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[G.R. NO. 163935, August 16, 2006]

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

RESOLUTION

CALLEJO, SR., J.:

The Energy Regulatory Commission (ERC) and the Manila Electric Company (MERALCO), in their respective motions, seek reconsideration of the Court's Decision[2] dated February 2, 2006 declaring void ERC Order dated June 2, 2004 which approved the increase of MERALCO's generation charge from P3.1886 per kilowatt hour (kWh) to P3.3213 per kWh.

The Private Electric Power Operators Association, Inc. (PEPOA) filed its Motion for Leave to Intervene and to Admit Attached Comment-in-Intervention and the said Comment-in-Intervention. The Philippine Independent Power Producers Association (PIPPA), without seeking leave of Court, filed its Intervention.

In the Decision, the Court essentially held that, in issuing the assailed Order, the ERC committed grave abuse of discretion, thus:

(1) MERALCO's amended application for the increase of its generation charge was not published in a newspaper of general circulation in violation of Section 4(e), Rule 3 of the Implementing Rules and Regulations (IRR) of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA);

(2) The Generation Rate Adjustment Mechanism (GRAM) Implementing Rules promulgated by the ERC on February 24, 2003, which was relied upon by the ERC and MERALCO as basis for the approval of the latter's amended application for the increase of generation charge and which does not require such publication, was likewise not published in the Official Gazette or in a newspaper of general circulation. Further, the GRAM Implementing Rules was not filed with the Office of the National Administrative Register (ONAR). This lack of publication of the GRAM Implementing Rules violates the fundamental principle of due process as enunciated by the Court in the landmark case of *Tañada v. Tuvera*.[2]

According to the Court, Section 4(e), Rule 3 of the IRR of the EPIRA speaks of "any application or petition for rate adjustment or any relief affecting the consumers."

The said provision does not make any distinction; hence, any application or petition that would result in the adjustment or change in the retail rate or total price paid by the end-users, whether such is occasioned by the adjustment or change in the charges for generation, transmission, distribution, supply, etc., falls within its contemplation. MERALCO's amended application for the increase of its generation charge is thus properly covered by Section 4(e), Rule 3 of the IRR of the EPIRA and its lack of publication, which constitutes non-compliance therewith, is fatal.

The Court held that the ERC and MERALCO's reliance on the GRAM Implementing Rules is unavailing. To recall, ERC and MERALCO argued that the latter's amended application for the increase of its generation charge is not covered by Section 4(e), Rule 3 of the IRR of the EPIRA but, instead, is governed by the GRAM Implementing Rules. The latter does not contain the requirement of publication of any application filed thereunder. However, as found by the Court, the GRAM Implementing Rules was not published in the Official Gazette or in any newspaper of general circulation in violation of the fundamental principle of due process. Consequently, the GRAM Implementing Rules has no force and effect for it is axiomatic that "publication in the Official Gazette or a newspaper of general circulation is a condition *sine qua non* before statutes, rules or regulations can take effect."[3]

The ERC submits the following grounds in support of its Motion for Reconsideration:

I

> The Honorable Court erred in ruling that "Section 4(e), Rule 3 of the IRR of the EPIRA speaks of "any application or petition for rate adjustment" without making any distinctions" despite the fact that the framers thereof intended it to apply to a general rate proceeding and not to filings or applications made pursuant to adjustment clauses or what are referred to as "escalator clauses".

II

> The Honorable Court erred in ruling that "the amended application of respondent MERALCO for the increase of its general [should read generation] charge is covered by Section 4(e), Rule 3 of the IRR of the EPIRA" notwithstanding that ERC Case No. 2004-112 wherein the June 2, 2004 Order of respondent ERC was issued is not a general rate proceeding but one instituted pursuant to the Generation Rate Adjustment Mechanism (GRAM) which the ERC adopted to improve on the then existing adjustment mechanism known as the Purchased Power Adjustment (PPA) and the resultant nullification by the Honorable Court of the June 2, 2004 Order of the ERC and its declaration that the GRAM Guidelines had not become effective, prejudiced the interests of the consumers.

III

> The Honorable Court erred in giving Section 4(e) of Rule 3 of the EPIRA IRR an expansive coverage by making it apply to any or all applications/petitions filed with respondent ERC that would result to [sic] changes in electricity rates the result of which would paralyze the ERC and render it unable to discharge its mandate under the EPIRA and in

this sense, said IRR effectively contravenes and defeats the very law it seeks to implement.[4]

For its part, MERALCO proffers the following grounds in support of its Motion for Reconsideration:

I

IT COULD NOT HAVE BEEN THE INTENT OF THE IRR TO COVER AUTOMATIC ADJUSTMENT CLAUSES.

II

THE APPLICATION OF RULE 3, SECTION 4(E) OF THE EPIRA IRR TO GRAM WOULD RESULT IN ABSURDITY AND UNDERMINE THE FINANCIAL VIABILITY OF THE DISTRIBUTION UTILITIES AS PROTECTED BY EPIRA.

III

THE IMPLEMENTATION OF THE DECISION OF THE HONORABLE COURT DATED 02 FEBRUARY 2006 WOULD RESULT IN SEVERE REPERCUSSIONS TO THE ENTIRE ELECTRIC INDUSTRY AND TO THE PUBLIC IN GENERAL, A SITUATION WHICH COULD NOT HAVE BEEN CONTEMPLATED BY THE FRAMERS OF THE LAW AND THE EPIRA IRR.

IV

PRIVATE RESPONDENT MERALCO, ALONG WITH THE OTHER DISTRIBUTION UTILITIES AND THE NPC ACTED IN GOOD FAITH IN RELYING UPON THE RULES AND REGULATIONS ISSUED BY THE ERC; HENCE, THE NULLIFICATION OF THE GRAM RULES MUST BE APPLIED PROSPECTIVELY SO AS NOT TO UNDULY PREJUDICE THE UTILITIES.[5]

The arguments raised in the respective motions of the ERC and MERALCO, as they are substantially similar, shall be addressed jointly. On the other hand, the arguments raised by the intervenors are basically ancillary to those of the ERC and MERALCO; hence, the Court finds no need to address them separately.

The ERC and MERALCO mainly posit that MERALCO's amended application for the increase of its generation charge is not covered by Section 4(e), Rule 3 of the IRR of the EPIRA. For clarity, the provision is quoted anew:

(e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement receipt of a copy thereof by the LGU Legislative Body of the locality where the applicant or petitioner principally operates together with the certification of the notice of publication thereof in a newspaper of general circulation in the same locality.

The ERC may grant provisionally or deny the relief prayed for not later than seventy-five (75) calendar days from the filing of the application or petition, based on the same and the supporting documents attached thereto and such comments or pleadings the consumers or the LGU

> concerned may have filed within thirty (30) calendar days from receipt of a copy of the application or petition or from the publication thereof as the case may be.
>
> Thereafter, the ERC shall conduct a formal hearing on the application or petition, giving proper notices to all parties concerned, with at least one public hearing in the affected locality, and shall decide the matter on the merits not later than twelve (12) months from the issuance of the aforementioned provisional order.
>
> This Section 4(e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance with Section 36 of the Act.

In *Freedom from Debt Coalition v. ERC*,[6] the Court outlined the procedure enjoined by the above provisions, thus:

> (1) The applicant must file with the ERC a verified application/petition for rate adjustment. It must indicate that a copy thereof was received by the legislative body of the LGU concerned. It must also include a certification of the notice of publication thereof in a newspaper of general circulation in the same locality.
>
> (2) Within 30 days from receipt of the application/petition or the publication thereof, any consumer affected by the proposed rate adjustment or the LGU concerned may file its comment on the application/petition, as well as on the motion for provisional rate adjustment.
>
> (3) If such comment is filed, the ERC must consider it in its action on the motion for provisional rate adjustment, together with the documents submitted by the applicant in support of its application/petition. If no such comment is filed within the 30-day period, then and only then may the ERC resolve the motion for provisional rate adjustment on the basis of the documents submitted by the applicant.
>
> (4) However, the ERC need not conduct a hearing on the motion for provisional rate adjustment. It is sufficient that it consider the written comment, if there is any.
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> (5) The ERC must resolve the motion for provisional rate adjustment within 75 days from the filing of the application/petition.
>
> (6) Thereafter, the ERC must conduct a full-blown hearing on the application/petition not later than 30 days from the date of issuance of the provisional order and must resolve the application/petition not later than 12 months from the issuance of the provisional order. Effectively, this provision limits the lifetime of the provisional order to only 12 months.[7]

The Court stressed in *Freedom from Debt Coalition* two important new requirements prescribed by Section 4(e), Rule 3 of the EPIRA IRR: "first, the need to publish the application in a newspaper of general circulation in the locality where the applicant

operates; and second, the need for the ERC to consider the comments or pleadings of the customers and the LGU concerned in its action on the application or motion for provisional rate adjustment."[8]

In their respective motions for reconsideration, the ERC and MERALCO vigorously contend that Section 4(e), Rule 3 of the IRR of the EPIRA applies only to a general rate application of a distribution utility and not to its application for cost recovery pursuant to "escalator clauses" or "purchased power or fuel adjustment clauses." Since MERALCO's amended application is for the increase of its generation charge and, as such, entails a cost recovery adjustment, then it is not covered by Section 4(e), Rule 3 of the EPIRA IRR. Specifically, MERALCO's amended application for the increase of its generation charge allegedly does not need to be published and the ERC is not required to consider the customers' comments thereon and conduct the necessary hearing.

The ERC and MERALCO point out that by its nature, an application for cost recovery pursuant to "purchased power or fuel adjustment clauses" or "escalator clauses" requires a summary proceeding to allow a utility to update certain costs such as fuel and/or generation costs. To require the ERC to approve applications of this nature only after notice and hearing would allegedly go against the precise and very purpose for which automatic cost updating/adjustment mechanisms are instituted, i.e., to have an effective mechanism to reflect actual costs of power and to have a timely adjustment, upwards or downwards, for the interest of all parties concerned. The matter is allegedly mechanical and merely one of computation.

The ERC and MERALCO rely heavily on American case law explaining the nature of these "escalator clauses" or "purchased power or fuel adjustment clauses," thus:

> "An escalator clause is a method designed to enable a utility to adjust its revenues either upward or downward to reflect changing elements of operating costs of a public utility without having to resort to the cumbersome procedure of filing a new rate case as often as material changes on the factors effecting the reasonableness of the rates occur (Duquesne Light Co. v. Pennsylvania Public Comm., 5 PUR 3d, 141-142).
>
> An escalator clause serves equitable and procedural purposes. The use of such method guarantees to the customer that he is not charged more than he ought to pay and to the utility that it gets its due compensation for its services. The method helps unclog the docket of the utility commissions and the courts especially in times of rapid fluctuations in prices (Re Lynchburg Gas Co., 6 PUR 3d., 34; City of Norfolk v. Virginia Electric and Power Co., 11 PUR 438)." (Camilo D. Quiason, Annotation on Rate Making, 41 SCRA 701).

> The power adjustment clause is the most convenient regulatory mechanism that addresses the need of the distribution utilities to recover their cost of power purchased in the most expeditious manner. It differs from an ordinary application for adjustment of rates of the distribution utilities in that the former is a summary proceeding designed solely to allow a utility to update certain costs such as fuel and/or generation