

## EN BANC

[ G.R. NO. 163935, February 02, 2006 ]

**NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS (NASECORE), REPRESENTED BY PETRONILO ILAGAN, FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), REPRESENTED BY SIEGFRIEDO ELOSO, AND FEDERATION OF LAS PIÑAS HOMEOWNERS ASSOCIATIONS (FOLPHA), REPRESENTED BY BONIFACIO DAZO, PETITIONERS, VS. ENERGY REGULATORY COMMISSION (ERC) AND MANILA ELECTRIC COMPANY (MERALCO) RESPONDENTS.**

### DECISION

**CALLEJO, SR., J.:**

Before the Court is the petition for certiorari, prohibition and injunction filed by National Association of Electricity Consumers for Reforms (NASECORE), Federation of Village Associations (FOVA) and Federation of Las Piñas Homeowners Associations (FOLPHA),<sup>[1]</sup> seeking to nullify the Order dated June 2, 2004 of the Energy Regulation Commission (ERC) in ERC Case No. 2004-112. The assailed order approved the increase of respondent Manila Electric Company's (MERALCO's) generation charge from P3.1886 per kilowatthour (kWh) to P3.3213 per kWh effective immediately.

#### *Factual and Procedural Antecedents*

Congress enacted Republic Act (RA) No. 9136, known as the Electric Power Industry Reform Act of 2001 (EPIRA) on June 8, 2001. Among others, EPIRA declares as policy of the State the following:

...

(b) To ensure the quality, reliability, security and affordability of the supply of electric power;

(c) To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market;

(d) To enhance the inflow of private capital and broaden the ownership base of the power generation, transmission and distribution sectors;

(e) To ensure fair and non-discriminatory treatment of public and private sector entities in the process of restructuring the electric power industry;

...

(j) To establish a strong and purely independent regulatory body and system to ensure consumer protection and enhance the competitive operation of the electricity market; "[2]

The ERC was created under the EPIRA.<sup>[3]</sup> The said regulatory body superseded the Energy Regulatory Board (ERB) which was created under Executive Order (EO) No. 172, as amended.<sup>[4]</sup> The ERC is tasked to promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry.<sup>[5]</sup> Towards this end, the ERC is granted, inter alia, the following functions:

- (a) Enforce the implementing rules and regulations of this Act;
- (b) Within six (6) months from the effectivity of this Act, promulgate and enforce, in accordance with law, a National Grid Code and a Distribution Code which shall include, but not limited to, the following:"
- (c) Enforce the rules and regulations governing the operations of the electricity spot market and the activities of the spot market operator and other participants in the spot market, for the purpose of ensuring a greater supply and rational pricing of electricity;
- (d) Determine the level of cross subsidies in the existing retail rate until the same is removed pursuant to Section 74 hereof;
- (e) Amend or revoke, after due notice and hearing, the authority to operate of any person or entity which fails to comply with the provisions hereof, the IRR or any order or resolution of the ERC. In the event that a divestment is required, the ERC shall allow the affected party sufficient time to remedy the infraction or for an orderly disposal, but in no case exceed twelve (12) months from the issuance of the order;
- (f) In the public interest, establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably. The ERC may adopt alternative forms of internationally-accepted rate-setting methodology as it may deem appropriate. The rate-setting methodology so adopted and applied must ensure a reasonable price of electricity. The rates prescribed shall be non-discriminatory. To achieve this objective and to ensure the complete removal of cross subsidies, the cap on the recoverable rate of system losses prescribed in Section 10 of Republic Act No. 7832, is hereby amended and shall be replaced by caps which shall be determined by the ERC based on load density, sales mix, cost of service, delivery voltage and other technical considerations it may promulgate. The ERC shall determine such form of rate-setting methodology, which shall promote efficiency. In case the rate-setting methodology used is RORB, it shall be

subject to the following guidelines:

...

(u) The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.

All notices of hearings to be conducted by the ERC for the purpose of fixing rates or fees shall be published at least twice for two successive weeks in two (2) newspapers of nationwide circulation.<sup>[6]</sup>

Section 36 of the EPIRA required every distribution utility to file its revised rates for the approval of the ERC. The said provision reads:

*Sec. 36. Unbundling of Rates and Functions.* – Within six (6) months from the effectivity of this Act, NPC [National Power Corporation] shall file with the ERC its revised rates. The rates of NPC shall be unbundled between transmission and generation rates and the rates shall reflect the respective costs of providing each service. Inter-grid and intra-grid cross subsidies for both the transmission and the generation rates shall be removed in accordance with this Act.

Within six (6) months from the effectivity of this Act, each distribution utility shall file its revised rates for the approval by the ERC. The distribution wheeling charge shall be unbundled from the retail rate and the rates shall reflect the respective costs of providing each service. For both the distribution retail wheeling and supplier's charges, inter-class subsidies shall be removed in accordance with this Act.

Within six (6) months from the date of submission of revised rates by NPC and each distribution utility, the ERC shall notify the entities of their approval.

Any electric power industry participant shall functionally and structurally unbundle its business activities and rates in accordance with the sectors as identified in Section 5 hereof. The ERC shall ensure full compliance with this provision.

On October 30, 2001, pursuant to the above provision, the ERC issued an Order requiring all distribution utilities to file their application for unbundled rates. In compliance therewith, respondent MERALCO filed on December 26, 2001 its application with the ERC for the approval of its unbundled rates and appraisal of its properties. The case was docketed as ERC Case No. 2001-900<sup>[7]</sup> and consolidated with ERC Case No. 2001-646.<sup>[8]</sup>

Acting thereon, the ERC issued an Order and a Notice of Public Hearing both dated February 1, 2002 setting the case for initial hearing on March 11 and 12, 2002. In the same order, MERALCO was directed to cause the publication of the notice of public hearing at its own expense twice for two successive weeks in two newspapers

of nationwide circulation, the last date of publication to be made not later than two weeks before the scheduled date of initial hearing.

The Office of the Solicitor General (OSG), the Commission on Audit and the Committees on Energy of both Houses of Congress were furnished with copies of the order and the notice of public hearing and were requested to have their respective duly authorized representatives present at the said hearing. Likewise, the Offices of the Municipal/City Mayors within MERALCO's franchise area were furnished with copies of the order and the notice of public hearing for the appropriate posting thereof on their respective bulletin boards.

At the initial hearing, representatives of MERALCO were present. Also at the said hearing were a representative from the OSG for the public and oppositors to the application including Mr. Pete Ilagan, representing herein petitioner NASECORE.

After a series of hearings, the ERC rendered the Decision dated March 20, 2003, approving MERALCO's unbundled schedule of rates effective on the next billing cycle. However, in the same decision, the ERC directed MERALCO, among others:

- a) To discontinue charging the PPA [Purchased Power Adjustment] upon effectivity of the approved unbundled rates; any change in the cost of power purchased shall be reflected as deferred charges or credits which shall be recovered through the Generation Rate Adjustment Mechanism (GRAM) approved by the Commission for implementation per ERC Order effective February 24, 2003;<sup>[9]</sup>

In other words, MERALCO was directed to recover the costs of power purchased from the National Power Corporation (NAPOCOR) through a new adjustment mechanism called the Generation Rate Adjustment Mechanism (GRAM). Prior thereto, the said costs were recovered through the Purchased Power Adjustment (PPA) mechanism.

It appears that in another proceeding, ERC Case No. 2003-44,<sup>[10]</sup> the ERC issued an Order dated January 29, 2003 setting for public consultation on February 17, 2003 its proposed Implementing Rules for the Recovery of Deferred Fuel and Independent Power Producers Costs (DÉCOR) and Deferred Incremental Currency Exchange Recovery (DICER). The proposed DÉCOR and DICER were formulated by the ERC to replace the PPA and the Currency Exchange Rate Adjustment (CERA), the automatic adjustment mechanisms then in effect, on its view that they (PPA and CERA) did not meet the goal of balancing the need for timely recoveries of costs by the utilities with the ERC's need to review the reasonableness and prudence of such costs.

A notice of the public consultation on the proposed implementing rules for the recovery of DÉCOR and DICER was caused to be published by the ERC in the Philippine Star on February 3, 2003. In the said notice and order, the ERC directed the parties to submit their comments on the proposed implementing rules on or before February 12, 2003.

Several distribution utilities and consumer groups, including petitioner NASECORE, filed their respective comments on the said proposed implementing rules for the recovery of DÉCOR and DICER. Most of the utilities manifested their strong objections to the adoption of the DÉCOR and DICER contending that these

mechanisms would defeat the purpose of escalator clauses such as the PPA and CERA. For their part, the consumer groups expressed that the ERC should have taken into consideration consumer protection in the drafting of the proposed implementing rules.

At the public consultation on February 17, 2003, the distribution utilities and consumer groups appeared with their respective representatives. The consumer groups requested for a separate consultation exclusively for them and the same was granted by the ERC. Another public consultation was set on February 21, 2003 for the consumer groups. At the said consultation, representatives of NASECORE and other consumer groups were present. The ERC explained to these groups the DÉCOR and DICER. On the other hand, MERALCO explained the PPA and the computation thereof. The consumer groups manifested their concerns and these were noted by the ERC.

After taking into consideration the positions of the distribution utilities and the consumer groups, the ERC promulgated the Order dated February 24, 2003 in ERC Case No. 2003-44. In the said order, the ERC adopted the Implementing Rules for the Recovery of Fuel and Independent Power Producer Costs: Generation Rate Adjustment Mechanism (GRAM) and the Implementing Rules for the Recovery of the Incremental Currency Exchange Rate Adjustment (ICERA). These implementing rules were all contained or incorporated in the aforesaid order.

The GRAM replaced the PPA and the basic differences between these two recovery mechanisms were outlined by the ERC thus:<sup>[11]</sup>

<b>ELEMENTS</b>	<b>PPA</b>	<b>GRAM</b>
1. Review by the regulatory body	1. After the cost had been passed on to the consumers.	1. After the cost had been passed on to the consumers.
2. Change in rates	2. Monthly	2. Quarterly
3. Change in recovery of fixed costs of generation	3. Automatic but subject to confirmation by the ERC.	3. Only through a petition to adjust generation rate subject to approval by the ERC within a maximum period of forty five (45) days.
4. Transmission	4. Included	4. Excluded
5. System loss and franchise tax	5. Included	5. Excluded
6. Carrying cost	6. Without carrying cost	6. With carrying cost

On the other hand, the ICERA replaced the CERA and the basic differences between these two recovery mechanisms were outlined by the ERC thus:<sup>[12]</sup>

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