

REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

POWER SECTOR ASSETS AND
LIABILITIES MANAGEMENT
CORPORATION (PSALM),
Petitioner,

- versus -

CA-G.R. SP No. 106322

PHILIPPINE ELECTRICITY SPOT
MARKET CORPORATION (PEMC)
and MANILAELECTRIC COMPANY
(MERALCO),

Respondents.

X ----- X

NOTICE OF JUDGMENT

***August 28, 2009**

S I R / M A D A M

Please take notice that on **AUGUST 28, 2009**, a **DECISION**, copy of which is hereto attached, was rendered by the **SPECIAL SIXTEENTH DIVISION** of this Court, in the above-entitled case, the original copy of which is on file with this Office.

You are hereby **required** to inform this Court, within **five (5) days** from receipt hereof, of the date when you received this notice.

Very truly yours,

MAB
MIRIAM ALFONSO BAUTISTA
Division Clerk of Court

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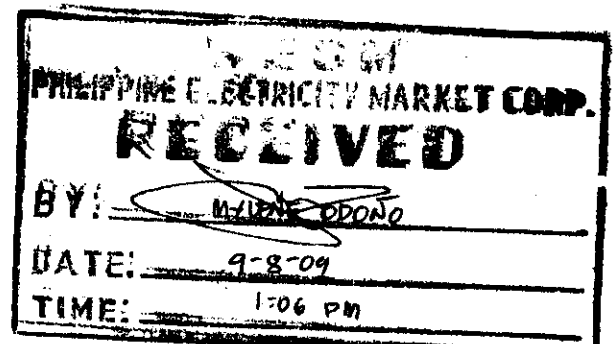
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Republic of the Philippines
Court of Appeals
MANILA

SPECIAL SIXTEENTH DIVISION

POWER SECTOR ASSETS AND
LIABILITIES MANAGEMENT
CORPORATION (PSALM),

Petitioner,

-versus-

PHILIPPINE ELECTRICITY SPOT
MARKET CORPORATION (PEMC)
and MANILA ELECTRIC COMPANY
(MERALCO),

Respondents.

CA-G.R. SP No. 106322

Members:

*DICDICAN, I. P., Chairman
DIMARANAN VIDAL., M., and
**LANTION, J. A. C., JJ.

Promulgated:

AUG 28 2009 *mmj*

-----X
DECISION

CERTIFIED TRUE COPY

VIDAL, M.D., J:

mmj
MIRIAM A. BAUTISTA
Division Clerk of Court
Court of Appeals

Before Us is a Petition for Review¹ under Rule 43 of the Revised Rules of Court filed by Petitioner POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION (PSALM) (hereinafter Petitioner) assailing the Order² dated 30 January 2008 of the Energy Regulatory Commission (hereinafter ERC) and its Order³ dated 20 October 2008 denying Petitioner's Motion for Reconsideration.

THE FACTS

As synthesized by the ERC:

* As substitute for J. Jose C. Mendoza who inhibited from the case on 20 August 2009

** Acting Junior Member per Office Order No. 633-09-CMV

1 Rollo, pp. 33-55

2 *Id.*, pp. 60-67

3 *Id.*, pp. 70-78

In a Memorandum dated 20 November 2006 addressed to the PEM Board, the Market Surveillance Committee (MSC) of the Philippine Electricity Market Corporation (PEMC) stated that the Power Sector Assets and Liabilities Management (PSALM) behaved anti-competitively and abused its market power during the third billing period of WESM commercial operations. Acting on the said Memorandum, the PEM Board issued its Resolution dated 22 November 2006, affirming the MSC's findings against PSALM and ordering the adjustment in the WESM settlement prices for the third and fourth billing periods. The National Power Corporation (NPC) then sought the Commission's clarification on the said price adjustments ordered by the PEM Board. On 6 December 2006, the Commission directed PEMC to submit the Resolution adverted to by NPC and thereafter initiated an inquiry into the said PEM Board Resolution and the PEM Board's action in adjusting the WESM settlement prices.

In an Order dated 13 December 2006, invoking its mandate under Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA), the Commission provisionally declared "the action of the PEM Board, in correcting the WESM settlement prices and imposing the administered prices, to be invalid for having been carried out beyond the scope of its authority and in violation of the EPIRA and the WESM Rules.

PEMC filed its Comments with the Commission on 11 January 2007. On 12 February 2007, the case was set for oral arguments to afford PEMC further opportunity to ventilate its position, after which the case was deemed submitted for decision.

In the meantime, on a related matter docketed as ERC Case No. 2007-421MC, entitled "In the Matter of the Investigation Conducted on Allegations of Anti-competitive Behavior and Market Power Abuse Committed by the Power Sector Asset and Liabilities Management Corporation (PSALM) in the Wholesale Electricity Spot Market", the Commission issued its Decision dated 6 June 2007. In said Decision, the Commission adopted the finding of its Investigatory Unit that "no prima facie case against PSALM for anti-competitive behavior or market power abuse" was established. Accordingly, the Commission terminated the investigation against PSALM.

Meanwhile, on 20 July 2007, PEMC filed a **Motion for Clarification** concerning the appropriate date by which late payment interest is to be reckoned considering the revisions made in the settlement statements. According to PEMC, pursuant to the 02 January 2007 Order of the Commission, it issued to the WESM customers on 25 January 2007 revised settlement statements covering the billing periods falling due, with payment due date for the generators on 26 January 2007. Subsequently, after the Commission issued its Order dated 05 February 2007, confirming the appropriate calculation on the customer metered quantities and consequently, PEMC issued on 25 April 2007 the second revised settlement statements with due dates for the customers set on 05 May 2007 and for the payment to the generators on 6 May 2007.⁴

On 14 August 2007, the ERC rendered its Decision⁵ in the case *a quo*, the dispositive portion of which reads:

WHEREFORE, PREMISES CONSIDERED, and in the exercise of its mandate under the EPIRA, the Commission confirms its Order dated 13 December 2006 and declares as invalid the action of the PEM Board in adjusting the WESM settlement prices for having been carried out beyond the scope of its authority and in violation of the EPIRA and the WESM Rules.

In order to put to rest issues on the delineation of functions exercised by entities within the industry, PEMC is hereby directed to formulate market protocols to fully address said issues and the relevant entities within the industry are hereby directed to extend their full cooperation, to facilitate realization of the said objective.

Further, the Commission hereby directs the implementation and adjustment of the WESM settlement prices for the third and fourth billing periods. PEMC is hereby allowed to institute adjustments in its billing and settlement processes to mitigate the impact of the instant Decision upon the WESM members.

SO ORDERED.

⁴ *Id.*, pp. 491-493

⁵ *Id.*, pp. 497

Respondents Philippine Electricity Market Corporation (hereinafter PEMC) and MERALCO filed their separate motions for reconsideration⁶, to which Opposition⁷ and Comment⁸ were respectively filed by the Petitioner. MERALCO prayed, inter alia, for the ERC to intervene “for the greater interest of the industry and the consumers, and set the WESM settlement prices for the aforesaid period at NPC-TOU rates.”⁹

On 30 January 2008, the ERC rendered the first assailed Order, supra, the dispositive portion of which reads:

WHEREFORE, PREMISES CONSIDERED, the Commission hereby denies the respective 'Motions for Reconsideration' filed by PEMC and Representative Teofisto Guingona III.

On the other hand, MERALCO's Motion for Reconsideration', insofar as it prays for the adjustment of the WESM settlement prices, is hereby granted. Accordingly, consistent with the policy of the State to afford adequate and appropriate consumer protection, the Commission hereby sets the WESM settlement prices for the third and fourth billing periods at the Commission-approved NPC-TOU rates.

PEMC is hereby directed to implement the corresponding adjustments in its settlement arrangements if necessary.

SO ORDERED.¹⁰

On 11 July 2008, Petitioner filed a Motion for Partial Reconsideration¹¹ of the aforesaid Order. PEMC filed its Opposition¹²

⁶ *Id.*, pp. 499-543

⁷ *Id.*, pp. 544-552

⁸ *Id.*, pp. 552-555

⁹ *Id.*, p. 541

¹⁰ *Id.*, pp. 66-67

¹¹ *Id.*, pp. 556-563

¹² *Id.*, pp. 564-573

thereto and MERALCO, its Comment¹³. On 20 October 2008, the ERC denied the said motion in the second assailed Order, *supra*, and affirmed its 30 January 2008 Order.

Hence, the instant Petition.

ISSUES

Petition raises the following arguments in its petition:

I. THERE IS NEITHER FACTUAL NOR LEGAL BASIS FOR THE HONORABLE COMMISSION TO IMPOSE PRICE ADJUSTMENT AND/OR PRICE CONTROL FOR THE THIRD AND FOURTH BILLING PERIODS IN THE WESM[;]

II. THE NPC-TOU RATES IMPOSED BY THE HONORABLE COMMISSION FOR WESM TRANSACTIONS COVERING THE THIRD AND FOURTH BILLING PERIODS ARE NOT SPOT MARKET PRICES[;]

III. THE IMPOSITION OF NPC-TOU RATES FOR THE THIRD AND FOURTH BILLING MONTHS CLEARLY CONTRAVENES THE EPIRA'S OBJECTIVES AND POLICIES, DISCOURAGES MARKET COMPETITION AND CURTAILS INVESTOR CONFIDENCE[;]

IV. THE IMPOSITION OF NPC-TOU RATES FOR THE THIRD AND FOURTH BILLING PERIODS AMOUNTS TO A CONDONATION OR REMISSION OF AN OBLIGATION.¹⁴

OUR RULING

Anent the *first* and *third* issues, the Petitioner primarily argues that in order for the ERC to impose price controls, the Petitioner must have committed anti-competitive behavior or market power abuse. Petitioner asserts that the ERC's Order¹⁵ dated 6 June 2007 in the related case *i. e.*, ERC Case No. 2007-421MC, the ERC adopted the

¹³ *Id.*, pp. 574-579

¹⁴ *Id.*, p. 44

¹⁵ *Id.*, pp. 471-476

findings of the investigatory unit that there was no prima facie case against Petitioner for anti-competitive behavior or market power abuse, hence, the assailed Orders are factually and legally infirm.

We are unpersuaded.

Section 2 of the EPIRA provides:

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

xxx

(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

xxx

f) To protect the public interest as it is affected by the rates and private sector entities in the process of restructuring the electric power industry;

xxx

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; xxx (Underscoring supplied)

To complement the above provision, Section 43 of the same law states:

SEC. 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. xxx:

xxx

(r) In the exercise of its investigative and quasi-judicial powers, act against any participant or player in the 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;

xxx

(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, xxx. (Underscoring supplied)

It is clear from the EPIRA that the ERC is empowered to act against any of the participants therein, e.g., Petitioner among others, and to exercise regulatory functions it deems appropriate in order to give effect to the policies enunciated by the State and the purposes for which the EPIRA was enacted. In the instant case, the ERC ruled in ERC Case No. 2007-421-MC as follows:

The Commission, however, notes the letters of NPC President Cyril C. del Callar to PSALM, attributing the losses incurred by NPC and PSALM during the first two billing months to the PSALM trading teams' strategies at the WESM and urging PSALM to adopt certain recommendations that ultimately affects how the PSALM trading teams their offers in the market.

It is highly inappropriate for NPC to write such letters to PSALM. The participants in the market are expected to act judiciously and be circumspect in their dealings with each other to thwart any notion of collusion or any tacit agreement or understanding among them. To the mind of the Commission, NPC's

proposal may in fact be taken as an invitation to collaborate so as to vary market results and it is no secret that the dominant position of PSALM can enable it to capitalize on such to easily dictate the prices in the WESM. The influencing capacity of NPC over PSALM and the bidding behavior of the trading teams, whether intended or not, cannot be discounted. Market participants, specifically NPC, should refrain from making such recommendations to PSALM that may have an impact on the market conditions.

WHEREFORE, PREMISES CONSIDERED, xxx

As for NPC's conduct, which was found to be highly inappropriate and irregular under the circumstances, the Commission hereby issues a stern warning for NPC to refrain from such conduct that is inimical to the objectives of free competition. Let it be a warning also to all other industry participants that conduct of similar nature shall be dealt with more severely by this Commission.

The Commission also directs PSALM to adopt policy measures that will strengthen the independence of its trading teams from one another and from PSALM management insofar as its dealings in the WESM are concerned and PEMC to make the necessary changes in its registration policies to reflect the same, within thirty (30) days from their receipt hereof, PSALM and PEMC are further directed to immediately apprise the Commission of the measures so adopted.¹⁶

Accordingly, in its assailed Order dated 20 October 2008 in ERC Case No. 2006-080RC, the ERC concluded in this wise:

It bears stressing that PSALM was absolved from the allegation of anti-competitive behavior merely by reason of lack of prima facie evidence. This simply indicates that the quantum of evidence essential to prove anti-competitive behavior was not achieved. However, this does not necessarily preclude the existence of irregular behavior or circumstances which would have contributed to the high prices in the WESM during the subject periods. The action of the Commission is consistent with the objectives of the law and surely, any rightful undertaking would not have served to frustrate investor interests. If there is anything that would

¹⁶ *Id.*, pp. 474-475

have curtailed investor confidence in the market, it would have been any unexplained behavior which is adverse to the workings of competition and free market.¹⁷

Thus, from the foregoing disquisitions and findings of irregular behavior of the NPC in urging PSALM, which possesses market power, to adopt certain recommendations that ultimately affected how the PSALM trading teams made their offers in the market thus arousing suspicions on its attempt to commit market power abuse, the intervention of the ERC cannot be denied pursuant to its mandate under the EPIRA.

It is worthy to note that *"the Commission recognized the peculiar market arrangements and the reality that the Philippine WESM has not attained the ideal make or structure / composition of a competitive market may have contributed to the increase in WESM prices during the third and fourth billing months."*¹⁸ Indeed, such recognition of the susceptibility of the WESM to market power abuse further justified such intervention.

Likewise, to support Petitioner's argument that there must first be a finding of anti-competitive behavior or market power abuse before the intervention of the ERC is necessary on the alleged ground that intervention would allegedly diminish investor's confidence, would be tantamount to a renunciation of duty on the part of the ERC to perform its regulatory functions *"to promote true market competition and prevent harmful monopoly and market power abuse"*¹⁹ which is among the prime objectives of the EPIRA.

Anent the *second* issue, the Petitioner insist that the NPC-TOU rates cannot be imposed since they were not approved by the ERC as default prices in the WESM. Essentially, the Petitioner argues that imposition of the NPC-TOU rates is violative of Section 30 of the EPIRA.

¹⁷ *Id.*, p. 77

¹⁸ *Id.*, p. 65

¹⁹ Section 45, EPIRA

We are likewise unconvinced.

The pertinent portion of Section 30 of the EPIRA provides:

**SEC. 30. Wholesale Electricity Spot Market. -
xxx**

Jointly with the electric power industry participants, the DOE shall formulate the detailed rules for the wholesale electricity spot market. Said rules shall provide the mechanism for determining the price of electricity not covered by bilateral contracts between sellers and purchasers of electricity users. The price determination methodology contained in said rules shall be subject to the approval of the ERC. Said rules shall also reflect accepted economic principles and provide a level playing field to all electric power industry participants. xxx

Indeed, the aforecited cited section is bereft of any proviso that prevents the ERC from imposing the NPC-TOU rates. Clearly, Section 30 provides that the price determination methodology to be formulated by the electric power industry participants, such as herein parties, is subject to the approval of the ERC and does not deal on the power of the ERC to impose rates.

The fact is, in *Freedom from Debt Coalition vs. Energy Regulatory Commission*²⁰, the Supreme Court recognized the rate-fixing authority of the ERC, viz:

The principal powers of the ERB relative to electric public utilities transferred to the ERC are the following:

- 1. To regulate and fix the power rates to be charged by elective companies;**
- 2. To issue certificates of public convenience for the operation of electric power utilities;**
- 3. To grant or approve provisional electric rates.**

²⁰ G.R. No. 161113. June 15, 2004.

xxx

Section 80 of the EPIRA complements Section 44, as it mandates the continued efficacy of the applicable provisions of the laws referred to therein. The material provisions of the Public Service Act which continue to be in full force and effect are contained in Section 16(c), which states thus:

Section 16. Proceedings of the Commission, upon notice and hearing. — The Commission shall have power, upon proper notice and hearing in accordance with the rules and provisions of this Act, subject to the limitations and exceptions mentioned and saving provisions to the contrary:

xxx

xxx

xxx

(c) To fix and determine individual or joint rates, toll, charges, classifications, or schedules thereof, as well as commutation, mileage, kilometrage, and other special rates which shall be imposed, observed, and followed thereafter by any public service:

Accordingly, the power of the then Energy Regulatory Board under Section 9(c) of Presidential Decree No. 1206, to fix rates is now transferred to the ERC. P.D. No. 1206 pertinently provides:

SECTION 9. Board of Energy. — xxx

xxx

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

c. Regulate and fix the power rates to be charged by electric companies except (1) electric cooperatives which shall continue to be governed by Presidential Decree No. 269, as amended, and (2) the National Power Corporation which shall continue to be governed by Republic Act No. 6395, as amended;

Thus, it is clear that it is well within the power of the ERC to impose the NPC-TOU rates. To stress, the ERC's authority to *“perform such other regulatory functions as are appropriate and necessary in order to ensure the successful restructuring and modernization of the*

*electric power industry*²¹ likewise vests it with the power to impose the NPC-TOU rates.

Further, the ERC's pronouncement in the assailed 20 October 2008 Order that "the adjustment of the prices using the regulator-approved NPC-TOU generation rates is founded on the test of "reasonableness" as these rates have been subjected to the usual hearing, evaluation and deliberation process by the Commission where the NPC's and PSALM's revenue requirement, return on rate base, and TOU rate design have been thoroughly evaluated."²² amply justify the imposition of the said rates.

Anent the *fourth* issue Petitioner argues that the ERC condoned the balance between the market clearing rates and other receivables of Petitioner from PEMC based on the NPC-TOU rates.

The Petitioner's argument is specious.

In the first place, as properly pointed out by MERALCO, no such balance arose. When the ERC exercised its regulatory function according to its lawful authority and in pursuance of the above discussed State policies, it did not give rise to such balance since the NPC-TOU rates is the ACTUAL PRICE pegged without regard to the difference between the market clearing rates and the NPC-TOU rates. If ever, the alleged losses that will be incurred by Petitioner is merely the result of the ERC's exercise of its regulatory powers on the basis of the State's police power. This is a kind of taking for which no compensation can be claimed by the Petitioner. In *Telecommunications and Broadcast Attorneys of the Philippines, Inc., et al., vs. Commission on Elections*,²³

²¹ Section 43 (t) EPIRA

²² Rollo, p. 77.

²³ G.R. No. 132922. April 21, 1998.

the Supreme Court explained the effect of the State's exercise of police power, viz:

Police power must be distinguished from the power of eminent domain. In the exercise of police power, there is a restriction of property interest to promote public welfare or interest which involves no compensable taking. xxx. Police power proceeds from the principle that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

In the same breadth, in *The Conference of Maritime Manning Agencies et al., vs. Philippine Overseas Employment Administration*²⁴, the Supreme Court emphatically held:

The constitutional prohibition against impairing contractual obligations is not absolute and is not to be read with literal exactness. It is restricted to contracts with respect to property or some object of value and which confer rights that may be asserted in a court of justice; it has no application to statutes relating to public subjects within the domain of the general legislative powers of the State and involving the public rights and public welfare of the entire community affected by it. It does not prevent a proper exercise by the State of its police power by enacting regulations reasonably necessary to secure the health, safety, morals, comfort, or general welfare of the community, even though contracts may thereby be affected, for such matters cannot be placed by contract beyond the power of the State to regulate and control them. Verily, the freedom to contract is not absolute; all contracts and all rights are subject to the police

²⁴ G.R. No. 114714. April 21, 1995.

power of the State and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity. (Underscoring Ours for emphasis)

In sum, We find as flawed the Petitioner's argument. The conditions that prompted the exercise of the State's regulatory power was set by the Petitioner and the NPC themselves. Accordingly, the Petitioner cannot insist that We construe the law in its favor considering that it is the one which committed the irregularity. Verily, We cannot sustain its argument for to do so would hold hostage the regulatory body which is supposed to implement the law, to the detriment of the public welfare and render inutile the policies enunciated by the State.

WHEREFORE, premises considered, the instant Petition is **DISMISSED.** Accordingly, the assailed Orders of the ERC **STAND.**

SO ORDERED.

ORIGINAL SIGNED
MYRNA DIMARANAN VIDAL
Associate Justice

WE CONCUR:

ORIGINAL SIGNED
ISAIAS P. DICDICAN
Associate Justice

ORIGINAL SIGNED
JANE AURORA C. LANTION
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ORIGINAL SIGNED
ISAIAS P. DICDICAN
Associate Justice
Chairman, Special Sixteenth Division