NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS (NASECORE), REPRESENTED BY PETRONILO ILAGAN, FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), REPRESENTED BY SIEGFRIEDO VELOS...

G.R. NO. 163935. August 16, 2006

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

The Energy Regulatory Commission (ERC) and the Manila Electric Company (MERALCO), in their respective motions, seek reconsideration of the Court's Decision[2] dated February 2, 2006 declaring void ERC Order dated June 2, 2004 which approved the increase of MERALCO's generation charge from P3.1886 per kilowatt hour (kWh) to P3.3213 per kWh.

The Private Electric Power Operators Association, Inc. (PEPOA) filed its Motion for Leave to Intervene and to Admit Attached Comment-in-Intervention and the said Comment-in-Intervention. The Philippine Independent Power Producers Association (PIPPA), without seeking leave of Court, filed its Intervention.

In the Decision, the Court essentially held that, in issuing the assailed Order, the ERC committed grave abuse of discretion, thus:

(1) MERALCO's amended application for the increase of its generation charge was not published in a newspaper of general circulation in violation of Section 4(e), Rule 3 of the Implementing Rules and Regulations (IRR) of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA);

(2) The Generation Rate Adjustment Mechanism (GRAM) Implementing Rules promulgated by the ERC on February 24, 2003, which was relied upon by the ERC and MERALCO as basis for the approval of the latter's amended application for the increase of generation charge and which does not require such publication, was likewise not published in the Official Gazette or in a newspaper of general circulation. Further, the GRAM Implementing Rules was not filed with the Office of the National Administrative Register (ONAR). This lack of publication of the GRAM Implementing Rules violates the fundamental principle of due process as enunciated by the Court in the landmark case of Tañada v. Tuvera.[2]

According to the Court, Section 4(e), Rule 3 of the IRR of the EPIRA speaks of "any application or petition for rate adjustment or any relief affecting the consumers." The said provision does not make any distinction; hence, any application or petition that would result in the adjustment or change in the retail rate or total price paid by the end-users, whether such is occasioned by the adjustment or change in the charges for generation, transmission, distribution, supply, etc., falls within its contemplation. MERALCO's amended application for the increase of its generation charge is thus properly covered by Section 4(e), Rule 3 of the IRR of the EPIRA and its lack of publication, which constitutes non-compliance therewith, is fatal.

The Court held that the ERC and MERALCO's reliance on the GRAM Implementing Rules is unavailing. To

recall, ERC and MERALCO argued that the latter's amended application for the increase of its generation charge is not covered by Section 4(e), Rule 3 of the IRR of the EPIRA but, instead, is governed by the GRAM Implementing Rules. The latter does not contain the requirement of publication of any application filed thereunder. However, as found by the Court, the GRAM Implementing Rules was not published in the Official Gazette or in any newspaper of general circulation in violation of the fundamental principle of due process. Consequently, the GRAM Implementing Rules has no force and effect for it is axiomatic that "publication in the Official Gazette or a newspaper of general circulation is a condition sine qua non before statutes, rules or regulations can take effect."[3]

The ERC submits the following grounds in support of its Motion for Reconsideration:

> I
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> The Honorable Court erred in ruling that "Section 4(e), Rule 3 of the IRR of the EPIRA speaks of "any application or petition for rate adjustment" without making any distinctions" despite the fact that the framers thereof intended it to apply to a general rate proceeding and not to filings or applications made pursuant to adjustment clauses or what are referred to as "escalator clauses".
> II
>
> The Honorable Court erred in ruling that "the amended application of respondent MERALCO for the increase of its general [should read generation] charge is covered by Section 4(e), Rule 3 of the IRR of the EPIRA" notwithstanding that ERC Case No. 2004-112 wherein the June 2, 2004 Order of respondent ERC was issued is not a general rate proceeding but one instituted pursuant to the Generation Rate Adjustment Mechanism (GRAM) which the ERC adopted to improve on the then existing adjustment mechanism known as the Purchased Power Adjustment (PPA) and the resultant nullification by the Honorable Court of the June 2, 2004 Order of the ERC and its declaration that the GRAM Guidelines had not become effective, prejudiced the interests of the consumers.
> III
>
> The Honorable Court erred in giving Section 4(e) of Rule 3 of the EPIRA IRR an expansive coverage by making it apply to any or all applications/petitions filed with respondent ERC that would result to [sic] changes in electricity rates the result of which would paralyze the ERC and render it unable to discharge its mandate under the EPIRA and in this sense, said IRR effectively contravenes and defeats the very law it seeks to implement.[4]

For its part, MERALCO proffers the following grounds in support of its Motion for Reconsideration:

> I
>
> IT COULD NOT HAVE BEEN THE INTENT OF THE IRR TO COVER AUTOMATIC ADJUSTMENT CLAUSES.
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> II
>
> THE APPLICATION OF RULE 3, SECTION 4(E) OF THE EPIRA IRR TO GRAM WOULD RESULT IN ABSURDITY AND UNDERMINE THE FINANCIAL VIABILITY OF THE DISTRIBUTION UTILITIES AS PROTECTED BY EPIRA.
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> III
>
> THE IMPLEMENTATION OF THE DECISION OF THE HONORABLE COURT DATED 02 FEBRUARY 2006 WOULD RESULT IN SEVERE REPERCUSSIONS TO THE ENTIRE ELECTRIC INDUSTRY AND TO THE PUBLIC IN GENERAL, A SITUATION WHICH COULD NOT HAVE BEEN CONTEMPLATED BY THE FRAMERS OF THE LAW AND THE EPIRA IRR.

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IV

PRIVATE RESPONDENT MERALCO, ALONG WITH THE OTHER DISTRIBUTION UTILITIES AND THE NPC ACTED IN GOOD FAITH IN RELYING UPON THE RULES AND REGULATIONS ISSUED BY THE ERC; HENCE, THE NULLIFICATION OF THE GRAM RULES MUST BE APPLIED PROSPECTIVELY SO AS NOT TO UNDULY PREJUDICE THE UTILITIES.[5]

The arguments raised in the respective motions of the ERC and MERALCO, as they are substantially similar, shall be addressed jointly. On the other hand, the arguments raised by the intervenors are basically ancillary to those of the ERC and MERALCO; hence, the Court finds no need to address them separately.

The ERC and MERALCO mainly posit that MERALCO's amended application for the increase of its generation charge is not covered by Section 4(e), Rule 3 of the IRR of the EPIRA. For clarity, the provision is quoted anew:

> (e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement receipt of a copy thereof by the LGU Legislative Body of the locality where the applicant or petitioner principally operates together with the certification of the notice of publication thereof in a newspaper of general circulation in the same locality.
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> The ERC may grant provisionally or deny the relief prayed for not later than seventy-five (75) calendar days from the filing of the application or petition, based on the same and the supporting documents attached thereto and such comments or pleadings the consumers or the LGU concerned may have filed within thirty (30) calendar days from receipt of a copy of the application or petition or from the publication thereof as the case may be.
>
> Thereafter, the ERC shall conduct a formal hearing on the application or petition, giving proper notices to all parties concerned, with at least one public hearing in the affected locality, and shall decide the matter on the merits not later than twelve (12) months from the issuance of the aforementioned provisional order.
>
> This Section 4(e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance with Section 36 of the Act.

In Freedom from Debt Coalition v. ERC,[6] the Court outlined the procedure enjoined by the above provisions, thus:

> (1) The applicant must file with the ERC a verified application/petition for rate adjustment. It must indicate that a copy thereof was received by the legislative body of the LGU concerned. It must also include a certification of the notice of publication thereof in a newspaper of general circulation in the same locality.
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> (2) Within 30 days from receipt of the application/petition or the publication thereof, any consumer affected by the proposed rate adjustment or the LGU concerned may file its comment on the application/petition, as well as on the motion for provisional rate adjustment.
>
> (3) If such comment is filed, the ERC must consider it in its action on the motion for provisional rate adjustment, together with the documents submitted by the applicant in support of its application/petition. If no such comment is filed within the 30-day period, then and only then may the ERC resolve the motion for provisional rate adjustment on the basis of the documents submitted by the applicant.
>
> (4) However, the ERC need not conduct a hearing on the motion for provisional rate adjustment. It is sufficient that it consider the written comment, if there is any.
>
> (5) The ERC must resolve the motion for provisional rate adjustment within 75 days from the filing of the application/petition.
>
> (6) Thereafter, the ERC must conduct a full-blown hearing on the application/petition not later than 30 days

> from the date of issuance of the provisional order and must resolve the application/petition not later than 12 months from the issuance of the provisional order. Effectively, this provision limits the lifetime of the provisional order to only 12 months.[7]

The Court stressed in Freedom from Debt Coalition two important new requirements prescribed by Section 4(e), Rule 3 of the EPIRA IRR: "first, the need to publish the application in a newspaper of general circulation in the locality where the applicant operates; and second, the need for the ERC to consider the comments or pleadings of the customers and the LGU concerned in its action on the application or motion for provisional rate adjustment."[8]

In their respective motions for reconsideration, the ERC and MERALCO vigorously contend that Section 4(e), Rule 3 of the IRR of the EPIRA applies only to a general rate application of a distribution utility and not to its application for cost recovery pursuant to "escalator clauses" or "purchased power or fuel adjustment clauses." Since MERALCO's amended application is for the increase of its generation charge and, as such, entails a cost recovery adjustment, then it is not covered by Section 4(e), Rule 3 of the EPIRA IRR. Specifically, MERALCO's amended application for the increase of its generation charge allegedly does not need to be published and the ERC is not required to consider the customers' comments thereon and conduct the necessary hearing.

The ERC and MERALCO point out that by its nature, an application for cost recovery pursuant to "purchased power or fuel adjustment clauses" or "escalator clauses" requires a summary proceeding to allow a utility to update certain costs such as fuel and/or generation costs. To require the ERC to approve applications of this nature only after notice and hearing would allegedly go against the precise and very purpose for which automatic cost updating/adjustment mechanisms are instituted, i.e., to have an effective mechanism to reflect actual costs of power and to have a timely adjustment, upwards or downwards, for the interest of all parties concerned. The matter is allegedly mechanical and merely one of computation.

The ERC and MERALCO rely heavily on American case law explaining the nature of these "escalator clauses" or "purchased power or fuel adjustment clauses," thus:

> "An escalator clause is a method designed to enable a utility to adjust its revenues either upward or downward to reflect changing elements of operating costs of a public utility without having to resort to the cumbersome procedure of filing a new rate case as often as material changes on the factors effecting the reasonableness of the rates occur (Duquesne Light Co. v. Pennsylvania Public Comm., 5 PUR 3d, 141-142).
>
> An escalator clause serves equitable and procedural purposes. The use of such method guarantees to the customer that he is not charged more than he ought to pay and to the utility that it gets its due compensation for its services. The method helps unclog the docket of the utility commissions and the courts especially in times of rapid fluctuations in prices (Re Lynchburg Gas Co., 6 PUR 3d., 34; City of Norfolk v. Virginia Electric and Power Co., 11 PUR 438)." (Camilo D. Quiason, Annotation on Rate Making, 41 SCRA 701).
>
> The power adjustment clause is the most convenient regulatory mechanism that addresses the need of the distribution utilities to recover their cost of power purchased in the most expeditious manner. It differs from an ordinary application for adjustment of rates of the distribution utilities in that the former is a summary proceeding designed solely to allow a utility to update certain costs such as fuel and/or generation costs. (Re Indianapolis Power & Light Co., 1984, 62 PUR 4th ed. 666)
>
> The use of the power adjustment clause is common and has, in fact, received widespread recognition and approval in international jurisdiction. In the United States, as observed by the Massachusetts Department of Public Utilities (Re Worcester Gas Light Co., 9 PUR 3d [1955] 1952, 1956], these clauses have operated in the various states without difficulty. Among these states are Arizona, Arkansas, Illinois, Louisiana, Michigan, Minnesota, Virginia, New Hampshire, New Jersey, New York, Iowa and South Carolina. (Re Hartford Electric

> Light Co. [La 1952] 95 PUR NS 161; Ex Parte Gulf Utilities Co. [La 1950], PUR NS 225; National Forge and Ordinance Co., vs. Pennsylvania Electric Co. [Pa. 1953], 99 PUR NS 161; Re Community Pub. Service Co. [NM 1951] 93 PUR NS 18; Re Duke Power Co. [NC 1948] 75 PUR NS 65; Re Rush Country Rural Electric Membership Corp. [Ind. 1947] 72 PUR NS 128; Re Wisconsin Michigan Power Co. [Ws 1948], 76 PUR NS 153; Glens Fall Portland Cement Co. v. New York Power & Light Corp. [NY 1947] 69 PUR NS 37)
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> In Virginia, the state utility commission first approved an adjustment clause in the case of Washington Gas Light Co., on June 30, 1954. The same company secured similar approval about the same time from the Maryland and District of Columbia commissions (Re Virginia Electric & Power Co., 7 PUR 3d 1955). The adjustment clause was given judicial scrutiny in the case of City of Norfolk v. Virginia Electric and Power Co. [1955] 197 Va 503, 11 PUR 3d 438, 90 SE 2d 140, and it likewise passed the test.
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> In this respect, Commissioner Hooker of Virginia, in 7 PUR 3d 108, 112, 113, said:
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> "The Commission has for many years approved rates for lower costs of electric power that are based on fuel clauses. The operation of those clauses results in increases or decreases in rates as the cost of fuel increases or decreases. No objection has ever been made to such rates despite the long period of their effectiveness. They cannot be distinguished in effect from the escalator provision proposed here. Electric rates with fuel clauses were considered and accepted by this commission more than thirty years ago ... (citing in Re Virginia R. & Power Co. PUR 1921C 193, 208; Re Lynchburg Traction & Light Co. PUR 1921E 87)."
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> Commissioner Hooker further said:
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> "The legality and propriety of such clauses were considered in length in 1953 by the New York Public Service Commission in a proceeding covering the large gas distributors in the New York City area, and that the commission approved such clauses. (Re Brooklyn Borough Gas Co. [NY 1953] 100 PUR NS 271). Other commissions have adopted the same course. (Re Southern California Gas Co. [Cal. 1952] 99 PUR NS 272; Re South Jersey Gas Co. [NJ 1952] 96 PUR NS 71; Re Piedmont Gas Co. [NC 1947] 71 PUR NS 19." (7 PUR 3d at p. 113)
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> The New York Public Service Commission sustained the legality and propriety of adjustment clauses [Re Brooklyn Borough Gas Co. (NY 1953) 100 PUR NS 271]. Likewise, the Edison Electric Institute estimated that in 1948, over 85% of all private power companies had adjustment clauses for electric energy sold to industrial customers. Subsequently, such clauses have also spread to rates for commercial service. The trend continued toward the use of adjustment clauses for fuel also for residential type of utility rates (Welch, Preparing for the Utility Rate Case, 1954 ed., 234; 50 Public Utilities Fortnightly, No. 9, p. 637, 1952, 54 Public Utilities Fortnightly, No. 4, 217, 1955)
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> In February 1948, a fuel adjustment clause became effective in the electric rate schedules of Pennsylvania Power & Light Company, of general application for certain commercial and industrial users. In April 1948, the commissions of North and South Carolina approved for Carolina Power & Light Co., a fuel adjustment clause for all kilowatt-hours used in excess of 15,000 per month and in July 1948, the same commission approved a similar clause for Duke Power Company. The most widely known and longest established adjustment clauses related to residential service are those adopted in 1920 in New York (Re New York Edison Co. 10 PUR NS 264) and revised in 1933. Similar arrangements for residential customers prevail in Boston, Baltimore and Florida (Welch, ibid, p. 2355).[9]

The Court is not quite impressed with the foregoing case law relied upon by the ERC and MERALCO because, in fact, they do not entirely support ERC's and MERALCO's theory that mechanisms for recovery of purchased power or fuel costs are necessarily "automatic." As will be shown shortly, automatic adjustments in rates according to a fixed formula, without the necessity for proceedings or hearings by the public utilities commission whenever specified costs of the utilities change by a certain amount, while permissible under some statutes in the

United States, is improper under others. Even some of the cases cited by the ERC and MERALCO illustrate that mechanisms for the recovery of purchased power or fuel costs are not necessarily antithetical to the requirements of notice and hearing. For example, in Re Indianapolis Power and Light Company,[10] the following narration of the procedural antecedents undertaken therein is worth mentioning:

> On September 10, 1984, the Indianapolis Power and Light Company (applicant or IPL) filed its verified application with this commission for approval of changes in its fuel cost charge for electric and steam service, pursuant to IC 8-1-2-42(d) and Cause No. 36880. On October 1, 1984, the utility consumer counselor's office filed its report in this cause.
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> Pursuant to notice published as required by law, proof of which was incorporated into the record and placed in the official files of the commission, a public hearing in this cause was held on October 9, 1984, at 3:00 P.M., in Room 903, State Office Building, Indianapolis, Indiana. At that hearing, IPL appeared by counsel and presented evidence relevant to its application. The Office of the Utility Consumer Counselor was also present and presented evidence concerning this application. No members of the general public appeared or sought to testify in this cause. At the close of the hearings, rulings had been made upon all pending motions or objections.
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> The commission, based upon the applicable law and all evidence of record herein, and being duly advised in the premises, now finds as follows:
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> 1. Notice and Commission Jurisdiction. Due legal and timely notice of the commencement of the public hearing in this cause was given and published by the commission as required by law. IPL operates a public electric utility and as such, is subject to the jurisdiction of this commission as provided for in the Public Service Commission Act, as amended, and the provisions of that act authorize the commission to act in this proceeding. Accordingly, the commission has jurisdiction over the parties and the subject matter herein.

x x x

In Re Arizona Public Service Company,[11] the following discussion on the history of Purchased Power and Fuel Adjustment Clause (PPFAC) again belies the ERC's and MERALCO's claim that "purchased power and fuel adjustment clauses" are "automatic" and, therefore, no hearings can be conducted with respect to applications for adjustments of this kind:

> Arizona Public Service Company (APS) has utilized a form of PPFAC since its origins in the early 1950's. See Decision No. 26996 (December 29, 1952). At first, the PPFAC only applied to gas generation. The provision was expanded to other fuels (but not purchased power) in Decision No. 33813 (April 3, 1962), and the adjustment was calculated on a plant-by-plant basis. This procedure was abandoned by Decision No. 44262 (June 14, 1974). The PPFAC was calculated on a system-wide basis, and the tremendous growth in interchange sales required incorporation of purchased power for the first time. Decision No. 44262 (which immediately followed the oil embargo) allowed for automatic monthly adjustments with no prior Commission review. Decision No. 46513 (October 30, 1975) created monthly reporting requirements and excluded fuel handling costs and line losses from the PPFAC. However, the PPFAC's basic structure remained intact.
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> On September 13, 1978, the Commission entered Decision No. 49333. That Decision abolished the then existing PPFAC. Just six (6) weeks later, the Commission reversed itself and authorized the basic form of the modern APS PPFAC. See Decision No. 49438 (October 25, 1978). The procedures to be followed were elaborated upon by Decision No. 49576. The "modern" PPFAC permitted no automatic increases, requiring instead that any increase be specifically authorized by the Commission after a public hearing. Almost by necessity, changes in the PPFAC could occur (at most) only at six (6) month intervals. Detailed reporting requirements were established, and increases were limited to amounts which would necessitate at least one (1) mill per Kwh change in the then current PPFAC. More importantly, a utility could not initiate any PPFAC

> proceeding. Only the Commission had that right.

x x x

The Illinois Public Utilities Commission and Indiana Public Service Commission had been reported to require hearings before any increase in rates was approved, even if the request for such increase was based on the increase in the prices of coal:

> A few statutes, however, require that a public hearing be held before any increase in rates is approved. The Illinois Public Utilities Commission, interpreting a statutory provision that "no public utility shall increase any rate ... under any circumstances whatsoever, except upon a showing before the Commission and a finding by the Commission that such increase is justified," held:
>
> "This seems to contemplate a formal showing which would justify any increase allowed, and certainly does not contemplate the allowance of an increase of rates predicated on the bare statement of the public utility involved that it has paid a certain amount for coal."
>
> The Indiana Public Service Commission reached the same conclusion, although the statute involved did not specifically require a hearing.
>
> "[I]t would appear that the Commission is without power to confer authority for increasing rates contingent upon some future happening, and that it would be necessary for the Commission to determine whether or not the price of coal had increased or decreased. Therefore it makes little difference whether the coal clauses are placed in the tariff or not, for the reason that it would be necessary for the Commission, either on petition of the consumer or the utility, to ascertain the prevailing price of coal before allowing an increase or reduction in rates, on the theory that no increase in rates can be allowed without a public hearing."[12]

On the other hand, in State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,[13] the Supreme Court of Missouri disallowed the use of automatic fuel adjustment clause as part of residential rate structure for lack of statutory authority.[14] Objections to the use of fuel adjustment clause were noted in the said case in this wise:

> Numerous objections have been raised to the use of fuel adjustment clauses. Even those states which approve them have required numerous safeguards surrounding their use, as has the commission in this case. The principal objections have been that to permit such automatic adjustments would be an abdication of the commission's rate making function; that it would violate the spirit and purpose of regulatory law; that it allows an increase in rates without consideration of all factors, thus overweighing the effect of one factor, and ignoring compensating economies; that it shifts the burden of proving reasonableness or unreasonableness from the utility to the consumer; that it violates the principle that utility rates should be definite and published in order to insure stability and notice of rates to consumers and in order that consumers understand their rates and thus have the knowledge necessary to determine if complaint is warranted; that utilities would lose any incentive to keep down fuel costs where they know such costs can be fully and automatically passed on to the consumer; and that presence of a fuel adjustment clause may bias selection of fuels or production methods so that the utility will choose the method which allows it to pass on the most cost and is thus cheapest to it, rather than the method which is cheapest to all.[16]

The Missouri Supreme Court particularly made the finding that an automatic fuel adjustment clause would negate the statutory provision, Section 393.140(11),[17] requiring notice and publication of rates:

> Not only would a fuel adjustment clause permit new "rates" to go into effect without consideration of other factors and thus without a framework in which to determine if overall rates are reasonable, it would also negate the effect of s 393.140(11), by which all rates are printed and open for public inspection. The purpose of thus providing the customer with a method of ascertaining what rates are in effect and enabling him to take the

> appropriate steps to challenge those rates would be destroyed with a fuel adjustment clause. Upon reference to the filed rate schedule of the utility, the consumer would be confronted with a formula and a rate filed as a result thereof. While it is debatable that representatives of large industrial or commercial customers might understand such a system, the average consumer could not be expected to do so. It is no answer to say that few understand the rates previously filed; this argument merely demonstrates the need to avoid further complication.
>
> Finally, as noted Supra, the rationale behind a fuel adjustment clause could be used to justify other automatic adjustment clauses for most remaining operating expenses. Having established a toehold with our decision in Hotel Continental,[17] we will not travel further down the "slippery slope" and risk a dismantling of the carefully balanced fixed rate system established by the legislature. While in itself the clause looks innocuous, and while the cost of fuel may look high, to permit such a clause would lead to the erosion of the statutorily-mandated fixed rate system. If the legislature wishes to approve automatic adjustment clauses, it can of course do so by amendment of the statutes, and set up appropriate statutory checks, safeguards, and mechanisms for public participation. As of this date, the only exception to the fixed rate system approved by the legislature is a sliding scale rate. We cannot imply an intent to allow a further exception where to do so would upset the fixed-rate system set up in the statutes. If the electric companies are faced with an "emergency" situation because of rising fuel costs, they can take advantage of the method set up by the legislature to deal with such situations and file for an interim rate increase on the basis of an abbreviated hearing.[18]

The following ratiocination made by the Missouri Supreme Court in State ex rel. Utility Consumers Council of Missouri, Inc. is likewise relevant to the present case:

> x x x While fuel costs are to a large extent dependent on general market conditions and periodically fixed contract costs, the utility does exercise control over its fuel costs when it negotiates its fuel contracts or chooses what fuel to buy or burn in what generating unit. It also is possible to offset fuel costs with savings from efficiencies in other areas of operation, such as salaries, wages, taxes, depreciation and materials and supplies other than fuel. This, of course, does not necessarily mean that a fuel adjustment clause is not authorized by statute, but it does mean that it is not authorized as simply an extension of the reasoning in Hotel Continental. We must now determine whether it is otherwise authorized by statute.
>
> Respondents themselves have difficulty pointing to what provisions in the statutes give them authority to utilize a fuel adjustment clause. In their brief, as noted Supra, they simply argue that "it is clear that the statutes and case law in Missouri authorize such provisions." In oral argument, they admitted that it was hard to find specific sections authorizing the FAC, but that we should approve it on the basis of ss 393.130, 393.140, and 393.270, and through application of the principle that where an agency is given broad supervisory authority, deference should be given to its interpretation of a statute, " Since FAC's have been used in regard to industrial and large commercial users for 60 years, and because other jurisdictions approve them, it is posited that we should also approve them.
>
> It is for the legislature, not the PSC, to set the extent of the latter's jurisdiction. The mere fact that the commission has approved similar clauses in the past, or that other states permit them, is irrelevant if they are not permitted under our statute.[19]

In the same manner, the mere fact that certain jurisdictions in the United States have adopted "escalator clauses" or "automatic purchased power or fuel adjustment clauses" does not warrant this Court to recognize their validity as applied to our jurisdiction. Unqualified or blind adherence to the American case law relied upon by the ERC and MERALCO is especially unwarranted considering that they have not shown that the statutes in those jurisdictions are similar in text to the EPIRA and its IRR.

Indeed, the Court's determination of the nullity of the ERC Order dated June 2, 2004 approving the increase of

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MERALCO's generation charge was made primarily within the context of the EPIRA, its IRR and its policy objectives. Again, in Freedom from Debt Coalition, the Court enumerated some of the avowed policies of the EPIRA, to wit: "to protect the public interest vis-à-vis the rates and services of electric utilities and other providers of electric power, to ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability for greater operational and economic efficiency, to enhance the competitiveness of Philippine products in the global market, and to balance the interests of the consumers and the public utilities providing electric power through the fair and non-discriminatory treatment of the two sectors."[20]

The publication and comment requirements in Section 4(e), Rule 3 of the IRR of the EPIRA were held to be in keeping with the foregoing avowed policies of the EPIRA. The pertinent disquisition in Freedom from Debt Coalition is quoted anew:

> Obviously, the new requirements are aimed at protecting the consumers and diminishing the disparity or imbalance between the utility and the consumers. The publication requirement gives them enhanced opportunity to consciously weigh the application in terms of the additional financial burden which the proposed rate increase entails and the basis for the application. With the publication of the application itself, the consumers would right from the start be equipped with the needed information to determine for themselves whether to contest the application or not and if they so decide, to take the needed further steps to repulse the application. On the other hand, the imposition on the ERC to consider the comments of the customers and the LGUs concerned extends the comforting assurance that their interests will be taken account. Indeed, the requirements address the right of the consuming public to due process and at the same time advance the cause of people empowerment which is also a policy goal of the EPIRA along with consumer protection.[21]

Although the new requirements of publication and comment are procedural in character, according to the Court, "they represent significant reforms in public utility regulation as they engender substantial benefits to the consumers. It is in this light that the new requirements should be appreciated and their observance enforced."[22]

Clearly, viewed in light of the EPIRA, its IRR and its policy objectives, the ERC's and MERALCO's contention that the latter's amended application for the increase of generation charge is not covered by Section 4(e), Rule 3 of the IRR cannot be sustained. For to allow MERALCO or any distribution utility to increase its generation charge without publication of its application therefor and to allow the ERC to approve the same without taking into consideration the comments thereon of the consumers and the LGUs concerned, on the ground that it is a cost recovery adjustment, would be to erode the EPIRA's avowed policies of people empowerment and consumer protection. Significantly, Section 75 of the EPIRA enjoins that it (the EPIRA) shall be construed "in favor of the establishment, promotion, preservation of competition and people empowerment so that the widest participation of the people, whether directly or indirectly, is ensured."

The ERC and MERALCO attempt to take the latter's amended application for the increase of its generation charge out of the coverage of Section 4(e), Rule 3 of the IRR of the EPIRA by arguing that it is not in itself a rate. This attempt is futile because, as already pointed out in the Decision, the approval of the same would effectively increase the rates payable by the consumers. Accordingly, such application is within the contemplation of Section 4(e), Rule 3 of the EPIRA IRR as it covers "any application or petition for rate adjustment or any relief affecting the consumers."

It bears reiterating that the ERC is not precluded from promulgating rules, guidelines or methodology, such as the GRAM, for the recovery by the distribution utilities of their fuel and purchased power costs. However, these rules, guidelines or methodology so adopted should conform to requirements of pertinent laws, including Section 4(e), Rule 3 of the IRR of the EPIRA.

For example, the ERC may adopt a summary or abbreviated hearing with respect to the distribution utilities'

applications to recover their purchased power or fuel adjustment costs but, and this should be stressed, the requirements of publication of the application as well as that the consumers and the local government units concerned be given 30 days from such publication to submit their comments thereon shall not be dispensed with. The abbreviated or summary hearing so adopted shall be conducted only after strict compliance with the publication and comment requirements. It should be made clear that, unless Section 4(e), Rule 3 of the IRR of the EPIRA is amended, the adjustments of rates based on purchased power or fuel adjustment costs shall not or in no case be "automatic."

In any case, as already pointed out, MERALCO's concern that it would be subjected to a long and tedious process of recovering its purchased power and fuel costs is addressed by the ERC's power of interim rate regulation as upheld by the Court in Freedom from Debt Coalition. MERALCO's contention that the ERC's power to grant provisional relief applies only to general rate applications, and not to applications for adjustments to recover purchased power or fuel costs, is tenuous. On this point, this statement made by the Missouri Supreme Court finds application: "If the electric companies are faced with an "emergency" situation because of rising fuel costs, they can take advantage of the method set up by the legislature to deal with such situations and file for an interim rate increase on the basis of an abbreviated hearing."[23] As already stated in the Decision, the grant to the ERC of the power of interim rate regulation is precisely for it to "be able to swiftly and flexibly respond to the exigencies of the times,"[24] including rising fuel costs.

The ERC, for its part, has raised the matter of logistical constraints vis-à-vis the requirement in Section 4(e), Rule 3 of the EPIRA IRR of conducting hearings with respect to the distribution utilities' applications to recover purchased power or fuel costs. Among others, it envisioned a scenario where, in a given year, it would allegedly be required to travel to and conduct 1,680 hearings in various localities all over the country for cost recovery filings alone. It would allegedly take the ERC 4½ years to decide the 1,680 cost recovery filings made in just a year even if it would render decisions on Saturdays and Sundays. By the Court's declaration that applications of distribution utilities for adjustments to recover their purchased power or fuel adjustment costs are covered by Section 4(e), Rule 3 of the EPIRA IRR, according to the ERC, "it is being required to enforce something that cannot be accomplished, given the insurmountable time, budgetary and other logistical constraints it faces."[25] In such a case, it would allegedly be impossible for the ERC to attend to its other equally important responsibilities and functions under the EPIRA, i.e., to ensure the successful restructuring of the electric power industry.

These contentions are hardly persuasive. The Court is not unmindful that it would be easier for the ERC to adopt a method, such as the GRAM, to allow distribution utilities to recover their purchased power or fuel costs without need for the ERC to conduct hearings or even to consider the comments of the consumers. This would certainly be less burdensome, more economical and efficacious for the ERC. But it would do well to remind the ERC that the Constitution recognizes higher values than administrative economy, efficiency and efficacy. The Bill of Rights, in general, and the Due Process Clause in particular, were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials.[26] Moreover, when an administrative procedure, such as the GRAM, runs roughshod over fundamental values, like the right of the citizenry to due process, enshrined in the Constitution and other statutes, the Court cannot let such procedure stand.

In this connection, the hearings on applications for rate adjustments, as a component of procedural due process under Section 4(e), Rule 3 of the EPIRA IRR, shall be conducted after compliance with the other procedural due process requirements therein. The ERC need not conduct a hearing in the exercise of its power of interim rate regulation. Nonetheless, the other components of procedural due process, i.e., the publication and comment requirements of the said provision, shall be strictly complied with before the ERC takes action on the application

itself or the motion for provisional rate adjustment. Publication of the application for rate adjustments in a newspaper of general circulation in the locality where the applicant operates and the need for the ERC to consider the comments thereon of the consumers and the local government units concerned filed within 30 days from their receipt of a copy of the application or the publication thereof are, therefore, mandatory.

As Justice Dante O. Tinga explained in his concurring opinion: "the publication under the IRR has a dual purpose: first, it is jurisdictional because without it, the ERC would be powerless to assume jurisdiction over the petition; and second, it is a necessary component of procedural due process aimed at giving the petition as wide publicity as possible so that all persons having an interest in the proceedings may be notified thereof."[28]

By way of recapitulation, the ERC Order dated June 2, 2004 is declared void for lack of publication of MERALCO's amended application for the increase of its generation charge in violation of Section 4(e), Rule 3 of the EPIRA IRR. Further, the GRAM Implementing Rules, relied upon by the ERC and MERALCO as basis for the approval of the latter's amended application and which does not require such publication, was likewise not published in the Official Gazette or in a newspaper of general circulation in violation of the doctrine laid down in Tañada.

To address MERALCO's plea that the present ruling be prospectively applied, it behooves the Court to clarify that the petition in the present case prayed only for the nullification of the ERC Order dated June 2, 2004 which approved the increase of MERALCO's generation charge from P3.1886 to P3.3213 per kWh. The Court, without overreaching itself, cannot extend the present ruling to the other ERC orders which have not been brought before it. Hence, the applicability or non-applicability of the ruling in the present case to the other orders of the ERC will have to be determined if and when the proper petitions are filed with the Court.

WHEREFORE, the Motion for Reconsideration dated February 17, 2006 of the ERC and the Motion for Reconsideration dated February 20, 2006 of MERALCO are DENIED with FINALITY.

The Comment-in-Intervention dated March 6, 2006 of PEPOA and the Intervention dated March 27, 2006 of PIPPA are, likewise, DENIED.

Consequently, upon finality of the Decision dated February 2, 2006, MERALCO is DIRECTED to REFUND to the affected consumers the amount of P0.1327 per kWh (representing the unauthorized increase from P3.1886 to P3.3213 per kWh under the nullified ERC Order dated June 2, 2004) reckoned from when the same was charged and collected from the affected consumers. Instead of an actual refund, MERALCO may correspondingly credit in favor of the affected customers the appropriate amounts for their future consumption. The ERC is DIRECTED to ensure the proper execution of the judgment in this case.

SO ORDERED.

Panganiban, C.J., Puno, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Carpio Morales, Tinga, Chico-Nazario, Garcia and Velasco, Jr., JJ., concur.Corona, J., on leave.Azcuna, J., on official business.

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[1] Rollo, pp. 741-782.

[2] 230 Phil. 528 (1986).

[3] Republic of the Philippines v. Express Telecommunications, Inc., 424 Phil. 372, 393 (2002).

[4] Rollo, pp. 783-784.

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[5] Id. at 841-842.

[6] G.R. No. 161113, June 15, 2004, 432 SCRA 157.

[7] Id. at 190-191.

[8] Id. at 193.

[9] MERALCO's Motion for Reconsideration, pp. 9-12; rollo, pp. 846-849.

[10] 62 P.U.R. 4[th] 666.

[11] 76 P.U.R. 4[th] 399.

[12] Trigg, Escalator Clauses in Public Utility Rate Schedules, 106 U.Pa.L.Rev. 964.

[13] 585 S.W.2d 41, 33 P.U.R.4[th] 273.

[14] The Missouri Supreme Court observed that, prior to the assailed order of the public service commission, the fuel adjustment clause had never before permitted to become part of a residential rate schedule in Missouri, although it had been permitted as a part of industrial and large commercial rate schedules. The matter with respect to the applicability of the fuel adjustment clause to industrial and large commercial schedules, however, was not before the said Court in the case.

[15] Supra note 12, at 49-50. Citations omitted.

[16] The said provision provide, in part, that the public service commission has the power to require all electric companies to "file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges and service used or to be used... No change shall be made without 30 days notice and 30 days publication except as authorized by the commission." Id. at 48.

[17] Referring to Hotel Continental v. Burton, 334 S.W.2d 75, where the same state Supreme Court affirmed the public commission's power in a rate case to permit the Kansas City Power & Light Co. to include in its rate schedule a tax adjustment clause (TAC) which permitted the company to state separately on each customer's bill a charge equal to any part of a license, occupation or other similar fee or tax applicable to service by the utility to that customer and imposed by local taxing authorities on the basis of gross receipts.

[18] Supra note 12, at 57, citing State ex rel. Laclede Gas Co., 535 S.W. 2d 561.

[19] Supra note 12, at 54. Citations omitted.

[20] Supra note 5, at 195 citing Sec. 2(f), (c) and (e) of the EPIRA.

[21] Id. at 193.

[22] Id. at 195.

[23] Supra note 17.

[24] Concurring and Dissenting Opinion of Justice Reynato S. Puno in Freedom from Debt Coalition, supra note 5, at 234.

[25] ERC's Motion for Reconsideration, pp. 17-25; rollo, pp. 799-807.

[26] Stanley, Sr. v. State of Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972).

[27] Supra note 5.

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