

NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS, INC. (NASECORE), REPRESENTED BY PETRONILO ILAGAN; FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), REPRESENTED BY SIEFRIEDO V...

G.R. No. 190795. July 06, 2011

Ponente: SERENO, J.

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SERENO, J.:

The Energy Regulatory Commission (ERC), created under the Electric Power Industry Reform Act of 2001(EPIRA), [1] used to apply the Return on Rate Base (RORB) method to determine the proper amount a distribution utility (DU) may charge for the services it provides. The RORB scheme had been the method for computing allowable electricity charges in the Philippines for decades, before the onset of the EPIRA. Section 43(f) of the EPIRA allows the ERC to shift from the RORB methodology to alternative forms of internationally accepted rate-setting methodology, subject to multiple conditions. [2] The ERC, through a series of resolutions, adopted the Performance-Based Regulation (PBR) method to set the allowable rates DUs may charge their customers. [3] Meralco, a DU, applied for an increase of its distribution rate under the PBR scheme docketed as ERC Case No. 2009-057 RC (MAP2010 case) on 7 August 2009. Petitioners NASECORE, FOLVA, FOVA, and Engineer Robert F. Mallillin (Mallillin) all filed their own Petitions for Intervention to oppose the application of Meralco. [4]

At the initial hearing, on 6 October 2009, the following entered their appearances: (1) Meralco, (2) Mallillin, and (3) FOVA. Petitioners NASECORE and FOLVA failed to appear despite due notice. [5]

Meralco presented its first witness on 13 November 2009. At the date of hearing, FOLVA failed to appear despite due notice. [6] Likewise, on 19 November 2009, the continuation of Meralco's presentation of its witness, petitioners NASECORE, FOVA, and FOLVA all failed to appear despite due notice. [7] NASECORE had sent a letter requesting that it be excused from the said hearing, but reserved its right to cross-examine the witness presented by Meralco. The latter objected to this request by virtue of the ERC's Rules of Practice and Procedure. ERC ruled that the absence of NASECORE and FOVA was deemed a waiver of their right to cross-examine Meralco's first witness. [8]

At the 26 November 2009 hearing, NASECORE and FOLVA again failed to attend the hearing despite due notice. Upon motion by Meralco, ERC declared that NASECORE had waived its right to cross-examine the second witness of Meralco for failure to attend the said hearing. ERC then gave Meralco five (5) days from said date of hearing within which to file its Formal Offer of Evidence. FOVA and all the other Intervenors were, likewise, given ten (10) days from receipt thereof to file their comments thereon and fifteen (15) days from said date of hearing to file their position papers or Memoranda. [9]

On 1 December 2009, Meralco filed its Formal Offer of Evidence with compliance. On 7 December 2009, it was directed by ERC to submit additional documents to facilitate the evaluation of its application.

Petitioner NASECORE claims that it was only on 8 December 2009, that it received Meralco's Formal Offer of Evidence, together with a copy of the 7 December 2009 ERC Order. Thus, it believes that it has until 18 December 2009 to file its comment thereon.

On 10 December 2009, Petitioner NASECORE filed with ERC a Manifestation with Motion dated 9 December 2009 requesting that the ERC direct applicant Meralco to furnish intervenor NASECORE all the items in ERC's directive/Order dated 7 December 2009; to furnish Intervenor NASECORE a copy of the Records of the Proceedings of the hearings held on 19 and 26 November 2009; and to grant the same intervenor fifteen (15) days, from receipt of applicant's compliance with the ERC's Order dated 7 December 2009, within which to file its comment to applicant's Formal Offer of Evidence.

On 14 December 2009, [10] Meralco's application in the MAP2010 case was approved by ERC. Petitioner NASECORE protests this claiming approval as premature, that there were still four days before the expiration of the period given to it to file its opposition to the formal offer of evidence of Meralco, and before petitioner NASECORE received its copy of the documents Meralco was required to additionally submit in the 7 December 2009 ERC Order.

A day after the aforementioned Decision, or on 15 December 2009, petitioner NASECORE allegedly received the additional documents Meralco submitted in compliance with the ERC's 7 December 2009 Order.

Malillin filed his Motion for Reconsideration (MR) before the ERC. [11] Instead of filing their own motions for reconsideration, petitioners came directly to this Court via a Petition for Certiorari under Rule 65 of the Rules of Court with an Urgent Prayer for the Issuance of a Temporary Restraining Order (TRO) or Status Quo Order.

Allegations in the Instant Petition; Meralco's and ERC's Comments

Petitioners' main assertion is that the ERC Decision approving the MAP2010 application of Meralco is null and void for having been issued in violation of their right to due process of law. [12] They further ask this Court to stay the execution of the aforementioned Decision for being void, to wit:

As already shown earlier, the assailed ERC Decision is a patent nullity due to lack of due process of law. Thus, being a void decision, it can not (sic) be the source of any right on the part of MERALCO to collect additional charges from their customers. Invariably, the 4.3 million customers of MERALCO has (sic) no obligation whatsoever to pay additional distribution charges to MERALCO. To implement such void ERC decision, is plainly oppressive, confiscatory, and unjust. [13]

On 26 January 2010, Meralco filed its Comment to the instant Petition. Meralco contends that the said Petition should be denied due course or dismissed for the following reasons:

- Petitioners have availed of an improper remedy; [14]
- Petitioners have failed to observe the proper hierarchy of courts; [15]
- Petitioners were amply afforded the right to participate in the proceedings and have thus been afforded sufficient opportunity to be heard; [16] and
- Meralco has already voluntarily suspended the implementation of the approved MAP2010 rates rendering the issues raised in this Petition moot. [17]

Meralco furthermore opposes petitioners' prayer for the issuance of a TRO or Status quo order. It argues that petitioners failed to present an "urgent and paramount necessity" for the issuance of the writ considering that

Meralco already voluntarily suspended the implementation of the assailed Decision pending resolution of Mallillin's MR. In fact, on 1 February 2010, ERC issued an Order suspending the implementation of the 14 December 2009 Decision pending the resolution of Mallillin's MR.

On 27 August 2010, ERC filed its Comment. The ERC argued that a Petition for Certiorari under Rule 65 is not the proper remedy in the case at bar; that there was no denial of petitioners' right to procedural due process; and that its 10 March 2010 order has rendered the instant petition moot. In this Order, the ERC granted the MR of Mallillin and directed the implementation of the therein reflected revised distribution rates.

New Allegations in the Reply and Meralco's Comment Thereon

On 8 April 2010, petitioners filed their Reply to Meralco's Comment. In their Reply, petitioners, for the first time, put forward the following arguments:

(1) Meralco, from 2003-2008, has been earning more than the 12% rate of recovery considered by law as just and reasonable.

Petitioners newly argue that the ERC erred in approving Meralco's application for increasing its charges in spite of the validation by the Commission on Audit (COA), through a report, of a computation showing Meralco's income as exceeding the 12% mandated by law. Petitioners conclude thus:

In view of the COA Audit Report (x x x), the position of the herein petitioners were validated, i.e., that Meralco's rate increase of P0.0865/KWh granted in 2003 was not only unnecessary but also unreasonable, hence MERALCO should not only be ordered to roll back its rate but also to refund its excess revenues to consumers.

(2) Questionable rate-setting methodology adopted by ERC.

According to petitioners, this Court ordered the ERC to consider the 2003 increase it granted to Meralco as provisional until it has taken action on the COA Audit Report but that ERC disregarded this order because of its adamant position that the PBR rate fixing methodology is the "be-all-and-end-all" of its rate fixing function while sacrificing the interests of millions of consumers. [18]

They argue that it is not the validity of the rate setting methodology employed but the reasonableness of the rates to be applied that ought to be the controlling factor in determining the rates that a public utility should be allowed to implement. [19]

Thus, the ERC should not limit itself with the use of the PBR method if it would result in unreasonable rates. Rather, the ERC should have the authority to employ any method so long as the result was reasonable to both consumer and investor. In effect, petitioners are asking this court to adopt the end result doctrine, which was pronounced by the U.S. Supreme Court in *National Power Commission v. Hope Natural Gas Co.* [20] and cited in the concurring opinion of former Chief Justice Fred Ruiz Castro in *Republic v. Medina*. [21]

Petitioners contend that the use of the PBR method results in disadvantage to the public, viz:

In fine, MERALCO succeeded in wangling from the ERC through an internationally accepted rate-setting methodology (i.e, Performance Based Rate [PBR]) a rate that will not only guarantee that its operations shall remain viable but a rate that will give it astronomical profits at the expense of the consuming public whom it is obligated to serve.

A table showing that the common stockholders of Meralco, for the last 21 years, had earned 424% on their actual investment, per year, was also presented by petitioners. Petitioners conclude that these numbers negate any

argument that Meralco needs a rate increase, irrespective of any under rate methodology applied. [22]

The Issue of the Validity of the PBR was not
Squarely Raised in this Petition; the Sole Issue
is the Denial of Due Process

We have ruled that "issues not previously ventilated cannot be raised for the first time on appeal, much less when first proposed in the reply to the comment on the petition for review." [23] To allow petitioners to blindsides Meralco with such newly raised issues violates the latter's due process rights. Having been raised for the first time, this Court cannot rule on the issues regarding the unreasonableness of Meralco's rates and the validity of the choice of the PBR method. If petitioners wanted to include these issues for resolution, the proper procedure was for them to ask this Court to allow them to amend their Petition for the inclusion of the aforementioned issues. Thus, we rule that the sole issue for resolution in this case is whether or not petitioners' right to due process of law was violated when the ERC issued its Order before the expiration of the period granted to petitioners to file their comment.

There Has Been No Denial of Due
Process, at most only an Irregularity
in the Precipitate Issuance of the Assailed
Decision, which Irregularity
ERC has Sought to Remedy

In *Cooperative Devt. Authority v. Dolefil Agrarian Reform Beneficiaries Coop., Inc. et al.*, [24] it was held that the appellate court violated the therein petitioners' right to be heard when it rendered judgment against them without allowing them to file their comment or opposition.

In the case at bar, petitioners were required to file their comment on the formal offer of evidence of Meralco. However, the ERC rendered its Decision prior to the lapse of the period granted to petitioners. According to petitioners, ERC's failure to accord them a reasonable opportunity to present their oppositions or comments on the application of Meralco clearly denied them due process of law. The ERC committed grave abuse of discretion when it deprived them of their opportunity to be heard.

This prompted Petitioners to file the present Petition on 20 January 2010.

This Court is of the Opinion that considering the facts in this case, including all the events that occurred both prior to and subsequent to the issuance of the 14 December 2010 Decision, the ERC did not deprive petitioners of their right to be heard.

Petitioners claim that that they were not given a chance to submit their evidence or memorandum in support of their position that Meralco had been charging rates that were beyond the 12% reasonable rate of return established in jurisprudence. [25] The records show, however, that they had been given notice to attend all the hearings conducted by the ERC, but that they voluntarily failed to appear in or attend those hearings.

Furthermore, after the issuance of the assailed Order, Mallillin filed an MR before petitioners filed their Petition in this Court. On 25 January 2010, the ERC issued an Order directing Petitioners NASECORE, FOLVA, and FOVA to file their respective comments on Mallillin's MR. Petitioners were given a period of ten days from receipt of the order, to file their comments. The ERC also scheduled the hearing on the said MR on 5 February 2010.

On 26 January 2010, Meralco filed a Manifestation and Motion wherein it expressed its decision to voluntarily

suspend the implementation of the 14 December 2009 Decision pending the ERC's resolution of Mallillin's MR.

Instead of filing their comments, petitioners NASECORE and FOVA, through separate letters respectively dated 28 January 2010 and 31 January 2010, sought to excuse themselves from participating in the proceedings before the ERC on the ground that they have already filed the present Petition.

On 1 February 2010, the ERC issued an Order suspending the implementation of the herein questioned 14 December 2010 Decision pending the resolution of the MR.

During the 5 February 2010 hearing, only Meralco appeared. Neither petitioners nor Mallillin participated in the proceedings.

On 10 March 2010, ERC issued an Order granting the MR with modification, the dispositive portion of which reads:

WHEREFORE, the foregoing premises considered, the "Motion for Reconsideration" filed by Engr. Robert F. Mallillin is hereby GRANTED WITH MODIFICATION. Accordingly, MERALCO is hereby directed to implement the revised distribution rates, excluding all rate distortions, as shown in the foregoing table. Consequently, the Order dated February 1, 2010 issued by the Commission granting the deferment of the implementation of the Decision dated December 14, 2009 pending final resolution of Engr. Mallillin's motions is hereby LIFTED.

SO ORDERED. [26]

Where opportunity to be heard either through oral arguments or through pleadings is granted, there is no denial of due process. It must not be overlooked that prior to the issuance of the assailed Decision, petitioners were given several opportunities to attend the hearings and to present all their pleadings and evidence in the MAP2010 case. Petitioners voluntarily failed to appear in most of those hearings.

Although it is true that the ERC erred in prematurely issuing its Decision, its subsequent act of ordering petitioners to file their comments on Mallillin's MR cured this defect. We have held that any defect in the observance of due process requirements is cured by the filing of a MR. [27] Thus, denial of due process cannot be invoked by a party who has had the opportunity to be heard on his MR. [28] Even though petitioners never filed a MR, the fact that they were still given notice of Mallillin's filing of a MR and the opportunity to file their comments thereto makes immaterial ERC's failure to admit their comment in the MAP2010 case. After all, petitioners' allegations in their unfiled comment could have still, easily and just as effectively, been raised in the MAP2010 case by incorporating the arguments in the comment to be filed in the MR case. It must be remembered that the standard of due process impressed upon administrative tribunals allows a certain degree of latitude as long as fairness is not ignored. [29]

The opportunity granted by the ERC of, technically, allowing petitioners to finally be able to file their comment in the case, resolves the procedural irregularity previously inflicted upon petitioners.

We find that there has been no denial of due process and that any irregularity in the premature issuance of the assailed Decision has been remedied by the ERC through its Order which gave petitioners the right to participate in the hearing of the MR filed by Mallillin.

Petitioners have Chosen the Wrong Remedy
and the Wrong Forum; the Real Motive for
Bringing Petition was to Obtain an indefinite
TRO, this the Court cannot Countenance

Section 1, Rule 23 of the ERC'S Rules of Procedure expressly provides for the remedy of filing a motion for reconsideration, viz:

A party adversely affected by a final order, resolution, or decision of the Commission rendered in an adjudicative proceeding may, within fifteen (15) days from receipt of a copy thereof, file a motion for reconsideration. In its motion, the movant may also request for reopening of the proceeding for the purpose of taking additional evidence in accordance with Section 17 of Rule 18. No more than one motion for reconsideration by each party shall be entertained.

Rule 65 of the Rules of Civil Procedure provides that a petition for certiorari may be filed when "there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law". The "plain" and "adequate remedy" referred to in Rule 65 is a motion for reconsideration of the assailed decision. [30] Thus, it is a well-settled rule that the filing of a motion for reconsideration is a condition sine qua non before the filing of a special civil action for certiorari. [31] The purpose of this rule is to give the lower court the opportunity to correct itself. [32] However, this requirement is not an ironclad rule. The prior filing of a motion for reconsideration may be dispensed with if petitioners are able to show a concrete, compelling, and valid reason for doing so. [33] The Court may brush aside the procedural barrier and take cognizance of the petition if it raises an issue of paramount importance and constitutional significance. [34] Thus:

True, we had, on certain occasions, entertained direct recourse to this Court as an exception to the rule on hierarchy of courts. In those exceptional cases, however, we recognized an exception because it was dictated by public welfare and the advancement of public policy, or demanded by the broader interest of justice, or the orders complained of were found to be patent nullities, or the appeal was considered as clearly an inappropriate remedy. [35]

Petitioners claim that they did not file any motion for reconsideration with the ERC "in order to prevent the imminent miscarriage of justice, that the issue involves the principles of social justice, that the Decision sought to be set aside is a patent nullity and that the need for relief therefore is extremely urgent" [36]; because they believe that the same would be a futile exercise considering that the ERC had blatantly disregarded the Supreme Court directive to consider the last increase of Meralco as provisional until ERC has taken action on the COA Audit Report; [37] and because "an appeal would be slow, inadequate, and insufficient." [38]

They also claim that the direct resort to the Supreme Court resorted to by them is in order "to timely prevent a grave injustice to the 4.3 million customers of Meralco who stand to suffer by reason of a patently void decision by ERC which would result in additional monthly billing of at least half a billion pesos"; [39] because "time is of the essence"; and because "transcendental constitutional issues" are involved in this case. [40]

Petitioners further argue that their decision to go directly to this Court is justified "because of the number of consumers affected by the said Decision; because the amount involved in the controversy is so huge (P605.25 million [plus 12% VAT] additional billing per month); because it is violative of the provisions of EPIRA; because it is contrary to the constitutional provisions on social justice, and because it is in utter disregard of the COA Audit Report". [41]

We do not uphold petitioners' arguments on this matter.

In *Cervantes v. CA*, [42] this Court ruled:

It must be emphasized that a writ of certiorari is a prerogative writ, never demandable as a matter of right, never issued except in the exercise of judicial discretion. Hence, he who seeks a writ of certiorari must apply for it only in the manner and strictly in accordance with the provisions of the law and the Rules. Petitioner may not arrogate to himself the determination of whether a motion for reconsideration is necessary or not. To

dispense with the requirement of filing a motion for reconsideration, petitioner must show a concrete, compelling, and valid reason for doing so, which petitioner failed to do. Thus, the Court of Appeals correctly dismissed the petition.

The general statements used by Petitioner to excuse their direct recourse to this Court are not the "concrete, compelling, and valid reasons" required by jurisprudence to justify their failure to comply with the mandated procedural requirements. In addition to this, the "urgency" of the resolution of matters raised by petitioners is negated, by the fact that rates approved by the ERC, in the exercise of its rate-fixing powers, are in a sense, inherently only provisional.

Furthermore, this Court finds that the real motive behind the filing of the present Petition is to obtain an indefinite TRO and this, the Court cannot countenance. Section 9, Rule 58 of the Rules of Court provides the rules for permanent injunctions, to wit:

Sec. 9. When final injunction granted.

If after the trial of the action it appears that the applicant is entitled to have the act or acts complained of permanently enjoined, the court shall grant a final injunction perpetually restraining the party or person enjoined from the commission or continuance of the act or acts or confirming the preliminary mandatory injunction.

Petitioners assert that this Court should issue a TRO because of the huge amount that would unduly burden the consumers with the continued application of the MAP2010 rates. According to petitioners, "if not stayed, the present financial hardships of 4.3 million MERALCO customers due to the global financial meltdown and the recent calamities in the country will surely further worsen." Petitioners also claim that there is an extreme urgency to secure a TRO, considering that the assailed Decision is immediately executory.

The purpose of a TRO is to prevent a threatened wrong and to protect the property or rights involved from further injury, until the issues can be determined after a hearing on the merits. [43] Under Section 5, Rule 58 of the 1997 Rules of Civil Procedure, a TRO may be issued only if it appears from the facts shown by affidavits or by a verified application that great or irreparable injury would be incurred by an applicant before the writ of preliminary injunction could be heard.

If such irreparable injury would result from the non-issuance of the requested writ or if the "extreme urgency" referred to by petitioners indeed exists, then they should have been more vigilant in protecting their rights. As they have all been duly notified of the proceedings in the ERC case, they should have appeared before the ERC and participated in the trials.

We find that petitioners erred in thinking that the non-issuance of the TRO they requested would put consumers in danger of suffering an "irreparable injury". But this asserted injury can be repaired, because, had petitioners participated in the proceedings before the ERC and the latter had found merit in their appeal, the undue increase in electric bills shall be refunded to the consumers.

All the other issues raised by petitioners in connection with the MAP2010 case are factual in nature and should be raised before the ERC not before this Court. Allegations and issues in connection with the rate increases under ERC Case No. 2008-018- RC and ERC Case No. 2008-004-RC, including the question of whether Meralco improperly exceeded the 12% maximum rate of return provided by law, are more properly to be disposed of in another pending case, G.R. No. 191150. [44]

Before finally disposing of this case, we deem it proper to warn the ERC that it cannot give a deadline to parties before it that it will not respect. Even though the ERC, as an administrative agency, is not bound by the rigidity of

certain procedural requirements, it is still bound by law and practice to observe the fundamental and essential requirements of due process in justiciable cases presented before it.

WHEREFORE, the instant petition is hereby DISMISSED.

SO ORDERED.

Carpio, (Chairperson), [*]Leonardo-De Castro, Brion, and Perez, JJ., concur.

[*] Additional member of the Second Division as per Special Order No. 1031 dated 30 June 2011.

[1] Republic Act No. 9136.

[2] Sec. 43. Functions of the ERC. - The ERC shall promote competition, encourage market development, ensure customer choice and discourage/penalize abuse of market power in the restructured electricity industry. Towards this end, it shall be responsible for the following key functions in the restructured industry:

(f) In the public interest, establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably. The ERC may adopt alternative forms of internationally-accepted rate-setting methodology as it may deem appropriate. The rate-setting methodology so adopted and applied must ensure a reasonable price of electricity. The rates prescribed shall be non-discriminatory. To achieve this objective and to ensure the complete removal of cross subsidies, the cap on the recoverable rate of system losses prescribed in Section 10 of Republic Act No. 7832, is hereby amended and shall be replaced by caps which shall be determined by the ERC based on load density, sales mix, cost of service, delivery voltage and other technical considerations it may promulgate. The ERC shall determine such form or rate-setting methodology, which shall promote efficiency. In case the rate setting methodology used is RORB, it shall be subject to the following guidelines:

.....

[3] ERC Resolution No. 12-02, Series of 2004, adopting the Distribution Wheeling Rate Guidelines; Rules for Setting Distribution Wheeling Rates for Privately Owned Distribution Utilities, 13 December 2006.

[4] Rollo at 1532.

[5] Id.

[6] Id. at 1532-1533.

[7] Id. at 1533.

[8] Id.

[9] Decision, ERC Case No. 2009-057 RC, 14 December 2009.

[10] Rollo at 1535

[11] Id.

[12] Id. at 8.

[13] Id. at 13.

[14] Id. at 362-368.

[15] Id. at 368-370.

[16] Id. at 370-376.

[17] Id. at 376-377.

[18] Id. at 462-463.

[19] Id. at 473.

[20] 320 U.S. 591 (1944).

[21] G.R. No. L-32068, 4 October 1971, 41 SCRA 643.

[22] Rollo at 476.

[23] Sps. Rasdas v. Estenor, G.R. No. 157605, 13 December 2005, 477 SCRA 538.

[24] G.R. No. 137489, 29 May 2002, 382 SCRA 552.

[25] Rollo at 468.

[26] Id. at 1547.

[27] A.Z. Arnaiz Realty, Inc. v. Office of the President, G.R. No. 170623, 9 July 2010.

[28] Samalio v. Court of Appeals, G.R. No. 140079, 31 March 2005, 454 SCRA 463, 473.

[29] Supra note 26.

[30] Sim v. NLRC, et al., G.R. No. 157376, 2 October 2007, 534 SCRA 515.

[31] Republic of the Phil. v. Sandiganbayan, et al., G.R. Nos. 141796 and 141804, 15 June 2005, 460 SCRA 146.

[32] Metro Transit Organization, Inc. and Bantang, Jr. v. CA, et al., G.R. No. 142133, November 19, 2002, 392 SCRA 229.

[33] Cervantes v. Court of Appeals, G.R. No. 166755, 18 November 2005, 475 SCRA 562, 569.

[34] Bayan (Bagong Alyansang Makabayan) v. Zamora, G.R. NO. 138570, 10 October 2010, 342 SCRA 449.

[35] Chong, et al. v. Dela Cruz, et al., G.R. No. 184948, 21 July 2009, 593 SCRA 311, citing Gelidon v. De la Rama, G.R. No. 105072, 9 December 1993, 228 SCRA 322, 326-327.

[36] Rollo at 7-8, citing ABS-CBN Broadcasting Corporation v. Comelec, 323 SCRA 811 (2000).

[37] Id. at 462.

[38] Id. at 8, citing SMI Development Corporation v. Republic, 323 SCRA 682 (2000).

[39] Id. at 7.

[40] Id. at 8.

[41] Id. at 46.

[42] G.R. No. 166755, 18 November 2005, 475 SCRA 562.

[43] *Lim v. Pacquing, et al.*, G.R. Nos. 115044 and 117263, 27 January 1995, citing *Ohio Oil Co. v. Conway*, 279 U.S. 813, 73 L. Ed. 972, 49 S. Ct. 256; *Gobbi v. Dilao*, 58 Or. 14, 111 p. 49, 113, p. 57.

[44] *NASECORE, et. al. v. MERALCO*.

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