

## **EN BANC**

**[ G.R. No. 228588, March 21, 2021 ]**

**PHILIPPINE CHAMBER OF COMMERCE AND INDUSTRY, SAN BEDA COLLEGE ALABANG INC., ATENEO DE MANILA UNIVERSITY, AND RIVERBANKS DEVELOPMENT CORPORATION, PETITIONERS,**

**MAYNILAD WATER SERVICES, INC., SILIGAN WHITE CAP SOUTHEAST ASIA, INC., AND FASTECH ELECTRONIQUE, INC., PETITIONERS-IN-INTERVENTION,**

**JOCELYN FORGE, INC. AND LYCEUM OF THE PHILIPPINES – BATANGAS CAMPUS, PETITIONERS-IN-INTERVENTION, VS. DEPARTMENT OF ENERGY, HON. ALFONSO G. CUSI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENERGY, ENERGY REGULATORY COMMISSION AND HON. JOSE VICENTE B. SALAZAR, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE ENERGY REGULATORY COMMISSION, AND HON. ALFREDO J. NON, HON. GLORIA VICTORIA C. YAPTARUC, HON. JOSEFINA PATRICIA M. ASIRIT, AND HON. GERONIMO D. STA. ANA, IN THEIR OFFICIAL CAPACITY AS INCUMBENT COMMISSIONERS OF THE ENERGY REGULATORY COMMISSION, RESPONDENTS. NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS, INC. (NASECOR), INTERVENOR, AC ENERGY HOLDINGS, INC., INTERVENOR, RETAIL ELECTRICITY SUPPLIERS ASSOCIATION OF THE PHILIPPINES, INC. (RESA), INTERVENOR, PHINMA ENERGY CORPORATION, INTERVENOR.**

**[G.R. No. 229143, March 2, 2021]**

**SILLIMAN UNIVERSITY, REPRESENTED BY ITS PRESIDENT, DR. BEN S. MALAYANG III, PETITIONERS, VS. DEPARTMENT OF ENERGY AND ENERGY REGULATORY COMMISSION, RESPONDENTS.**

**[G.R. No. 229453, March 2, 2021]**

**BATANGAS II ELECTRIC COOPERATIVE, INC., PENINSULA ELECTRIC COOPERATIVE, INC., CAMARINES SUR I ELECTRIC COOPERATIVE, INC., ILOILO I ELECTRIC COOPERATIVE, INC., AKLAN ELECTRIC COOPERATIVE, INC., CAPIZ ELECTRIC COOPERATIVE, INC., ANTIQUE ELECTRIC COOPERATIVE INC., AND LEYTE III ELECTRIC COOPERATIVE, INC., PETITIONERS, VS. DEPARTMENT OF ENERGY AND ENERGY REGULATORY COMMISSION, RESPONDENTS.**

# DECISION

## LEONEN, J.:

Subordinate legislation from specialized administrative agencies must "be germane to the objects and purposes of the law and . . . in conformity with, the standards prescribed by the law"<sup>[1]</sup> to be held as a valid exercise of delegated legislative authority.

The Department of Energy is the agency tasked with formulating rules and regulations that will animate the policy objectives of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA). The Energy Regulatory Commission, in turn, is tasked with implementing the EPIRA rules and regulations as formulated and issued by the Department of Energy. It is not empowered to supplant the Department of Energy's policies, rules, and regulations with its own issuances.<sup>[2]</sup>

This Court resolves these consolidated Petitions from electricity end-users and electric cooperatives under EPIRA. They claim that Department of Energy Circular No. DC2015-06-0010 and Energy Regulatory Commission Resolution Nos. 5, 10, 11, and 28, all series of 2016, are unconstitutional for usurping legislative authority, violating the right to due process, equal protection clause, and non-impairment clause, as well as being an unreasonable exercise of police power.

On June 8, 2001, the EPIRA was signed into law. It provided "a framework for the restructuring of the electric power industry, including the privatization of the assets of [National Power Corporation], the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities."<sup>[3]</sup>

In line with the EPIRA, the Department of Energy and the Energy Regulatory Commission issued several administrative issuances allowing electricity end-users in the contestable market to freely choose from the qualified retail electricity suppliers, including local retail electricity suppliers and distribution utilities within their franchise area.<sup>[4]</sup>

On June 19, 2015, the Department of Energy issued Department Circular No. DC2015-06-0010<sup>[5]</sup> (Department Circular), which provided policies for the full implementation of Retail Competition and Open Access. The Department of Energy noted that only about 35% of the total number of contestable customers had chosen their retail electricity supplier and registered with the Philippine Electricity Market Corporation.<sup>[6]</sup> This slow movement impacted its preparation of the Distribution Development Plan, particularly in demand forecasting.<sup>[7]</sup>

Thus, the Department Circular mandated all contestable customers with a monthly average peak demand of one megawatt (MW) which were still sourcing electricity from distribution utilities, to secure a retail supply contract from any of the following energy suppliers by June 25, 2016:

Section 1. Compliance to Full Contestability by Contestable Customers with Average Demand of One (1) MW and Above.

All [Contestable Customers], which are currently being served by their franchised [Distribution Utilities], are mandated to secure their respective [Retail Service Contracts] no later than 25 June 2016, with any of the following:

- (a) *Any licensed [Retail Electricity Supplier];*
- (b) *Any Generation Company, currently owning and operating power generation facilities, duly issued a Certificate of Compliance (COC) by the [Energy Regulatory Commission] and is offering to serve the power requirements of any [Contestable Customers]: Provided, That it secures a [Retail Electricity Supplier] license from the [Energy Regulatory Commission];*
- (c) *Any Prospective Generation Company. As used in this Circular, a Prospective Generation Company shall refer to any Person or Entity that power generation project is undergoing construction or planned and has been included in the [Department of Energy's] Power Development Plan (PDP);*

Any [Retail Supply Contract] that the [Contestable Customer] entered into with a Prospective Generation Company shall be deemed compliant with the Mandatory Contestability prescribed in this Circular;

The [Contestable Customer] and its counterparty [Retail Electricity Supplier], Generation Company or Prospective Generation Company shall submit to [the Department of Energy] and [Energy Regulatory Commission] their signed [Retail Supply Contract] for assessment, monitoring, policy and rule-making purposes particularly on the timelines and effectivity date of the [Retail Supply Contract].<sup>[8]</sup> (Emphasis supplied)

The Department Circular likewise gave a similar deadline to end-users with a monthly average peak demand ranging from 750 kilowatt (kW) to 999 kW to secure a retail supply contract with a retail electricity supplier.<sup>[9]</sup> It lowered the contestability threshold from one MW to below 750 kW and directed end-users with an average demand of 501 kW to below 750 kW to choose their retail electricity suppliers by June 26, 2018, subject to the Energy Regulatory Commission's evaluation of the retail market's performance.<sup>[10]</sup>

The Department Circular also directed the Energy Regulatory Commission to issue the necessary rules and procedures to resolve any displaced contract capacity or energy that the distribution utilities may experience due to the mandatory migration of their customers to Retail Competition and Open Access.<sup>[11]</sup>

On March 8, 2016, the Energy Regulatory Commission issued Resolution No. 5<sup>[12]</sup> (ERC Resolution No. 5), which adopted the Rules Governing the Issuance of Licenses to Retail Electricity Suppliers and Prescribing the Requirements and Conditions Therefor.<sup>[13]</sup> Its Section 3 provided those that may be retail electricity suppliers:

Section 3. Who may become a [Retail Electricity Supplier]

In accordance with the Act and its [Implementing Rules and Regulations], any of the following may become a [Retail Electricity Supplier];

- a. Generation Company or Affiliate thereof;
- b. An Affiliate of a [Distribution Utility] with respect to the latter's Contestable Market within or outside its Franchise Area, subject to restrictions imposed by the [Energy Regulatory Commission] on market share limits and the conduct of business activities;
- c. Retail Aggregators;
- d. An Independent Power Producer (IPP) Administrator; and
- e. Any other Person intending to engage in the selling, brokering[,] or marketing of electricity to the Contestable Market, consistent with the Act and its [Implementing Rules and Regulations].

The [Energy Regulatory Commission] shall not be precluded from imposing additional restrictions contained in separate rules issued, or still be issued by it. The [Energy Regulatory Commission], for justifiable reasons, may likewise exempt compliance by a [Retail Electricity Supplier] license holder to specific license conditions, taking into account the actual operations of such [Retail Electricity Supplier] license holder.

[14]

On May 12, 2016, the Energy Regulatory Commission issued Resolution No. 10<sup>[15]</sup> (ERC Resolution No. 10), which adopted the Revised Rules for Contestability.<sup>[16]</sup> It mandated end-users with an average monthly peak demand of at least one MW to enter into a retail supply contract with a retail electricity supplier by December 26, 2016. It also mandated end-users with an average monthly peak demand of at least 750 kW to enter into a retail supply contract with a retail electricity supplier by June 26, 2017. It then allowed for retail aggregation by June 26, 2018, in which electricity suppliers may contract with groups of end-users with an aggregate demand of at least 750 kW per group.<sup>[17]</sup>

Also on May 12, 2016, the Energy Regulatory Commission issued Resolution No. 11<sup>[18]</sup> (ERC Resolution No. 11), which imposed restrictions on distribution utilities and retail electricity suppliers in the Competitive Retail Electricity Market. It forbade distribution utilities from participating as suppliers in the contestable market and gave local retail electricity suppliers three years to wind down their business. It also barred them from entering into new retail supply contracts:

NOW THEREFORE, pursuant to its mandate to promote competition and protect customer interests and to establish the ultimate goal of achieving a robust and competitive retail electricity market, the ERC hereby RESOLVES to ADOPT the following:

1. *No Distribution Utility (DU) shall engage in the Supply of Electricity to End-users in the Contestable Market unless such supply is made in its capacity as a Supplier of Last Resort (SOLR).*
2. *All Local Retail Electricity Suppliers (Local RES) shall wind down their business within three (3) years from effectivity [of] the instant Resolution. Existing Retail Supply Contracts (RSCs) entered into with their respective Contestable Customers shall*

remain valid until the expiration of the said contracts subject to the winding down period. Accordingly, no new RSCs shall be signed and executed after the effectivity of this Resolution.

During the said winding down period, the Local RES shall continue to comply with all reportorial requirements prescribed by the Commission.

3. No [Retail Electricity Supplier] shall be allowed to supply more than thirty percent (30%) of the total average monthly peak demand of all contestable customers in the [Competitive Retail Electricity Market]. The level demand shall be determined by the [Energy Regulatory Commission] on a quarterly basis which should be posted on the website every 30<sup>th</sup> of the month following the quarter.
4. No [Retail Electricity Supplier] shall be allowed to transact more than fifty percent (50%) of the total energy transactions of its Supply business, with its affiliate Contestable Customers.

Any [Retail Electricity Supplier] not in compliance with this safeguard shall be given a period of two (2) years from 26 December 2016 to comply therewith: *Provided further*, That in no case shall it be allowed to execute any [Retail Service Contracts] with Affiliates, nor renew its [Retail Service Contracts] with the said affiliates unless such execution or renewal no longer amounts to a breach of the aforementioned safeguard.

[19]

On November 15, 2016, the Energy Regulatory Commission issued Resolution No. 28<sup>[20]</sup> (ERC Resolution No. 28), which amended the mandatory contestability date for end-users with an average monthly peak demand of at least one MW. Originally set on December 26, 2016 per the Revised Rules for Contestability, the deadline was moved to February 26, 2017.<sup>[21]</sup> However, ERC Resolution No. 28 did not amend the mandatory contestability deadlines for end-users with an average monthly peak demand of at least 750 kW and 500 kW.

On December 27, 2016, petitioners Philippine Chamber of Commerce and Industry, San Beda College Alabang, Inc., Ateneo de Manila University, and Riverbanks Development Corporation filed a Petition for Certiorari, Prohibition, and Injunction<sup>[22]</sup> (First Petition) against respondents Department of Energy, Energy Regulatory Commission, and their respective officers. Petitioners claim to be end-users that have migrated to the contestable market to be able to freely choose from the retail electricity suppliers, including local retail electricity suppliers and distribution utilities, within their franchise area.<sup>[23]</sup>

The First Petition asserts that under Section 31 of the EPIRA, any migration of electricity end-users to the contestable market is voluntary,<sup>[24]</sup> as supported by congressional deliberations.<sup>[25]</sup> It argues that respondents abandoned the clear policy of the EPIRA, which was to promote competition through greater end-user