Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

PEAKPOWER SAN FRANCISCO, INC.,	**G.R. No. 268094**
Petitioner,	Present:
-versus-	LEONEN, *SAJ.*, *Chairperson*, LAZARO-JAVIER, LOPEZ, M., LOPEZ, J., and KHO, Jr.,* *JJ.*
ENERGY REGULATORY COMMISSION,	**Promulgated:** OCT 30 2025
Respondent.	

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DECISION

LOPEZ, J., *J.*:

This Court resolves a Petition for *Certiorari* and Prohibition With Application for the Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction[1] filed before this Court by Peakpower San Francisco Inc. (PSFI), assailing the September 11, 2019 Order[2] (First Order) and the March 1, 2023 Order[3] (Second Order) (collectively, assailed orders) of the Energy Regulatory Commission (ERC), which dismissed PSFI's and Agusan Del Sur Electric Cooperative, Inc. (ASELCO)'s application for the approval of their Power Purchase and Transfer Agreement (PPTA).

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* on leave.

1 *Rollo*, pp. 10–85.

2 *Id.* at 86–90. The September 11, 2019 Order in ERC Case No. 2016-064 RC was issued by Commissioners Josefina Patricia A. Magpale-Asirit, Alexis M. Lumbatan, Catherine P. Maceda, and Paul Christian M. Cervantes, with Agnes Vst Devanadera (on leave), of the Energy Regulatory Commission, Pasig City.

3 *Id.* at 91–115. The Order in ERC Case No. 2016-064 RC was issued by Commissioners Agnes Vst Devanadera, Josefina Patricia A. Magpale-Asirit, Alexis M. Lumbatan, Catherine P. Maceda, and Paul Christian M. Cervantes of the Energy Regulatory Commission, Pasig City.

The Antecedents

PSFI operates a 1 x 5.2 MV (Gross) Wartsila 12V32 Bunker/Diesel-fired power plant located at the ASELCO Office Compound. The power plant is contracted exclusively to ASELCO and directly connected to its distribution system. ASELCO is a distribution utility (DU) that uses the PSFI Power Plant primarily as a peaking plant and as an intermediate source of electricity, especially when there is a supply shortage from the Mindanao Grid.[4] This agreement is covered by a PPTA between PSFI and ASELCO, which was executed on May 29, 2013 (First PPTA).[5]

On December 8, 2014, PSFI and ASELCO negotiated and executed another PPTA (Second PPTA) contract for an additional Wartsila 12V32 generating unit (additional unit) at the PSFI Power Plant under substantially the same terms and conditions as the First PPTA. Under their agreement, PSFI would finance, build, and operate the unit, and then transfer it to ASELCO at the end of the term of the PPTA for the additional unit.[6]

On June 11, 2015, the Department of Energy (DOE) issued Department Circular No. DC2015-06-0008 (2015 DOE Circular) requiring all distribution utilities to procure their power supply agreements (PSAs) exclusively through a Competitive Selection Process (CSP). The main features of a CSP-compliant operations were provided as follows:

> Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all Dus shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of ECs, the Third Party shall also be duly recognized by the National Electrification Administration (NEA).[7]

On April 28, 2016, ASELCO and PSFI filed an application for the approval of their Second PPTA with prayer for the issuance of provisional authority.[8]

On October 7, 2016, the ERC granted the prayer for the issuance of provisional authority and issued an Order and Notice of hearing, setting the Application for hearing, on the determination of its compliance with

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4 *Id.* at 17.
5 *Id.* at 116–161.
6 *Id.*
7 Department of Energy Department Circular 2015-06-0008, sec. 3.
8 *Rollo*, p. 296.

jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence.[9]

On May 8, 2017, the ERC granted provisional authority to ASELCO and PSFI for the implementation of their Second PPTA. The dispositive portion of that Order states:

> WHEREFORE, the foregoing premises considered, the Commission hereby PROVISIONALLY APPROVES the Power Purchase and Transfer Agreement (PPTA) for the additional unit between Agusan del Sur Electric Cooperative, Inc. (ASELCO) and Peak Power San Francisco, Inc. (PSFI) subject to the following conditions:
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> a. Applicable Rate Upon Commercial Operation:
> . . . .
> b. In the implementation of Article 4.3 (Fees – No Payment) of the subject PPTA, ASELCO is reminded that interests and penalties are not recoverable from consumers;
> c. The final generation cost that can be recovered shall be determined by the Commission in its Decision in the instant application; and
> d. In the event that the final rate is higher than that provisionally granted, the resulting additional charges shall be collected by PSFI from ASELCO. On the other hand, if the final rate is lower than that provisionally granted, the amount corresponding to the reduction shall be refunded by PSFI to ASELCO.
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> SO ORDERED.[10]

On February 9, 2018, the DOE issued Department Circular No. DC2018-02-0003 (2018 DOE Circular) prescribing a policy of the CSP in the procurement by the distribution utilities of power supply agreement for captive market in both grid and off-grid areas.

On April 18, 2018, the ERC issued an Order extending the provisional authority granted to ASELCO and PSFI:

> WHEREFORE, premises considered, the provisional authority granted to Applicants Agusan del Sur Electric Cooperative, Inc. (ASELCO) and Peak Power San Francisco (PSFI) in the Order dated 12 July 2016 is hereby EXTENDED until revoked or made permanent by the Commission.
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> SO ORDERED.[11]

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[9] *Id.* at 92.
[10] *Id.* at 92–93.
[11] *Id.* at 93–94.

On May 3, 2019, this Court promulgated *Alyansa Para Sa Bagong Pilipinas (ABP), Inc. v. ERC, et al.*,[12] requiring compliance with the CSP requirements on PSA applications that were filed before the ERC on or after June 30, 2015, in accordance with the 2015 DOE Circular. This Court nullified the ERC issuances which extended the deadline for CSP compliance and stated in its disposition:

> **WHEREFORE**, the petition for *certiorari* and prohibition is **GRANTED**. The first paragraph of Section 4 of Energy Regulatory Commission Resolution No. 13, Series of 2015 (CSP Guidelines), and Energy Regulatory Commission Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), are hereby declared **VOID *ab initio***. Consequently, all Power Supply Agreement applications submitted by Distribution Utilities to the Energy Regulatory Commission on or after 30 June 2015 shall comply with the Competitive Selection Process in accordance with Department of Energy Circular No. DC2018-02-0003 (2018 DOE Circular) and its Annex "A." Upon compliance with the Competitive Selection Process, the power purchase cost resulting from such compliance shall retroact to the date of effectivity of the complying Power Supply Agreement, but in no case earlier than 30 June 2015, for purposes of passing on the power purchase cost to consumers.[13]

Following this guidance from the DOE, the ERC issued its First Order directing ASELCO and PSFI to comply with the CSP requirements and to submit, within 90 days, the necessary DOE certification attesting their compliance. The dispositive portion of the First Order stated:

> IN VIEW OF THE FOREGOING, ASELCO and PSFI are hereby DIRECTED to comply with the pertinent rules and regulations of the Department of Energy (DOE) relative to the CSP requirements pursuant to the Supreme Court Decision in the ABP Case, and to SUBMIT the necessary DOE Certification attesting the Parties' compliance thereto. Such Certification should be submitted within ninety (90) days from receipt of ASELCO of this Order.
>
> Failure of the Applicants to comply with the foregoing directives within the prescribed period shall constrain the Commission to dismiss the instant case with prejudice.
>
> SO ORDERED.[14]

ASELCO and PSFI then filed a Joint Manifestation and Motion for Reconsideration of the First Order, praying for the following:

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12 852 Phil. 1. (2019) [Per J. Carpio, *En Banc*].
13 *Id.* at 67–68.
14 *Rollo*, pp. 87–88.

1. Consider the foregoing manifestation/motion and issue an Order setting aside its Order dated 11 September 2019 and, upholding and ruling that Joint Applicant ASELCO complied with the applicable selection process for its new power supplier at the time that the PPTA for the Additional unit with Joint Applicant PSFI was procured, executed the Agreement, and the subsequent filing of the instant Application;
2. Uphold the validity of the PPTA for the Additional Unit in accordance with its Provisional Approval in the instant case;
3. After full proceedings on the merits, issue a Decision APPROVING the terms of the PPTA for the Additional Unit between Joint Applicants PSFI and ASELCO, thereby authorizing PSFI to charge and collect from ASELCO the Electricity Fees as contained in the PPTA for the Additional Unit and authorizing ASELCO to pass the full amount therof of its consumer as originally prayed for by the Joint Applicants in their Joint Application. [15]

In its Second Order, the ERC found that ASELCO and PSFI failed to prove that the procurement process of ASELCO adhered to the general CSP principles of accountability, transparency, and competitiveness. The pertinent portion of the second order stated:

> C. Competitiveness. The 2015 and the 2018 DOE CSP Circulars established that the procurement of power supply by DUs shall be governed by, among others, the principle of competitiveness / competition. Competitive offers and competition are only possible if equal opportunity to supply is extended to all eligible and qualified suppliers.
>
> Apart from providing a fair and equal opportunity for qualified suppliers to participate in the CSP, the evaluation and selection criteria for rating and determining the most competitive and best offers are also indispensable requirements at ensuring effectiveness in the CSP process. This principle helps ensure that the best price and power supply offers are delivered to the consumers.
>
> In the instant Application, PSFI only submitted its offer to ASELCO, which was consequently evaluated without the participation of other interested parties. There is neither any allegation nor documentation that will show that the opportunity to supply the requirements of ASELCO was extended to other eligible and qualified suppliers.
>
> This clearly establishes that the competitiveness principle was not met by the procurement conducted under this Application.
>
> In light of the foregoing, the Commission finds that ASELCo and PSFI failed to comply with the DOE 2018 CSP Circular relative to the procurement of the subject PPTA, as required by the Supreme Court in the Alyansa Case.
>
> WHEREFORE, the foregoing premises considered, the Joint Manifestation and Motion for Reconsideration (of the Order dated 11

[15] *Id.* at 95.

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> September 2019) dated 08 November 2019 filed by Agusan del Sur Electric Cooperative, Inc. (ASELCO) and Peak Power San Francisco, Inc. (PSFI) is hereby DENIED.
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> ACCORDINGLY, the instant Application dated 21 April 2016 filed by ASELCO and PSFI is hereby DISMISSED WITH PREJUDICE for failure of the Applicants to comply with the Order dated 11 September 2019, and the CSP policy under the DOE 2018 CSP Circular, the compliance thereto is directed by the Supreme Court in its ruling in the Alyansa Case.
>
> RELATIVE THERETO, the provisional authority granted to ASELCO and PSFI by virtue of the Orders dated 12 July 2016 and 27 June 2017 is hereby TERMINATED, without prejudice to any rate adjustment, as may be determined in a separate Order to be issued by the Commission.
>
> FURTHER, ASELCO and PSFI are hereby DIRECTED to stop implementing their PPTA immediately upon receipt of this Order.
>
> FINALLY, to ensure efficiency and reliability of supply of electricity, ASELCO is hereby DIRECTED to immediately review its Demand-Supply Profile, and if the results of such review require contracting of additional power supply capacities, for it to conduct a CSP based on pertinent DOE CSP Circulars.[16]

Hence, PSFI filed the instant petition.

In this Petition, PSFI claims that the ERC arbitrarily and gravely abused its discretion when it applied the *Alyansa* ruling to PSFI and ASELCO's Second PPTA, ignoring various substantial factual distinctions between its arrangement as compared to those covered by the *Alyansa* ruling. It also asserts that the Second PPTA should be treated differently because the First PPTA was already approved by the ERC, while the Second PPTA was only for the installation and construction of an additional Wartsila unit, which was already granted a provisional approval. Further, the PSFI claims that the Second PPTA involved a transfer of the Wartsila unit to ASELCO at the end of their contract term, akin to a Build-Operate-Transfer (BOT) arrangement, which is excluded from the requirement of conducting CSP. It also assails the ERC Orders for being violative of due process, citing that ERC failed to conduct a hearing as to whether the Second PPTA was subject to a CSP requirement and that the Order constituted a confiscation of PSFI's property. Assuming that PSFI came under the CSP requirement, it has substantially complied with the requirement as 45(b) of the Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) states that DUs "may enter into bilateral power supply contracts subject to review by ERC." Further, PSFI claims that the orders by ERC violate the constitutional proscription against non-impairment of contracts and against *ex-post facto* laws. Assuming that the CSP requirements were to be retroactively applied, the doctrine of

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[16] *Id.* at 110–112.

operative fact should prevail. Finally, the implementation of the PPTA will ultimately redound to the benefit of the consumers.[17]

In their Comment,[18] the ERC assails the Petition on procedural grounds. It argued: (1) that the proper remedy by PSFI should have been a petition for review under Rule 43 of the Rules of Court; (2) the extraordinary remedies of *certiorari* and prohibition are not substitute for a lost appeal; and (3) the direct filing of the petition before this Court contravened the doctrine of hierarchy of courts. ERC also raises jurisdictional defects, citing that PSFI failed to implead ASELCO as an indispensable party. On the substantive grounds, ERC claims that it did not commit grave abuse of discretion amounting to lack or in excess of jurisdiction because it merely complied with this Court's ruling in the *Alyansa* case. Likewise, there is no violation of the equal protection clause as no substantial distinction exists to warrant the Second PPTA from the application of the *Alyansa* case. ERC also argued that it did not violate PSFI's right to due process because the 2018 DOE Circular is essentially the same as the 2015 Circular, which PSFI should have followed without need of further instructions from ERC. On constitutional grounds, ERC claimed that: (1) PSFI and ASELCO's contractual and property rights cannot override the police power of the State; (2) the non-impairment clause under Article III of the Constitution is not absolute; (3) its application of the *Alyansa* case on the Second PPTA was not violative of the prohibition on *ex-post facto* laws, and (4) the doctrine of operative fact does not apply to this case. The ERC points out that PSFI admitted its noncompliance with the CSP requirement, hence it cannot be considered to have substantially complied with the 2015 DOE Circular. Finally, PSFI is not entitled to the issuance of a temporary restraining order and/or writ of preliminary injunction because it has no right *in esse* to the grant of its Second PPTA, and that it did not establish a grave or irreparable injury to be suffered from the ERC's non-approval of its Second PPTA.[19]

Issue

The sole issue for resolution is whether respondent ERC committed grave abuse of discretion in the issuance of its First and Second Orders which dismissed, with prejudice, the application filed by ASELCO and petitioner PSFI for the approval of their Second PPTA for failure to comply with the CSP requirements of the DOE.

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[17] *Id.* at 4–7.
[18] *Id.* at 879–974.
[19] *Id.* at 88–89.

This Court's Ruling

I. The petition suffers from procedural defects

The Rules of Court are clear regarding the proper appeal from decisions and final decisions of quasi-judicial agencies, which include the ERC:

> **RULE 43**
>
> **Appeals From the Court of Tax Appeals and Quasi-Judicial Agencies to the Court of Appeals**
>
> **Section 1.** *Scope.* — This Rule shall apply to appeals from judgments or final orders of the Court of Tax Appeals and from awards, judgments, final orders or resolutions of or authorized by any quasi-judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, Central Board of Assessment Appeals, Securities and Exchange Commission, Office of the President, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer, National Electrification Administration, **Energy Regulatory Board**, National Telecommunications Commission, Department of Agrarian Reform under Republic Act No. 6657, Government Service Insurance System, Employees Compensation Commission, Agricultural Invention Board, Insurance Commission, Philippine Atomic Energy Commission, Board of Investments, Construction Industry Arbitration Commission, and voluntary arbitrators authorized by law.[20]

Clearly, the decisions and final orders of the Energy Regulatory Board, predecessor of the respondent,[21] are explicitly included as those which are subject to the remedy of appeal, first to the Court of Appeals. In determining whether an order from quasi-judicial agencies is interlocutory or final, jurisprudence provides that a final order is one that "finally disposes of, adjudicates or determines the rights, or some rights of the parties, either on the controversy of some definite and separate branch thereof, and which concludes them until it is reversed or set aside."[22] Such final orders are a proper subject of appeal, not *certiorari*.

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[20] RULES OF COURT, Rule 43, sec. 1.

[21] Republic Act No. 9136, sec. 44 provides: *Transfer of Powers and Functions.* - The powers and functions of the Energy Regulatory Board not inconsistent with the provisions of this Act are hereby transferred to the ERC. The foregoing transfer of powers and functions shall include all applicable funds and appropriations, records, equipment, property and personnel as may be necessary.

[22] *GSIS v. Olisa*, 364 Phil. 59, 65 (1999) [Per J. Pardo, First Division].

In this case, the respondent's assailed Orders clearly disposed of the controversy over petitioner's application when it dismissed the same with prejudice and directed it and ASELCO to stop implementing their Second PPTA immediately. Also, the assailed Orders terminated, without prejudice to any rate adjustment, the provisional authority granted to ASELCO and petitioner. Given the adjudication on the controversy, the proper appeal should have been lodged with the appropriate court within 15 days from petitioner's receipt of the final order.

Nevertheless, it is an established principle in case law that the mere availability of an appeal is not a sufficient ground to prevent a party from making use of the extraordinary remedy of *certiorari*:

> [A]lthough Section 1, Rule 65 of the Rules of Court provides that the special civil action of certiorari may only be invoked when "there is no appeal, nor any plain speedy and adequate remedy in the course of law," this rule is not without exception. The availability of the ordinary course of appeal does not constitute sufficient ground to prevent a party from making use of the extraordinary remedy of certiorari where the appeal is not an adequate remedy or equally beneficial, speedy and sufficient. It is the inadequacy—not the mere absence—of all other legal remedies and the danger of failure of justice without the writ, that must usually determine the propriety of certiorari.[23]

Given the potential injustice or injurious effects of the assailed Orders in this case, the mere presence of the remedy of appeal should neither preclude the parties from availing of a *certiorari*, nor should it prevent this Court from entertaining it.

II. The CSP Requirement in the 2015 DOE Circular, its effectivity, and its mandatory nature, is unequivocal

At the outset, it bears emphasizing that the mandatory nature and effectivity of the CSP requirement in the 2015 DOE Circular is not in dispute.

The petitioner was created by the EPIRA, which declares the following State policies:

> (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 marker;

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[23] *Jaca v. Davao Lumber Company*, 198 Phil. 493, 517 (1982) [Per J. Fernandez, First Division].

> (d) To enhance the inflow of private capital and broaden the ownership base of the power generation transmission and distribution sectors in order to minimize the financial risk exposure of the national government;
>
> . . . .
>
> (f) To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power.[24]

The EPIRA likewise states that generation of electric power shall be competitive and open.[25] For the distribution sector, which includes ASELCO, the EPIRA is clear that DUs shall have the obligation to supply electricity in the least costly manner to its captive market, subject to the collection of distribution retail supply rate duly approved by respondent.[26] Finally, with the objective of market competition in the interest of consumers, the EPIRA states that DUs may enter into bilateral power supply contract *subject to review by ERC*.[27] This provision unequivocally requires approval from the respondent before the execution of any power supply agreement, such as the Second PPTA in this case.

With this as the legal and policy backdrop, the DOE issued the 2015 DOE Circular mandating all DUs to undergo a competitive selection process in securing power supply agreements (PSAs). It stated the following general principles:

> Section 1. General Principles. Consistent with its mandate, the DOE recognizes the Competitive Selection Process (CSP) in the procurement of PSAs by the DUs ensures security and certainty of electricity prices of electric power to end-users in the long-term. Towards this end, all CSPs undertaken by the DUs shall be guided by the following principles:
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> (a) Increase the transparency needed in the procurement process in order to reduce risks;
> (b) Promote and instill competition in the procurement and supply of electric power to all electricity end-users;
> (c) Ascertain least-cost outcomes that are unlikely to be challenged in the future as the political and institutional scenarios should change; and
> (d) Protect the interest of the general public.

The 2015 DOE Circular included a provision that the "[respondent] in coordination with the DOE shall issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP."[28] Nevertheless, the same Circular already detailed the standard features in the conduct of CSP:

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[24] Republic Act No. 9136 (2001), sec. 2.
[25] Republic Act No. 9136 (2001), sec. 6.
[26] Republic Act No. 9136 (2001), sec. 23.
[27] Republic Act No. 9136 (2001), sec. 45.
[28] Circular DC2015-06-0008 (2015), sec. 4.

> Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and this DOE. In case of ECs, the Third Party shall also be duly recognized by the National Electrification Administration (NEA).
>
> Under this Circular, CSPs for the procurement of PSAs of all DUs shall observe the following:
>
> (a) Aggregation for un-contracted demand requirements of DUs;
> (b) Annually conducted; and
> (c) Uniform template for the terms and conditions in the PSA to be issued by the ERC in coordination with the DOE.

Verily, the effectivity of the 2015 Circular placed the DUs, including ASELCO, under obligation to reform their process of selecting contractors from the power generation companies, without any qualification by the ERC, with the objective of security and certainty in electricity prices.

> We quote below the entirety of Section 43 of the EPIRA, prescribing the functions of the ERC, and there is *absolutely nothing whatsoever* in this complete enumeration of the ERC's functions that grants the ERC rule-making power to supplant or change the policies, rules, regulations, or circulars prescribed by the DOE. The ERC's functions, as granted by the EPIRA, are limited, *inter alia,* to the enforcement of the implementing rules and regulations of the EPIRA, and not to amend or revoke them. At most, as stated in paragraph (m) of Section 43, the ERC may only take any other action delegated to it pursuant to EPIRA. The ERC may not exceed its delegated authority.[29]

In the *Alyansa* case, this Court was unequivocal about the effectivity of the CSP requirements:

> Section 5 of the 2015 DOE Circular states the non-retroactivity of the Circular's effect.
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> Section 5. Non-Retroactivity. This Circular shall have prospective application and will not apply to PSAs with tariff rates already approved and/or have been filed for approval by the ERC before the effectivity of this Circular.
>
> Clearly, PSAs filed with the ERC after the effectivity of the 2015 DOE Circular must comply with CSP as only PSAs filed "before the effectivity" of the Circular are excluded from CSP.
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> Section 10 of the 2015 DOE Circular provides for its effectivity:

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[29] *Alyansa Para sa Bagong Pilipinas, Inc. v. ERC*, 852 Phil. 1, 41 (2019).

> Section 10. Effectivity. This Circular shall take effect immediately upon its publication in two (2) newspapers of general circulation and shall remain in effect until otherwise revoked. (Boldfacing added)
>
> The 2015 DOE Circular took effect upon its publication on 30 June 2015 in the *Philippine Daily Inquirer* and the *Philippine Star*. Section 10 expressly declares that the "Circular [....] shall remain in effect until otherwise revoked." Indisputably, CSP became mandatory as of 30 June 2015. **Taking all these provisions together, all PSAs submitted to the ERC after the effectivity of the 2015 DOE Circular, on or after 30 June 2015, are required to undergo CSP.**[30] (Emphasis supplied)

Hence, the CSP requirement *itself* is prospective in application because it only comes into effect for PSA applications submitted to the ERC after June 30, 2015, which was the effectivity date of the 2015 DOE Circular.

III. Property and contractual rights are not absolute

We clarify as well the issues regarding the petitioner's insistence of their contractual or property rights. They argue that the assailed Orders from the ERC are tantamount to a confiscation of property in violation of due process because it would invalidate the BOT arrangement and deprive ASELCO of eventual ownership of the unit.

At the outset, We note that ASELCO is not impleaded in this petition despite being an indispensable party. Jurisprudence discusses the definition of an indispensable party:

> An indispensable party is one whose interest will be affected by the court's action in the litigation, and without whom no final determination of the case can be had. The party's interest in the subject matter of the suit and in the relief sought are so inextricably intertwined with the other parties' that his legal presence as a party to the proceeding is an absolute necessity. In his absence, there cannot be a resolution of the dispute of the parties before the court which is effective, complete, or equitable. Thus, the absence of an indispensable party renders all subsequent actions of the court null and void, for want of authority to act, not only as to the absent parties but even as to those present.[31]

Here, it is ASELCO that would be deprived of the eventual ownership of the unit if the PPTA implementation is terminated. Consequently, the failure to implead them as indispensable party is fatal to petitioner's cause.

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[30] *Id.* at 50.

[31] *Divinagracia v. Parilla*, 755 Phil 783, 789 (2015) [Per J. Perlas-Bernabe, First Division].

In any case, ASELCO's right to ownership of the additional generating unit was never a matter of right. It can only be characterized as a mere expectancy of a right, which vests in them depending on the happening of a condition. [32] This is evident in the provisions of the PPTA:

> **Article 12**
> **TERM and TERMINATION**
>
> **Term.**
>
> 12.1.1. The term of this Agreement shall end on the last day of the Cooperation Period, unless sooner terminated pursuant to this Agreement.
>
> 12.1.2 Transfer
>
> At the end of the Cooperation Period (including any extensions thereof by virtue of force majeure), SELLER shall transfer to the BUYER the ownership of the Facilities free from any lien or encumbrance without the payment of any compensation by the BUYER to the SELLER provided that buyer has no outstanding accounts with the SELLER. BUYER shall pay SELLER for any fuel at the Power Station on the Transfer Date.[33]

It appears, therefore, that the bone of contention by petitioner is its autonomy of contract with ASELCO. However, the right against the impairment of contracts by government has never been considered absolute:

> True, it is a fundamental rule that contracts, once perfected, bind both contracting parties and a contract freely entered into should be respected since a contract is the law between the parties. However, it must be understood that contracts are not the only source of law that govern the rights and obligations between parties. More specifically, no contractual stipulation may contradict law, morals, good customs, public order or public policy.
>
> The principle of party autonomy in contracts is not an absolute principle. The rule in Article 1306 of our Civil Code is that the contracting parties may establish such stipulations as they may deem convenient provided they are not contrary to law, morals, good customs, public order or public policy. Thus, counter-balancing the principle of autonomy of contracting parties is the equally general rule that provisions of applicable laws, especially provisions relating to matters affected with public policy, are deemed written into the contract. Put a little differently, the governing principle is that parties may not contract away applicable provisions of law, especially peremptory provisions dealing with matters heavily impressed with public interest.
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> In this jurisdiction, public bidding is the established procedure in the grant of

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[32] *See* civil code, art. 1181.
[33] *Rollo*, p. 133.

> government contracts. The award of public contracts through public bidding is a matter of public policy.
>
> Public policy has been defined as that principle under which freedom of contract or private dealing is restricted for the good of the community. Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold a transaction when its object, operation, or tendency is calculated to be prejudicial to the public welfare, to sound morality or to civic honesty.
>
> Consistent with the principle that public auction in the conferment of government contract involves public policy, Congress enacted various laws governing the procedure in the conduct of public bidding and prescribing policies and guidelines therefor.[34] (Citations omitted)

In this case, the policy goals in the EPIRA, as reiterated in the 2015 DOE Circular, pursue the quality, reliability, security, and affordability of electricity. The CSP requirements were enacted to encourage private sector investments in the electricity sector and structural reforms in the distribution utilities for greater efficiency and lower costs. Furthermore, Section 23 of the EPIRA specifically mandates DUs to supply electricity in the least-cost manner. Therefore, the actions of the respondent in enforcing the 2015 DOE Circular, therefore, are aligned with their mandate and that of the DOE. Given this, petitioner's bare allegations on the respondent's violation of the non-impairment clause do not deserve merit.

IV. The prohibition on ex-post facto laws and the doctrine of operative fact do not apply in this case

The petitioner asserts that the respondent gravely abused its discretion when it retroactively applied the CSP requirements to ASELCO, which had already contracted the additional unit from the petitioner before the 2015 DOE Circular. This, according to petitioner, amounted to an *ex-post facto* law, which is prohibited by the Constitution.

The proscription against *ex post facto* laws does not apply in this case. This right is only available to penal laws. "The constitutional doctrine that outlaws an *ex post facto* law generally prohibits the retrospectivity of *penal* laws. Penal laws are those acts of the legislature which prohibit certain acts and establish penalties for their violations; or those that define crimes, treat of their nature, and provide for their punishment."[35] Given that the prohibition pertains to punishment in a penal statute, it follows that the proscription

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[34] *PSALM v. Pozzolanic Philippines Inc.*, 671 Phil. 731, 761–762 (2011) [Per J. Perez, Second Division].
[35] *Salvador v. Mapa*, 564 Phil. 31, 45 (2007) [Per J. Nachura, Third Division].

against *ex post facto* laws is a right that is only enjoyed when the assailed issuance is a penal law.

Here, the CSP requirements contained in the 2015 DOE Circular are not considered penalties, nor do they impede any previously available civil rights. The power of the DOE to enact rules and regulations, and the ERC's authority to implement these rules and regulations, are not considered as an enactment of a criminal statute.

Petitioner likewise cannot claim the doctrine of operative fact to compel the respondent to approve the Second PPTA application. This doctrine is an "exception to the general rule that a void or unconstitutional law produces no effect."[36] The consequences of the invalidated law or executive act, as a matter of equity and fair play, may have consequences that cannot be ignored considering the operative fact, which is the law prior its invalidation. In this case, the 2015 DOE Circular was not invalidated, and no ground of unconstitutionality plagues its CSP requirements. Further, We do not find the principles of equity and fair play to be present in this case, as the 2015 DOE Circular was already issued and effective when petitioner applied for its Second PPTA before the respondent on April 21, 2016.

V. Exemptions from the CSP Requirement Must be Strictly Construed

In pursuit of the objectives of transparency, clarity, and fairness in the supply procurement process that will enable full accountability of DUs in the provision of affordable electricity prices to their captive market, We emphasize that the DOE Circular on the CSP guidelines did not qualify the covered PSAs:

> Section 2. Coverage
>
> 2.1. This Policy shall govern all DUs, grid and off-grid.
>
> 2.2. All PSAs shall be procured through CSP; Provided, however, that the following instances shall warrant a Certificate of Exemption from the Department of Energy (DOE) on the conduct of the CSP:
>
> 2.2.1. Any generation project owned by the DU funded by grants or donations. The DU may be allowed to infuse internally generated funds; Provided, that the amount shared by the DU shall not exceed 30% of the total

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[36] *Mandanas v. Ochoa*, 851 Phil. 545, 573 (2019) [Per J. Bersamin, *En Banc*].

> project cost; Provided, further, that taxes to be paid by the DU shall not be included in the total project cost;
>
> 2.2.2. Negotiated procurement of emergency power supply; Provided, that the cooperation period of the corresponding PSA shall not exceed one (1) year; Provided further, that the rate shall not be higher than the latest ERC approved generation tariff for same or similar technology in the area;
>
> 2.2.3. Provision of power supply by any mandated Government Owned and Controlled Corporation (GOCC) for off-grid areas prior to, and until the entry of New Power Providers (NPP) in an area; and
>
> 2.2.4. Provision of power supply by the Power Sector Assets and Liabilities Management (PSALM) Corporation through bilateral contracts for the power produced from the undisposed generating assets and Independent Power Producer (IPP) contracts fully sanctioned by the "Electric Power Industry Reform Act of 2001" or EPIRA as deemed by the DUs, subject to a periodic review by the DOE.
>
> 2.3. The Certificate of Exemption shall be issued by the DOE within ten (10) working days from receipt of the application.
>
> 2.4 For PSAs contemplated under Section 2.2.2, the grant of a Certificate of Exemption shall be issued by the DOE within ten (10) working days from receipt of the application.
>
> 2.4. The DU shall be required to inform the Energy Regulatory Commission (ERC), National Power Corporation (NPC) and National Electrification Administration (NEA) of the exemption. [37]

Under the rules of statutory construction, as a general rule, exceptions should be strictly but reasonably construed and all doubts should be resolved in favor of the general provisions rather than the exception.[38] It can be gleaned from the above provisions that the exemptions pertain to a specific list of instances when the PSAs do not contravene the competition and electricity affordability objectives of the CSP requirement.

It also bears emphasizing that, based on the guidelines, exceptions from the CSP requirement cannot be presumed. Applicant DUs must apply for an exemption *and* obtain a Certificate of Exemption from the DOE.

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[37] Department Circular No. 002018-02-0003. Adopting and Prescribing the Policy for the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreement for the Captive Market.

[38] *CIR v. Court of Appeals*, 363 Phil. 130, 137 (1999) [Per J. Purisima, Third Division].

9

VI. The arrangement between ASELCO and PSFI does not amount to a BOT as defined under Republic Act No. 6957

Petitioner also claims that it is allegedly different from the usual arrangements of a PSA, having an additional contractual feature that allows ASELCO to obtain ownership over the additional unit, similar to a BOT agreement, at the end of the stated term.

The second PPTA over the unit, however, does not constitute a BOT arrangement. Under Republic Act No. 6957,[39] an essential element of a BOT is that the project proponent transfers the facility to the government agency or local government unit concerned. This element is lacking in the second PPTA, as ASELCO is neither a government agency nor a local government unit. In reality, the arrangement between petitioner and ASELCO is a bilateral contract between two private entities where petitioner, as a generating company, sells and supplies power to ASELCO, albeit with an obligation on the former to transfer the additional unit to ASELCO at the end of the agreed term. In any case, the DOE guidelines on the CSP requirement do not contemplate any exemption for BOT arrangements.

VII. Nevertheless, it was not reasonable in this case for the respondent to require specific CSP requirements in the application for the second PPTA, three years after it had already granted provisional approval and extended the same

In its Petition, petitioner asserts that a substantial difference exists between the circumstances of its second PPTA and the PSAs that were invalidated by this Court in the *Alyansa* decision. Petitioner states that, while it *filed* its application for approval after the June 30, 2015 reckoning date for the enforcement of the CSP requirement, it had already *executed* the second PPTA before the issuance of the 2015 DOE Circular, or on December 8, 2014:

> 41. The ABP Decision involved eighty-three (83) additional PSAs submitted from 16 April 2016 until 29 April 2016 at which time of their execution between Meralco and its power suppliers, the 2015 DOE CSP Circular had already been issued by the Department of Energy. Accordingly, Meralco and its power suppliers already knew at the time of the execution of the PSAs that a CSP shall be undertaken in securing PSAs in accordance with

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[39] An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for the Other Purposes (1990).

> the 2015 DOE CSP Circular. Meralco even mentioned that no actual bidding was conducted and that the PSAs entered into underwent a competitive selection and thorough negotiation.
>
> 42. This gave rise to the impression that the distribution utilities and generation companies were rushing to entering into the PSAs shortly before the 30 April 2016 deadline in an obvious attempt to avoid having to comply with the CSP requirements. At the time these agreements were executed, the relevant stakeholders already had actual notice and knowledge of the requirements of the CSP as laid down in the 2015 DOE CSP Circular. Thus, Meralco and their counterpart generation companies had the reasonable opportunity to comply with the said requirements. In other words, they knew what the game was and were trying to avoid playing by the rules.
>
> 43. Conversely, the facts are materially different in the instant case. Here, the PPTA for the Additional Unit between the joint applicants petitioner PSFI and ASELCO was executed on 08 December 2014. It would take another six (6) months before the 2015 DOE CSP Circular would be subsequently issued on 11 June 2015.
>
> 44. Clearly, the 2015 DOE CSP Circular which applied to Meralco and its power suppliers had not yet been issued at the time of the execution of the petitioner PSFI and ASELCO's PPTA for the Additional Unit. Surely, neither ASELCO nor petitioner PSFI could be faulted for not conducting a CSP under the provisions of either the 2015 DOE CSP Circular and 2018 DOE CSP Circular considering these rules had yet to exist at the time the PPTA for the Additional Unit was executed in 08 December 2014. [40]

Further, petitioner asserts that it had executed the Second PPTA as a continuation to the first PPTA, as a response to the power crisis in Mindanao:

> 50. This PPTA for the Additional Unit was executed under the premise that the installation and construction of the additional Wartsila unit would be undertaken by ASELCO and petitioner PSFI due to the already existing construction under their first PPTA. It was determined in due course that the current power plant might still not address the power crisis in Mindanao prompting the execution of the PPTA for the Additional Unit. . . .
>
> 51. ASELCO and petitioner PSFI's situation is therefore peculiar considering a prior PPTA was already approved by respondent ERC and a new PPTA was merely executed for the installation and construction of an additional Wartsila unit. In contrast with the ABP Decision, however, it was never disclosed whether the PSAs which were sought for approval covered prior agreements with already established power plants much like that between ASELCO and petitioner PSFI.[41]

Petitioner also claims that it had relied on the provisional approval of the ERC:

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40 *Rollo*, pp. 29–30.

41 *Id.* at 31–32.

> 52. ASELCO and petitioner PSFI's PPTA for the Additional Unit was already granted provisional approval through the Order dated 12 July 2016 issued by respondent ERC. This was not the situation of Meralco in the ABP Decision. In approving ASELCO and petitioner PSFI's PPTA for the Additional Unit, respondent ERC categorically found that this PPTA for the Additional Unit is consistent with the declared policy under the EPIRA, [*viz.*]:
>
> > The Commission has a mandate under the EPIRA to protect the interest of electricity consumers insofar as they are affected by the rates imposed upon them to pay, by ensuring that the tariffs are consistent with the principle of full recovery of prudent and reasonable costs.
> >
> > The initial evaluation of the instant Application disclosed that the PPTA entered into by and between ASELCO and PSFI will redound to the benefit of ASELCO's member-consumers in terms of reliable, continuous, and efficient supply of power within its franchise area at reasonable cost, as mandated by Section 2(b), Chapter 1 of the EPIRA, to wit:
> >
> > Section 2. Declaration of Policy –
> >
> > (b) to ensure the quality, reliability, security, and affordability of the supply of electric power; x x x
>
> 53. The Order dated 12 July 2016 was issued by respondent ERC on 08 May 2017, nearly two (2) full years after the 2015 DOE CSP Circular was issued and over one (1) year after it already took effect. This confirms that even before the Order dated 12 July 2016 was issued on 08 May 2017, respondent ERC could have already declared that ASELCO and petitioner PSFI were not compliant with the conduct of CSP and could have held in abeyance the provisional approval of the PPTA for the Additional Unit. Instead, respondent ERC viewed that petitioner PSFI and ASELCO's PPTA for the Additional Unit was compliant, resulting in its issuance in due course of provisional authority.[42]

We grant the Petition on these grounds.

To be clear, the rule remains that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed.[43] We find, however, that the above-argued grounds of distinction sufficiently differentiated the Second PPTA between petitioner and ASELCO from other PSAs filed at the first instance, after the effectivity of the 2015 DOE Circular. The record in this case shows that petitioner had already delivered, and ASELCO had already accepted, the power produced under the Second PPTA, relying on the provisional authority that was granted by the respondent. While the general rule is that the State cannot be put in estoppel, this is subject to exceptions:

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42 *Id.* at 32–33.

43 *Philippine Judges Association v. Hon. Pete Prado*, 298 Phil 502 (1993) [Per J. Cruz, *En Banc*].

> Estoppels against the public are little favored. They should not be invoked except in a rare and unusual circumstances, and may not be invoked where they would operate to defeat the effective operation of a policy adopted to protect the public. They must be applied with circumspection and should be applied only in those special cases where the interests of justice clearly require it. Nevertheless, the government must not be allowed to deal dishonorably or capriciously with its citizens, and must not play an ignoble part or do a shabby thing; and subject to limitations . . . the doctrine of equitable estoppel may be invoked against public authorities as well as against private individuals.[44]

In this case, the respondent, in its October 4, 2016 Order,[45] issued a provisional authority for the Second PPTA "finding [that] the said Applicant [is] sufficient in form and substance." It also failed to mention the lack of ASELCO's compliance with the CSP requirement anywhere in the Order.

Curiously, the respondent extended this provisional authority to implement the Second PPTA in its Order[46] dated June 27, 2017, likewise without any mention of a lacking requirement of the CSP requirement under the 2015 DOE Circular.

Hence, when the ERC issued its initial Order on September 11, 2019[47] and final Order[48] on March 1, 2023 finding that the application failed to allege specific parameters such as a Third Party Bids and Awards Committee, CSP Observers, and various bid documents, knowing fully well since 2016 that these were not included in the application, We find that the ERC acted unreasonably. Although "reasonableness" in the context of administrative law evades a singular, unifying definition in law, academic legal literature describe the lack or presence of reason with the following parameters:

> Considerations of logic and common sense also contribute to reasonableness review of an agency's non-interpretive actions and decisions: what might roughly be called its practical acts. In assessing reasonableness, courts evince efforts to determine how a particular strategy would be feasible, or would make sense in light of surrounding circumstances, or measure up against recognized alternatives.[49]

Despite a detailed decision with its findings of noncompliance, the respondent could not have reasonably expected at that point for the application, which was already lodged before it, to conform with such specific requirements. Such order was, at best, a futile exercise.

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[44] *Republic v. Court of Appeals*, 361 Phil. 319 (1999) [Per J. Panganiban, Second Division].
[45] *Rollo*, pp. 314–332.
[46] *Id.* at 330–334.
[47] *Id.* at 86–88.
[48] *Id.* at 91–112.
[49] Alyse Bertenthal, *Administrative Reasonableness: An Empirical Analysis.* 85 Wis. L. Rev. 136 (2020).

In any case, the Second PPTA is but a continuation of the First PPTA which was already approved by the ERC. The Second PPTA, similar to the First PPTA, utilized a procurement process by ASELCO which espoused the principles of transparency and competitiveness. A review of the procurement process undertaken by ASELCO in its application for the First PPTA would show that it had considered other generation companies as its supplier for the additional power needed. As detailed in its application:

> Details on the Procurement Process undertaken by ASELCO
>
> 17. As stated, Applicant PSFI through PEI, sent a letter to Applicant ASELCO offering to supply power from the Power Plant that PSFI shall finance, build and operate within the franchise area of ASELCO and which PSFI would transfer to ASELCO at the end of the Cooperation Period under the then proposed PPTA. ASELCO received power supply offers from other potential power suppliers namely:
>
> A. 5 Megawatts from the Coal-Fired Power Plant to be built by San Miguel Consolidated Power Corporation;
> B. 1.6 Megawatt Photovoltaic Solar system with diesel generating set from Lim Solar Philippines;
> C. 5 Megawatts from the Coal-Fired Power Plant to be built by Filinvest Development Corporation.
>
> 18. After evaluating the foregoing offers, Applicant ASELCO determined that the offer from San Miguel Consolidated Power Corporation and Filinvest Development Corporation would be available only by 2016 at the earliest since their respective plants would still have to be built and such would take around thirty six months to construct. Thus, the offers from San Miguel Consolidated Power Corporation and Filinvest Development Power Corporation would not address the immediate need for additional generating capacity of ASELCO due to the power crisis currently being experienced in Mindanao. Further, the supply offered by both San Miguel Consolidated Power and Filinvest Development Corporation would come from baseload coal fired power plants while the immediate requirement of ASELCO was for supply during its peak demand hours. ASELCO also determined that the offer from Lim Solar Philippines was expensive due to the price of the solar panels and the generating unit would use diesel fuel.[50]

In conclusion

Grave abuse in the exercise of judgment warranting the remedy of *certiorari* only occurs in specified instances:

> Grave abuse of discretion in the issuance of writs of preliminary injunction implies a capricious and whimsical exercise of judgment that is equivalent to

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[50] *Rollo*, p. 166.

> lack of jurisdiction, or where the power is exercised in an arbitrary or despotic manner by reason of passion, prejudice or personal aversion amounting to an evasion of positive duty or to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law.[51]

All the above premises considered, We find that the respondent committed grave abuse of discretion when it failed to implement the CSP requirements under the 2015 DOE Circular in a reasonable manner and according to the factual circumstances of each case. We emphasize, however, that this ruling is *pro hac vice* and does not affect the mandatory nature or enforceability of the 2015 DOE Circular, as already determined in *Alyansa.*

Given that this Court has already ruled on the main case, We find it impracticable to discuss the merits of the prayer for the issuance of a temporary restraining order.

ACCORDINGLY, the Petition for *Certiorari* filed by Peak Power San Francisco Inc. is **GRANTED.** The September 11, 2019 Order and the March 1, 2023 Order issued by the Energy Regulatory Commission in ERC Case No. 2016-064 RC are **REVERSED** and **SET ASIDE.**

The April 28, 2016 application by Peak Power San Francisco Inc. and Agusan Del Sur Electric Cooperative, Inc. for a second Power Purchase and Transfer Agreement covering the additional Wartsilla 12V32 generating unit is **GRANTED.**

SO ORDERED.

JHOSEP Y. LOPEZ
Associate Justice

WE CONCUR:

see dissenting opinion

MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson

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[51] *Cahambing v. Espinosa, et al.*, 804 Phil. 412, 421 (2017).

AMY C. LAZARO-JAVIER
Associate Justice

MARIO V. LOPEZ
Associate Justice

(on leave)
ANTONIO T. KHO, JR.
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of this Court's Division.

MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of this Court's Division.

ALEXANDER G. GESMUNDO
Chief Justice

SECOND DIVISION

G.R. No. 268094 – PEAK POWER SAN FRANCISCO, INC., Petitioner, **v. ENERGY REGULATORY COMMISSION,** Respondent.

Promulgated:
OCT 30 2024

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DISSENTING OPINION

LEONEN, *J.*:

I cannot join my colleague's act of granting the Petition for *Certiorari* considering the glaring procedural and substantive missteps which merit its dismissal.

It is puzzling why petitioner Peak Power San Francisco, Inc. did not implead Agusan Del Sur Electric Cooperative, Inc. (ASELCO). Being the power supplier to a distribution utility like ASELCO, they are both directly affected with respondent Energy Regulatory Commission's termination of the provisional authority given to their second Power and Purchase Transfer Agreement. As the *ponencia* sensibly observed: "[I]t is ASELCO that would be deprived of the eventual ownership of the unit if the PPTA implementation is terminated. Consequently, the failure to implead them as indispensable party is fatal to petitioner's cause."[1]

It is hornbook principle that all indispensable parties must be joined in an action since it is an essential ingredient for the exercise of judicial power. Further, "the absence of an indispensable party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present."[2] *Sepulveda, Sr. v. Atty. Pelaez*[3] underscores the necessity of joining all indispensable parties as follows:

> Indeed, the presence of all indispensable parties is a condition *sine qua non* for the exercise of judicial power. It is precisely when an indispensable party is not before the court that the action should be dismissed. Thus, the plaintiff is mandated to implead all the indispensable parties, considering that the absence of one such party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present. One who is a party to a case is not bound by any decision of the court, otherwise, he will

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1 *Ponencia* at 12.

2 *Dr. Orbeta v. Sendiong*, 501 Phil 482, 490 (2005) [Per J. Tinga, Second Division]. (Citations omitted)

3 490 Phil. 713 (2005) [Per J. Callejo, Sr., Second Division].

> be deprived of his right to due process. Without the presence of all the other heirs as plaintiffs, the trial court could not validly render judgment and grant relief in favor of the private respondent. The failure of the private respondent to implead the other heirs as parties-plaintiffs constituted a legal obstacle to the trial court and the appellate court's exercise of judicial power over the said case, and rendered any orders or judgments rendered therein a nullity.[4]

On the substantive aspect, the Petition should also be denied for failing to prove compliance with the competitive selection process mandated by the Department of Energy (DOE).

Electricity is a basic necessity "whose generation and distribution is imbued with public interest."[5] The distribution of electricity within the various provinces in our country is dominated by local monopolies within their franchise areas, which the government regulates pursuant to its constitutional mandate.[6]

Electricity franchise holders face no competition within their areas of operation; hence, to protect the consuming public from price gouging practices and to ensure fair pricing, the State regulates these monopolies by requiring the distribution utilities to resort to competitive public bidding when purchasing its supply of electricity from power generating companies. *Alyansa para sa Bagong Pilipinas, Inc. v. Energy Regulatory Commission*[7] explains:

> The State grants electricity distribution utilities, through legislative franchises, a regulated monopoly within their respective franchise areas. Competitors are legally barred within the franchise areas of distribution utilities. Facing no competition, distribution utilities can easily dictate the price of electricity that they charge consumers. To protect the consuming public from exorbitant or unconscionable charges by distribution utilities, the State regulates the acquisition cost of electricity that distribution utilities can pass on to consumers.
>
> As part of its regulation of this monopoly, the State requires distribution utilities to subject to **competitive public bidding** their purchases of electricity from power generating companies. Competitive public bidding is **essential** since the power cost purchased by distribution utilities is entirely passed on to consumers, along with other operating expenses of distribution utilities. **Competitive public bidding is the most efficient, transparent, and effective guarantee that there will be no price gouging by distribution utilities.**
>
> Indeed, the requirement of competitive public bidding for power purchases of distribution utilities has been adopted in the United States,

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4 *Sepulveda, Sr. v. Pelaez,* 490 Phil. 713, 722–723 (2005) [Per J. Callejo, Sr., Second Division]. (Citations omitted)

5 *Manila Electric Co. v. Spouses Chua,* 637 Phil. 89, 101 (2010) [Per J. Brion, Third Division].

6 CONST, art. XII, sec. 19 provides: The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

7 G.R. No. 227670, May 3, 2019 [Per J. Carpio, *En Banc*].

> Europe, Latin America, India, and many developing countries. This requirement is primarily aimed at ensuring a fair, reasonable, and least-cost generation charge to consumers, under a transparent power sale mechanism between the generation companies and the distribution utilities.[8] (Emphasis in the original)

Hence, being imbued with public interest, electricity franchise holders are subject to State regulation because "in the absence of [competitive selection process], there is no transparency in the purchase by [distribution utilities] of electric power, and thus there is no assurance of the reasonableness of the power rates charged to consumers."[9]

It is of no moment that the second Power Purchase and Transfer Agreement between petitioner and ASELCO was provisionally granted by respondent. The approval was done within the second postponement of the mandatory competitive selection process for the purchase of electricity. To recall, *Alyansa* struck down both instances of respondent's postponement of the mandatory competitive selection process for being done without coordination with the DOE and for being a grave abuse of its authority as an implementing agency:

> Lest we forget, the ERC is expressly mandated in Section 43(o) of the EPIRA of "**ensuring that the xxx pass through of bulk purchase cost by distributors is *transparent.***" The ERC's postponement of CSP twice, totaling 305 days and enabling **90 PSAs** in various areas of the country to avoid CSP for **at least 20 years,** directly and glaringly violates this express mandate of the ERC, resulting in the non-transparent, secretive fixing of prices for bulk purchases of electricity, to the great prejudice of the 95 million Filipinos living in this country as well as the millions of business enterprises operating in this county. This ERC action is a most extreme instance of grave abuse of discretion, amounting to lack or excess of jurisdiction, warranting the strong condemnation by this Court and the annulment of the ERC's action.
>
> Absent compliance with CSP in accordance with the 2015 DOE Circular, the PSAs shall be valid only as between the Dus and the power generation suppliers, and shall not bind the DOE, the ERC, and the public for purposes of determining the transparent and reasonable power purchase cost to be passed on to consumers.[10] (Emphasis in the original)

As players in an industry "imbued with public interest" and being the recipient of State sanctioned monopoly, petitioner and ASELCO's contracts are rightly subject to State supervision, particularly since they will merely pass-on the expenses to their captive market.

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8 *Alyansa para sa Bagong Pilipinas, Inc. v. Energy Regulatory Commission,* G.R. No. 227670, May 3, 2019 [Per J. Carpio, *En Banc*].

9 *Id.*

10 *Id.*

While the Constitution prohibits the impairment of contracts,[11] this is a safeguard only against *unwarranted State interference*. Here, petitioner and ASELCO provide a basic need but do so in a monopoly. It is thus incumbent on the State to protect the public interest against potential abuses of the power and privilege exercised by those running a monopoly.

The freedom to contract is not meant to be absolute. In fact, for a contract to be valid there must be the implied guarantee that it must not be "contrary to law, morals, good customs, public order, or public policy."[12] Further, the non-impairment clause, which is meant to shield purely private agreements from State interference,[13] necessarily yields to the State's police power.[14] *Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*[15] provides:

> Not all contracts, however, are protected under the non-impairment clause. Contracts whose subject matters are so related to the public welfare are subject to the police power of the State and, therefore, some of its terms may be changed or the whole contract even set aside without offending the Constitution; otherwise, 'important and valuable reforms may be precluded by the simple device of entering into contracts for the purpose of doing that which otherwise may be prohibited.'
>
> Likewise, contracts which relate to rights not considered property, such as a franchise or permit, are also not protected by the non-impairment clause. The reason is that the public right or franchise is always subject to amendment or repeal by the State, the grant being a mere privilege. In other words, there can be no vested right in the continued grant of a franchise. Additional conditions for the grant of the franchise may be made and the grantee cannot claim impairment.[16]

ACCORDINGLY, I vote for the **DISMISSAL** of the Petition for *Certiorari*.

MARVIC M.V.F. LEONEN
Senior Associate Justice

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11 CONST, art. III, sec. 10 states: No law impairing the obligation of contracts shall be passed.

12 CIVIL CODE, art. 1306 provides: The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

13 *National Development Company v. Philippine Veterans Bank*, 270 Phil. 352, 359 (1990) [Per J. Cruz, *En Banc*].

14 *The Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*, 836 Phil. 214, 273 (2018) [Per J. Leonen, *En Banc*].

15 *Id* at 214.

16 *Id.* at 272–273.