

EN BANC

G.R. No. 248061 – MORE ELECTRIC AND POWER CORPORATION *Petitioner*, v. PANAY ELECTRIC COMPANY, INC., *Respondent*.

G.R. No. 249406 – REPUBLIC OF THE PHILIPPINES, *Petitioner* / *Oppositor*, MORE ELECTRIC AND POWER CORPORATION *Petitioner* v. PANAY ELECTRIC COMPANY, INC., *Respondent*.

Promulgated:
March 9, 2021

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CONCURRING OPINION

INTING, J.:

I am reconsidering my vote in the Decision¹ dated September 15, 2020 and find that Sections 10 and 17 of Republic Act No. (RA) 11212² which grant MORE Electric and Power Corporation (MORE) the right of eminent domain are constitutional.

Sections 10 and 17 of RA 11212 provide:

SECTION 10. *Right of Eminent Domain.* — *Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the power of eminent domain insofar as it may be reasonably necessary for the efficient establishment, improvement, upgrading, rehabilitation, maintenance and operation of its services.* The grantee is authorized to install and maintain its poles wires, and other facilities over, under, and across public property, including streets, highways, parks, and other similar property of the Government of the Philippines, its branches, or any of its instrumentalities. The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted, including, but not limited to poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment previously, currently or actually used, or intended to be used, or have been abandoned, unused or underutilized, or which obstructs its facilities, for the operation of a distribution system for the conveyance of electric power to end users in its franchise area: *Provided*, That proper expropriation proceedings shall have been instituted and just compensation paid.

Provided, further, That upon the filing of the petition for expropriation, or at any time thereafter, and after due notice to the

¹ *MORE Electric and Power Corporation v. Panay Electric Company, Inc.*, G.R. No. 248061 & 249406, September 15, 2020.

² Entitled, "An Act Granting More Electric and Power Corporation a Franchise to Establish, Operate, and Maintain, for Commercial Purposes and in the Public Interest, a Distribution System for the Conveyance of Electric Power to the End Users in the City of Iloilo, Province of Iloilo, and Ensuring the Continuous and Uninterrupted Supply of Electricity in the Franchise Area," approved on February 14, 2019.

owner of the property to be expropriated and the deposit in a bank located in the franchise area of the full amount of the *assessed value* of the property or properties, the grantee shall be entitled to immediate possession, operation, control, use and disposition of the properties sought to be expropriated, including the power of demolition, if necessary, notwithstanding the pendency of other issues before the court, including the final determination of the amount of just compensation to be paid. The court may appoint a representative from the ERC as a trial commissioner in determining the amount of just compensation. The court may consider the tax declarations, current audited financial statements, and rate-setting applications of the owner or owners of the property or properties being expropriated in order to determine their assessed value.

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SECTION 17. *Transition of Operations.* — In the public interest and to ensure uninterrupted supply of electricity, the current operator, Panay Electric Company, Inc. (PECO), shall in the interim be authorized to operate the existing distribution system within the franchise area, as well as implement its existing power supply agreements with generation companies that had been provisionally or finally approved by the ERC until the establishment or acquisition by the grantee of its own distribution system and its complete transition towards full operations as determined by the ERC, which period shall in no case exceed two (2) years from the grant of this legislative franchise.

Upon compliance with its rules, the ERC shall grant PECO the necessary provisional certificate of public convenience and necessity (CPCN) covering such interim period. The applicable generation rate shall be the provisional or final rate approved by the ERC.

This provisional authority to operate during the transition period shall not be construed as extending the franchise of PECO after its expiration on January 18, 2019, and it shall not prevent the grantee from exercising the right of eminent domain over the distribution assets existing at the franchise area as provided in Section 10 of this Act. During such interim period, the ERC shall require PECO to settle the full amount which the ERC has directed to refund to its customers in connection with all the cases filed against it.
x x x x (Italics in the original and supplied.)

Eminent domain is defined as “the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner’s consent, conditioned upon payment of just compensation.”³

³ *Brgy. Sindalan, San Fernando, Pampanga, rep. by Brgy. Capt. Gutierrez v. Court of Appeals*, 547 Phil. 542, 551 (2007), citing 26 Am Jur 2d 638, further citing *Re Ohio Turnpike Can.* 164 Ohio St 377, 58 Ohio Ops 179, 131 NE2d 397.

The power of eminent domain is exercised by Congress. However, as cited in the *ponencia*, the Court discussed in *Manapat v. Court of Appeals*⁴ that Congress which possesses the power of eminent domain may delegate such power to the President, administrative bodies, local government units and *even to private enterprises performing public services*. By way of a footnote to this discussion, the Court explained that “[u]nder existing laws, quasi-public corporations such as the Philippine National Railways, the PLDT and Meralco have been granted the power of expropriation.”⁵

Further, the exercise of the power of eminent domain is subject to limitations under the 1987 Constitution, *i.e.*: (1) that private property shall not be taken for public use without just compensation as provided in Section 9, Article III; and (2) that no person shall be deprived of his/her life, liberty, or property without due process of law as provided in Section 1, Article III.⁶

Guided by this discussion, I find that the delegation of the power of eminent domain in favor of MORE under Sections 10 and 17 of RA 11212 is constitutional for the following reasons:

First, as discussed by the *ponencia*, MORE is a private enterprise allowed by Congress to operate a public utility for public interest. Specifically, MORE was granted a franchise for the purpose of “establish[ing], operat[ing], and maintain[ing], for commercial purposes, and in the public interest, a distribution system for the conveyance of electric power to end users in the City of Iloilo.”⁷ Thus, Congress may delegate to MORE the right of eminent domain in such a manner that the delegation will not violate the constitutional safeguards for the taking of private property for public use.

Second, the delegation by Congress of the power of eminent domain to MORE is for a public use. It must be emphasized that “[p]ublic use, as an eminent domain concept, has acquired an expansive meaning to include utility, advantage or productivity for the benefit of the public.”⁸ Here, without doubt, the continuous and uninterrupted

⁴ 562 Phil. 31 (2007).

⁵ See footnote 52 of *Manapat v. Court of Appeals*, *id.* at 47.

⁶ *Brgy. Sindulan, San Fernando, Pampanga, rep. by Brgy. Capt. Gutierrez v. Court of Appeals*, *supra* note 3.

⁷ Section 1, Republic Act No. (RA) 11212.

⁸ *Rep. of the Phils. v. Heirs of Saturnino Q. Borbon, et al.*, 750 Phil. 37, 49 (2015), citing

distribution of electric power in Iloilo City will ultimately be of utility, advantage or productivity to Iloilo City's general public.

As emphasized by Associate Justice Alfredo Benjamin S. Caguioa in his Separate Opinion to the Decision in this case, PECO is the sole operator of the electric power distribution utility in Iloilo City, a situation which is typical in the industry as the energy sector has always been a natural monopoly given the extremely high fixed costs involved.⁹ With the non-renewal of PECO's franchise, a decision which is solely within the prerogative of Congress, MORE, the new franchisee must be given reasonable means to establish its service to ensure the continuous supply of electric power in Iloilo City. To my mind, the delegation of the power of eminent domain to MORE which includes the right to immediately possess and take over PECO's property/ies upon deposit of the assessed value of the property/ies, among other requirements, is reasonable considering that MORE is a newcomer in the industry. As aptly explained by the Court, speaking through Associate Justice Jose C. Reyes, Jr. in the Decision in this case, "MORE is x x x peculiarly and doubly burdened. It must not only supply electricity, it must also prevent any disruption that might arise from its takeover of the franchise."¹⁰

I share the view of Associate Justice Alfredo Benjamin S. Caguioa that the "Congress should not be deprived of the authority to grant *new* franchise holders with the power to expropriate necessary assets. To hold otherwise would effectively constrain Congress to continuously renew the existing franchise of the current operator despite its sub-par service, until another prospective operator has built its own capital assets."¹¹ And yet given the high fixed costs and other barriers to entry, a new prospective operator might be discouraged from building its own capital assets as there is even no guarantee that Congress will grant a franchise in its favor.¹²

Third, I concur with the *ponencia* that the incidental benefit enjoyed by MORE does not render its legislative franchise unconstitutional. Such incidental benefit to MORE does not outweigh and by no means negate the benefit that will inure to the entire

Metropolitan Water District v. De los Angeles, 55 Phil. 776 (1931); See also *National Power Corporation v. Posada, et al.*, 755 Phil. 613, citing *Vda de Ouano, et al. v. Republic, et al.*, 657 Phil. 391, 418 (2011).

⁹ Separate Opinion of Associate Justice Alfredo Benjamin S. Caguioa, p. 5.

¹⁰ *MORE Electric and Power Corporation v. Panay Electric Company, Inc.*, *supra* note 1.

¹¹ Separate Opinion of Associate Justice Alfredo Benjamin S. Caguioa, p. 7.

¹² *Id.*

population of Iloilo City if MORE's power of eminent domain under Sections 10 and 17 will be upheld. Surely, the “prevent[ion] [of] massive and prolonged economic disruption in the city, not to mention oppressive discomfort by its residents” should not be frustrated just because of some incidental benefit that would inure to MORE.¹³

Fourth, the grant of the power of eminent domain to MORE under Sections 10 and 17 of RA 11212 does not amount to deprivation of property without due process of law. Sections 10 and 17 are not confiscatory as they do not provide for the automatic taking of PECO's property/properties without the conduct of the proper judicial proceedings for expropriation. What is evident from Section 10 is that MORE must initiate the proper expropriation proceedings in the exercise of its power of eminent domain.

Expropriation consists of two stages. The Court discussed in *National Power Corporation v. Posada, et al.*:¹⁴

x x x The first is concerned with the determination of the authority of the plaintiff to exercise the power of eminent domain and the propriety of its exercise in the context of the facts involved in the suit. It ends with an order, if not of dismissal of the action, “of condemnation declaring that the plaintiff has a lawful right to take the property sought to be condemned, for the public use or purpose described in the complaint, upon the payment of just compensation to be determined as of the date of the filing of the complaint.” x x x

The second phase of the eminent domain action is concerned with the determination by the Court of “the just compensation for the property sought to be taken.” This is done by the Court with the assistance of not more than three (3) commissioners. x x x¹⁵ (Italics in the original.)

Section 10 in particular does not render the first stage of the expropriation proceedings inutile. Associate Justice Estela M. Perlas-Bernabe aptly discussed in her Separate Opinion to the Decision in this case that “the grant of the authority to expropriate is different from the propriety of the expropriation itself.” Specifically, the present case “only concerns the issue of constitutionality of Sections 10 and 17 of RA 11212 which provisions must be examined against the prevailing

¹³ *MORE Electric and Power Corporation v. Pancy Electric Company, Inc.*, *supra* note 1.

¹⁴ 755 Phil. 613 (2015).

¹⁵ *Id.* at 624; see also *Sporises Abad v. Fil-Homes Realty and Development Corp.*, 650 Phil. 608 (2010).

jurisprudential standard that public use is equal to ‘whatever is beneficially employed for the general welfare.’” I am of the same view that the issue of whether the power of eminent domain is properly exercised by MORE as to PECO’s specific property/ies is the subject matter of the appropriate expropriation proceedings.¹⁶

Further, as aptly pointed out by Associate Justice Alfredo Benjamin S. Caguioa, Section 10 expressly provides that the authority of MORE to exercise the power of eminent domain is subject to the limitations and procedures prescribed by law. Specifically, Section 10 sets out a restriction on expropriation, *i.e.*, “insofar as maybe necessary for the efficient establishment, improvement, upgrading, rehabilitation, maintenance and operation of [MORE’s] services.”¹⁷ Thus, in the appropriate expropriation proceedings, MORE still has the burden to establish that the property sought to be condemned is for the specific public use or purpose embodied in RA 11212.

The non-confiscatory nature of Section 10 is also highlighted by the fact that the provision does not do away with the second stage of the expropriation proceedings, *i.e.*, the determination of just compensation which essentially belongs to the Courts.¹⁸

Just compensation has been defined by the Court as “the full and fair equivalent of the property taken from its owner by the expropriator. The measure is not the taker’s gain, but the owner’s loss.”¹⁹ Further, “[t]he word ‘just’ is used to qualify the meaning of the word ‘compensation’ and to convey thereby the idea that the amount to be tendered for the property to be taken shall be real, substantial, full and ample.”²⁰

It must be emphasized that the deposit of the assessed value of the property/ies as provided in Section 10 is merely preliminary and does not constitute the totality of the compensation to be received by PECO in the event of expropriation of its property/ies by MORE. It is also not meant to substitute the fair market value that the Government is supposed to pay to PECO under Section 4²¹ of PECO’s franchise, *i.e.*,

¹⁶ Separate Opinion of Associate Justice Estela M. Perlas-Bernabe, p. 7.

¹⁷ Separate Opinion of Associate Justice Alfredo Benjamin S. Caguioa, p. 9.

¹⁸ See *Evergreen Manufacturing Corp. v. Rep. of the Phils.*, 817 Phil. 1048 (2017).

¹⁹ *National Power Corporation v. Sps. Zabala*, 702 Phil. 491, 499 (2013).

²⁰ *Id.* at 500, citing *Rep. of the Phils. v. Rural Bank of Kabacan, Inc., et al.*, 680 Phil. 247, 256 (2012); *National Power Corporation v. Manubay Agro-Industrial Development Corporation*, 480 Phil. 470, 479 (2004).

²¹ Section 4 of RA 5360 provides:

RA 5360,²² in the event that the Government should desire to operate and maintain for itself PECO's system and enterprise.

Notably, the deposit of the assessed value as a requirement for the possession of the property/ies is not novel to RA 11212 as it is similar with Rule 67 of the Rules of Court which governs expropriation proceedings.²³ Section 2, Rule 67 provides:

SEC. 2. *Entry of plaintiff upon depositing value with authorized government depositary.* — Upon the filing of the complaint or at any time thereafter and after due notice to the defendant, the plaintiff shall have the right to take or enter upon the possession of the real property involved if he deposits with the authorized government depositary an amount equivalent to the *assessed value* of the property for purposes of taxation to be held by such bank subject to the orders of the court. Such deposit shall be in money, unless in lieu thereof the court authorizes the deposit of a certificate of deposit of a government bank of the Republic of the Philippines payable on demand to the authorized government depositary.

x x x x (Italics supplied.)

After the deposit of the assessed value to a bank located in the franchise area as provided in Section 10 of RA 11212, the expropriation proceedings must continue. Consistent with the constitutional requirement for the payment of just compensation in case of taking of a private property for public use, Section 10 of RA 11212 expressly provides for the need to pay just compensation to the owner deprived of property/ies. Thus, in the event of a finding by the trial court that MORE has a lawful right to take the specific property/ies of PECO, MORE must still pay PECO just compensation based on the court's determination coupled with legal interest thereon from the time of taking of the property/ies.²⁴

Section 4. It is expressly provided that in the event the Government should desire to operate and maintain for itself the system and enterprise herein authorized, the grantee shall surrender its franchise and will turn over to the government all equipment therein at fair market value.

²² Entitled, "An Act Granting More Electric And Power Corporation A Franchise To Establish, Operate, And Maintain, For Commercial Purposes And In The Public Interest, A Distribution System For The Conveyance Of Electric Power To The End Users In The City Of Iloilo, Province Of Iloilo, And Ensuring The Continuous And Uninterrupted Supply Of Electricity In The Franchise Area," approved on June 15, 1968.

²³ In certain instances such as in the acquisition by the government of real property needed as right-of-way, site or location for any national government infrastructure project, the expropriation proceedings are governed by Rule 67 of the Rules of Court in conjunction with Republic Act No. 8974. See *National Power Corporation v. Posada, et al.*, 755 Phil. 613 (2015).

²⁴ *Evergreen Manufacturing Corp. v. Rep. of the Phils.*, *supra* note 18 at 1064.

All told, I find that the delegation of the power of eminent domain to MORE under Sections 10 and 17 of RA 11212 is for a public use and does not constitute deprivation of property without due process of law.

Given the foregoing, I concur with the *ponencia* and vote to **DENY** the motion for reconsideration.



HENRI JEAN PAUL B. INTING
Associate Justice