

FIRST DIVISION

[G.R. No. 191150, October 10, 2016]

NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS (NASECORE), REPRESENTED BY PETRONILO ILAGAN, FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), REPRESENTED BY SIEGFRIEDO VELOSO, AND FEDERATION OF LAS PIÑAS VILLAGE ASSOCIATIONS (FOLVA), REPRESENTED BY BONIFACIO DAZO, PETITIONERS, MANILA ELECTRIC COMPANY (MERALCO), RESPONDENT.

D E C I S I O N

PERLAS-BERNABE, J.:

Before this Court is a petition for review on *certiorari*^[1] assailing the Decision^[2] dated January 29, 2010 of the Court of Appeals (CA) in CA-G.R. SP No. 108663, which affirmed the Decision^[3] dated May 29, 2008 and the Order^[4] dated April 13, 2009 of the Energy Regulatory Commission (ERC) in ERC Case Nos. 2008-004 RC and 2008-018 RC, approving with modification respondent Manila Electric Company's (MERALCO) applications for the translation into distribution rates of the Energy Regulatory Commission (ERC)-approved Annual Revenue Requirement (ARR), utilizing the Performance-Based Regulation (PBR) methodology, covering the first and second regulatory years of the 2007-2011 regulatory period.

The Facts

On April 14, 2000, MERALCO, a utility company engaged in the business of sale and distribution of electricity within its franchise area, filed with the now-defunct Energy Regulatory Board (ERB) an application for approval of the revision of its current rate schedules and an appraisal of its properties, which would allow an increase in its basic charge by about P0.30 per kilowatt hour (kWh), docketed as ERB Case No. 2000-57.^[5] During the pendency of this case, the Philippine Congress enacted Republic Act No. 9136,^[6] otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA), which provisions, *inter alia*, abolished the ERB and created the ERC in its stead,^[7] as well as directed all electric distribution utilities to file an application for approval of their unbundled rates with the ERC.^[8]

Thus, pursuant to the EPIRA, MERALCO filed an application for the approval of its unbundled rates and the appraisal of its properties, docketed as **ERC Case No. 2001-900**. Eventually, this latter case was consolidated with ERB Case No. 2000-57, which was re-docketed as **ERC Case No. 2001-646**.^[9] During this time, the ERC adopted the Rate on Return Base (RORB) methodology in its rate-setting function. Under the RORB methodology, rates are set to recover the cost of service incurred by the distribution utility plus a reasonable rate of return^[10], whereby historical costs are used to determine the revenue requirement.^[11]

On March 20, 2003, the ERC issued a Decision in **ERC Case Nos. 2001-646 and 2001-900**, approving MERALCO's twin applications and fixing its rate of return, initially at 12%, but later, upon reconsideration, at 15.5% through an Order dated May 30, 2003.^[12] The matter eventually reached this Court through separate petitions respectively filed by MERALCO, *i.e.*, G.R. No. 166769^[13] and the ERC, *i.e.*, G.R. No. 166818,^[14] which cases were eventually consolidated. On December 6, 2006, this Court rendered a Decision in these consolidated cases, *i.e.*, *MERALCO v. Lualhati (Lualhati)*,^[15] upholding the new rates fixed by the ERC, albeit provisionally, pending the complete audit on the books, records, and accounts of MERALCO to be performed by the Commission on Audit (COA).^[16]

Meanwhile, the ERC, acting in accordance with its rate-setting authority under the EPIRA,^[17] and after the conduct of several public consultations, issued Resolution No. 4, Series of 2003 dated May 29, 2003, **signaling its shift from the RORB methodology to the PBR methodology in fixing the wheeling rates of regulated entities**.^[18] Under the PBR methodology, the price of the utility concerned, *i.e.*, electricity, is controlled through an average price cap mechanism under which a limit is placed upon the average revenue per kWh at a particular period which the utility is allowed to earn.^[19]

Consequently, the ERC issued Resolution No. 12-02, Series of 2004^[20] promulgating the Distribution Wheeling Rate Guidelines (DWRG), which would govern the setting of distribution rates of privately-owned distribution utilities that will enter into the new PBR system.^[21] Under the DWRG, five (5) entry groups are defined. to enter into the PBR system.^[22] MERALCO, together with Dagupan Electric Corporation (DECORP) and Cagayan Electric Power and Light Company, Inc. (CEPALCO), were among the first entrants to the PBR.^[23]

On July 26, 2006, the ERC issued Resolution No. 39, Series of 2006,^[24] promulgating the Rules for Setting Distribution Wheeling Rates (RDWR) for Privately Owned Distribution Utilities Entering Performance Based Regulation.^[25] The RDWR, which is an update of the DWRG, sets a maximum price cap on the distribution wheeling rates that may be charged by regulated entities in a regulated period. Regulation occurs during a four (4)-year period and prices are set in advance for each regulatory year in a period.^[26] The PBR-entrant is given an ARR,^[27] which is a forecast of the cash flow requirements of the regulated entity, based on a Building Block analysis that uses a 'classical' weighted average cost of capital (WACC).^[28] This will be used to derive the Maximum Annual Price (MAP),^[29] which, in turn, shall be allocated by the distribution utilities in setting the rate schedule for its distribution, supply, and metering charges for each customer class or segment^[30] following the provisions of the Distribution Services Open Access Rules^[31] and the Uniform Rate Filing Requirements.^[32] Prompted by the foregoing, MERALCO filed on September 1, 2006 an application for the approval of its ARR and performance incentive scheme for the regulatory period 2007-2011 in accordance with the RDWR before the ERC, docketed as **ERC Case No. 2006-045 RC**.^[33]

On May 16, 2007, the ERC, in accordance with the RDWR, issued a Draft

Determination^[34] in **ERC Case No. 2006-045 RC** that embodied its initial views on the price control arrangements that were to apply to PBR entrants, as well as its initial evaluation of MERALCO's proposals and subjected it to public consultation.^[35] Various stakeholders in the energy sector, including herein petitioners National Association of Electricity Consumers for Reforms (NASECORE), Federation of Village Associations (FOVA), and Federation of Las Piñas Village Associations (FOLVA; collectively, petitioners), were invited to attend the said public consultations, ask clarificatory questions, and even file their respective petitions for intervention; however, petitioners, among others, failed to do so despite due notice.^[36] As such, the ERC declared a general default against all those who failed to appear during the hearing and file their petitions for intervention without justifiable reasons, especially since a considerable length of time from the publication of MERALCO's application, as well as of the Notice of Public Hearing, had lapsed without said stakeholders heeding the notices of the ERC.^[37]

After considering all the evidence and public comments submitted, the ERC rendered a Decision^[38] dated August 30, 2007 in **ERC Case No. 2006-045 RC**, approving MERALCO's application albeit with substantial disallowances and reductions, the details of which were embodied in the Final Determination^[39] (FD) that was annexed to the said Decision.^[40] MERALCO sought for the reconsideration^[41] of the foregoing, which was denied in an Order^[42] dated December 5, 2007. It appearing that no more appeals were filed, the ERC ruling in **ERC Case No. 2006-045 RC** became final and executory.

Pursuant to the directives of the ERC, as stated in the FD, MERALCO consequently filed on January 11, 2008 and April 1, 2008 separate applications for the approval of its translation into distribution rates of different customer classes for the first and second regulatory years of the ERC-approved ARR for the regulatory period 2007-2011 before the ERC, docketed as **ERC Case Nos. 2008-004 RC**^[43] and **2008-018 RC**,^[44] from which the present petition before this Court originated.

At the initial hearing, the following intervenors/oppositors entered their appearances, namely, herein petitioners, Consolidated Industrial Gases, Incorporated (CIGI), Freedom from Debt Coalition (FDC), National Power Corporation (NPC), and Mr. Amado H. Soliman.^[45] None of the intervenors/oppositors presented any evidence in support of their stand despite the opportunity given.^[46]

The ERC Ruling in ERC Case Nos. 2008-004 RC and 2008-018 RC and Further Proceedings

On May 29, 2008, the ERC rendered a Decision^[47] approving with modification MERALCO's separate applications for approval of its translation into distribution rates of different customer classes for the 1st and 2nd regulatory years of the ERC-approved ARR for the regulatory period 2007-2011. It consolidated the two (2) distribution rate applications for regulatory years 2008 and 2009 into one price reset to be implemented beginning July 1, 2008, in view of the substantial delay in the issuance of the FD for MERALCO.^[48]

Petitioners, in a joint motion, sought for reconsideration,^[49] averring in the main that the new PBR methodology adopted was inconsistent and contrary to the provisions of the EPIRA. The other intervenors/oppositors likewise filed separate motions for reconsideration of the May 29, 2008 ERC Decision; while the Office of the Solicitor General (OSG), for the Republic of the Philippines through the Department of Trade and Industry (DTI) and the Philippine Chamber of Commerce and Industry (PCCI), moved to intervene and to admit their motions for reconsideration.^[50]

In the meantime, MERALCO submitted a Manifestation,^[51] stating, among others, its intention to defer the recovery of its corporate income tax (CIT) in order to mitigate the impact of the implementation of the new distribution rate structure on its consumers and prevent price shocks.^[52]

In an Order^[53] dated April 13, 2009, the ERC modified its May 29, 2008 Decision relative to the computation of the MAP for 2009 to reflect a zero CIT component after MERALCO manifested to defer the recovery of its CIT and further removed all rate distortions from MERALCO's distribution costs for regulatory year 2008.^[54] On the other hand, all the motions for reconsideration, as well as petitions for intervention were denied for lack of merit.^[55] It held that the issues relative to the propriety of the PBR methodology under the RDWR should have been raised during the time the RDWR was being promulgated by the ERC and that no further interventions can be entertained as it had already issued declarations of general default in accordance with the ERC rules.^[56]

Unconvinced, petitioners appealed^[57] to the CA, docketed as **CA-G.R. SP No. 108663**, asserting that: (a) the ERC should have first revisited the assumptions it used in approving the increased RORB rate from 12% to 15.5% in accordance with its Order^[58] dated May 30, 2003 in **ERC Case Nos. 2001-646 and 2001-900**^[59]; and (b) there must be compliance with the audit requirement by the COA as directed by this Court in *Lualhati* before the ERC could approve MERALCO's applications.^[60]

The CA Ruling in CA-G.R. SP No. 108663

In a Decision^[61] dated January 29, 2010, the CA affirmed the May 29, 2008 Decision and April 13, 2009 Order of the ERC in **ERC Case Nos. 2008-004 RC and 2008-018 RC**, holding that a review of the assumptions used in the approval of the provisional rate increase in *Lualhati* was not required since the RORB rate-setting methodology used therein had already been abandoned by the adoption of the PBR methodology. It added that the factors considered in determining MERALCO's ARR and MAP had already been settled in the ERC's August 30, 2007 Decision and FD in **ERC Case No. 2006-045**, hence, cannot be the subject of review.^[62] The CA likewise dismissed petitioners' contention that a complete audit by the COA is required before approving MERALCO's applications, pointing out that no less than the *Lualhati* case held that the same was not an indispensable requirement, and that absent any showing that the decision and order of the ERC were arrived at arbitrarily, the latter's findings are accorded not only respect but even finality.^[63] In the same manner, the CA denied petitioners' claims for rate rollback and refund for

lack of basis.^[64]

Hence, the instant petition.

The Issue Before the Court

The main issue for the Court's resolution is whether or not the CA correctly upheld the ERC ruling in **ERC Case Nos. 2008-004 RC and 2008-018 RC**, which approved with modification MERALCO's applications for the translation into distribution rates of the ERC-approved ARR under the PBR methodology for the first and second regulatory years of the 2007-2011 regulatory period.

The Court's Ruling

The petition is without merit.

Primarily, petitioners assail the ERC's shift to the PBR methodology, arguing that while the ERC has the authority to adopt alternative forms of internationally-accepted rate-setting methodology as provided for by the EPIRA, it must nevertheless ensure a reasonable price of electricity.^[65] Corollary thereto, petitioners likewise assail the approval of MERALCO's proposed rates pursuant to the PBR methodology, contending that such rates are unreasonable and unjustified, especially in view of its allegation that MERALCO was receiving excessive profits over the last six (6) years.^[66]

The arguments are untenable.

The rule is settled that "[a]dministrative regulations enacted by administrative agencies to implement and interpret the law which they are entrusted to enforce have the force of law x x x and enjoy the presumption of constitutionality and legality until they are set aside with finality in an appropriate case by a competent court."^[67] As such, they "cannot be attacked collaterally. Unless [such] rule is annulled in a direct proceeding, the legal presumption of its validity stands."^[68]

In this case, petitioners' opposition against the PBR rate-setting methodology adopted by the ERC, through its issuance of the DWRG and the RDWR, was not made through the proper case directly attacking the constitutionality and/or validity of the same. Hence, the instant petition constitutes a collateral attack on the above-stated regulation, and therefore, should, at the outset, be disallowed. To explain, based on the PBR methodology, regulated entities, such as MERALCO, are required to go through two (2) **separate** proceedings for their rates to be finally approved. These are: **first**, the determination of the ARR, which is used to derive the MAP; and **second**, the translation of the MAP into a distribution rate structure for each customer class or segment.^[69] **ERC Case Nos. 2008-004 RC and 2008-018 RC, from which the instant petition emanated**, already refer to MERALCO's separate applications for the translation of its MAP into distribution rates of different customer classes for the First and Second regulatory years of the ERC-approved ARR for the regulatory period 2007-2011, which is the second proceeding contemplated under the PBR methodology. **It no longer concerns the propriety of MERALCO's shift to the PBR methodology**, which was what the ERC had officially adopted at the time **ERC Case Nos. 2008-004 RC and 2008-018 RC** were filed.