581 Phil. 541

FIRST DIVISION

[G.R. No. 170934, July 23, 2008]

NATIONAL POWER CORPORATION, PETITIONER, VS. EAST ASIA UTILITIES CORPORATION AND CEBU PRIVATE POWER CORPORATION, RESPONDENTS.

D E C I S I O N

PUNO, CJ.:

This is a Petition for Review[1] under Rule 45 of the Rules of Court, assailing the Decision dated December 14, 2005 of the Court of Appeals (CA) in CA-G.R. SP No. 77600, entitled "National Power Corporation v. East Asia Utilities Corporation and Cebu Private Power Corporation." Said Decision affirmed *in toto* the Decision dated June 28, 2001 rendered by the then Energy Regulatory Board (ERB) in ERB Case No. 99-51 (ERB Decision), as modified by the Order dated March 28, 2003 issued by the then Energy Regulatory Commission (ERC) in ERC Case No. 2001-557 (ERC Order).

The undisputed facts of the case, as summarized by the CA, are as follows:

> Petitioner National Power Corporation (NPC) is a government-owned and controlled corporation created and existing by virtue of Republic Act 6395, as amended. On the other hand, respondents East Asia Utilities Corporation (EAUC) and Cebu Private Power Corporation (Cebu Power) are private corporations duly organized under the existing laws of the Republic of the Philippines.
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> The respondents EAUC and Cebu Power and the petitioner NPC are the complainants and respondent, respectively, in ERB Case No. 99-51 entitled "*East Asia Utilities Corporation and Cebu Private Power Corporaiton vs. National Power Corporation.*"
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> Respondents are both independent power producers (IPPs) duly accredited with the Department of Energy (DOE) as operators of diesel power generating units. Both had secured the approval of the then Energy Regulatory Board (ERB) to sell their excess power to the Visayan Electric Company, Inc. (VECO) under ERB Cases Nos. 94-26 and 97-05. While respondent EAUC is a registered ecozone utility enterprise of the Mactan Economic Processing Zone (MEPZ) which wheels its excess capacity to VECO using its own 69 KV sub-transmission line, respondent Cebu Power sells its entire generating capacity to VECO using a direct connection to VECO's 69 KV grid through its Ermita Substation.
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> Sometime in 1999, the petitioner billed respondent EAUC as PDS tariffs the amount of P29,069,294.93 for the period covering December 26,

1998 to April 15, 1999. Respondent EAUC paid under protest the total amount billed, out of which the sum of P17,551,912.59 is being contested. Petitioner also billed respondent Cebu Power as PDS tariffs the amount of P3,032,509.08 for the period covering March 26, 1999 to April 25, 1999. Respondent Cebu Power paid under protest the total amount billed and contested P1,324,275.31 thereof.

Despite respondents' protestations, petitioner NPC continued to bill the former with what they claimed as inapplicable/contested tariffs. Fearing that the said unauthorized billings by the petitioner NPC would continuously amplify and escalate to their prejudice, the respondents filed on August 24, 1999 a complaint in the then ERB against petitioner NPC for a refund/credit and/or collection of inapplicable/unauthorized tariffs with prayer for a cease and desist order and/or preliminary injunction.

The petitioner NPC filed its comment on said complaint. It averred that the Power Delivery Services (PDS) that it provides and for which respondent EAUC is being charged of refer to the one associated with the firm Load Following and Frequency Regulation (LFFR) and Spinning Reserve (SR) services. It also averred that the use of its transmission and sub-transmission facilities is the reason why it charges PDS under the approved tariffs for Open Access Transmission Services (AOTS) and Ancillary Services (AS). Also, the PDS charges were applied to the respondents in conjunction with the AS provided to them. Petitioner further averred that it applied the approved PDS charges only to a certain percentage of the billing capacities of the IPPS, i.e., 13.2% of the billing capacities in conjunction with the provision of the firm LFFR and SR while additional PDS charges were applied when back-up power services were requested. Furthermore, petitioner averred that the PDS charges are applicable to transmission customers which are embedded generation not for the transfer of power and energy from the generating resources to the load but for the delivery to the generation-based AS being provided by it; that the provision of AS would not be possible unless its transmission and sub-transmission facilities are used; that non-payment of the PDS charges by embedded generation would be less than fair and short of discriminatory to its other customers even as the same would not reflect its true cost of service; that the energy supplied in relation to the provision of non-firm back-up power service requires the consumption of fuel for conversion to electrical energy; that while the `Peso per kW' charges are similar to its demand charge, the customer is likewise required to pay for the corresponding energy consumption; that there is no question that such energy was delivered inasmuch as the back-up power was delivered as scheduled for a definite period of time; that the Energy Imbalance and Back-up Energy Charge are actually charges for the energy delivered and consumed by the transmission customer or its load and, if the said charges are not paid, petitioner would not be able to recover its variable costs; that with regards to over-generation, part of the stipulation and agreement approved by ERB in ERB Case No. 96-118 provide that it shall not pay the transmission customer for over-deliveries; that in accordance with its prior agreement with respondent EAUC's representatives in Cebu, it was agreed that

respondent EAUC would continue to charge VECO for the entire production of respondent EAUC to avoid confusion; that the same virtually makes petitioner NPC pay respondent EAUC (in terms of electricity) for over-deliveries in violation of the stipulation and agreement; that it was agreed that respondent EAUC shall reimburse petitioner for over-deliveries in the form of Over-Generation Charges using applicable rates as if electricity was still sold to VECO; that it does not prevent respondent EAUC from selling as much as it wants to VECO provided that it schedules such deliveries; and that any excess requirement of VECO is already the (existing) market of respondent and should not be expropriated by any other supplier, inadvertently or otherwise, in violation of any existing contract executed by the parties.

On January 11, 2000, respondents EAUC and Cebu Power filed a reply to petitioner's comment with Motion to Reiterate Prayer for the Issuance of a Cease and Desist Order and/or Writ of Preliminary Injunction against the petitioner. Respondents contended that petitioner cannot and must not charge its transmission customers rates that have not been approved by ERB in ERB Case No. 96-118; that the Tariff Structure and Stipulation and Agreement as embodied in the Decision of ERB in ERB Case No. 96-118 consists of the Tariffs for Transmission and Ancillary Services; that under the Transmission Tariff, petitioner adopted the `Postage Stamp Methodology' while, under the Ancillary Services, it used the `Marginal Capacity Cost Method'; that in the power delivery of the petitioner, it is but just and proper for it to charge its customers for both Power Delivery (actual usage of the line in transport) and Ancillary Services Charges (maintenance of grid reliability); that in case of IPPs, however, petitioner cannot use the assertion that the transmission facilities are used to provide ancillary services; that justice and equity demand that customers be made to pay only for services that are actually rendered, i.e. that they pay for the transmission line used in transporting power and for the ancillary services required in maintaining grid reliability; that under the existing regulatory framework, petitioner is allowed to recover all its costs, also known as revenue requirement, but must not be allowed to `Double Recover' its cost by charging at the same time separate amounts for PDS, Ancillary Services and Power Delivery Service for Ancillary Services; that the PDS is not an automatic component of the Ancillary Services, thus, PDS is only applicable to IPPs using the transmission facilities in transporting power while Ancillary Services are required in maintaining grid reliability; that consequently, an IPP need not pay PDS if its facilities are embedded in the distribution network but must, however, pay for Ancillary Services necessary for maintaining grid reliability; that there is no such thing as PDS for Ancillary Services; that an IPP which is not using the transmission system to transport power should not be made to pay for PDS; that it is totally unfair on the part of an IPP to assist respondent in maintaining the grid yet pay for PDS where actual line flows do not exist; that the Open Access Transmission Services (OATS) and Ancillary Services Tariffs as approved by the ERB do not include the Energy Imbalance Charge and Back-up Energy Charge and, consequently, petitioner cannot charge an IPP a fee/tariff which is not approved by the ERB; and that they are in no way questioning the legally [sic] and/or wisdom of the tariffs/charges imposed by ERB in ERB Case

No. 96-118 but rather the applicability of the same to a particular class of customers.

During the proceedings in ERB Case No. 99-51, the respondents adduced in evidence the testimonies of their Executive Vice President and General Manager, Mr. John V. Alcordo and Mr. Arthur Evangelista, respectively, and some documentary evidence marked as Exhibits "A" to "HH". For its part, petitioner NPC adduced in evidence the testimonies of its Utility Economics Manager, Jesusito Sulit, and its Transmission Service Bureau Head, Mr. Mario Pangilinan, and some documentary evidence marked as Exhibits "1" to "8".

ERB then ruled that the core issue which was to be passed upon by it is whether or not the respondents, as IPP's embedded in the distribution network of VECO (as the distribution company), are liable to pay petitioner NPC the following:

(a) The firm Power Delivery Services Charges corresponding to the Load Following and Frequency Regulation and Spinning Reserve ancillary services provided by petitioner, or what respondents refer to as `Transmission for Internal Generation';

(b) The rate for Back-up (Bu, kW) Service prescribed [by] ERB in its June 11, 1997 Decision in ERB Case No. 96-118 in relation to the non-firm Back-up (Bu, kW) Service purchased by respondents from the petitioner;

(c) The energy related service received by respondents in relation to the provision of non-firm Back-up (Bu, kW) Service by petitioner;

(d) The rate for Load Following and Frequency Regulation Service and Spinning Reserve Service relative to the provision of Back-up (Bu, kW) Service by petitioner; and

(e) The rate for Power Delivery Service relative to the provision of Back-up (Bu, kW) Service by petitioner.

On June 28, 2001, after a thorough hearing and review of both parties' evidence, the ERB rendered a decision, the dispositive portion of which reads as follows:

> "WHEREFORE, considering all the foregoing, this Board hereby directs:
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> 1. Respondent to CEASE and DESIST from charging complainants the Power Delivery Service charges corresponding to the Ancillary Services, i.e., firm Load Following and Frequency Regulation Service and Spinning Reserve Service, being availed of by them, or what complainants refer to a[s] "Transmission for Internal Generation" charges, and to REFUND all amounts collected by reason thereof to the complainants who, if they so desire, may opt to credit or apply the

same to their future billings from the respondent;

2. Respondent to SUBMIT to this Board, for approval, a proposed rate for non-firm Back-up (Bu, kW) Service, together with the supporting documents used in the determination of the said rate, within thirty (30) days from receipt of this decision. It must be emphasized that in computing for the said rate, the base data to be used should refer to the year 1995, the test year used in determining the tariffs for the OATS and the other ancillary services. Pending approval of the proposed rate, respondent may continue to charge the firm Back-up (Bu, kW) Service rate prescribed in the board's Decision in ERB Case No. 96-11[8]. Any amount corresponding to the difference between the rate presently charged by respondent and the rate for non-firm Back-up Service to be finally approved by the Board shall be refunded to or credited to future billings of the complainants, at the option of the latter.

3. Respondent to CEASE and DESIST from charging complainants the commercial rate for the energy supplied in relation to the provision of non-firm Back-up (Bu, kW) Service, and to instead bill complainants therefore at the computed monthly average One Day Power Sales (ODPS) rate multiplied by the energy involved. Any sum representing the difference between the commercial rate and the computed monthly ODPS rate shall be refunded to or credited to future billings of the complainants, at the option of the latter.

4. Respondent to continue to charge, and complainants to continue to pay the Power Delivery Service (PDS) rate in connection with the provision of non-firm Back-up (Bu, kW) Service.

5. Respondent to CEASE and DESIST from charging complainants the rates for Load Following and Frequency Regulation (LFFR) Service and Spinning Reserve (SR) Service relative to the provision of Back-up (Bu, kW) Service, and to REFUND all amounts collected by reason thereof to the complainants who, if they so desire, may choose to credit or apply the same to their future billings from the respondent.

6. Respondent to submit to this Board for approval rules and regulations implementing the tariffs for the OATS and ancillary services to enable the Board to conduct a review of all existing billing determinants applied by respondent in computing its charges relative to the provision of Power Delivery Services and Ancillary Services to its customers.