

NATIONAL POWER CORPORATION, PETITIONER, VS. COURT OF APPEALS AND CAGAYAN ELECTRIC POWER AND LIGHT CO., INC. (CEPALCO), RESPONDENTS.

G.R. No. 112702. September 26, 1997

Ponente: ROMERO, J.

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ROMERO, J.:

Offered for resolution in these consolidated petitions for review on certiorari is the issue of whether or not the National Power Corporation (NPC) has jurisdiction to determine whether it may supply electric power directly to the facilities of an industrial corporation in areas where there is an existing and operating electric power franchisee.

On June 17, 1961, the Cagayan Electric and Power Light Company (CEPALCO) was enfranchised by Republic Act No. 3247 "to construct, maintain and operate an electric light, heat and power system for the purpose of generating and/or distributing electric light, heat and/or power for sale within the City of Cagayan de Oro and its suburbs" for fifty (50) years. Republic Act No. 3570, approved on June 21, 1963, expanded the area of coverage of the franchise to include the municipalities of Tagoloan and Opol, both in the Province of Misamis Oriental. On August 4, 1969, Republic Act No. 6020 further amended the same franchise to include in the areas of CEPALCO's authority of "generating and distributing electric light and power for sale," the municipalities of Villanueva and Jasaan, also of the said province.

Presidential Decree No. 243, issued on July 12, 1973, created a "body corporate and politic" to be known as the Philippine Veterans Investment Development Corporation (PHIVIDEC) vested with authority to engage in "commercial, industrial, mining, agricultural and other enterprises" among other powers^[1] and "to allow the full and continued employment of the productive capabilities of and investment of the veterans and retirees of the Armed Forces of the Philippines." On August 13, 1974, Presidential Decree No. 538 was promulgated to create the PHIVIDEC Industrial Authority (PIA), a subsidiary of PHIVIDEC, to carry out the government policy "to encourage, promote and sustain the economic and social growth of the country and that the establishment of professionalized management of well-planned industrial areas shall further this objective."^[2] Under Sec. 3 of P.D. No. 538, the first area for development shall be located in the municipalities of Tagoloan and Villanueva.^[3] This area forms part of the PHIVIDEC Industrial Estate Misamis Oriental (PIE-MO).

As manager of PIE-MO, PIA granted the Ferrochrome Philippines, Inc. (FPI) and Metal Alloys Corporation (MAC) authority to operate in its area of development. On July 6, 1979, PIA granted CEPALCO a temporary authority to retail electric power to the industries operating within the PIE-MO.^[4] The Agreement executed by PIA and CEPALCO authorized CEPALCO "to operate, administer, construct and distribute electric power within the PHIVIDEC Industrial Estate, Misamis Oriental, such authority to be co-extensive with the territorial jurisdiction of PHIVIDEC Industrial Estate, as defined in Sec. 3 of P.D. No. 538 and shall be for a period of five (5) years, renewable for another five (5) years at the option of CEPALCO." The parties provided further that:

9. At the end of the fifth year, or at the end of the 10th year, should this Agreement be thus renewed, PIA has the option to take over the operation of the electric service and acquire by purchase CEPALCO's assets within PIE-MO. This option shall be communicated to CEPALCO in writing at least 24 months before the date of acquisition of assets and takeover of operation by PIA. Should PIA exercise its option to purchase the assets of CEPALCO in PIE-MO, PIA shall respect the right of ownership of and maintenance by CEPALCO of those assets inside PIE-MO not covered by such purchase. x x x."

According to PIA,[5] CEPALCO proved no match to the power demands of the industries in PIE-MO that most of these companies operating therein closed shop.[6] Impelled by a "desire to provide cheap power costs to power-intensive industries operating within the Estate," PIA applied with the National Power Corporation (NPC) for direct power connection which the latter in due course approved.[7] One of the companies which entered into an agreement with the NPC for a direct sale and supply of power was the Ferrochrome Phils., Inc. (FPI).

Contending that the said agreement violated its right as the authorized operator of an electric light and power system in the area and the national electrification policy, CEPALCO filed Civil Case No. Q-35945, a petition for prohibition, mandamus and injunction before the Regional Trial Court of Quezon City against the NPC. Notwithstanding NPC's claim that it was authorized by its Charter to sell electric power "in bulk" to industrial enterprises, the lower court rendered a decision on May 2, 1984, restraining the NPC from supplying power directly to FPI upon the ground that such direct sale, supply and delivery of electric power by the NPC to FPI was violative of the rights of CEPALCO under its legislative franchise. Hence, the lower court ordered the NPC to "permanently desist" from effecting direct supply of power to the FPI and "from entering into and/or implementing any agreement or arrangement for such direct power connection, unless coursed through the power line" of CEPALCO.

Eventually, the case reached this Court through G.R. No. 72085.[8] On December 28, 1989, the Court denied the appeal interposed by NPC on the ground that the statutory authority given to the NPC as regards direct supply of power to BOI-registered enterprises "should always be subordinate to the 'total-electrification-of-the-entire-country-on-an-area-coverage basis policy' enunciated in P. D. No. 40." [9] We held further that:

Nor should we lose sight of the factual findings of the court a quo that petitioner-appellee CEPALCO had not only been authorized by the Phividec Industrial Authority to provide electrical power to the Phividec Industrial Estate within which the FPI plant is located, but that petitioner-appellee CEPALCO had in fact, supplied the latter's power requirements for the construction of its plant, upon FPI's application therefor as early as October 17, 1980.

It bears emphasis then that 'it is only after a hearing (or an opportunity for such a hearing) where it is established that the affected private franchise holder is incapable or unwilling to match the reliability and rates of NPC that a direct connection with NPC may be granted.' Here, petitioner-appellee's reliability as a power supplier and ability to match the NPC rates were never put in issue.

It is immaterial that petitioner-appellee's franchise was not exclusive. A privilege to sell within specified territory, even if not exclusive, is a valuable property right entitled to protection against unauthorized competition." [10]

Notwithstanding said decision, in September 1990, FPI filed a new application for the direct supply of electric power from NPC. The Hearing Committee of the NPC had started hearing the application but CEPALCO filed with the Regional Trial Court of Quezon City a petition for contempt against NPC officials led by Ernesto Aboitiz. On August 10, 1992, the trial court found the respondents in direct contempt of court and accordingly imposed upon them a fine of 500.00 each.

The respondent NPC officials challenged before this Court the judgment holding them in contempt of court through G.R. No. 107809, (*Aboitiz v. Regino*).^[11] In the Decision of July 5, 1993, the Court upheld the contempt ruling and, after quoting the lower court's decision of May 2, 1984 which the Court upheld in G.R. No. 72085, said:

These directives show that the lower court (and this Court) intended the arrangement between FPI and CEPALCO to be permanent and free from NAPOCOR's influence or intervention. Any attempt on the part of NAPOCOR or its officers and/or employees to strike a deal with FPI would be a clear and direct disobedience to a lawful order and therefore contemptuous.

The petitioners call the attention of the Court to the statement of CEPALCO that 'NAPOCOR has already implemented in full' the May 2, 1984 decision of the lower court as affirmed by this Court. They suggest that in view of this, the decision no longer has any binding effect upon the parties, or to put it another way, has become *functus officio*. Consequently, when they entertained the re-application of FPI for direct power connection to NAPOCOR, they were not disobeying the May 2, 1984 order of the trial court and so should not be held in contempt.

This argument must be rejected in view of our finding of the permanence and comprehensiveness of the challenged order of the trial court. 'Permanent' is not a difficult word to understand. It means 'lasting or intended to last indefinitely without change.' As for the scope of the order, NAPOCOR was directed to 'desist from effecting, causing, and continuing the direct supply, sale and delivery of electricity from its power line to the plant of Ferrochrome Philippines, Inc., and from entering into and/or implementing any agreement or arrangement for such direct power connection, unless coursed through the power line of petitioner.' (Underscoring supplied.)

Meanwhile, the NPC Hearing Committee^[12] proceeded with its hearings. CEPALCO was duly notified thereof but it opted to question the committee's jurisdiction. It did not submit any evidence. Consequently, in its Report and Recommendation dated September 27, 1991, the committee gave weight to the evidence presented by FPI that CEPALCO charged higher rates than what the NPC would if allowed to supply power directly to FPI. Although the committee considered as unfounded FPI's claim of CEPALCO's unreliability as a power supplier,^[13] it nonetheless held that:

Form (sic) the foregoing and on the basis of the decision of the Supreme Court in the case of National Power Corporation and Fine Chemicals (Phils.) Inc. v. The Court of Appeals and the Manila Electric Company, G.R. No. 84695, May 8, 1990, FPI is entitled to a direct connection to NPC as applied for considering that CEPALCO is unwilling to match the rates of NPC for directly serving FPI and that FPI is a duly registered BOI registered enterprises (sic). The Supreme Court in the aforesated case has ruled as follows:

'As consistently ruled by the Court pursuant to P.D. No. 380 as amended by P.D. No. 395, NPC is statutorily empowered to directly service all the requirements of a BOI registered enterprise provided that, first, any affected private franchise holder is afforded an opportunity to be heard on the application therefor and second, from such a hearing, it is established that said private franchise holder is incapable or unwilling to match the reliability and rates of NPC for directly serving the latter (*National Power Corporation v. Jacinto*, 134 SCRA 435 [1985]. *National Power Corporation v. Court of Appeals*, 161 SCRA 103 [1988]).'^[14]

However, considering the "better and priority right" of PIA, the committee recommended that instead of a direct power connection by the NPC to FPI, the connection should be made to PIA "as a utility user for its industrial Estate at Tagoloan, Misamis Oriental."^[15]

For its part, on November 3, 1989, CEPALCO filed with the Energy Regulatory Board (ERB) a petition praying that the ERB "order the discontinuance of all existing direct supply of power by the NPC within petitioner's

franchise area" (ERB Case No. 89-430). On July 17, 1992, the ERB ruled that CEPALCO "is relatively efficient and reliable as manifested by its very low system losses (far from the 14% standard) and very high power factors" and therefore CEPALCO is technically capable "to distribute power to its consumers within its franchise area, particularly the industrial customers." It disposed of the petition as follows:

WHEREFORE, in view of the foregoing premises, when the petitioner has been proven to be capable of distributing power to its industrial consumers and having passed the secondary considerations with a passing mark of 85%, judgment is hereby rendered granting the relief prayed for. Accordingly, it is hereby declared that all direct connection of industries to NPC within the franchise area of CEPALCO is no longer necessary. Therefore, all existing NPC direct supply of power to industrial consumers within the franchise area of CEPALCO is hereby ordered discontinued. x x x."[16]

However, during the pendency of the Aboitiz case in this Court or on August 3, 1992, PIA contracted the NPC for the construction of a 138 kilovolt (KV) transmission line from Namutulan substation to the receiving and/or substation of PIA.[17]

As expected, on February 17, 1993, CEPALCO filed in the Regional Trial Court of Pasig (Branch 68), a petition for certiorari, prohibition, mandamus and injunction against the NPC and some officials of both the NPC and PIA.[18] Docketed as SCA No. 290, the petition specifically sought the issuance of a temporary restraining order. However, after hearing, the prayer for the temporary restraining order was denied by the court in its order of March 12, 1993.[19] CEPALCO filed a motion for the reconsideration of said order while NPC and PIA moved for the dismissal of the petition.[20]

On June 23, 1993, noting the cases filed by CEPALCO all seeking exclusivity in the distribution of electric power to areas covered by its franchise, the court[21] ruled that "the right of petitioner to supply electric power in the aforesaid area to the exclusion of other entities had been settled once and for all by the Regional Trial Court of Quezon City wherein petitioner obtained a favorable judgment." Hence, the petition was dismissed on the ground of res judicata.[22]

Forthwith, CEPALCO elevated the case to this Court through a petition for certiorari, prohibition and injunction with prayer for the issuance of a preliminary injunction or a temporary restraining order. The petition was docketed as G.R. No. 110686 but on August 18, 1993, the Court referred it to the Court of Appeals pursuant to Sec. 9, paragraph 1 of B.P. Blg. 129 conferring upon the appellate court original jurisdiction to issue writs of prohibition and certiorari and auxiliary writs.[23] In the Court of Appeals, the petition was docketed as CA-G.R. No. 31935-SP.

On September 10, 1993, the Fifteenth Division of the Court of Appeals issued a resolution[24] denying the prayer for the issuance of a temporary restraining order on the strength of Sec. 1 of P.D. No. 1818. It ruled that since the NPC is a public utility, it "enjoys the protective mantle" of said decree prohibiting courts from issuing restraining orders or preliminary injunctions in cases involving infrastructure and natural resource development projects of, and operated by, the government.[25]

However, on September 17, 1993, upon a motion for reconsideration filed by CEPALCO and a re-evaluation of the provisions of P.D. No. 1818, the Court of Appeals set aside its resolution of September 10, 1993 and held that:

x x x the project intended by respondent NPC, which is the construction, completion and operation of the 138-kv line, is not in consonance with the intendment of said Decree which is to protect public utilities and their projects and activities intended for public convenience and necessity. The project of respondent NPC is intended to serve exclusively the needs of private entities, Metal Alloys Corporation and Ferrochrome Philippine in Tagoloan, Misamis Oriental."

Accordingly, the Court of Appeals issued a temporary restraining order directing the private respondents therein "to immediately cease and desist from proceeding with the construction, completion and operation of the 138-kv line subject of the petition." The NPC, PIA and the officers of both were directed to explain why the preliminary injunction prayed for should not issue.[26]

In due course, the Court of Appeals rendered the decision[27] of November 15, 1993 assailed herein. After ruling that the lower court gravely abused its discretion in dismissing the petition below on the grounds of *res judicata* and *litis pendentia*, the Court of Appeals confronted squarely the issue of whether or not "the NPC itself has the power to determine the propriety of direct power connection from its lines to any entity located within the franchise area of another public utility." [28]

Elucidating that the ruling of this Court in both G.R. No. 78609 (NPC v. Court of Appeals)[29] and G.R. No. 87697 (Del Monte [Philippines], Inc. v. Hon. Felix M. de Guzman, etc., et al.)[30] categorically held that before a direct connection to the NPC may be granted, a proper administrative body must conduct a hearing "to determine which entity, the franchise holder or the NPC, has the right to supply electric power to the entity applying for direct connection," the Court of Appeals declared:

"We have no doubt that the ERB, and not the NPC, is the administrative body referred to by the Supreme Court where the hearing is to be conducted to determine the propriety of direct connection. The charter of the ERB (PD 1206 in relation to EO 172) is clear on this:

"The Board shall, after due notice and hearing, exercise the following powers and functions, among others:

x x x x x x x x

e. Issue Certificate of Public Convenience for the operation of electric power utilities and services, ... including the establishment and regulation of areas of operation of particular operators of public power utilities and services, the fixing of standards and specifications in all cases related to the issued Certificate of Public Convenience ..."

Moreover, NPC is not an administrative body as jurisprudentially defined, and that the NPC cannot usurp a power it has never been conferred by its charter or by other law -- the power to determine the validity of direct connection agreement it enters into in violation of a power distributor's franchise.

Thus, considering that PIA professes to be and intends to engage in the business of a public power utility, it must first apply for a public convenience and necessity (conferment of operating authority) with the ERB. This may have been the opportune time for ERB to determine whether to allow PIA to directly connect with NPC, with notice and opportunity for CEPALCO considering that, as the latter alleges, this new line which NPC is installing duplicates that existing Cepalco 138 kv line which NPC itself turned over to Cepalco and for which it was paid in full."

Consequently, the Court of Appeals affirmed the dismissal of the petition, annulled and set aside the decision of the Hearing Committee of the NPC on direct connection with PIA, and ordered the NPC "to desist from continuing the construction of that NPC-Natumulan-Phividec 138 kv transmission line." [31]

Without filing a motion for the reconsideration of said Decision, NPC filed in this Court on December 9, 1993, a motion for an extension of time within which to file "the proper petition." The motion which was docketed as G.R. No. 112702, was granted on December 20, 1993 with warning that no further extension would be granted. Thereafter, NPC filed a motion praying that it be excused from filing the petition on account of the filing by PIA in the Court of Appeals of a motion for the reconsideration of the Decision of November 15, 1993. In the Resolution of February 2, 1994, the Court noted and granted petitioner's motion and considered the case "closed

and terminated." [32] This resolution was withdrawn in the Resolution of February 8, 1995 [33] in view of the "inadvertent clerical error" terminating the case, after the NPC had mailed its petition for review on certiorari on February 21, 1994. [34]

In the meantime, PIA filed a motion for reconsideration of the appellate court's Decision of November 15, 1993 arguing in the main that, not being a party to previous cases between CEPALCO and NPC, it was not bound by decisions of this Court. The Court of Appeals denied the motion on January 28, 1994 on the basis of *stare decisis* where once the court has laid down a principle of law as applicable to a certain state of facts, it will adhere to and apply the principle to all future cases where the facts are substantially the same. [35] Hence, PIA filed a petition for review on certiorari which was docketed as G.R. No. 113613.

G.R. Nos. 112702 and 113613 were consolidated on June 15, 1994. [36]

In G.R. No. 112702, petitioner NPC contends that private respondent CEPALCO is not entitled to relief because it has been forum-shopping. Private respondent had filed Civil Case No. Q-93-14597 in the Regional Trial Court of Quezon City which had been forwarded to it by the Regional Trial Court of Pasig. Said case and the instant case (SCA No. 290) deal with the same issue of restoring CEPALCO's right to supply power to FPI and MAC. Petitioner thus contends that because the principle of *litis pendentia* applies, although other parties are involved in the case before the Quezon City court, there is no basis for granting relief to private respondent CEPALCO "(s)ince the dismissal for lack of jurisdiction was affirmed by the respondent court." [37] Corollarily, petitioner asserts that because the main case herein was dismissed "without trial," the respondent appellate court should not have accorded private respondent affirmative relief. [38]

Petitioner NPC's contention is based on the fact that on October 6, 1992, private respondent CEPALCO filed against the NPC in the Regional Trial Court of Pasig, Civil Case No. 62490, an action for specific performance and damages with prayer for preliminary mandatory injunction directing the NPC to immediately restore to CEPALCO the distribution of power pertaining to MAC's consumption. [39] However, no summons was served and the *ex-parte* writ prayed for was not issued. Nevertheless, the case was forwarded to the Regional Trial Court of Quezon City where it was docketed as Civil Case No. 93-14597. That case was pending when SCA No. 290 was filed before the Regional Trial Court of Pasig.

The Court of Appeals affirmed the lower court's dismissal of the case neither on the grounds of *res judicata* nor *litis pendentia* but on the "only one unresolved issue, which is whether the NPC itself has the power to determine the propriety of direct power connection from its lines to any entity located within the franchise area of another public utility." [40] The Court of Appeals opined that the effects of *litis pendentia* could not have resulted in the dismissal of SCA No. 290 because Civil Case No. Q-35945 which became G.R. No. 72085 was based on facts totally different from that of SCA No. 290.

In invoking *litis pendentia*, however, petitioner NPC refers to this case, SCA No. 290, and Civil Case No. 93-14597. SCA No. 290 and Civil Case No. 93-14597 may both have the same objective, the restoration of CEPALCO's right to distribute power to PIE-MO areas under its franchise aside from the fact that the cases involve practically the same parties. However, *litis pendentia* may not be successfully invoked to cause the dismissal of SCA No. 290.

In order to constitute a ground for the abatement or dismissal of an action, *litis pendentia* must exhibit the concurrence of the following requisites: (a) identity of parties, or at least such as representing the same interest in both actions; (b) identity of rights asserted and relief prayed for, the relief being founded on the same facts, and (c) identity in the two (2) cases should be such that the judgment that may be rendered in the pending case would, regardless of which party is successful, amount to *res judicata* in the other. [41] As a rule, the second case filed

should be abated under the maxim *qui prior est tempore, potior est jure*. However, this rule is not a hard and fast one. The "priority-in-time rule" may give way to the criterion of "more appropriate action." More recently, the criterion used was the "interest of justice rule."^[42]

We hold that the last criterion should be the basis for resolving this case, although it was filed later than Civil Case No. 62490 which, upon its transfer, became Civil Case No. 93-14795. In so doing, we shall avoid multiplicity of suits which is the matrix upon which *litis pendentia* is anchored and eventually bring about the final settlement of the recurring issue of whether or not the NPC may supply power directly to the industries within PIE-MO, notwithstanding the operation of franchisee CEPALCO in the same area.

It should be noted that there is yet pending another case, namely, Civil Case No. 91-383, instituted by PIA against CEPALCO in the Regional Trial Court of Misamis Oriental which apparently deals with a related issue - PIA's franchise or authority to provide power to enterprises within the PIE-MO.^[43] Hence, the principle of *litis pendentia* which ordinarily demands the dismissal of an action filed later than another, should be considered under the primordial concept of "interest of justice," in order that a recurrent issue common to all cases may be definitively resolved.

The principal and common question raised in these consolidated cases is: whether or not the NPC may supply power directly to PIA in the PIE-MO area where CEPALCO has a franchise. Petitioner PIA in G.R. No. 113613 asserts that it may receive power directly from the NPC because it is a public utility. It avers that P.D. No. 538, as amended, empowers PIA "as and to be a public utility to operate and serve the power needs within PIE-MO, i.e., a specific area constituting a small portion of petitioner's franchise coverage," without, however, specifying the particular provision which so empowers PIA.^[44]

A "public utility" is a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service.^[45] The term implies public use and service.^[46]

Petitioner PIA is a subsidiary of the PHIVIDEC with "governmental and proprietary functions."^[47] Sec. 4 of P.D. No. 538 specifically confers upon it the following powers:

- a. To operate, administer and manage the PHIVIDEC Industrial Areas and other areas which shall hereafter be proclaimed, designated and specified in subsequent Presidential Proclamation; to construct acquire, own, lease, operate and maintain infrastructure facilities, factory buildings, warehouses, dams, reservoirs, water distribution, electric light and power systems, telecommunications and transportation networks, or such other facilities and services necessary or useful in the conduct of industry and commerce or in the attainment of the purposes and objectives of this Decree;" (Underscoring supplied.)

Clearly then, the PIA is authorized to render indirect service to the public by its administration of the PHIVIDEC industrial areas like the PIE-MO and may, therefore, be considered a public utility. As it is expressly authorized by law to perform the functions of a public utility, a certificate of public convenience, as suggested by the Court of Appeals, is not necessary for it to avail of a direct power connection from the NPC. However, such authority to be a public utility may not be exercised in such a manner as to prejudice the rights of existing franchisees. In fact, by its actions, PIA recognized the rights of the franchisees in the area.

Accordingly, in pursuit of its powers "to grant such franchise for and to operate and maintain within the Areas electric light, heat or power systems," etc. under Sec. 4 (i) of P.D. No. 538 and its rule-making power under Sec. 4 (l) of the same law, on July 20, 1979, the PIA Board of Directors promulgated the "Rules and Regulations To Implement the Intent and Provisions of Presidential Decree No. 538."^[48] Rule XI thereof on "Utilities and Services" provides as follows:

SECTION 1. Utilities - It is the responsibility of the Authority to provide all required utilities and services inside the Estate:

x x x x x x x x.

a) Contracts for the purchase of public utilities and/or services shall be subject to the prior approval of the Authority; Provided, however, that similar contract(s) existing prior to the effectivity of this Rules and Regulations shall continue to be in full force and effect.

x x x x x x x x.

(Underscoring supplied.)

It should be noted that the Rules and Regulations took effect thirty (30) days after its publication in the Official Gazette on September 24, 1979 or more than three (3) months after the July 6, 1979 contract between PIA and CEPALCO was entered into. As such, the Rules and Regulations itself allowed the continuance of the supply of electric power to PIE-MO by CEPALCO.

That the contract of July 6, 1979 was not renewed by the parties after the expiration of the five-year period stipulated therein did not change the fact that within that five-year period, in violation of both the contract and its Rules and Regulations, PIA applied with the NPC for direct power connection. The matter was aggravated by NPC's favorable action on the application, totally unmindful of the extent of its powers under the law which, in *National Power Corporation v. Court of Appeals*,^[49] the Court delimits as follows:

x x x. It is immaterial whether the direct connection is merely an improvement or an increase in existing voltage, as alleged by petitioner, or a totally new and separate electric service as claimed by private respondent. The law on the matter is clear. PD 40 promulgated on 7 November 1972 expressly provides that the generation of electric power shall be undertaken solely by the NPC. However, Section 3 of the same decree also provides that the distribution of electric power shall be undertaken by cooperatives, private utilities (such as the CEPALCO), local governments and other entities duly authorized, subject to state regulation. (Underscoring supplied.)

The same case ruled that "(i)t is only after a hearing (or an opportunity for such a hearing) where it is established that the affected private franchise holder is incapable or unwilling to match the reliability and rates of NPC that a direct connection with NPC may be granted."^[50] As earlier stated, the Court arrived at the same ruling in the later cases of G.R. Nos. 72085, 84695 and 87697.

Petitioner NPC attempted to abide by these rulings when it conducted a hearing to determine whether it may supply power directly to PIA. While it notified CEPALCO of the hearing, the NPC is not the proper authority referred to by this Court in the aforementioned earlier decisions, not only because the subject of the hearing is a matter involving the NPC itself, but also because the law has created the proper administrative body vested with authority to conduct a hearing.

CEPALCO shares the view of the Court of Appeals that the Energy Regulatory Board (ERB) is the proper administrative body for such hearings. However, a recent legislative development has overtaken said view.

The ERB, which used to be the Board of Energy, is tasked with the following powers and functions by Executive Order No. 172 which took effect immediately after its issuance on May 8, 1987:

SEC. 3. Jurisdiction, Powers and Functions of the Board. - When warranted and only when public necessity requires, the Board may regulate the business of importing, exporting, re-exporting, shipping, transporting, processing, refining, marketing and distributing energy resources. x x x.

The Board shall, upon prior notice and hearing, exercise the following, among other powers and functions:

- (a) Fix and regulate the prices of petroleum products;
- (b) Fix and regulate the rate schedule or prices of piped gas to be charged by duly franchised gas companies which distribute gas by means of underground pipe system;
- (c) Fix and regulate the rates of pipeline concessionaires under the provisions of Republic Act No. 387, as amended, otherwise known as the 'Petroleum Act of 1949,' as amended by Presidential Decree No. 1700;
- (d) Regulate the capacities of new refineries or additional capacities of existing refineries and license refineries that may be organized after the issuance of this Executive Order, under such terms and conditions as are consistent with the national interest;
- (e) Whenever the Board has determined that there is a shortage or any petroleum product, or when public interest so requires, it may take such steps as it may consider necessary, including the temporary adjustment of the levels of prices of petroleum products and the payment to the Oil Price Stabilization Fund created under Presidential Decree No. 1956 by persons or entities engaged in the petroleum industry of such amounts as may be determined by the Board, which will enable the importer to recover its cost of importation."

As may be gleaned from said provisions, the ERB is basically a price or rate-fixing agency. Apparently recognizing this basic function, Republic Act No. 7638 (An Act Creating the Department of Energy, Rationalizing the Organization and Functions of Government Agencies Related to Energy, and for Other Purposes),[51] which was approved on December 9, 1992 and which took effect fifteen days after its complete publication in at least two (2) national newspapers of general circulation, specifically provides as follows:

SEC. 18. Rationalization or Transfer of Functions of Attached or Related Agencies.- The non-price regulatory jurisdiction, powers, and functions of the Energy Regulatory Board as provided for in Section 3 of Executive Order No. 172 are hereby transferred to the Department.

The foregoing transfer of powers and functions shall include all applicable funds and appropriations, records, equipment, property, and such personnel as may be necessary. Provided, That only such amount of funds and appropriations of the Board as well as only the personnel thereof which are completely or primarily involved in the exercise by said Board of its non-price regulatory powers and functions shall be affected by such transfer.

The power of the NPC to determine, fix, and prescribe the rates being charged to its customers under Section 4 of Republic Act No. 6395, as amended, as well as the power of electric cooperatives to fix rates under Section 16 (o), Chapter II of Presidential Decree No. 269, as amended, are hereby transferred to the Energy Regulatory Board. The Board shall exercise its new powers only after due notice and hearing and under the same procedure provided for in Executive Order No. 172."

Upon the effectivity of Republic Act No. 7638, then Acting Chairman of the Energy Coordinating Council Delfin Lazaro transmitted to the Department of Justice the query of whether or not the "non-power rate powers and functions" of the ERB are included in the "jurisdiction, powers and functions transferred to the Department of Energy." Answering the query in the affirmative, the Department of Justice rendered Opinion No. 22 dated February 12, 1993 the pertinent portion of which states:

x x x we believe that since the provision of Section 18 on the transfer of certain powers and functions from ERB to DOE is clear and unequivocal, and devoid of any ambiguity, in the sense that it categorically refers to 'non-price jurisdiction, powers and functions' of ERB under Section 3 of E.O. No. 172, there is no room for interpretation, but only for application, of the law. This is a cardinal rule of statutory construction.

Clearly, the parameters of the transfer of functions from ERB to DOE pursuant to Section 18, are

circumscribed by the provision of Section 3 of E.O. No. 172 alone, so that, if there are other 'related' functions of ERB under other provisions of E.O. No. 172 or other energy laws, these 'related' functions, which may conceivably refer to what you call 'non-price rate powers and functions' of ERB, are clearly not contemplated by Section 18 and are, therefore, not to be deemed included in the transfer of functions from ERB to DOE under the said provision.

It may be argued that Section 26 of R.A. No. 7638 contains a repealing clause which provides that:

'All laws, presidential decrees, executive orders, rules and regulations or parts thereof, inconsistent with the provisions of this Act, are hereby repealed or modified accordingly. x x x.'

and, therefore, all provisions of E.O. No. 172 and related laws which are inconsistent with the policy, purpose and intent of R.A. No. 7638 are deemed repealed. It has been said, however, that a general repealing clause of such nature does not operate as an express repeal because it fails to identify or designate the act or acts that are intended to be repealed. Rather, it is a clause which predicates the intended repeal upon the condition that a substantial conflict must be found on existing and prior acts of the same subject matter. Such being the case, the presumption against implied repeals and the rule on strict construction regarding implied repeals shall apply *ex proprio vigore*. For the legislature is presumed to know the existing laws so that, if repeal of particular or specific laws is intended, the proper step is to so express it. The failure to add a specific repealing clause particularly mentioning the statute to be repealed indicates that the intent was not to repeal any existing law on the matter, unless an irreconcilable inconsistency and repugnancy exists in the terms of the new and the old laws (*Iloilo Palay and Corn Planters Association, Inc. vs. Feliciano*, 13 SCRA 377; *City of Naga vs. Agna*, 71 SCRA 176, cited in *Agpalo*, *Statutory Construction*, 1990 Edition, pp. 191-192).

In view of the foregoing, it is our opinion that only the non-price regulatory functions of ERB under Section 3 of E.O. 172 are transferred to the DOE. All other powers of ERB which are not within the purview of its 'non-price regulatory jurisdiction, powers and functions' as defined in Section 3 are not so transferred to DOE and accordingly remain vested in ERB."

The determination of which of two public utilities has the right to supply electric power to an area which is within the coverage of both is certainly not a rate-fixing function which should remain with the ERB. It deals with the regulation of the distribution of energy resources which, under Executive Order No. 172, was expressly a function of ERB. However, with the enactment of Republic Act No. 7638, the Department of Energy took over such function. Hence, it is this Department which shall then determine whether CEPALCO or PIA should supply power to PIE-MO.

Clearly, petitioner NPC's assertion that its "authority to entertain and hear direct connection applications is a necessary incident of its express authority to sell electric power in bulk" is now baseless.[52] Even without the new legislation affecting its power to conduct hearings, it is certainly irregular, if not downright anomalous for the NPC itself to determine whether it should supply power directly to the PIA or the industries within the PIE-MO. It simply cannot arrogate unto itself the authority to exercise non-rate fixing powers which now devolves upon the Department of Energy and to hear and eventually grant itself the right to supply power in bulk.[53]

On the other hand, ventilating the issue in a public hearing would not unduly prejudice CEPALCO although it was enfranchised by law earlier than the PIA. Exclusivity of any public franchise has not been favored by this Court such that in most, if not all, grants by the government to private corporations, the interpretation of rights, privileges or franchises is taken against the grantee. Thus in *Alger Electric, Inc. v. Court of Appeals*,[54] the Court said:

x x x Exclusivity is given by law with the understanding that the company enjoying it is self-sufficient and capable of supplying the needed service or product at moderate or reasonable prices. It would be against public

interest where the firm granted a monopoly is merely an unnecessary conduit of electric power, jacking up prices as a superfluous middleman or an inefficient producer which cannot supply cheap electricity to power intensive industries. It is in the public interest when industries dependent on heavy use of electricity are given reliable and direct power at the lower costs thus enabling the sale of nationally marketed products at prices within the reach of the masses. x x x."

WHEREFORE, both petitions in G.R. No. 112702 and 113613 are hereby DENIED. The Department of Energy is directed to conduct a hearing with utmost dispatch to determine whether it is the Cagayan Electric Power and Light Co., Inc. or the National Power Corporation, through the PHIVIDEC Industrial Authority, which should supply electric power to the industries in the PHIVIDEC Industrial Estate-Misamis Oriental. This Decision is immediately executory.

SO ORDERED

Narvasa, C.J. (Chairman), Melo, Francisco and Panganiban, JJ., concur.

[1] Sec. 3 (a).

[2] Secs. 1 & 2.

[3] Sec. 3 of P.D. No. 538 describes the area as follows: "The first Area which the Authority shall develop shall be that located in the municipalities of Tagoloan and Villanueva in the Province of Misamis Oriental, bounded on the West by Macajalar Bay, on the North by the Taganga Creek, on the East by the Kiamo and Kirahon plateaus and the South by the Tagoloan River containing an area of 3,000 hectares more or less x x x."

[4] Rollo of G.R. No. 113613, pp. 118-121.

[5] In its Report and Recommendation dated September 27, 1991 on the application of FPI and PHIVIDEC for direct power connection to the NPC, the NPC Hearing Committee found that PHIVIDEC had terminated the Agreement of July 6, 1979 and that CEPALCO's continued supply of power to the PIE-MO was merely upon PHIVIDEC's tolerance (Rollo of G.R. No. 113613, p. 424).

[6] Ibid., pp. 61-62.

[7] Ibid., p. 142.

[8] Cagayan Electric Power and Light Company, Inc. v. National Power Corporation, G.R. No. 72085, December 28, 1989, 180 SCRA 628, 631.

[9] Ibid., p. 633.

[10] Ibid., p. 634.

[11] G.R. No. 107809, July 5, 1993, 224 SCRA 500.

[12] With Hector N. Campos as chairman and Eleuterio M. Olaer, C.C. Alcantara and Armando Minia as members.

[13] Rollo of G.R. No. 113613, pp. 425-426.

[14] Ibid., p. 426.

[15] Ibid., p. 428.

[16] Rollo of G.R. No. 113613, pp. 105-107.

[17] Ibid., p. 143.

[18] Ibid., p. 148.

[19] Ibid., p. 166.

[20] Ibid., p. 63.

[21] Presided by Judge Santiago G. Estrella.

[22] Rollo of G.R. No. 113613, p. 184.

[23] Rollo of CA-G.R. No. 31935-SP, p. 105.

[24] Penned by Associate Justice Quirino D. Abad Santos, Jr. and concurred in by Associate Justices Oscar M. Herrera and Alfredo J. Lagamon.

[25] Rollo of G.R. No. 113613, p. 221.

[26] Ibid., pp. 224-225.

[27] Penned by Associate Justice Quirino D. Abad Santos, Jr. and concurred in by Associate Justices Emeterio C. Cui and Nathanael P. de Pano, Jr.

[28] Ibid., p. 112.

[29] Decided on May 5, 1988 (161 SCRA 100).

[30] In the Minute Resolution of September 4, 1989 the Court dismissed the petition in this case and said:

"x x x the Court finds lack of merit in petitioner's claim that the order of disconnection issued by the Court of Appeals is qualified by the 5 May 1988 decision of this Court, which allegedly requires that, before the order of disconnection can be effected, a hearing should first be held to determine whether franchise holder is incapable or unwilling to match the reliability and rates of NPC. The required hearing which was found to be lacking in the case at bar should have been held before the case even arose and not after the Court has already ruled against NPC and order has been issued to disconnect the direct line of petitioner to NPC, as well as to allow CEPALCO to supply the power to petitioner.

The statement of this Court in its decision in G.R. No. 78605 is clear that before a direct connection to NPC may be granted, a hearing (or an opportunity for such a hearing) should be first conducted. Since under the circumstances, no hearing took place, then it is only proper that NPC be disqualified to directly supply the power to petitioner. The negotiations between petitioner and CEPALCO which followed after this Court's decision was rendered, do not rectify the previous lack of hearing. The hearing required in the case at bar is one conducted before a proper administrative body to determine as to which entity, i.e. CEPALCO or NPC, has the right to supply electric power to petitioner; negotiations between the parties is not a substitute to such a hearing."

[31] Ibid., p. 114-A.

[32] Rollo of G.R. No. 112702, p. 5.

[33] Ibid., p. 83.

[34] Ibid., p. 7.

[35] Rollo of G.R. No. 113613, p. 116.

[36] Ibid., p. 326-A.

[37] Petition, pp. 14-19.

[38] Ibid., pp. 22-24.

[39] Rollo of G.R. No. 112702, pp. 56-61.

[40] Decision, p. 13.

[41] Victronics Computers, Inc. v. RTC, Br. 63, Makati, G.R. No. 104019, January 25, 1993, 217 SCRA 517, 529.

[42] Ibid., pp. 531-534.

[43] Petition in G.R. No. 113613, p. 15.

[44] Petition in G.R. No. 113613, pp. 31-32.

[45] 64 AM. JUR. 549 cited as footnote No. 1 in Albano v. Reyes, G.R. No. 83551, July 11, 1989, 175 SCRA 264, 270.

[46] Sec. 14 of Commonwealth Act No. 146 states that "public utilities" include "every individual, copartnership, association, corporation, or joint-stock company, whether domestic or foreign, their lessees, trustees, or receivers appointed by any court whatsoever, or any municipality, province, or other department of the Government of the Philippines that now may own, operate, manage or control in the Philippines, for hire or compensation, any common carrier, railroad, x x x, gas, electric light, heat, power x x x." In *Kilusang Mayo Uno Labor Center v. Garcia, Jr.* (G.R. No. 115381, December 23, 1994, 239 SCRA 386, 391), however, Court defines public utilities as "privately owned and operated businesses whose services are essential to the general public. They are enterprises which specially cater to the needs of the public and conduce to their comfort and convenience." (Underscoring supplied.)

[47] Sec. 3, P.D. 538.

[48] 75 O.G. 7848.

[49] G.R. No. 78605, May 5, 1988, 161 SCRA 100, 104-105.

[50] Ibid., pp. 105-106.

[51] 89 O.G. 166.

[52] Petitioner NPC's Memorandum, p. 23.

[53] In *NPC v. Court of Appeals* (G.R. No. 84695, May 8, 1990, 185 SCRA 169) which petitioner NPC Hearing Committee, in its report dated September 27, 1991, used as a basis for its claim that it has the power to make a direct connection with FPI, the Court indeed held that the "NPC is statutorily empowered to directly service all the requirements of a BOI registered enterprise" subject to the conditions that there must be a hearing which establishes that the private franchise holder is incapable or unwilling to match the reliability and rates of the NPC for providing power directly. However, this jurisprudential pronouncement has been rendered obsolete by Rep. Act No. 7638 as discussed earlier.

[54] L-34298, February 28, 1985, 135 SCRA 37, 46.

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