

## EN BANC

[ G.R. NO. 159796, July 17, 2007 ]

**ROMEO P. GEROCHI, KATULONG NG BAYAN (KB) AND ENVIRONMENTALIST CONSUMERS NETWORK, INC. (ECN), PETITIONERS, VS. DEPARTMENT OF ENERGY (DOE), ENERGY REGULATORY COMMISSION (ERC), NATIONAL POWER CORPORATION (NPC), POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT GROUP (PSALM CORP.), STRATEGIC POWER UTILITIES GROUP (SPUG), AND PANAY ELECTRIC COMPANY INC. (PECO), RESPONDENTS.**

### DECISION

**NACHURA, J.:**

Petitioners Romeo P. Gerochi, *Katulong Ng Bayan* (KB), and Environmentalist Consumers Network, Inc. (ECN) (petitioners), come before this Court in this original action praying that Section 34 of Republic Act (RA) 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA), imposing the Universal Charge,<sup>[1]</sup> and Rule 18 of the Rules and Regulations (IRR)<sup>[2]</sup> which seeks to implement the said imposition, be declared unconstitutional. Petitioners also pray that the Universal Charge imposed upon the consumers be refunded and that a preliminary injunction and/or temporary restraining order (TRO) be issued directing the respondents to refrain from implementing, charging, and collecting the said charge.<sup>[3]</sup> The assailed provision of law reads:

SECTION 34. *Universal Charge*. – Within one (1) year from the effectivity of this Act, a universal charge to be determined, fixed and approved by the ERC, shall be imposed on all electricity end-users for the following purposes:

(a) Payment for the stranded debts<sup>[4]</sup> in excess of the amount assumed by the National Government and stranded contract costs of NPC<sup>[5]</sup> and as well as qualified stranded contract costs of distribution utilities resulting from the restructuring of the industry;

(b) Missionary electrification;<sup>[6]</sup>

(c) The equalization of the taxes and royalties applied to indigenous or renewable sources of energy vis-à-vis imported energy fuels;

(d) An environmental charge equivalent to one-fourth of one centavo per kilowatt-hour (P0.0025/kWh), which shall accrue to an environmental fund to be used solely for watershed rehabilitation and management. Said fund shall be managed by NPC under existing arrangements; and

(e) A charge to account for all forms of cross-subsidies for a period not exceeding three (3) years.

The universal charge shall be a non-bypassable charge which shall be passed on and collected from all end-users on a monthly basis by the distribution utilities. Collections by the distribution utilities and the TRANSCO in any given month shall be remitted to the PSALM Corp. on or before the fifteenth (15th) of the succeeding month, net of any amount due to the distribution utility. Any end-user or self-generating entity not connected to a distribution utility shall remit its corresponding universal charge directly to the TRANSCO. The PSALM Corp., as administrator of the fund, shall create a Special Trust Fund which shall be disbursed only for the purposes specified herein in an open and transparent manner. All amount collected for the universal charge shall be distributed to the respective beneficiaries within a reasonable period to be provided by the ERC.

### ***The Facts***

Congress enacted the EPIRA on June 8, 2001; on June 26, 2001, it took effect.<sup>[7]</sup>

On April 5, 2002, respondent National Power Corporation-Strategic Power Utilities Group<sup>[8]</sup> (NPC-SPUG) filed with respondent Energy Regulatory Commission (ERC) a petition for the availment from the Universal Charge of its share for Missionary Electrification, docketed as ERC Case No. 2002-165.<sup>[9]</sup>

On May 7, 2002, NPC filed another petition with ERC, docketed as ERC Case No. 2002-194, praying that the proposed share from the Universal Charge for the Environmental charge of P0.0025 per kilowatt-hour (/kWh), or a total of P119,488,847.59, be approved for withdrawal from the Special Trust Fund (STF) managed by respondent Power Sector Assets and

Liabilities Management Group (PSALM)<sup>[10]</sup> for the rehabilitation and management of watershed areas.<sup>[11]</sup>

On December 20, 2002, the ERC issued an Order<sup>[12]</sup> in ERC Case No. 2002-165 provisionally approving the computed amount of P0.0168/kWh as the share of the NPC-SPUG from the Universal Charge for Missionary Electrification and authorizing the National Transmission Corporation (TRANSCO) and Distribution Utilities to collect the same from its end-users on a monthly basis.

On June 26, 2003, the ERC rendered its Decision<sup>[13]</sup> (for ERC Case No. 2002-165) modifying its Order of December 20, 2002, thus:

WHEREFORE, the foregoing premises considered, the provisional authority granted to petitioner National Power Corporation-Strategic Power Utilities Group (NPC-SPUG) in the Order dated December 20, 2002 is hereby modified to the effect that an additional amount of P0.0205 per kilowatt-hour should be added to the P0.0168 per kilowatt-hour provisionally authorized by the Commission in the said Order. Accordingly, a total amount of P0.0373 per kilowatt-hour is hereby

APPROVED for withdrawal from the Special Trust Fund managed by PSALM as its share from the Universal Charge for Missionary Electrification (UC-ME) effective on the following billing cycles:

(a) June 26-July 25, 2003 for National Transmission Corporation (TRANSCO); and

(b) July 2003 for Distribution Utilities (Dus).

Relative thereto, TRANSCO and Dus are directed to collect the UC-ME in the amount of P0.0373 per kilowatt-hour and remit the same to PSALM on or before the 15th day of the succeeding month.

In the meantime, NPC-SPUG is directed to submit, not later than April 30, 2004, a detailed report to include Audited Financial Statements and physical status (percentage of completion) of the projects using the prescribed format.

Let copies of this Order be furnished petitioner NPC-SPUG and all distribution utilities (Dus).

SO ORDERED.

On August 13, 2003, NPC-SPUG filed a Motion for Reconsideration asking the ERC, among others,<sup>[14]</sup> to set aside the above-mentioned Decision, which the ERC granted in its Order dated October 7, 2003, disposing:

WHEREFORE, the foregoing premises considered, the "Motion for Reconsideration" filed by petitioner National Power Corporation-Small Power Utilities Group (NPC-SPUG) is hereby GRANTED. Accordingly, the Decision dated June 26, 2003 is hereby modified accordingly.

Relative thereto, NPC-SPUG is directed to submit a quarterly report on the following:

1. Projects for CY 2002 undertaken;
2. Location
3. Actual amount utilized to complete the project;
4. Period of completion;
5. Start of Operation; and
6. Explanation of the reallocation of UC-ME funds, if any.

SO ORDERED.<sup>[15]</sup>

Meanwhile, on April 2, 2003, ERC decided ERC Case No. 2002-194, authorizing the NPC to draw up to P70,000,000.00 from PSALM for its 2003 Watershed Rehabilitation Budget subject to the availability of funds for the Environmental Fund component of the Universal Charge.<sup>[16]</sup>

On the basis of the said ERC decisions, respondent Panay Electric Company, Inc. (PECO) charged petitioner Romeo P. Gerochi and all other

end-users with the Universal Charge as reflected in their respective electric bills starting from the month of July 2003.<sup>[17]</sup>

Hence, this original action.

Petitioners submit that the assailed provision of law and its IRR which sought to implement the same are unconstitutional on the following grounds:

- 1) The universal charge provided for under Sec. 34 of the EPIRA and sought to be implemented under Sec. 2, Rule 18 of the IRR of the said law is a tax which is to be collected from all electric end-users and self-generating entities. The power to tax is strictly a legislative function and as such, the delegation of said power to any executive or administrative agency like the ERC is unconstitutional, giving the same unlimited authority. The assailed provision clearly provides that the Universal Charge is to be determined, fixed and approved by the ERC, hence leaving to the latter complete discretionary legislative authority.
- 2) The ERC is also empowered to approve and determine where the funds collected should be used.
- 3) The imposition of the Universal Charge on all end-users is oppressive and confiscatory and amounts to taxation without representation as the consumers were not given a chance to be heard and represented.<sup>[18]</sup>

Petitioners contend that the Universal Charge has the characteristics of a tax and is collected to fund the operations of the NPC. They argue that the cases<sup>[19]</sup> invoked by the respondents clearly show the regulatory purpose of the charges imposed therein, which is not so in the case at bench. In said cases, the respective funds<sup>[20]</sup> were created in order to balance and stabilize the prices of oil and sugar, and to act as buffer to counteract the changes and adjustments in prices, peso devaluation, and other variables which cannot be adequately and timely monitored by the legislature. Thus, there was a need to delegate powers to administrative bodies.<sup>[21]</sup> Petitioners posit that the Universal Charge is imposed not for a similar purpose.

On the other hand, respondent PSALM through the Office of the Government Corporate Counsel (OGCC) contends that unlike a tax which is imposed to provide income for public purposes, such as support of the government, administration of the law, or payment of public expenses, the assailed Universal Charge is levied for a specific regulatory purpose, which is to ensure the viability of the country's electric power industry. Thus, it is exacted by the State in the exercise of its inherent police power. On this premise, PSALM submits that there is no undue delegation of legislative power to the ERC since the latter merely exercises a limited authority or discretion as to the execution and implementation of the provisions of the EPIRA.<sup>[22]</sup>

Respondents Department of Energy (DOE), ERC, and NPC, through the Office of the Solicitor General (OSG), share the same view that the Universal Charge is not a tax because it is levied for a specific regulatory purpose, which is to ensure the viability of the country's electric power industry, and is, therefore, an exaction in the exercise of the State's police power. Respondents further contend that said Universal Charge does not possess the essential characteristics of a tax, that its imposition

would redound to the benefit of the electric power industry and not to the public, and that its rate is uniformly levied on electricity end-users, unlike a tax which is imposed based on the individual taxpayer's ability to pay. Moreover, respondents deny that there is undue delegation of legislative power to the ERC since the EPIRA sets forth sufficient determinable standards which would guide the ERC in the exercise of the powers granted to it. Lastly, respondents argue that the imposition of the Universal Charge is not oppressive and confiscatory since it is an exercise of the police power of the State and it complies with the requirements of due process.<sup>[23]</sup>

On its part, respondent PECO argues that it is duty-bound to collect and remit the amount pertaining to the Missionary Electrification and Environmental Fund components of the Universal Charge, pursuant to Sec. 34 of the EPIRA and the Decisions in ERC Case Nos. 2002-194 and 2002-165. Otherwise, PECO could be held liable under Sec. 46<sup>[24]</sup> of the EPIRA, which imposes fines and penalties for any violation of its provisions or its IRR.<sup>[25]</sup>

### ***The Issues***

The ultimate issues in the case at bar are:

- 1) Whether or not, the Universal Charge imposed under Sec. 34 of the EPIRA is a tax; and
- 2) Whether or not there is undue delegation of legislative power to tax on the part of the ERC.<sup>[26]</sup>

Before we discuss the issues, the Court shall first deal with an obvious procedural lapse.

Petitioners filed before us an original action particularly denominated as a Complaint assailing the constitutionality of Sec. 34 of the EPIRA imposing the Universal Charge and Rule 18 of the EPIRA's IRR. No doubt, petitioners have *locus standi*. They impugn the constitutionality of Sec. 34 of the EPIRA because they sustained a direct injury as a result of the imposition of the Universal Charge as reflected in their electric bills.

However, petitioners violated the doctrine of hierarchy of courts when they filed this "Complaint" directly with us. Furthermore, the Complaint is bereft of any allegation of grave abuse of discretion on the part of the ERC or any of the public respondents, in order for the Court to consider it as a petition for *certiorari* or prohibition.

Article VIII, Section 5(1) and (2) of the 1987 Constitution<sup>[27]</sup> categorically provides that:

SECTION 5. The Supreme Court shall have the following powers:

1. Exercise *original jurisdiction* over cases affecting ambassadors, other public ministers and consuls, and over *petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus*.
2. Review, revise, reverse, modify, or affirm on *appeal or certiorari*, as the law or the rules of court may provide, final judgments and orders of lower courts in: