 million as down payment. However, Astronergy reneged on its commitment to sell its 40% stake despite receiving the down payment. Thus, criminal complaints for Estafa and Libel were filled against key officers of Astronergy.
Verified Comment by Respondent Corporations, ¶ 20.

2. The 2017 AFS of SPARC is the proper basis of the Size of Transaction as the same is regularly prepared as contemplated by law.[27] It is likewise the most recent and most proximate AFS of SPARC to the Transaction; thus, more accurately reflecting the financial condition of the company at the time of the Transaction;[28]
3. The aggregate value of the assets of SPARC at the time of the transaction did not exceed the Php 1 billion threshold based on its 2017 AFS;[29]
4. Less than two months after the Transaction, the notification thresholds were substantially increased; thus, at the time of the Transaction, the Commission already deemed the Php 1 billion threshold no longer reasonable or appropriate;[30]
5. The sole standard against which an acquisition will be evaluated is whether or not the transaction prevents, restricts, or lessens competition.[31] Thus, since SPARC is only a minor player in the solar power industry in the Philippines,[32] the Transaction will not result in a substantial impact on competition in the relevant market to warrant the Commission's intervention; [33]
6. Their right to due process was violated by the MAO's failure to give notice of the clarificatory conference with Astronergy and directing in the Notice to Explain only DYT Equities to file a written explanation;[34] and
7. Pure Energy should not be included as a respondent as it is not a respondent in Astronergy's Complaint[35] nor is it one of the parties mandated to give notification under the pertinent laws and rules.[36]

In Respondent Soriano Group's Verified Comment, they allege in their defense that:

1. The total assets and gross revenue of SPARC did not exceed the Php 1 billion threshold in the Size of Transaction Test. This is supported by the values reflected in the following financial documents: (a) Interim Balance Sheet as of 31 December 2017, which was submitted to Land Bank of the Philippines ("LBP") on 16 January 2018 ("LBP IBS"); (b) Interim Balance Sheet as of 30 November 2017, which was submitted to Astronergy on 10 December 2017 ("Astronergy IBS"); and (c) 2017 AFS of SPARC.[37]
2. Based on Section 3, Rule 4 of the PCA IRR, an entity can resort to two (2) types of documents in computing the aggregate value of its assets: (1) the last regularly prepared balance sheet, or (2) the most recent audited financial statements.[38] Thus, Respondents could rely on either the last regularly prepared balance sheets which are the LBP IBS,[39] or the Astronergy IBS,[40] or the 2017 AFS which was also regularly prepared and submitted to both the BIR and the SEC.[41]
3. The Guidelines on the Computation of Merger Notification Thresholds ("Threshold Guidelines") are ineffective for not having been filed with the UP Law Center as required by the Administrative Code.[42] They are not mere internal rules since they

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27 *Id.* ¶ 43.
28 *Id.* ¶ 48.
29 *Id.* ¶ 63.
30 *Id.* ¶ 81.
31 *Id.* ¶ 71.
32 Verified Comment by Respondent Corporations, ¶ 77.
33 *Id*. ¶ 71.
34 *See* Verified Comment by Respondent Corporations, ¶¶ 24-32.
35 *Id.* ¶ 34.
36 *Id.* ¶ 38.
37 Verified Comment by Respondent Soriano Group, at 18-22.
38 *Id*. at 18.
39 *Id*.
40 *Id.* at 20.
41 *Id.* at 21.
42 *Id.* at 22-24.

affect the public and not merely the Commission's personnel.[43] The Threshold Guidelines effectively amended Section 3, Rule 4 of the PCA IRR since they further reduce, constrain and qualify the list of documents that an entity can use to compute thresholds.[44] This failure to file the Threshold Guidelines with the UP Law Center renders the same ineffective; and

4. The inclusion by the MAO in its Final Report of alleged electronic messages supposedly presented by Astronergy showing that Respondents were purportedly aware of the notification requirement, but observing that the same were inadmissible for Astronergy's failure to properly authenticate the electronic messages was improper.[45] Regardless, there was no illegal custom-fitting as all transactions made were valid, legal and the financial statements were prepared in accordance with Philippine Accounting Standards.[46] Any assignment of receivables by Respondent SPARC to Astronergy is a valid payment of due and demandable debt.[47] The conversion of deposits to suppliers and payment of accounts payable are valid transactions.[48] The updating and verification of the value of assets is part of the preparation of financial statements.[49]

On 20 December 2019, the Commission directed the MAO to submit a reply to the verified comments filed by the Respondents.[50]

On 14 January 2020, the MAO submitted its Consolidated Reply (To: Respondents' Verified Comments dated 27 November 2019 and 29 November 2019). According to the MAO:

1. Due process was afforded to Respondent Corporations during the investigation.[51] Pure Energy, Just Solar and SPARC were separately issued a Notice to Explain; thus, common logic dictates that their receipt of the notice should have prompted them to respond; [52] and
2. The Threshold Guidelines are interpretative regulation; therefore, the same is not required to be filed with the UP Law Center.[53]

On 1 June 2020, Respondent Soriano Group submitted its Motion to Admit Attached Rejoinder, which was granted by the Commission in its Resolution dated 22 September 2020. In its Rejoinder, the Soriano Group further alleged that:

1. The Threshold Guidelines effectively amended the PCA IRR as it added a qualification as to when the last regularly prepared balance sheet may be used – a qualification absent in the PCA IRR. Thus, it should have been filed with the UP Law Center; [54] and

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43 Verified Comment by Respondent Soriano Group, at 25.
44 *Id.*
45 *Id.* at 27.
46 *Id.*
47 *Id.*
48 *Id.* at 28
49 Verified Comment by Respondent Soriano Group, at 28.
50 On 3 January 2020, the Commission received a Motion for Extension of Time to File a Reply from the MAO praying for an additional period to file a Reply until 14 January 2020, which the Commission granted through a Notice dated 7 January 2020.
51 Consolidated Reply (To: Respondents' Verified Comments dated 27 November 2019 and 29 November 2019) by the Mergers and Acquisitions Office [Consolidated Reply by the MAO], 14 January 2020, ¶ 9-21.
52 Consolidated Reply by the MAO, ¶¶ 24-25.
53 *Id.* ¶ 51.
54 Rejoinder [Re: Consolidated Reply (To: Respondents' Verified Comments dated 27 November 2019 and 29 November 2019) dated 14 January 2020] by Respondents JJ Samuel A. Soriano, Marie Herminia C. Soriano, Racquel F. Resurreccion-Tanyag, Maria Michelle Michiko C. Soriano, and Jose Miguel Lorenzo C. Soriano [Rejoinder by Respondent Soriano Group], 01 June 2020, at 4-10.

2. Respondent SPARC is merely a small player in the solar power industry.[55] Accordingly, Respondent SPARC's intention to expand its business to be able to compete in its relevant market does not pose any anticompetitive concerns.[56] The aggregate value of SPARC's assets was below the threshold, which was increased barely two months after the Transaction.[57] Thus, a liberal construction of the rules in calculating notification thresholds is warranted to further the state policy on the efficiency of market competition.[58] Furthermore, the liberal construction of the Rules will enable a more accurate and timely determination of the degree of competition or anti-competition of a transaction since the size of the transaction would be determined at the actual time of its consummation and not on the basis of financial statements that are severely outdated and that may significantly vary from the actual relevant financial data.[59]

On 2 October 2020, Respondent Corporations submitted their Manifestation with Motion to Admit Attached Rejoinder, which was granted by the Commission in its Resolution dated 6 October 2020. Respondent Corporations further argued that:

1. Astronergy, not being a concerned party as contemplated by the PCC Rules on Merger Procedure ("Merger Rules"), had no standing to appear before the MAO in the clarificatory conference to allegedly clarify matters relative to the Transaction, in the absence or to the exclusion of SPARC, Just Solar, and DYT Equities as Concerned Parties;[60]
2. With regard to the Notices to Explain,[61] a more reasonable interpretation of the fact that separate Notices to Explain were sent to Respondents is that the Respondents were merely copy furnished by the MAO without any intention to require them to submit their separate explanations; [62] and
3. The inclusion of Pure Energy as Respondent is unwarranted since Pure Energy is a 76% owned subsidiary of DYT Equities and thus is not a UPE as contemplated under the Rules.[63]

On 5 November 2020, the Commission issued an Order for the conduct of a clarificatory hearing. In the same Order, the Respondents were directed to submit their 2016 and 2017 AFS, 2017 Interim Balance Sheets and related correspondences and documents, regularly prepared balance sheets or financial statements, and other related matters.

Respondent Soriano Group and Respondent Corporations submitted on 13 November 2020 and 16 November 2020, respectively, their separate Compliances.

In their Compliance, Respondent Soriano Group manifested that all relevant financial documents are already attached in their Verified Comment, and submitted a copy of an email thread dated 16 January 2018 between Respondent JJ Samuel A. Soriano and Mr. Ernie Magsanoc of the LBP as evidence of LBP's receipt of SPARC's Interim Balance Sheet for 2017. While Respondent Corporations submitted in their Compliance, among others, the following:

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55 *Id*. at 22.
56 *Id.* at 22-23.
57 *Id.* at 23.
58 *Id*. at 24.
59 *Id.* at 25.
60 Rejoinder (Re: MAO's Consolidated Reply dated 14 January 2020) by Respondents DYT Equities Corporation, Pure Energy Holdings Corporation, Just Solar Corporation, and SPARC-Solar Powered Agri-Rural Communities Corporation, [Rejoinder by Respondent Corporations], 30 September 2020, ¶ 5.
61 *See* Annex "A", "A-1", "A-2" & "A-3" of the Verified Comment by Respondent Corporations.
62 Rejoinder by Respondent Corporations, ¶ 13.
63 *Id.* ¶¶ 16-23.

1. SPARC's AFS for 2016, 2017, and 2018;
2. SPARC's monthly balance sheets for 2016, 2017, and 2018; and
3. Respondents Corporations' respective AFS for 2016 and 2017.

On 18 December 2020, the Commission conducted the clarificatory hearing wherein the Commission sought clarification from SPARC regarding the preparation of its AFS, LBP IBS and Astronergy IBS, and the variances observed in some of the balance sheets attached by the Respondents to their Verified Comments and Rejoinders, and Compliance with the 5 November 2020 Order.

On 22 December 2020, the Commission issued an Order directing Respondent SPARC to submit the following documents: (1) yearend Interim Financial Statements submitted to LBP from 2016 to 2020 pursuant to the Loan Agreement dated 16 January 2016; (2) AFS submitted to LBP in June of each year from 2016-2020; (3) cover letters or emails to LBP showing SPARC's submission of the financial statements, or in the absence of such, a certification under oath from Atty. Rolando Domingo (or if submitted before his tenure as Chief Financial Officer of SPARC, by the relevant corporate officer of SPARC) that such were the financial statements duly submitted to LBP; and (4) the request of LBP for these submissions.

On 5 January 2021, Respondent SPARC filed its Compliance to the Order dated 22 December 2020, submitting therewith the following documents:

1. Interim Financial Statements for 2017 and 2018; and
2. Copy of emails as proof of submission to LBP of its Interim Financial Statements.

On 7 June 2021, the Commission directed the parties to file their respective memoranda.[64]

On 15 July 2021, after receipt of the parties' memoranda,[65] the Commission, issued a Notice submitting the case for decision.[66]

ISSUES

The issues before the Commission are the following:

1. Whether due process was properly observed when Respondents Pure Energy and Just Solar were not directed to file written explanations to the Notice to Explain.
2. Whether due process was properly observed when Respondent Corporations were not notified and included in the clarificatory conference conducted by the MAO.
3. Which instrument among the 2016 Audited Financial Statement, 2016 Re-issued Audited Financial Statement, 2017 Audited Financial Statement, and the Interim Balance Sheets is the proper basis to determine if the aggregate value of assets of SPARC breached the Size of Transaction threshold?
4. Whether the compulsory notification requirement under Section 17 of the PCA and Rule 4, Section 3(g) was violated by the Respondents.

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[64] On 22 June 2021, Respondent Soriano Group and the MAO filed their respective Motions for Extension of Time to File Memorandum praying for an additional period of fifteen (15) days or until 7 July 2021 to file a Reply. The Commission issued a Notice dated 2 July 2021 granting the Motions for Extension.

[65] Respondent Corporations and Respondent Soriano Group filed their Memoranda on 23 June 2021 and 6 July 2021, respectively. The MAO filed its Memorandum on 7 July 2021.

[66] Due to need to extensively deliberate on the issues in the case, the Commission issued Notices of Minute Resolutions on 12 August 2021 and 2 September 2021 extending the period for which to render the Decision, until 13 October 2021.

DISCUSSION

First and Second Issues

The first and second issues will be discussed together since they are interrelated.

Respondent Corporations argued that they should have been afforded ample opportunity to dispute the allegations against them before the MAO because the essence of procedural due process is embodied in the basic requirement of notice, and a real opportunity to be heard.[67] First, Respondent Corporations allege that in the Notice to Explain dated 4 June 2019, only DYT Equities, as the UPE of Just Solar, was directed by the MAO to file an explanation.[68] Second, it is alleged that the MAO conducted a clarificatory conference with Astronergy without informing Respondent Corporations thereof and without giving Respondent Corporations an opportunity to participate therein.[69]

According to Respondent Corporations, the Merger Rules require the MAO to issue a notice to the merger parties to submit an explanation.[70] In particular, Section 14.2 of the Merger Rules provides that a notice shall be issued "to the merger parties and their ultimate parent entities ("Concerned Parties")." In merely serving them identical copies of the Notice to Explain directing only DYT Equities to submit a written explanation, Respondent Corporations claim that they were merely copy furnished of the Notice to Explain for DYT Equities by the MAO without any intention to allow them to submit their separate explanations.[71] They note that there was never any intention on the part of Just Solar and SPARC to exclude themselves from the MAO's investigation.[72] In fact, they have shown their willingness to participate and cooperate in the investigation through their prompt compliance with the MAO's requests for documents and directive to file an Explanation.[73]

On the contrary, the MAO contends that Pure Energy, Just Solar, and SPARC were each served their respective Notice to Explain separately; thus, simple logic dictates that Pure Energy, Just Solar, and SPARC were equally required to send their respective written explanations.[74] Furthermore, nothing prevented the Parties from clarifying with the MAO if they can submit a separate response to the Notice to Explain.[75] According to the MAO, Respondents were nevertheless afforded ample opportunity to be heard as evidenced by their active participation in the administrative proceedings.[76]

The Commission finds that the MAO committed a procedural lapse.

The disputed identical Notice to Explain that were served to each of the Respondent Corporations read:

> A preliminary review of the complaint indicates that the Transaction may have breached the threshold under Section 17 of the Act and Rule 4, Section 3(a) and (b)(4) of the IRR. Accordingly, **DYT Equities Corporation ("DYT"), as the ultimate parent entity of Just Solar, is hereby required to explain** in writing within fifteen (15) days from receipt of this notice why

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67 *See* Verified Comment by Respondent Corporations, ¶ 29.
68 *Id.* ¶ 31.
69 *See* Verified Comment by Respondent Corporations, ¶¶ 27-28.
70 Rejoinder by Respondent Corporations, ¶ 12.
71 *Id.* ¶ 13.
72 Verified Comment by Respondent Corporations, ¶ 32.
73 *Id.*
74 Consolidated Reply by the MAO, ¶ 24.
75 *Id.* ¶ 25.
76 Memorandum for the Mergers and Acquisitions Office [Memorandum for the MAO], 7 July 2021, ¶ 19.

> no administrative fine under Section 17 of the Act should be imposed against it for violating the compulsory notification requirements under the Act and its IRR. Failure to submit an explanation within the aforesaid period shall be deemed a waiver of its right to be heard, for which reason the Commission shall act accordingly based on available evidence.[77]
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> *(Emphasis Supplied)*

There is no mistaking from the plain text of the above-quoted Notice to Explain served to the Respondent Corporations separately that it is a directive addressed only to DYT Equities to file a written explanation. While Just Solar, Pure Energy, and SPARC were furnished copies thereof, it is clear that the Notice to Explain is not directed to any of them but to DYT Equities. There is no disputing that the language of the Notice to Explain is addressed to DYT Equities. Under no circumstance can the said notice be mistaken to include a directive to the other respondent corporations to file a written explanation as the MAO insisted.

The use of the conjunctive "and" in Section 14.2 of the Merger Rules[78] indicates that the MAO is required to issue separate notices to the merger parties in addition to their respective parent entities requiring them all to submit their written explanations. Hence, aside from DYT Equities, the MAO is required to issue separate notices to Pure Energy, Just Solar, and SPARC. It is not sufficient for the MAO to merely furnish concerned parties copies of the Notice to Explain directed only to DYT Equities as the ultimate parent entity.

Nonetheless, the MAO's oversight did not deprive Respondent Corporations of their right to due process.

The Supreme Court explained in *Standard Realty & Development Corp. v. Office of the President*[79] the essence of due process in administrative proceedings, specifically the right to be heard, in the following words:

> [P]rocedural due process simply means the opportunity to explain one's side or the opportunity to seek a reconsideration of the action or ruling complained of. 'To be heard' does not mean only verbal arguments in court; one may be heard also thru pleadings. Where opportunity to be heard, either through oral arguments or pleadings, is accorded, there is no denial of procedural due process.[80]

The Respondents were able to fully participate in the entirety of the adjudication proceedings before the Commission.

The records of this case show that Respondent Corporations were able to file their Verified Comment, with their subsequent Rejoinder also admitted. They participated and were heard during the clarificatory hearing. More importantly, Respondents were made to submit additional documents for consideration by the Commission. Lastly, they were able to elaborate on their arguments when they filed their Memorandum.

Evidently, Respondents were given more than just an opportunity to defend themselves against the charges filed against them. For as long as the parties were given fair and reasonable opportunity to be heard before judgment was rendered, the demands of due

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77 *See* Annex "A" of the Verified Comment by Respondent Corporations.

78 Rule 14.2. If, based on its initial findings, the MAO suspects that (i) a merger that reaches the thresholds under the Rules has not been notified to the PCC; or (ii) there is a violation of the waiting periods required under Section 17 of the Act (the "Non-Compliance Acts"), it will issue a notice to the merger parties and their ultimate parent entities ("Concerned Parties") to explain (the "Initial Notice").

79 *Standard Realty & Development Corp. v. Office of the President*, G.R. No. 220003, 14 October 2020.

80 *Id.*

process are sufficiently met.[81] Consequently, MAO's procedural lapse was cured by Respondent Corporations' participation in the proceedings before the Commission.

As to the conduct of clarificatory conferences by the MAO during its investigation, entities being investigated do not have the right to insist on being informed of such clarificatory conferences and to take part therein. The nature and purpose of the proceedings before the MAO, including the conduct of a clarificatory conference, are purely fact-finding in nature. An examination of Rule 14 of the Merger Rules and the nature of the proceedings before the MAO leaves no doubt that the object of the investigations is to determine whether a formal charge for an administrative offense should be filed against the Respondents.

To be clear, the MAO does not have any power to hear and determine questions of fact. The MAO cannot rule on the rights of specific persons and cannot render any award. The proceedings before the MAO are merely investigative, aimed at determining the existence of facts for the purpose of deciding whether to proceed with an administrative action. The MAO's findings do not decide or resolve authoritatively, finally, and definitely any controversy being investigated.

In *Cariño v. Commission on Human Rights*,[82] the Supreme Court differentiated investigation proceedings from adjudication proceedings – investigation involves only obtaining information while adjudication implies the determination of facts and rendering a judgment based thereon.[83] The words of the Supreme Court are instructive on this matter, to wit: "To investigate is not to adjudicate or adjudge. Whether in the popular or the technical sense, these terms have well understood and quite distinct meanings."[84] In the same case, the Supreme Court held:

> The purpose of investigation, of course, is to discover, to find out, to learn, obtain information. Nowhere included or intimated is the notion of settling, deciding or resolving a controversy involved in the facts inquired into by application of the law to the facts established by the inquiry.
>
> The legal meaning of "investigate" is essentially the same: "(t)o follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry;" "to inquire; to make an investigation," "investigation" being in turn described as "(a)n administrative function, the exercise of which ordinarily does not require a hearing. 2 Am J2d Adm L Sec. 257; . . . an inquiry, judicial or otherwise, for the discovery and collection of facts concerning a certain matter or matters."
>
> "Adjudicate," commonly or popularly understood, means to adjudge, arbitrate, judge, decide, determine, resolve, rule on, settle. The dictionary defines the term as "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised: . . . to pass judgment on: settle judicially: . . . act as judge." And "adjudge" means "to decide or rule upon as a judge or with judicial or quasi-judicial powers: . . . to award or grant judicially in a case of controversy . . ."
>
> In the legal sense, "adjudicate" means: "To settle in the exercise of judicial authority. To determine finally. Synonymous with adjudge in its strictest

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81 *Magcamit v. Internal Affairs Service-Philippine Drug Enforcement Agency*, G.R. No. 198140, 25 January 2016.
82 *Cariño v. Commission on Human Rights*, G.R. No. 96681, 2 December 1991.
83 *Id*.
84 *Id.*

> sense;" and "adjudge" means: "To pass on judicially, to decide, settle or decree, or to sentence or condemn. . . . Implies a judicial determination of a fact, and the entry of a judgment.[85]

The distinction between investigation and adjudication was further dissected by the Supreme Court in *Biraogo v. The Philippine Truth Commission of 2010,*[86] where it held:

> Fact-finding is not adjudication and it cannot be likened to the judicial function of a court of justice, or even a quasi-judicial agency or office. The function of receiving evidence and ascertaining therefrom the facts of a controversy is not a judicial function. To be considered as such, the act of receiving evidence and arriving at factual conclusions in a controversy must be accompanied by the authority of applying the law to the factual conclusions to the end that the controversy may be decided or resolved authoritatively, finally and definitively, subject to appeals or modes of review as may be provided by law.[87]

In determining whether an administrative body is exercising judicial or merely investigatory functions, the Supreme Court laid down the following test: adjudication signifies the exercise of the power and authority to adjudicate upon the rights and obligations of the parties. Hence, if the only purpose of an investigation is to evaluate the evidence submitted to an agency based on the facts and circumstances presented to it, and if the agency is not authorized to make a final pronouncement affecting the parties, then there is an absence of judicial discretion and judgment.[88]

There is no violation of due process in an investigative proceeding when a party is not informed thereof or not allowed to participate therein when said party's presence is not required during an investigation. There is no right to participate in clarificatory conferences or meetings in investigative proceedings.

In a fact-finding or investigatory proceeding, a party cannot invoke the right to due process or insist on being informed and to participate in the conferences or meetings held by the investigating agency. In *Shu v. Dee, et al.*,[89] the Supreme Court had the occasion to state that the National Bureau of Investigation does not possess judicial or quasi-judicial powers because its functions are merely investigatory and informational in nature.[90] The Supreme Court held that: "Since the NBI's findings were merely recommendatory, we find that no denial of the respondents' due process right could have taken place; the NBI's findings were still subject to the prosecutor's and the Secretary of Justice's actions for purposes of finding the existence of probable cause."[91] As such, respondents in an NBI investigation cannot be denied due process. If there was any defect in due process, such defect is cured by the remedy availed of by the respondents.

The said principle was reiterated in *Subido Pagente Certeza Mendoza and Binay Law Offices v. Court of Appeals*[92] wherein the Supreme Court held that the *ex-parte* investigation by the Anti-Money Laundering Council of money laundering offenses and its determination of possible money laundering offenses by authorizing a bank inquiry

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[85] *Id*.
[86] *Biraogo v. The Philippine Truth Commission of 2010*, G.R. No. 192935, 7 December 2010.
[87] *Id.*
[88] *Encinas v. Agustin*, G.R. No. 187317, 11 April 2013.
[89] *Shu v. Dee, et al.,* G.R. No. 182573, 23 April 2014.
[90] *Id.*
[91] *Id.*
[92] *Subido Pagente Certeza Mendoza and Binay Law Offices v. Court of Appeals*, G.R. No. 216914, 6 December 2016.

order is fact-finding and investigative in nature.[93] Therefore, the absence of the respondents in a bank inquiry does not violate their right to procedural due process.[94]

Consistent with the foregoing rulings of the Supreme Court, the MAO may conduct *ex-parte* proceedings pursuant to its fact-finding and investigative functions without violating Respondents' right to procedural due process. The proceedings with Astronergy are investigative in nature since the MAO's findings are merely recommendatory to the Commission *En Banc*, which ultimately determines the facts and resolves the issues. Further, as thoroughly discussed above, due process was served to Respondents when they were given the full opportunity to present their defenses to this Commission pursuant to the Merger Rules through the filing of pleadings, being heard during the clarificatory conference, and submitting additional evidence.

It is also worth emphasizing that there can be no violation of due process when the administrative agency's rules do not provide for the right allegedly infringed. In *Saunar v. Executive Secretary,*[95] the Supreme Court explained that in instances where the investigating authority calls for a clarificatory conference, there can be a violation of due process only if: (1) the administrative agency's rules prescribe that the parties be notified of the clarificatory hearings and that the parties be afforded the opportunity to be present in the hearings without the right to examine witnesses; and (2) the investigating authority disregards the rules in conducting the clarificatory conference.

In the same vein, the clarificatory conference cannot also be likened to a clarificatory hearing set by an investigating prosecutor during preliminary investigation, where there is a right to be present albeit without the right to cross-examine. The rules on preliminary investigation specifically provide for such right.[96]

Under the Merger Rules, the MAO may conduct a clarificatory conference. However, the same rules do not explicitly state that the parties be notified of such clarificatory conference and be given the opportunity to be present and examine witnesses. Absent any express provision in the Merger Rules or other regulations of the PCC creating any right on the part of parties under investigation to be notified and to participate in the clarificatory conferences by the MAO, the Respondents' claim of violation of their right to due process finds no support.

Also, nothing in Section 14.6 of the Merger Rules limits the MAO from conducting clarificatory conferences with persons or entities other than the Concerned Parties. As part of the evidence gathering process, the clarificatory conference is akin to a follow-up interview conducted by law enforcement officers to confer with complainants, witnesses, informants, or persons of interests to verify information gathered by the investigators. The clarificatory conference is only a meeting called by the MAO to clarify matters raised in the written explanations and other information gathered by the MAO.

Finally, the second paragraph of Section 14.6 does not convert the clarificatory conference into an adversarial proceeding, but merely grants Concerned Parties, especially those who believe that they may become possible respondents to a case, the privilege to have counsel present during a clarificatory conference.

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93 *Id.*

94 *Id.*

95 *Saunar v. Executive Secretary*, G.R. No. 186502, 13 December 2017.

96 Section 3(e), Rule 112 of the Rules of Court:
(e) The investigating officer may set a hearing if there are facts and issues to be clarified from a party or a witness. The parties can be present at the hearing but without the right to examine or cross-examine. They may, however, submit to the investigating officer questions which may be asked to the party or witness concerned.

The Third and Fourth Issues

The third and fourth issues will be discussed jointly because the resolution of the former issue is determinative of the latter issue.

A non-notification violation under Section 17 of the PCA has four (4) essential elements, as follows:

1. There is a merger or acquisition ("Transaction");
2. The Transaction breached the notification thresholds;
3. The parties to the merger or acquisition did not notify the Commission of the Transaction; and
4. The merger or acquisition was consummated.

The PCA IRR prescribes two (2) tests to determine the presence of the second element. In this case, in particular, where the acquiring and acquired entities are both domestic corporations, the notification threshold are breached if both conditions below are met:

a. Size of Party Test: The aggregate annual gross revenue in, into or from the Philippines, or value of the assets in the Philippines of the UPE of at least one of the acquiring or acquired entities, including that of all entities that the UPE controls, directly or indirectly, exceed One Billion Pesos (Php1,000,000,000.00);[97] and

b. Size of Transaction Test: The value of the merger or acquisition transaction exceeds One Billion Pesos (Php1,000,000,000.00) with respect to a proposed merger or acquisition of voting shares of a corporation:[98]

    i. If the aggregate value of the assets in the Philippines that are owned by the corporation or by entities it controls, other than assets that are shares of those corporations, exceed One Billion Pesos (Php1,000,000,000.00);[99] or

    ii. The gross revenues from sales in, into, or from the Philippines of the corporation or by entities it controls, other than assets that are shares of any of those corporations, exceed One Billion Pesos (Php1,000,000,000.00);[100]

The presence of the first, third, and fourth elements in this case are not disputed by the Respondents. The SPA, the Deed of Absolute Sale, and the General Information Sheet, whose existence and execution are not denied or impugned by the Respondents, collectively prove the first and fourth elements. The third element is proven by the absence of any notification filing with the PCC, which is likewise not denied by the Respondents.

The defenses raised by the Respondents are centered on the second element. Even as none of the Respondents dispute the MAO's claim that the Size of Party Test was met as the aggregate value of the assets in the Philippines of Respondent Pure Energy exceeded Php 1 billion, they however contested that the Size of Transaction threshold of Php 1 billion aggregate value of assets of SPARC was exceeded. Respondents argued that the MAO erred in relying on the 2016 AFS of SPARC where the value of its assets is over Php 1 billion. Respondents pointed out that the assets of SPARC is below Php 1 billion

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97 Philippine Competition Commission, Rules and Regulations Implementing the Philippine Competition Act, Republic Act No. 10667, rule 4, § 3 (a) (2015).
98 *Id.* rule 4, § 3 (b) (4).
99 *Id.* rule 4, § 3 (b) (4) (i).
100 *Id.* rule 4, § 3 (b) (4) (ii).

in its 2017 AFS, the LBP IBS, and the Astronergy IBS, any of which can be the proper financial instrument to rely on.

Inapplicability of the Guidelines on Computation of Merger Notification Thresholds

The MAO posits that SPARC's 2016 AFS is the proper basis for assessing whether or not the Size of Transaction Test was satisfied pursuant to the PCA IRR and the Threshold Guidelines.[101] The MAO stressed that the SPA was executed on 15 January 2018, while the 2017 AFS was only approved by the Board of Directors on 28 February 2018.[102]

To determine the Size of Transaction, the PCA IRR[103] provides:

> (f) For purposes of calculating notification thresholds:
>
> (1) The aggregate value of assets in the Philippines shall be as stated on the last regularly prepared balance sheet or the most recent audited financial statements in which those assets are accounted for.
>
> (2) The gross revenues from sales of an entity shall be the amount stated on the last regularly prepared annual statement of income and expense of that entity.

Further, Section 2.2 of the Threshold Guidelines states that: "[f]or purposes of these Guidelines, 'regularly prepared' means that the document should have been prepared at a normal time, according to the entity's normal accounting procedures and for the purpose of submitting to other government agencies, self-regulatory organizations, and other market operators."

Section 2.19 of the same Guidelines provides:

> Similar to the determination of revenues, the aggregate value of assets in the Philippines shall be that as stated on the (i) most recent audited financial statements **or if the entity is not required to prepare audited financial statements**, (ii) the last regularly prepared balance sheet in which those assets are accounted for.
>
> XXX XXX XXX
>
> *(Emphasis Supplied)*

If the MAO's argument will be followed, the AFS will be the only basis in determining the Size of Transaction when the entity is required to prepare one pursuant to Rule 68 of the Securities Regulation Code ("SRC"). Conversely, a regularly prepared balance sheet can only be used as basis if the entity is not required to prepare an AFS or in the absence thereof.

In evaluating the financial documents submitted by the Respondents, the MAO relied on the Threshold Guidelines. The MAO rejected the use of the Interim Balance Sheets presented by the Respondents because according to Section 2.19 of the Threshold Guidelines, the last regularly prepared balance sheet may be used only if the entity is not required to prepare an AFS. Since Respondent SPARC is required to file an AFS under Rule 68 of the SRC, then the most recent AFS shall be used in assessing compliance

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101 Final Report by the MAO, ¶ 29.

102 *Id.*

103 Rules and Regulations Implementing the Philippine Competition Act, rule 4, § 3(f).

with the notification requirement.[104] Thus, the MAO posits that the 2016 AFS, which reflects that Respondent SPARC's assets is above Php 1 billion, should be the basis for the Size of the Transaction Test because it is the latest available at the time of the Transaction.

Respondent Soriano Group challenged the application of the Threshold Guidelines, arguing that it was ineffective for not having been filed with the Office of the National Administrative Register at the UP Law Center, as required by the Administrative Code of the Philippines.[105] They contend that the MAO cannot limit to the 2016 AFS the basis in determining the Size of Transaction. Instead, they offered the LBP IBS as of 31 December 2017 and the Astronergy IBS as of 30 November 2017, as alternative instruments that may serve as proper basis in determining the Size of Transaction. They emphasize that the 2017 AFS, which was also regularly prepared and submitted to government agencies, may also be used because it is the closest to, and most accurately depicts the financial status of SPARC at the time of the Transaction.

The Threshold Guidelines are not applicable.

Both the MAO and the Respondents' arguments relating to the Threshold Guidelines are misplaced. The Threshold Guidelines were issued on 26 March 2018 or after the execution of the SPA. Thus, at the time of the Transaction, there were no guidelines to speak of. The question to be addressed is, thus, whether the Threshold Guidelines may be applied by the MAO retroactively against the Respondents.

Under the Civil Code of the Philippines, laws shall have no retroactive effect, unless the contrary is provided.[106] However, the Supreme Court has, on many occasions, settled certain exceptions to this rule such as remedial or procedural laws:

> [R]emedial or procedural laws, i.e., those statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, ordinarily do not come within the legal meaning of a retrospective law, nor within the general rule against the retrospective operation of statutes.[107]

All the same, the above exception is further qualified. In *Tan v. Court of Appeals,*[108] the Supreme Court held:

> The rule that procedural laws are applicable to pending actions or proceedings admits certain exceptions. The rule does not apply where the statute itself expressly or by necessary implication provides that pending

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104 Memorandum of the MAO, ¶ 115.

105 Book VII: Administrative Procedure
Chapter 2: General Provisions
Section 3. Filing. –
(1) Every agency shall file with the University of the Philippines Law Center three (3) certified copies of every rule adopted by it. Rules in force on the date of effectivity of this Code which are not filed within three (3) months from that date shall not thereafter be the basis of any sanction against any party or persons.

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Section. 4. Effectivity. – In addition to other rule-making requirements provided by law not inconsistent with this Book, each rule shall become effective fifteen (15) days from the date of filing as above provided unless a different date is fixed by law, or specified in the rule in cases of imminent danger to public health, safety and welfare, the existence of which must be expressed in a statement accompanying the rule. The agency shall take appropriate measures to make emergency rules known to persons who may be affected by them.

106 An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 4 (1949).

107 *Frivaldo v. Commission on Elections*, G.R. No. 120295, 26 June 1996.

108 *Tan v. Court of Appeals,* G.R. No. 136368, 16 January 2002.

> actions are excepted from its operation, or where to apply it to pending proceedings would impair vested rights. Under appropriate circumstances, courts may deny the retroactive application of procedural laws in the event that to do so would not be feasible or would work injustice. Nor may procedural laws be applied retroactively to pending actions if to do so would involve intricate problems of due process or impair the independence of the courts.[109]

This was reiterated in *O.B. Jovenir Construction and Development Corporation v. Macamir Realty and Development Corporation*,[110] which held that: "[p]rocedural rules may not be given retroactive effect if vested rights would be disturbed, or if their application would not be feasible or would work injustice."[111]

The Commission holds that the Threshold Guidelines cannot be given retroactive effect because laws, which includes administrative regulations, as a general rule operate prospectively pursuant to the Civil Code.

Even if treated as a procedural rule, the same Guidelines may still not be given any retroactive effect.

First, the Threshold Guidelines do not provide for its retroactive application. Absent a retroactivity clause in the Threshold Guidelines, there is no legal basis to give it a retroactive application, as the MAO would have it. Neither is there anything in the Threshold Guidelines that could be interpreted to imply retroactivity.

Further, and more importantly, applying the Threshold Guidelines retroactively would result in an injustice to the Respondents. At the time of consummation of the Transaction on 15 January 2018, the Size of Transaction can be determined using the aggregate value of the assets as reflected in the last regularly prepared balance sheet or the most recent audited financial statement, pursuant to Rule 4, Section 3(f)(1) of the PCA IRR, without any qualification, preference or limitation for either financial document.

The retroactive application of the Threshold Guidelines to the transaction will effectively limit the usable financial documents to the audited financial statement only and discard the regularly prepared balance sheet as basis. The limitation or preference in the Threshold Guidelines for the most recent AFS by entities that are required to prepare it constitutes an impairment of the vested rights of merger parties to opt for the last regularly prepared balance sheet in calculating whether or not they have breached the notification threshold for compulsory notification prescribed in Section 17 of the PCA. Likewise, such preference will impair vested rights of parties who have relied on the last regularly prepared balance sheet in determining their notification obligation in merger or acquisition transactions consummated before the adoption of the Threshold Guidelines. Worse, it may lead to merger parties becoming liable to fines and penalties, in addition to the transaction being voided, for non-notification where they would otherwise not be covered if the last regularly prepared balance sheet is used as basis in calculating the Size of Transaction. Fairness dictates that transactions be evaluated according to the rules existing at the time of its consummation, not by rules promulgated thereafter.

Verily, the Threshold Guidelines cannot be given retroactive effect. The Commission cannot agree with the MAO's erroneous retroactive application of the Threshold Guidelines to the Transaction that occurred before the promulgation of the Threshold Guidelines. A regulation cannot be used as basis for determining the existence of a violation in a transaction that predates the regulation.

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109 *Id.*

110 *O.B. Jovenir Construction and Development Corporation v. Macamir Realty and Development Corporation,* G.R. No. 135803, 28 March 2006.

111 *Id.*

Rule 4, Section 3(f) of the PCA IRR is the applicable rule for calculating the notification thresholds

At the time of the consummation of the Transaction, Rule 4, Section 3(f)(1) of the PCA IRR governs what financial documents may be used as basis in computing the value of the aggregate assets of the acquired corporation for purposes of the Size of Transaction. The rule prescribes the use of the aggregate value of assets reflected in either the last regularly prepared balance sheet or the most recent audited financial statements to calculate the notification threshold.

The PCC IRR was approved on 31 May 2016 and was effective at the time the Transaction was consummated by Respondents on 15 January 2018. It is the applicable rule, not the Threshold Guidelines, which was promulgated after the Transaction.

Notably, the rule does not provide any priority or preference for either the last regularly prepared balance sheet or the most recent audited financial statements. The use of the disjunctive term "or" connotes that either document may be used as the basis for computing the aggregate value of an entity's assets. The only qualification in the case of the balance sheet is that it must be the last regularly prepared balance sheet; and for an AFS, it must be the most recent.

In the case at bar, four (4) sets of documents were presented as possible basis for the Size of Transaction Test, as follows:

(1) SPARC's 2016 AFS and re-issued AFS;

(2) SPARC's 2017 AFS;

(3) LBP IBS (as of 31 December 2017); and

(4) Astronergy IBS (as of 30 November 2017).

Additionally, Respondent SPARC submitted several monthly balance sheets in accordance with the Commission's Order dated 5 November 2020,[112] the monthly balance sheets for the months of August to December 2017, being the most relevant to this case.

The Commission weighed and evaluated these financial documents to determine which may serve as correct basis in determining the Size of Transaction following Rule 4, Section 3(f)(1) of the PCA IRR. In doing so, the Commission applied the rule on availability and proximity. Rule 4, Section 2(a) of the PCC IRR mandates that: "Parties to a merger or acquisition that satisfy the thresholds in Section 3 of this Rule are required to notify the Commission before the execution of the definitive agreements relating to the transaction." In other words, the obligation to notify the Commission of the transaction arises before the execution of the definitive agreement relating to the transaction. Accordingly, the parties to the transaction must provide the Commission with the financial data that are available proximately before or at the time of the transaction.

Audited Financial Statements

There is no complicated requirement when an AFS is used as the basis in computing the notification threshold. The PCA IRR requires that the AFS must be the most recent. As previously discussed, the Commission uses the rule on availability and proximity. Hence,

[112] "Respondents are also instructed to submit to the Commission at least five (5) days prior to the hearing, all balance sheets prepared in the ordinary course of business and other related financial documents for the years 2016 and 2017."

the term “most recent” must be understood to mean available at the time of the merger or acquisition and the most proximate thereto. This is to ensure that the AFS to be used as basis reflects the financial condition of the entity at the time of the merger or acquisition. Otherwise, the AFS is deemed outdated and not an accurate representation of the entity’s aggregate value of assets to serve as basis for computation of the notification threshold.

Regularly Prepared Balance Sheet

The other option provided by Rule 4, Section 3(f)(1) of the PCA IRR for the computation of the notification thresholds is a regularly prepared balance sheet.

In the Philippines, there is no settled legal definition for what is a “regularly prepared” balance sheet, as a financial document. What is recognized in this jurisdiction is that financial statements are fairly presented in relation to the application of the Philippine Financial Reporting Standards (“PFRS”) and/or the International Financial Reporting Standards (“IFRS”).[113] Compliance of interim financial statements with accounting standards is substantive and formal, but it is only required if the entity is mandated or elects to publish its interim financial statements.[114] Considering the absence of a settled definition for a “regularly prepared” balance sheet in the Philippines, an examination of the rules on merger of the United States Fair Trade Commission (“US FTC”), which heavily influenced the Merger Rules of the PCC, will be instructive.

During the preparation of the Merger Rules, officials of the US FTC served as consultants to the drafting committee. Thus, in determining what a “regularly prepared” balance sheet means, an examination of the US FTC rules on merger notification and formal interpretations is imperative. While foreign sources are merely persuasive, they provide a framework for our analysis, as our rules on merger notification are patterned after the US FTC rules and procedure. Most importantly, among the established competition law authorities, the US merger control regime is the most developed, having been established under the Clayton Act in 1914 and further developed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

A reading of the relevant US FTC rules shows that the requirement of using an entity’s “last regularly prepared balance sheet” was adopted by the drafters of the PCA IRR.[115] However, the framers of the PCA IRR added another financial report – the “most recent AFS.”

A financial statement, whether or not audited, is a set of financial documents or reports composed of the 1) balance sheet; 2) income statement; 3) cash flow statement; and 4) statement of shareholders’ equity.[116] The balance sheet presents the assets, liabilities, and equity of the entity as of the reporting date.

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[113] International Accounting Standards [IAS], IAS 1 – Presentation of Financial Statements (2003).

[114] IAS 34(1): “This Standard applies if an entity is required or elects to publish an interim financial report in accordance with International Financial Reporting Standards (IFRSs).

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[115] 16 CFR § 801.11(c) - Annual net sales and total assets.

xxx

c) Subject to the provisions of paragraph (b) of this section:

(1) The annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person; and

(2) The total assets of a person shall be as stated on the last regularly prepared balance sheet of that person.

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[116] Securities and Exchange Commission, Revised Implementing Rules and Regulations of the Securities Regulation Code [Revised SRC Rules], rule 68, pt. II, no. 9 (B) (ii) (19 August 2019).

According to the US FTC, "regularly prepared" as used in 16 CFR § 801.11(c)(1) and (2), means that the statement was prepared both at the time a statement would normally be prepared and in the normal fashion that such a statement would be prepared.[117]

The US FTC has also held that "the regular preparation of the financial statements, and not the specific purpose for which they were prepared, is relevant in assessing whether the financial statements can (and must) be used to determine if the test is satisfied."[118] Further, "one indication that financials are regularly prepared is that they are in some way relied on or used by management."[119] Finally, the US FTC opined that "a final draft of a financial statement, approved by management and submitted to auditors, should be considered the most recent regularly prepared financials until the audited version is ready."[120]

From the foregoing, "regularly prepared" connotes regularity in time and regularity in the manner or procedure of preparing the balance sheet. A balance sheet may also be deemed regularly prepared if it is relied on or used by management.[121] The specific purpose for which the balance sheet was prepared is immaterial.

The underlying reason for requiring that the balance sheet be regularly prepared is to ensure that the information necessary to determine the thresholds is reliable and not overly burdensome on the part of the transacting parties to produce. The information, having been prepared regularly and relied upon by management, should already exist at the time it is needed to be filed with the Commission and, as such, will not delay the filing of the parties. The Commission does not impose any kind of special obligation on the parties to prepare documents that they would not regularly produce in the ordinary course of its business.

The instrument to be used as the proper basis in calculating the notification threshold

Based on the foregoing discussion of the applicable rule and its interpretation, we now examine the different financial reports submitted by the parties.

SPARC's 2016 AFS[122] and Reissued 2016 AFS[123]

While an AFS is certified and is a credible source of information, its relevance is limited to the specific point in time reported by the AFS taking into consideration the rule on availability and proximity.

As in this case, the 2016 AFS and reissued AFS were audited and finalized before the execution of the SPA having been approved by SPARC's Board of Directors on 25 January 2017 and 11 July 2017, respectively. Both were available before or at the time of the Transaction. However, the information contained therein reflect values as of 31 December 2016, which is more than a year away from the execution of the SPA and Deed of Sale on 15 January 2018 and 17 January 2018, respectively. Thus, such values are too far removed from the date of consummation of the Transaction. Using the financial

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117 Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33462 (31 July 1978) at https://www.ftc.gov/sites/default/files/documents/hsr_statements/43-fr-33450/780731fr43fr33450.pdf. Last accessed 16 September 2021.

118 Formal Interpretation No. 81, ABA Pre-Merger Notification Practice Manual, Fifth Edition, at 146. ABA Book Publishing, 6 March 2015.

119 *Id*. at 146.

120 *Id*. at 147.

121 *Id*. at 147.

122 *See* Annex "I-1" of the Complaint by the MAO.

123 *See* Annex "I" of the Complaint by the MAO.

information reflected in the 2016 AFS of SPARC is outdated. It is not a fair representation of SPARC's financial condition, particularly the aggregate value of its assets, at the time of the Transaction. As such, even as the 2016 AFS, or its reissued version, may be used as basis under Rule 4, Section 3(f)(1) of the PCA IRR, it is not the most reliable given that it contains outdated financial data of the aggregate value of assets of SPARC in relation to the Transaction.

2017 AFS[124]

The 2017 AFS cannot be considered as the most recent AFS. It was approved by SPARC's Board of Directors on 28 February 2018, or 48 days after the execution of the SPA[125]. Even as it contains financial information for the yearend of 2017, which is very proximate to the Transaction, the 2017 AFS was not available at the time of the Transaction. If the 2017 AFS was not existing before or at the time of the Transaction, it obviously cannot be used for computing the notification threshold.

Balance Sheets

For its part, Respondent Soriano Group asserts that in computing the aggregate value of assets, the last regularly prepared balance sheet of SPARC may be used.[126] Relying on the PCA IRR, they argue that resorting to the last regularly prepared balance sheet of SPARC predating the SPA is allowed, which may either be the LBP IBS for the month of December 2017, where the aggregate value of the assets is Php 983,897,932;[127] or the Astronergy IBS for the month of November 2017, where the value is Php 975,934,419.[128]

Respondent Corporations likewise submitted SPARC's monthly balance sheets from 2016 to 2018 in accordance with the Commission's Order dated 5 November 2020.

An examination of the monthly balance sheets closest to the execution of the SPA - from August 2017 to December 2017 - shows that the aggregate value of SPARC's assets did not breach the Php 1 billion threshold for compulsory notification. A summary of the values contained in the balance sheets is presented below:

Balance Sheet	Total Assets	Date Prepared/Accomplished[129]
For the period ending August 2017[130]	Php 996,903,768	5 September 2017
For the period ending September 2017[131]	Php 994,181,012	5 October 2017
For the period ending October 2017[132]	Php 995,217,803	5 November 2017
For the period ending November 2017[133]	Php 963,705,632	5 December 2017

124 *See* Annex "J" of the Complaint by the MAO.
125 *See* Annex "C" of the Verified Comment by Respondent Corporations and Annex "2" of the Verified Comment by Respondent Soriano Group.
126 Verified Comment by Respondent Soriano Group, at 18.
127 *Id.* at 40.
128 *Id.* at 41.
129 As explained by Atty. Rolando Domingo during the Clarificatory Hearing.
130 *See* Annex "F-7" of the Compliance by Respondents DYT Equities Corporation, Pure Energy Holdings Corporation, Just Solar Corporation, and SPARC-Solar Powered Agri-Rural Communities Corporation [Compliance by Respondent Corporations], 13 November 2020.
131 *See* Annex "F-8" of the Compliance by Respondent Corporations.
132 *See* Annex "F-9" of the Compliance by Respondent Corporations.
133 *See* Annex "F-10" of the Compliance by Respondent Corporations.

Astronergy IBS - For the period ending November 2017[134]	Php 975,934,419	5 December 2017, transmitted to Astronergy on 10 December 2017
For the period ending December 2017[135]	Php 940,380,736	5 January 2018
LBP IBS - For the period ending December 2017[136]	Php 994,487,643	5 January 2018, transmitted to LBP on 16 January 2018

The above-listed balance sheets satisfy the definition of a regularly prepared balance sheet. To recall, a regularly prepared balance sheet is one that is: (1) regular as to the time of preparation; (2) regular as to the manner or procedure of preparation; and (3) relied on or used by management. As sufficiently shown by Respondent SPARC, it has consistently prepared monthly balance sheets since January 2016 in accordance with accounting rules and procedures.[137] It is also evident that Respondent SPARC's management relies on its balance sheets for business decisions. That these balance sheets were prepared in the ordinary course of business was not repudiated. Likewise, there is no proof that Respondent SPARC deviated from the usual manner or procedure in preparing these balance sheets.

The explanations of Atty. Rolando Domingo, SPARC Chief Finance Officer, during the clarificatory hearing before the Commission, supplies clear evidence that the monthly balance sheets are regularly prepared. The relevant exchanges during the clarificatory conference between Commissioner Bernabe and Atty. Domingo are as follows:

Comm. Bernabe	:	When we say that you are supervising, you are in charge of reviewing and approving what your internal accountants have prepared for submission to the board, for transmittal to management or to other third parties, is that correct?
Atty. Domingo	:	Yeah, before these are given to the auditors or to the other government bodies, yes, I reviewed some of those.
Comm. Bernabe	:	And these financial statements or financial documents, are they prepared more than once a year because once a year, we expect that the financial statements are prepared for purposes of audit and the audited FS are submitted to BIR and SEC? So apart from those financial statements, are you responsible for preparing other financial statements during the course of the year? And if you are, as you had stated, you are earlier, what are those conditions? What are those periods? What are those circumstances when you are required to prepare these other financial documents?
Atty. Domingo	:	***Usually we prepare also for a board meeting, we prepare interim financial statements also.***

[134] *See* Annex "6" of the Verified Comment by Respondent Soriano Group.
[135] *See* Annex "F-11" of the Compliance by Respondent Corporations.
[136] *See* Annex "3" of the Verified Comment by Respondent Soriano Group.
[137] *See* Compliance by Respondent Corporations.

Comm. Bernabe	:	So how often are the board meetings for which you prepare these types of interim financial documents?
Atty. Domingo	:	We have annual meetings, but usually in addition to the audited, we also prepare some interim FS –
Comm. Bernabe	:	Do you prepare –
Atty. Domingo	:	for the government [inaudible]
Comm. Bernabe	:	Go ahead, Atty. Domingo.
Atty. Domingo	:	We prepare financial statements, ***the accountants prepare and I review the financial statements every month*** but most of the time quarterly because this is in consonance of some regulating bodies like the BIR.
Comm. Bernabe	:	So, in addition to the annual audited FS, you also prepare interim FS at least once a year for board meetings and in addition to that, you prepare quarterly FS for submission to the BIR?
Atty. Domingo	:	Yes, and also, we regularly prepare for our internal use monthly financial statements.
Comm. Bernabe	:	And all of those are prepared by your internal accounts and then you review them?
Atty. Domingo	:	***Yes, they are regularly prepared every month***.
Comm. Bernabe	:	So, there is a record or there is evidence of these monthly FS that you would have for every month since the time that you assumed office in the company?
Atty. Domingo	:	Yes, most operating companies and there's two other operating companies like Hydro company, we prepare that at least quarterly or, but I want to see it on a monthly basis also so that we know what is happening to the company.[138]

(Emphasis Supplied)

Concern was raised by the dissenting minority in the Commission on the variances in some of the balance sheets. In particular, the monthly balance sheets for November 2017 and December 2017, where the reported aggregate asset values of ₱964,705,632 and ₱940,380,736, respectively, are not perfectly equal with the aggregate asset values of ₱975,934,419 and ₱994,487,643 reported in the Astronergy IBS for the month of November 2017 and the LBP IBS for the month of December 2017, respectively. The November 2017 Balance Sheet and the Astronergy IBS have a variance of Php 12,228,787, while variance between the December 2017 Balance Sheet and the LBP IBS is Php 54,106,907. To illustrate:

November 2017 IBS	Astronergy IBS	Variance	Variance %
Php 963,705,632	Php 975,934,419	Php 12,228,787	1.25%

December 2017 IBS	LBP IBS	Variance	Variance %
Php 940,380,736	Php 994,487,643	Php 54,106,907	5.44%

The 1.25% variance in the November 2017 balance sheets and 5.44% in December 2017, though minimal, are cited as strong reasons to disregard the conflicting balance sheets

[138] Transcript of the Clarificatory Hearing dated 18 December 2021, at 7-8.

for it raises suspicions of possible manipulation of data to evade the compulsory notification requirement.

However, aside from the variances, the MAO barely had any credible evidence to prove the suspicion of possible data manipulation of the asset values reported in the balance sheets for November 2017 and December 2017. Given this predicament, the MAO had to admit in its Consolidated Reply that it could not rely on the unauthenticated email and Viber message exchanges that were supplied as evidence by Astronergy to prove data manipulation, to wit:

> At the outset, **MAO respectfully emphasizes that the Final Report merely provided a factual account of an allegation made by ASP**.
>
> xxx xxx xxx
>
> **Notations in the Final Report relating to the "custom-fitting" of SPARC's 2017 AFS merely echoed the allegation of ASP** in its 3 October 2018 submission, to wit:
>
> > "We have learned that during the course of the negotiations, the parties encountered issues regarding the assailed transaction's compliance with the PCA. Specifically, we have been advised that Mr. JJ Samiel A. Soriano, as seller, and shareholder of SPARC and JSC… were aware of the notification requirements under Section []17 of the PCA… The exchange of messages between the parties is self-explanatory. We believe that the parties were fully cognizant of the compulsory notification requirement… and were advised by counsel regarding this issue. However, it appears that the total assets of SPARC listed in the 2017 AFS… was reduced to less than PhP1,000,000,000
> > 00."
>
> As is evident in the Final Report, **MAO did not rely on the email and Viber exchanges because ASP failed to authenticate them** up until the MAO's submission of the Final Report. However, nothing prevents this Honorable Commission from admitting the said email and Viber exchanges in its own assessment of the Respondents' violations.[139]
>
> *(Emphasis Supplied)*

Confronted with this lack of credible and reliable evidence, the Commission cannot but toss out the suspicions as baseless allegations that deserve no consideration to avoid running afoul with the standard prescribed by the High Tribunal in *Sps. Cabasal v. BPI Family Savings Bank, Inc.*[140]:

> **It is a fundamental rule that bare allegations, unsubstantiated by evidence, are not equivalent to proof. Charges based on mere suspicion and speculation cannot be given credence**. When the complainant relies on mere conjectures and suppositions, and fails to substantiate his allegations, the complaint must be dismissed for lack of merit.
>
> *(Emphasis Supplied)*

Further, the Commission cannot jump into the conclusion that the discrepancies in the November and December 2017 balance sheets are proof of the MAO's suspicion of custom-fitting as it is merely a possibility. However, it is likewise possible that the variances may be due to legitimate and allowable adjustments. The IAS recognizes adjustments in interim financial reports for anticipated or deferred revenues when such

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139 Consolidated Reply by the MAO, ¶¶ 57-59.

140 *Sps. Cabasal v. BPI Family Savings Bank, Inc.*, G.R. No. 233846, 18 November 2020.

anticipation or deferral is not appropriate at the end of the year,[141] or for anticipated or deferred costs,[142] or income tax expenses recognized on a best estimate basis.[143]

The Commission noted that during the clarificatory hearing, SPARC's Accountant, Ferdinand Casedo, explained that the cause of the variances are adjustments for depreciation and input tax. His explanation to Commissioner Asuncion are as follows:

Commissioner Asuncion	:	Mr. Casedo, can we go back to the two questions I had for you regarding the variances in the November 2017 and the December 2017 financial statements?
Mr. Casedo	:	*Okay lang.*
Commissioner Asuncion	:	Let's go to the November 2017 first. It's flashed on the screen, Mr. Casedo.
Mr. Casedo	:	Ma'am, actually I did not check this while Atty. Roly was interviewed. You need this already now?
Commissioner Asuncion	:	Mr. Casedo, that is the purpose of this hearing to clarify these matters.
Mr. Casedo	:	Okay because I need to check with the excel file.
Commissioner Asuncion	:	So, you wouldn't be able to explain these variances today.
Mr. Casedo	:	I need to check the excel file where I guess there's a difference, why there's two amounts for the month of November and as of December.
Commissioner Asuncion	:	But Mr. Casedo just looking at the amount of the difference, you have been, I suppose, practicing and working with this company for quite a bit now. What do you think or typically what would this difference account for?
Mr. Casedo	:	Yes, ma'am. I checked, but maybe as of November, maybe this is the depreciation.
Commissioner Asuncion	:	Depreciation.
Mr. Casedo	:	**For November ah [inaudible] and the depreciation every month is at least between 13 to 15 million.**
Commissioner Asuncion	:	Which one is the later document?
Mr. Casedo	:	The later document is the one on the left.
Commissioner Asuncion	:	So, Mr. Casedo, the later document is the one with a lower figure of 963 million. So, what accounts for the reduction?
Mr. Casedo	:	**One difference is the provision of 72 million. That's the amount of the input tax that was filed before. The 72 million plus**.
Commissioner Asuncion	:	Yes. Go ahead. Which one is that I can't see.
Mr. Casedo	:	The current asset.

[141] IAS 34.37.
[142] IAS 34.39.
[143] IAS 34, Appendix B12.

Commissioner Asuncion	:	The 73 million?
Mr. Casedo	:	Yes because that's the input tax before specified.
Commissioner Asuncion	:	So, you paid that income tax and so –
Mr. Casedo	:	Input tax ma'am. It was classified under other current assets.
Commissioner Asuncion	:	Okay can we go to the December.
Mr. Casedo	:	Yes ma'am. Other current assets also. **The one that is being classified as input tax. That was filed for refund. The 72 million plus**.
Commissioner Asuncion	:	Same amount?
Mr. Casedo	:	Yes ma'am.[144]

(Emphasis Supplied)

Respondent Corporations clarified in detail in their Memorandum the above explanation of Mr. Casedo that the variance in the amounts was on account of the adjustments made by SPARC prior to submission to the auditor for preparation of the 2017 AFS. They explained that the bulk of the adjustments came from Cash-In-Bank that was used to pay for SPARC's expenses such as insurance, repairs and maintenance and distribution charges, and the Impairment of Input Tax since SPARC was under the assumption that its claim for refund will not be granted by the BIR, as the latter is known for being conservative in granting refunds.[145]

Given the paucity of evidence to support the suspicion of data manipulation on the part of the MAO, and the explanations on the variances presented by the Respondent Corporations, the Commission cannot interpret the said variances to be due to the bad faith of the latter.

Concern was also raised against the monthly balance sheets being unsigned. The lack of signature does not affect the authenticity and admissibility of the monthly balance sheets as entries made in the ordinary course of business pursuant to the ruling in *Jose v. Michaelmar Phils., Inc*.,[146] to wit:

> Under legal rules of evidence, not all unsigned documents or papers fail the test of admissibility. There are kinds of evidence known as exceptions to the hearsay rule which need not be invariably signed by the author if it is clear that it issues from him because of necessity and under circumstances that safeguard the trustworthiness of the paper. A number of evidence of this sort are called entries in the course of business, which are transactions made by persons in the regular course of their duty or business.
>
> xxx xxx xxx
>
> In KAR ASIA, Inc. v. Corona, the Court admitted in evidence unsigned payrolls. In that case, the Court held that:
>
> > Entries in the payroll, being entries in the course of business, enjoy the presumption of regularity under Rule 130, Section 43 of the Rules of Court. It is therefore incumbent upon the respondents to adduce clear and convincing evidence in support of their claim.

144 Transcript of the Clarificatory Hearing dated 18 December 2020, at 24-25.
145 Memorandum for Respondent Corporations, ¶ 55.
146 *Jose v. Michaelmar Phils., Inc*., G.R. No. 169606, 27 November 2009.

> Unfortunately, respondents' naked assertions without proof in corroboration will not suffice to overcome the disputable presumption.[147]

The monthly balance sheets constitute entries made in the ordinary or regular course of Respondent SPARC's business. The monthly balance sheets are routinely prepared as a matter of course for Respondent SPARC's management, shareholders, and creditors. The monthly balance sheets are evidence in themselves and do not require additional supporting evidence unless it is shown that the balance sheets were not prepared in accordance with prevailing procedures.

Even assuming arguendo that the inconsistent balance sheets are excluded for being inadmissible and unreliable, the August, September, and October monthly balance sheets still furnish substantial evidence that the aggregate value of Respondent SPARC's assets was below the threshold amount at the time of the Transaction. The aggregate asset values reported in the monthly balance sheets for August, September and October 2017 are more proximate and relevant to the Transaction than the 2016 AFS or reissued 2016 AFS, which reported values outdated by more than one year.

To the Commission's assessment, there is sufficient evidence to support a conclusion in the mind of a reasonable person to conclude that the Size of Transaction Test was not satisfied.

In this regard, the Commission reiterates that the quantum of proof required in administrative cases like the instant controversy is substantial evidence, which is defined in the Revised Rules on Evidence as –

> *Substantial Evidence*. – In cases filed before administrative or quasi-judicial bodies, a fact may be deemed established if it is supported by substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.[148]

Substantial evidence is explained in finer detail by in *Caasi v. Sacramento*[149] in the following manner:

> [I]n actions filed before administrative agencies, the quantum of proof required is substantial evidence, xxx which is defined as such amount of relevant evidence which a reasonable mind might accept as adequate to support a conclusion. It is more than a mere scintilla of evidence. [x x x] It need not be overwhelming or preponderant, as is required in an ordinary civil case, or evidence beyond reasonable doubt, as is required in criminal cases, but the evidence must be enough for a reasonable mind to support a conclusion.[150]

Clearly, the balance sheets for the months of August to December 2017 submitted by the Respondents adequately prove that the value of SPARC's assets at the time of or proximate to the Transaction is below the Php 1 billion notification threshold.

Additionally, while we have stated that the 2017 AFS of SPARC cannot be used as basis for not being available at the time of the Transaction, it nonetheless serves the purpose of confirming what was established by the monthly balance sheets - that the value of the assets of SPARC was below Php 1 billion as of 31 December 2017, or 15 days prior to the date of the Transaction. Notably, the 2017 AFS is the financial document filed with,

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147 *KAR ASIA, Inc. v. Corona,* G.R. No. 154985, 24 August 2004 *as cited in supra* note 146.
148 REVISED RULES ON EVIDENCE, rule 133, § 5.
149 *Caasi v. Sacramento*, G.R. No. 243054, 3 March 2021.
150 *Id.*

and relied upon by, other regulatory government agencies for purposes of the financial condition of SPARC at the end of the year in 2017.

Respondents did not violate Section 17 of the PCA

To summarize, the applicable rule in determining the Size of Transaction Test in this case, is Rule 4, Section 3(f)(1) of the PCA IRR under which either the most recent audited financial statements or regularly prepared balance sheets may be used. The available and most proximate financial documents at the time of the Transaction are the balance sheets for August to December 2017, which all reflect that the aggregate value of SPARC's assets is below the Php 1 billion notification threshold. These monthly balance sheets, which are regularly prepared balance sheets in the contemplation of the PCA IRR, reflect the more current and fairer valuation of the assets of SPARC most proximate to the Transaction when compared to the 2016 AFS used by the MAO. As the aggregate value of the assets of SPARC reflected in the monthly balance sheets did not breach the Php 1 billion threshold for the Size of Transaction Test under Section 17 of the PCA and Rule 4, Section 3 (b)(4) of the PCA IRR, Respondents Just Solar Corporation, Pure Energy Holdings Corporation, DYT Equities Corporation, SPARC-Solar Powered Agri-Rural Communities Corporation, JJ Samuel A. Soriano, Marie Herminia C. Soriano, Racquel F. Resurreccion-Tanyag, Maria Michelle Michiko C. Soriano, and Jose Miguel Lorenzo C. Soriano have no obligation to notify the Transaction to the Commission.

DISPOSITIVE PORTION

WHEREFORE, the Complaint dated 25 October 2019 is hereby **DISMISSED** for lack of merit. No pronouncement as to costs.

SO ORDERED.

16 September 2021.

ARSENIO M. BALISACAN
Chairman

JOHANNES BENJAMIN R. BERNABE
Commissioner
(See Concurring and Dissenting Opinion)

MACARIO R. DE CLARO, JR.
Commissioner

EMERSON B. AQUENDE
Commissioner

CONCURRING and DISSENTING OPINION

Commissioner Bernabe:

I concur with the majority insofar as the resolution of the first and second issues articulated in their decision is concerned.[1] This dissent is limited to the findings with respect to the third and fourth issues in the Commission's majority decision.[2] In brief, the undersigned is not convinced that the interim balance sheets relied upon by the majority decision constitute substantial evidence that the transaction in question did not breach the notification thresholds under the Implementing Rules and Regulations of the PCA. In particular, the balance sheets of Respondent SPARC for November 2017 and December 2017 submitted by Respondent Soriano Group in their Verified Comment, taken together with SPARC's interim balance sheets for the same period submitted by the Respondent Corporations as part of their Compliance, indicate a disturbing inconsistency which could not be clearly and adequately explained, and thus cast doubt on their reliability as basis for concluding that the Size of Transaction test has not been met.

As rightly pointed out in the majority decision, a regularly prepared balance sheet is one that is: (1) regular as to the time of preparation; (2) regular as to the manner or procedure of preparation; and (3) relied on or used by management. In this case, while the first and third criteria may have been met as may be gleaned for instance in the exchange[3] during the clarificatory hearing between the undersigned and Atty. Rolando Domingo, Chief Finance Officer of Respondent SPARC, the second criteria is not clearly established as may be deduced from the variance between the abovementioned balance sheets submitted by the Respondents for the same periods. Neither was the variance sufficiently clarified and explained in the answers[4] of Respondent SPARC's accountant, Mr. Ferdinand Casedo, to Commissioner Asuncion's questions on the justification for the variances during the hearing. Notably, the figures (re provision for payment of input tax) Mr. Casedo was alluding to as underlying the differences did not coincide with or relate to the actual variance.

While the majority is swayed by the clarification offered by Respondent Corporations in their Memorandum that the variance in the amounts was on account of the adjustments made by SPARC prior to submission to the auditor for preparation of the 2017 AFS, and that the bulk of these adjustments came from Cash-In-Bank that was used to pay for SPARC's expenses such as insurance, repairs and maintenance and

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[1] These pertain to:

1. Whether due process was properly observed when Respondents Pure Energy and Just Solar were not directed to file written explanations to the Notice to Explain; and
2. Whether due process was properly observed when Respondent Corporations were not notified and included in the clarificatory conference conducted by the MAO.

[2] To wit:

3. Which instrument among the 2016 Audited Financial Statement, 2016 Re-issued Audited Financial Statement, 2017 Audited Financial Statement, and the Interim Balance Sheets is the proper basis to determine if the aggregate value of assets of SPARC breached the Size of Transaction threshold?
4. Whether the compulsory notification requirement under Section 17 of the PCA and Rule 4, Section 3(g) was violated by the Respondents.

[3] Transcript of the Clarificatory Hearing dated 18 December 2021, at pp.7-8.

[4] *Id.*, at pp. 24-25.

distribution charges, and the Impairment of Input Tax,[5] the undersigned is not. A more careful perusal of the explanation offered will show that this explanation pertains to differences in entries between interim balance sheets prepared at the end of the year and audited financial statements prepared thereafter for the same period. The explanation in the Memorandum does not pertain to, much less clarify, differences in interim balance sheets logically presumed to have been prepared contemporaneously covering the same period.

The majority further errs in making an argument for the Respondents that "it is likewise possible that the variances may be due to legitimate and allowable adjustments [as the] IAS recognizes adjustments in interim financial reports for anticipated or deferred revenues when such anticipation or deferral is not appropriate at the end of the year, or for anticipated or deferred costs, or income tax expenses recognized on a best estimate basis."[6] Neither the Respondent Corporations nor Soriano Group assert this argument in any of their pleadings or submissions to the Commission. Furthermore, an examination of the International Accounting Standards put forward by the majority, specifically, IAS 34.37, 34.39 and IAS 34 Appendix B12, shows that these are not pertinent in clarifying the variance between the different interim balance sheets for November and December 2017. The recognition of adjustments under the IAS appear relevant insofar as a comparison of interim financial reports vis-à-vis annual or audited financial statements is concerned but not when comparing two different interim balance sheets for the same period that were prepared contemporaneously.

To the undersigned's mind, the fact that the figures in the interim balance sheets for November and December 2017 submitted as part of the Verified Comments vary from those in the interim balance sheets for the same periods submitted in their Compliance in and of themselves evince irregularity in the preparation of either or both sets of these balance sheets. Indeed, how can the Commission determine which of these interim balance sheets it should rely on, or whether these could even be relied upon, when the Respondents themselves cannot adequately, much less convincingly explain the variance in figures for balance sheets which cover the same period?

Not only should the foregoing balance sheets not be relied upon, but the manifest irregularity likewise throws into question the reliability of the other interim balance sheets covering other months in 2017 submitted by Respondents in their Compliance. While the Chief Financial Officer of SPARC may have confirmed the *periodic* preparation of financial statements for the company's internal use, this relates only to one aspect of regularity in the preparation of these documents, that is, the regularity as to the time of preparation. Neither this financial officer nor Respondent SPARC's accountant were sufficiently persuasive to maintain that the other interim balance sheets were regularly prepared "as to the manner or procedure of preparation" in the face of conflicting interim balance sheets they had previously submitted to the Commission. It bears emphasis that such regularity cannot be presumed, precisely because of the doubts regarding reliability which the Respondents' previous submissions had engendered in the mind of the Commission. This dissenting Commissioner is not persuaded that the interim balance sheets for the months of

[5] *Commission Decision No. 05-M-008/2021,* page 25, citing Memorandum for Respondent Corporations.
[6] *Id.,* at pp. 23-24.

September 2017 and October 2017 which the majority alternatively offers reliance on[7] were indeed prepared at around the time they purport to cover, or more importantly, that the figures therein are correct and reliable. The onus of erasing the doubt and uncertainty resulting from the conflicting submissions is on the Respondents, and they failed to do this.

The disregard for the 2016 AFS of SPARC on the premise that the values therein are "too far removed from the date of the consummation of the Transaction" and that "[u]sing the financial information reflected in the 2016 AFS of SPARC is outdated. It is not a fair representation of SPARC's financial condition x x x at the time of the Transaction x x x"[8] flies against the explicit directive of Rule 4, Section 3(f)(1) of the PCA's Implementing Rules and Regulations to avail of either the most recent audited financial statements or the last regularly prepared balance sheet in determining the notifiability of a transaction. If the last regularly prepared balance sheet is not available or cannot be properly established, as in this case, then the only alternative is to resort to the most recent audited financial statements even if the information contained therein may appear to be "too far removed" or "outdated." This is the clear letter and intent of the PCA IRR developed and promulgated by the Commission itself, from which it cannot deviate on the supposition that, on a case-to-case basis, the most recent audited financial statements do not offer "a fair representation" of an entity's financial condition at the time of the transaction. Otherwise, the Commission risks going down a slippery slope of subjectively assessing when a transaction is "too far removed" from an entity's audited financial statements.

The reference by the majority to the 2017 AFS of SPARC as serving "the purpose of confirming what was established by the monthly balance sheets - that the value of the assets of SPARC was below Php1 billion as of 31 December 2017, or 15 days prior to the date of the Transaction x x x"[9] should be viewed as mere *obiter* and of no precedential value. Any financial statement that comes after a transaction is consummated is strictly of no moment in establishing or even confirming the notifiability of a merger or acquisition. That the 2017 AFS was filed with, and relied upon by, other regulatory government agencies for purposes of the financial condition of SPARC at the end of the year in 2017 is irrelevant as far as the PCA's notification thresholds are concerned, as the law's implementing rules and regulations and the various issuances of the PCC regarding merger review provide the exclusive legal framework for this.

To conclude, the interim balance sheets offered by the Respondents as basis for determining notifiability suffer from lack of reliability and probative value, and consequently, do not constitute *prima facie* evidence of the facts stated therein. Among the financial statements and documents submitted by the merging parties, the 2016 AFS is the only document the Commission can properly rely upon to establish

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[7] *Id.,* at page 26.
"Even assuming arguendo that the inconsistent balance sheets are excluded for being inadmissible and unreliable, the August, September, and October monthly balance sheets still furnish substantial evidence that the aggregate value of Respondent SPARC's assets was below the threshold amount at the time of the Transaction. The aggregate asset values reported in the monthly balance sheets for August, September and October 2017 are more proximate and relevant to the Transaction than the 2016 AFS or reissued 2016 AFS, which reported values outdated by more than one year."

[8] *Id.*, at pp. 19-20.

[9] *Id.,* at pp. 26-27.

the total value of assets of SPARC. Considering that the value of the assets as shown in 2016 AFS exceeded the notification thresholds, the Respondents should have notified the Commission of the transaction. Failing to comply with this legal obligation, the transaction should have been deemed void and the appropriate fine should have been imposed upon the Respondents.

The findings of fact of the Commission and other administrative agencies of similar nature are deemed conclusive when supported by substantial evidence. As defined by many cases before our courts, "substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other minds equally reasonable might conceivably opine otherwise."[10] In hearing and deciding the Complaint filed by MAO, the substantial evidence requirement is satisfied when there are reasonable grounds to believe that the Respondents are guilty of the act or omission complained of, even if the evidence might not be overwhelming.[11]

It is incumbent upon the Commission in the performance of its adjudicatory functions to assess not only the admissibility of the evidence submitted to it, but more so, to evaluate the credibility of such evidence. While the Commission may indeed exercise some margin of liberality in deciding to accept certain evidence, the degree of scrutiny in determining the probative value of such evidence cannot be relaxed.

As a final note, to protect the integrity of the Commission's merger notification system, it is imperative that the submissions made by parties be credible and of utmost reliability. While the Commission must of necessity accord veracity to merging entities' submissions, once these submissions engender doubt and uncertainty for reasons attributable to any of the merging entities themselves, the latter must be able to convincingly persuade the Commission that the information they henceforth provide are beyond reproach and can be relied upon.

JOHANNES BENJAMIN R. BERNABE
Commissioner

[10] *Diaz v. Office of the Ombudsman*, G.R. No. 203217, 2 July 2008.

[11] *Office of the Ombudsman-Visayas and Ko Lim Chao v. Castro*, G.R. No. 172637, 22 April 2015.

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