

G.R. No. 190199 – POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION (PSALM), *Petitioner*, v. PHILIPPINE ELECTRICITY MARKET CORPORATION and MANILA ELECTRIC COMPANY, *Respondents*.

Promulgated:

171 MAR 2009

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CONCURRING OPINION

PERLAS-BERNABE, J.:

I fully concur with the conclusion of the Resolution in affirming the Decision¹ dated August 28, 2009 of the Court of Appeals (CA) in CA-G.R. SP No. 106322, which, in turn, upheld the assailed Orders dated January 30, 2008² and October 20, 2008³ of the Energy Regulatory Commission (ERC) in ERC Case No. 2006-080 RC. However, I would like to offer some further elucidation with respect to the ERC's power to adjust the pertinent rates in the present case.

To recall, this case originated from reports that petitioner Power Sector Assets and Liabilities Management Corporation (PSALM) behaved anti-competitively and abused its market power during the third billing period of the Wholesale Electricity Spot Market (WESM) operations for 2006. In response thereto, the Board of Directors of respondent Philippine Electricity Market Corporation (PEMC) ordered adjustments for the WESM settlement prices for the third and fourth billing periods which were allegedly affected by PSALM's actions.⁴ Accordingly, this brought to the fore two (2) distinct issues for the ERC to resolve. The first issue was whether or not PSALM acted anti-competitively. In ERC Case No. 2007-421 MC, it was resolved that there existed no *prima facie* case of anti-competitive behavior on the part of PSALM.⁵ The second issue was whether or not PEMC had authority to adjust the rates for the above-mentioned billing periods. In ERC Case No. 2006-080 RC, it was resolved that PEMC had no authority to adjust the rates, given that such power is vested in the ERC alone. Nevertheless, owing to the abnormally high rates for the third and fourth billing period, the ERC itself ordered an adjustment of the prices for the relevant period by applying the National Power Corporation – Time of Use (NPC-TOU) rates. It is this particular aspect of the ERC's Orders which were raised as an issue before the CA and now before this Court.

¹ *Rollo*, pp. 54-68. Penned by Associate Justice Myrna Dimaranan Vidal with Associate Justices Isaias P. Dicedican and Jane Aurora C. Lantion, concurring.

² *Id.* at 526-534.

³ *Id.* at 560-569.

⁴ *See id.* at 55.

⁵ *See id.*

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Thus, with respect to the ERC's ruling in ERC Case No. 2006-080 RC, petitioner PSALM asserted that the ERC had no authority to impose price controls for the third and fourth billing months in the WESM for the year 2006 considering that such power must be premised on a prior finding of "market power abuse" or "anti-competitive or discriminatory act", which is absent in the present case. ERC, on the other hand, maintained that its power to impose price controls stems from its "original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties x x x."⁶

The ERC's position is well-taken. Contrary to petitioner PSALM's assertion, the ERC's power to set and adjust rates exists apart from and independent with its regulatory power to impose price controls in order to stop and redress any act or behavior which it perceives as anti-competitive or discriminatory. Hence, it may properly order an adjustment of rates regardless of whether or not there is a prior finding of anti-competitive behavior in order to ultimately protect the rights of end-consumers.

As correctly pointed out in the Resolution, the power to fix rates was originally conferred upon the Energy Regulatory Board (ERB). Upon the enactment of Republic Act No. 9136,⁷ otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001, this power was transferred to the ERC. Although this general rate-fixing power was not expressly enumerated under the ERC's powers and functions under Section 43 of the EPIRA, this Court in *Freedom From Debt Coalition v. Energy Regulatory Commission*,⁸ held that:

Significantly, the fundamental power to fix rates is also not one of the functions enumerated under Section 43. Thus, to deny the power to grant provisional rate increase to ERC simply because it is not mentioned in Section 43 is also to deny the power to fix rates to the Commission by the same token. Clearly, the proposition is absurd.

Moreover, as the OSG correctly pointed out, to interpret the EPIRA as not retaining the ERC's power to issue provisional orders will wreak havoc on the regulatory environment, which has been painstakingly built and enhanced since the enactment of the EPIRA.

To repeat, **the EPIRA grants unto the ERC both old and new powers. The old powers are referred to in Section 44 while the new ones are listed in Section 43 of the law.**

x x x x

Notably, under Section 43(u) the ERC is granted "original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties" imposed thereby in the exercise of its functions and responsibilities in Section 43.

⁶ Id. at 566.

⁷ Entitled "AN ACT ORDAINING REFORMS IN THE ELECTRIC POWER INDUSTRY, AMENDING FOR THE PURPOSE CERTAIN LAWS AND FOR OTHER PURPOSES," approved on June 8, 2001.

⁸ 476 Phil. 134 (2004).

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In determining the extent of powers possessed by the ERC, the provisions of the EPIRA must not be read in separate parts. Rather, the law must be read in its entirety, because a statute is passed as a whole, and is animated by one general purpose and intent. Its meaning cannot be extracted from any single part thereof but from a general consideration of the statute as a whole.

Considering the intent of Congress in enacting the EPIRA and reading the statute in its entirety, it is plain to see that **the law has expanded the jurisdiction of the regulatory body**, the ERC in this case, **to enable the latter to implement the reforms sought to be accomplished by the EPIRA.** When the legislators decided to broaden the jurisdiction of the ERC, **they did not intend to abolish or reduce the powers already conferred upon ERC's predecessors. To sustain the view that the ERC possesses only the powers and functions listed under Section 43 of the EPIRA is to frustrate the objectives of the law.**

All the foregoing undeniably lead to the conclusion that the ERC, under **Sections 43(u), 44 and 80 of the EPIRA**, in relation to Section 16(c) of the Public Service Act and Section 8 of E.O. No. 172, possesses the power to grant provisional rate adjustments subject to the procedure laid down in these laws as well as in the IRR.¹⁰ (Emphases supplied)

On the other hand Section 45 of the EPIRA grants the ERC a separate regulatory power to address particular situations of market power abuse and anti-competitive behavior:

Section 45. *Cross Ownership, Market Power Abuse and Anti-Competitive Behavior.* – No participant in the electricity industry or any other person may engage in any anti-competitive behavior including, but not limited to, cross-subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.

x x x x

The ERC shall, *motu proprio*, **monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior** by any participant in the electric power industry. Upon finding that a market participant has engaged in such act or behavior, **the ERC shall stop and redress the same.** Such remedies shall, without limitation, include the **imposition of price controls**, issuance of injunctions, requirement of divestment or disgorgement of excess profits and imposition of fines and penalties pursuant to this Act.

x x x x (Emphases supplied)

The two powers, founded on separate provisions, do not operate mutually exclusive to one another, as PSALM appears to suggest. Its powers under Section 45 are meant to redress very serious detrimental behavior on the part of Electric Power Industry Participants. In fact, price controls are

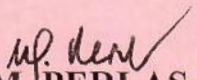
¹⁰ Id. at 194-197; citations omitted.

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only one of several remedies it may pursue in relation thereto. However, nothing in the said provision can be construed to have deprived ERC from exercising its broader rate-fixing powers.

Clearly, it is beyond cavil that even outside of the ERC's power to penalize anti-competitive behavior and order price controls in relation thereto under Section 45 of the EPIRA, the ERC is empowered to order price adjustments whenever it becomes necessary to shield end-consumers from any irregularity in the prices of the electric industry. Such authority is based on its quasi-judicial and regulatory functions which may partake the nature of police power, as pointed out in the Resolution.

Given the foregoing, I vote to deny the instant Petition and affirm the assailed CA rulings.


ESTELA M. PERLAS-BERNABE
Senior Associate Justice