EN BANC

G.R. No. 227670 – ALYANSA PARA SA BAGONG PILIPINAS, INC. (ABP), represented by Evelyn V. Jallorina and Noel Villones, *petitioner, versus* **ENERGY REGULATORY COMMISSION, represented by its Chairman, JOSE VICENTE B. SALAZAR, DEPARTMENT OF ENERGY, represented by Secretary ALFONSO G. CUSI, MERALCO CENTRAL LUZON PREMIERE POWER CORPORATION, ST. RAPHAEL POWER GENERATION CORPORATION, PANAY ENERGY DEVELOPMENT CORPORATION, MARIVELES POWER GENERATION CORPORATION, GLOBAL LUZON ENERGY DEVELOPMENT CORPORATION, ATIMONAN ONE ENERGY INC., REDONDO PENINSULA ENERGY, INC., and PHILIPPINE COMPETITION COMMISSION,** *respondents.*

Promulgated:

May 3, 2019

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DISSENTING OPINION

CAGUIOA, *J.*:

I dissent: for the principal reason that the *ponencia* fails to appreciate — and, in the process, unduly undermines — the singular role and duty of the Energy Regulatory Commission (ERC) to act as the industry's independent regulator that has, under the explicit language of the Electric Power Industry Reform Act of 2001[1] (EPIRA), the exclusive mandate as to the implementation, the specific requirements, and effectivity date, of the Competitive Selection Process (CSP) requirement. The decision here constitutes an unwarranted curtailment of the ERC's powers.

The issuance by the ERC of Resolution No. 1, s. 2016 (Resolution No. 1) creating a transition period for Distribution Utilities (DUs) to comply with the CSP requirement was a reasonable well thought-out response to the various concerns posed by DUs, Generation Companies (GenCos) and electric cooperatives which arose from the immediate implementation of the CSP. Accordingly, this issuance — that sought to correct what the ERC itself subsequently recognized as an untimely and unrealistic immediate imposition of a requirement that could not reasonably be complied with — was not, as it cannot reasonably be categorized as, arbitrary, whimsical or capricious.

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[1] Republic Act No. 9136, entitled "AN ACT ORDAINING REFORMS IN THE ELECTRIC POWER INDUSTRY AMENDING FOR THE PURPOSE CERTAIN LAWS AND FOR OTHER PURPOSES" (EPIRA).

Indeed, it is a doctrine of long-standing that courts will not interfere in matters which are addressed to the sound discretion of the government agency entrusted with regulation of activities coming under the special and technical training and knowledge of such agency.[2] For the exercise of administrative discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation.[3] ***This task can best be discharged by the government agency concerned and not by the courts***.[4]

With due respect, the Court oversteps its bounds when it, as here, annuls acts of regulators acting within the bounds of law and their areas of expertise. In ruling in the manner it did, the *ponencia* not only annulled the acts of the ERC but in fact acted as the regulator itself supplanting its wisdom for that of the agency tasked by law to regulate the energy industry and to assure a steady supply of electricity to the country. The *ponencia,* in essentially disapproving all the 90 Power Supply Agreements (PSAs) that have been submitted to the ERC between June 30, 2015 and April 30, 2016, has effectively imposed an impossible condition on the PSAs — that they should comply with Department of Energy (DOE) Circular No. DC2018-02-0003 (2018 DOE Circular) when all of them had already been negotiated and executed prior to the effectivity of the 2018 DOE Circular. How this unfortunate decision will impact on the country's electricity supply, only time will tell.

A backgrounder

To engender transparency and ensure reasonable prices of electricity in a regime of free and fair competition, the DOE, on June 11, 2015, issued DOE Department Circular No. DC2015-06-0008 (DOE Circular), which mandated the conduct of CSP as a prerequisite to the approval of a PSA. The DOE Circular likewise provided that the ERC, "upon its determination and 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."[5]

Subsequently, on October 20, 2015, the DOE and ERC jointly issued Joint Resolution No. 1 (Joint Resolution), entitled "*A Resolution Enjoining All Distribution Utilities to Conduct Competitive Selection Process (CSP) in the Procurement of Supply for their Captive Market.*" Section 1 provides:

> **Section 1. Competitive Selection Process.** Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term.

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2 *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, 526 Phil. 79, 88 (2006).
3 *Bureau Veritas v. Office of the President*, 282 Phil. 734, 747 (1992).
4 *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 88.
5 DOE Circular, Sec. 4.

> **Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulations to implement the same.** (Emphasis and underscoring supplied)

On the same date, the ERC issued Resolution No. 13, s. 2015 (Resolution No. 13) which provided that, pending the issuance of a prescribed CSP, any DU may adopt any accepted form of CSP subject only to minimum standards to be included in the terms of reference. Resolution No. 13 provided that for "PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC."[6] It also provided that it shall be effective immediately following its publication in a newspaper of general circulation in the Philippines,[7] which publication was done on November 6, 2015.

However, when various concerns were raised by stakeholders, the ERC addressed these concerns by restating or moving the effectivity of the CSP implementation under Resolution No. 13, from November 7, 2015 to April 30, 2016, through the issuance of Resolution No. 1 which it issued on March 15, 2016.

The Petition assails Resolution No. 1 for having allegedly been issued with grave abuse of discretion.

The *ponencia* rules that the ERC committed grave abuse of discretion when it issued Resolution No. 1, and goes even beyond the issues of the petition, by declaring as void *ab initio* the first paragraph of Section 4 of Resolution No. 13. The *ponencia* then directs that all PSAs submitted to the ERC on or after June 30, 2015 should comply with the CSP requirement following 2018 DOE Circular, particularly its Annex "A".

As stated at the outset, and for the reasons itemized below, I dissent.

The present case involves questions of fact not cognizable by this Court

At the outset, it should be pointed out that the present case contains several factual matters that are **not** cognizable by the Court, and which should be threshed out before the appropriate forum. Whether the moving of the effective date of the CSP effectively puts the requirement into a "deep freeze," as maintained by the *ponencia*, is a factual matter that cannot intelligently be resolved by the Court. As to whether the restatement of the effectivity date of the CSP affected, or will continue to affect, the supply of electricity for the entire country is another matter that should be properly ventilated before a court equipped to receive evidence. As well, the problems

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6 ERC Resolution No. 13, Sec. 4.

7 Id.

that the DUs faced in the immediate effectivity of the requirement — which led them to seek exemption from the CSP requirement, and which later on prompted the ERC to issue Resolution No. 1 — are also better appreciated in the context of actual evidence. In addition, whether the restatement of the effectivity date of the CSP was reasonable, or effective in guaranteeing the steady supply of electricity for the entire country is a factual matter that demands the presentation of evidence. All these factual matters need to be addressed before the Court can even begin to determine whether the ERC's act of issuing Resolution No. 1 can be considered to have been tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.

These factual contentions cannot be resolved in the petition at hand which is an ***original*** petition for *certiorari* and prohibition filed ***directly*** to this Court. As the Court *En Banc* recently held in *Gios-Samar, Inc. v. DOTC*[8] (*Gios-Samar*):

> In fine, while this Court has original and concurrent jurisdiction with the RTC and the CA in the issuance of writs of *certiorari,* prohibition, *mandamus, quo warranto,* and *habeas corpus* (extraordinary writs), **direct recourse to this Court is proper only to seek resolution of questions of law.** Save for the single specific instance provided by the Constitution under Section 18, Article VII, cases the resolution of which depends on the determination of questions of fact cannot be brought directly before the Court because we are not a trier of facts. **We are not equipped, either by structure or rule, to receive and evaluate evidence in the first instance; these are the primary functions of the lower courts or regulatory agencies.** This is the *raison d'etre* behind the doctrine of hierarchy of courts. It operates as a constitutional filtering mechanism designed to enable this Court to focus on the more fundamental tasks assigned to it by the Constitution. It is a bright-line rule which cannot be brushed aside by an invocation of the transcendental importance or constitutional dimension of the issue or cause raised.[9] (Emphasis and underscoring supplied)

Thus, the *ponencia* committed a grave error in taking cognizance of the petition as it violates the long-standing doctrine of hierarchy of courts — a doctrine that, according to the pronouncement of the Court in *Gios-Samar*, is not simply a matter of policy but is, in fact, a constitutional imperative. This is so because, to borrow the language of the Court in *Gios-Samar,* the Court's "***sole*** role is to apply the law based on the **findings of facts brought before us.**"[10] More importantly:

> x x x Strict adherence to the doctrine of hierarchy of courts also proceeds from considerations of due process. While the term "due process of law" evades exact and concrete definition, this Court, in one of its earliest decisions, referred to it as a law which hears before it condemns which proceeds upon inquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty, property, and

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8 G.R. No. 217158, March 12, 2019.

9 Id. at 14.

10 Id. at 35-36. Emphasis and underscoring supplied.

> immunities under the protection of the general rules which govern society. Under the present Rules of Court, which governs our judicial proceedings, warring factual allegations of parties are settled through presentation of evidence. Evidence is the means of ascertaining, in a judicial proceeding, the truth respecting a matter of fact. As earlier demonstrated, the Court cannot accept evidence *in the first instance.* By directly filing a case before the Court, litigants necessarily deprive themselves of the opportunity to completely pursue or defend their causes of actions. Their right to due process is effectively undermined by their own doing.[11]

The foregoing viewpoint from the lens of due process squarely applies in the present case considering that there are a number of cases, administrative and criminal — some of which have pending incidents before the Court — that are directly intertwined with the facts of the present case. Therefore, a finding that the ERC, as a body, committed grave abuse of discretion based on ***incomplete and contested facts,*** would be unfair and would constitute a violation of due process for respondents and the several accused in the said cases.

Nature and procedure for approval of PSAs

PSAs are contracts between a DU and a power producer.[12] **PSAs**, which are bilateral power supply contracts, **are made subject to review by the ERC** precisely to promote true market competition and prevent harmful monopoly and market power abuse.[13]

The process to get ERC approval for PSAs, based on the ERC Rules, is as follows:

Even before an application is lodged with the ERC, the DUs and the power producers (or GenCos) have already negotiated and executed material documents that comprise their commercial agreements. In fact, the ERC Rules enumerate the numerous documents and information that should be submitted together with the application,[14] which include the following:

(a) Articles of Incorporation of Generation Company

(b) Securities and Exchange Commission (SEC) Certificate of Registration of the said Articles of Incorporation of Generation Company

(c) Latest General Information Sheet of Generation Company

(d) Board of Investment (BOI) Certificate of Registration of Generation Company

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11 Id. at 37.

12 ERC RULES OF PRACTICE AND PROCEDURE (ERC RULES), Rule 20(B), Sec. 1.

13 EPIRA, Sec. 45.

14 ERC RULES, Rule 20(B), Sec. 2.

(e) Environmental Compliance Certificate (ECC) issued by the Department of Environment and Natural Resources (DENR) to the Generation Company

(f) Power Supply Agreement/Energy Conversion Agreement Contract (PSA/ECA)

(g) Details of the PSA/ECA

1. Executive Summary

2. Sources of Funds/Financial Plans

2.1. Debt/Equity Ratio

2.2. Project Cost

2.3. Annual Interest

2.4. Computation of Return on Investment/WACC

2.5. Certification from the Bank/Lending Institution specifying the principal amortization, term and interest during the cooperation period of the loan agreement

3. Purchased Power Rate

3.1. Breakdown of the base prices of Operation and Maintenance, Capacity Fee, Fixed Operation Fee, and Energy Fee (provide computations)

3.2. Sample Computation of Power Rates with the supporting documents on the assumptions taken

3.3. If applicable, basis/rationale of indexation and level of indexation

4. Cash flow specifying the following:

4.1. Initial Costs

4.2. Breakdown of Operating and Maintenance Expenses and

4.3. Minimum Energy Off-take (MEOT)

(i) All details on the procurement process of fuel including requests, proposals received, tender offers, etc.

(j) Copy of Related Agreements (i.e. Transmission Wheeling Contract, Fuel Supply Agreements, etc.)

(k) Certificate of Compliance (COC) issued by the ERC pursuant to the Guidelines for the issuance of COC for Generation Companies/Facilities

(l) Certification by NPC on whether or not Transition Supply Contract (TSC) capacity and energy are expected to be available during the contractual period (include relevant supporting documentation, data and analysis supporting each statement)

(m) All relevant technical and economic characteristics of the generation capacity, installed capacity, mode of operation, and dependable capacity of the plant

(n) <u>Details on the procurement process used by the Distribution Utility leading to the selection of the Generation Company including request(s) for proposals, proposal received by the Distribution Utility, tender offers, etc.</u>

(o) Details regarding transmission projects or grid connection projects necessary to complement the proposed generation capacity, including the parties that will develop and/or own such facilities, any costs related to such project, and specification of the parties responsible for recovery of any costs related to such projects

(p) Certification regarding the consistencies and inconsistencies between the proposed generation capacity and the [DOE's] Philippine Development Plan (PDP). Any inconsistency shall be supported by relevant analysis including but not limited to, forecasts and assessment of available generation capacity and technology mix.

(q) Details regarding the load forecast projections in accordance with the latest Distribution Development Plan of the Distribution Utility and the variability of those projections over the proposed contract period, including the estimation of the potential for a reduction in load supplied by the Distribution Utility due to retail competition. Any inconsistency shall be supported by relevant analysis.

(r) If the application is filed later than two years following the effectivity of the Guidelines for the Recovery of Costs for the Generation Component of the Distribution Utilities' Rates, the application must include an alternative Demand Side Management (DSM) program that could be implemented by the Distribution Utilities if approved by the ERC. The Distribution Utility shall submit the projected costs and benefits of the DSM program.[15] (Emphasis and underscoring supplied)

The foregoing shows that even before an application for a PSA is submitted for approval, the PSA itself and other supporting agreements have already been meticulously, extensively and heavily negotiated and executed by the DUs and the GenCos. Not only have these documents been executed, but the GenCos and the DUs have already spent considerable money and financial resources to complete the documentation, finalized bank loans for the funding of the project, and registered with several government agencies such as the Securities and Exchange Commission, Board of Investments and the Department of Environment and Natural Resources. **Thus, when the application is lodged, the PSA is already finalized by the parties, and the ERC, as a regulator, comes in and <u>reviews each and every aspect of the transaction and may change or amend aspects of the transaction that will affect consumers</u>**.

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[15] Id.

In fact, to highlight that the application will not prejudice consumers, the application for approval of PSAs between a DU and GenCos is required to include not only the details on the procurement process used by the DU that led to the selection of the GenCo, including request(s) for proposals, proposals received by the DU, tender offers, etc.,[16] **but also** the stipulations on the pricing, and **a statement of its effect on the overall rates of the applicant-utility once the contract is approved**.[17]

In addition to the foregoing documents, all applications for approval of PSAs must show compliance with the pre-filing requirements[18] before the ERC issues a Notice of Hearing to the parties and such other persons that the ERC may designate.[19] Such notice shall be published.[20]

During the hearing, the applicant is then required to present proof of compliance with the jurisdictional requirements of publication and notice to all affected parties.[21]

Pre-trial will then be conducted, which may be immediately after the applicant has submitted its compliance with the jurisdictional requirements.[22] A pre-trial order will then be issued.[23]

Thereafter, public hearings on the applications are conducted.[24]

During the hearings, the applicant presents its witnesses, who will be subject to cross-examination, re-direct examination, and re-cross examination.[25]

It is only after the reception of evidence and compliance with the foregoing requirements does the ERC then issue a decision on the application.[26]

Parties may request for provisional authority together with their application for approval of their PSA. The ERC resolves these requests within 75 days from the filing of the application, and if it issues a provisional authority, the ERC is mandated to start the hearing on the application within 30 days from the issuance of the provisional authority.[27] The ERC then resolves the application within 12 months from the issuance of the provisional authority.[28]

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16 Id., Rule 20(B), Sec. 2(k).
17 Id., Rule 20(B), Sec. 1.
18 Id., Rule 6.
19 Id., Rule 13, Sec. 1.
20 Id., Rule 13, Sec. 4.
21 Id.
22 Id., Rule 16, Sec. 1.
23 Id., Rule 16, Sec. 5.
24 Id., Rule 18, Sec. 1.
25 Id., Rule 18.
26 Id., Rule 20(B).
27 Id., Rule 14, Sec. 3.
28 Id.

CSP is merely a tool; it is only one of the mechanisms to ensure the low cost of electricity

The *ponencia* rules that in the absence of competitive bidding or CSP there is no assurance of the reasonableness of the power rates charged to the consumers.[29]

This is farthest from the truth. With utmost respect to my esteemed colleagues, this is plainly and grievously erroneous.

Pursuant to its power, as provided by the EPIRA, to "[f]acilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs,"[30] and in recognition of the obligation of the DUs to "supply electricity in the least cost manner to its captive market,"[31] the DOE issued the DOE Circular that required all DUs to procure PSAs only through CSP.[32] The DOE Circular explains that CSP "ensures security and certainty of electricity prices of electric power to end-users in the long-term."[33] In fact, one of the DOE Circular's Whereas Clauses invokes the State policy, evinced in the EPIRA, to "ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market."[34]

From the foregoing, it is true that the CSP was devised to provide electricity in the least-cost manner. However, contrary to the reasoning of the *ponencia*, it is **not** the only manner to achieve a reasonable cost of electricity.

Prior to the CSP requirement, DUs would secure their supply of electricity by entering into bilateral contracts with GenCos and the choice of which GenCo to have business with — or from which it will get their supply — rested on the sole discretion of the DUs. **This did not mean, however, that prior to the CSP requirement, the DUs had unbridled discretion on the price of electricity to impose on consumers.** Far from it. The EPIRA itself provides that DUs "shall have the obligation to supply electricity in the least cost manner to [their] captive market, ***subject to the collection of retail rate duly approved by the ERC.***"[35] Further, the ERC was empowered by the EPIRA to review "bilateral power supply contracts" entered into by DUs, **and to likewise *impose price controls*** and ***order the disgorgement of excess***

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29 *Ponencia*, p. 13.
30 EPIRA, Sec. 37(e)(ii).
31 Id., Sec. 23.
32 DOE Circular, Sec. 3.
33 Id., Sec. 1.
34 EPIRA, Sec. 2(c).
35 Id., Sec. 23.

profits where, for instance, the DU is found to be engaged in market power abuse or anti-competitive behavior.[36] Thus:

> 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.
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> x x x x
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> To promote true market competition and prevent harmful monopoly and market power abuse, the ERC shall enforce the following safeguards:
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> (a) No company or related group can own, operate or control more than thirty percent (30%) of the installed generating capacity of a grid and/or twenty-five percent (25%) of the national installed generating capacity. "Related group" includes a person's business interests, including its subsidiaries, affiliates, directors or officers or any of their relatives by consanguinity or affinity, legitimate or common law, within the fourth civil degree;
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> **(b) Distribution utilities may enter into bilateral power supply contracts subject to review by the ERC**: *Provided*, That such review shall only be required for distribution utilities whose markets have not reached household demand level. **For the purpose of preventing market power abuse between associated firms engaged in generation and distribution, no distribution utility shall be allowed to source from bilateral power supply contracts more than fifty percent (50%) of its total demand from an associated firm engaged in generation** but such limitation, however, shall not prejudice contracts entered into prior to the effectivity of this Act. An associated firm with respect to another entity refers to any person which, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such entity; and
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> (c) For the first five (5) years from the establishment of the wholesale electricity spot market, no distribution utility shall source more than ninety percent (90%) of its total demand from bilateral power supply contracts.
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> x x x x
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> **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.**

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[36] Id., Sec. 45.

> The ERC shall, within one (1) year from the effectivity of this Act, promulgate rules and regulations providing for a complaint procedure that, without limitation, provides the accused party with notice and an opportunity to be heard. (Emphasis and underscoring supplied)

That the ERC possesses inherent and sufficient powers to control the price of electricity is supported not just by the foregoing letter of the EPIRA, but also by the following deliberations of the Senate on the said law:

> Senator Guingona. What about the term "excess profits"? What does that mean?
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> Senator Osmena (J). Mr. President, obviously, if the GENCOs are charging more than what they should, -- although I do not see how that could possibly happen, because the line starts actually with 29jj and it says "upon the finding," and there has to be a finding that a market participant has engaged in such act or behavior, meaning anticompetitive or discriminatory act or abuse of market power -- the ERC shall stop and redress the same. Such remedies shall, without limitation, include the imposition of price controls, the issuance of injunctions, the requirement of divestment or disgorgement of excess profits and the imposition of fines and penalties.
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> Those are the remedies that the law allows the regulator to impose in the event that it has a finding of an abuse of market power, anticompetitive behavior or discriminatory action.
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> Senator Guingona. Supposing that the GENCO, which is owned 30% by a distributor, owns not only the shares of that distributor, but the distributor and the GENCO both commonly own the subtransformer and they enter into a contract at a certain price which is higher than the others. The distributor prefers to buy the electric power from the GENCO because the GENCO is reliable and has shown efficiency in the regular and constant delivery of power service. As a result, it gets more profits. Would that be an excess profit warranting price controls?
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> Senator Osmena (J). Mr. President, there are a number of, shall we say, conditions or circumstances that the gentleman is talking about all in one situation. **But the fact is that, the price at which a distribution utility sells to its customers is regulated by the regulatory body. If that distribution utility buys power at a higher rate than the full price, the ERB will not allow it to charge the difference.** ***So, there is a control of how much it can sell this power because that control is coming from the regulatory authority*****.**
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> The question is whether, hypothetically, a distribution company may choose on the ground of better service or reliability to buy power from a distribution company at a higher cost than its competitor. And the answer to that question is in the affirmative, Mr. President.
>
> If the distribution company makes money in excess of what is generally accepted as the norm of return, then that would be what we call excess profits.
>
> Senator Guingona. **So, the ERC would be in a position to impose price controls?**

> **Senator Osmena (J). That is correct, Mr. President. I mean, in an event like that, the ERC, in fact, does impose. That is the very nature of the ERC. Because the approval of the rates on power being sold by a distributor is subject to the approval of the ERC. So, that is price control, Mr. President.**
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> **The electricity we buy has to be sold to us at a rate approved by the ERB right now. That is price control.**[37] (Emphasis and underscoring supplied)

From the foregoing, it is crystal clear that the ERC holds sufficient power, ***as the independent regulator of the industry***, to ensure that the prices of electricity passed on to the consumers are at a reasonable cost, **even without the conduct of the CSP**.

Indeed, the EPIRA was passed as far back as 2001, or 18 years ago, and the DOE and ERC only conceptualized the CSP in recent years. **Throughout the years that the EPIRA was already in effect, *and while there was still no CSP requirement in place*, the ERC had been continuously doing its mandate of regulating the industry — particularly the DUs — to ensure that the prices passed on to the consumers are at a reasonable cost.** Again, this is supported by the EPIRA itself, as it provides:

> SECTION 43. *Functions of the ERC.* — The ERC shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:
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> x x x x
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> (f) **In the public interest, establish and enforce a methodology for setting** transmission and distribution wheeling rates and **retail rates for the captive market of a distribution utility**, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably. The ERC may adopt alternative forms of internationally-accepted rate-setting methodology as it may deem appropriate. **The rate-setting methodology so adopted and applied must ensure a reasonable price of electricity.** The rates prescribed shall be non-discriminatory. To achieve this objective and to ensure the complete removal of cross subsidies, the cap on the recoverable rate of system losses prescribed in Section 10 of Republic Act No. 7832, is hereby amended and shall be replaced by caps which shall be determined by the ERC based on load density, sales mix, cost of service, delivery voltage and other technical considerations it may promulgate. The ERC shall determine such form of rate-setting methodology, which shall promote efficiency. x x x[38] (Emphasis and underscoring supplied)

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[37] Deliberations of EPIRA, May 30, 2000 Session, pp. 8-10.

[38] EPIRA, Sec. 43(f).

In fact, the Implementing Rules and Regulations (IRR) of the EPIRA empowers the ERC **to *constantly* and *continually* monitor and accordingly penalize any anti-competitive act that distorts competition or harms consumers**, thus:

> **Section 7. ERC Responsibilities.**
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> x x x x
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> (d) ERC shall, *motu proprio*, monitor and penalize any market power abuse or anti-competitive or unduly discriminatory act or behavior, or any unfair trade practice that distorts competition or harms consumers, by any Electric Power Industry Participant. Upon a finding of a *prima facie* case that an Electric Power Industry Participant has engaged in such act or behavior, the ERC shall after due notice and hearing, stop and redress the same. Such remedies shall, without limitation, include the separation of the business activities of an Electric Power Industry Participant into different juridical entities, the imposition of bid or price controls, issuance of injunctions in accordance with the Rules of Court, divestment or disgorgement of excess profits, and imposition of fines and penalties pursuant to Section 46 of the Act.[39]

Further, bidding strategies that limit the market participation of a GenCo under conditions that will result in significant increases in market prices are considered anti-competitive behavior and unfair trade practice.[40] ***It is thus totally inaccurate and egregiously wrong to claim that the CSP "is the only way to ensure a transparent and reasonable cost of electricity to consumers."***[41]

Indeed, it bears stressing that the CSP is not required by the EPIRA itself. It is a mechanism which, in the DOE's and ERC's exercise of their wisdom, was envisioned to ***further*** ensure the low cost of electricity.

Stated differently, the CSP requirement is merely a ***policy decision*** by the DOE and implemented by the ERC to ensure the reasonableness of the cost of electricity. **It is only a tool. It is but one of the various means that the ERC may adopt to control the price of electricity and ensure that it is set at a reasonable cost.**

Premature to claim that the CSP has been put into deep freeze

The *ponencia* further rules that (a) postponing the effectivity of the CSP from June 30, 2015 to November 7, 2015 and again postponing the effectivity to April 30, 2016, or by 305 days, allows DUs to avoid the CSP, which took effect on June 30, 2015; and (b) the extension effectively freezes

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39 IRR of EPIRA, Rule 11.
40 Id., Rule 11, Sec. 8(e).
41 *Ponencia*, p. 35.

for 20 years the DOE-mandated CSP to the great prejudice of the public. The purpose of the CSP is to compel DUs to purchase their electric power at a transparent, fair, reasonable, and competitive cost, since this cost is passed on to consumers. The ERC's extension unconscionably placed this purpose in deep freeze for 20 years.[42]

Further, according to the *ponencia*, "[t]he postponement effectively prevented for at least 20 years the enforcement of a mechanism intended to ensure '*transparent and reasonable prices in a regime of free and fair competition*' x x x. In short, in the absence of CSP there is no transparency in the purchase by DUs of electric power, and thus there is no assurance of the reasonableness of the power rates charged to consumers."[43]

The *ponencia* goes further and argues that the non-implementation of the CSP will affect the entire country as there are 83 PSAs filed with the ERC from April 16, 2016 to April 29, 2016, excluding the seven PSAs where Meralco is a contracting party.[44]

I again disagree.

As discussed, the EPIRA and the ERC already have mechanisms **in place *long before* the decision to implement the CSP** to ensure that the public will not be prejudiced.

Here, the ERC has yet to approve the PSAs. In fact, as of the filing of ERC's Comment, none of them had yet been approved.[45] The mere submission of the application for the approvals of the PSAs does not necessarily mean that the PSAs have been approved or will be approved.

Also, even though the PSAs did not undergo the CSP, this will not mean that the public will be prejudiced. The applicant still has to show that the PSA it has entered into will still result in the least cost to its captive market. The ERC will still have to look into the many factors enumerated above, including the procurement process of the distribution utility, in order to see how the proposal from the GenCo will be the least costly to its captive market. In fact, one of the first things that the applicant will submit to the ERC is the effect of the contract on the overall rates of the DU.

It is therefore premature, if not outrightly erroneous, to claim that the executions of the PSAs during the transition period have placed the CSP into "deep freeze" for the duration of the PSAs, and that the public will be prejudiced. During the transition period provided by Resolution No. 1, and even before the implementation of the CSP, the ERC, in compliance with its

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42 Id. at 13.

43 Id.

44 Id. at 8. As stated earlier, this argument is premised on factual assertions that have not been tested in the crucible of trial.

45 *Rollo*, p. 1210.

mandate under the EPIRA, has the power — ***nay, the duty*** — to ensure that any bilateral power supply contracts entered into by the DUs will be consistent with their mandate that they supply electricity to their captive market in the least cost manner.

Although the CSP is one manner by which this is attained, its non-application to the PSAs in this case — which, again, have yet to be approved — does not mean that the PSAs would prejudice the public. Once more, the EPIRA and its IRR are clear that acts that harm customers and those that prohibit participation of GenCos to increase market prices are prohibited. **These preceded the institution of the CSP and remain to be in force even if the CSP is implemented**. **Thus, *with or without the CSP*, the public is protected from practices that harm them or that would result in market increases arising from non-competitive practices**. As stated above, the ERC, among other powers, may direct the disgorgement of excess profits and impose price control mechanisms, all with the objective of ensuring the reasonableness of the price of electricity.

The ERC is an independent regulatory body separate and distinct from the DOE

The *ponencia* rules that the ERC does not have the power to supplant the policies of the DOE[46] and that ERC's powers are limited to the enforcement of rules and regulations of the EPIRA.[47] However, it should be noted that in issuing Resolutions Nos. 13 and 1, the ERC did **not** supplant any policy of the DOE.

First of all, it should be emphasized that the ERC, under the EPIRA, is a purely **independent** regulatory body performing the combined quasi-judicial, quasi-legislative and administrative functions in the electric industry.

Section 38 of the EPIRA mandated the creation of an "independent, *quasi-judicial* regulatory body to be named the Energy Regulatory Commission." **To be sure, one of the most important changes introduced by the EPIRA in the restructuring of the energy industry was the creation of an *independent regulatory body*.** Section 2 of the EPIRA states:

> SECTION 2. *Declaration of Policy.* — It is hereby declared the policy of the State:
>
> x x x x
>
> (j) To establish a **strong** and **purely independent regulatory body** and system to ensure consumer protection and enhance the

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46 *Ponencia*, p. 16.
47 Id. at 21.

> competitive operation of the electricity market x x x. (Emphasis and underscoring supplied)

The deliberations of the Senate on the EPIRA also reveal that it was the intention of the legislature to create a regulatory body **that is *independent* and *separate from* the DOE**:

> Senator Guingona. I thank the gentleman for that. The Distribution Code, however, shall be prepared by the Energy Regulatory Commission (ERC) and the wheeling rates and connection fees from the residents of the mountaintop will have to be approved by the ERC.
>
> Senator Osmena (J). That is correct, Mr. President.
>
> Senator Guingona. We were under the impression before when we were deliberating on the Energy Regulatory Authority that it was the Energy Regulatory Authority that would impose or determine the prices of electricity for distributors.
>
> Senator Osmena (J). Mr. President, I am sorry for the confusion. When we passed on Second Reading the Energy Regulatory Authority bill, the suggestion, I think, made on the Floor of Sen. Serge Osmena was that all regulatory bodies would be referred to uniformly. I think we agreed that all of them would be referred to as a commission.
>
> **Anyway, Mr. President, whether we call it as a board, a commission or an authority, it is the regulator or the regulatory body.**
>
> Senator Guingona. I thank the gentleman for that, Mr. President. But there seems to be some difference because the Energy Regulatory Commission would be under the Department of Energy or attached to it and **our concept of a regulatory body, under the previous interpellations, was that it was going to be an independent body, independent from any department, independent from pressure from the Executive so that it could really fix the rational price for electricity.**
>
> Senator Osmena (J). Mr. President, in the bill that we have approved on Second Reading on the energy regulatory body -- whatever we want to call it -- we have provided for as much independence as we could possibly provide. That bill has only been approved precisely on Second Reading so that we may revisit, if we may want to, whatever provisions therein we want now to discuss after having gone through this bill. Because what we have before us is the last bill that we expect to take up in this session.[48] (Emphasis and underscoring supplied)

In *Freedom From Debt Coalition v. ERC*[49] (*Freedom From Debt Coalition*), the Court **already recognized** that the independence of the ERC was part and parcel of the objectives of the EPIRA:

> Thus, the EPIRA provides a framework for the restructuring of the industry, including the privatization of the assets of the National Power

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48 Deliberations of EPIRA, May 29, 2000 Session, pp. 31-32.

49 476 Phil. 134 (2004).

> Corporation (NPC), the transition to a competitive structure, and the delineation of the roles of various government agencies and the private entities. The law ordains the division of the industry into four (4) distinct sectors, namely: generation, transmission, distribution and supply. Corollarily, the NPC generating plants have to privatized and its transmission business spun off and privatized thereafter.
>
> **In tandem with the restructuring of the industry is the establishment of "a strong and purely independent regulatory body." Thus, the law created the ERC *in place of* the Energy Regulatory Board (ERB).**[50] (Emphasis, italics and underscoring supplied)

The intent to *separate* the regulatory body from the DOE is further revealed from an analysis of both the letter of the law and the deliberations of the lawmakers.

Under the EPIRA, the ERC is empowered to perform the following functions:

> SECTION 43. *Functions of the ERC.* — The ERC shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:
>
> (a) Enforce the implementing rules and regulations of this Act;
>
> (b) Within six (6) months from the effectivity of this Act, promulgate and enforce, in accordance with law, a National Grid Code and a Distribution Code which shall include, but not limited to, the following:
>
> (i) Performance standards for TRANSCO O & M Concessionaire, distribution utilities and suppliers: *Provided,* That in the establishment of the performance standards, the nature and function of the entities shall be considered; and
>
> (ii) Financial capability standards for the generating companies, the TRANSCO, distribution utilities and suppliers: *Provided*, That in the formulation of the financial capability standards, the nature and function of the entity shall be considered: *Provided, further*, That such standards are set to ensure that the electric power industry participants meet the minimum financial standards to protect the public interest. Determine, fix, and approve, after due notice and public hearings the universal charge, to be imposed on all electricity end-users pursuant to Section 34 hereof;
>
> (c) Enforce the rules and regulations governing the operations of the electricity spot market and the activities of the spot market operator

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[50] Id. at 184-185.

and other participants in the spot market, for the purpose of ensuring a greater supply and rational pricing of electricity;

(d) Determine the level of cross subsidies in the existing retail rate until the same is removed pursuant to Section 74 hereof;

(e) Amend or revoke, after due notice and hearing, the authority to operate of any person or entity which fails to comply with the provisions hereof, the IRR or any order or resolution of the ERC. In the event a divestment is required, the ERC shall allow the affected party sufficient time to remedy the infraction or for an orderly disposal, but shall in no case exceed twelve (12) months from the issuance of the order;

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

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

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

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

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

interest during construction applicable to these unexcused delays; and

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

(g) Three (3) years after the imposition of the universal charge, ensure that the charges of the TRANSCO or any distribution utility shall bear no cross subsidies between grids, within grids, or between classes of customers, except as provided herein;

(h) Review and approve any changes on the terms and conditions of service of the TRANSCO or any distribution utility;

(i) Allow the TRANSCO to charge user fees for ancillary services to all electric power industry participants or self-generating entities connected to the grid. Such fees shall be fixed by the ERC after due notice and public hearing;

(j) Set a lifeline rate for the marginalized end-users;

(k) Monitor and take measures in accordance with this Act to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant;

(l) Impose fines or penalties for any non-compliance with or breach of this Act, the IRR of this Act and the rules and regulations which it promulgates or administers;

(m) **Take any other action delegated to it pursuant to this Act;**

(n) Before the end of April of each year, submit to the Office of the President of the Philippines and Congress, copy furnished the DOE, an annual report containing such matters or cases which have been filed before or referred to it during the preceding year, the actions and proceedings undertaken and its decision or resolution in each case. The ERC shall make copies of such reports available to any interested party upon payment of a charge which reflects the printing costs. The ERC shall publish all its decisions involving rates and anti-competitive cases in at least one (1) newspaper of general circulation, and/or post electronically and circulate to all interested electric power industry participants copies of its resolutions to ensure fair and impartial treatment;

(o) **Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition** and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all retail suppliers;

(p) **Act on applications for or modifications of certificates of public convenience and/or necessity, licenses or permits of franchised electric utilities in accordance with law and revoke, review and modify such certificates, licenses or permits in appropriate cases**, such as in cases of violations of the Grid Code, Distribution Code and other rules and regulations issued by the ERC in accordance with law;

(q) Act on applications for cost recovery and return on demand side management projects;

(r) In the exercise of its investigative and quasi-judicial powers, act against any participant or player in the energy sector for violations of any law, rule and regulation governing the same, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts by any participant in the energy sector or by any person, as may be provided by law, and require any person or entity to submit any report or data relative to any investigation or hearing conducted pursuant to this Act;

(s) Inspect, on its own or through duly authorized representatives, the premises, books of accounts and records of any person or entity at any time, in the exercise of its quasi-judicial power for purposes of determining the existence of any anti-competitive behavior and/or market power abuse and any violation of rules and regulations issued by the ERC;

(t) Perform such other regulatory functions as are appropriate and necessary in order to ensure the successful restructuring and modernization of the electric power industry, such as, but not limited to, the rules and guidelines under which generation companies, distribution utilities which are not publicly listed shall offer and sell to the public a portion not less than fifteen percent (15%) of their common shares of stocks: *Provided, however*, That generation companies, distribution utilities or their respective holding companies that are already listed in the PSE are deemed in compliance. For existing companies, such public offering shall be implemented not later than five (5) years from the effectivity of this Act. New companies shall implement their respective public offerings not later than five (5) years from the issuance of their certificate of compliance; and

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

From the foregoing functions, it is unequivocally clear that the EPIRA intended the ERC to be the **body in charge of regulating the participants in the energy sector, particularly the DUs.** In contrast to this regulatory role of the ERC, the functions of the DOE[51] are mainly on policy-making

[51] SECTION 37. *Powers and Functions of the DOE.* — In addition to its existing powers and functions, the DOE is hereby mandated to supervise the restructuring of the electricity industry. In pursuance thereof, Section 5 of RA 7638 otherwise known as "The Department of Energy Act of 1992" is hereby amended to read as follows:

and direction-setting. That the ERC is the regulator, on the one hand, and that the DOE is the policy-maker, on the other, is evident from the following exchange between Senators John Osmena and Juan Ponce Enrile:

"(a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan and with the policies on environmental protection and conservation and maintenance of ecological balance, and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;

(b) Develop and update annually the existing Philippine Energy Plan, hereinafter referred to as 'The Plan', which shall provide for an integrated and comprehensive exploration, development, utilization, distribution, and conservation of energy resources, with preferential bias for environment-friendly, indigenous, and low-cost sources of energy. The plan shall include a policy direction towards the privatization of government agencies related to energy, deregulation of the power and energy industry, and reduction of dependency on oil-fired plants. Said Plan shall be submitted to Congress not later than the fifteenth day of September and every year thereafter;

(c) Prepare and update annually a Power Development Program (PDP) and integrate the same into the Philippine Energy Plan. The PDP shall consider and integrate the individual or joint development plans of the transmission, generation, and distribution sectors of the electric power industry, which are submitted to the Department: *Provided, however*, That the ERC shall have exclusive authority covering the Grid Code and the pertinent rules and regulations it may issue;

(d) Ensure the reliability, quality and security of supply of electric power;

(e) Following the restructuring of the electricity sector, the DOE shall, among others:

(i) Encourage private sector investments in the electricity sector and promote development of indigenous and renewable energy sources;

(ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;

(iii) In consultation with other government agencies, promote a system of incentives to encourage industry participants, including new generating companies and end-users to provide adequate and reliable electric supply; and

(iv) Undertake, in coordination with the ERC, NPC, NEA and the Philippine Information Agency (PIA), information campaign to educate the public on the restructuring of the electricity sector and privatization of NPC assets;

(f) Jointly with the electric power industry participants, establish the wholesale electricity spot market and formulate the detailed rules governing the operations thereof;

(g) Establish and administer programs for the exploration, transportation, marketing, distribution, utilization, conservation, stockpiling, and storage of energy resources of all forms, whether conventional or non-conventional;

(h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;

(i) Develop policies and procedures and, as appropriate, promote a system of energy development incentives to enable and encourage electric power industry participants to provide adequate capacity to meet demand including, among others, reserve requirements;

(j) Monitor private sector activities relative to energy projects in order to attain the goals of the restructuring, privatization, and modernization of the electric power sector as provided for under existing laws: *Provided*, That the Department shall endeavor to provide for an environment conducive to free and active private sector participation and investment in all energy activities;

(k) Assess the requirements of, determine priorities for, provide direction to, and disseminate information resulting from energy research and development programs for the optimal development of various forms of energy production and utilization technologies;

(l) Formulate and implement programs, including a system of providing incentives and penalties, for the judicious and efficient use of energy in all energy-consuming sectors of the economy;

(m) Formulate and implement a program for the accelerated development of non-conventional energy systems and the promotion and commercialization of its applications;

(n) Devise ways and means of giving direct benefit to the province, city, or municipality, especially the community and people affected, and equitable preferential benefit to the region that hosts the energy resource and/or the energy-generating facility: *Provided, however,* That the other provinces, cities, municipalities, or regions shall not be deprived of their energy requirements;

(o) Encourage private enterprises engaged in energy projects, including corporations, cooperatives, and similar collective organizations, to broaden the base of their ownership and thereby encourage the widest public ownership of energy-oriented corporations;

(p) Formulate such rules and regulations as may be necessary to implement the objectives of this Act; and

(q) Exercise such other powers as may be necessary or incidental to attain the objectives of this Act."

The President. Senator Enrile is recognized.

Senator Enrile. May I go back to page 3, line 19, DISTRIBUTION CODE.

"DISTRIBUTION CODE" after the word "CODE" and before the article "a", insert AS PROMULGATED BY THE DEPARTMENT OF ENERGY AND ENFORCED AND IMPLEMENTED BY THE ENERGY REGULATORY AUTHORITY.

Senator Osmeña (J). Mr. President, in TRANSCO and again in the bill on the Energy Regulatory Board -- in fact, this came out in our debates -- we pointed out the historical situation that the predecessor of the Energy Regulatory Board was the Philippine Public Service Commission created by a Commonwealth Act and it was always the agency that promulgated this. Therefore, we are pursuing that historical situation with respect to the promulgation of the distribution and the grid code, Mr. President.

Senator Enrile. But I wonder whether this factor may tend to reconsider the position of the sponsor, Mr. President. **When the Public Service Commission Act was adopted, we did not have a Department of Energy. Therefore, that function was limited and given to the Public Service Commission. Since we have a Department of Energy that is now tasked to defining policies in the energy sector, I am just wondering whether it is not appropriate at this time to really reflect the presence of the Department of Energy and grant to the Department of Energy the authority and initiative to promulgate the Distribution Code.** And the enforcement and implementation of it shall be done by the Energy Regulatory Authority which is actually the successor of the Public Service Commission.

Senator Osmeña (J). Mr. President, that is a debate that the committee had to face in the process of hearings. **Precisely, we were of the mind that the Department of Energy sets policies.** It prepares the power development plans. It sets goals for the country.

The manner of the regulation of a distribution utility, Mr. President, which is the essence of the distribution code -- it tells the distribution utility what it can and what it cannot do -- **is a matter that belongs to the Energy Regulatory Board.**

I am sorry but this matter has been a settled issue. I hope Senator Enrile will understand.

Senator Enrile. I thank the distinguished sponsor for that, Mr. President.

If that is the position of the sponsor, Mr. President, I will not insist on my proposed amendment.

The President. Thank you, Senator Enrile.[52] (Emphasis and underscoring supplied)

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[52] Deliberations of EPIRA, June 5, 2000 Session, pp. 56-57.

In the deliberations for another part of the EPIRA, the issue of whether the DOE can dabble in matters referring to distribution and DUs — a matter that is within the exclusive jurisdiction of the ERC — again surfaced:

> The President. Senator Guingona is recognized for an anterior amendment.
>
> Senator Guingona. On line 11, after the word "generation" comma (,), insert the word DISTRIBUTION so that it will read: "repair and maintenance of generation, DISTRIBUTION and transmission facilities."
>
> The President. What does the sponsor say?
>
> Senator Osmeña (J). Mr. President, we would like to read the whole paragraph: "The Power Development Program refers to the indicative plan for managing electricity demands through energy efficient programs and for upgrading, expansion, rehabilitation, repair, and maintenance of generation and transmission facilities formulated and updated yearly by the DOE in coordination with the generation, transmission, and utility companies."
>
> When we add the word DISTRIBUTION, Mr. President, are we, therefore, saying that the PDP is a program which would involve rehabilitation, repair, and maintenance of generation, DISTRIBUTION, and transmission facilities?
>
> **Again, Mr. President, I am sorry to state that this is a back-door attempt of the DOE to a covetous desire to take over the promulgation of the distribution rules.**
>
> Senator Guingona. This refers to the Power Development Program.
>
> Senator Osmeña (J). Yes, Mr. President, but it says that it provides for the upgrading, expansion, rehabilitation, repair, and maintenance. ***Makikialam na naman sila sa distribution.***
>
> The President. So, the sponsor is not accepting the Guingona amendment?
>
> Senator Osmeña (J). No, Mr. President.
>
> Senator Guingona. May I know the reason again? Because if it is a Power Development Program, I think it is logical to include distribution.
>
> Senator Osmeña (J). Mr. President, power development program....
>
> Senator Guingona. It is only a plan.
>
> Senator Osmeña (J). **One has to appreciate the ingenuity of the bureaucracy. One of the most heated arguments within government agencies on this bill, Mr. President, has been the result of the attempt of the DOE to take over distribution which our committee sat through.**

> **The PDP is a plan for managing demand through energy-efficient programs. Therefore, Mr. President, by allowing the DOE to plan energy-efficient programs, it intrudes into the functions of the ERB which controls distribution.**
>
> Senator Guingona. So, the Power Development Plan will include distribution?
>
> Senator Osmeña (J). Mr. President, **the Power Development Plan** will include upgrading, expansion, rehabilitation, repair and maintenance of generation and transmission facilities. **It is just a plan to make available a certain amount of power. It is not a plan that will tell a distribution company where, how, or in what manner it should do its business.**
>
> Senator Guingona. Yes, but the distribution is regulated, Mr. President. Therefore, if it is to be regulated, it must tell the company what is expected of it as far as standards are concerned.
>
> Senator Osmeña (J). Mr. President, **standards are part and parcel of the responsibility of the ERB which promulgates a distribution code.**[53] (Emphasis and underscoring supplied)

Quite evident from the foregoing is the intention of the legislature — reflected in both the letter of the law and the deliberations — to create an independent ERC that is separate from the DOE. Thus, while the DOE validly set the CSP requirement, acting within the scope of its powers as the industry's policy-maker, the EPIRA nonetheless lodges the particulars, *i.e.,* its implementation, the specific requirements, and its effectivity date, among others, to ERC — the industry's independent **regulator.**

Guided by the pronouncement of the Court in *Freedom From Debt Coalition* that "[i]n determining the extent of powers possessed by the ERC, the provisions of the EPIRA must not be read in separate parts"[54] and that "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,"[55] **it is therefore unquestionable that EPIRA granted the ERC sufficient powers to set when the players in the energy sector will be bound by the policy set by DOE. This is especially true *in this case* when, as will be shown below, the DOE itself did not set the timeframe for the effectivity of the policy it put in place**, and even, in fact, delegated to the ERC the power to issue supplemental guidelines for its implementation.

The ERC has the power to issue the assailed Resolution

As the independent regulator of the industry, the ERC therefore had the power and jurisdiction to state, and restate, the effectivity date of the

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53 Deliberations of EPIRA, June 5, 2000 Session, pp. 57-59.
54 Supra note 49, at 196.
55 Id.

requirement to undergo the CSP before a PSA between a GenCo and a DU is approved.

In this regard, the *ponencia*, however, rules that as soon as the DOE's Circular became effective on June 30, 2015, the CSP already became effective, so that all PSAs submitted on or after June 30, 2015 are required to undergo the CSP.[56] The *ponencia* further rules that the ERC therefore unilaterally moved the effectivity of the CSP twice — first, when it issued Resolution No. 13 and stated that it would be effective after its publication (it became effective on November 7, 2015) and second, when it issued Resolution No. 1 which moved the effectivity from November 7, 2015 to April 30, 2016.[57] Further, the *ponencia* rules that even if the ERC is empowered to issue the appropriate regulations to implement the CSP,[58] this is limited by the fact that such regulation should be issued in coordination with the DOE.[59]

Justice Bernabe adds, in her Separate Concurring Opinion, that the ERC had no sole discretion under Joint Resolution No. 1 to promulgate whatever rules it deemed fit to implement the CSP.[60] For Justice Bernabe, even if Joint Resolution No. 1 gave the ERC the power to issue the "appropriate guidelines to implement the [CSP]", the term "appropriate guidelines" refers only to the "supplemental guidelines" that the ERC may issue for the design and execution of the CSP following Section 4 of the DOE Circular.[61] In the same breath, however, Justice Bernabe disagrees with the *ponencia*'s assertion that the CSP became effective on June 30, 2015 because, according to her, the Joint Resolution explicitly recognized the ERC's power to issue the specific guidelines on the CSP, and Resolution No. 13 is not being questioned in this petition thus rendering it impossible for the CSP to be effective by June 30, 2015.[62]

I agree with Justice Bernabe that the CSP could not have been effective by June 30, 2015 because by June 30, 2015, all that was set was only the policy that the CSP would be the mode of procuring PSAs. There were no guidelines yet on how the CSP was to be implemented. Indeed, Resolution No. 13 is not even questioned in this petition and the DOE Circular and the Joint Resolution are both clear in that the ERC still needed to issue the guidelines to implement the CSP, which it did in Resolution No. 13.

I, however, disagree that the ERC was required to coordinate with the DOE in setting the effective date of the implementation of the CSP.

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56 *Ponencia*, p. 24.
57 Id. at 26.
58 Id. at 27.
59 Id.
60 *J.* Perlas-Bernabe, Separate Concurring Opinion, p. 5.
61 Id. at 4.
62 Id. at 5.

I stress anew that Resolutions Nos. 13 and 1 cannot be said to have amended the DOE Circular **because the latter did not set the effective date or the start of the implementation of the CSP requirement**. The DOE Circular was a mere policy-setting document that put in place the CSP requirement, and it did not require that the CSP must be implemented by June 30, 2015, because by then no CSP guidelines existed. In fact, the effective date of the CSP Guidelines of November 7, 2015 was set only by Resolution No. 13 which, in turn, the ERC could *solely* issue precisely because it was empowered by the law, *i.e.*, the EPIRA. The power of the ERC to set the effectivity date was even recognized by the DOE in the Joint Resolution.

When it issued Resolution No. 13, the ERC had yet to realize the effects of an immediate imposition of the CSP requirement. When the ERC subsequently decided to suspend the implementation of the CSP requirement by a few months, through the issuance of Resolution No. 1, in response to various issues raised by the players in the energy industry, it was, therefore, still acting within its powers as granted by the EPIRA, **the exercise of which was not limited or contracted by the issuance of the Joint Resolution**.

There was thus no grave abuse of discretion when Resolutions Nos. 13 and 1 were issued because the ERC was acting within the scope of powers granted to it. It is erroneous to require the ERC to coordinate with, much less to seek the approval of, the DOE in connection with the issuance of Resolutions Nos. 13 and 1. **It simply did not, and does not, need to.**

That the ERC was **not required** to coordinate with the DOE with regard to the date of effectivity of the CSP is fundamentally anchored on the EPIRA which created the ERC **as a body *separate* and *distinct* from the DOE**. Again, at the risk of belaboring the point, even Joint Resolution No. 1 recognized the power of ERC to state and restate the effective date of the CSP through Resolution No. 13, and later on Resolution No. 1.

In sum, it is thus fundamentally erroneous to conclude that the ERC needed to coordinate with the DOE before issuing Resolutions Nos. 13 and 1 when:

(1) The resolutions affect, and deal with, how DUs conduct their business, which is a domain that is within the sole and exclusive jurisdiction of the ERC; and

(2) The ERC's power to issue them on its own was recognized by the Joint Resolution itself.

The grant of rule-making power necessarily includes the power to amend, revise, alter, or repeal the same

Further, in arguing that the ERC committed a grave abuse of discretion in restating the effectivity date of Resolution No. 13, petitioner, in effect, is saying that a body exercising quasi-legislative powers cannot suspend or revoke the rules and regulations it has itself promulgated once it has become effective. It is as if the rules and regulations issued by the ERC become *irrepealable* once issued. This lacks basis, and is undeniably absurd.

The legislative power has been described generally as the power to make, alter, and repeal laws.[63] The authority to amend, change, or modify a law is thus part of such legislative power.[64] It is the peculiar province of the legislature to prescribe general rules for the government of society.[65] However, the legislature cannot foresee every contingency involved in a particular problem that it seeks to address.[66] Thus, it has become customary for it to delegate to instrumentalities of the executive department, known as administrative agencies, the power to make rules and regulations.[67] This is because statutes are generally couched in general terms which express the policies, purposes, objectives, remedies and sanctions intended by the legislature.[68] The details and manner of carrying out the law are left to the administrative agency charged with its implementation.[69]

If the Congress itself, which possesses plenary legislative powers, cannot pass irrepealable laws,[70] there is more reason then to hold that entities exercising delegated or quasi-legislative powers are also covered by the same proscription.

As earlier established, the ERC has the power to issue rules and regulations as regards the implementation of the CSP. Accordingly, following the doctrine of necessary implication, this grant of express power to formulate implementing rules and regulations must necessarily include the power to amend, revise, alter, or repeal the same.[71] **This is to allow administrative agencies the needed flexibility in formulating and adjusting the details and manner by which they are to implement the provisions of a law, in order to make them more responsive to the times.**[72]

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63 *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 89.
64 Id.
65 Id.
66 Id.
67 Id. at 89-90.
68 Id. at 90.
69 Id.
70 *Kida v. Senate of the Philippines,* 683 Phil. 198, 221 (2012).
71 *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 90.
72 *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 386, 444 (2007).

Therefore, the ERC, being vested with the power to promulgate rules and regulations concerning its mandate, is also necessarily vested with the power to amend, revise, alter or repeal the same. Thus, the creation of a transition period is within the powers of the ERC.

Given the foregoing discussion — that ERC had the power to issue Resolutions Nos. 13 and 1, and that this power is anchored on the EPIRA itself — then it cannot be said that the body acted with grave abuse of discretion amounting to lack or excess of jurisdiction. The ERC, as a body made up of its commissioners, thus issued the resolutions *in good faith,* or on the basis of its interpretation of the powers granted to it by the EPIRA.

The restatement of the effectivity date of ERC Resolution No. 13 is reasonable

The OSG asserts that the issuance of Resolution No. 1 was in the exercise of ERC's sound judgment as a regulator and pursuant to its mandate under the EPIRA to "protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power."[73] I agree.

And in the exercise of its regulatory powers, the ERC's restatement of the effectivity date of the CSP implementation cannot be anything but valid. ***The creation of the transition period was done in good faith and was neither whimsical nor capricious — it was prompted by the ERC's receipt of numerous letters from stakeholders posing various concerns***. Excerpts of some of these letters are as follows:

a. *November 25, 2015 letter*[74] *of SMC Global Power*, ***which requests that it be allowed to file its PSCs because the requirements imposed pursuant to the CSP implementation were non-existent when its PSCs were evaluated and signed***:

> Upon filing with the ERC, however, our counter-part counsel for the DUs and ECs (Dechavez & Evangelista Law Offices) informed us that even at the pre-filing stage, the ERC rejects applications which do not include the following: DUs/ECs Invitation to Participate and Submit Proposal, DUs/ECs' Terms of Reference, Proposals Received by the DU/EC, tender offers, DU/ECs Special Bids and Awards Committees (SBAC) Evaluation Report, DU Board Resolution confirming the approval of the SBAC Evaluation report and Notice of Award issued by the DU/EC.
>
> It is significant to note that all of these requirements, even the creation of the SBAC, were non-existent when our PSCs were evaluated and signed. x x x

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73 EPIRA, Sec. 2(f).

74 *Rollo* (Vol. III), pp. 1237-1238.

> To this end, we respectfully request the consideration of the Honorable Commission to allow us to file, and for the Commission to accept, the applications for approval of the subject PSCs. In our case, mere filing is critical for us to achieve financial close for purposes of funding our power plant project.
>
> The filing of the application will enable us to continue financing the Limay Phase 1 Project, Malita Project and proceed with Limay Phase 2 Project to augment the capacity in the Luzon and Mindanao Grids and prevent the projected shortage in 2017.[75]

b. *December 1, 2015 letter*[76] *of Philippine Rural Electric Cooperative Association, Inc. (PHILRECA),* ***which requests for exemption from coverage of DOE Circular***:

> May we respectfully furnish you a copy of the PHILRECA Board Resolution No. 10-23-2015 "Resolution Requesting the Department of Energy (DOE) and the Energy Regulatory Commission (ERC) to exempt the Southern Philippines Power Corporation (SPPC) and Western Mindanao Power Corporation (WMPC) from the coverage of Department Circular No. DC2015-06-0008".[77]

c. *December 10, 2015 letter*[78] *of Agusan del Norte Electric Cooperative, Inc. (ANECO),* ***which requests confirmation that any extension of PSAs (or ESAs) previously approved is outside the scope of Resolution No. 13****:*

> The ESA, as amended and supplemented, will expire on 25 June 2016. Given the power shortage in Mindanao, the insufficiency of the NPC/PSALM supply, taken together with the continuing demand growth of our end-users, we wish to exercise the option provided under the Amendment to the ESA to extend the Term of our Amended and Supplemented ESA with TMI x x x.
>
> Relating this provision to Reso 13, we are of the impression that Reso 13 may not be strictly applied to ESA extensions, especially considering that the Honorable Commission has already meticulously scrutinized and approved TMI's Fixed O&M, Energy and Fuel Fees, as well as its asset base in determining the Capital Recovery Fee.
>
> x x x x
>
> Since Section 4 of the Resolution states that the CSP requirement shall not apply to PSAs (or ESAs) already filed with the ERC, we are of the understanding that an extension of an existing ESA, which is part of the provisions submitted to and has been approved by the ERC, albeit provisionally, is outside the coverage of the present Resolution. Hence, we intend to enter into an extension of our existing ESA with TMI, applying

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75 Id. at 1238.
76 Id. at 1239.
77 Id.
78 Id. at 1242-1243.

the same methodology and asset base as approved by the Honorable Commission in arriving at the rates. x x x[79]

d. *December 14, 2015 letter*[80] *of SMC Global Power,* ***which seeks acceptance and approval of PSCs that were signed prior to the issuance of Resolution No. 13***:

Further to our letter dated November 25, 2015, we would like to reiterate our request to the Honorable Commission *En Banc* to accept and allow the filing of Power Supply Contracts (PSC) already signed ***prior*** to its issuance Resolution No. 13, Series of 2015 "A Resolution Directing All Distribution Utilities (DUs) to Conduct Competitive Selection Process (CSP) in the Procurement of Their Supply to the Captive Market."

We wish to stress that in the event the subject PSCs cannot be filed, the Honorable Commission would effectively invalidate the same to the detriment of the contracting parties and the industry. It is significant to note that the Distribution Utilities (DU) and Electric Cooperatives (EC) have carefully evaluated and considered the most advantageous terms and conditions for its consumers prior to signing the subject PSCs.

x x x x

Meanwhile, another round of CSP may likely alter the terms of the contract that could prove to be disadvantageous to the DU or EC.

Considering the execution of the PSCs and the stage of their application process prior to the issuance of the CSP requirement, we beg the indulgence of the Honorable Commission *En Banc* to accept the subject PSCs and allow the filing thereof to proceed.[81]

e. *December 21, 2015 letter*[82] *of Camarines Sur IV Electric Cooperative, Inc. (CASURECO),* ***which asks for an extension to file its joint application***:

On 03 August 2015, CASURECO IV and San Miguel Energy Corporation ("SMEC") entered into a mutual agreement before this Honorable Commission to pre-terminate the Power Supply Contract dated 23 August 2013 between CASURECO IV and SMEC ("SMEC PSC"). As a result of the pre-termination of SMEC PSC, beginning 00:00H of 26 August 2015, SMEC ceased to supply power to CASURECO IV.

x x x Because CASURECO IV received no proposals for its power supply requirements, it began direct negotiations with ULGEI.

x x x x

Since CASURECO IV received such letter on 24 September 2015, CASURECO IV and ULGEI had until 23 November 2015 to file a joint-application for the approval of a power supply agreement. Due, however,

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79 Id.
80 Id. at 1244-1245.
81 Id.
82 Id. at 1246-1249.

to the extensive negotiations conducted to provide the Franchise Area a competitive and reliable supply of power, and since it will take time to prepare and finalize a power supply agreement, CASURECO IV and ULGEI requested this Honorable Commission for an additional thirty (30) days within which to file a joint-application, or until 23 December 2015.[83]

f. *March 9, 2016 letter*[84] *of Aklan Electric Cooperative Inc. (AKELCO),* ***which poses some queries regarding the CSP requirement****:*

We write to advance our queries pertaining to the Competitive Selection Process which is now part of the Power Supply Procurement requirements for all DUs. The related ERC Resolution No. 13 Series of 2015 was already in effect 15 days after its publication last October 20, 2015.

In the case of AKELCO where in previous years, two (2) Power Supply Contracts for base load requirements were already signed by both parties but were not filed with the ERC before the effectivity of the CSP. The queries are as follows:

1. If the Power Supply Contracts that were not filed due to non-compliance to CSP still binding?

2. What are the ERC's recommended modes of CSPs? Is the so-called "Price Challenge" or Swiss Challenge allowed? And,

3. Presuming that some of the stipulated provisions (i.e. date of initial delivery, base load demand requirements) in the said contracts cannot be met due to CSP requirement or already unacceptable to either of the party, can we still re-negotiate the provisions and at the same time introduce the ERC recommended terms of reference?[85]

g. *December 15, 2015 letter*[86] *of Astronergy Development,* ***which raises the issue of impairment of contracts****:*

We respectfully request a meeting with you at your earliest convenience, so that we can discuss our peculiar situation following the issuance of the Resolution. Our meeting objective is to understand your views regarding the retroactive application of the Resolution and further, to understand how to harmonize Resolution in light of the third party legal opinion we have attached herein for your consideration. Lastly, we hope to be allowed a brief opportunity to present and discuss our views on why the Commission's staff should interpret the Resolution in a manner that is consistent with the Commission's past written responses on RE to the Senate Energy Committee; and the Commission's related Decision relevant to our particular circumstances.

x x x x

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83 Id. at 1246-1247.
84 Id. at 1250.
85 Id.
86 Id. at 1251-1252.

> Section 4 of the Resolution requires the DUs to conduct a CSP for PSAs that have not yet submitted its PSA with the ERC. We believe the result is a retroactive application of the Resolution that impairs our contracts that were entered into in good faith. This creates uncertainties, including the possible revision and rescission of existing binding agreements, which our group of companies, and their shareholders and creditors, are greatly concerned about. There are also specific considerations with each DU: for each PSA we have executed since the application of the Resolution would potentially lead to losses and additional project delay. Any further delay (such as revisiting CSP) would result in a breach of contract for not meeting deadlines.[87]

It bears stressing that these concerns were recognized to be reasonable and legitimate concerns by the DOE itself as shown by the act of the DOE of endorsing one of these letters to the ERC. On January 18, 2016, the DOE endorsed for the ERC's consideration to allow Abra Electric Cooperative (ABRECO) to directly negotiate with a power supplier, albeit without following the CSP requirement.[88] The DOE explained that the said request for endorsement was made in consideration of ABRECO's situation as an ailing electric cooperative and to prevent its vulnerability to volatile wholesale electricity spot market (WESM) prices given that its supply is sourced from it.[89]

The *ponencia* views this letter as a confirmation that the DOE directed the ERC to take action on the matter and that it did not foreclose the ERC from directing ABRECO to undertake a Swiss challenge, a form of public bidding where an original proponent's offer is opened to competitive bids but the original proponent may counter match any superior offer.[90]

To my mind, this letter from the DOE is not, as the *ponencia* says, an admission of the need to coordinate with the DOE. Rather, this letter is in fact a recognition by the DOE that the power of whether to exempt an entity from the CSP is lodged solely with the ERC. That the DOE was clearly requesting the ERC and not directing it is seen from a plain reading of the letter where the DOE stated: "x x x thus, we are endorsing for ERC's consideration x x x."[91] This is a clear admission by the DOE that it is only the ERC which has the power to determine whether a certain energy sector player, such as ABRECO, may be exempted from the requirement of the CSP.

Confronted with these concerns, the ERC deemed it wise to restate the effectivity of the CSP implementation. Thus, the restatement of the effectivity date of the CSP implementation from November 7, 2015 to April 30, 2016, virtually creating a transition period of five (5) months, was

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87 Id.
88 *Rollo* (Vol. IV), p. 1516.
89 Id.
90 *Ponencia*, p. 28.
91 *Rollo* (Vol. IV), p. 1516.

deemed by the ERC a long enough period to allow fruition of the PSAs at the throes of perfection or those already executed but not yet filed, and short enough to block those PSAs which were still too early in the negotiation or so far from execution.[92] The ERC found that granting a period of transition would avoid the risk of inconsistency in resolving the individual requests for exemptions sought by DUs, GenCos and electric cooperatives — **while, at the same, *ensuring a steady electric supply for the period covered by the different calls for the CSP exemption*.**[93]

And, as the regulator, ERC had full knowledge and complete sense of the difficulty of adding a new requirement to an application for the approval of a PSA when the DUs and the GenCos had already executed their PSAs. ***In fact, requiring a CSP would most likely have resulted in the undoing of heavily and lengthily negotiated and executed agreements over which many computations and projections had already been done***.

A review of the requirements enumerated above shows that in addition to the executed PSA, the parties are required to disclose their sources of funding, a sample computation of power rates, and even a breakdown of operating and maintenance expenses. **The undoing of a PSA and a re-negotiation of its terms will affect these figures and may even result in the replacement of the GenCos. The DUs will have to start from scratch as a result of the directive to comply with the CSP.** Again, these cannot be done at a whim or in a span of a few days. And this realization was the *animus* for the creation of the transition period — to make the CSP applicable only to those PSAs that are still being negotiated as the parties to these PSAs have yet to conclude loan agreements for the financing of the project, they may adjust their projections on how the contract will affect the cost of electricity, and adjust their projected operating and maintenance expenses.

This is the reason why the recommendation of Justice Bernabe, *i.e.*, for the creation of transitory regulations so that the PSAs shall become effective only when a new PSA is executed after following the CSP, is not feasible. These PSAs were heavily negotiated and loans and projections have already been made following the terms reflected in the PSAs. All of these PSAs will be undone should the parties thereto be now required to undergo CSP.

Further, Resolution No. 1 did not only restate the effectivity date of the CSP implementation, it likewise already addressed certain concerns raised by these stakeholders. The ERC, in said resolution, clarified certain compliance requirements on the other forms of CSP as provided in Resolution No. 13. It further resolved that the PSAs with provisions allowing automatic renewal or extension of their term, whether or not such

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92 *Rollo* (Vol. III), pp. 1208-1209.
93 Id. at 1206.

renewal or extension requires the intervention of the parties, may have one (1) automatic renewal or extension for a period not exceeding one (1) year from the end of their respective terms, provided that these PSAs were approved by the ERC before the effectivity of Resolution No. 1; if not, then automatic renewal clauses or extension of the PSAs shall no longer be permitted.

The *ponencia*, however, reasons that the extension was not necessary because "the issuance of the 2015 DOE Circular and of the CSP Resolution was not conjured on a whim"[94] and that "the DOE has conducted a series of nationwide public consultations on the proposed policy on competitive procurement of electric supply for all electricity end-users."[95]

It must be pointed out, however, that the public consultations and focus-group discussions referred to by the *ponencia* were in relation to the draft "*Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements entered into by Distribution Utilities for the Supply of Electricity to their Captive Market*" (PSA Rules). Quoted below is the Whereas Clause of Resolution No. 13 relied on by the *ponencia*[96] in arguing that public consultations were conducted:

> **WHEREAS,** the ERC, likewise, conducted Focus Group Discussions (FGDs) with the stakeholders on April 22 to 24, 2014 in Pasig City, May 6 to May 8, 2014 in Cebu City, May 13 to 14, 2014 in Cagayan De Oro City and May 20 to 22, 2014 in Pasig City, to thoroughly discuss major issues in relation to the **draft PSA Rules**, such as: **a) the requirement of Competitive Selection Process (CSP);** b) the proposed PSA template; c) the joint filing of PSA applications by the DUs and generation companies (GenCos); and d) the "walk-away" provision in the PSA, and the ERC likewise set the deadline for the submission of additional comments or position papers for May 30, 2014.[97] (Emphasis and underscoring supplied)

The Court can take judicial notice[98] of the fact that up to the present, the said PSA Rules are still in draft form. In fact, comments on the draft PSA Rules are still being received by the ERC,[99] and a public consultation on the draft was just concluded by the ERC on October 15, 2018.[100]

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94 *Ponencia*, p. 30.

95 Id. at 31.

96 Id. at 32.

97 Resolution No. 13, 9th Whereas Clause.

98 RULES OF COURT, Rule 129, Section 1 provides:

> SECTION 1. *Judicial notice, when mandatory.* — **A court shall take judicial notice**, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, **the official acts of the legislative, executive and judicial departments of the Philippines**, the laws of nature, the measure of time, and the geographical divisions. (Emphasis and underscoring supplied)

99 See Comments Received on the Draft PSA Rules, ERC Case No. 2018-0002-RM, *available at* http://www.erc.gov.ph/ContentPage/51512 (last accessed November 9, 2018).

100 See 15 October 2018 PubCon on PSA Rules, *available at* http://erc.gov.ph/ContentPage/51514 (last accessed November 9, 2018).

Therefore, while it is true that the CSP requirement was not totally unexpected, the DUs cannot, however, be expected to comply with the said requirement that was made effective ***immediately***. While consultations were indeed made regarding the CSP requirement, these consultations were in the context of the draft PSA rules ***that have not been made effective yet***; hence, it is understandable that the DUs were still negotiating their PSAs under the old framework where the CSP was not yet required.

To stress, the DUs cannot be expected to follow a rule that was not yet in place. In other words, it was but natural for the DUs to have pending PSA negotiations that did not go through the CSP when the CSP requirement was made effective all of a sudden.

Thus, it is clear that the issuance of Resolution No. 1 was not, as it cannot reasonably be categorized as, arbitrary, whimsical or capricious. **The creation of a transition period, together with the clarifications provided in Resolution No. 1, constitutes a reasonable well thought-out response to the various concerns posed by DUs, GenCos and electric cooperatives.**

Indeed, it is worth repeating that there is a doctrine of long-standing that courts will not interfere in matters that are addressed to the sound discretion of the government agency entrusted with regulation of activities coming under the special and technical training and knowledge of such agency.[101] For the exercise of administrative discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation.[102] ***This task can best be discharged by the government agency concerned and not by the courts***.[103]

To be sure, the interpretation of an administrative government agency, which is tasked to implement a statute, is accorded great respect and ordinarily controls the construction of the courts.[104] The reason behind this rule was explained in *Nestle Philippines, Inc. v. Court of Appeals*,[105] in this wise:

> The rationale for this rule relates not only to the emergence of the multifarious needs of a modern or modernizing society and the establishment of diverse administrative agencies for addressing and satisfying those needs; it also relates to accumulation of experience and growth of specialized capabilities by the administrative agency charged with implementing a particular statute. In *Asturias Sugar Central, Inc. v. Commissioner of Customs*[106] the Court stressed **that executive officials are presumed to have familiarized themselves with all the**

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101 *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 88.
102 *Bureau Veritas v. Office of the President*, supra note 3, at 747.
103 *Yazaki Torres Manufacturing, Inc. v. Court of Appeals*, supra note 2, at 88.
104 *Melendres, Jr. v. Commission on Elections*, 377 Phil. 275, 291 (1999).
105 280 Phil. 548 (1991).
106 140 Phil. 20, 26 (1969).

> **considerations pertinent to the meaning and purpose of the law, and to have formed an independent, conscientious and competent expert opinion thereon.** The courts give much weight to contemporaneous construction because of the respect due the government agency or officials charged with the implementation of the law, their competence, expertness, experience and informed judgment, and the fact that they frequently are the drafters of the law they interpret.[107] (Emphasis supplied)

Thus, I submit anew that the Court stepped out of bounds in annulling the acts of a regulator acting within the bounds of law and its area of expertise. Indeed, this sends a chilling effect on all regulators. This is true in this case because the acts of the ERC have been made the basis of administrative and criminal complaints.

While an action by an administrative agency may be set aside by the judicial department, it must only be done if there is abuse of power, lack of jurisdiction or grave abuse of discretion clearly conflicting with the letter and spirit of the law.[108] There is no such situation here. There is no cogent reason to hold that the ERC acted with grave abuse of discretion amounting to lack or excess of jurisdiction.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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[107] *Nestle Philippines, Inc. v. Court of Appeals*, supra note 105, at 556-557.
[108] *Melendres, Jr. v. Commission on Elections*, supra note 104, at 292.