EN BANC

G.R. No. 210245 ***(Bayan Muna Reps., et al., v. Energy Regulatory Commission)***

G.R. No. 210255 ***(National Association of Electricity Consumers for Reforms, et al. v. Manila Electric Company, et al.)***

G.R. No. 210502 ***(Manila Electric Company v. Philippine Electricity Market Corporation, et al)***

Promulgated:

August 3, 2021

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DISSENTING OPINION

LAZARO-JAVIER, *J.*:

I dissent.

The **principal issue** revolves around **what Energy Regulatory Commission (ERC) should have done** with regard to Manila Electric Company's (MERALCO) proposal to charge its captive market of consumers with higher rates to recover its generation costs for the supply month of November 2013. The issue is **not** what its **decision** should have been **on** the proposal, but **how** it should have **acted on** it.

On the facts of this case, I believe that ERC acted with **grave abuse of discretion** in **conducting** a **process** which **ignored** the bedrock **principles** that **should have animated** the exercise of its discretion. I am **not questioning** the **outcome** of the exercise of its discretion ***per se***, but the **manner** by which it reached this outcome. **Tainted** as the **process** was, the **outcome** must also be set aside.

Facts

The facts are not disputed. One fine morning in December 2013, people in Metro Manila and nearby provinces **could have woken up** to an **additional** ₱800.00 to their 200 per KwH electric bill in November 2013. This **increase** represented 61% or ₱4.15 per KwH more than the average bill in November 2013. The **total amount of this increase** which every household would have to contribute to was **₱22.64 billion**.

The increase was **not** to pay for the household's **additional use** of electricity. Rather, it was for **just one of the amounts** billed and collected by MERALCO – here, for **purchasing electricity** from **power generating companies** which it **then sells** to the households in its franchise area. This is

referred to in the electric power industry as the **generation rates.** Under the **operational** definition of *generation rates*, consumers **would not** be **paying merely for** the generator's **cost of generating** electricity, **but** for **add-ons** as well, like **system loss charge, value added tax,** and **local franchise tax**, among others.

Nearly every household in Metro Manila and nearby provinces has had **only one choice – to buy** electricity from **MERALCO**. The **alternative** has been to **live without electricity**. This would have meant **living with no** lighting, refrigerator, electric fans, television, radio, **none of the necessities** of life. If **one wants the necessities**, there is **only one choice**. MERALCO consumers are **captive market consumers**. MERALCO runs a *natural* **monopoly** and inevitably **captures** them. With **no one else** to turn to now or in the future, MERALCO consumers will **remain** to be **captives** for the rest of their lives.

Fortunately, consumers now live under a **rule of law**. Since **electricity** is a **necessity,** good sense has it that the business of the **electric power** industry **must** be **regulated** by law. **Republic Act No. 9136 (RA 9136)** is the **governing statute. ERC** is the government agency which **electricity consumers may run to** for help because its **role is to regulate** this industry.

This case arose due to the *perceived* **faulty action** or **interaction** of ERC on MERALCO's **generation rate increase**. The allegation was that ERC **reacted wrongly** by following an **improper process** as soon as it received MERALCO's proposal to bill and collect that increase.

Justice Leonen narrated the relevant events of MERALCO's action or inaction in greater detail:

> On December 5, 2013, Thursday, MERALCO wrote the Energy Regulatory Commission regarding its proposal to charge consumers with higher rates to recover its generation costs for the supply month of November 2013.
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> In its letter, MERALCO discussed that it presented to the Energy Regulatory Commission on October 10, 2013 the possible impact of the SPEX-Malampaya natural gas facility shutdown. It estimates that this will result in a ₱7.86 per kWh generation charge to its subscribers. The shutdown will affect the Ilijan, San Lorenzo, and Santa Rita power plants, which in turn supplies MERALCO an aggregate capacity of 2,700 MW. This shutdown also coincides with the scheduled maintenance of Pagbilao and Sual power plants, which supplies over 950 MW to MERALCO's requirements.
>
> According to MERALCO, even if it undertook measures to mitigate the impact of these circumstances, its November 2013 bill from its power suppliers still stood at ₱22.64 billion. This generation cost, together with other bill components such as system loss charge, VAT, and local franchise tax, translates to a ₱4.15 per kWh price increase for a 200 kWh residential consumer.

> MERALCO mentioned in its letter that the Guidelines for the Automatic Adjustment of Generation Rate and System Loss Rates by Distribution Utilities ("AGRA Rules") authorizes it to automatically reflect this ₱22.64 billion cost in the December 2013 billing to its subscribers.
>
> MERALCO invoked the exception to these rules. Instead of applying the automatic rate adjustment, MERALCO proposed in its letter to mitigate the abrupt rate increase by (1) implementing a lower generation charge of ₱7.90 per kWh in the December 2013 billing instead of the calculated ₱9.107 per kWh, and (2) deferring recovery of the remaining ₱3 billion generation charge for the February 2014 billing, but with carrying costs since MERALCO has to pay its power suppliers in full on December 2013.
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> x x x x
>
> On December 9, 2013, Monday, the Energy Regulatory Commission approved MERALCO's proposal for the staggered collection of its rate increase. The Commission's letter provides:
>
> > The ERC therefore grants MERALCO the clearance it seeks to stagger implementation of its generation cost recovery by way of an exception to the AGRA Rules. Accordingly, MERALCO is authorized to implement a generation charge of P7.67/kWh in its December 2013 billing and add its calculated generation charge for February 2014 billing the generation rate of P1.00/kWh. The balance on the deferred generation amount without any carrying costs shall be included in MERALCO's generation charge for March 2014. Should MERALCO seek to recover its carrying costs on the entire deferred amount, it shall file a formal application for this.
> >
> > The foregoing should not in any way be construed as a confirmation of MERALCO's generation costs incurred in November 2013, which shall remain subject of the confirmation and post-verification proceedings in accordance with the applicable ERC resolution on the matter.

This was the **end of the matter** at the ERC level. ERC **did nothing else**. On the other hand, **MERALCO billed** its captive market of consumers and **collected** from them (or us) according to what MERALCO had fed to ERC.

Legal Framework

How should ERC have **acted on** MERALCO's proposal?

In the beginning, circa February 2002, the resolution of this process issue was straightforward.

Subsection 4(e) of Rule 3 of the *Implementing Rules and Regulations (IRR) of RA 9136* (*Rules*) dated **February 27, 2002** provided a procedure to be followed for **rate adjustment** or **any relief affecting consumers**:

> (e) Any **application** or **petition** for **rate adjustment** or for **any relief affecting the consumers** must be **verified**, and **accompanied with an acknowledgment of 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.

This **subsection 4(e) process** was a **rigid** one. It provided **no exceptions** to the **broad subject matter** (*i.e.*, any application or petition for rate adjustment or for any relief affecting the consumers) that the process included. **Neither** was **discretion** granted to ERC to **shorten** or **abort** the process when in its expert discretion it **may** or **must** do so.

But this process is **not** decreed in RA 9136. It is **not** a **statutory** mandate. The process came about as a result of the mandate of **administrative decision-makers to issue implementing rules** or regulations and **discretion** as to what they thought would make for an effective and efficient enforcement of RA 9136. Therefore, the process was **not** cast in stone. The process may change as they **changed** it five (5) years later.

In June 2007, the **subsection 4(e) process** was **amended substantially**. With the kilometric title *Amendments to Section 4 (e) of Rule 3 and Section 7 of Rule 18 of the IRR of RA 9136 otherwise known as the Electric Power Industry Reform Act (EPIRA)*, hereafter ***Amended Rules***, this regulation introduced **several exceptions** to the *once all-encompassing* subsection 4(e) process. The **exceptions** depend on the **type of rates** that a distributing utility wants to bill and collect. One of the **exceptions** to the subsection 4(e) process is **generation charges** computed using any of the recognized ERC-instituted mechanisms – **Generation Rate Adjustment Mechanism**, **Automatic**

Generation Rate Adjustment Mechanism, and **Incremental Generation Cost Adjustment Mechanism.**

The amended subsection 4(e) reads:

"Section 4. Responsibilities of the ERC.

(e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgment of 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.

This section 4 (e) shall **not apply to Generation Rate Adjustment Mechanism (GRAM)**, Incremental Currency Exchange Recovery Adjustment (ICERA), Transmission Rate Adjustment Mechanism, Transmission True-up Mechanism, System Loss Rate Adjustment Mechanism, Lifeline, Rate Recovery Mechanism, Cross-Subsidy Mechanism, Local Franchise Tax Recovery Mechanism, Business Tax Recovery Mechanism, **Automatic Generation Rate Adjustment Mechanism**, VAT Recovery Mechanism, **Incremental Generation Cost Adjustment Mechanism**, and Recovery of Deferred Accounting Adjustment for Fuel Cost and Power Producers by NPC and NPC-SPUG, **Provided** that, such adjustments shall be **subject to subsequent verification** by the ERC **to avoid over/under recovery** of charges."

Generation Rate Adjustment Mechanism or **GRAM** was introduced in March 2004 **long before the amendment** of the subsection 4(e) process. The mechanisms were embodied in ERC's *Guidelines for the Recovery of Costs for the Generation Component of the Distribution Utilities' Rates* (*GRAM Guidelines*). The mechanisms are two-pronged – one for **generation costs** corresponding to the **term** of a **Transition Supply Contract** and another for **generation costs subsequent to term** of the Transition Supply Contract.

Under the *GRAM Guidelines*, distribution utilities were authorized to **collect** the ***costs for the generation component of their supply of electricity in their retail rate***[1] by **passing these costs on** to their respective captive market customers.

But these pass-on charges were then **severely restricted**. These costs were **not determined solely** on the basis of a *fixed formula* but on **benchmarks** culled from **submitted documents** and on **ERC-evaluated** and **approved costing rates**. For this reason, "Generation Rate Adjustment Mechanism (GRAM)" was defined as the "mechanism which allows the periodic adjustment to the Generation Rate to reflect changes in fuel and purchased power costs ***after a review by the ERC before costs are passed on to customers***."

In October 2004 the *GRAM Guidelines* was **abandoned**. In its place ERC instituted the ***Guidelines for the Automatic Adjustment of Generation Rates and System Loss Rates by Distribution Utilities*** (*AGRA Guidelines*). The *AGRA Guidelines* **authorized** distribution utilities to **calculate on their own** using a fixed formula prescribed in the *AGRA Guidelines* the **generation rates** that they could pass on to their respective captive market customers.

The **generation rates** include not only the **generation costs** associated with the acquisition of purchased power but also **"Other Generation Rate Adjustments (OGA)"** which refers to "under(cover)-recoveries in generation costs, recoveries from violation of contracts and other pilferages, as well as other adjustments deemed necessary by the ERC."

There appears to be **two (2) types of OGA**. The **first** is the OGA that may be computed, billed, and collected **at once**. The **other** is that OGA that may be billed and collected **only after** an ERC review and approval.[2]

But **"any carrying charge" cannot be passed on** as an OGA.

The computation of the **generation rates** is done **monthly** – on the 10th day of each month.

Thereafter, the **generation rates** as computed by the distribution utilities can be **billed automatically** by them **effective** on the same date they are computed – also on the 10th day of each month.

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[1] SECTION 4. Definition of Terms. — x x x (ss) "Retail Rate" refers to the total price paid by end-users consisting of the charges for generation, transmission and related ancillary services, distribution, supply and other related charges for electric service....

[2] ARTICLE V, Verification Process. SECTION 3. Prior Verification of Other Generation Rate Adjustments (OGA). — **OGA other than those included in Article V, Section 2 shall be verified and confirmed** by the ERC within forty-five (45) days from date of its filing **and only thereafter shall they be recoverable**.

Under the *AGRA Guidelines*, ERC's role is generally **post-facto** except for *that type of OGA* that cannot be billed and collected before an ERC review and approval. Thus:

ARTICLE V
Verification Process

SECTION 1. Monthly Reporting Requirements. — On or before the twentieth (20th) day of each month, the Distribution Utilities **shall provide the ERC with all calculations** related to Articles III and IV along with supporting documentations, which shall include, but not limited to, the following:

- Invoices from power suppliers;
- Sample bills to end-users;
- Official receipts of payment of power supplier invoices
- ERC Forms M-001 & M-002; and
- Other documents deemed relevant by the ERC.

SECTION 2. Post Verification. — At least every six (6) months, the ERC **shall verify the recovery** of Generation Costs by comparing the actual allowable costs incurred for the period with the actual revenues for the same period generated by the Generation Rates and the portion of the Systems Loss Rates attributable to Generation Costs.

Should the ERC fail to verify the Generation Rate (including the OGA) and System Loss Rate within six (6) months from the submission of calculation and supporting documentations in accordance with the immediately preceding Section, the **rates shall be deemed final and confirmed**.

Upon completion of the semi-annual verification process, the ERC shall **issue an Order establishing the adjustments** to be included in the OGA resulting from said semi-annual verification. These adjustments shall be implemented in the succeeding six (6) month period to reflect any over or under recovery.

The *AGRA Guidelines,* nonetheless, is **not** as **rigid** as it seems to be. There is an **escape clause** from its provisions:

ARTICLE VIII
Final Provisions

SECTION 1. **Exception Clause.** — Where **good cause** appears, the **ERC may allow an exception from any provisions** of these Guidelines, if such **exception** is found to be **in the public interest** and is **not contrary to law** or **any other related rules and regulations.**

In other words, ERC has the **discretion** to **reject** the **automatic** computation, billing, and collection of **generation rates**, the **formula** used in

the determination of generation rates, the **post-verification** procedure, and the **deeming** provision of finality and confirmation, among others, if **public interest** so requires and there is **no violation** of the law.

The **exception clause** coincides with the nature of ERC as an **administrative decision-maker** in its **regulatory role**. The **exception clause** emphasizes the **latitude of discretion** it has **to counter** any semblance of **regulatory** or **corporate capture**.[3] The **exception clause** also distinguishes clearly between the ***persuasive* nature** of the *AGRA Guidelines* (that is why it is called *Guidelines*) and the **mandatory rule-of-law characterization** of ERC's power of **discretion** under RA 9136. In other words, the *AGRA Guidelines* itself precludes ERC from ***fettering*** its **expansive discretionary authority** under RA 9136 through the **exception clause**.

RA 9136 did **not** create ERC to be a mere **wallflower**. RA 9136 envisions the ERC as a **powerful** and **discretion-laden** administrative **decision-maker** in a **regulatory** role. The following notable provisions in RA 9136 show the **breadth** of ERC's **discretionary** mandate:

> SECTION 2. Declaration of Policy. — It is hereby declared the policy of the State:
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> x x x x
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> (b) **To ensure** the quality, reliability, security and **affordability of the supply of electric power**;
>
> (c) **To ensure transparent and reasonable prices** of electricity in a regime of **free and fair competition** and **full public accountability** to achieve **greater operational and economic efficiency** and enhance the competitiveness of Philippine products in the global market;
>
> x x x x
>
> (f) **To protect the public interest** as it is **affected by the rates and services** of electric utilities and other providers of electric power;
>
> x x x x
>
> (j) **To establish a strong and purely independent regulatory body** and **system to ensure consumer protection** and **enhance the competitive operation** of the electricity market x x x x

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[3] See Jason MacLean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons from Canada's Environmental Regulatory Review Process" (2019) 52 UBC L Rev 479 at 480 (WL Can), citing Daniel Carpenter & David A Moss, "Introduction" in Daniel Carpenter & David A Moss, eds, Preventing Regulatory Capture: Special Interest Influence and How to Limit It (New York: Cambridge University Press, 2014) at 13: "Regulatory capture is at once the process and effect of regulated entities or entire industries systematically redirecting regulation away from the public interest and toward the private, special interests of regulated parties themselves." See also Brink Lindsey & Steven M Teles, The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality (New York: Oxford University Press, 2017).

SECTION 6. Generation Sector. — Generation of electric power, a business affected with public interest, shall be competitive and open.

x x x x

Upon **implementation of retail competition** and **open access**, the **prices charged** by a **generation company** for the **supply of electricity** shall **not** be **subject** to **regulation** by the ERC **except as otherwise provided in this Act**.

Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.

The ERC shall, **in determining the existence of market power abuse or anti-competitive behavior**, require from generation companies the submission of their financial statements.

SECTION 25. Retail Rate. — The **retail rates charged** by distribution utilities for the supply of electricity in their **captive market** shall be **subject to regulation by the ERC** based on the principle of **full recovery of prudent and reasonable economic costs incurred,** or **such other principles that will promote efficiency** as may be determined by the ERC.

Every distribution utility shall identify and segregate in its bills to end-users the components of the retail rate, as defined in this Act.

SECTION 43. Functions of the ERC. — The **ERC shall promote competition, encourage market development**, ensure customer choice and **penalize abuse of market power** in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:

x x x x

(f) **In the public interest**, establish and enforce a **methodology for setting** transmission and distribution wheeling rates and **retail rates for the captive market of a distribution utility, taking into account all relevant considerations**, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of **just and reasonable costs** and a **reasonable return on rate base** (RORB) to enable the entity to operate viably. The ERC **may adopt alternative forms of internationally-accepted rate-setting methodology** as it may deem appropriate. The **rate-setting methodology** so adopted and applied **must ensure a reasonable price of electricity**. the rates prescribed shall be non-discriminatory. To achieve this objective and to ensure the complete removal of cross subsidies, the cap on the recoverable rate of system losses prescribed in Section 10 of Republic Act No. 7832, is hereby amended and shall be replaced by **caps which shall be determined by the ERC based on load density, sales mix, cost of service, delivery voltage and other technical considerations** it may promulgate. The ERC **shall determine such form of rate-setting methodology**, which shall **promote efficiency**. In case the rate setting methodology used is RORB, it shall be **subject to the following guidelines**:

(i) For purposes of determining the rate base, the TRANSCO or any distribution utility may be allowed to revalue its eligible assets not more than once every three (3) years by an independent appraisal company: Provided, however, That ERC may give an exemption in case of unusual devaluation: Provided, further, That the ERC shall exert efforts to minimize price shocks in order to protect the consumers;

(ii) Interest expenses are not allowable deductions from permissible return on rate base;

(iii) **In determining eligible cost of services that will be passed on to the end-users**, the **ERC shall establish minimum efficiency performance standards** for the TRANSCO and distribution utilities including systems losses, interruption frequency rates, and collection efficiency;

(iv) Further, **in determining rate base**, the TRANSCO or any distribution utility shall **not be allowed to include management inefficiencies like cost of project delays not excused by force majeure, penalties** and **related interest during construction** applicable to these unexcused delays; and

(v) Any **significant operating costs or project investments** of the TRANSCO and distribution utilities which **shall become part of the rate base shall be subject to verification by the ERC** to ensure that the contracting and procurement of the equipment, assets and services have been subjected to transparent and accepted industry procurement and purchasing practices to protect the public interest.

x x x x

(u) The ERC shall have the **original and exclusive jurisdiction over all cases contesting rates**, fees, fines and penalties imposed by the ERC in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.

All notices of hearings to be conducted by the ERC for the purpose of fixing rates or fees shall be **published at least twice for two successive weeks** in two (2) newspapers of nationwide circulation.

SECTION 75. Statutory Construction. — **This Act shall**, unless the context indicates otherwise, **be construed in favor of** the establishment, promotion, preservation of **competition and people empowerment** so that the **widest participation of the people**, whether directly or indirectly, is ensured. With respect to NPC's debts and IPP and related contracts, nothing in this Act shall be construed as: (1) an implied waiver of any right, action or claim, against any person or entity, of NPC or the Philippine Government arising from or relating to any such contracts; or (2) a conferment of new or better rights to creditors and IPP contractors in addition to subsisting rights granted by the NPC or the Philippine Government under existing contracts.

Analysis

- *ERC applied the AGRA Guidelines in a manner that* ***unlawfully fetters its broad discretion*** *under RA 9136.*

Where **legislation** gives a public authority **discretion** to make decisions, *e.g.*, to award a licence or to grant a rate increase or to bill and collect automatically certain charges, the public authority **must allow itself to consider each decision on its own merits.**[4] The public authority **must not "fetter" its discretion by applying a rigid or one-size-fits-all policy** to all applications **without considering the specific facts** of each case.[5]

A decision made by **a public authority that has fettered its discretion in this way** may be challenged on the ground that **the decision is unlawful.** The reasoning goes like this. Decision-makers must follow the law. If the **law gives them discretion** of a certain scope, they **cannot, in a binding way, cut down that scope.** To allow that is **to allow them to rewrite the law.** Only Congress or its validly authorized delegates through subordinate legislation can write or rewrite law.[6] Slavishly adhering to guidelines that are neither legislation nor subordinate legislation and regardless of the breadth of statutory discretion and the facts of the case before them is **unlawful.**[7]

An administrative decision-maker entrusted with discretion **must not disable itself from exercising its discretion in individual cases** by the adoption of a fixed rule of policy. It is a fundamental rule for the exercise of discretionary power that **discretion must be brought to bear on every case**: each one must be **considered on its own merits** and decided as the public interest requires **at the time.**

Here, ERC, in my opinion, **unduly fettered its discretion** by **adopting an inflexible rule** relating to the **automatic computation, billing** and **collection** of **generation rates,** which prevented it from **giving consideration to the special circumstances** when MERALCO's proposal was presented before it under the *AGRA Guidelines*. These circumstances were that the **increase** in the **generation rates** sought was ***exponential*** that even MERALCO had to **back track** from a one-time big-time billing and **propose** a **staggered** payment scheme though with carrying costs, and that the

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[4] HEU, *Local 180 v. Peace Arch District Hospital,* 1989 CarswellBC 29, [1989] BCWLD 1002, 57 DLR (4th) 386: "Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all." And: "a body entrusted with a discretion must not disable itself from exercising its discretion in individual cases by adopting a fixed rule of policy. In modern administrative law this issue arises most often when an administrative agency of its own volition seeks to structure its discretion by formulating and following policy statements, guidelines, and the like."

[5] *Id.*

[6] *Stemijon Investments Ltd v. Canada (Attorney General),* 2011 FCA 299 at par. 22.

[7] *Thamotharem v. Canada (Minister of Citizenship & Immigration),* 2007 FCA 198 at par. 11.

confluence of events more likely than not triggered such **humongous increase** in generation rates.

It is clear that ERC **did not exercise** its expansive **discretion** under RA 9136 and the *AGRA Guidelines* itself (through the **exemption clause**) when it approved MERALCO's proposal *sans the carrying costs* in **less than five (5) days** using and echoing **only MERALCO's submissions** as basis.

There is **no question** that the *AGRA Guidelines* was issued pursuant to the authority given to ERC by RA 9136. But the **mechanisms** for the computation, billing, and collection of generation rates under the *AGRA Guidelines* are **not** decreed in RA 9136. They are themselves **discretionary** devices of ERC, the **enforceability** thereof being dependent upon **other factors** within ERC's **discretionary** authority under RA 9136.

In other words, the **mechanisms** in the *AGRA Guidelines* are **not cast in stone**. For this reason, the *AGRA Guidelines* itself includes an **exception clause** whereby the ERC may allow an exception from any of the provisions in the *AGRA Guidelines* where **good cause** appears and if the **exception** is found to be **in the public interest** and is **not contrary to law** or any other related rules and regulations.

I recognize that **effective decision-making** by administrative agencies often involves striking a **balance between general rules and the exercise of ad hoc discretion**. Put in another way, there is that tension **between the benefits of certainty and consistency** on the one hand, and of **flexibility and fact-specific solutions** on the other. Legislative instruments (including non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the **public to predict** how an agency is likely to exercise its statutory discretion and to **arrange their affairs** accordingly, and enable an agency **to deal with a problem comprehensively and proactively**, rather than incrementally and reactively on a case by case basis. This is especially important in an agency like ERC.

But –

> ... while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order **to enhance consistency**, administrative decision-makers may **not apply them as if they were law**. Thus, a decision made **solely by reference to** the mandatory prescription of a **guideline, despite a request to deviate** from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.[8]

[8] *Id.* at par. 75.

ERC's **inflexible** reference to the *AGRA Guidelines* may also be challenged on the ground that **the procedure by which it was made was unfair**, or on the ground that **it is unreasonable**.

In having regard to the above objectives of RA 9136, ERC **cannot hope to achieve public interest** as well as **industry transparency** and **efficiency** if its proceedings are **conducted unfairly** or **appear to be conducted unfairly** or if the **effect of the imposition** is or appears to be **unfair**. If the **captive market customers** are treated arbitrarily or unfairly, a simmering **sense of injustice** will prevail. **Grudges** will be harbored. **Confidence** in ERC will fall.

In short, the **concept of fairness** goes to the very heart of RA 9136.

Here, ERC's decision is **unreasonable** because it was based on an **inflexible** and **one-sided policy determination** that despite their **exponential** increase, these generate rates may still be imposed and collected **perfunctorily**. The ERC process **failed to consider** whether, on the **facts not disputed** by anyone, it would be **unfair** and therefore contrary to both the **principles** expressed or implied in **RA 9136** and the **exception clause** in the *AGRA Guidelines* to accede to MERALCO's proposal.

The **language** of RA 9136, especially the **above-quoted provisions**, is **broad enough**, having regard to the purpose of ERC's power of review, to permit it **to intervene to ensure** that in the end, a fair hearing of the **exponential increase** is achieved and that harmony in the power industry is fostered. The **refusal to hear other stakeholders** and **admit their submissions**, *regardless of the circumstances and without regard to the merits of the other stakeholders' inputs*, resulted as we now know in an **unfair hearing**. The adoption of such an inflexible rule is a **fettering of discretion resulting in an unfairness in the process**.[9]

As Justice Leonen opined, the Court **should not allow** ERC to **fetter** its **discretion** under RA 9136 by invoking the *AGRA Guidelines*. Aside from the fact that the *Guidelines* is simply a set of guidelines, persuasive at best and not binding, the *Guidelines* itself has an **exception clause** precisely to prevent ERC from boxing itself to a corner and **fettering** the discretion it **must exercise** per RA 9136. ***Conversely***, if we were to allow the *AGRA Guidelines* to take precedence and control the disposition of the principal issue here, we would be **encouraging dereliction** by **ERC** of **its duty** to **exercise** the **discretion** reposed upon it by RA 9136.

- *Wittingly or unwittingly, the **circumstances** attending ERC's approval of MERALCO's proposal indicate **regulatory** or*

[9] HEU, *Local 180 v. Peace Arch District Hospital*, 1989 CarswellBC 29, [1989] BCWLD 1002, 57 DLR (4th) 386.

corporate capture *that is* ***antithetical*** *to the bed-rock though motherhood* ***principles*** *enunciated in RA 9136.*

Regulatory agencies are "considered 'captured' when they 'regulate businesses **in accordance with the private interests of the regulated** as **opposed to the public interest** for which they were established.'"[10] **Regulatory** or **corporate capture** is therefore **bad** for it **deflects** the administrative agency's **attention** and **action** from the **principles** outlined in a statute **defining public interest** to **policies** that **only benefit** the regulated sector. Regulatory or corporate capture **signifies** either negligent/reckless or intentional **dereliction** of duty. Either way, it **betrays** not only the **legislative will** as expressed in the relevant statute, but more important, the **public interest** that the agency vowed to protect, defend, and promote.

Often, this **shift in allegiance** is **not easy to detect** because the principles an agency ought to foster are **embodied in motherhood** and therefore **textually ambiguous** statements. It is easy to fry under one's own fat without feeling the heat.

But not here – a **confluence of circumstances** has made the **capture** a **proposition** that *more likely than not* **occurred**. Justice Leonen mentioned these circumstances – 61% increase in generation rates from November 2013 to December 2013; quick ERC approval of MERALCO's proposal; sole reliance by ERC upon MERALCO's claims in justifying the proposal's approval; and the ERC leaders' admitted lack of specialized knowledge of and familiarity with the details of MERALCO's proposal to be able to deal competently with it.

Regulatory or **corporate** capture arises from three (3) diverse circumstances.[11]

The **first** deals with the **traditional capture threat**: personal benefits. Here, regulators are influenced in their decision-making by the chance of personal gain offered by the regulated industry.[12] Regulators may also be captured through threats from the regulated industry. The regulator's current job may be threatened, or the agency is faced with defunding if certain decisions are not made.[13] I do **not** think this circumstance is involved or relevant here.

The **second** considers regulators to be driven by something **other than** their own pecuniary interests. The theory is that capture is not always the result of regulators seeking personal benefits. Instead, capture may result from

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[10] Ma. Lourdes Sereno, Dissenting Opinion, *Biraogo v. The Philippine Truth Commission of 2010*, 651 Phil. 374 (2010).
[11] J. Jonas Anderson, Court Capture, 59 BCL Rev 1543 (May 2018).
[12] *Id.*
[13] *Id.*

regulators **making poor regulatory decisions** because they **lack good information about the consequences** of those decisions.[14]

Because the regulator **often must rely** upon the regulated industry **to provide the data necessary** for effective decision-making, the regulator is at the **mercy of the regulated industry**.[15] Underfunded and overworked staff may **simply not have sufficient resources to locate the facts** needed to regulate properly, resulting in an **overly-heavy reliance on the industry** to identify problematic practices.[16]

Agencies are thus **captured** when the **regulated industries are the sole possessors of information** which the agency itself ought to possess as well to make informed regulatory decisions.[17] This is **worsened** by the fact that the **information** that the agency needs **to make an informed** regulatory decision may be **shielded from** public view.[18] This **insulates** both the regulated industry and the agency from **public oversight** and **criticism**, thus:

> This **version of capture as an informational problem** is rooted in collective action concerns. Information capture **drives up participation costs** for some groups, like those concerned with the public interest, while advantaging larger groups within the industry that control the information. Some scholars have written about the various problems that can arise from information capture, including **excessive, undigested facts at the agency level, discussions** that take place **at too high of a level**, and **discussions** that delve into the **minutiae of the regulatory decision**. To these scholars, the solution to information capture is the **creation of "filters,"** which allow the regulatory creation process **to remain open to all interested parties**. In this way, decision-makers have the **optimal quantity** and **quality of information**. At the same time, these **transfers of information** would have to occur with **public scrutiny** if they were to be **effective**.[19]

The **third** focuses on **cultural** and **behavioral forces** as the cause of the capture.[20] This is **distinct from personal benefits** or information.[21] This form of capture is **more concerned** with the **informal influence** of the regulated industries through their **interpersonal interactions** with agency employees.[22] The **result** of these interactions is for the **agency to come to discern** the regulated sector **the same way** that its **regulated entities** do.[23] While agency people may believe they are doing their best, their **worldview is affected by the industries** they interact with.[24] This form of capture does **not** rely on self-interested agency employees trying to make as much personal gain as possible.

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

Viewed from the lens of **regulatory** or **corporate** capture, I agree with Justice Leonen's conclusion that the ERC's decision is fraught with **grave abuse of discretion**. The **confluence of circumstances** indicates that *more likely than not,* the decision was **not reached** with the bedrock principles of RA 9136 in mind. The **investigation** and **evaluation** that ERC was tasked to complete **before** it **could be said** that ERC had **competently** and **diligently approved** MERALCO's proposal, would have been a **complex process** that **could not have been completed** within **four (4)** or **five (5) days** and with **only MERALCO's inputs** on hand. It stands to reason, thus, that the **ERC decision** could have **arisen** more likely than not **from** either **information** or **cultural capture** or both.

To counter any **indication** of **information** or **cultural capture**, it is important for the talking heads of ERC to already **internalize** their **expertise** and the **powers** their agency wields in the **regulation** of the electric power industry. The ERC Chairperson and its Commissioners should **embrace** the **importance** of their roles in this everyday multi-trillion worth commodity. They **cannot sit idly by** while large corporate interests *game the process* for their profit at the peoples' expense. It is, thus, **not amiss** for Justice Leonen to have noted and noted **keenly** how the ERC Chair *passed on* to the ERC Executive Director the *responsibility* of answering the **important questions** plaguing MERALCO's proposal to increase exponentially the generation rates it had billed and collected from its captive market customers, **because** the **Chair did not know** or **was not familiar** with the **important questions** and the **answers to them**.

- *ERC should have conducted a **fair, principled, thorough, competent** and **independent investigation** of MERALCO's proposal before approving it.*

Justice Leonen further stated that the **subsection 4(e) process applied** because MERALCO had **asked for carrying cost** as a **premium** on the staggered payment of the hefty generation rates. **I agree.**

The subsection 4(e) process is the **general rule** whenever rates are changed or relief is sought against consumers. The **exceptions** to this general rule are spelled out clearly and distinctly. Whatever is **not included** in the list of exceptions is **covered** by the **general rule**. Since carrying cost is **not among** the exceptions, the **general rule** of a subsection 4(e) process **applies** to it.

The fact that the proposal for **carrying cost** was rejected by the ERC is **irrelevant** to the statutory requirement of a subsection 4(e) process. Laws are **not dispensed** with by the **non-use** or **disrespect** of the process. In the exercise of judicial review, the Court is **duty-bound to call out this error** so ERC would **not repeat** the mistake *and* **apply the correct process** in the future.

As regards the substance of MERALCO's proposal, the **humongous** generation rate to be computed, billed, and collected, the **proper process** should have been a **fair, principled, thorough, competent,** and **independent investigation**. While I **do not share** Justice Leonen's view that this involved both an **investigative** and **quasi-judicial** processes, I **nonetheless agree** that the investigation should have been **robust** to **bring about** the **principles** called for in RA 9136. Justice Leonen summarizes these **principles** as follows:

> ... transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market." The State is also required to "establish a strong and purely independent regulatory body and system to ensure consumer protection and enhance the competitive operation of the electricity market."
>
> Under Section 25 of the EPIRA, it states that "retail rates charged by distribution utilities for the supply of electricity in the captive market shall be subject to the regulation by the ERC x x x." ....
>
> Under Section 43 (f) of the EPIRA, one of ERC's key function is that "[i]n the public interest, establish and enforce a methodology for setting x x x retail rates for the captive market of a distribution utility, x x x The rate setting methodology so adopted and applied must ensure a reasonable price of electricity."
>
> Also under Section 43 (k) of the EPIRA is the function of the ERC to "[m]onitor and take measures in accordance with this Act to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant." Related to this is Section 43 (o) directs that the ERC "[m]onitor the activities in the generation x x x of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory x x x."

The determination of the **proper amount of generation rates** to be computed, billed, and collected is **essentially** a **legislative** and **not** an **adjudicative** act. Thus:

> Defendants also argue that **setting rates is a legislative act**, to which procedural due process does not apply. Thus, even if a property interest exists, which the Court does not concede, Plaintiffs were not entitled to the protections of procedural due process in the setting of RS 17.
>
> [17] [18] **Procedural due process does not apply to legislative acts.** Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46, 36 S.Ct. 141, 60 L.Ed. 372 (1915). Therefore, before procedural due process rights attach, a plaintiff must show that the deprivation occurred as a result of an adjudicatory process rather than a legislative process. See Harris v. Cty. of Riverside, 904 F.2d 497, 501 (9th Cir. 1990). The parties

dispute whether the adoption of RS 17, including Plaintiffs' placement in the Evolving Industries category, was a legislative act.

Plaintiffs argue that, because RS 17 applies to relatively few people, it should be characterized as an adjudicatory act, to which procedural due process rights apply. Plaintiffs find support for their argument in the case of Londoner v. City & Cty. of Denver, 210 U.S. 373, 385–86, 28 S.Ct. 708, 52 L.Ed. 1103 (1908). In Londoner, a local board had to decide "whether, in what amount, and upon whom" a tax for paving a street should be levied. Bi-Metallic Inv. Co., 239 U.S. 441, 445–6, 36 S.Ct. 141 (quoting Londoner, 210 U.S. at 385, 28 S.Ct. 708). Because only a few people were affected by the tax, and because each of them was affected "upon individual grounds," the Court found that the affected individuals had a due process right to a hearing before the tax was passed. Plaintiffs claim that, because RS 17 only has been applied to cryptocurrency mining companies, Londoner applies and requires certain procedural due process protections, such as notice and a hearing.

While there is merit to Plaintiffs' Londoner argument, Plaintiffs do not adequately respond to precedent that explicitly identifies rate setting as a legislative act, rather than an adjudicatory act. In Prentis v. Atlantic Coast Line Co., a case involving train ticket rates, the Supreme Court explained why rate setting is legislative in nature. 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908). In Prentis, a Virginia commission regulated the maximum rates that railway companies could charge their customers. Id. at 224, 29 S.Ct. 67. The commission was responsible for creating and enforcing those rates, and ensuring that they were "reasonable and just." Id. **Prior to passing a new rate schedule, the commission held a hearing, during which it heard objections to the proposed rates.** Id. After the hearing, the commission enacted *1041 a rate schedule, setting different rates for different railway companies. Id. at 225, 29 S.Ct. 67. Under the new rate regime, some railways were permitted to charge customers more than others. Id. Plaintiff railways challenged the new rates as confiscatory. Id. at 223, 29 S.Ct. 67.

The Prentis Court concluded that the commission's proceedings in adopting the new rate scheme were plainly legislative. Id. at 226, 29 S.Ct. 67. In doing so, it explained **the difference between a judicial inquiry and a legislative act**, stating:

A **judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.** That is its purpose and end. **Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.** The **establishment of a rate is the making of a rule for the future**, and **therefore is an act legislative, not judicial**, in kind....

Id. The Court further announced that **a legislative action cannot be recast as an adjudicatory action simply because the commission or other legislative body engaged in fact-finding prior to reaching a decision**. Id. at 227, 29 S.Ct. 67. As the Supreme Court explained, **"[m]ost legislation is preceded by hearings and investigations."** Id. Therefore, **"it does not matter what inquiries may have been made as a preliminary to the legislative act."** Id. The Supreme Court decided Prentis six months

after deciding Londoner and still concluded that rate setting is legislative in nature.

Since Prentis, courts consistently have held that rate setting is a legislative act....

[19]Because rate setting is a legislative act, procedural due process rights do not attach. Therefore, even if Plaintiffs could point to a valid property interest, which the Court does not concede that they did, Plaintiffs' procedural due process claim fails as a matter of law.[25]

While ERC is **not** mandated to conduct the subsection 4(e) process on MERALCO's proposal to increase the **generation rates**, *the fact* that ERC is mandated to conduct an **investigation** pursuant to the requirements of **abiding by** the **principles** mentioned in RA 9136 and the **exception clause** in the *AGRA Guidelines*, only means that the **investigation** will have to be **fair, principled, thorough, competent,** and **independent**.

The reason for requiring this **type of investigation** is **RA 9136** itself. RA 9136 **demands** *fairness*, *thoroughness*, *competence,* and *independence* in the **investigation process** and a **principled outcome**. It **does not mean** that simply because the process is called an **investigation**, ERC can already throw caution to the wind as to the procedure it ought to observe.

As explained elsewhere:

The Commission has a **public interest mandate** and the **statutory obligation to fix just and reasonable rates** for the utilities under its jurisdiction. In fulfilling this obligation, the Commission, acting through its staff and the assigned panel, **must be able to probe into the evidence filed before it** in order for the Commission panel to determine the merits and the weight to accord such evidence, subject always to the rules of procedural fairness. The Commission **cannot simply rely on counsel for the parties to act in the public interest** or **to test the evidence sufficiently to satisfy the Commission's statutory obligations** when they do not bear the same statutory obligations, have completely different objectives in participating in the proceeding and where each has a stake in the outcome. One commentator has remarked on this issue as follows:

The work of most tribunals cannot be adequately accomplished by means of an adversarial system of evidence-gathering.

Most tribunals have a "public interest" element that is not adequately covered off by the material put forward by the participants. Our civil justice system is based on an assumption that issue identification, evidence-gathering and argument can be left in the safekeeping of the parties. Our criminal justice system is based on a similar assumption, with the parties being the Crown and the defense. **Administrative justice is different. There is the "public interest."**

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[25] *Blocktree Properties LLC v. Public Utility District No 2* (2020), 447 F Supp 3d 1030.

> **To cover off the "public interest" angle, tribunals have to become inquisitorial (some more than others). And inquisitorial tribunals need more legal advice tha[n] more passive decision-makers.**[26]

A **fair investigation** is **not** a contradiction in terms. In fact, **only** a **proper** investigation is a **fair** investigation. Thus:

> 7. **Regardless of the nature of the** Coroner's **inquest, which is fundamentally a process of inquiry and reporting, rather than the determination of rights and liabilities**, when a person applies for standing under s. 33, the Coroner must embark upon an inquiry and make a finding whether or not the applicant has such an interest. In so doing, the Coroner is **required to act judicially in the sense of that expression as it denotes a standard of conduct. He must therefore afford the applicant full opportunity to be heard.** He is not required to follow the procedure and other requirements in the Statutory Powers Procedure Act, 1971 (Ont.), c. 47, as that Act does not apply to Coroners. He **nevertheless must make a finding on the basis of a fair hearing which he may conduct in his own way**. In so doing he must follow the principles stated in Board of Education v. Rice et al., [1911] A.C. 179, per Lord Loreburn at p. 182:
>
> > In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that **in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything**. But I do **not think they are bound to treat such a question as though it were a trial**. They have no power to administer an oath and need not examine witnesses. **They can obtain information in any way they think best, always giving a fair opportunity** to those who are parties in the controversy **for correcting or contradicting** any relevant statement prejudicial to their view. **Provided this is done, there is no appeal from the determination of the Board** under s. 7, sub-s. 3, of this Act....[27]

Unfortunately, the **investigation** done by ERC, if at all, was **not fair, principled, thorough, competent,** and **independent**. It **failed to hear** other stakeholders, was based **exclusively on MERALCO's submissions, did not indicate ERC's independence**, and **grossly ignored** the **principles per RA 9136** that **ought** to have **shaped, colored,** and **controlled** the **exercise** of its discretion.

Had ERC given a respectful and thoughtful attention to the proposal, it **would have looked into** diverse factors such as patterns and human behavior in applying the broad and amorphous RA 9136 legal standards like **public interest, competition, transparency,** or **reasonableness** to a set or sets of behaviour. ERC most likely would have needed **analogic analysis** of

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[26] *Milner Power Inc v. Alberta Utilities Commission*, 2019 ABCA 127 at par. 74.
[27] *Brown et al. and Patterson*, [1974] OJ No 2189, 6 OR (2d) 441, 53 DLR (3d) 64, 21 CCC (2d) 373.

comparing and contrasting past and present behaviour and facts. The **scope** and **extent** of the **investigation** ERC did is **nowhere near** this type of investigation which it **should** have done.

As discussed , what happened was that the ERC process was *most likely* or *probably* **captured** by MERALCO if not by the regulated industries as a whole and its **discretion was fettered** by its **unreasonable** refusal **to deviate** from the mechanisms in the *AGRA Guidelines* **despite** its authority to do so under the **exception clause**. By any stretch of imagination, the **process by which** the ERC resolved or acted upon MERALCO's proposal **cannot** be described as *fair*, *principled*, *thorough*, *competent* and *independent*.

Conclusion

ACCORDINGLY, I vote to

(a) DECLARE as VOID the Order dated March 3, 2014 of ERC;

(b) DECLARE as VOID the Letter dated December 9, 2013 of ERC approving the Letter Request dated December 5, 2013 of MERALCO for having been issued with grave abuse of discretion;

(c) REMAND the aforesaid Letter Request dated December 5, 2013 to ERC for proper disposition and DIRECT MERALCO to notify all affected parties on its Letter Request and comply with a fair, thorough, competent, principled, and independent investigation; and

(d) DIRECT the ERC to submit a report to the Court regarding the status of the Letter Request dated December 5, 2013 of MERALCO within ninety (90) days from notice.

AMY C. LAZARO-JAVIER
Associate Justice

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MARIFE M. LOMIBAO-CUEVAS
Clerk of Court
Supreme Court