Republic of the Philippines
Department of Finance
Securities and Exchange Commission
COMMISSION EN BANC

ATTY. RAMON R. TORRALBA,
Appellant,

-versus- **SEC En Banc Case No. 09-13-300**

THE PHILIPPINE STOCK EXCHANGE, INC.,
Appellee.
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DECISION

Before the Commission is the Memorandum on Appeal dated 18 September 2013 (the "Appeal") filed by Atty. Ramon R. Torralba, assailing the Letter-Order dated 23 August 2013 (the "Assailed Order") issued by the Enforcement and Investor Protection Department (EIPD) which dismissed the petition of Appellant for lack of merit.

RELEVANT FACTS

On 26 October 2011, the Philippine Long Distance Telephone Company (PLDT) entered into various agreements[1] to acquire shares of Digital Telecommunications Philippines, Inc. (DIGITEL), which resulted in a 51.55% ownership stake in DIGITEL.

PLDT then launched a Tender Offer for the remaining 48% in compliance with the Mandatory Tender Offer Rule provided in Section 19 of the Securities Regulation Code (SRC).

PLDT communicated its offer to the remaining shareholders of DIGITEL, including Appellant. However, dissatisfied with the offer price, Appellant and a few other shareholders opted not to sell their DIGITEL shares.

On 28 November 2011, DIGITEL, through a Board Resolution, agreed to apply for Voluntary Delisting from the PSE in the event that public ownership of the corporation falls below 10% after the Tender Offer.

On 05 December 2011, PLDT submitted its Tender Offer Report (SEC Form 19-1) to the Commission, stating that DIGITEL agreed to apply for

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[1] Share swap with DIGITEL shareholders and purchase of DIGITEL convertible bonds.

voluntary delisting from the PSE if public ownership of the corporation falls below 10%. PLDT emphasized that its recent Tender Offer will be sufficient to comply with the PSE requirement of Tender Offer for purposes of voluntary delisting.

On 25 January 2012, DIGITEL applied for Voluntary Delisting after PLDT acquired 98% of its outstanding shares. In other words, Appellant's shares in DIGITEL were among the 2% not acquired by PLDT.

On 22 February 2012, the PSE, through a Resolution (the "Resolution"), approved and granted DIGITEL's Petition for Voluntary Delisting dated 24 January 2012 sans the second Tender Offer after the filing of the Petition.

On 20 March 2012, Appellant filed a Complaint with the EIPD praying for the issuance of an Order nullifying and setting aside the Resolution of the PSE Board Dated 22 February 2012.

On 3 September 2012, the EIPD issued the Assailed Order, the dispositive portion of which reads:

> "In view of all the foregoing, the complaint was (sic) hereby DISMISSED for lack of merit."

On 18 September 2013, Appellant filed the instant Appeal where he maintained that the Voluntary Delisting was invalid because it did not comply with the Tender Offer required under Paragraph (e) of PSE Delisting Rules, thus:

> "The person(s) proposing the delisting must show to the Exchange that following the acquisition of the tendered shares, said person(s) shall have obtained a total of at least ninety-five percent (95%) of the issued and outstanding shares of the Company. However, if at the time the petition for delisting is filed, the person(s) proposing the delisting are already the beneficial owners of ninety-five percent (95%) of the issued and outstanding shares of the Company, said person(s) shall still be required to make a tender offer to all stockholders of record."

On 7 October 2013, the PSE filed its Reply Memorandum which prayed for the denial of the Appeal for alleged lack of merit. PSE argued that the approval of DIGITEL's Petition for Voluntary Delisting was valid because the PSE Rules require a Tender Offer only if none has been conducted previously, thus:

> "16.3 xxx if the delisting proponent is already the owner of at least 95% of the outstanding shares as of the filing of this petition, it shall be required to make a tender offer to all stockholders of record, <u>if none has been made before</u>. This is to satisfy the rationale for the tender offer requirement,

which is to give the majority shareholders a chance to exit the company subject of the delisting, on the premise that no tender offer has been previously made. Thus, even if the delisting proponent already owns the threshold percentage of the outstanding shares of the subject company, it still has to conduct a tender offer for the remaining shares to give the holders of the said shares an opportunity to dispose of their shares prior to delisting. Obviously if a tender offer has already been made, a subsequent tender offer need not be undertaken.[2]

17. In this case, PLDT, which initially owned 51.55% of the outstanding shares of DIGITEL, already conducted a tender offer for the remaining [48.45] DIGITEL shares.[3]

18. While the tender offer was primarily undertaken by PLDT to comply with the requirements of the Securities Regulation Code and its Implementing Rules and Regulations on Mandatory Tender Offer, PLDT repeatedly stressed in its tender offer documents that it is also meant to serve as compliance with the tender offer requirement."

ISSUE

Did the EIPD commit reversible error in sustaining PSE's approval of the Petition for Voluntary Delisting filed by DIGITEL?

DISCUSSION

After a careful consideration of the arguments presented by the parties, the Commission finds the Appeal to be bereft of merit and hereby decides to dismiss the same.

Paragraph (e) of the Rules on Delisting (Voluntary Delisting)[4] issued by the PSE and approved by the Commission, provides:

> "The persons proposing the delisting must show to the exchange that following the acquisition of the tendered shares, said person(s) have obtained a total of at least ninety-five (95%) percent of the issued and outstanding shares of the Company. However, if at the time the petition for delisting is filed, the person(s) proposing the delisting are already the beneficial owners of ninety-five percent (95%) of the issued and outstanding shares of the Company, said person(s) shall still be required to make a tender offer to all stockholders of record."

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[2] Page 8 of PSE's Reply Memorandum.
[3] Id
[4] https://www.pse.com.ph/resource/rulesAndRegulations/Supplemental%20Rules/Supplemental%20Rule%208%20-%20Delisting%20Rules.pdf

At the outset, it should be emphasized that the Appeal does not allege factual errors. What is disputed in the instant case relates to the interpretation of the afore-quoted provision of the Rules on Delisting.

In his Appeal, Appellant argues that the Rules require PLDT to make another tender offer since at the time of the filing of the Petition for Voluntary Delisting, they are already the beneficial owners of ninety-eight percent (98%) of the issued and outstanding shares of the company (DIGITEL). Hence, it was erroneous for PSE to approve the Petition for Voluntary Delisting without the second tender offer.

We do not agree with Appellant.

The concept and purpose of a "tender offer" under Section 19 of the SRC was discussed by the Supreme Court in the case of *Osmeña III v. Social Security System*[5], to wit:

> "For perspective, a "tender offer" is a publicly announced intention by a person acting alone or in concert with other persons to acquire equity securities of a public company, i.e., one listed on an exchange, among others. <u>The term is also defined as "an offer by the acquiring person to stockholders of a public company for them to tender their shares therein on the terms specified in the offer." Tender offer is in place to protect the interests of minority stockholders of a target company against any scheme that dilutes the share value of their investments. It affords such minority shareholders the opportunity to withdraw or exit from the company under reasonable terms, a chance to sell their shares at the same price as those of the majority stockholders</u>." (Emphasis supplied)

In the instant case, Appellant does not dispute that PLDT conducted a mandatory tender offer in compliance with Section 19 of the SRC. Appellant also does not dispute that he and the other shareholders of DIGITEL comprising the 2% which was not acquired by PLDT were duly informed of the mandatory tender offer, and were given an offer relating to purchase of their respective shares. In the context of these established and uncontested factual backdrop, the Commission finds no cogent reason to disturb the Assailed Order which sustained the Resolution. Clearly, PLDT complied with the requirement set forth in Section 19 of the SRC and accorded Appellant and the other minority shareholders of DIGITEL the requisite opportunity to withdraw or exit from the latter under reasonable terms. Appellant cannot at this time cry foul and allege that his interest as a minority shareholder was disregarded. The purpose of the mandatory tender offer under Section 19 of the SRC has been met.

Moreover, we agree with PSE that Paragraph (e) of the Rules covers two (2) circumstances i.e. first, the petitioner or applicant for delisting owns

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[5] G.R. No. 165272, September 13, 2007.

less than 95% of the outstanding shares of the company at the time of the filing of the petition for delisting, and second, the petitioner or applicant for delisting already owns 95% or more of the outstanding shares of the company at the time of the filing of the petition for delisting. In the first instance, the conduct of tender offer is mandatory in all cases because the petitioner is required to prove, to the satisfaction of PSE, that it has acquired at least 95% of the outstanding shares of the company. In the second instance, the petitioner who is already the owner of at least 95% or more of the outstanding shares of the company at the time of the filing of the petition is required to make a tender offer only if none has been made before.

The Rules which are based on Section 19 of the SRC did not and would not contemplate the conduct of two (2) successive tender offers. Section 19 of the SRC requires the conduct of a mandatory tender offer only if the circumstances provided therein are present, and the parameters set forth therein are breached. Once this is complied with, a second mandatory tender offer is no longer required. The position of Appellant that the Rules require an applicant for delisting to make a second mandatory tender offer is not tenable because it will constitute an amendment of Section 19 of the SRC which is outside the authority of the Commission. This is a power that is vested in the Congress.

Considering that PLDT already made a tender offer for the remaining 48.45% of the issued and outstanding capital stock of DIGITEL, we hold that the EIPD did not commit reversible error in sustaining the finding of PSE that the requirement under Paragraph (e) of the Rules relative to the conduct of a tender offer for purposes of delisting was complied with. Section 19 of the SRC and the Rules could not have contemplated that PLDT would make another tender offer to the shareholders of DIGITEL representing the remaining 2% who have rejected the offer in the first tender offer. More importantly, the Rules do not require PLDT to offer the purchase of shares at a price acceptable to all shareholders. Appellant lost his opportunity to exit the company after he rejected the offer of PLDT, after the shareholders representing 46.48% agreed to sell their shares.

WHEREFORE, premises considered, the instant *Appeal* is hereby **DISMISSED** for lack of merit. The Assailed Order of the EIPD is hereby **AFFIRMED.**

SO ORDERED.

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Pasay City, Philippines, 6 August 2020.

EMILIO B. AQUINO
Chairperson

EPHYRO LUIS B. AMATONG
Commissioner

JAVEY PAUL D. FRANCISCO
Commissioner

KELVIN LESTER K. LEE
Commissioner

KARLO S. BELLO
Commissioner