669 Phil. 93

SECOND DIVISION

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

NATIONAL ASSOCIATION OF ELECTRICIY CONSUMERS FOR REFORMS, INC. (NASECORE), REPRESENTED BY PETRONILO ILAGAN; FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), REPRESENTED BY SIEFRIEDO VELOSO; AND FEDERATION OF LAS PIÑAS VILLAGE (FOLVA), REPRESENTED BY BONIFACIO DAZO, PETITIONERS, VS. ENERGY REGULATORY COMMISSION (ERC) AND MANILA ELECTRIC COMPANY, INC. (MERALCO), RESPONDENTS.

D E C I S I O N

SERENO, J.:

The Energy Regulatory Commission (ERC), created under the *Electric Power Industry Reform Act of 2001*(EPIRA), [1] used to apply the Return on Rate Base (RORB) method to determine the proper amount a distribution utility (DU) may charge for the services it provides. The RORB scheme had been the method for computing allowable electricity charges in the Philippines for decades, before the onset of the EPIRA. Section 43(f) of the EPIRA allows the ERC to shift from the RORB methodology to alternative forms of internationally accepted rate-setting methodology, subject to multiple conditions. [2] The ERC, through a series of resolutions, adopted the Performance-Based Regulation (PBR) method to set the allowable rates DUs may charge their customers. [3] Meralco, a DU, applied for an increase of its distribution rate under the PBR scheme docketed as ERC Case No. 2009-057 RC (MAP_{2010} case) on 7 August 2009. Petitioners NASECORE, FOLVA, FOVA, and Engineer Robert F. Mallillin (Mallillin) all filed their own Petitions for Intervention to oppose the application of Meralco. [4]

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

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

At the 26 November 2009 hearing, NASECORE and FOLVA again failed to attend the

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

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

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

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

On 14 December 2009, [10] Meralco's application in the MAP_{2010} case was approved by ERC. Petitioner NASECORE protests this claiming approval as premature, that there were still four days before the expiration of the period given to it to file its opposition to the formal offer of evidence of Meralco, and before petitioner NASECORE received its copy of the documents Meralco was required to additionally submit in the 7 December 2009 ERC Order.

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

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

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

Petitioners' main assertion is that the ERC Decision approving the MAP_{2010} application of Meralco is null and void for having been issued in violation of their right to due process of law. [12] They further ask this Court to stay the execution of the aforementioned Decision for being void, to wit:

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

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

1. Petitioners have availed of an improper remedy; [14]
2. Petitioners have failed to observe the proper hierarchy of courts; [15]
3. Petitioners were amply afforded the right to participate in the proceedings and have thus been afforded sufficient opportunity to be heard; [16] and
4. Meralco has already voluntarily suspended the implementation of the approved MAP_{2010} rates rendering the issues raised in this Petition moot. [17]

Meralco furthermore opposes petitioners' prayer for the issuance of a TRO or Status quo order. It argues that petitioners failed to present an "urgent and paramount necessity" for the issuance of the writ considering that Meralco already voluntarily suspended the implementation of the assailed Decision pending resolution of Mallillin's MR. In fact, on 1 February 2010, ERC issued an Order suspending the implementation of the 14 December 2009 Decision pending the resolution of Mallillin's MR.

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

New Allegations in the Reply and
Meralco's Comment Thereon

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

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

Petitioners newly argue that the ERC erred in approving Meralco's application for increasing its charges in spite of the validation by the Commission on Audit (COA),

through a report, of a computation showing Meralco's income as exceeding the 12% mandated by law. Petitioners conclude thus:

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

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

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

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

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

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

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

A table showing that the common stockholders of Meralco, for the last 21 years, had earned 424% on their actual investment, per year, was also presented by petitioners. Petitioners conclude that these numbers negate any argument that Meralco needs a rate increase, irrespective of any under rate methodology applied. [22]

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

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

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

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

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

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

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

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

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