

ALYANSA PARA SA BAGONG PILIPINAS, INC. (ABP), REPRESENTED BY EVELYN V. JALLORINA AND NOEL VILLONES, PETITIONER, VS. ENERGY REGULATORY COMMISSION, REPRESENTED BY ITS CHAIRMAN, JO...

G.R. No. 227670. May 03, 2019

Ponente: CARPIO, J.

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CARPIO, J.:

The outcome of this case will greatly affect, for the next two decades, all consumers of electricity in the Philippines, which include the over 95 million Filipinos living in the Philippines as well as the millions of business enterprises operating in the Philippines.

Section 19, Article XII of the 1987 Constitution provides: "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."

The State grants electricity distribution utilities, through legislative franchises, a regulated monopoly within their respective franchise areas. Competitors are legally barred within the franchise areas of distribution utilities. Facing no competition, distribution utilities can easily dictate the price of electricity that they charge consumers. To protect the consuming public from exorbitant or unconscionable charges by distribution utilities, the State regulates the acquisition cost of electricity that distribution utilities can pass on to consumers.

As part of its regulation of this monopoly, the State requires distribution utilities to subject to competitive public bidding their purchases of electricity from power generating companies. Competitive public bidding is essential since the power cost purchased by distribution utilities is entirely passed on to consumers, along with other operating expenses of distribution utilities. Competitive public bidding is the most efficient, transparent, and effective guarantee that there will be no price gouging by distribution utilities.

Indeed, the requirement of competitive public bidding for power purchases of distribution utilities has been adopted in the United States, Europe, Latin America, India, and many developing countries.[1] This requirement is primarily aimed at ensuring a fair, reasonable, and least-cost generation charge to consumers, under a transparent power sale mechanism between the generation companies and the distribution utilities.

Section 6, Article XII of the 1987 Constitution provides: "The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

Indisputably, the use of electricity bears a vital social function. The State, in requiring competitive public bidding in the purchase of power by distribution utilities, has exercised its constitutional "duty x x x to intervene when the common good so demands." [2]

The breakdown of charges in a Manila Electric Company (Meralco) bill contains the following: Generation Charge, Transmission Charge, System Loss Charge, Distribution Charge (Meralco), Subsidies, Government Taxes, Universal Charges, FiT-All Charge (Renewable), and Other Charges. The Power Supply Agreements (PSAs) involved in the present case were executed in April 2016 and have terms that range from 20 to 21 years.

Section 43 of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA), includes a description, in broad strokes, of the functions of the Energy Regulatory Commission (ERC): "The ERC shall promote competition, encourage market development, ensure customer choice and discourage/penalize abuse of market power in the restructured electricity industry." Moreover, Section 2 of the EPIRA declares it a state policy to "ensure the x x x affordability of the supply of electric power." Further, Section 45 of the EPIRA mandates the ERC to enforce safeguards to "promote true market competition and prevent harmful monopoly and market power abuse." If the ERC violates its statutory functions, this Court, as mandated by Section 1, Article VIII of the 1987 Constitution,[3] has the duty to strike down the acts of ERC whenever these are performed with grave abuse of discretion amounting to lack or excess of jurisdiction.

The Case

Alyansa para sa Bagong Pilipinas, Inc. (ABP), represented by Evelyn V. Jallorina and Noel Villones, filed G.R. No. 227670, a petition for certiorari and prohibition[4] with an application for a temporary restraining order and/or writ of preliminary injunction. Named as respondents are the ERC, the Department of Energy (DOE), Meralco, Central Luzon Premiere Power Corporation (CLPPC), St. Raphael Power Generation Corporation (SRPGC), Panay Energy Development Corporation (PEDC), Mariveles Power Generation Corporation (MPGC), Global Luzon Energy Development Corporation (GLEDC), Atimonan One Energy, Inc. (AIE), Redondo Peninsula Energy, Inc. (RPE), and the Philippine Competition Commission (PCC).

The petition seeks to declare as void ERC Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution). The petition also seeks that this Court direct the ERC to disapprove the Power Supply Agreements (PSAs) of the Distribution Utilities (DUs) submitted after 7 November 2015 for failure to conduct Competitive Selection Process (CSP). The petition further asks the Court to order ERC to implement CSP in accordance with the Department of Energy (DOE) Circular No. DC2015-06-0008 (2015 DOE Circular) and ERC Resolution No. 13, Series of 2015 (CSP Guidelines).[5]

The Facts

On 11 June 2015, the DOE issued the 2015 DOE Circular entitled "Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)." Sections 3 and 10 of the 2015 DOE Circular provide:

Section 3. Standard Features in the Conduct of the CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of [Electric Cooperatives (ECs)], the Third Party shall also be duly recognized by the National Electrification Administration (NEA).

Under this Circular, CSPs for the procurement of PSAs of all DUs shall observe the following:

- (a) Aggregation for un-contracted demand requirements of DUs;
- (b) Annually conducted; and
- (c) Uniform template for the terms and conditions in the PSA to be issued by the ERC in coordination with the DOE.

Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and [the] DOE shall jointly issue the guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and

the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided. For clarity, the term aggregation as used in this Circular refers to the wholesale demand and energy requirements of DUs, and not of the Contestable Markets under Retail Competition and Open Access (RCOA) regime.

As used in this section, the un-contracted demand or energy requirements of the DUs shall refer to the energy and demand not yet procured individually or collectively by the DUs, excluding those energy and capacity covered by PSAs that have been filed for approval before the ERC.

x x x x

Section 10. Effectivity. This Circular shall take effect immediately upon its publication in two (2) newspapers of general circulation and shall remain in effect until otherwise revoked. (Boldfacing added)

Section 3 of the 2015 DOE Circular expressly and categorically mandates CSP, or competitive public bidding, whenever DUs secure PSAs. The 2015 DOE Circular took effect on 30 June 2015 upon its publication in two newspapers of general circulation. Section 3 expressly states that "[a]fter the effectivity of this Circular, all DUs shall procure PSAs only through CSP x x x."

On 20 October 2015, Joint Resolution No. 1 (Joint Resolution), executed by the DOE and the ERC, reiterated the need to adopt a "regime of transparent process in securing Power Supply Agreements." The fifth Whereas clause of the Joint Resolution provides:

WHEREAS, the DOE and ERC recognize the adoption of competitive selection as a policy that will encourage investments in the power generation business thereby ensuring electric power supply availability in a regime of transparent process in securing Power Supply Agreements (PSAs), which is an integral part of the power sector reform agenda. (Boldfacing added)

Under the Joint Resolution, the DOE and the ERC agreed that ERC shall issue the appropriate regulation to implement CSP. Section 1 of the Joint Resolution states:

Section 1. Competitive Selection Process. Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of Power Supply Agreements (PSAs) by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulation to implement the same. (Boldfacing and italicization added)

On the same date, 20 October 2015, the ERC issued the CSP Guidelines, which directed all DUs to conduct CSP in the procurement of their power supply for their captive markets.

The CSP Guidelines fixed a new date of effectivity for compliance with CSP. This is the first instance that the ERC unilaterally fixed a different date from 30 June 2015, effectively postponing the date of effectivity of CSP from 30 June 2015 to 7 November 2015 or by 130 days:

Section 4. Applicability. The CSP requirement herein mandated shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution. For PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.

This Resolution shall take effect immediately following its publication in a newspaper of general circulation in the Philippines.

x x x x (Boldfacing and italicization added)

Based on its provisions, the CSP Guidelines took effect on 7 November 2015, following its publication in the

Philippine Daily Inquirer and the Philippine Star. Section 4 of the CSP Guidelines expressly provides that CSP "shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution." Thus, the ERC no longer required CSP for all PSAs already filed with the ERC on or before 7 November 2015. Section 4 of the CSP Guidelines further states that "[f]or PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC."

On 15 March 2016, however, the ERC, for the second time, unilaterally postponed the date of effectivity of CSP. The ERC issued the ERC Clarificatory Resolution, which restated the date of effectivity of the CSP Guidelines from 7 November 2015 to 30 April 2016. Paragraph 1 of the ERC Clarificatory Resolution reads:

1. The effectivity of the CSP [Guidelines] is hereby restated to be 30 April 2016. All PSAs executed on or after the said date shall be required, without exception, to comply with the provisions of the CSP [Guidelines]. (Boldfacing added)

The second postponement of the effectivity of CSP from 7 November 2015 to 30 April 2016, or by 175 days, allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP.

The table below shows that the following PSAs between Meralco and its power suppliers were executed and submitted to the ERC within 10 days prior the restated 30 April 2016 deadline. According to the ERC Clarificatory Resolution, these PSAs are not required to comply with CSP.

Power Supplier
Power Purchaser
Amount of Power Purchased
Term of Agreement
Start of Negotiations
Date of PSA Execution
Date of Submission of Application to ERC
Redondo Peninsula Energy, Inc. (RPE)
Manila Electric Company (Meralco)
225 Megawatts (MW)[6]
20 years[7]
19 July 2012[8]
20 April 2016[9]
28 April 2016[10]
Atimonan One Energy, Inc. (A1E)
Meralco
2 x 600
MW(net)[11]

20 years and six months[12]

3[rd] or 4[th] quarter of 2014[13]

26 April 2016[14]

28 April 2016[15]

St. Raphael Power Generation Corporation (SRPGC)

Meralco

Up to 400 MW[16]

20 years and four months[17]

Latter part of 2014[18]

26 April 2016[19]

28 April 2016[20]

Panay Energy Development Corporation (PEDC)

Meralco

Up to 70 MW[21]

20 years[22]

21 May 2014[23]

26 April 2016[24]

27 April 2016[25]

Global Luzon Energy Development Corporation (GLEDC)

Meralco

600 MW[26]

20 years[27]

9 December 2014[28]

27 April 2016[29]

29 April 2016[30]

Central Luzon Premiere Power Corporation (CLPPC)

Meralco

Up to 528 MW[31]

21 years[32]

18 March 2015[33]

26 April 2016[34]

29 April 2016[35]

Mariveles Power Generation Corporation (MPGC)

Meralco

Up to 528 MW[36]

21 years[37]

11 February 2015[38]

26 April 2016[39]

29 April 2016[40]

A1E and RPE are subsidiaries or affiliates of Meralco.[41] In paragraph 3.71 of its Comment, Meralco stated that "[a]t the time of the signing of the A1E PSA, A1E was wholly-owned by Meralco PowerGen Corporation ('PowerGen'), a wholly-owned subsidiary of Meralco. On the other hand, at the time of the signing of the RPE PSA, forty-seven percent (47%) of the total subscribed capital of RPE was owned by PowerGen, and three percent (3%) of its total subscribed capital was owned by the Meralco Pension Fund." [42]

CLPPC and MPGC are subsidiaries of SMC Global Power Holdings Corp. (SMC Global), the subsidiary of San Miguel Corporation (SMC) engaged in the construction and operation of various power projects.[43]

In its Comment, Meralco admitted that "no actual bidding is conducted,"[44] and that "the PSAs entered into by Meralco undergo competitive selection and thorough negotiations, taking into consideration its specific and unique requirements." [45] In short, no CSP was conducted through a third party recognized by the ERC as mandated in the 2015 DOE Circular.

Meralco also stated that, apart from the seven (7) PSAs between Meralco and its power suppliers, there are eighty-three (83) other PSAs filed with the ERC during the period from 16 April 2016 to 29 April 2016, bringing the total PSAs excluded from CSP to ninety (90) PSAs.

DATE

NO. OF PSAS

GENERATION COMPANIES

16 to 24 April 2016

4 PSAs

Mineral Power, Palm Concepcion, Astroenergy, GNPowder Kauswagan

25 April 2016

5 PSAs

GNPower Dinginin

26 April 2016

5 PSAs

GNPower Dinginin, Astroenergy

27 April 2016

4 PSAs

GNPower Dinginin

28 April 2016

10 PSAs

A. Brown, GNPower Dinginin, Southern Philippines Power, SMCPC, Surepep, Total Power, Upper Manupali Hydro

29 April 2016

55 PSAs

SMEC, MPGC, SCPC, SMCPC, LPPC, PEDC, GLEDC, CLPPC, A. Brown, A1E, Anda, Astronenergy, Delta P, GNPower Dinginin, GPower, Isabela Power, Levan Marketing, Mapalad Power, Minergy, RPE, SRPGC, Sunasia Energy, TeaM Energy, Trans-Asia, Unified Leyte Geothermal Energy, Western Power Mindanao[46]

Meralco further stated in its Comment:

1.41. Furthermore, apart from MERALCO, the following DUs and electric cooperatives also filed more than one PSA with the ERC during the second (2nd) half of April 2016: (a) Agusan del Sur Electric Cooperative, Inc.; (b) Bukidnon Second Electric Cooperative, Inc.; (c) Cagayan Electric Power & Light Company, Inc.; (d) Cotabato Light and Power Company; (e) Davao del Sur Electric Cooperative; (f) Iloilo 1 Electric Cooperative; (g) Ilocos Sur Electric Cooperative Incorporation; (h) Isabela I Electric Cooperative, Inc.; (i) Isabela II Electric Cooperative; (j) Leyte III Electric Cooperative, Inc.; (k) La Union Electric Cooperative, Inc.; (l) Pangasinan Electric Cooperative III; (m) Peninsula Electric Cooperative, Inc.; (n) Tarlac II Electric Cooperative, Inc.; (o) Zamboanga City Electric Cooperative, Inc.; and (p) Zamboanga del Sur Electric Cooperative, Inc.[47]

The Issues

ABP raised the following issues:

- Whether or not the ERC committed grave abuse of discretion in issuing the [ERC Clarificatory Resolution].
- Whether or not the separate PSAs of Meralco with respondent generation companies should be disapproved for their failure to comply with the requirements of the [2015 DOE Circular] and the [CSP Guidelines].[48]

ABP's petition thus presents a purely legal issue: Does ERC have the statutory authority to postpone the date of effectivity of CSP, thereby amending the 2015 DOE Circular which required CSP to take effect on 30 June 2015?

The determination of the extent of the ERC's statutory authority in the present case is a purely legal question and can be resolved without making any finding of fact. The affirmative or negative resolution of this purely legal question will necessarily result in legal consequences, thus:

(a) If the Court rules affirmatively (that is, the ERC has the statutory authority to postpone the date of effectivity of CSP, and thereby ERC can amend the 2015 DOE Circular), then the legal consequence is that the 90 PSAs submitted to the ERC before the amended effectivity of CSP (30 April 2016) will serve as basis to pass on the power cost to consumers for the duration of the PSAs, whatever the duration of these PSAs.

(b) If the Court rules negatively (that is, the ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular), then the legal consequence is that the

90 PSAs submitted to the ERC after the effectivity of CSP on or after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. In such a case, the ERC will have to conduct CSP on all PSA applications submitted on or after 30 June 2015.

Clearly, there is no factual issue in dispute in the present case, and no factual issue has been raised by any of the parties. Thus, the present case can be resolved purely on the legal issue raised by ABP even as the resolution of this purely legal issue will necessarily result in legal consequences either way.

The Court's Ruling

We GRANT ABP's petition. The ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular. As a result, the 90 PSAs submitted to the ERC after the effectivity of CSP on or after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. The ERC must require CSP on all PSA applications submitted on or after 30 June 2015.

Certiorari and Prohibition As Remedy

Petitioner ABP correctly filed a petition for certiorari and prohibition before this Court.

[T]he remedies of certiorari and prohibition are necessarily broader in scope and reach, and the writ of certiorari or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions. This application is expressly authorized by the text of the second paragraph of Section 1, [Article 8 of the 1987 Constitution].[49] (Boldfacing and italicization added)

Not every abuse of discretion can be occasion for this Court to exercise its jurisdiction. Grave abuse of discretion means "such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, in other words where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. It is not sufficient that a tribunal, in the exercise of its power, abused its discretion, such abuse must be grave." [50]

The Dissenting Opinion of Justice Andres B. Reyes, Jr. would rather have this Court dismiss the petition. Justice Reyes asserts that the ERC, in issuing the ERC Clarificatory Resolution, acted within its jurisdiction [51] and did not act with grave abuse of discretion amounting to lack or excess of jurisdiction. [52] Justice Reyes claims that the ERC was exercising its quasi-legislative power, as granted by Sections 43 and 45 of the EPIRA and as defined in Sections 3 and 4 of the 2015 DOE Circular, when the ERC issued the ERC Clarificatory Resolution. Justice Reyes advances three reasons to justify his assertion that the ERC did not act with grave abuse of discretion amounting to lack or excess of jurisdiction.

First, the implementation of ERC Resolution No. 13 caused an avalanche of concerns and confusion from the stakeholders of the industry regarding the actual implementation of the provisions of the resolution, so much so that a multitude of [Distribution Utilities] DUs, mostly electric cooperatives, sought for an exemption from the guidelines in the resolution, x x x.

x x x x

Second, ERC did not "evade" its positive duty as provided for in the Constitution, the EPIRA, [the 2015 DOE Circular], or [the CSP Guidelines] as the petitioners would like the Court to believe. x x x.

x x x x

x x x ERC's action on merely "restating" the date of effectivity of [the ERC Clarificatory Resolution] - its own resolution that has been in effect since April, 2016 - has not been shown to have been promulgated with grave abuse of discretion amounting to lack or excess of jurisdiction.

Third, it must also be emphasized that [the ERC Clarificatory Resolution] enjoys a strong presumption of its validity. x x x.[53]

Justice Reyes's Dissenting Opinion also finds no problem with the issuance and the contents of the ERC Clarificatory Resolution. According to Justice Reyes, under the Joint Resolution executed by the DOE and the ERC on 20 October 2015, the DOE and the ERC agreed that the ERC shall issue the appropriate regulation to implement CSP.[54]

Justice Reyes is correct - consistent with their respective mandates under EPIRA, the DOE and the ERC agreed that the ERC shall issue the appropriate regulation to implement CSP in accordance with the 2015 DOE Circular.[55] However, the ERC's delegated authority is limited to implementing or executing CSP in accordance with the 2015 DOE Circular, not postponing CSP so as to freeze CSP for at least 20 years, effectively suspending CSP for one entire generation of Filipinos. The delegated authority to implement CSP does not include the authority to postpone or suspend CSP for 20 years, beyond the seven-year terms of office[56] of the ERC Commissioners postponing or suspending the CSP, and beyond the seven-year terms of office of their next successors, as well as beyond the six-year terms of office of three Presidents of the Republic.

The ERC's exercise of its quasi-legislative power, which took the form of the issuance of the ERC Clarificatory Resolution, was done in excess of its jurisdiction. The postponement of the effectivity of CSP was without the approval, and even without coordination with the DOE, in clear and blatant violation of Section 4 of the 2015 DOE Circular mandating CSP. The ERC has no power to postpone the effectivity of the 2015 DOE Circular. Under the 2015 DOE Circular, the ERC can only issue supplemental guidelines, which means guidelines to implement the 2015 DOE Circular, and not to amend it. Postponing the effectivity of CSP amends the 2015 DOE Circular, and does not constitute issuance of mere supplemental guidelines.

The issuance of the ERC Clarificatory Resolution was attended with grave abuse of discretion amounting to lack or excess of jurisdiction for the following reasons:

(1)

Postponing the effectivity of CSP from 30 June 2015 to 7 November 2015, and again postponing the effectivity of CSP from 7 November 2015 to 30 April 2016, or a total of 305 days, allowed DUs nationwide to avoid the mandatory CSP;

(2)

Postponing the effectivity of CSP effectively freezes for at least 20 years the DOE-mandated CSP to the great prejudice of the public. The purpose of CSP is to compel DUs to purchase their electric power at a transparent, reasonable, and least-cost basis, since this cost is entirely passed on to consumers. The ERC's postponement unconscionably placed this public purpose in deep freeze for at least 20 years.

Indisputably, the ERC committed grave abuse of discretion amounting to lack or excess of jurisdiction when the ERC postponed the effectivity of CSP. The postponement effectively prevented for at least 20 years the enforcement of a mechanism intended to ensure "transparent and reasonable prices in a regime of free and fair competition," as mandated by law under EPIRA, a mechanism implemented in the 2015 DOE Circular which took effect on 30 June 2015.

In short, in the absence of CSP, there is no transparency in the purchase by DUs of electric power, and thus there is no assurance of the reasonableness of the power rates charged to consumers. As a consequence, all PSA applications submitted to the ERC on or after 30 June 2015 should be deemed not submitted and should be made to comply with CSP.

Why the ERC Acted in Excess of its Jurisdiction: Purpose of CSP and Significance of the Postponement of the CSP Deadline

The EPIRA was enacted on 8 June 2001. Among the EPIRA's declared State policies are, as stated in its Section 2:[57]

x x x x

(b)

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

(c)

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

x x x x

(f)

To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power;

x x x x (Boldfacing and italicization added)

The EPIRA mandates the DOE to "supervise the restructuring of the electricity industry." [58] The EPIRA amended Section 5 of Republic Act No. 7638, or "The Department of Energy Act of 1992," to allow the DOE to fulfill this new mandate under the EPIRA.

More importantly, Section 37 of the EPIRA includes the following in its enumeration of the DOE's powers and functions:

(a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan x x x and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;

x x x x

(d) Ensure the reliability, quality and security of supply of electric power;

x x x x

(e) x x x [T]he DOE shall, among others,

x x x x

(ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;

x x x x

(h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;

x x x x

(p) Formulate such rules and regulations as may be necessary to implement the objectives of this Act; x x x

x x x x (Boldfacing and italicization added)

Under the EPIRA, it is the DOE that issues the rules and regulations to implement the EPIRA, including the implementation of the policy objectives stated in Section 2[59] of the EPIRA. Rules and regulations include circulars that have the force and effect of rules or regulations. Thus, pursuant to its powers and functions under the EPIRA, the DOE issued the 2015 DOE Circular mandating the conduct of CSP.

The 2015 DOE Circular, as stated in its very provisions, was issued pursuant to the DOE's power to "formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,"[60] where the State policy is to "[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power."[61] Under the EPIRA, it is also the State policy to "ensure the x x x affordability of the supply of electric power."[62] The purpose of the 2015 DOE Circular is to implement the State policies prescribed in the EPIRA. Clearly, the 2015 DOE Circular constitutes a rule or regulation issued by the DOE pursuant to its rule-making power under Section 37(p) of the EPIRA.

The EPIRA also provides for the powers and functions of the ERC. Section 43 of the EPIRA mandates that the ERC "shall be responsible for the following key functions in the restructured industry:"

(a) Enforce the implementing rules and regulations of this Act.

x x x x

(o) Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all retail suppliers;

x x x x (Boldfacing and italicization added)

Thus, the very first mandate of the ERC under its charter, the EPIRA, is to "[e]nforce the implementing rules and regulations" of the EPIRA as formulated and adopted by DOE. Clearly, under the EPIRA, it is the DOE that formulates the policies, and issues the rules and regulations, to implement the EPIRA. The function of the ERC is to enforce and implement the policies formulated, as well as the rules and regulations issued, by the DOE. The ERC has no power whatsoever to amend the implementing rules and regulations of the EPIRA as issued by the DOE. The ERC is further mandated under EPIRA to ensure that the "pass through of bulk purchase cost by distributors is transparent [and] non-discriminatory." [63]

Despite the ERC's characterization as an "independent, quasi-judicial regulatory body,"[64] it is incorrect to conclude, as Justice Alfredo Benjamin S. Caguioa holds, that the ERC exercises "inherent and sufficient power,"[65] and "sufficient power, as the independent regulator of the industry,"[66] to supplant or change, as it did in the present case, policies, rules, and regulations prescribed by the DOE. The power involved in the ERC's implementation of the 2015 DOE Circular is not quasi-judicial but executive. There are no adverse parties involved in the implementation by the ERC of the 2015 DOE Circular. The ERC does not adjudicate rights and obligations of adverse parties in the present case. The issue presented here involves the propriety of the exercise of the ERC's executive implementation of the policies, as well as the rules and regulations of the EPIRA as issued

by the DOE.

Moreover, the nature of the power involved in the ERC's postponement of the effectivity of CSP as mandated in the 2015 DOE Circular is not quasi-judicial but delegated legislative power. Justice Caguioa states that "the ERC could solely issue"[67] any resolution changing the dates of effectivity of CSP as set by the CSP Guidelines and the ERC Clarificatory Resolution "because it was empowered by the law, i.e., the EPIRA." [68]

We quote below the entirety of Section 43 of the EPIRA, prescribing the functions of the ERC, and there is absolutely nothing whatsoever in this complete enumeration of the ERC's functions that grants the ERC rule-making power to supplant or change the policies, rules, regulations, or circulars prescribed by the DOE. The ERC's functions, as granted by the EPIRA, are limited, inter alia, to the enforcement of the implementing rules and regulations of the EPIRA, and not to amend or revoke them. At most, as stated in paragraph (m) of Section 43, the ERC may only take any other action delegated to it pursuant to EPIRA. The ERC may not exceed its delegated authority. Section 43 of the EPIRA provides as follows:

Section 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. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:

(a) Enforce the implementing rules and regulations of this Act;

(b) Within six (6) months from the effectivity of this Act, promulgate and enforce, in accordance with law, a National Grid Code and a Distribution Code which shall include, but not limited to, the following:

(i)

Performance standards for TRANSCO O & M Concessionaire, distribution utilities and suppliers: Provided, That in the establishment of the performance standards, the nature and function of the entities shall be considered; and

(ii)

Financial capability standards for the generating companies, the TRANSCO, distribution utilities and suppliers: Provided, That in the formulation of the financial capability standards, the nature and function of the entity shall be considered: Provided, further, That such standards are set to ensure that the electric power industry participants meet the minimum financial standards to protect the public interest. Determine, fix, and approve, after due notice and public hearings the universal charge, to be imposed on all electricity end-users pursuant to Section 34 hereof;

(c) Enforce the rules and regulations governing the operations of the electricity spot market and the activities of the spot market operator and other participants in the spot market, for the purpose of ensuring a greater supply and rational pricing of electricity;

(d) Determine the level of cross subsidies in the existing retail rate until the same is removed pursuant to Section 74 hereof;

(e) Amend or revoke, after due notice and hearing, the authority to operate of any person or entity which fails to comply with the provisions hereof, the IRR or any order or resolution of the ERC. In the event a divestment is required, the ERC shall allow the affected party sufficient time to remedy the infraction or for an orderly disposal, but shall in no case exceed twelve (12) months from the issuance of the order;

(f) In the public interest, establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant

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

(i)

For purposes of determining the rate base, the TRANSCO or any distribution utility may be allowed to revalue its eligible assets not more than once every three (3) years by an independent appraisal company: Provided, however, That ERC may give an exemption in case of unusual devaluation: Provided, further, That the ERC shall exert efforts to minimize price shocks in order to protect the consumers;

(ii)

Interest expenses are not allowable deductions from permissible return on rate base;

(iii)

In determining eligible cost of services that will be passed on to the end-users, the ERC shall establish minimum efficiency performance standards for the TRANSCO and distribution utilities including systems losses, interruption frequency rates, and collection efficiency;

(iv)

Further, in determining rate base, the TRANSCO or any distribution utility shall not be allowed to include management inefficiencies like cost of project delays not excused by force majeure, penalties and related interest during construction applicable to these unexcused delays; and

(v)

Any significant operating costs or project investments of TRANSCO and distribution utilities which shall become part of the rate base shall be subject to verification by the ERC to ensure that the contracting and procurement of the equipment, assets and services have been subjected to transparent and accepted industry procurement and purchasing practices to protect the public interest.

(g) Three (3) years after the imposition of the universal charge, ensure that the charges of the TRANSCO or any distribution utility shall bear no cross subsidies between grids, within grids, or between classes of customers, except as provided herein;

(h) Review and approve any changes on the terms and conditions of service of the TRANSCO or any distribution utility;

(i) Allow TRANSCO to charge user fees for ancillary services to all electric power industry participants or self-generating entities connected to the grid. Such fees shall be fixed by the ERC after due notice and public hearing;

(j) Set a lifeline rate for the marginalized end-users;

(k) Monitor and take measures in accordance with this Act to penalize abuse of market power, cartelization,

and anti-competitive or discriminatory behavior by any electric power industry participant;

(l) Impose fines or penalties for any non-compliance with or breach of this Act, the IRR of this Act and the rules and regulations which it promulgates or administers;

(m) Take any other action delegated to it pursuant to this Act;

(n) Before the end of April of each year, submit to the Office of the President of the Philippines and Congress, copy furnished the DOE, an annual report containing such matters or cases which have been filed before or referred to it during the preceding year, the actions and proceedings undertaken and its decision or resolution in each case. The ERC shall make copies of such reports available to any interested party upon payment of a charge which reflects the printing costs. The ERC shall publish all its decisions involving rates and anti-competitive cases in at least one (1) newspaper of general circulation, and/or post electronically and circulate to all interested electric power industry participants copies of its resolutions to ensure fair and impartial treatment;

(o) Monitor the activities of the generation and supply of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all retail suppliers;

(p) Act on applications for or modifications of certificates of public convenience and/or necessity, licenses or permits of franchised electric utilities in accordance with law and revoke, review and modify such certificates, licenses or permits in appropriate cases, such as in cases of violations of the Grid Code, Distribution Code and other rules and regulations issued by the ERC in accordance with law;

(q) Act on applications for cost recovery and return on demand side management projects;

(r) In the exercise of its investigative and quasi-judicial powers, act against any participant or player in the energy sector for violations of any law, rule and regulation governing the same, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts by any participant in the energy sector or by any person, as may be provided by law, and require any person or entity to submit any report or data relative to any investigation or hearing conducted pursuant to this Act;

(s) Inspect, on its own or through duly authorized representatives, the premises, books of accounts and records of any person or entity at any time, in the exercise of its quasi-judicial power for purposes of determining the existence of any anti-competitive behavior and/or market power abuse and any violation of rules and regulations issued by the ERC;

(t) Perform such other regulatory functions as are appropriate in order to ensure the successful restructuring and modernization of the electric power industry, such as, but not limited to, the rules and guidelines under which generation companies, distribution utilities which are not publicly listed shall offer and sell to the public a portion not less than fifteen percent (15%) of their common shares of stocks: Provided, however, That generation companies, distribution utilities or their respective holding companies that are already listed in the PSE are deemed in compliance. For existing companies, such public offering shall be implemented not later than five (5) years from the effectivity of this Act. New companies shall implement their respective public offerings not later than five (5) years from the issuance of their certificate of compliance; and

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

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

In the present case, where there is no exercise of the ERC's quasi-judicial powers, the ERC is legally bound to enforce the rules and regulations of the DOE as authorized under the EPIRA. The ERC has no independence or discretion to ignore, waive, amend, postpone, or revoke the rules and regulations of the DOE pursuant to the EPIRA, as it is hornbook doctrine that rules and regulations issued pursuant to law by administrative agencies, like the DOE, have the force and effect of law.^[69] In fact, the first duty and function of the ERC under its charter is to "enforce the implementing rules and regulations" of the EPIRA as issued by the DOE. Certainly, the ERC has no power to ignore, waive, amend, postpone, or revoke the policies, rules, regulations, and circulars issued by the DOE pursuant to the EPIRA.

In any event, even in quasi-judicial cases, the ERC is bound to apply the policies, rules, regulations, and circulars issued by the DOE as the ERC has no power to ignore, waive, amend, postpone, or revoke the policies, rules, regulations, and circulars issued by the DOE pursuant to the EPIRA. To repeat, the DOE's rules, regulations, and circulars issued pursuant to the DOE's rule-making power under the EPIRA have the force and effect of law which the ERC is legally bound to follow, whether the ERC is exercising executive, quasi-legislative, or quasi-judicial powers.

Pursuant to the DOE's mandate under the EPIRA,^[70] the 2015 DOE Circular required all DUs to undergo CSP in procuring PSAs. The DOE issued on 11 June 2015 the 2015 DOE Circular which took effect upon its publication on 30 June 2015.

The 2015 DOE Circular recognized that under the EPIRA, the DOE has the mandate to "formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,"^[71] where the State policy is to "[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power."^[72] The 2015 DOE Circular reiterated the EPIRA's mandate that "all Distribution Utilities (DUs) shall have the obligation to supply electricity in the least-cost manner to their Captive Market, subject to the collection of retail rate duly approved by the [ERC]."^[73]

The 2015 DOE Circular mandated that DUs, including electric cooperatives, obtain their PSAs through CSP. Section 1 of the 2015 DOE Circular states the principles behind CSP:

Section 1. General Principles. Consistent with its mandate, the DOE recognizes that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs ensures security and certainty of electricity prices of electric power to end-users in the long-term. Towards this end, all CSPs undertaken by the DUs shall be guided by the following principles:

- (a) Increase the transparency needed in the procurement process to reduce risks;
- (b) Promote and instill competition in the procurement and supply of electric power to all end-users;
- (c) Ascertain least-cost outcomes that are unlikely to be challenged in the future as the political and institutional scenarios should change; and
- (d) Protect the interest of the general public. (Boldfacing added)

In sum, the *raison d'être* of CSP is to ensure transparency and competition in the procurement of power supply by DUs so as to provide the least-cost electricity to the consuming public.

The clear text of Section 3 of the 2015 DOE Circular mandates the conduct of CSP after the Circular's effectivity on 30 June 2015.

Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In case of

the [Electric Cooperatives (ECs)], the Third Party shall also be duly recognized by the National Electrification Administration (NEA).

x x x x (Boldfacing and italicization added)

Section 5 of the 2015 DOE Circular states the non-retroactivity of the Circular's effect.

Section 5. Non-Retroactivity. This Circular shall have prospective application and will not apply to PSAs with tariff rates already approved and/or have been filed for approval by the ERC before the effectivity of this Circular. (Boldfacing added)

Clearly, PSAs filed with the ERC after the effectivity of the 2015 DOE Circular must comply with CSP as only PSAs filed "before the effectivity" of the Circular are excluded from CSP.

Section 10 of the 2015 DOE Circular provides for its effectivity

Section 10. Effectivity. This Circular shall take effect immediately upon its publication in two (2) newspapers of general circulation and shall remain in effect until otherwise revoked. (Boldfacing added)

The 2015 DOE Circular took effect upon its publication on 30 June 2015 in the Philippine Daily Inquirer and the Philippine Star.[74] Section 10 expressly declares that the "Circular x x x shall remain in effect until otherwise revoked." Indisputably, CSP became mandatory as of 30 June 2015. Taking all these provisions together, all PSAs submitted to the ERC after the effectivity of the 2015 DOE Circular, on or after 30 June 2015, are required to undergo CSP.

Since the 2015 DOE Circular was issued solely by the DOE, it is solely the DOE that can amend, postpone, or revoke the 2015 DOE Circular unless a higher authority, like the Congress or the President, amends or revokes it. Certainly, the ERC has no authority to amend, postpone, or revoke the 2015 DOE Circular, including its date of effectivity.

The Joint Resolution executed by DOE and the ERC on 20 October 2015 reiterated that the ERC shall issue the appropriate regulation to implement CSP. The Joint Resolution did not authorize the ERC to change the date of effectivity of the mandatory CSP. The Joint Resolution expressly mandated that the "ERC shall issue the appropriate regulation to implement" CSP. The power "to implement" CSP does not include the power to postpone the date of effectivity of CSP, which is expressly mandated in the 2015 DOE Circular to take effect upon the publication of the Circular. In fact, to postpone is the opposite of "to implement."

On the same date, 20 October 2015, the ERC issued the CSP Guidelines, which directed all DUs to conduct CSP in the procurement of their power supply for their captive markets. While the 2015 DOE Circular mandated CSP to take effect on 30 June 2015, the ERC under the CSP Guidelines unilaterally postponed the date of effectivity of CSP from 30 June 2015 to 7 November 2015 or by 130 days. This marks the first postponement by ERC of the effectivity of the mandatory CSP.

On 15 March 2016, however, the ERC, for the second time, unilaterally postponed the date of effectivity of the mandatory CSP. On this date the ERC issued the ERC Clarificatory Resolution, which restated the date of effectivity of CSP from 7 November 2015 to 30 April 2016. The second postponement of the effectivity of CSP from 7 November 2015 to 30 April 2016, or by 175 days, allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP.

Why the ERC Acted in Excess of its Jurisdiction: Required Coordination Between the DOE and the ERC

The 2015 DOE Circular explicitly stated the instances that required joint action of the DOE and the ERC:

- Recognition of the Third Party that will conduct the CSP for the procurement of PSAs by the DUs;
- Issuance of guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs;
- Issuance of guidelines and procedures for the recognition or accreditation of the Third Party that conducts the CSP; and
- Issuance of supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP.

These instances are in Sections 3 and 4 of the 2015 DOE Circular:

Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In case of the [Electric Cooperatives (ECs)], the Third Party shall also be duly recognized by the National Electrification Administration (NEA).

x x x x

Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and [the] DOE shall jointly issue guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided. x x x.

x x x x

Section 4. Supplemental Guidelines. To ensure efficiency and transparency of the CSP Process [sic], the ERC, upon its determination and in coordination with the DOE shall issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP. The supplemental guidelines should ensure that any CSP and its outcome shall redound to greater transparency in the procurement of electric supply, and promote greater private sector participation in the generation and supply sectors, consistent with the declared policies under EPIRA. (Boldfacing and italicization added)

In all the foregoing instances, the ERC is mandated to act jointly with the DOE. All these instances merely implement CSP, and do not postpone CSP or amend the 2015 DOE Circular, which are beyond mere implementation of CSP. If the ERC cannot act by itself on certain instances in the mere implementation of CSP, then the ERC certainly cannot act by itself in the postponement of CSP or in the amendment of the 2015 DOE Circular.

We reiterate that the ERC unilaterally postponed the effectivity of the mandatory CSP twice. The ERC made the first unilateral postponement on 20 October 2015, when it stated that PSAs already filed with the ERC on or before 7 November 2015 were not required to undergo CSP. This first unilateral postponement was from 30 June 2015 to 7 November 2015, or a period of postponement of 130 days. The ERC made a second unilateral postponement on 15 March 2016, when it restated the effectivity of the CSP Guidelines from 7 November 2015 to 30 April 2016, or a postponement of 175 days. All in all, the ERC, by itself and without authorization from or coordination with the DOE, postponed the effectivity of the mandatory CSP for 305 days.

The ERC thus amended, and not merely supplemented, the "guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP." [75] This is contrary to what the 2015 DOE Circular clearly intended - that CSP shall take effect upon the Circular's publication on 30 June 2015.

In its Comment to the present petition, [76] the DOE denied any responsibility in the ERC's restatement of the

effective date in the ERC Clarificatory Resolution. The DOE stated:

15. DOE is not aware of the cut-off date shift. There is nothing on record that shows that ERC, contrary to Section 4 of the [2015] DOE Circular, coordinated with DOE in "restating" the date of effectivity to a later date, or from 7 November 2015 to 30 April 2016 for a period of one-hundred and seventy-five (175) days.[77] (Boldfacing added)

In contrast, there is nothing in the ERC's 60-page Comment[78] which disavowed DOE's allegation of non-coordination. If anything, the ERC's Comment underscored its assertion that the ERC Clarificatory Resolution was solely issued by the ERC supposedly as "a legitimate exercise of its quasi-legislative powers granted by law." [79]

We do not doubt that the ERC has the power to issue the appropriate regulation to implement CSP. This is clear from the EPIRA and the 2015 DOE Circular. Indeed, Justice Reyes in his Dissenting Opinion belabored this delegated power by underscoring the existence of the Joint Resolution. Justice Reyes misunderstood the delegation of power to mean that the Joint Resolution, by itself, is the required "coordination" in the implementation of CSP. Under this theory of Justice Reyes, the required "coordination" could take place only once upon the issuance of the Joint Resolution, and there can be no other coordination required in the future even if the ERC issues additional guidelines or regulations to implement CSP. This interpretation is obviously erroneous.

Moreover, the ERC's power is neither absolute nor unbridled. The ERC can only promulgate rules, but only insofar as it is authorized. Section 4(b) of Rule 3 of the Implementing Rules and Regulations of the EPIRA states:

Pursuant to Sections 43 and 45 of the Act, the ERC shall promulgate such rules and regulations as authorized thereby, including but not limited to Competition Rules and limitations on recovery of system losses, and shall impose fines or penalties for any non-compliance with or breach of the Act, these Rules and the rules and regulations which it promulgates or administers. (Boldfacing and italicization added)

The 2015 DOE Circular specifically stated that the ERC's power to issue CSP guidelines and procedures should be exercised "in coordination with the DOE." The purpose of such coordination was "to ensure efficiency and transparency in the CSP." In short, the ERC could not issue CSP guidelines and procedures without coordination with DOE. The DOE has expressly declared that the ERC did not coordinate with DOE in issuing the ERC Clarificatory Resolution. The ERC's unilateral postponement of CSP for 305 days, allowing DUs to avoid the mandatory CSP to the great prejudice of the public, was clearly without authority and manifestly constituted grave abuse of discretion. Moreover, the ERC's unilateral postponement of CSP egregiously prevented "transparency" and resulted in inefficiency by delaying the implementation of CSP.

In their Dissenting Opinions, Justice Reyes[80] and Justice Caguioa[81] both use the DOE's letter dated 18 January 2016,[82] which requested the ERC to allow an electric cooperative (Abra Electric Cooperative, Inc. [ABRECO]) to directly negotiate with a power supplier despite the mandatory CSP, to justify the ERC's alleged power to amend the 2015 DOE Circular.

First, Justice Reyes overlooks the direction of the exercise of power in this instance: instead of the ERC acting alone, the DOE directed the ERC to take action on the matter. This letter proves that the power to amend the 2015 DOE Circular belongs to the DOE, not to the ERC. There is clearly a necessity for the ERC to coordinate with the DOE with regard to CSP matters.

Second, the DOE's endorsement to the ERC, as expressly stated in the DOE's letter dated 18 January 2016, "does not preclude the ERC from exercising its authority to evaluate ABRECO's PSAs and require further action, such as subjecting ABRECO's PSA to a Swiss challenge." A Swiss challenge is "a hybrid mechanism between the

direct negotiation approach and the competitive bidding route." [83] It is a system where "[a] third party can bid on a project during a designated period but the original proponent can counter match any superior offer." [84] In short, a Swiss challenge is a form of public bidding, and is recognized in the implementing rules of laws such as Republic Act No. 6957, "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes," as amended by Republic Act No. 7718, [85] and Executive Order No. 146, [86] "Delegating to the National Economic and Development Authority (NEDA) Board the Power of the President to Approve Reclamation Projects." [87]

Third, even assuming that the DOE letter exempted one specific DU from CSP, it did not authorize ERC to postpone the effectivity of the mandatory CSP for 305 days for all other DUs nationwide.

Fourth, the term of exemption for ABRECO was only for three years, or from 2016 to 2018. The PSAs executed during ERC's unilateral 305-day postponement had terms that range from 20 to 21 years.

In view of the DOE's explicit assertion that the ERC did not coordinate with the DOE regarding the issuance of the ERC Clarificatory Resolution, and the ERC's corresponding silence on the same matter, we hold that the ERC's issuance of the ERC Clarificatory Resolution is void, because it was issued with grave abuse of discretion and in excess of its rule-making authority.

Why the ERC Gravely Abused its Discretion: Effective Twenty-Year Freeze of the Mandatory CSP

The PSAs between Meralco and its power suppliers were executed and submitted to the ERC within 10 days prior to the restated 30 April 2016 deadline. The data collated in the above-mentioned tables are, as indicated in the footnotes, found in the pleadings submitted by the pertinent parties. These are judicial admissions, and are not findings of fact. According to the ERC Clarificatory Resolution, these PSAs are not required to comply with CSP.

Obviously, the rationale behind CSP - to ensure transparency in the purchase by DUs of bulk power supply so as to provide the consuming public affordable electricity rates - acquires greater force and urgency when the DU or its parent company holds a significant equity interest in the bulk power supplier. Such a parent-subsidiary relationship, or even a significant equity interest in the bulk power supplier, does not lend itself to fair and arms-length transactions between the DU and the bulk power supplier.

From Meralco's Comment, we see that the effect of the non-implementation of CSP is more widespread and far-reaching than what petitioners initially presented. Non-implementation of CSP affects various areas of the country and not just Meralco's extensive service areas. Postponement of the effectivity of the mandatory CSP resulted in the exemption from CSP of a total of ninety (90) PSAs covering various areas of the country. Under the ERC Clarificatory Resolution, the dates of submission put these PSAs outside the ambit of the mandatory CSP for at least 20 years based on the contract terms of these PSAs.

In effect, the ERC Clarificatory Resolution signaled to DUs to rush the negotiations and finalize their PSAs with power generation companies. Meeting the extended deadline would then render the 2015 DOE Circular mandating CSP inutile for at least 20 years. We cannot, in conscience, allow this to happen. To validate the ERC's postponement of CSP under the CSP Guidelines and the ERC Clarificatory Resolution means to validate ERC's arbitrary and unauthorized act of putting into deep freeze, for at least 20 years, the principles behind CSP to the great prejudice of the public. [88]

Why the ERC Gravely Abused its Discretion: The Whereas Clauses of the CSP Guidelines and of the ERC Clarificatory Resolution

The ERC's Comment states: "It must be emphasized that the considerable amount of time, money, and effort it

took to enter into a PSA would have been wasted if the CSP [Guidelines] took effect immediately." [89] Granting that negotiations for the PSAs took considerable time, the issuance of the 2015 DOE Circular and of the CSP Guidelines was not conjured on a whim. We find that ERC's Comment fails to consider the efforts of both the DOE and the ERC prior to the issuance of the 2015 DOE Circular as well as the CSP Guidelines.

As early as 5 December 2003, the DOE issued Department Circular No. 2003-12-011, entitled "Enjoining All Distribution Utilities to Supply Adequate, Affordable, Quality and Reliable Electricity," which reiterated the state policy that "all DUs must x x x take cognizance and assume full responsibility to forecast, assure and contract for the supply of electric power within their respective franchise areas to meet their obligations as a DU particularly to their Captive Market." [90] Moreover, the DOE had conducted a series of nationwide public consultations on the proposed policy on competitive procurement of electric power for all electricity end-users. [91] The dates and manner of consultations, as well as the acts of the DOE and the ERC, were specifically mentioned in the Whereas Clauses of the CSP Guidelines, thus:

x x x x

WHEREAS, on February 19, 2013, the ERC issued a Notice in ERC Case No. 2013-005 RM, entitled "In the Matter of the Promulgation of the Rules Governing the Execution, Review and Evaluation of Power Supply Agreements Entered Into by Distribution Utilities for the Supply of Electricity to their Captive Market" (PSA Rules), which was posted on the ERC's website, directing all interested parties to submit their respective comments on the first draft of the PSA Rules, not later than March 22, 2013;

WHEREAS, on various dates, the ERC received comments on the first draft of the PSA Rules from interested parties, namely: a) Cagayan Electric Power and Light Co., Inc. (CEPALCO); b) Visayan Electric Company, Inc. (VECO); c) Quezon Power (Philippines) Ltd. Co. (QPL); d) Power Source Philippines, Inc. (PSPI); e) National Grid Corporation of the Philippines (NGCP); f) Philippine Independent Power Producers Association, Inc. (PIPPA); g) Next Power Consortium, Inc.; h) SN Aboitiz Power Group (SNAP); i) Aboitiz Power Corporation (APC); j) Philippine Electricity Market Corporation (PEMC); k) Manila Electric Company (MERALCO); l) Department of Energy (DOE); m) Philippine Rural Electric Cooperatives Associations, Inc. (PHILRECA); and n) National Rural Electric Cooperative Association (NRECA);

WHEREAS, on October 16, 2013, the ERC issued a Notice of Posting and Publication in the aforementioned case, which was posted on the ERC's website, directing all interested parties to submit their respective comments on the second draft of the PSA Rules and setting the same for public consultations on December 2, 2013 in Pasig City for the Luzon stakeholders and on December 5, 2013 in Cebu City for the Visayas and Mindanao stakeholders;

WHEREAS, on various dates, the ERC received comments on the second draft of the PSA Rules from interested parties, namely: a) PHILRECA; b) CEPALCO; c) VECO; d) QPL; e) PSPI; f) NGCP; g) PIPPA; h) Next Power Consortium, Inc.; i) SNAP; j) APC; k) PEMC; l) MERALCO; m) DOE; and n) NRECA;

WHEREAS, on January 27, 2014, the ERC issued a Notice of Posting and Public Consultation setting the second draft of the PSA Rules for public consultations on February 18, 20 and 24, 2014 in Davao City, Cebu City and Pasig City for the Mindanao, Visayas and Luzon stakeholders, respectively;

WHEREAS, on February 18, 20 and 24, 2014, the ERC conducted public consultations wherein the comments of the interested parties were discussed;

WHEREAS, the ERC, likewise, conducted Focus Group Discussions (FGDs) with the stakeholders on April 22 to 24, 2014 in Pasig City, May 6 to 8, 2014 in Cebu City, May 13 to 14, 2014 in Cagayan De Oro City and May 20 to 22, 2014 in Pasig City, to thoroughly discuss major issues in relation to the draft PSA Rules, such as: a) the requirement of Competitive Selection Process (CSP); b) the proposed PSA template; c) the joint

filing of PSA applications by the DUs and generation companies (GenCos); and d) the "walk-away" provision in the PSA, and the ERC likewise set the deadline for the submission of additional comments or position papers for May 30, 2014;

WHEREAS, on various dates, the ERC received position papers/additional comments from interested parties, namely: a) PIPPA; b) APC; c) Mindanao Coalition of Power Consumers; and d) Association of Mindanao Rural Electric Cooperatives, Inc. (AMRECO);

WHEREAS, Article III of the draft PSA Rules requires the DU to undertake a transparent and competitive selection process before contracting for the supply of electricity to its captive market;

WHEREAS, in October 2014, the DOE issued for comments its draft Circular on the proposed Demand Aggregation and Supply Auctioning Policy (DASAP);

WHEREAS, in the proposed DASAP, all DUS will be mandated to comply with the auction requirement prescribed therein and other rules and guidelines as may be prescribed in the implementation of the DASAP;

WHEREAS, by reason of the issuance of the DASAP and pending the finalization thereof, the ERC held in abeyance its action on ERC Case No. 2013-005 RM and final approval of the draft PSA Rules;

WHEREAS, on June 11, 2015, the Department of Energy (DOE) issued Department Circular No. DC2015-06-008, Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA);

WHEREAS, on October 20, 2015, the DOE and the ERC approved the issuance of a Joint Resolution embodying their agreement on the CSP, particularly, that the ERC shall issue the appropriate regulations requiring the DUs to undertake a CSP for the PSAs they will enter into for the supply to their captive markets;

WHEREAS, the ERC and the DOE are convinced that there is an advantage to be gained by having a CSP in place, in terms of ensuring transparency in the DUs' supply procurement and providing opportunities to elicit the best price offers and other PSA terms and conditions from suppliers[.][92] (Boldfacing and italicization added)

In stark contrast to the extensive consensus-building which attended the drafting of the 2015 DOE Circular and the CSP Guidelines, the ERC Clarificatory Resolution explicitly admitted that its issuance was not accompanied by any public consultation or focus group discussion. Rather, the ERC Clarificatory Resolution was unilaterally issued by the ERC, without coordinating with DOE, on the basis of "several letters from stakeholders." The stakeholders had no way of knowing the concerns of their peers as there was no interaction or discussion among the stakeholders.

WHEREAS, since the publication of the CSP [Guidelines] on 06 November 2015, the [ERC] has received several letters from stakeholders which raised issues on the constitutionality of the effectivity of the CSP [Guidelines], sought clarification on the implementation of the CSP and its applicability to the renewal and extension of PSAs, requested a determination of the accepted forms of CSP, and submitted grounds for exemption from its applicability, among others.

WHEREAS, after judicious study and due consideration of the different perspectives raised in the aforementioned letters, with the end in view of ensuring the successful implementation of the CSP for the benefit of consumers, DUs, and GenCos, the [ERC] has resolved to allow a period of transition for the full implementation of the CSP [Guidelines] and, as such, restates the effectivity date of the CSP [Guidelines] to a later date[.][93]

The CSP Guidelines did not, in the words of the OSG, "take effect immediately." Rather, it was the product of years of negotiation. The stakeholders were aware of the contents and the eventual implementation of CSP.

Moreover, the CSP Guidelines, although signed on 20 October 2015, took effect on 7 November 2015, or 18 days after signing.

Why the ERC Gravely Abused its Discretion: Obligations of a Distribution Utility in the Electric Power Industry

The EPIRA divided the electric power industry into four sectors, namely: generation, transmission, distribution, and supply.[94] The distribution of electricity to end-users is a regulated common carrier business requiring a franchise.[95] We reiterate that the EPIRA mandates that a distribution utility has the obligation to supply electricity in the least-cost manner to its captive market, subject to the collection of distribution retail supply rate duly approved by the ERC.[96]

Republic Act No. 9209 granted Meralco a congressional franchise to construct, operate, and maintain a distribution system for the conveyance of electric power to the end-users in the cities and municipalities of Metro Manila, Bulacan, Cavite, and Rizal, and certain cities, municipalities, and barangays in Batangas, Laguna, Quezon, and Pampanga. Meralco's franchise is in the nature of a monopoly because it does not have any competitor in its designated areas. The actual monopolistic nature of Meralco's franchise was recognized and addressed by the framers of our Constitution, thus:

MR. DAVIDE: x x x

Under Section 15 on franchise, certificate, or any other form of authorization for the operation of a public utility, we notice that the restriction, provided in the 1973 Constitution that it should not be exclusive in character, is no longer provided. Therefore, a franchise, certificate or any form of authorization for the operation of a public utility may be exclusive in character.

MR. VILLEGAS: I think, yes.

MR. DAVIDE: It may be "yes." But would it not violate precisely the thrust against monopolies?

MR. VILLEGAS: The question is, we do not include the provision about the franchise being exclusive in character.

MR. SUAREZ: This matter was taken up during the Committee meetings. The example of the public utility given was the MERALCO. If there is a proliferation of public utilities engaged in the servicing of the needs of the public for electric current, this may lead to more problems for the nation. That is why the Commissioner is correct in saying that that will constitute an exemption to the general rule that there must be no monopoly of any kind, but it could be operative in the case of public utilities.

MR. DAVIDE: Does not the Commissioner believe that the other side of the coin may also be conducive to more keen competition and better public service?

MR. SUAREZ: The Commissioner may be right.

MR. DAVIDE: Does not the Commissioner believe that we should restore the qualification that it should not be exclusive in character?

MR. SUAREZ: In other words, under the Commissioner's proposal, Metro Manila, for example, could be serviced by two or more public utilities similar to or identical with what MERALCO is giving to the public?

MR. DAVIDE: That is correct.

MR. SUAREZ: The Commissioner feels that that may create or generate improvement in the services?

MR. DAVIDE: Yes, because if we now allow an exclusive grant of a franchise, that might not be conducive to public service.

MR. SUAREZ: We will consider that in the committee level.

MR. MONSOD: With the Commissioner's permission, may I just amplify this.

MR. VILLEGAS: Commissioner Monsod would like to make a clarification.

MR. MONSOD: I believe the Commissioner is addressing himself to a situation where it lends itself to more than one franchise. For example, electric power, it is possible that within a single grid, we may have different distribution companies. So the Commissioner is right in that sense that perhaps in some situations, non-exclusivity may be good for the public. But in the case of power generation, this may be a natural activity that can only be generated by one company, in which case, prohibiting exclusive franchise may not be in the public interest.[97] (Boldfacing added)

Section 5 of Republic Act No. 9209 provides that "[t]he retail rates to [Meralco's] captive market and charges for the distribution of electric power by [Meralco] to its end-users shall be regulated by and subject to the approval of the ERC." As the holder of a distribution franchise, Meralco is obligated to provide electricity at the least cost to its consumers. The ERC, as Meralco's rate regulator, approves the retail rates - comprising of power and distribution costs - to be charged to end-users. As we have demonstrated above, both Meralco and the ERC have been remiss in their obligations. Going through competitive public bidding as prescribed in the 2015 DOE Circular is the only way to ensure a transparent and reasonable cost of electricity to consumers.

Lest we forget, the ERC is expressly mandated in Section 43(o) of the EP1RA of "ensuring that the x x x pass through of bulk purchase cost by distributors is transparent." The ERC's postponement of CSP twice, totaling 305 days and enabling 90 PSAs in various areas of the country to avoid CSP for at least 20 years, directly and glaringly violates this express mandate of the ERC, resulting in the non-transparent, secretive fixing of prices for bulk purchases of electricity, to the great prejudice of the 95 million Filipinos living in this country as well as the millions of business enterprises operating in this country. This ERC action is a most extreme instance of grave abuse of discretion, amounting to lack or excess of jurisdiction, warranting the strong condemnation by this Court and the annulment of the ERC's action.

Absent compliance with CSP in accordance with the 2015 DOE Circular, the PSAs shall be valid only as between the DUs and the power generation suppliers, and shall not bind the DOE, the ERC, and the public for purposes of determining the transparent and reasonable power purchase cost to be passed on to consumers.

On 1 February 2018, the DOE issued Circular No. DC2018-02-0003 entitled "Adopting and Prescribing the Policy for the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreements for the Captive Market" (2018 DOE Circular). The DOE prescribed, in Annex "A" of this 2018 DOE Circular, the DOE's own CSP Policy in the procurement of power supply by DUs for their captive market (2018 DOE CSP Policy). Section 16.1 of the 2018 DOE CSP Policy expressly repealed Section 4 of the 2015 DOE Circular authorizing ERC to issue supplemental guidelines to implement CSP.

In short, the DOE revoked the authority it delegated to the ERC to issue supplemental guidelines to implement CSP, and the DOE itself issued its own guidelines, the 2018 DOE CSP Policy, to implement CSP under the 2015 DOE Circular. This means that the CSP Guidelines issued by the ERC have become *functus officio* and have been superseded by the 2018 DOE CSP Policy. Under its Section 15, the 2018 DOE CSP Policy is expressly made to apply to "all prospective PSAs." The 2018 DOE Circular, including its Annex "A," took effect upon its publication on 9 February 2018. Thus, the 90 PSAs mentioned in this present case must undergo CSP in accordance with the 2018 DOE Circular, in particular the 2018 DOE CSP Policy prescribed in Annex "A" of the 2018 DOE Circular.

WHEREFORE, the petition for certiorari and prohibition is GRANTED. The first paragraph of Section 4 of Energy Regulatory Commission Resolution No. 13, Series of 2015 (CSP Guidelines), and Energy Regulatory Commission Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), are hereby declared VOID ab initio. Consequently, all Power Supply Agreement applications submitted by Distribution Utilities to the Energy Regulatory Commission on or after 30 June 2015 shall comply with the Competitive Selection Process in accordance with Department of Energy Circular No. DC2018-02-0003 (2018 DOE Circular) and its Annex "A." Upon compliance with the Competitive Selection Process, the power purchase cost resulting from such compliance shall retroact to the date of effectivity of the complying Power Supply Agreement, but in no case earlier than 30 June 2015, for purposes of passing on the power purchase cost to consumers.

SO ORDERED.

Bersamin, C. J., Peralta, Del Castillo, J. Reyes, Jr., Hernando, Carandang, and Lazaro-Javier, JJ., concur.

Perlas-Bernabe, J., Please see Separate Concurring Opinion.

Leonen, J., I concur. I join J. Carpio and J. Bernabe.

Jardeleza, J., no part.

Caguioa, J., See Dissenting Opinion.

A. Reyes, Jr., J., See my dissenting opinion.

Gesmundo, J., I certify that Justice Gesmundo who is travelling on official business left his vote for the opinion of Justice Carpio.

[1] See Renewable Energy Auctions in Developing Countries (2013), https://www.irena.org/documentdownloads/publications/irena_renewable_energy_auctions_in_developing_countries.pdf; Electricity Auctions: An Overview of Efficient Practices (2011), <http://hdl.handle.net/10986/2346>; Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices (2008), https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/competitive_procurement.pdf [All accessed 4 March 2019].

[2] Another way for the State to intervene is to examine the accounts of public utilities. Section 22, Chapter 4, Subtitle B, Title I, Book V of the Administrative Code of 1987 provides:

Section 22. Authority to Examine Accounts of Public Utilities. - (1) The Commission [on Audit] shall examine and audit the books, records and accounts of public utilities in connection with the fixing of rates of every nature, or in relation to the proceedings of the proper regulatory agencies, for purposes of determining franchise taxes;

(2) Any public utility refusing to allow an examination and audit of its books of accounts and pertinent records, or offering unnecessary obstruction to the examination and audit, or found guilty of concealing any material information concerning its financial status shall be subject to the penalties provided by law; and

(3) During the examination and audit, the public utility concerned shall produce all the reports, records, books of accounts and such other papers as may be required. The Commission shall have the power to examine under oath any official or employee of the said public utility.

[3] This provision reads:

Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are

legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[4] Under Rule 65 of the Rules of Court.

[5] Rollo, p. 33.

[6] Id. at 54, 329, 749.

[7] Id. at 55, 750.

[8] Id. at 501.

[9] Id. at 329, 501.

[10] Id. at 329.

[11] Id. at 77, 388.

[12] Id. at 77, 591.

[13] Id. at 501

[14] Id. at 388.

[15] Id.

[16] Id. at 95, 445, 814.

[17] Id. at 96, 814.

[18] Id. at 502.

[19] Id. at 445.

[20] Id.

[21] Id. at 148, 698.

[22] Id. at 148, 699.

[23] Id. at 501.

[24] Id. at 987-988.

[25] Id. at 988.

[26] Id. at 164.

[27] Id.

[28] Id. at 502.

[29] Id. at 988.

[30] Id.

[31] Id. at 112, 646.

[32] Id. at 112, 647.

[33] Id. at 503.

[34] Id. at 1326.

[35] Id.

[36] Id. at 130.

[37] Id.

[38] Id. at 502.

[39] Id. at 1346.

[40] Id.

[41] Id. at 346 (RPE), 411 (A1E).

[42] Id. at 534.

[43] Id. at 1325 (CLPPC), 1345 (MPGC).

[44] Id. at 497.

[45] Id. Boldfacing added.

[46] Id. at 506.

[47] Id. at 507.

[48] Id. at 17.

[49] *Araullo v. President Benigno S. C. Aquino, III*, 737 Phil. 457, 531 (2014). Italicization in the original. Boldfacing added.

[50] *Pilipino Telephone Corporation v. NTC*, 457 Phil. 101, 113 (2003), citing *Benito v. Commission on Elections*, 402 Phil. 764 (2001).

[51] Dissenting Opinion, Justice Andres B. Reyes, Jr., pp. 5-7.

[52] Id. at 7-12.

[53] Id. at 8-11.

[54] Id. at 9. Emphasis omitted.

[55] Section 1 of Joint Resolution No. 1 reads:

Section 1. Competitive Selection Process. Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulations to implement the same.

[56] Section 38, Republic Act No. 9136.

[57] This provision reads:

Section 2. Declaration of Policy. - It is hereby declared the policy of the State:

- (a) To ensure and accelerate the total electrification of the country;
- (b) To ensure the quality, reliability, security and affordability of the supply of electric power;
- (c) To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market;
- (d) To enhance the inflow of private capital and broaden the ownership base of the power generation, transmission and distribution sectors;
- (e) To ensure fair and non-discriminatory treatment of public and private sector entities in the process of restructuring the electric power industry;
- (f) To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power;
- (g) To assure socially and environmentally compatible energy sources and infrastructure;
- (h) To promote the utilization of indigenous and new and renewable energy resources in power generation in order to reduce dependence on imported energy;
- (i) To provide for an orderly and transparent privatization of the assets and liabilities of the National Power Corporation (NPC);
- (j) To establish a strong and purely independent regulatory body and system to ensure consumer protection and enhance the competitive operation of the electricity market; and
- (k) To encourage the efficient use of energy and other modalities of demand side management.

[58] Republic Act No. 9136, Section 37.

[59] See the complete enumeration of policies in note 57.

[60] 2015 DOE Circular, Second Whereas Clause, par. (d).

[61] 2015 DOE Circular, First Whereas Clause, par. (d).

[62] Republic Act No. 9136, Section 2 (b).

[63] Republic Act No. 9136, Section 43 (o).

[64] Republic Act No. 9136, Section 38.

[65] Dissenting Opinion, Justice Caguioa, p. 11.

[66] Id. at 12. Emphasis omitted.

[67] Id. at 25. Italicization in the original.

[68] Id.

[69] *Victorias Milling Co., Inc. v. Office of the Presidential Assistant for Legal Affairs*, 237 Phil. 306 (1987).

[70] Section 37 of the EPIRA reads:

SEC. 37. Powers and Functions of the DOE. — In addition to its existing powers and functions, the DOE is hereby mandated to supervise the restructuring of the electricity industry. In pursuance thereof, Section 5 of Republic Act

No. 7638, otherwise known as "The Department of Energy Act of 1992," is hereby amended to read as follows:

- (a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan and with the policies on environmental protection and conservation and maintenance of ecological balance, and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;
- (b) Develop and update annually the existing Philippine Energy Plan, hereinafter referred to as 'The Plan', which shall provide for an integrated and comprehensive exploration, development, utilization, distribution, and conservation of energy resources, with preferential bias for environment-friendly, indigenous, and low-cost sources of energy. The plan shall include a policy direction towards the privatization of government agencies related to energy, deregulation of the power and energy industry, and reduction of dependency on oil-fired plants. Said Plan shall be submitted to Congress not later than the fifteenth day of September and every year thereafter;
- (c) Prepare and update annually a Power Development Program (PDP) and integrate the same into the Philippine Energy Plan. The PDP shall consider and integrate the individual or joint development plans of the transmission, generation, and distribution sectors of the electric power industry, which are submitted to the Department: Provided, however, That the ERC shall have exclusive authority covering the Grid Code and the pertinent rules and regulations it may issue;
- (d) Ensure the reliability, quality and security of supply of electric power;
- (e) Following the restructuring of the electricity sector, the DOE shall, among others:
 - (i) Encourage private sector investments in the electricity sector and promote development of indigenous and renewable energy sources;
 - (ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;
 - (iii) In consultation with other government agencies, promote a system of incentives to encourage industry participants, including new generating companies and end-users to provide adequate and reliable electric supply; and
 - (iv) Undertake in coordination with the ERC, NPC, NEA and the Philippine Information Agency (PIA), information campaign to educate the public on the restructuring of the electricity sector and privatization of NPC assets.
- (f) Jointly with the electric power industry participants, establish the wholesale electricity spot market and formulate the detailed rules governing the operations thereof;
- (g) Establish and administer programs for the exploration, transportation, marketing, distribution, utilization, conservation, stockpiling, and storage of energy resources of all forms, whether conventional or non-conventional;
- (h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;
- (i) Develop policies and procedures and, as appropriate, promote a system of energy development incentives to enable and encourage electric power industry participants to provide adequate capacity to meet demand including, among others, reserve requirements;
- (j) Monitor private sector activities relative to energy projects in order to attain the goals of the restructuring,

privatization, and modernization of the electric power sector as provided for under existing laws: Provided, That the Department shall endeavor to provide for an environment conducive to free and active private sector participation and investment in all energy activities;

(k) Assess the requirements of, determine priorities for, provide direction to, and disseminate information resulting from energy research and development programs for the optimal development of various forms of energy production and utilization technologies; (1) Formulate and implement programs, including a system of providing incentives and penalties, for the judicious and efficient use of energy in all energy-consuming sectors of the economy;

(m) Formulate and implement a program for the accelerated development of non-conventional energy systems and the promotion and commercialization of its applications;

(n) Devise ways and means of giving direct benefit to the province, city, or municipality, especially the community and people affected, and equitable preferential benefit to the region that hosts the energy resource and/or the energy-generating facility: Provided, however, That the other provinces, cities, municipalities, or regions shall not be deprived of their energy requirements;

(o) Encourage private enterprises engaged in energy projects, including corporations, cooperatives, and similar collective organizations, to broaden the base of their ownership and thereby encourage the widest public ownership of energy-oriented corporations;

(p) Formulate such rules and regulations as may be necessary to implement the objectives of this Act; and

(q) Exercise such other powers as may be necessary or incidental to attain the objectives of this Act.

[71] 2015 DOE Circular, Second Whereas Clause, par. (d).

[72] 2015 DOE Circular, First Whereas Clause, par. (d).

[73] 2015 DOE Circular, Third Whereas Clause.

[74]

<http://www.nea.gov.ph/nea-ec-legal-conclave?download=1510%3Adoe-circular-no.-dc-2015-06-000-mandating-a-ll-dus-to-undergo-competitive-selection-process-in-securing-psa> (Accessed 1 July 2018).

[75] 2015 DOE Circular, Section 4.

[76] Rollo, pp. 1140-1152. Filed by the DOE's Assistant Secretary Gerardo D. Erguiza, Jr., Assistant Secretary Caron Aicitel E. Lascano, and Director III-Legal Services Arthus T. Tenazas.

[77] Id. at 1145.

[78] Id. at 1175-1234. Filed by the Office of the Solicitor General, and signed by Solicitor General Jose C. Calida, Assistant Solicitors General Raymund I. Rigodon and Henry S. Angeles, State Solicitor Lawrence Martin A. Albar, and Associate Solicitors Jose Angelo A. David, Lilibeth C. Perez-De Guzman, Maria Cristina T. Mundin, and Patricia Anne D. Sta. Maria.

[79] Id. at 1193.

[80] Dissenting Opinion, Justice A. B. Reyes, Jr., p. 5.

[81] Dissenting Opinion, Justice Caguioa, p. 32.

[82] Rollo, p. 1516. The letter reads:

18 January 2016

HON. JOSE VICENTE B. SALAZAR

Chairman

ENERGY REGULATORY COMMISSION

Pacific Center Building, San Miguel Avenue,
Ortigas Avenue, 1500 Pasig City, Metro Manila

Subject: ABRECO'S Interim Power Supply Requirement

Dear Chairman Salazar:

We refer to the attached communication we received from the Abra Electric Cooperative, Inc. (ABRECO) dated 24 November 2015, seeking DOE's endorsement to ERC to allow ABRECO to directly negotiate with a power supplier for their short-term requirement in its quest for a secured and affordable power supply and to consequently relieve them from full exposure with the WESM.

In its attached letter to ERC, ABRECO mentioned that AES is considering a 2MW Interim supply for the EC's power requirements for the next three (3) years from 2016 to 2018. We welcome this as a positive move for the improvement of ABRECO's operations, thus, we are endorsing for ERC's consideration to allow ABRECO to directly negotiate with a power supplier for its short-term requirement, albeit the requirement for competitive selection process. This request is made in consideration of ABRECO's situation as an ailing EC and to prevent its vulnerability to volatile WESM prices given its supply [is] sourced from the WESM currently. This endorsement, however, does not preclude the ERC from exercising its authority to evaluate the DUs Power Supply Agreements (PSAs) and require further action, such as, but not limited to subjecting ABRECO's PSA to a Swiss challenge.

For your consideration. Thank you.

Very truly yours,

(signed)

Zenaida Y. Monsada

Secretary

[83] SM Land, Inc. v. Bases Conversion and Development Authority, 741 Phil. 269, 288 (2014).

[84] Footnote 13 of SM Land, Inc. v. Bases Conversion and Development Authority, id.

[85] The term "Swiss Challenge" is also found in Section 3.2 of the Revised Implementing Rules and Regulations of Republic Act No. 6957, "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes," as amended by Republic Act No. 7718. Section 3.2 reads as follows:

Responsibility of the PBAC. - The PBAC herein created shall be responsible for all aspects of the pre-bidding and bidding process in the case of solicited proposals, and for the comparative bidding process (otherwise known as the "Swiss Challenge"), in the case of Unsolicited Proposals, including, among others, the preparation of the bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project.

[86] Repealed by Executive Order No. 74 (2019). The Philippine Reclamation Authority (PRA) shall be under the

control and supervision of the Office of the President, while the power of the President to approve all reclamation projects shall be delegated to the PRA governing board.

[87] The term "Swiss Challenge" is also found in Section 6.2 of the Implementing Rules and Regulations of Executive Order No. 146, dated 13 November 2013, "Delegating to the National Economic and Development Authority (NEDA) Board the Power of the President to Approve Reclamation Projects." Section 6.2 reads as follows:

6.2. Reclamation projects identified under Sections 2.2.2, 2.3.2, 2.4 and 2.5, after undergoing a thorough review, evaluation and negotiation process and upon acceptance by the PRA Board, shall be subjected to a competitive challenge process ("Swiss Challenge") in accordance with existing laws such as but not limited to the BOT Law, NEDA JV Guidelines and based on the parameters as approved by the NEDA Board, upon recommendation of the PRA Board.

In all cases, the Public Bidding in Section 6.1 and competitive challenge process ("Swiss Challenge") under Section 6.2 shall be undertaken after the NEDA Board approval in compliance with the competitive bidding requirement of EO No. 146.

[88] 2015 DOE Circular, Section 1.

[89] Rollo, p. 1207.

[90] See 2015 DOE Circular, Fourth Whereas Clause.

[91] See 2015 DOE Circular, Seventh Whereas Clause.

[92] CSP Guidelines, Third to Seventeenth Whereas Clauses.

[93] ERC Clarificatory Resolution, Seventh and Eighth Whereas Clauses.

[94] See Republic Act No. 9136, Section 5.

[95] See Republic Act No. 9136, Section 22.

[96] See Republic Act No. 9136, Section 23.

[97] III RECORD, CONSTITUTIONAL COMMISSION 261-262 (13 August 1986).

SEPARATE CONCURRING OPINION

PERLAS-BERNABE, J.:

I concur with the ponencia to the extent that the respondent Energy Regulatory Commission (ERC) gravely abused its discretion when it issued ERC Resolution No. 01, Series of 2016,[1] which "restated" the date of effectivity of ERC Resolution No. 13, Series of 2015,[2] entitled "A Resolution Directing All Distribution Utilities (DUs) to Conduct a Competitive Selection Process [(CSP)] in the Procurement of their Supply to the Captive Market." [3] As will be herein discussed, absent the approval of and coordination with the Department of Energy (DOE), the ERC cannot suspend the effectivity of the CSP, which process was originally mandated under DOE Department Circular No. DC2015-06-0008,[4] entitled "Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)" (DOE Circular). However, as will be elaborated upon below, I qualify my concurrence in that: (a) only ERC Resolution No. 01, Series of 2016 - and not the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015 - should be declared null

and void; and (b) pursuant to the doctrine of operative fact, the effects of the PSAs already approved prior to the invalidity of ERC Resolution No. 01, Series of 2016, notwithstanding their CSP non-compliance, should be recognized.

As background, the CSP is essentially a regulation on the procurement of PSAs by the DUs [to ensure] security and certainty of electricity prices of electric power to end-users in the long term.[5] As presently defined in DOE Department Circular No. DC2018-02-0003[6] issued on February 1, 2018:[7]

3.8.

"Competitive Selection Process" or "CSP" refers to the process wherein a Generation Company or, in the case of off-grid areas, New Power Provider, is awarded to supply electric power requirements of a DU through transparent and competitive bidding undertaken by a DU or by Aggregated DUs to secure supply of electricity based on the evaluation of criteria adopted by the DUs in accordance with the requirements of this Policy. For purposes of, and throughout the Policy, the terms "Competitive Bidding" and "CSP" shall have the same meaning and shall be used interchangeably.

The CSP traces its roots to the policies mandated under Republic Act No. 9136,[8] otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA). Under the EPIRA, both the DOE and the ERC are authorized by law to issue and implement the proper rules in order to - among other policy objectives - "ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market." [9] In particular, the DOE is tasked to formulate the rules "necessary to implement the objectives of [EPIRA]," [10] whereas "[p]ursuant to Sections 43 and 45 of the [EPIRA], the ERC shall promulgate such rules and regulations as authorized thereby, including but not limited to Competition Rules and limitations on recovery of system losses x x x." [11]

As headlined in this case, the inaugural issuance meant to put the CSP in force is DOE Department Circular No. DC2015-06-0008, issued in June 2015. Section 3 thereof pertinently states that "[a]fter the effectivity of this circular [(which was on June 30, 2015 following its publication[12])], all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE." [13] In this regard, the same section provides that "[w]ithin one hundred twenty (120) days from the effectivity of this Circular, the ERC and DOE shall jointly issue the guidelines and procedures for the aggregation of the [uncontracted] demand requirements of the DUs and the process of recognition or accreditation of the Third Party that conducts the CSP x x x." [14]

Related thereto, Section 4[15] of DOE Department Circular No. DC2015-06-0008 confers unto the ERC the power to issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP. Section 4, however, makes clear that still, the ERC shall exercise such power "upon its determination and in coordination with the DOE." [16] In addition, Section 6[17] of the DOE Circular also provides that monitoring of the compliance with the conditions of the CSPs will be exercised jointly by both the DOE and the ERC.

Based on the foregoing, it is therefore apparent that DOE Circular No. DC2015-06-0008 provides for the adoption of the CSP, but leaves the issuance of supplemental guidelines and procedures for its design and execution to the ERC after it has coordinated with the DOE.

On October 20, 2015, or within one hundred twenty (120) days from the effectivity of the DOE Circular, the DOE and ERC issued Joint Resolution No. 1, which provides that the ERC, by agreement of the DOE and the ERC, "shall issue the appropriate regulations to implement the [CSP]." [18]

Given (1) the rule-making authority of the DOE and the ERC under the EPIRA, and (2) the circumstantial trajectory of the issuances on the CSP, it is thus fairly apparent that the term "appropriate regulations" under Section 1 of Joint Resolution No. 1 should only pertain to the supplemental guidelines and procedures for the design and execution of the CSP[19] that the ERC is empowered to issue in coordination with the DOE. To my mind, Section 1 should not be construed as a blanket grant of authority by the DOE to the ERC to issue whatever guidelines the latter deems fit for the implementation of the CSP. To adopt this latter view would be tantamount to an isolated reading of a provision that is impervious to the context under which it was formulated. Worse, this construction tends to effectively undermine the DOE's role in the process of promulgating rules to advance the EPIRA's policy objectives on fair competition.

In fact, it deserves pointing out that the ERC issued Resolution No. 13, Series of 2015 on the same day (i.e., October 20, 2015) that Joint Resolution No. 1 was passed. To recall, ERC Resolution No. 13, Series of 2015 is the resolution whose effectivity was "restated" by the assailed issuance herein, ERC Resolution No. 01, Series of 2016. In the "whereas clauses" of ERC Resolution No. 13, Series of 2015, DOE Circular No. DC2015-06-0008, which had originally set the parameters of authority of the DOE and the ERC anent the implementation of the CSP, was explicitly recognized, viz.:

WHEREAS, on June 11, 2015, the Department of Energy (DOE) issued Department Circular No. [DC2015-06-0008], Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA);

WHEREAS, on October 20, 2015, the DOE and the ERC approved the issuance of a Joint Resolution embodying their agreement on the CSP, particularly, that the ERC shall issue the appropriate regulations requiring the DUs to undertake a CSP for the PSAs they will enter into for the supply to their captive market;

WHEREAS, the ERC and the DOE are convinced that there is an advantage to be gained by having a CSP in place, in terms of ensuring transparency in the DUs' supply procurement and providing opportunities to elicit the best price offers and other PSA terms and conditions from suppliers;

x x x x

As per its terms, ERC Resolution No. 13, Series of 2015 not only sets the guidelines for the design and execution of the CSP, but also clearly supplements DOE Department Circular No. DC2015-06-0008. Thus, it stands to reason that ERC Resolution No. 13, Series of 2015 is the embodiment of the phrase "appropriate regulations" contemplated under the Joint Resolution issued by both agencies to implement the CSP.

In this case, it is apparent that both the DOE and the ERC are intent on implementing the CSP. DOE Department Circular No. DC2015-06-0008 already mandated that upon its effectivity on June 30, 2015, all DUs shall procure PSAs only through the CSP. However, as noted in the ponencia, the ERC, unilaterally postponed the date of effectivity of the CSP from June 30, 2015 to November 7, 2015, marking the first postponement by the ERC of the effectivity of the mandatory CSP.[20] This appears to be in pursuance of the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015, which reads:

Section 4. Applicability. - The CSP requirement herein mandated shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution [(i.e., November 7, 2015)]. For PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.

The implementation of the CSP requirement was further stalled by the ERC for another five (5) months, particularly, up until April 30, 2016, through the issuance of ERC Resolution No. 01, Series of 2016.[21] The main reason for this subsequent postponement was the "several letters from stakeholders"[22] received by the

ERC expressing certain reservations anent the implementation thereof.

As I see it, ERC Resolution No. 01, Series of 2016 cannot qualify as a supplemental guideline for the design and execution of the CSP as contemplated under the ERC's delegated authority pursuant to Section 4 of DOE Department Circular No. DC2015-06-0008. Contrary to the very nature of a supplemental guideline, ERC Resolution No. 01, Series of 2016 does not merely add or clarify the existing regulations on the CSP, but rather completely halts its implementation. Accordingly, it cannot fall under the phrase "appropriate regulations" under Section 1 of Joint Resolution No. 1, as agreed upon by the DOE and the ERC. To reiterate, the ERC was not given sole discretion under Joint Resolution No. 1 to promulgate whatever rules it deems fit to implement the CSP. This is, in fact, further confirmed by the Comment of the DOE itself wherein it denied any responsibility in the ERC's restatement of the CSP's date of effectivity:

15. DOE is not aware of the cut-off date shift. There is nothing on record that ERC, contrary to Section 4 of the [2015] DOE Circular, coordinated with DOE in "restating" the date of the effectivity to a later date, or from 7 November 2015 to 30 April 2016 for a period of one-hundred and seventy-five (175) days.[23]

In fine, since the ERC had no authority to suspend the implementation of the CSP on its own, it gravely abused its discretion in issuing ERC Resolution No. 01, Series of 2016 and hence, ought to be declared void.

The ponencia, however, proceeds to also invalidate the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015, as the said provision marked the first postponement of the CSP implementation from June 30, 2015 (as per the original DOE Circular) to November 7, 2015. As the dispositive of the ponencia reads:

WHEREFORE, the petition for certiorari and prohibition is GRANTED. The first paragraph of Section 4 of the Energy Regulatory Commission Resolution No. 13, Series of 2015 (CSP Guidelines), and the Energy Regulatory Commission Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), are hereby declared VOID ab initio. Consequently, all Power Supply Agreement applications submitted by Distribution Utilities to the Energy Regulatory Commission on or after 30 June 2015 shall comply with the Competitive Selection Process in accordance with the Department of Energy Circular No. DC2018-02-0003 (2018 DOE Circular) and its Annex "A". Upon compliance with the Competitive Selection Process, the power purchase cost resulting from such compliance shall retroact to the date of effectivity of the complying Power Supply Agreement, but in no case earlier than June 30, 2015, for purpose of passing on the power purchase cost to consumers.[24]

Respectfully, I disagree with the holding anent the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015 because the validity of ERC Resolution No. 13, Series of 2015 was not questioned in the present petition. In any case, it is my view that there was nothing infirm about the failure to implement the CSP by June 30, 2015 and postponing the same to November 7, 2015. This is because the CSP could not have been implemented by the time the original DOE Circular took effect on June 30, 2015 given that there were no proper implementing guidelines at that time. Based on the records, it was only upon the issuance of ERC Resolution No. 13, Series of 2015 (which took effect later on November 7, 2015) that concrete guidelines on the CSP were set. Notably, this latter ERC Resolution was issued on the same day Joint Resolution No. 1 was issued by both the DOE and the ERC, and in this joint resolution, the authority of the ERC to issue the appropriate guidelines to implement the CSP, by agreement of the DOE and the ERC, was recognized. In fact, there is an express statement by the DOE in the original DOE Circular that the ERC was still to issue supplemental guidelines and procedures for the design and execution of the CSP to properly guide the DUs; hence, the immediate effectivity of the CSP requirement could not be reckoned as of June 30, 2015. Accordingly, for these reasons, only ERC Resolution No. 01, Series of 2016 - and not the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015 - should be declared null and void.

Also, albeit not explicitly expressed in the ponencia, I caution against the wholesale invalidation of PSAs which

were non-compliant with the CSP requirement at the time the said process should have been carried out, which date the ponencia pegs on June 30, 2015. Being in the nature of a selection and qualification requirement, compliance with the CSP to already existing - more so, implemented - PSAs appears to be impossible, unless one invalidates the entire contract. Logically speaking, it is highly impracticable to reverse the consummation of acts already done. This being the case, it may be prudent to recognize the validity of the effects of the PSAs already approved prior to the invalidity of ERC Resolution No. 01, Series of 2016, notwithstanding their CSP non-compliance. Lest it be misunderstood, this does not necessarily mean that the approved PSAs[25] shall be valid and effective for their entire full 20 or 21-year term. The compromise to this matter is to only recognize these contracts' validity up until a new DU, selected under the applicable CSP process, has qualified to take-over the obligations for the remaining period in accordance with the appropriate transitory regulations to be issued by the proper governing agency/agencies. To my mind, this approach balances out the legalistic attribution of the questioned issuance with the practical impact that the afore-discussed declaration would have on the power industry and on a larger scale, the consuming public in general.

ACCORDINGLY, I vote to GRANT the petition based on the qualifications stated above. Energy Regulatory Commission Resolution No. 01, Series of 2016 should be declared INVALID for having been issued with grave abuse of discretion. Power Supply Agreements approved on or after November 7, 2015, despite non-compliance with the Competitive Selection Process (CSP) requirement, should not per se be invalidated, but shall be subject to the appropriate transitory regulations on the CSP to be issued by the proper governing agency/agencies.

[1] Entitled "A RESOLUTION CLARIFYING THE EFFECTIVITY OF ERC RESOLUTION NO. 13, SERIES OF 2015," issued on March 15, 2016.

[2] Issued on October 20, 2015.

[3] See ponencia, pp. 12-13.

[4] Issued on June 11, 2015.

[5] DOE Circular, Section 1.

[6] Entitled "ADOPTING AND PRESCRIBING THE POLICY FOR THE COMPETITIVE SELECTION PROCESS IN THE PROCUREMENT BY THE DISTRIBUTION UTILITIES OF POWER SUPPLY AGREEMENT FOR THE CAPTIVE MARKET."

[7] Section 3.8 of Department of Energy Circular No. DC2018-02-0003, Annex "A".

[8] Entitled "AN ACT ORDAINING REFORMS IN THE ELECTRIC POWER INDUSTRY, AMENDING FOR THE PURPOSE CERTAIN LAWS AND FOR OTHER PURPOSES," approved on June 8, 2001.

[9] EPIRA, Chapter I, Section 2 (c); emphasis and underscoring supplied.

[10] EPIRA, Chapter III, Section 37 (p).

[11] Section 4 (b), Rule 3 of the EPIRA IRR.

[12] See ponencia, p. 5.

[13] Emphases supplied.

[14] Emphases and underscoring supplied.

[15] Repealed under Section 16.1 of DOE Department Circular No. DC2018-02-0003.

[16] Underscoring supplied.

[17] Section 6. Monitoring, Enforcement and Compliance. The DOE through the Electric Power Industry Management Bureau (EPIMB), together with the ERC, shall monitor compliance with the conditions of the CSPs and the compliance with the provisions of PSAs.

[18] Joint Resolution No. 1, Section 1; emphasis and underscoring supplied.

[19] Notably, however, as discussed in the ponencia, this authority has already been revoked under DOE Circular No. DC2018-02-0003; see p. 36 of the ponencia.

[20] See ponencia, p. 24.

[21] See *id.*

[22] See 7[th] Whereas Clause, Resolution No. 01, Series of 2016.

[23] See ponencia, p. 26; emphasis supplied.

[24] *Id.* at 36.

[25] See *id.* at. 29.

DISSENTING OPINION

CAGUIOA, J.:

I dissent: for the principal reason that the ponencia fails to appreciate — and, in the process, unduly undermines — the singular role and duty of the Energy Regulatory Commission (ERC) to act as the industry's independent regulator that has, under the explicit language of the Electric Power Industry Reform Act of 2001^[1] (EPIRA), the exclusive mandate as to the implementation, the specific requirements, and effectivity date, of the Competitive Selection Process (CSP) requirement. The decision here constitutes an unwarranted curtailment of the ERC's powers.

The issuance by the ERC of Resolution No. 1, s. 2016 (Resolution No. 1) creating a transition period for Distribution Utilities (DUs) to comply with the CSP requirement was a reasonable well thought-out response to the various concerns posed by DUs, Generation Companies (GenCos) and electric cooperatives which arose from the immediate implementation of the CSP. Accordingly, this issuance — that sought to correct what the ERC itself subsequently recognized as an untimely and unrealistic immediate imposition of a requirement that could not reasonably be complied with — was not, as it cannot reasonably be categorized as, arbitrary, whimsical or capricious.

Indeed, it is a doctrine of long-standing that courts will not interfere in matters which are addressed to the sound discretion of the government agency entrusted with regulation of activities coming under the special and technical training and knowledge of such agency.^[2] For the exercise of administrative discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation.^[3] This task can best be discharged by the government agency concerned and not by the courts.^[4]

With due respect, the Court oversteps its bounds when it, as here, annuls acts of regulators acting within the bounds of law and their areas of expertise. In ruling in the manner it did, the ponencia not only annulled the acts

of the ERC but in fact acted as the regulator itself supplanting its wisdom for that of the agency tasked by law to regulate the energy industry and to assure a steady supply of electricity to the country. The ponencia, in essentially disapproving all the 90 Power Supply Agreements (PSAs) that have been submitted to the ERC between June 30, 2015 and April 30, 2016, has effectively imposed an impossible condition on the PSAs — that they should comply with Department of Energy (DOE) Circular No. DC2018-02-0003 (2018 DOE Circular) when all of them had already been negotiated and executed prior to the effectivity of the 2018 DOE Circular. How this unfortunate decision will impact on the country's electricity supply, only time will tell.

A backgrounder

To engender transparency and ensure reasonable prices of electricity in a regime of free and fair competition, the DOE, on June 11, 2015, issued DOE Department Circular No. DC2015-06-0008 (DOE Circular), which mandated the conduct of CSP as a prerequisite to the approval of a PSA. The DOE Circular likewise provided that the ERC, "upon its determination and in coordination with the DOE shall issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP." [5]

Subsequently, on October 20, 2015, the DOE and ERC jointly issued Joint Resolution No. 1 (Joint Resolution), entitled "A Resolution Enjoining All Distribution Utilities to Conduct Competitive Selection Process (CSP) in the Procurement of Supply for their Captive Market." Section 1 provides:

Section 1. Competitive Selection Process. Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulations to implement the same. (Emphasis and underscoring supplied)

On the same date, the ERC issued Resolution No. 13, s. 2015 (Resolution No. 13) which provided that, pending the issuance of a prescribed CSP, any DU may adopt any accepted form of CSP subject only to minimum standards to be included in the terms of reference. Resolution No. 13 provided that for "PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC." [6] It also provided that it shall be effective immediately following its publication in a newspaper of general circulation in the Philippines, [7] which publication was done on November 6, 2015.

However, when various concerns were raised by stakeholders, the ERC addressed these concerns by restating or moving the effectivity of the CSP implementation under Resolution No. 13, from November 7, 2015 to April 30, 2016, through the issuance of Resolution No. 1 which it issued on March 15, 2016.

The Petition assails Resolution No. 1 for having allegedly been issued with grave abuse of discretion.

The ponencia rules that the ERC committed grave abuse of discretion when it issued Resolution No. 1, and goes even beyond the issues of the petition, by declaring as void ab initio the first paragraph of Section 4 of Resolution No. 13. The ponencia then directs that all PSAs submitted to the ERC on or after June 30, 2015 should comply with the CSP requirement following 2018 DOE Circular, particularly its Annex "A".

As stated at the outset, and for the reasons itemized below, I dissent.

The present case involves questions of fact not cognizable by this Court

At the outset, it should be pointed out that the present case contains several factual matters that are not cognizable by the Court, and which should be threshed out before the appropriate forum. Whether the moving of the effective

date of the CSP effectively puts the requirement into a "deep freeze," as maintained by the ponencia, is a factual matter that cannot intelligently be resolved by the Court. As to whether the restatement of the effectivity date of the CSP affected, or will continue to affect, the supply of electricity for the entire country is another matter that should be properly ventilated before a court equipped to receive evidence. As well, the problems that the DUs faced in the immediate effectivity of the requirement — which led them to seek exemption from the CSP requirement, and which later on prompted the ERC to issue Resolution No. 1 — are also better appreciated in the context of actual evidence. In addition, whether the restatement of the effectivity date of the CSP was reasonable, or effective in guaranteeing the steady supply of electricity for the entire country is a factual matter that demands the presentation of evidence. All these factual matters need to be addressed before the Court can even begin to determine whether the ERC's act of issuing Resolution No. 1 can be considered to have been tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.

These factual contentions cannot be resolved in the petition at hand which is an original petition for certiorari and prohibition filed directly to this Court. As the Court En Banc recently held in *Gios-Samar, Inc. v. DOTC*[8] (*Gios-Samar*):

In fine, while this Court has original and concurrent jurisdiction with the RTC and the CA in the issuance of writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus (extraordinary writs), direct recourse to this Court is proper only to seek resolution of questions of law. Save for the single specific instance provided by the Constitution under Section 18, Article VII, cases the resolution of which depends on the determination of questions of fact cannot be brought directly before the Court because we are not a trier of facts. We are not equipped, either by structure or rule, to receive and evaluate evidence in the first instance; these are the primary functions of the lower courts or regulatory agencies. This is the *raison d'être* behind the doctrine of hierarchy of courts. It operates as a constitutional filtering mechanism designed to enable this Court to focus on the more fundamental tasks assigned to it by the Constitution. It is a bright-line rule which cannot be brushed aside by an invocation of the transcendental importance or constitutional dimension of the issue or cause raised.[9] (Emphasis and underscoring supplied)

Thus, the ponencia committed a grave error in taking cognizance of the petition as it violates the long-standing doctrine of hierarchy of courts — a doctrine that, according to the pronouncement of the Court in *Gios-Samar*, is not simply a matter of policy but is, in fact, a constitutional imperative. This is so because, to borrow the language of the Court in *Gios-Samar*, the Court's "sole role is to apply the law based on the findings of facts brought before us." [10] More importantly:

x x x Strict adherence to the doctrine of hierarchy of courts also proceeds from considerations of due process. While the term "due process of law" evades exact and concrete definition, this Court, in one of its earliest decisions, referred to it as a law which hears before it condemns which proceeds upon inquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Under the present Rules of Court, which governs our judicial proceedings, warring factual allegations of parties are settled through presentation of evidence. Evidence is the means of ascertaining, in a judicial proceeding, the truth respecting a matter of fact. As earlier demonstrated, the Court cannot accept evidence in the first instance. By directly filing a case before the Court, litigants necessarily deprive themselves of the opportunity to completely pursue or defend their causes of actions. Their right to due process is effectively undermined by their own doing.[11]

The foregoing viewpoint from the lens of due process squarely applies in the present case considering that there are a number of cases, administrative and criminal — some of which have pending incidents before the Court — that are directly intertwined with the facts of the present case. Therefore, a finding that the ERC, as a body, committed grave abuse of discretion based on incomplete and contested facts, would be unfair and would constitute a violation of due process for respondents and the several accused in the said cases.

Nature and procedure for approval of PSAs

PSAs are contracts between a DU and a power producer.[12] PSAs, which are bilateral power supply contracts, are made subject to review by the ERC precisely to promote true market competition and prevent harmful monopoly and market power abuse.[13]

The process to get ERC approval for PSAs, based on the ERC Rules, is as follows:

Even before an application is lodged with the ERC, the DUs and the power producers (or GenCos) have already negotiated and executed material documents that comprise their commercial agreements. In fact, the ERC Rules enumerate the numerous documents and information that should be submitted together with the application,[14] which include the following:

(a)

Articles of Incorporation of Generation Company

(b)

Securities and Exchange Commission (SEC) Certificate of Registration of the said Articles of Incorporation of Generation Company

(c)

Latest General Information Sheet of Generation Company

(d)

Board of Investment (BOI) Certificate of Registration of Generation Company

(e)

Environmental Compliance Certificate (ECC) issued by the Department of Environment and Natural Resources (DENR) to the Generation Company

(f)

Power Supply Agreement/Energy Conversion Agreement Contract (PSA/ECA)

(g)

Details of the PSA/ECA

1.

Executive Summary

2.

Sources of Funds/Financial Plans

2.1.

Debt/Equity Ratio

2.2.

Project Cost

2.3.

Annual Interest

2.4.

Computation of Return on Investment/WACC

2.5.

Certification from the Bank/Lending Institution specifying the principal amortization, term and interest during the cooperation period of the loan agreement

3.

Purchased Power Rate

3.1.

Breakdown of the base prices of Operation and Maintenance, Capacity Fee, Fixed Operation Fee, and Energy Fee (provide computations)

3.2.

Sample Computation of Power Rates with the supporting documents on the assumptions taken

3.3.

If applicable, basis/rationale of indexation and level of indexation

4.

Cash flow specifying the following:

4.1.

Initial Costs

4.2.

Breakdown of Operating and Maintenance Expenses and

4.3.

Minimum Energy Off-take (MEOT)

(i)

All details on the procurement process of fuel including requests, proposals received, tender offers, etc.

(j)

Copy of Related Agreements (i.e. Transmission Wheeling Contract, Fuel Supply Agreements, etc.)

(k)

Certificate of Compliance (COC) issued by the ERC pursuant to the Guidelines for the issuance of COC for Generation Companies/Facilities

(l)

Certification by NPC on whether or not Transition Supply Contract (TSC) capacity and energy are expected to be available during the contractual period (include relevant supporting documentation, data and analysis supporting each statement)

(m)

All relevant technical and economic characteristics of the generation capacity, installed capacity, mode of operation, and dependable capacity of the plant

(n)

Details on the procurement process used by the Distribution Utility leading to the selection of the Generation Company including request(s) for proposals, proposal received by the Distribution Utility, tender offers, etc.

(o)

Details regarding transmission projects or grid connection projects necessary to complement the proposed generation capacity, including the parties that will develop and/or own such facilities, any costs related to such project, and specification of the parties responsible for recovery of any costs related to such projects

(p)

Certification regarding the consistencies and inconsistencies between the proposed generation capacity and the [DOE's] Philippine Development Plan (PDP). Any inconsistency shall be supported by relevant analysis including but not limited to, forecasts and assessment of available generation capacity and technology mix.

(q)

Details regarding the load forecast projections in accordance with the latest Distribution Development Plan of the Distribution Utility and the variability of those projections over the proposed contract period, including the estimation of the potential for a reduction in load supplied by the Distribution Utility due to retail competition. Any inconsistency shall be supported by relevant analysis.

(r)

If the application is filed later than two years following the effectivity of the Guidelines for the Recovery of Costs for the Generation Component of the Distribution Utilities' Rates, the application must include an alternative Demand Side Management (DSM) program that could be implemented by the Distribution Utilities if approved by the ERC. The Distribution Utility shall submit the projected costs and benefits of the DSM program.[15] (Emphasis and underscoring supplied)

The foregoing shows that even before an application for a PSA is submitted for approval, the PSA itself and other supporting agreements have already been meticulously, extensively and heavily negotiated and executed by the DUs and the GenCos. Not only have these documents been executed, but the GenCos and the DUs have already spent considerable money and financial resources to complete the documentation, finalized bank loans for the funding of the project, and registered with several government agencies such as the Securities and Exchange Commission, Board of Investments and the Department of Environment and Natural Resources. Thus, when the application is lodged, the PSA is already finalized by the parties, and the ERC, as a regulator, comes in and reviews each and every aspect of the transaction and may change or amend aspects of the transaction that will affect consumers.

In fact, to highlight that the application will not prejudice consumers, the application for approval of PSAs between a DU and GenCos is required to include not only the details on the procurement process used by the DU that led to the selection of the GenCo, including request(s) for proposals, proposals received by the DU, tender

offers, etc.,[16] but also the stipulations on the pricing, and a statement of its effect on the overall rates of the applicant-utility once the contract is approved.[17]

In addition to the foregoing documents, all applications for approval of PSAs must show compliance with the pre-filing requirements[18] before the ERC issues a Notice of Hearing to the parties and such other persons that the ERC may designate.[19] Such notice shall be published.[20]

During the hearing, the applicant is then required to present proof of compliance with the jurisdictional requirements of publication and notice to all affected parties.[21]

Pre-trial will then be conducted, which may be immediately after the applicant has submitted its compliance with the jurisdictional requirements.[22] A pre-trial order will then be issued.[23]

Thereafter, public hearings on the applications are conducted.[24]

During the hearings, the applicant presents its witnesses, who will be subject to cross-examination, re-direct examination, and re-cross examination.[25]

It is only after the reception of evidence and compliance with the foregoing requirements does the ERC then issue a decision on the application.[26]

Parties may request for provisional authority together with their application for approval of their PSA. The ERC resolves these requests within 75 days from the filing of the application, and if it issues a provisional authority, the ERC is mandated to start the hearing on the application within 30 days from the issuance of the provisional authority.[27] The ERC then resolves the application within 12 months from the issuance of the provisional authority.[28]

CSP is merely a tool; it is only one of the mechanisms to ensure the low cost of electricity

The ponencia rules that in the absence of competitive bidding or CSP there is no assurance of the reasonableness of the power rates charged to the consumers.[29]

This is farthest from the truth. With utmost respect to my esteemed colleagues, this is plainly and grievously erroneous.

Pursuant to its power, as provided by the EPIRA, to "[f]acilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs,"[30] and in recognition of the obligation of the DUs to "supply electricity in the least cost manner to its captive market,"[31] the DOE issued the DOE Circular that required all DUs to procure PSAs only through CSP.[32] The DOE Circular explains that CSP "ensures security and certainty of electricity prices of electric power to end-users in the long-term." [33] In fact, one of the DOE Circular's Whereas Clauses invokes the State policy, evinced in the EPIRA, to "ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market." [34]

From the foregoing, it is true that the CSP was devised to provide electricity in the least-cost manner. However, contrary to the reasoning of the ponencia, it is not the only manner to achieve a reasonable cost of electricity.

Prior to the CSP requirement, DUs would secure their supply of electricity by entering into bilateral contracts with GenCos and the choice of which GenCo to have business with — or from which it will get their supply — rested on the sole discretion of the DUs. This did not mean, however, that prior to the CSP requirement, the DUs had unbridled discretion on the price of electricity to impose on consumers. Far from it. The EPIRA itself provides

that DUs "shall have the obligation to supply electricity in the least cost manner to [their] captive market, subject to the collection of retail rate duly approved by the ERC." [35] Further, the ERC was empowered by the EPIRA to review "bilateral power supply contracts" entered into by DUs, and to likewise impose price controls and order the disgorgement of excess

profits where, for instance, the DU is found to be engaged in market power abuse or anti-competitive behavior. [36] Thus:

SECTION 45. Cross Ownership, Market Power Abuse and Anti-Competitive Behavior. — No participant in the electricity industry or any other person may engage in any anti-competitive behavior including, but not limited to, cross-subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.

x x x x

To promote true market competition and prevent harmful monopoly and market power abuse, the ERC shall enforce the following safeguards:

(a) No company or related group can own, operate or control more than thirty percent (30%) of the installed generating capacity of a grid and/or twenty-five percent (25%) of the national installed generating capacity. "Related group" includes a person's business interests, including its subsidiaries, affiliates, directors or officers or any of their relatives by consanguinity or affinity, legitimate or common law, within the fourth civil degree;

(b) Distribution utilities may enter into bilateral power supply contracts subject to review by the ERC: Provided, That such review shall only be required for distribution utilities whose markets have not reached household demand level. For the purpose of preventing market power abuse between associated firms engaged in generation and distribution, no distribution utility shall be allowed to source from bilateral power supply contracts more than fifty percent (50%) of its total demand from an associated firm engaged in generation but such limitation, however, shall not prejudice contracts entered into prior to the effectivity of this Act. An associated firm with respect to another entity refers to any person which, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such entity; and

(c) For the first five (5) years from the establishment of the wholesale electricity spot market, no distribution utility shall source more than ninety percent (90%) of its total demand from bilateral power supply contracts.

x x x x

The ERC shall, *motu proprio*, monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior by any participant in the electric power industry. Upon finding that a market participant has engaged in such act or behavior, the ERC shall stop and redress the same. Such remedies shall, without limitation, include the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits and imposition of fines and penalties pursuant to this Act.

The ERC shall, within one (1) year from the effectivity of this Act, promulgate rules and regulations providing for a complaint procedure that, without limitation, provides the accused party with notice and an opportunity to be heard. (Emphasis and underscoring supplied)

That the ERC possesses inherent and sufficient powers to control the price of electricity is supported not just by the foregoing letter of the EPIRA, but also by the following deliberations of the Senate on the said law:

Senator Guingona. What about the term "excess profits"? What does that mean?

Senator Osmeña (J). Mr. President, obviously, if the GENCOs are charging more than what they should, -- although I do not see how that could possibly happen, because the line starts actually with 29jj and it says

"upon the finding," and there has to be a finding that a market participant has engaged in such act or behavior, meaning anticompetitive or discriminatory act or abuse of market power -- the ERC shall stop and redress the same. Such remedies shall, without limitation, include the imposition of price controls, the issuance of injunctions, the requirement of divestment or disgorgement of excess profits and the imposition of fines and penalties.

Those are the remedies that the law allows the regulator to impose in the event that it has a finding of an abuse of market power, anticompetitive behavior or discriminatory action.

Senator Guingona. Supposing that the GENCO, which is owned 30% by a distributor, owns not only the shares of that distributor, but the distributor and the GENCO both commonly own the subtransformer and they enter into a contract at a certain price which is higher than the others. The distributor prefers to buy the electric power from the GENCO because the GENCO is reliable and has shown efficiency in the regular and constant delivery of power service. As a result, it gets more profits. Would that be an excess profit warranting price controls?

Senator Osmeña (J). Mr. President, there are a number of, shall we say, conditions or circumstances that the gentleman is talking about all in one situation. But the fact is that, the price at which a distribution utility sells to its customers is regulated by the regulatory body. If that distribution utility buys power at a higher rate than the full price, the ERB will not allow it to charge the difference. So, there is a control of how much it can sell this power because that control is coming from the regulatory authority.

The question is whether, hypothetic-ally, a distribution company may choose on the ground of better service or reliability to buy power from a distribution company at a higher cost than its competitor. And the answer to that question is in the affirmative, Mr. President.

If the distribution company makes money in excess of what is generally accepted as the norm of return, then that would be what we call excess profits.

Senator Guingona. So, the ERC would be in a position to impose price controls?

Senator Osmeña (J). That is correct, Mr. President. I mean, in an event like that, the ERC, in fact, does impose. That is the very nature of the ERC. Because the approval of the rates on power being sold by a distributor is subject to the approval of the ERC. So, that is price control, Mr. President.

The electricity we buy has to be sold to us at a rate approved by the ERB right now. That is price control.[37] (Emphasis and underscoring supplied)

From the foregoing, it is crystal clear that the ERC holds sufficient power, as the independent regulator of the industry, to ensure that the prices of electricity passed on to the consumers are at a reasonable cost, even without the conduct of the CSP.

Indeed, the EPIRA was passed as far back as 2001, or 18 years ago, and the DOE and ERC only conceptualized the CSP in recent years. Throughout the years that the EPIRA was already in effect, and while there was still no CSP requirement in place, the ERC had been continuously doing its mandate of regulating the industry — particularly the DUs — to ensure that the prices passed on to the consumers are at a reasonable cost. Again, this is supported by the EPIRA itself, as it provides:

SECTION 43. Functions of the ERC. — The ERC shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:

x x x x

(f) In the public interest, establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably. The ERC may adopt alternative forms of internationally-accepted rate-setting methodology as it may deem appropriate. The rate-setting methodology so adopted and applied must ensure a reasonable price of electricity. The rates prescribed shall be non-discriminatory. To achieve this objective and to ensure the complete removal of cross subsidies, the cap on the recoverable rate of system losses prescribed in Section 10 of Republic Act No. 7832, is hereby amended and shall be replaced by caps which shall be determined by the ERC based on load density, sales mix, cost of service, delivery voltage and other technical considerations it may promulgate. The ERC shall determine such form of rate-setting methodology, which shall promote efficiency. x x x[38] (Emphasis and underscoring supplied)

In fact, the Implementing Rules and Regulations (IRR) of the EPIRA empowers the ERC to constantly and continually monitor and accordingly penalize any anti-competitive act that distorts competition or harms consumers, thus:

Section 7. ERC Responsibilities.

x x x x

(d)

ERC shall, motu proprio, monitor and penalize any market power abuse or anti-competitive or unduly discriminatory act or behavior, or any unfair trade practice that distorts competition or harms consumers, by any Electric Power Industry Participant. Upon a finding of a prima facie case that an Electric Power Industry Participant has engaged in such act or behavior, the ERC shall after due notice and hearing, stop and redress the same. Such remedies shall, without limitation, include the separation of the business activities of an Electric Power Industry Participant into different juridical entities, the imposition of bid or price controls, issuance of injunctions in accordance with the Rules of Court, divestment or disgorgement of excess profits, and imposition of fines and penalties pursuant to Section 46 of the Act.[39]

Further, bidding strategies that limit the market participation of a GenCo under conditions that will result in significant increases in market prices are considered anti-competitive behavior and unfair trade practice.[40] It is thus totally inaccurate and egregiously wrong to claim that the CSP "is the only way to ensure a transparent and reasonable cost of electricity to consumers." [41]

Indeed, it bears stressing that the CSP is not required by the EPIRA itself. It is a mechanism which, in the DOE's and ERC's exercise of their wisdom, was envisioned to further ensure the low cost of electricity.

Stated differently, the CSP requirement is merely a policy decision by the DOE and implemented by the ERC to ensure the reasonableness of the cost of electricity. It is only a tool. It is but one of the various means that the ERC may adopt to control the price of electricity and ensure that it is set at a reasonable cost.

Premature to claim that the CSP has been put into deep freeze

The ponencia further rules that (a) postponing the effectivity of the CSP from June 30, 2015 to November 7, 2015 and again postponing the effectivity to April 30, 2016, or by 305 days, allows DUs to avoid the CSP, which took effect on June 30, 2015; and (b) the extension effectively freezes for 20 years the DOE-mandated CSP to the great prejudice of the public. The purpose of the CSP is to compel DUs to purchase their electric power at a transparent, fair, reasonable, and competitive cost, since this cost is passed on to consumers. The ERC's extension

unconscionably placed this purpose in deep freeze for 20 years.[42]

Further, according to the ponencia, "[t]he postponement effectively prevented for at least 20 years the enforcement of a mechanism intended to ensure 'transparent and reasonable prices in a regime of free and fair competition' x x x. In short, in the absence of CSP there is no transparency in the purchase by DUs of electric power, and thus there is no assurance of the reasonableness of the power rates charged to consumers." [43]

The ponencia goes further and argues that the non-implementation of the CSP will affect the entire country as there are 83 PSAs filed with the ERC from April 16, 2016 to April 29, 2016, excluding the seven PSAs where Meralco is a contracting party.[44]

I again disagree.

As discussed, the EPIRA and the ERC already have mechanisms in place long before the decision to implement the CSP to ensure that the public will not be prejudiced.

Here, the ERC has yet to approve the PSAs. In fact, as of the filing of ERC's Comment, none of them had yet been approved.[45] The mere submission of the application for the approvals of the PSAs does not necessarily mean that the PSAs have been approved or will be approved.

Also, even though the PSAs did not undergo the CSP, this will not mean that the public will be prejudiced. The applicant still has to show that the PSA it has entered into will still result in the least cost to its captive market. The ERC will still have to look into the many factors enumerated above, including the procurement process of the distribution utility, in order to see how the proposal from the GenCo will be the least costly to its captive market. In fact, one of the first things that the applicant will submit to the ERC is the effect of the contract on the overall rates of the DU.

It is therefore premature, if not outrightly erroneous, to claim that the executions of the PSAs during the transition period have placed the CSP into "deep freeze" for the duration of the PSAs, and that the public will be prejudiced. During the transition period provided by Resolution No. 1, and even before the implementation of the CSP, the ERC, in compliance with its mandate under the EPIRA, has the power — nay, the duty — to ensure that any bilateral power supply contracts entered into by the DUs will be consistent with their mandate that they supply electricity to their captive market in the least cost manner.

Although the CSP is one manner by which this is attained, its non-application to the PSAs in this case — which, again, have yet to be approved — does not mean that the PSAs would prejudice the public. Once more, the EPIRA and its IRR are clear that acts that harm customers and those that prohibit participation of GenCos to increase market prices are prohibited. These preceded the institution of the CSP and remain to be in force even if the CSP is implemented. Thus, with or without the CSP, the public is protected from practices that harm them or that would result in market increases arising from non-competitive practices. As stated above, the ERC, among other powers, may direct the disgorgement of excess profits and impose price control mechanisms, all with the objective of ensuring the reasonableness of the price of electricity.

The ERC is an independent regulatory body separate and distinct from the DOE

The ponencia rules that the ERC does not have the power to supplant the policies of the DOE[46] and that ERC's powers are limited to the enforcement of rules and regulations of the EPIRA.[47] However, it should be noted that in issuing Resolutions Nos. 13 and 1, the ERC did not supplant any policy of the DOE.

First of all, it should be emphasized that the ERC, under the EPIRA, is a purely independent regulatory body performing the combined quasi-judicial, quasi-legislative and administrative functions in the electric industry.

Section 38 of the EPIRA mandated the creation of an "independent, quasi-judicial regulatory body to be named the Energy Regulatory Commission." To be sure, one of the most important changes introduced by the EPIRA in the restructuring of the energy industry was the creation of an independent regulatory body. Section 2 of the EPIRA states:

SECTION 2. Declaration of Policy. — It is hereby declared the policy of the State:

x x x x

(j) To establish a strong and purely independent regulatory body and system to ensure consumer protection and enhance the competitive operation of the electricity market x x x. (Emphasis and underscoring supplied)

The deliberations of the Senate on the EPIRA also reveal that it was the intention of the legislature to create a regulatory body that is independent and separate from the DOE:

Senator Guingona. I thank the gentleman for that. The Distribution Code, however, shall be prepared by the Energy Regulatory Commission (ERC) and the wheeling rates and connection fees from the residents of the mountaintop will have to be approved by the ERC.

Senator Osmeña (J). That is correct, Mr. President.

Senator Guingona. We were under the impression before when we were deliberating on the Energy Regulatory Authority that it was the Energy Regulatory Authority that would impose or determine the prices of electricity for distributors.

Senator Osmeña (J). Mr. President, I am sorry for the confusion. When we passed on Second Reading the Energy Regulatory Authority bill, the suggestion, I think, made on the Floor of Sen. Serge Osmeña was that all regulatory bodies would be referred to uniformly. I think we agreed that all of them would be referred to as a commission.

Anyway, Mr. President, whether we call it as a board, a commission or an authority, it is the regulator or the regulatory body.

Senator Guingona. I thank the gentleman for that, Mr. President. But there seems to be some difference because the Energy Regulatory Commission would be under the Department of Energy or attached to it and our concept of a regulatory body, under the previous interpellations, was that it was going to be an independent body, independent from any department, independent from pressure from the Executive so that it could really fix the rational price for electricity.

Senator Osmeña (J). Mr. President, in the bill that we have approved on Second Reading on the energy regulatory body -- whatever we want to call it -- we have provided for as much independence as we could possibly provide. That bill has only been approved precisely on Second Reading so that we may revisit, if we may want to, whatever provisions therein we want now to discuss after having gone through this bill. Because what we have before us is the last bill that we expect to take up in this session.[48] (Emphasis and underscoring supplied)

In *Freedom From Debt Coalition v. ERC*[49] (*Freedom From Debt Coalition*), the Court already recognized that the independence of the ERC was part and parcel of the objectives of the EPIRA:

Thus, the EPIRA provides a framework for the restructuring of the industry, including the privatization of the assets of the National Power Corporation (NPC), the transition to a competitive structure, and the delineation of the roles of various government agencies and the private entities. The law ordains the division of the industry into four (4) distinct sectors, namely: generation, transmission, distribution and supply. Corollarily, the NPC generating plants have to be privatized and its transmission business spun off and privatized thereafter.

In tandem with the restructuring of the industry is the establishment of "a strong and purely independent regulatory body." Thus, the law created the ERC in place of the Energy Regulatory Board (ERB).[50] (Emphasis, italics and underscoring supplied)

The intent to separate the regulatory body from the DOE is further revealed from an analysis of both the letter of the law and the deliberations of the lawmakers.

Under the EPIRA, the ERC is empowered to perform the following functions:

SECTION 43. Functions of the ERC. — The ERC shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:

(a) Enforce the implementing rules and regulations of this Act;

(b) Within six (6) months from the effectivity of this Act, promulgate and enforce, in accordance with law, a National Grid Code and a Distribution Code which shall include, but not limited to, the following:

(i) Performance standards for TRANSCO O & M Concessionaire, distribution utilities and suppliers: Provided, That in the establishment of the performance standards, the nature and function of the entities shall be considered; and

(ii) Financial capability standards for the generating companies, the TRANSCO, distribution utilities and suppliers: Provided, That in the formulation of the financial capability standards, the nature and function of the entity shall be considered: Provided, further, That such standards are set to ensure that the electric power industry participants meet the minimum financial standards to protect the public interest. Determine, fix, and approve, after due notice and public hearings the universal charge, to be imposed on all electricity end-users pursuant to Section 34 hereof;

(c) Enforce the rules and regulations governing the operations of the electricity spot market and the activities of the spot market operator and other participants in the spot market, for the purpose of ensuring a greater supply and rational pricing of electricity;

(d) Determine the level of cross subsidies in the existing retail rate until the same is removed pursuant to Section 74 hereof;

(e) Amend or revoke, after due notice and hearing, the authority to operate of any person or entity which fails to comply with the provisions hereof, the IRR or any order or resolution of the ERC. In the event a divestment is required, the ERC shall allow the affected party sufficient time to remedy the infraction or for an orderly disposal, but shall in no case exceed twelve (12) months from the issuance of the order;

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

setting methodology used is RORB, it shall be subject to the following guidelines:

- (i) For purposes of determining the rate base, the TRANS CO or any distribution utility may be allowed to revalue its eligible assets not more than once every three (3) years by an independent appraisal company: Provided, however, That ERC may give an exemption in case of unusual devaluation: Provided, further, That the ERC shall exert efforts to minimize price shocks in order to protect the consumers;
 - (ii) Interest expenses are not allowable deductions from permissible return on rate base;
 - (iii) In determining eligible cost of services that will be passed on to the end-users, the ERC shall establish minimum efficiency performance standards for the TRANSCO and distribution utilities including systems losses, interruption frequency rates, and collection efficiency;
 - (iv) Further, in determining rate base, the TRANSCO or any distribution utility shall not be allowed to include management inefficiencies like cost of project delays not excused by force majeure, penalties and related interest during construction applicable to these unexcused delays; and
 - (v) Any significant operating costs or project investments of the TRANSCO and distribution utilities which shall become part of the rate base shall be subject to verification by the ERC to ensure that the contracting and procurement of the equipment, assets and services have been subjected to transparent and accepted industry procurement and purchasing practices to protect the public interest.
- (g) Three (3) years after the imposition of the universal charge, ensure that the charges of the TRANSCO or any distribution utility shall bear no cross subsidies between grids, within grids, or between classes of customers, except as provided herein;
- (h) Review and approve any changes on the terms and conditions of service of the TRANSCO or any distribution utility;
- (i) Allow the TRANSCO to charge user fees for ancillary services to all electric power industry participants or self-generating entities connected to the grid. Such fees shall be fixed by the ERC after due notice and public hearing;
- (j) Set a lifeline rate for the marginalized end-users;
- (k) Monitor and take measures in accordance with this Act to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant;
- (l) Impose fines or penalties for any non-compliance with or breach of this Act, the IRR of this Act and the rules and regulations which it promulgates or administers;
- (m) Take any other action delegated to it pursuant to this Act;
- (n) Before the end of April of each year, submit to the Office of the President of the Philippines and Congress, copy furnished the DOE, an annual report containing such matters or cases which have been filed before or referred to it during the preceding year, the actions and proceedings undertaken and its decision or resolution in each case. The ERC shall make copies of such reports available to any interested party upon payment of a charge which reflects the printing costs. The ERC shall publish all its decisions involving rates and anti-competitive cases in at least one (1) newspaper of general circulation, and/or post electronically and circulate to all interested electric power industry participants copies of its resolutions to ensure fair and impartial treatment;
- (o) Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all

retail suppliers;

(p) Act on applications for or modifications of certificates of public convenience and/or necessity, licenses or permits of franchised electric utilities in accordance with law and revoke, review and modify such certificates, licenses or permits in appropriate cases, such as in cases of violations of the Grid Code, Distribution Code and other rules and regulations issued by the ERC in accordance with law;

(q) Act on applications for cost recovery and return on demand side management projects;

(r) In the exercise of its investigative and quasi-judicial powers, act against any participant or player in the energy sector for violations of any law, rule and regulation governing the same, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts by any participant in the energy sector or by any person, as may be provided by law, and require any person or entity to submit any report or data relative to any investigation or hearing conducted pursuant to this Act;

(s) Inspect, on its own or through duly authorized representatives, the premises, books of accounts and records of any person or entity at any time, in the exercise of its quasi-judicial power for purposes of determining the existence of any anti-competitive behavior and/or market power abuse and any violation of rules and regulations issued by the ERC;

(t) Perform such other regulatory functions as are appropriate and necessary in order to ensure the successful restructuring and modernization of the electric power industry, such as, but not limited to, the rules and guidelines under which generation companies, distribution utilities which are not publicly listed shall offer and sell to the public a portion not less than fifteen percent (15%) of their common shares of stocks: Provided, however, That generation companies, distribution utilities or their respective holding companies that are already listed in the PSE are deemed in compliance. For existing companies, such public offering shall be implemented not later than five (5) years from the effectivity of this Act. New companies shall implement their respective public offerings not later than five (5) years from the issuance of their certificate of compliance; and

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

From the foregoing functions, it is unequivocally clear that the EPIRA intended the ERC to be the body in charge of regulating the participants in the energy sector, particularly the DUs. In contrast to this regulatory role of the ERC, the functions of the DOE[51] are mainly on policy-making and direction-setting. That the ERC is the regulator, on the one hand, and that the DOE is the policy-maker, on the other, is evident from the following exchange between Senators John Osmeña and Juan Ponce Enrile:

The President. Senator Enrile is recognized.

Senator Enrile. May I go back to page 3, line 19, DISTRIBUTION CODE.

"DISTRIBUTION CODE" after the word "CODE" and before the article "a", insert AS PROMULGATED BY THE DEPARTMENT OF ENERGY AND ENFORCED AND IMPLEMENTED BY THE ENERGY REGULATORY AUTHORITY.

Senator Osmeña (J). Mr. President, in TRANSCO and again in the bill on the Energy Regulatory Board -- in fact, this came out in our debates -- we pointed out the historical situation that the predecessor of the Energy Regulatory Board was the Philippine Public Service Commission created by a Commonwealth Act and it was always the agency that promulgated this. Therefore, we are pursuing that historical situation with respect to the

promulgation of the distribution and the grid code, Mr. President.

Senator Enrile. But I wonder whether this factor may tend to reconsider the position of the sponsor, Mr. President. When the Public Service Commission Act was adopted, we did not have a Department of Energy. Therefore, that function was limited and given to the Public Service Commission. Since we have a Department of Energy that is now tasked to defining policies in the energy sector, I am just wondering whether it is not appropriate at this time to really reflect the presence of the Department of Energy and grant to the Department of Energy the authority and initiative to promulgate the Distribution Code. And the enforcement and implementation of it shall be done by the Energy Regulatory Authority which is actually the successor of the Public Service Commission.

Senator Osmeña (J). Mr. President, that is a debate that the committee had to face in the process of hearings. Precisely, we were of the mind that the Department of Energy sets policies. It prepares the power development plans. It sets goals for the country.

The manner of the regulation of a distribution utility, Mr. President, which is the essence of the distribution code -- it tells the distribution utility what it can and what it cannot do -- is a matter that belongs to the Energy Regulatory Board.

I am sorry but this matter has been a settled issue. I hope Senator Enrile will understand.

Senator Enrile. I thank the distinguished sponsor for that, Mr. President.

If that is the position of the sponsor, Mr. President, I will not insist on my proposed amendment.

The President. Thank you, Senator Enrile.[52] (Emphasis and underscoring supplied)

In the deliberations for another part of the EPIRA, the issue of whether the DOE can dabble in matters referring to distribution and DUs — a matter that is within the exclusive jurisdiction of the ERC — again surfaced:

The President. Senator Guingona is recognized for an anterior amendment.

Senator Guingona. On line 11, after the word "generation" comma(,), insert the word DISTRIBUTION so that it will read: "repair and maintenance of generation, DISTRIBUTION and transmission facilities."

The President. What does the sponsor say?

Senator Osmeña (J). Mr. President, we would like to read the whole paragraph: "The Power Development Program refers to the indicative plan for managing electricity demands through energy efficient programs and for upgrading, expansion, rehabilitation, repair, and maintenance of generation and transmission facilities formulated and updated yearly by the DOE in coordination with the generation, transmission, and utility companies."

When we add the word DISTRIBUTION, Mr. President, are we, therefore, saying that the PDP is a program which would involve rehabilitation, repair, and maintenance of generation, DISTRIBUTION, and transmission facilities?

Again, Mr. President, I am sorry to state that this is a back-door attempt of the DOE to a covetous desire to take over the promulgation of the distribution rules.

Senator Guingona. This refers to the Power Development Program.

Senator Osmeña (J). Yes, Mr. President, but it says that it provides for the upgrading, expansion, rehabilitation, repair, and maintenance. Makikialam na naman sila sa distribution.

The President. So, the sponsor is not accepting the Guingona amendment?

Senator Osmeña (J). No, Mr. President.

Senator Guingona. May I know the reason again? Because if it is a Power Development Program, I think it is logical to include distribution.

Senator Osmeña (J). Mr. President, power development program....

Senator Guingona. It is only a plan.

Senator Osmeña (J). One has to appreciate the ingenuity of the bureaucracy. One of the most heated arguments within government agencies on this bill, Mr. President, has been the result of the attempt of the DOE to take over distribution which our committee sat through.

The PDP is a plan for managing demand through energy-efficient programs. Therefore, Mr. President, by allowing the DOE to plan energy-efficient programs, it intrudes into the functions of the ERB which controls distribution.

Senator Guingona. So, the Power Development Plan will include distribution?

Senator Osmeña (J). Mr. President, the Power Development Plan will include upgrading, expansion, rehabilitation, repair and maintenance of generation and transmission facilities. It is just a plan to make available a certain amount of power. It is not a plan that will tell a distribution company where, how, or in what manner it should do its business.

Senator Guingona. Yes, but the distribution is regulated, Mr. President. Therefore, if it is to be regulated, it must tell the company what is expected of it as far as standards are concerned.

Senator Osmeña (J). Mr. President, standards are part and parcel of the responsibility of the ERB which promulgates a distribution code.[53] (Emphasis and underscoring supplied)

Quite evident from the foregoing is the intention of the legislature — reflected in both the letter of the law and the deliberations — to create an independent ERC that is separate from the DOE. Thus, while the DOE validly set the CSP requirement, acting within the scope of its powers as the industry's policy-maker, the EPIRA nonetheless lodges the particulars, i.e., its implementation, the specific requirements, and its effectivity date, among others, to ERC — the industry's independent regulator.

Guided by the pronouncement of the Court in Freedom From Debt Coalition that "[i]n determining the extent of powers possessed by the ERC, the provisions of the EPIRA must not be read in separate parts"[54] and that "the law must be read in its entirety, because a statute is passed as a whole, and is animated by one general purpose and intent,"[55] it is therefore unquestionable that EPIRA granted the ERC sufficient powers to set when the players in the energy sector will be bound by the policy set by DOE. This is especially true in this case when, as will be shown below, the DOE itself did not set the timeframe for the effectivity of the policy it put in place, and even, in fact, delegated to the ERC the power to issue supplemental guidelines for its implementation.

The ERC has the power to issue the assailed Resolution

As the independent regulator of the industry, the ERC therefore had the power and jurisdiction to state, and restate, the effectivity date of the requirement to undergo the CSP before a PSA between a GenCo and a DU is approved.

In this regard, the ponencia, however, rules that as soon as the DOE's Circular became effective on June 30, 2015, the CSP already became effective, so that all PSAs submitted on or after June 30, 2015 are required to undergo the CSP.[56] The ponencia further rules that the ERC therefore unilaterally moved the effectivity of the CSP twice — first, when it issued Resolution No. 13 and stated that it would be effective after its publication (it became

effective on November 7, 2015) and second, when it issued Resolution No. 1 which moved the effectivity from November 7, 2015 to April 30, 2016.[57] Further, the ponencia rules that even if the ERC is empowered to issue the appropriate regulations to implement the CSP,[58] this is limited by the fact that such regulation should be issued in coordination with the DOE.[59]

Justice Bernabe adds, in her Separate Concurring Opinion, that the ERC had no sole discretion under Joint Resolution No. 1 to promulgate whatever rules it deemed fit to implement the CSP.[60] For Justice Bernabe, even if Joint Resolution No. 1 gave the ERC the power to issue the "appropriate guidelines to implement the [CSP]", the term "appropriate guidelines" refers only to the "supplemental guidelines" that the ERC may issue for the design and execution of the CSP following Section 4 of the DOE Circular.[61] In the same breath, however, Justice Bernabe disagrees with the ponencia's assertion that the CSP became effective on June 30, 2015 because, according to her, the Joint Resolution explicitly recognized the ERC's power to issue the specific guidelines on the CSP, and Resolution No. 13 is not being questioned in this petition thus rendering it impossible for the CSP to be effective by June 30, 2015.[62]

I agree with Justice Bernabe that the CSP could not have been effective by June 30, 2015 because by June 30, 2015, all that was set was only the policy that the CSP would be the mode of procuring PSAs. There were no guidelines yet on how the CSP was to be implemented. Indeed, Resolution No. 13 is not even questioned in this petition and the DOE Circular and the Joint Resolution are both clear in that the ERC still needed to issue the guidelines to implement the CSP, which it did in Resolution No. 13.

I, however, disagree that the ERC was required to coordinate with the DOE in setting the effective date of the implementation of the CSP.

I stress anew that Resolutions Nos. 13 and 1 cannot be said to have amended the DOE Circular because the latter did not set the effective date or the start of the implementation of the CSP requirement. The DOE Circular was a mere policy-setting document that put in place the CSP requirement, and it did not require that the CSP must be implemented by June 30, 2015, because by then no CSP guidelines existed. In fact, the effective date of the CSP Guidelines of November 7, 2015 was set only by Resolution No. 13 which, in turn, the ERC could solely issue precisely because it was empowered by the law, i.e., the EPIRA. The power of the ERC to set the effectivity date was even recognized by the DOE in the Joint Resolution.

When it issued Resolution No. 13, the ERC had yet to realize the effects of an immediate imposition of the CSP requirement. When the ERC subsequently decided to suspend the implementation of the CSP requirement by a few months, through the issuance of Resolution No. 1, in response to various issues raised by the players in the energy industry, it was, therefore, still acting within its powers as granted by the EPIRA, the exercise of which was not limited or contracted by the issuance of the Joint Resolution.

There was thus no grave abuse of discretion when Resolutions Nos. 13 and 1 were issued because the ERC was acting within the scope of powers granted to it. It is erroneous to require the ERC to coordinate with, much less to seek the approval of, the DOE in connection with the issuance of Resolutions Nos. 13 and 1. It simply did not, and does not, need to.

That the ERC was not required to coordinate with the DOE with regard to the date of effectivity of the CSP is fundamentally anchored on the EPIRA which created the ERC as a body separate and distinct from the DOE. Again, at the risk of belaboring the point, even Joint Resolution No. 1 recognized the power of ERC to state and restate the effective date of the CSP through Resolution No. 13, and later on Resolution No. 1.

In sum, it is thus fundamentally erroneous to conclude that the ERC needed to coordinate with the DOE before

issuing Resolutions Nos. 13 and 1 when:

(1)

The resolutions affect, and deal with, how DUs conduct their business, which is a domain that is within the sole and exclusive jurisdiction of the ERC; and

(2)

The ERC's power to issue them on its own was recognized by the Joint Resolution itself.

The grant of rule-making power necessarily includes the power to amend, revise, alter, or repeal the same

Further, in arguing that the ERC committed a grave abuse of discretion in restating the effectivity date of Resolution No. 13, petitioner, in effect, is saying that a body exercising quasi-legislative powers cannot suspend or revoke the rules and regulations it has itself promulgated once it has become effective. It is as if the rules and regulations issued by the ERC become irrevocable once issued. This lacks basis, and is undeniably absurd.

The legislative power has been described generally as the power to make, alter, and repeal laws.[63] The authority to amend, change, or modify a law is thus part of such legislative power.[64] It is the peculiar province of the legislature to prescribe general rules for the government of society.[65] However, the legislature cannot foresee every contingency involved in a particular problem that it seeks to address.[66] Thus, it has become customary for it to delegate to instrumentalities of the executive department, known as administrative agencies, the power to make rules and regulations.[67] This is because statutes are generally couched in general terms which express the policies, purposes, objectives, remedies and sanctions intended by the legislature.[68] The details and manner of carrying out the law are left to the administrative agency charged with its implementation.[69]

If the Congress itself, which possesses plenary legislative powers, cannot pass irrevocable laws,[70] there is more reason then to hold that entities exercising delegated or quasi-legislative powers are also covered by the same proscription.

As earlier established, the ERC has the power to issue rules and regulations as regards the implementation of the CSP. Accordingly, following the doctrine of necessary implication, this grant of express power to formulate implementing rules and regulations must necessarily include the power to amend, revise, alter, or repeal the same.[71] This is to allow administrative agencies the needed flexibility in formulating and adjusting the details and manner by which they are to implement the provisions of a law, in order to make them more responsive to the times.[72]

Therefore, the ERC, being vested with the power to promulgate rules and regulations concerning its mandate, is also necessarily vested with the power to amend, revise, alter or repeal the same. Thus, the creation of a transition period is within the powers of the ERC.

Given the foregoing discussion — that ERC had the power to issue Resolutions Nos. 13 and 1, and that this power is anchored on the EPIRA itself — then it cannot be said that the body acted with grave abuse of discretion amounting to lack or excess of jurisdiction. The ERC, as a body made up of its commissioners, thus issued the resolutions in good faith, or on the basis of its interpretation of the powers granted to it by the EPIRA.

The restatement of the effectivity date of ERC Resolution No. 13 is reasonable

The OSG asserts that the issuance of Resolution No. 1 was in the exercise of ERC's sound judgment as a regulator and pursuant to its mandate under the EPIRA to "protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power." [73] I agree.

And in the exercise of its regulatory powers, the ERC's restatement of the effectivity date of the CSP implementation cannot be anything but valid. The creation of the transition period was done in good faith and was neither whimsical nor capricious — it was prompted by the ERC's receipt of numerous letters from stakeholders posing various concerns. Excerpts of some of these letters are as follows:

- November 25, 2015 letter[74] of SMC Global Power, which requests that it be allowed to file its PSCs because the requirements imposed pursuant to the CSP implementation were non-existent when its PSCs were evaluated and signed:

Upon filing with the ERC, however, our counter-part counsel for the DUs and ECs (Dechavez & Evangelista Law Offices) informed us that even at the pre-filing stage, the ERC rejects applications which do not include the following: DUs/ECs Invitation to Participate and Submit Proposal, DUs/ECs' Terms of Reference, Proposals Received by the DU/EC, tender offers, DU/ECs Special Bids and Awards Committees (SBAC) Evaluation Report, DU Board Resolution confirming the approval of the SBAC Evaluation report and Notice of Award issued by the DU/EC.

It is significant to note that all of these requirements, even the creation of the SBAC, were non-existent when our PSCs were evaluated and signed. x x x

To this end, we respectfully request the consideration of the Honorable Commission to allow us to file, and for the Commission to accept, the applications for approval of the subject PSCs. In our case, mere filing is critical for us to achieve financial close for purposes of funding our power plant project.

The filing of the application will enable us to continue financing the Limay Phase 1 Project, Malita Project and proceed with Limay Phase 2 Project to augment the capacity in the Luzon and Mindanao Grids and prevent the projected shortage in 2017.[75]

- December 1, 2015 letter[76] of Philippine Rural Electric Cooperative Association, Inc. (PHILRECA), which requests for exemption from coverage of DOE Circular:

May we respectfully furnish you a copy of the PHILRECA Board Resolution No. 10-23-2015 "Resolution Requesting the Department of Energy (DOE) and the Energy Regulatory Commission (ERC) to exempt the Southern Philippines Power Corporation (SPPC) and Western Mindanao Power Corporation (WMPC) from the coverage of Department Circular No. DC2015-06-0008".[77]

- December 10, 2015 letter[78] of Agusan del Norte Electric Cooperative, Inc. (ANECO), which requests confirmation that any extension of PSAs (or ESAs) previously approved is outside the scope of Resolution No. 13:

The ESA, as amended and supplemented, will expire on 25 June 2016. Given the power shortage in Mindanao, the insufficiency of the NPC/PSALM supply, taken together with the continuing demand growth of our end-users, we wish to exercise the option provided under the Amendment to the ESA to extend the Term of our Amended and Supplemented ESA with TMI x x x.

Relating this provision to Reso 13, we are of the impression that Reso 13 may not be strictly applied to ESA extensions, especially considering that the Honorable Commission has already meticulously scrutinized and approved TMI's Fixed O&M, Energy and Fuel Fees, as well as its asset base in determining the Capital Recovery Fee.

x x x x

Since Section 4 of the Resolution states that the CSP requirement shall not apply to PSAs (or ESAs) already filed with the ERC, we are of the understanding that an extension of an existing ESA, which is part of the provisions submitted to and has been approved by the ERC, albeit provisionally, is outside the coverage of the

present Resolution. Hence, we intend to enter into an extension of our existing ESA with TMI, applying the same methodology and asset base as approved by the Honorable Commission in arriving at the rates. x x x[79]

- December 14, 2015 letter[80] of SMC Global Power, which seeks acceptance and approval of PSCs that were signed prior to the issuance of Resolution No. 13:

Further to our letter dated November 25, 2015, we would like to reiterate our request to the Honorable Commission En Banc to accept and allow the filing of Power Supply Contracts (PSC) already signed prior to its issuance Resolution No. 13, Series of 2015 "A Resolution Directing All Distribution Utilities (DUs) to Conduct Competitive Selection Process (CSP) in the Procurement of Their Supply to the Captive Market."

We wish to stress that in the event the subject PSCs cannot be filed, the Honorable Commission would effectively invalidate the same to the detriment of the contracting parties and the industry. It is significant to note that the Distribution Utilities (DU) and Electric Cooperatives (EC) have carefully evaluated and considered the most advantageous terms and conditions for its consumers prior to signing the subject PSCs.

x x x x

Meanwhile, another round of CSP may likely alter the terms of the contract that could prove to be disadvantageous to the DU or EC.

Considering the execution of the PSCs and the stage of their application process prior to the issuance of the CSP requirement, we beg the indulgence of the Honorable Commission En Banc to accept the subject PSCs and allow the filing thereof to proceed.[81]

- December 21, 2015 letter[82] of Camarines Sur IV Electric Cooperative, Inc. (CASURECO), which asks for an extension to file its joint application:

On 03 August 2015, CASURECO IV and San Miguel Energy Corporation ("SMEC") entered into a mutual agreement before this Honorable Commission to pre-terminate the Power Supply Contract dated 23 August 2013 between CASURECO IV and SMEC ("SMEC PSC"). As a result of the pre-termination of SMEC PSC, beginning 00:00H of 26 August 2015, SMEC ceased to supply power to CASURECO IV.

x x x Because CASURECO IV received no proposals for its power supply requirements, it began direct negotiations with ULGEI.

x x x x

Since CASURECO IV received such letter on 24 September 2015, CASURECO IV and ULGEI had until 23 November 2015 to file a joint-application for the approval of a power supply agreement. Due, however, to the extensive negotiations conducted to provide the Franchise Area a competitive and reliable supply of power, and since it will take time to prepare and finalize a power supply agreement, CASURECO IV and ULGEI requested this Honorable Commission for an additional thirty (30) days within which to file a joint-application, or until 23 December 2015.[83]

- March 9, 2016 letter[84] of Aldan Electric Cooperative Inc. (AKELCO), which poses some queries regarding the CSP requirement:

We write to advance our queries pertaining to the Competitive Selection Process which is now part of the Power Supply Procurement requirements for all DUs. The related ERC Resolution No. 13 Series of 2015 was already in effect 15 days after its publication last October 20, 2015.

In the case of AKELCO where in previous years, two (2) Power Supply Contracts for base load requirements were already signed by both parties but were not filed with the ERC before the effectivity of the CSP. The queries are as follows:

- If the Power Supply Contracts that were not filed due to non-compliance to CSP still binding?
- What are the ERC's recommended modes of CSPs? Is the so-called "Price Challenge" or Swiss Challenge allowed? And,
- Presuming that some of the stipulated provisions (i.e. date of initial delivery, base load demand requirements) in the said contracts cannot be met due to CSP requirement or already unacceptable to either of the party, can we still re-negotiate the provisions and at the same time introduce the ERC recommended terms of reference?[85]

- December 15, 2015 letter[86] of Astronergy Development, which raises the issue of impairment of contracts:

We respectfully request a meeting with you at your earliest convenience, so that we can discuss our peculiar situation following the issuance of the Resolution. Our meeting objective is to understand your views regarding the retroactive application of the Resolution and further, to understand how to harmonize Resolution in light of the third party legal opinion we have attached herein for your consideration. Lastly, we hope to be allowed a brief opportunity to present and discuss our views on why the Commission's staff should interpret the Resolution in a manner that is consistent with the Commission's past written responses on RE to the Senate Energy Committee; and the Commission's related Decision relevant to our particular circumstances.

x x x x

Section 4 of the Resolution requires the DUs to conduct a CSP for PSAs that have not yet submitted its PSA with the ERC. We believe the result is a retroactive application of the Resolution that impairs our contracts that were entered into in good faith. This creates uncertainties, including the possible revision and rescission of existing binding agreements, which our group of companies, and their shareholders and creditors, are greatly concerned about. There are also specific considerations with each DU: for each PSA we have executed since the application of the Resolution would potentially lead to losses and additional project delay. Any further delay (such as revisiting CSP) would result in a breach of contract for not meeting deadlines.[87]

It bears stressing that these concerns were recognized to be reasonable and legitimate concerns by the DOE itself as shown by the act of the DOE of endorsing one of these letters to the ERC. On January 18, 2016, the DOE endorsed for the ERC's consideration to allow Abra Electric Cooperative (ABRECO) to directly negotiate with a power supplier, albeit without following the CSP requirement.[88] The DOE explained that the said request for endorsement was made in consideration of ABRECO's situation as an ailing electric cooperative and to prevent its vulnerability to volatile wholesale electricity spot market (WESM) prices given that its supply is sourced from it.[89]

The ponencia views this letter as a confirmation that the DOE directed the ERC to take action on the matter and that it did not foreclose the ERC from directing ABRECO to undertake a Swiss challenge, a form of public bidding where an original proponent's offer is opened to competitive bids but the original proponent may counter match any superior offer.[90]

To my mind, this letter from the DOE is not, as the ponencia says, an admission of the need to coordinate with the DOE. Rather, this letter is in fact a recognition by the DOE that the power of whether to exempt an entity from the CSP is lodged solely with the ERC. That the DOE was clearly requesting the ERC and not directing it is seen from a plain reading of the letter where the DOE stated: "x x x thus, we are endorsing for ERC's consideration x x x." [91] This is a clear admission by the DOE that it is only the ERC which has the power to determine whether a certain energy sector player, such as ABRECO, may be exempted from the requirement of the CSP.

Confronted with these concerns, the ERC deemed it wise to restate the effectivity of the CSP implementation. Thus, the restatement of the effectivity date of the CSP implementation from November 7, 2015 to April 30, 2016,

virtually creating a transition period of five (5) months, was deemed by the ERC a long enough period to allow fruition of the PSAs at the throes of perfection or those already executed but not yet filed, and short enough to block those PSAs which were still too early in the negotiation or so far from execution.[92] The ERC found that granting a period of transition would avoid the risk of inconsistency in resolving the individual requests for exemptions sought by DUs, GenCos and electric cooperatives — while, at the same, ensuring a steady electric supply for the period covered by the different calls for the CSP exemption.[93]

And, as the regulator, ERC had full knowledge and complete sense of the difficulty of adding a new requirement to an application for the approval of a PSA when the DUs and the GenCos had already executed their PSAs. In fact, requiring a CSP would most likely have resulted in the undoing of heavily and lengthily negotiated and executed agreements over which many computations and projections had already been done.

A review of the requirements enumerated above shows that in addition to the executed PSA, the parties are required to disclose their sources of funding, a sample computation of power rates, and even a breakdown of operating and maintenance expenses. The undoing of a PSA and a re-negotiation of its terms will affect these figures and may even result in the replacement of the GenCos. The DUs will have to start from scratch as a result of the directive to comply with the CSP. Again, these cannot be done at a whim or in a span of a few days. And this realization was the animus for the creation of the transition period — to make the CSP applicable only to those PSAs that are still being negotiated as the parties to these PSAs have yet to conclude loan agreements for the financing of the project, they may adjust their projections on how the contract will affect the cost of electricity, and adjust their projected operating and maintenance expenses.

This is the reason why the recommendation of Justice Bernabe, i.e., for the creation of transitory regulations so that the PSAs shall become effective only when a new PSA is executed after following the CSP, is not feasible. These PSAs were heavily negotiated and loans and projections have already been made following the terms reflected in the PSAs. All of these PSAs will be undone should the parties thereto be now required to undergo CSP.

Further, Resolution No. 1 did not only restate the effectivity date of the CSP implementation, it likewise already addressed certain concerns raised by these stakeholders. The ERC, in said resolution, clarified certain compliance requirements on the other forms of CSP as provided in Resolution No. 13. It further resolved that the PSAs with provisions allowing automatic renewal or extension of their term, whether or not such renewal or extension requires the intervention of the parties, may have one (1) automatic renewal or extension for a period not exceeding one (1) year from the end of their respective terms, provided that these PSAs were approved by the ERC before the effectivity of Resolution No. 1; if not, then automatic renewal clauses or extension of the PSAs shall no longer be permitted.

The ponencia, however, reasons that the extension was not necessary because "the issuance of the 2015 DOE Circular and of the CSP Resolution was not conjured on a whim"[94] and that "the DOE has conducted a series of nationwide public consultations on the proposed policy on competitive procurement of electric supply for all electricity end-users."[95]

It must be pointed out, however, that the public consultations and focus-group discussions referred to by the ponencia were in relation to the draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements entered into by Distribution Utilities for the Supply of Electricity to their Captive Market" (PSA Rules). Quoted below is the Whereas Clause of Resolution No. 13 relied on by the ponencia[96] in arguing that public consultations were conducted:

WHEREAS, the ERC, likewise, conducted Focus Group Discussions (FGDs) with the stakeholders on April 22

to 24, 2014 in Pasig City, May 6 to May 8, 2014 in Cebu City, May 13 to 14, 2014 in Cagayan De Oro City and May 20 to 22, 2014 in Pasig City, to thoroughly discuss major issues in relation to the draft PSA Rules, such as: a) the requirement of Competitive Selection Process (CSP); b) the proposed PSA template; c) the joint filing of PSA applications by the DUs and generation companies (GenCos); and d) the "walk-away" provision in the PSA, and the ERC likewise set the deadline for the submission of additional comments or position papers for May 30, 2014.[97] (Emphasis and underscoring supplied)

The Court can take judicial notice[98] of the fact that up to the present, the said PSA Rules are still in draft form. In fact, comments on the draft PSA Rules are still being received by the ERC,[99] and a public consultation on the draft was just concluded by the ERC on October 15, 2018.[100]

Therefore, while it is true that the CSP requirement was not totally unexpected, the DUs cannot, however, be expected to comply with the said requirement that was made effective immediately. While consultations were indeed made regarding the CSP requirement, these consultations were in the context of the draft PSA rules that have not been made effective yet; hence, it is understandable that the DUs were still negotiating their PSAs under the old framework where the CSP was not yet required.

To stress, the DUs cannot be expected to follow a rule that was not yet in place. In other words, it was but natural for the DUs to have pending PSA negotiations that did not go through the CSP when the CSP requirement was made effective all of a sudden.

Thus, it is clear that the issuance of Resolution No. 1 was not, as it cannot reasonably be categorized as, arbitrary, whimsical or capricious. The creation of a transition period, together with the clarifications provided in Resolution No. 1, constitutes a reasonable well thought-out response to the various concerns posed by DUs, GenCos and electric cooperatives.

Indeed, it is worth repeating that there is a doctrine of long-standing that courts will not interfere in matters that are addressed to the sound discretion of the government agency entrusted with regulation of activities coming under the special and technical training and knowledge of such agency.[101] For the exercise of administrative discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation.[102] This task can best be discharged by the government agency concerned and not by the courts.[103]

To be sure, the interpretation of an administrative government agency, which is tasked to implement a statute, is accorded great respect and ordinarily controls the construction of the courts.[104] The reason behind this rule was explained in *Nestle Philippines, Inc. v. Court of Appeals*,[105] in this wise:

The rationale for this rule relates not only to the emergence of the multifarious needs of a modern or modernizing society and the establishment of diverse administrative agencies for addressing and satisfying those needs; it also relates to accumulation of experience and growth of specialized capabilities by the administrative agency charged with implementing a particular statute. In *Asturias Sugar Central, Inc. v. Commissioner of Customs*[106] the Court stressed that executive officials are presumed to have familiarized themselves with all the considerations pertinent to the meaning and purpose of the law, and to have formed an independent, conscientious and competent expert opinion thereon. The courts give much weight to contemporaneous construction because of the respect due the government agency or officials charged with the implementation of the law, their competence, expertness, experience and informed judgment, and the fact that they frequently are the drafters of the law they interpret.[107] (Emphasis supplied)

Thus, I submit anew that the Court stepped out of bounds in annulling the acts of a regulator acting within the bounds of law and its area of expertise. Indeed, this sends a chilling effect on all regulators. This is true in this case because the acts of the ERC have been made the basis of administrative and criminal complaints.

While an action by an administrative agency may be set aside by the judicial department, it must only be done if there is abuse of power, lack of jurisdiction or grave abuse of discretion clearly conflicting with the letter and spirit of the law.[108] There is no such situation here. There is no cogent reason to hold that the ERC acted with grave abuse of discretion amounting to lack or excess of jurisdiction.

[1] Republic Act No. 9136, entitled "An Act Ordaining Reforms in the Electric Power Industry Amending for the Purpose Certain Laws and For Other Purposes" (EPIRA).

[2] *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, 526 Phil. 79, 88 (2006).

[3] *Bureau Veritas v. Office of the President*, 282 Phil, 734, 747 (1992).

[4] *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 88.

[5] DOE Circular, Sec. 4.

[6] ERC Resolution No. 13, Sec. 4.

[7] *Id.*

[8] G.R. No. 217158, March 12, 2019.

[9] *Id.* at 14.

[10] *Id.* at 35-36. Emphasis and underscoring supplied.

[11] *Id.* at 37.

[12] ERC RULES OF PRACTICE AND PROCEDURE (ERC RULES), Rule 20(B), Sec. 1.

[13] EPIRA, Sec. 45.

[14] ERC RULES, Rule 20(B), Sec. 2.

[15] *Id.*

[16] *Id.*, Rule 20(B), Sec. 2(k).

[17] *Id.*, Rule 20(B), Sec. 1.

[18] *Id.*, Rule 6.

[19] *Id.*, Rule 13, Sec. 1.

[20] *Id.*, Rule 13, Sec. 4.

[21] *Id.*

[22] *Id.*, Rule 16, Sec. 1.

[23] *Id.*, Rule 16, Sec. 5.

[24] *Id.*, Rule 18, Sec. 1.

[25] *Id.*, Rule 18.

[26] *Id.*, Rule 20(B).

[27] *Id.*, Rule 14, Sec. 3.

[28] *Id.*

[29] Ponencia, p. 13.

[30] EPIRA, Sec. 37(e)(ii).

[31] *Id.*, Sec. 23.

[32] DOE Circular, Sec. 3.

[33] *Id.* Sec. 1.

[34] EPIRA, Sec. 2(c).

[35] *Id.*, Sec. 23.

[36] *Id.*, Sec. 45.

[37] Deliberations of EPIRA, May 30, 2000 Session, pp. 8-10.

[38] EPIRA, Sec. 43(f).

[39] IRR of EPIRA, Rule 11.

[40] *Id.*, Rule 11, Sec. 8(e).

[41] Ponencia, p. 35.

[42] *Id.* at 13.

[43] *Id.*

[44] *Id.*, at 8. As stated earlier, this argument is premised on factual assertions that have not been tested in the crucible of trial.

[45] Rollo, p. 1210.

[46] Ponencia, p. 16.

[47] *Id.* at 21.

[48] Deliberations of EPIRA, May 29, 2000 Session, pp. 31-32.

[49] 476 Phil. 134 (2004).

[50] *Id.* at 184-185.

[51] SECTION 37. Powers and Functions of the DOE. — In addition to its existing powers and functions, the DOE is hereby mandated to supervise the restructuring of the electricity industry. In pursuance thereof, Section 5 of RA 7638 otherwise known as "The Department of Energy Act of 1992" is hereby amended to read as follows:

"(a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan and with the policies on environmental protection and conservation and maintenance of ecological balance, and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;

(b) Develop and update annually the existing Philippine Energy Plan, hereinafter referred to as 'The Plan', which

shall provide for an integrated and comprehensive exploration, development, utilization, distribution, and conservation of energy resources, with preferential bias for environment-friendly, indigenous, and low-cost sources of energy. The plan shall include a policy direction towards the privatization of government agencies related to energy, deregulation of the power and energy industry, and reduction of dependency on oil-fired plants. Said Plan shall be submitted to Congress not later than the fifteenth day of September and every year thereafter;

(c) Prepare and update annually a Power Development Program (PDP) and integrate the same into the Philippine Energy Plan. The PDP shall consider and integrate the individual or joint development plans of the transmission, generation, and distribution sectors of the electric power industry, which are submitted to the Department: Provided, however, That the ERC shall have exclusive authority covering the Grid Code and the pertinent rules and regulations it may issue;

(d) Ensure the reliability, quality and security of supply of electric power;

(e) Following the restructuring of the electricity sector, the DOE shall, among others:

(i) Encourage private sector investments in the electricity sector and promote development of indigenous and renewable energy sources;

(ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;

(iii) In consultation with other government agencies, promote a system of incentives to encourage industry participants, including new generating companies and end-users to provide adequate and reliable electric supply; and

(iv) Undertake, in coordination with the ERC, NPC, NEA and the Philippine Information Agency (PIA), information campaign to educate the public on the restructuring of the electricity sector and privatization of NPC assets;

(f) Jointly with the electric power industry participants, establish the wholesale electricity spot market and formulate the detailed rules governing the operations thereof;

(g) Establish and administer programs for the exploration, transportation, marketing, distribution, utilization, conservation, stockpiling, and storage of energy resources of all forms, whether conventional or non-conventional;

(h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;

(i) Develop policies and procedures and, as appropriate, promote a system of energy development incentives to enable and encourage electric power industry participants to provide adequate capacity to meet demand including, among others, reserve requirements;

(j) Monitor private sector activities relative to energy projects in order to attain the goals of the restructuring, privatization, and modernization of the electric power sector as provided for under existing laws: Provided, That the Department shall endeavor to provide for an environment conducive to free and active private sector participation and investment in all energy activities;

(k) Assess the requirements of, determine priorities for, provide direction to, and disseminate information resulting from energy research and development programs for the optimal development of various forms of energy production and utilization technologies;

- (l) Formulate and implement programs, including a system of providing incentives and penalties, for the judicious and efficient use of energy in all energy-consuming sectors of the economy;
- (m) Formulate and implement a program for the accelerated development of non-conventional energy systems and the promotion and commercialization of its applications;
- (n) Devise ways and means of giving direct benefit to the province, city, or municipality, especially the community and people affected, and equitable preferential benefit to the region that hosts the energy resource and/or the energy-generating facility: Provided, however, That the other provinces, cities, municipalities, or regions shall not be deprived of their energy requirements;
- (o) Encourage private enterprises engaged in energy projects, including corporations, cooperatives, and similar collective organizations, to broaden the base of their ownership and thereby encourage the widest public ownership of energy-oriented corporations;
- (p) Formulate such rules and regulations as may be necessary to implement the objectives of this Act; and
- (q) Exercise such other powers as may be necessary or incidental to attain the objectives of this Act."

[52] Deliberations of EPIRA, June 5, 2000 Session, pp. 56-57.

[53] Deliberations of EPIRA, June 5, 2000 Session, pp. 57-59.

[54] Supra note 49, at 196.

[55] Id.

[56] Ponencia, p. 24.

[57] Id. at 26.

[58] Id. at 27.

[59] Id.

[60] J. Perlas-Bernabe, Separate Concurring Opinion, p. 5.

[61] Id. at 4.

[62] Id. at 5.

[63] Yazaki Torres Manufacturing, Inc. v. Court of Appeals, supra note 2, at 89.

[64] Id.

[65] Id.

[66] Id.

[67] Id. at 89-90.

[68] Id. at 90.

[69] Id.

[70] Kida v. Senate of the Philippines, 683 Phil. 198, 221 (2012).

[71] Yazaki Torres Manufacturing, Inc. v. Court of Appeals, supra note 2, at 90.

[72] Pharmaceutical and Health Care Association of the Philippines v. Duque III, 561 Phil. 386, 444 (2007).

[73] EPIRA, Sec. 2(f).

[74] Rollo (Vol. III), pp. 1237-1238.

[75] Id. at 1238.

[76] Id. at 1239.

[77] Id.

[78] Id. at 1242-1243.

[79] Id.

[80] Id. at 1244-1245.

[81] Id.

[82] Id. at 1246-1249.

[83] Id. at 1246-1247.

[84] Id. at 1250.

[85] Id.

[86] Id. at 1251-1252.

[87] Id.

[88] Rollo (Vol. IV), p. 1516.

[89] Id.

[90] Ponencia, p. 28.

[91] Rollo (Vol. IV), p. 1516.

[92] Rollo (Vol. III), pp. 1208-1209.

[93] Id. at 1206.

[94] Ponencia, p. 30.

[95] Id. at 31.

[96] Id. at 32.

[97] Resolution No. 13, 9[th] Whereas Clause.

[98] RULES OF COURT, Rule 129, Section 1 provides:

SECTION 1. Judicial notice, when mandatory. — A court shall take judicial notice, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions. (Emphasis and underscoring supplied)

[99] See Comments Received on the Draft PSA Rules, ERC Case No. 2018-0002-RM, available at <http://www.erc.gov.ph/ContentPage/51512> (last accessed November 9, 2018).

[100] See 15 October 2018 PubCon on PSA Rules, available at <http://erc.gov.ph/ContentPage/51514> (last accessed November 9, 2018).

[101] *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 88.

[102] *Bureau Veritas v. Office of the President*, supra note 3, at 747.

[103] *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 88.

[104] *Melendres, Jr. v. Commission on Elections*, 311 Phil. 275, 291 (1999).

[105] 280 Phil. 548 (1991).

[106] 140 Phil. 20, 26 (1969).

[107] *Nestle Philippines, Inc. v. Court of Appeals*, supra note 105, at 556-557.

[108] *Melendres, Jr. v. Commission on Elections*, supra note 104, at 292.

DISSENTING OPINION

A. REYES, JR., J.:

The ponencia declared the first paragraph of Section 4 of Energy Regulatory Commission (ERC) Resolution No. 13, Series of 2015, and ERC Resolution No. 1, Series of 2016, as null and void. As a result, all Power Supply Agreement (PSA) applications submitted by Distribution Utilities (DUs) on or after June 30, 2015, should be subject to the Competitive Selection Process (CSP) in accordance with the Department of Energy (DOE) Circular No. DC2015-06-0008.

With due respect, I disagree with the said ruling.

The ERC did not commit grave abuse of discretion amounting to lack or excess of jurisdiction.

According to Rule 65 of the Rules of Court, for a petition for certiorari to lie, it must be proven that the tribunal, board, or officer exercising judicial or quasi-judicial functions has acted (1) without or in excess of its or his jurisdiction, or (2) with grave abuse of discretion amounting to lack or excess of jurisdiction.[1] In the same Rule, it was also provided for that a petition for prohibition will lie when the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, are (1) without or in excess of its or his jurisdiction, or (2) with grave abuse of discretion amounting to lack or excess of jurisdiction.[2] In both instances, there should be no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law.[3]

But while the Rules of Court zeroes in on tribunals, boards, or officers exercising judicial or quasi-judicial functions for petitions for certiorari, and tribunals, corporations, boards, officers or persons, whether exercising judicial, quasi-judicial or ministerial functions, for petitions for prohibition, the Court has, time and again, ruled that the same remedies extend to any act of grave abuse of discretion amounting to lack or excess of jurisdiction of any branch or instrumentality of the Government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions.[4]

In this case, the ERC is an independent quasi-judicial body that has regulatory powers[5] for the purpose of promoting competition, encouraging market development, ensuring customer choice and penalizing abuse of market power in the restructured electricity industry.[6] In appropriate cases, the ERC is also authorized to issue cease and desist orders after due notice and hearing.[7] Indeed, any issue on ERC's action of promulgating ERC Resolution No. 1 is cognizable by the Court through a petition for certiorari or prohibition, but only if ERC has acted (1) without or in excess of its jurisdiction, or (2) with grave abuse of discretion amounting to lack or excess of jurisdiction.

As earlier mentioned, ERC has not committed any of these two acts.

To begin with, there is no doubt that the ERC has the power to promulgate rules and regulations that concern the exercise of its mandate. In issuing ERC Resolution No. 1, ERC acted within its jurisdiction.

According to the case of *Alliance for the Family Foundation, Philippines, Inc., (ALFI) v. Garin*,[8] the powers of an administrative body are classified into two fundamental powers: quasi-legislative and quasi-judicial. Quasi-legislative power—that which is relevant in this case—has been defined as "the authority delegated by the lawmaking body to the administrative body to adopt rules and regulations intended to carry out the provisions of law and implement legislative policy." [9] It is in the nature of subordinate legislation, which is "designed to implement a primary legislation by providing the details thereof." [10]

The ERC is granted this quasi-legislative power by no less than Sections 43 (Functions of the ERC) and 45 (Cross Ownership, Market Power Abuse And Anti-Competitive Behavior) of R.A. No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA).[11] In fact, EPIRA's implementing rules and regulations (IRR) specified this rule-making power in stating:

Section 4. Responsibilities of the ERC.

x x x x

(b) Pursuant to Sections 43 and 45 of the Act, the ERC shall promulgate such rules and regulations as authorized thereby, including but not limited to Competition Rules and limitations on recovery of system losses, and shall impose fines or penalties for any non-compliance with or breach of the Act, these Rules and the rules and regulations which it promulgates or administers.[12]

This rule-making power by the ERC is further defined, at least insofar as the CSP implementation is concerned, in Sections 3 and 4 of DOE Circular No. DC2015-06-0008. This circular granted unto the DOE and the ERC the power to jointly issue the "guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP." It also empowered the ERC, "upon its determination and in coordination with the DOE [to] issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP." The provisions read:

Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of ECs, the Third Party shall also be duly recognized by the National Electrification Administration (NEA).

x x x x

Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and DOE shall jointly issue the guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto

provided. x x x

Section 4. Supplemental Guidelines. To ensure efficiency and transparency of the CSP Process [sic], the ERC, upon its determination and in coordination with the DOE shall issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP. The supplemental guidelines should ensure that any CSP and its outcome shall redound to greater transparency in the procurement of electric supply, and promote greater private sector participation in the generation and supply sectors, consistent with the declared policies under the EPIRA.[13]

On October 20, 2015, almost four (4) months after the issuance of DOE Circular No. DC2015-06-0008 and pursuant to the mandate of its provisions, the DOE and the ERC issued Joint Resolution No. 1, "A Resolution Enjoining All Distribution Utilities To Conduct Competitive Selection Process (CSP) In The Procurement of Supply For Their Captive Market." [14] In this Joint Resolution, the DOE and the ERC agreed that it is the ERC which shall issue the appropriate regulations to implement the CSP. Section 1 of Joint Resolution No. 1 provides:

Section 1. Competitive Selection Process. Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulations to implement the same.[15] (Emphasis supplied)

Thus, while the language of DOE Circular No. DC2015-06-0008 empowers the DOE and the ERC jointly to issue the relevant guidelines in the implementation of the CSP, in turn, the DOE, through Joint Resolution No. 1, gave its concurrence to and duly empowered the ERC to act and to issue the appropriate regulations.

On the strength of the provisions of the EPIRA, EPIRA's IRR, DOE Circular No. DC2015-06-0008, and Joint Resolution No. 1, the ERC thence promulgated ERC Resolution No. 13, as well as the assailed ERC Resolution No. 1. These resolutions contained the relevant rules and regulations that govern the implementation of the CSP policy of the government—a power which has been specifically delegated to the ERC and to no other. Notably, none of the parties in this case challenged this power. In fact, this authority was recognized by the DOE in its Letter dated January 18, 2016 when it requested the ERC to allow an electric cooperative to directly negotiate with a power supplier despite the CSP requirement.[16]

In the ponencia, however, it was stated that the ERC had no authority to issue ERC Resolution No. 1, because the ERC cannot unilaterally restate the effectivity of its earlier resolution for doing so violates DOE Circular No. DC2015-06-0008. It was likewise explained therein that "the DOE Circular [No. DC2015-06-0008] specifically stated that the ERC's power to issue CSP guidelines and procedures should be done in coordination with the DOE." That the ERC "restated" the date of effectivity unilaterally is, according to the ponencia, an "amendment" of DOE Circular No. DC2015-06-0008, which the ERC could not do. The ponencia further held that the ERC is empowered only to issue "supplemental guidelines and procedures" as this is the only power granted by Section 4 of DOE Circular No. DC2015-06-0008 to the ERC.

Likewise, the ponencia declared that ERC Resolution No. 1 is void because it was issued without the concurrence of the DOE, and as such, it was in excess of ERC's rule-making power.

Finally, the ponencia further launched a full discourse on the power of the DOE vis-a-vis the power of the ERC, such that, it argued that, it is the former which formulates the policies, rules, regulations, and circulars concerning the energy sector, and the latter should only enforce and implement the same. The opinion likewise quoted in its entirety Section 43 of the EPIRA (enumerating the powers of the ERC) and stated that nothing therein could "supplant" the policies, rules, regulations, or circulars prescribed by the DOE.

The ponencia, however, fails to consider the clear mandate of DOE Circular No. DC2015-06-0008 and Joint Resolution No. 1.

First, it is not correct to summarily state that the ERC's power is limited to the implementation of a policy dictated by the ERC. It could not be any clearer when Section 3 of DOE Circular No. DC2015-06-0008, as quoted above, specifically stated that "the ERC and DOE shall jointly issue the guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided." This is not a case where the DOE issues a policy and then the ERC implements the policy. As can be read in Section 3, the matter of formulating the guidelines, as well as the rules of procedure for its implementation, falls on both the DOE and the ERC.

Second, this joint authority, as it were, is further clarified by Joint Resolution No. 1 where the DOE specifically delegated unto the ERC the power to issue the appropriate regulations to implement the CSP. At the risk of sounding repetitive, this could only mean that, contrary to the ponencia, the DOE and the ERC already have a "coordination" with regard to their duties of implementing the CSP, and the DOE already authorized the ERC to perform this duty. Again, the ERC in this case is not a mere implementing agency, rather, it is the main agency tasked and empowered to lay the ground for the new selection process, the same being the agency which has the direct contact with the affected stakeholders of the energy sector.

Indeed, even the ponencia recognized this when it was mentioned that:

Joint Resolution No. 1 (Joint Resolution), executed by the DOE and the ERC on 20 October 2015, reiterated that the ERC shall issue the appropriate regulations to implement the CSP. x x x (Emphasis and underscoring supplied)

Third, it is also misplaced to say that the ERC has no power at all to formulate the rules and regulations concerning the CSP because, according to the ponencia, the same power does not appear in the enumeration of the ERC's functions in Section 43 of the EPIRA. But paragraph (m) of the same section in fact authorizes the ERC to:

(m) Take any action delegated to it pursuant to this Act;

This function, taken together with the DOE and ERC's joint authority accorded by Section 3 of DOE Circular No. DC2015-06-0008 and the specific delegation in Section 1 of Joint Resolution No. 1, is more than enough to dispel any accusation of impropriety or any lack of authority to the ERC's issuance of the assailed resolution. In the language of Section 43 of the EPIRA, the ERC did not "supplant" the policies, rules, regulations, or circulars prescribed by the DOE, instead, the ERC merely accepted the action "delegated" to it pursuant to DOE Circular No. DC2015-06-0008 and Joint Resolution No. 1.

Finally, it must also be emphasized that Joint Resolution No. 1 speaks of the "appropriate regulations," and not merely of "guidelines and procedures" or of "supplemental guidelines" to implement the CSP. As a regulatory agency, one which is "vested with jurisdiction to regulate, administer or adjudicate matters affecting substantial rights and interests of private persons, the principal powers of which are exercised by a collective body, such as a commission, board or council,"^[17] the ERC clearly is empowered to promulgate the assailed resolution.

To be sure, in promulgating ERC Resolution No. 13, as well as ERC Resolution No. 1, the ERC acted within its jurisdiction.

This said, the focus of this Dissenting Opinion now shifts to whether or not the ERC, in promulgating the assailed resolution, acted with grave abuse of discretion amounting to lack or excess of jurisdiction.

Again, the Court answers in the negative.

The term grave abuse of discretion has a specific meaning. It has been defined as the arbitrary or despotic exercise of power due to passion, prejudice or personal hostility; or the whimsical, arbitrary, or capricious exercise of power that amounts to an evasion or refusal to perform a positive duty enjoined by law or to act at all in contemplation of law.[18] According to the case of *John Dennis G. Chua v. People of the Philippines*,[19] citing *Yu v. Judge Reyes-Carpio, et al.*[20]

[a]n act of a court or tribunal can only be considered as with grave abuse of discretion when such act is done in a "capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction." The abuse of discretion must be so patent and gross as to amount to an "evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility." [21] (Citations omitted)

"For an act to be struck down as having been done with grave abuse of discretion, the abuse of discretion must be patent and gross." [22]

In this instance, the ERC has sufficiently established that "restating" the effectivity of ERC Resolution No. 13 at a later date is not exercised whimsically or capriciously. Neither is it an arbitrary exercise of power by reason of passion or hostility. Indeed, its issuance is clearly not without basis. In fact, the Court finds that the ratiocination put forth by the Office of the Solicitor General (OSG) is reasonable to justify ERC's action.

First, the implementation of ERC Resolution No. 13 caused an avalanche of concerns and confusion from the stakeholders of the industry regarding the actual implementation of the provisions of the resolution, so much so that a multitude of DUs, mostly electric cooperatives, sought for an exemption from the guidelines in the resolution. There was a real possibility that the implementation of ERC Resolution No. 13 would invariably render nugatory the already pending negotiations among the DUs and generation companies. This fact is proven from the letters sent by SMC Global Power dated November 25, 2015 and December 14, 2015, Philippine Rural Electric Cooperative Association, Inc. dated December 1, 2015, Agusan Del Norte Electric Cooperative, Inc. dated December 10, 2015, Camarines Sur IV Electric Cooperative, Inc. dated December 21, 2015, and Aklan Electric Cooperative, Inc. dated March 9, 2016.[23]

A reading of these letters confronted the ERC with probabilities of discontinuance in the financing of projects during their implementation stage,[24] aggravation of power shortages,[25] confusion of ERC Resolution No. 13's applicability on PSAs already filed with the ERC,[26] disenfranchisement of Power Supply Contracts (PSCs) which have already been signed but were still unfiled to the ERC prior to the effectivity of ERC Resolution No. 13,[27] and the reality of the necessity of sufficient period within which to complete the applications which are still governed by the rules prior to ERC Resolution No. 13.[28]

All these concerns were presented to the ERC, which then, by its mandate, acted accordingly. There is wisdom in the OSG's assertion that by granting a period of transition, the ERC would avoid the risk of inconsistency in resolving individual requests for exemptions sought by the DUs, generation companies, and electric cooperatives, while at the same time, it would secure the steady supply of electricity for the same period.[29]

The ponencia mistakenly characterizes ERC's "restatement" of the effectivity of Resolution No. 1 as an "amendment" to DOE Circular No. DC2015-06-0008. The ponencia stated that ERC extended the CSP's implementation twice, totaling 305 days, which should not be allowed by the Court.

But this kind of interpretation with regard to the nature of implementing rules and regulations, specifically in this case, disavows the very purpose for which implementing rules and regulations are created.

One, it is a blatant error to state that ERC Resolution No. 13 already "amended" DOE Circular No.

DC2015-06-0008 (the first "amendment" according to the ponencia). While it is true that DOE Circular No. DC2015-06-0008 took effect on June 30, 2015, the enforcement of the CSP was not to take effect until after 120 days therefrom. This is because Section 3 of the same circular categorically provided for a 120-day period for the promulgation of the CSP guidelines and procedures. It said:

Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of ECs, the Third Party shall also be duly recognized by the National Electrification Administration (NEA).

x x x x

Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and DOE shall jointly issue the guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided. x x x (Emphasis and underscoring supplied)

By promulgating Joint Resolution No. 1 and ERC Resolution No. 13 on October 20, 2015, less than 120 days from the effectivity of DOE Circular No. DC2015-06-0008, both the DOE and ERC merely followed Section 3 thereof. There was no first "amendment" in this case as the ponencia concluded, and the Court should not rush into ascribing grave abuse of discretion on the part of ERC for performing its mandate.

Two, it will be absurd to require stakeholders in the energy sector to comply with a new procurement method at the very moment of the circular's promulgation when there is yet no implementing rules and regulations that would guide them on the methodologies of its implementation. In DOE Circular No. DC2015-06-0008, CSPs to be undertaken by DUs are couched in principles, rather than procedure. Section 1 states:

Section 1. General Principles. Consistent with its mandate, the DOE recognizes that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs ensures security and certainty of electricity prices of electric power to end-users in the long-term. Towards this end, all CSPs undertaken by the DUs shall be guided by the following principles:

(a)

Increase the transparency needed in the procurement process in order to reduce risks;

(b)

Promote and instill competition in the procurement and supply of electric power to all electricity end-users;

(c)

Ascertain least-cost outcomes that are unlikely to be challenged in the future as the political and institutional scenarios should change; and

(d)

Protect the interest of the general public.

Section 3 of the same circular is not any clearer. It provides:

Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of ECs, the Third Party shall also be duly recognized by the National Electrification Administration

(NEA).

Under this Circular, CSPs for the procurement of PSAs of all DUs shall observe the following:

(a)

Aggregation for un-contracted demand requirements of DUs;

(b)

Annually conducted; and

(c)

Uniform template for the terms and conditions in the PSA to be issued by the ERC in coordination with the DOE.

x x x x

If the enforcement of the CSP began on June 30, 2015, as was posited in the ponencia, how should the Third Party mentioned in the section conduct the CSP? What are the parameters? What are the required documents/uniform templates to be submitted? What are the deadlines? More to the point, who are these Third Parties? How can they be recognized by the ERC and the DOE? By the National Electrification Administration?

This is why there was wisdom in the DOE's imposition of a period prior to the enforcement of the CSP. The reasons are obvious: (a) the agency tasked to draft the implementing rules and regulations must be accorded reasonable time within which to draft the same; and (b) the same agency must balance the implementation of the new policy over the already existing ones so as to ascertain continuous and unabated service to the public.

To this end, the action of the ERC in issuing ERC Resolution No. 1, rather than subvert the intentions of EPIRA, allowed the smooth transition of one procurement method to be utilized by the Government to another new method. Thus, the "restatement" of the effectivity of the CSP in ERC Resolution No. 1 is not an "amendment" but a carefully studied enforcement of the very same mandate reposed upon the ERC.

Second, ERC did not "evade" its positive duty as provided for in the Constitution, the EPIRA, DOE Department Circular No. DC2015-06-0008, or ERC Resolution No. 13 as the petitioners would like the Court to believe. The petitioners stretch the interpretation of these laws and issuances by their insinuations that "restating" the effectivity of ERC Resolution No. 13 is already tantamount to evasion of duties.

I could not subscribe to this interpretation.

The petitioners did not convincingly show any action by the ERC that negated any provision of the Constitution, the EPIRA, or any of the resolutions mentioned. No action has been indicated to have disregarded CSP procedure. In fact, ERC Resolution No. 13, the very resolution that the petitioners assert to have been violated, has been in effect since April, 2016. As discussed earlier, the issuance of ERC Resolution No. 1 is a by-product of the concerns of the DUs, generation companies, and electric cooperatives. The Court could not dictate upon the ERC the time upon which the effectivity of ERC Resolution No. 13 should begin. This is a policy decision that rests solely on the ERC. This being the case, I find no illicit connection—as the petitioners have proved no illicit connections—between ERC Resolution No. 1 and the submission by the respondents of their PSAs prior to the given deadline.

If anything, what the petitioners ask of the Court is for the latter to substitute its own wisdom to that of ERC's actions as the main administrative agency clothed with expertise to decide on the effectivity of its own rules. This,

the Court could not do. As has been repeatedly mentioned herein, ERC's action on merely "restating" the date of effectivity of ERC Resolution No. 13—its own resolution that has been in effect since April, 2016—has not been shown to have been promulgated with grave abuse of discretion amounting to lack or excess of jurisdiction.

Third, it must also be emphasized that ERC Resolution No. 1 enjoys a strong presumption of its validity. In *Spouses Dacudao v. Secretary Gonzales*,^[30] Chief Justice Lucas P. Bersamin reiterated the Court's ruling in *ABAKADA Guro Party List (formerly AASJS), et al. v. Hon. Purisima, et al.*^[31] where the Court extended the presumption of validity to legislative issuances as well as to rules and regulations issued by administrative agencies. *ABAKADA Guro Party List* said:

Administrative regulations enacted by administrative agencies to implement and interpret the law which they are entrusted to enforce have the force of law and are entitled to respect. Such rules and regulations partake of the nature of a statute and are just as binding as if they have been written in the statute itself. As such, they have the force and effect of law and enjoy the presumption of constitutionality and legality until they are set aside with finality in an appropriate case by a competent court^[32].

Moreover, the ERC, being envisioned to be "a strong and purely independent regulatory body,"^[33] is "vested with broad regulatory and monitoring functions over the Philippine electric industry to ensure its successful restructuring and modernization."^[34] The burden of proving that the presumption of validity should be disregarded rests solely on the petitioners. For the reasons already mentioned above, I believe that the petitioners failed on this purpose. Thus, as the ERC has been "provided by the law with tools, ample wherewithal, and considerable latitude in adopting means that will ensure the accomplishment of the great objectives for which it was created [its actions should similarly be] accorded by the Court the greatest measure of presumption of regularity in its course of action and choice of means in performing its duties[.]"^[35]

Finally, anent the petitioners' prayer to require the ERC to disapprove the PSAs already submitted before it for the private respondents' failure to conduct CSP or for the possibility of "freezing" the CSP procedure for 20 years, I believe that the Court must once again rule against the petitioners and for the respondents.

In truth, the approval or disapproval of the PSAs have heretofore been pending before the ERC.^[36] Considering that the ERC is not guilty of any grave abuse of discretion amounting to lack or excess of jurisdiction in issuing ERC Resolution No. 1, the Court should not substitute its judgment on PSA applications which are not yet acted upon. It is worth stressing that the Court could only discharge such actions if, in approving or disapproving the PSA applications, the ERC acted (1) without or in excess of jurisdiction, or (2) with grave abuse of discretion amounting to lack or excess of jurisdiction. For the moment, such action of the ERC, if ever it would act in that manner, is still in the realm of conjecture and deserves scant consideration.

ACCORDINGLY, I vote to DISMISS the petition for certiorari and prohibition.

[1] Rules of Court (1997), Rule 65, Sec. 1.

[2] Rules of Court (1997), Rule 65, Sec. 2.

[3] *Id.*

[4] *Umali v. JBC*, G.R. No. 228628, July 25, 2017, 832 SCRA 194, 223-224.

[5] R. A. No. 9136 (2001), Sec. 38.

[6] R. A. No. 9136 (2001), Sec. 43.

[7] Id.

[8] G.R. Nos. 217872 & 221866, April 26, 2017, 825 SCRA 191.

[9] Id. at 209.

[10] Id. at 209-210.

[11] R. A. No. 9136 (2001).

[12] Rules and Regulations to Implement Republic Act No. 9136, Entitled "Electric Power Industry Reform Act of 2001" (2001), Sec. 4 (b).

[13] Rollo, Vol. 1, pp. 40-43.

[14] Department of Energy and Energy Regulatory Commission, October 20, 2015.

[15] Id.

[16] AIE's Manifestation and Motion for Early Resolution dated November 16, 2018, Annex 3.

[17] Exec. Order No. 292 (1987), Sec. 2(11).

[18] Fajardo v. Hon. Court of Appeals, et al., 591 Phil. 146, 153 (2008).

[19] G.R. No. 195248, November 22, 2017, 846 SCRA 74.

[20] 667 Phil. 474 (2011).

[21] Id. at 481-482.

[22] Supra note 18, at 153.

[23] Rollo, Vol. II, pp. 1201-1206.

[24] Id. at 1202.

[25] Id.

[26] Id. at 1203.

[27] Id. at 1204, 1206.

[28] Id. at 1205.

[29] Id. at 1206.

[30] 701 Phil. 96 (2013).

[31] 584 Phil. 246 (2008).

[32] Id at 283.

[33] Sec. 2(j), R.A. No. 9136.

[34] Chamber of Real Estate and Builders' Associations, Inc. v. Energy Regulatory Commission (ERC) et al., 638 Phil. 542, 546 (2010).

[35] The Province of Agusan Del Norte v. The Commission on Elections (COMELEC), et al., 550 Phil. 271, 281 (2007).

[36] Rollo, Vol. II, pp. 1188-1189.

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