EN BANC

G.R. No. 210245 – BAYAN MUNA REPS. NERI JAVIER COLMENARES and CARLOS ISAGANI ZARATE, GABRIELA WOMEN'S PARTY REPS. LUZ ILAGAN and EMMI DE JESUS, ACT TEACHERS PARTY-LIST REP. ANTONIO TINIO, and KABATAAN PARTY-LIST REP. TERRY RIDON, *Petitioners,* **v. ENERGY REGULATORY COMMISSION (ERC) and MANILA ELECTRIC COMPANY (MERALCO),** *Respondents.*

G.R. No. 210255 – NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS (NASECORE), represented by Petronilo L. Ilagan, FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), represented by Siegfriedo A. Veloso, FEDERATION OF LAS PIÑAS HOMEOWNERS ASSOCIATION (FOLPHA), represented by Bonifacio Dazo and RODRIGO C. DOMINGO, JR., *Petitioners,* **v. MANILA ELECTRIC COMPANY (MERALCO), ENERGY REGULATORY COMMISSION (ERC) and DEPARTMENT OF ENERGY (DOE),** *Respondents.*

G.R. No. 210502 – MANILA ELECTRIC COMPANY [MERALCO], *Petitioner,* **v. PHILIPPINE ELECTRICITY MARKET CORPORATION, FIRST GAS POWER CORPORATION, SOUTH PREMIERE POWER CORPORATION, SAN MIGUEL ENERGY CORPORATION, MASINLOC POWER PARTNERS CO. LTD., QUEZON POWER (PHILS.) LTD. CO., THERMA LUZON, INC., SEM-CALACA POWER CORPORATION, FGP CORPORATION AND NATIONAL GRID CORPORATION OF THE PHILIPPINES, AND THE FOLLOWING GENERATION COMPANIES THAT TRADE IN THE WESM NAMELY: 1590 ENERGY CORPORATION, AP RENEWABLES, INC., BAC-MAN ENERGY DEVELOPMENT CORPORATION/BAC-MAN GEOTHERMAL, INC., FIRST GEN HYDRO POWER CORPORATION, GNPOWER MARIVELES COAL PLANT LTD. CO., PANASIA ENERGY HOLDINGS, INC., POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, SN ABOITIZ POWER, STRATEGIC POWER DEVELOPMENT CORPORATION, BULACAN POWER GENERATION CORPORATION AND VIVANT STA. CLARA NORTHERN RENEWABLES GENERATION CORPORATION,** *Respondents.*

Promulgated:

August 3, 2021

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DISSENTING OPINION

LEONEN, *J.*:

The Energy Regulatory Commission was created by Republic Act No. 9136, the Electric Power Industry Reform Act of 2001 (the EPIRA Law), with the definite mandate of being a proactive agency to enable the EPIRA Law's broad policy objective of "ensur[ing] transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability."[1] It represents the public interest in the face of massive business interests supported by vast resources and dominating mechanisms. The public is a captive market consigned to passivity as against well-heeled industry players.

The Energy Regulatory Commission is a quasi-judicial body with broad inquisitorial powers. As such, it commits grave abuse of discretion when it proceeds to favorably rule on a distribution utility's application to impose higher rates or to obtain other relief affecting consumers without observing the twin requirements of notice and hearing. In doing so, it acts in evasion of its positive duty, effectively refuses a duty enjoined by law, or otherwise fails to act at all in contemplation of law.

A plea for relief that asks for more than automatic generation rate adjustment—such as one that simultaneously seeks to recover carrying costs—is not a perfunctory adjustment for which notice and hearing may be dispensed with. It is of no consequence that the Energy Regulatory Commission would subsequently deny the recovery of carrying costs. What controls is the character of the relief sought, not the eventual regulatory action that denies the relief sought.

The Energy Regulatory Commission similarly acts with grave abuse of discretion when it allows a distribution utility to collect unprecedentedly prohibitive rates without exercising the vast competencies bestowed on it to examine and investigate, spending none but a single working day to review the plea for relief, and on the basis of nothing but a solitary, unrefuted letter and presentation. Such a course of action betrays how it has fallen hook, line, and sinker for a monolithic business interest's self-indulgent representation. Given the sheer breadth of the Energy Regulatory Commission's powers, it is reasonable for this Court to consider far more prudent ways through which the Energy Regulatory Commission could have conducted itself and reviewed a distribution utility's plea for relief. In so doing, this Court does not supplant its wisdom for the technical expertise of an administrative agency, but merely appraises justice and prudence.

With these premises, I dissent.

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[1] Republic Act No. 9136 (2001), sec. 2(c).

Before this Court are petitions questioning the Energy Regulatory Commission's approval of Manila Electric Company's (MERALCO) unverified and unpublished letter request to stagger the collection of automatic rate adjustments for the recovery of power generation costs for the November 2013 supply month.

On December 5, 2013, MERALCO wrote the Energy Regulatory Commission regarding its plan to charge consumers with higher rates to recover its generation costs for the supply month of November 2013.[2]

In the letter, MERALCO stated that it earlier presented to the Energy Regulatory Commission the possible impact of the shutdown of the Shell Philippines Exploration-Malampaya natural gas facility. It estimated that this would result in a ₱7.86 per kWh generation charge to its subscribers. The shutdown will affect the Ilijan, San Lorenzo, and Santa Rita power plants, which in turn supply MERALCO an aggregate capacity of 2,700 MW. This shutdown will also coincide with the scheduled maintenance of Pagbilao 2 and Sual 1 power plants, which supply over 950 MW to MERALCO's requirements.[3]

Despite measures to mitigate the impact of these circumstances, MERALCO claimed that its November 2013 bill from its power suppliers still stood at ₱22.64 billion. Together with other bill components, such as system loss charge, value-added tax, and local franchise tax, this generation cost translates to a ₱4.15 per kWh-price increase for a 200 kWh residential consumer.[4]

MERALCO added that the *Guidelines for the Automatic Adjustment of Generation Rate and System Loss Rates by Distribution Utilities* ("AGRA Rules")[5] authorizes it to automatically reflect this ₱22.64 billion cost in the December 2013 billing to its subscribers. However, instead of applying the automatic rate adjustment, MERALCO proposed to mitigate the abrupt rate increase by (1) implementing a lower generation charge of ₱7.90 per kWh in the December 2013 billing instead of the calculated ₱9.107 per kWh and (2) deferring recovery of the remaining ₱3 billion generation charge for the February 2014 billing, albeit with carrying costs as MERALCO has to pay its power suppliers in full by December 2013.[6]

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2 *Rollo* (G.R. No. 210245, vol. I), pp. 33–35. A copy is attached as Annex A of the Petition.

3 Id. at 33.

4 Id. at 33–34. According to MERALCO, it allowed First Gas to run on liquid fuel and Ilijan to use bio-diesel. It also entered a power supply agreement with Therma Mobile.

5 The AGRA Rules were later replaced by the *Rules Governing the Automatic Cost Adjustment and True-up Mechanisms and Corresponding Confirmation Process for Distribution Utilities* adopted in ERC Resolution No. 16, Series of 2009.

6 *Rollo* (G.R. No. 210245, vol. I), p. 34.

On December 6, 2013, House Resolution No. 588 was filed, calling for an investigation of MERALCO's unprecedented power rate increase proposal.[7] The investigation was scheduled to begin on December 10, 2013.

On December 9, 2013, the Energy Regulatory Commission approved MERALCO's proposal for the staggered collection of its rate increase.[8] The Commission's letter states:

> The ERC therefore grants MERALCO the clearance it seeks to stagger implementation of its generation cost recovery by way of an exception to the AGRA Rules. Accordingly, MERALCO is authorized to implement a generation charge of P7.67/kWh in its December 2013 billing and add its calculated generation charge for February 2014 billing the generation rate of P1.00/kWh. The balance on the deferred generation amount without any carrying costs shall be included in MERALCO's generation charge for March 2014. Should MERALCO seek to recover its carrying costs on the entire deferred amount, it shall file a formal application for this.
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> The foregoing should not in any way be construed as a confirmation of MERALCO's generation costs incurred in November 2013, which shall remain subject of the confirmation and post-verification proceedings in accordance with the applicable ERC resolution on the matter.[9]

This prompted the filing of Petitions with this Court.

On December 19, 2013, a Special Civil Action for certiorari and prohibition[10] was filed by Bayan Muna Representatives Neri Colmenares and Carlos Zarate, Gabriela Women's Party Representatives Luz Ilagan and Emmi de Jesus, ACT Teachers Party-list Representative Antonio Tino, amd Kabataan Party-List Representative Terry Ridon (collective referred to as Bayan Muna et al.), incumbent members of the House of Representatives holding seats for their respective party-lists. They pray that (1) their petition be given due course; (2) a temporary restraining order and/or preliminary injunction be issued to restrain respondents from implementing the rate hike during the pendency of this case; (3) oral arguments be held so that the issues may be exhaustively threshed out; and (4) a final order be issued declaring the Energy Regulatory Commission's provisional grant of rate increase as null and void for lack of due process and declaring Sections 6 and 29 of the EPIRA as unconstitutional.[11]

A day later, a class suit[12] was filed by National Association of Electricity Consumers for Reforms (NASECORE), Federation of Village

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7 Id. at 36–37. A copy is attached as Annex B of the Petition.

8 Id. at 38–39; *rollo* (G.R. No. 210255, vol. I), pp. 94–95. A copy is attached as Annex C of the G.R. No. 210245 and Annex H of the G.R. No. 210255 Petition.

9 *Rollo* (G.R. No. 210255, vol. I), pp. 94–95.

10 *Rollo* (G.R. No. 210245, vol. I), pp. 3–32. This Petition, docketed as G.R. No. 210245, was filed pursuant to Rule 65 of the Rules of Court.

11 Id. at 25.

12 *Rollo* (G.R. No. 210255, vol. I), pp. 3–37. Docketed as G.R. No. 210255.

Associations, and Federation of Las Piñas Homeowners Association (collectively referred to as NASECORE et al.). They challenge the validity of MERALCO's automatic rate adjustments in light of consumers' right to due process. They allege that the amendment to Section 4(e), Rule III of the implementing rules and regulations of the EPIRA Law dispenses with the publication requirement and allows automatic rate adjustments by distribution utilities in recovering their generation costs.[13]

As such, NASECORE et al. pray that (1) a temporary restraining order or status quo ante order be issued ex-parte immediately to enjoin respondents from implementing Resolution No. 10-01, Resolution 10-04, both series of 2004, and the December 9, 2013 letter of the Energy Regulatory Commission to MERALCO; (2) a writ of prohibitory preliminary injunction be issued until the final disposition on the merits; (3) the writ of prohibitory preliminary injunction be declared permanent; and (4) a decision be rendered finding that the Commission acted with grave abuse of discretion. Consequently, they pray that the amendment to Section 4(e), Rule 3 of the implementing rules and regulations of the EPIRA law be declared void.[14]

They also pray for an audit and subsequent refund of all power rate adjustments and increases automatically collected or imposed by MERALCO by virtue of the assailed issuances reckoned from 2004, and that a committee headed by a Commission on Audit representative be created for this purpose. The aggregate amount of refund to be determined by the committee is to be deposited in an escrow account, later to be distributed proportionally to all class members.[15]

On December 23, 2013, this Court issued a temporary restraining order against MERALCO and the Energy Regulatory Commission, effective immediately for a period of 60 days. Respondents were required to file their comments by January 8, 2014 and the case was set for oral arguments on January 21, 2014.[16]

On January 8, 2014, MERALCO filed by registered mail a consolidated comment/opposition with counter-petition, which prayed, among others, that the Philippine Electricity Market Corporation, National Grid Corporation of the Philippines, and the generation companies it enumerated, be joined as parties-respondents in this case. This counter-petition was later docketed as G.R. No. 210502.[17]

On January 9, 2014, Private Electric Power Operators Association

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13 Id. at 23.
14 Id. at 32–33.
15 Id. at 34.
16 *Rollo* (G.R. No. 210245, vol. I), pp. 42–45.
17 *Rollo* (G.R. No. 210502).

(PEPOA) filed a Motion for Leave to Intervene and Admit Its Comment-in-Intervention.[18]

On the same day, this Court issued a Resolution,[19] noting the allegations made by the petitioners on the alleged "collusion with vested oil interests in their profiteering activities,"[20] and that "a very high ceiling price was revealed, at P62/kWh sold at the WESM, while normally the price is way below this on the average in the spot market."[21] We thus resolved to order petitioners to amend their petitions to implead as necessary parties the generation companies with power supply agreements with MERALCO per public records, as well as the Philippine Electricity Market Corporation, the governance arm of the Wholesale Electricity Spot Market.[22]

On January 10, 2014, this Court acted on MERALCO's consolidated Comment/Opposition with Counter-Petition and resolved to treat it as in the nature of a third-party complaint. We granted the prayer to include the Philippine Electricity Market Corporation, National Grid Corporation of the Philippines, and the generation companies it enumerated as parties-respondents in this case.[23]

In compliance with the above Resolutions, the petitioners filed their respective amended Petitions to implead the additional respondents.

Oral arguments were held on January 21, 2014, February 4, 2014, and February 11, 2014. The National Engineering Center, through Professor Rowaldo Del Mundo, and the University of the Philippines School of Economics, through Dr. Maria Joy V. Abrenica, were appointed as *amici curiae*.[24]

On February 18, 2014, we extended the temporary restraining order for another 60 days and granted a temporary restraining order for a similar period against the Philippine Electricity Market Corporation and the generation companies specified by MERALCO in its urgent motion and manifestation.

The Energy Regulatory Commission filed a Manifestation and Motion dated March 6, 2014,[25] submitting a copy of its Order dated March 3, 2014, the dispositive portion of which reads:

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18 Motion for Leave to Intervene and Admit Its Comment-in-Intervention.
19 *Rollo* (G.R. No. 210245, vol. I), pp. 63–67.
20 Id. at 66.
21 Id.
22 Id. at 67. *See* RULES OF COURT, Rule 3, sec. 8 and 11 on necessary parties and non-joinder of parties.
23 Id. at 67-R–67-S.
24 Id. at 682-CC.
25 Manifestation and Motion dated March 6, 2014.

> IN VIEW OF THE FOREGOING, given that prices in [Wholesale Electricity Spot Market] during the November and December 2013 supply months could not qualify as reasonable, rational and competitive due to the confluence of factors as pointed out above, and without prejudice to the results of the investigations into the possible culpability of any or all of the market participants, the Commission, in the exercise of the police power delegated to it by the State and for the general welfare of society, hereby VOIDS these Luzon [Wholesale Electricity Spot Market] prices and declares the imposition of regulated prices in lieu thereof.
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> The regulated prices shall be calculated based on the load weighted average of the ex-post nodal energy prices and meter quantity of the same day same trading interval that have not been administered covering the period December 26, 2012 to September 25, 2013, subject to the payment to the oil-based plants of additional compensation to cover their full Fuel and Variable O&M Costs, if warranted, following the manner and procedure for computing additional compensation under the Administered Price Determination Methodology.
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> [Philippine Electricity Market Corporation] is hereby directed within seven (7) days from receipt hereof to calculate these regulated prices and implement the same in the revised [Wholesale Electricity Spot Market] bills of the concerned distribution utilities in Luzon for the November and December 2013 supply months for their immediate settlement, except for MERALCO whose November 2013 [Wholesale Electricity Spot Market] bill shall be maintained, unless otherwise ordered by the Commission, in compliance to the Temporary Restraining Order issued by the Supreme Court in G.R. No. 21024[5] and G.R. No. 210255.
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> Within a period of no less than ninety (90) days from receipt of this Order, [Philippine Electricity Market Corporation] is further directed to conduct an investigation on the possible breach of Must-Offer Rule pursuant to Section 2.4 of the Protocol adopted in the Memorandum of Agreement between the Commission and [Philippine Electricity Market Corporation] dated January 31, 2008. Thereafter, the result of the investigation (Investigation Report) of the [Enforcement and Compliance Office] shall be submitted directly to the Commission containing the recommended sanctions and penalties, as the case may be.
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> SO ORDERED.[26]

On March 18, 2014, this Court resolved to require all parties to comment on the Energy Regulatory Commission's manifestation dated March 6, 2014 and order dated March 3, 2014 within 15 days from receipt of notice.[27]

For this Court's resolution are the following issues:

First, whether the remedy the petitioners availed of is proper;

Second, whether these cases and the issues they raise are justiciable;

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26 Manifestation and Motion dated March 6, 2014.

27 Order dated March 18, 2014.

Third, whether the Energy Regulatory Commission committed grave abuse of discretion in approving MERALCO's December 5, 2013 request in that:

i. it violates petitioners' rights to due process of law;

ii. it violates its mandate under the Constitution and the EPIRA Law to protect the public from anti-competitive practices and market abuse;

Fourth, whether the amendment to Section 4(e), Rule 3 of the Implementing Rules and Regulations of the EPIRA Law, which allows automatic rate adjustments to recover generation costs, violates due process and the declared policy of the EPIRA Law; corollarily, whether Resolution Nos. 10-01 and 10-04, both series of 2004, and the December 9, 2013 letter of the Energy Regulatory Commission are valid;

Fifth, whether the automatic rate adjustments to recover generation costs amount to a surrender by the Energy Regulatory Commission of its regulatory functions in violation of Section 25 of the EPIRA Law;

Sixth, whether Sections 6 and 29 of the EPIRA Law are unconstitutional in declaring that (a) power generation and supply are not public utilities and (b) their charges are beyond regulation by the Energy Regulatory Commission;

Seventh, whether the temporary restraining order should be lifted; and

Finally, whether the petitioners are entitled to the reliefs sought.

The first two issues involve remedy, jurisdiction, and justiciability. The parties argued as follows:

Petitioners Bayan Muna, et al. argue that this Court has expanded judicial power to annul the challenged act of the Energy Regulatory Commission done with grave abuse of discretion.[28]

They justify their direct resort to this Court as the Energy Regulatory Commission's regulatory authority is national in scale, MERALCO's franchise affects over five million consumers, and the amount passed on to these consumers over four months is at least ₱25.64 billion.[29]

As regards non-exhaustion of administrative remedies, petitioners

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28 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14644. Bayan Muna Memorandum.
29 Id. at 14644–14645.

contend that this issue was rendered moot when the Energy Regulatory Commission submitted to this Court's jurisdiction during oral arguments.[30]

Moreover, they argue that exceptions to this rule are present, namely: the Energy Regulatory Commission's provisional approval of MERALCO's request was patently illegal; judicial intervention was urgent as MERALCO has started billing the rate hike; constitutionality questions were raised; Section 78 of the EPIRA gives this Court the power to enjoin the implementation of EPIRA provisions; and the rate hike constitutes grave and irreparable injury to the public.[31] An appeal under Rule 43 was not available to petitioners, who were denied the opportunity to participate in the proceedings when the Energy Regulatory Commission acted on MERALCO's request letter within one working day.[32]

Petitioners Bayan Muna, et al. also raise their compliance with the requisites for judicial review.

First, the power rate hike to be included in the December 2013 to March 2014 MERALCO billings is an actual case or controversy.[33] The constitutionality of Sections 6 and 9 of the EPIRA was also questioned as these sections have emboldened the generation and supply sectors to manipulate the market to jack up power rates.[34]

Second, petitioners have legal standing as individual legislators, citizens, and persons with direct interest.[35] They have personal and substantial interest in ensuring that MERALCO is complying with its duty to supply electricity in the least cost manner.[36] Petitioners submit that an individual legislator is not confined within the halls of Congress, and no law or rule removes their rights and duties as a citizen to seek judicial recourse.[37]

Third, petitioners raised the issues at the earliest opportunity. The assailed act of the Commission was by mere letter, and there was no "proceeding below."[38] Petitioners contend they had no opportunity to challenge Sections 6 and 29 of the EPIRA Law until they learned of the simultaneous shutdowns and anomalous "gaming." These circumstances warrant the relaxation of the rule.[39]

Fourth, the constitutionality questions are the *lis mota* of the case as

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30 Id. at 14645.
31 Id.
32 Id. at 14646.
33 Id. at 14647.
34 Id. at 14648.
35 Id. at 14649.
36 Id. at 14650.
37 Id. at 14651.
38 Id.
39 Id. at 14652.

the rate hike is inextricably linked with how the law treats some of its industry players.[40] Petitioners also raise transcendental public interest.[41]

Petitioners NASECORE, et al. in G.R. No. 210255 invoke Article VIII, Section 5(1) of the Constitution as basis for this Court to assume jurisdiction. They raise transcendental importance as basis for their direct resort with this court.[42]

They filed their petition under Rule 65 as they are "questioning an act or omission resulting [in] regulatory failure made by the public respondents in the exercise of their quasi-judicial function as the statute-mandated protectors of the welfare of electricity consumers or subscribers."[43]

They add that they have exhausted administrative remedies when they wrote the Energy Regulatory Commission a letter dated December 5, 2013, urging the it "to immediately direct MERALCO not to implement its reported rate increase as this will be contrary to law." However, the Energy Regulatory Commission has not acted on this letter to date.[44]

On the other hand, private respondent MERALCO argues that the petitions should be dismissed for failure to exhaust administrative remedies and for violation of the doctrine of primary jurisdiction. It claims that the Energy Regulatory Commission has the power to grant petitioners' prayers for injunction and refund of excessive collections based on the EPIRA.[45] The petitions also raised factual issues, such as an alleged collusion to cause price increase.[46] These issues are not proper subject of a petition under Rule 65 and should be remanded to the Energy Regulatory Commission.[47]

Meanwhile, public respondents Energy Regulatory Commission and Department of Energy argue that the remedy of certiorari is improper. As such, the petitions should be dismissed outright as all elements of a valid petition for certiorari are lacking.[48]

First, there was no act by any of the public respondents considered as done in exercise of their quasi-judicial functions.[49] The Energy Regulatory Commission used its executive power to implement the AGRA rules when it acted on MERALCO's December 5, 2013 Letter.[50]

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40 Id. at 14652.
41 Id. at 14656.
42 *Rollo* (G.R. No. 210255, vol. XXVIII), p. 24215, NASECORE Memorandum.
43 Id.
44 Id. at 24216.
45 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14980, MERALCO Memorandum.
46 Id. at 14995.
47 Id. at 14996–14998.
48 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22362, Energy Regulatory Commission and Department of Energy Memorandum.
49 Id. at 22360.
50 Id. at 22361.

Second, there was no grave abuse of discretion by the Energy Regulatory Commission when it allowed MERALCO's request for staggered collection of the November 2013 generation costs.[51]

Third, petitioners should not have filed directly with this Court as they had a plain, speedy, and adequate remedy with the Energy Regulatory Commission pursuant to Section 4, Rule 5 of the Commission's Rules of Practice and Procedure.[52]

Public respondents add that the petitions are premature for failure to exhaust administrative remedies. They claim that the Energy Regulatory Commission has original and exclusive jurisdiction over all cases contesting rates pursuant to Section 43(u) of the EPIRA Law.[53]

They likewise argued that there was also a violation of the doctrine of primary jurisdiction. The Energy Regulatory Commission has the special competence on the technical factual matters involved in the issue of automatically adjusted generation costs.[54] There are exceptions to this doctrine but none are present in this case.

Meanwhile, market operator Philippine Electricity Market Corporation argues that the petitions should be dismissed for failure to exhaust administrative remedies, violation of the doctrine of primary jurisdiction, and failure to meet the requisites for judicial review.[55]

Philippine Electricity Market Corporation contends that it is the Energy Regulatory Commission that has original and exclusive jurisdiction over all cases contesting rates under Section 43(u) of the EPIRA. The Energy Regulatory Commission can also penalize anticompetitive practices and market power abuse under Section 43(k) of the EPIRA.[56]

Philippine Electricity Market Corporation emphasizes that this Court is not a trier of facts. It cannot entertain factual issues, such as the alleged collusion, price manipulation, and cross-ownership.[57] On the requisites for judicial review, the constitutionality question is not the *lis mota* of the case.[58]

The generation companies with bilateral agreements with MERALCO similarly argue that certiorari is the wrong remedy as certiorari only applies

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51 Id.
52 Id.
53 Id. at 22362.
54 Id. at 22365.
55 *Rollo* (G.R. No. 210255, vol. IV), p. 2302, PEMC Consolidated Comment.
56 Id. at 2303–2304.
57 Id. at 2307.
58 Id. at 2308.

to judicial and quasi-judicial acts. They claim that the December 9, 2013 letter was not a quasi-judicial act of the Energy Regulatory Commission.[59]

They add that petitioners have another plain, speedy, and adequate remedy in law. However, they failed to exhaust the available administrative remedies with the Energy Regulatory Commission[60] and their Petitions were filed in violation of the latter's exclusive and original,[61] as well as primary jurisdiction.[62]

They similarly argue that the Petitions raised factual questions, such as price manipulation in the Wholesale Electricity Spot Market, or collusion among power industry players.[63] These allegations are already subject of the Energy Regulatory Commission's ongoing investigation on any possible abuse of market power by the trading participants of Wholesale Electricity Spot Market.[64]

The generation companies also raise absence of all requisites for judicial review. First, the attack on Section 29 of the EPIRA is purely speculative as the supply sector was not even impleaded.[65] As regards Section 6 of the EPIRA, petitioners' claim that generation companies are not subject to regulation is baseless as they have not shown that the two conditions for deregulation have been fulfilled.[66]

Second, petitioners do not have legal standing to question Sections 6 and 29 of the EPIRA as these provisions apply to the contestable market, not the captive market, where petitioners belong.[67]

Third, the constitutional challenge is not the *list mota* of this case as the validity of the approval of Energy Regulatory Commission of MERALCO's request may be resolved without ruling on these constitutionality questions.[68]

They assert that the questions on the validity of certain provisions of

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59 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15480–15482, TMO and TLI Memorandum.

60 Id. at 16053, FGP Memorandum.

61 Id. at 16054, FGP Memorandum; id. at 15862–15867, QPPL Memorandum,

62 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15485–15486 and 15489–15490, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), pp. 15707 and 15709, SMEC Memorandum; at 15972 and 15974, Sem-Calaca Memorandum; at 15788–15790, Masinloc Memorandum; at 16057. FGP Memorandum.

63 *Rollo* (G.R. No. 210245, vol. XXV), pp. 15713–15714, SMEC Memorandum; at 16058, FGP Memorandum; at 15860–15862. QPPL Memorandum.

64 Id. at 15978–15980, Masinloc Memorandum.

65 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15501, TMO and TLI Memorandum.

66 *Rollo* (G.R. No. 210245, vol. XXV), pp. 15719–15720, SMEC Memorandum.

67 Id. at 15715–15716, SMEC Memorandum.

68 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15501–15502, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), pp. 15722–15723, SMEC Memorandum; at 16060, FGP Memorandum; at 15868–15871, QPPL Memorandum.

the EPIRA and its implementing rules and regulations were not raised at the earliest possible opportunity. The EPIRA has already been in effect for 13 years, while the amendment to Section 4(e), Rule III of its implementing rules and regulations has already been in effect for seven years.[69]

The generation companies also contend that the issues raised in the petitions are not justiciable.[70] The constitutionality of Sections 6 and 29 of the EPIRA declaring the generation and supply sectors as not public utilities is a political question.[71] The issue on the Energy Regulatory Commission's December 9, 2013 Letter was rendered moot by its December 20, 2013 Letter, directing MERALCO to defer the imposition of further adjustments.[72]

The generation companies that traded in the Wholesale Electricity Spot Market but have no bilateral contracts with MERALCO have the same position.

They emphasize that this Court is not a trier of facts,[73] and that certiorari and prohibition are not the proper remedies in this case.[74] They add that this Court cannot resolve factual controversies with respect to the issues on collusion and the existence of a monopoly or oligopoly.[75]

SN Aboitiz Power argues that even if this Court has jurisdiction, monopolies and oligopolies *per se* are not unconstitutional.[76] The regulation of industries that behave as monopolies and oligopolies is beyond this Court's jurisdiction, but rather, are part of legislative prerogatives.[77]

Northern Renewables and 1590 Energy Corporation point out that the petitioners have remedies with respect to the December 9, 2013 Letter and their choice not to avail of these remedies within the Energy Regulatory Commission cannot be equated to a denial of due process.[78]

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69 *Rollo* (G.R. No. 210245, vol. XXV), p. 16060, FGP Memorandum.

70 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15498, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), pp. 15714-15715, SMEC Memorandum; at 16059, FGP Memorandum; at 15829, QPPL Memorandum.

71 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15500, TMO and TLI Memorandum.

72 Id. at 15502.

73 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14731, SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), p. 15315, AP Renewables Memorandum; at 15423, Panasia Memorandum; *Rollo* (G.R. No. 210255, vol. XXVIII), p. 24023, 1590 Memorandum.

74 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14848–14853, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15323–15328. AP Renewables Memorandum; at 15413–15419. Panasia Memorandum; at 15643–15651, Northern Renewables Memorandum; at 15618–15619, GNPower Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 23999–24006, 1590 Memorandum.

75 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14733, SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15424, 15436, Panasia Memorandum.

76 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14733–14734, SNAP Memorandum.

77 Id. at 14735.

78 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15657, Northern Renewables Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24011–24012, 1590 Memorandum.

These generation companies also focus on the doctrine of primary jurisdiction.[79] It is the Energy Regulatory Commission that has the special knowledge, experience, and services to resolve the factual controversies.[80] They argue that the Energy Regulatory Commission is already exercising its jurisdiction in relation to the Malampaya shutdown and the price hike and conducting its investigation.[81] They raise exhaustion of administrative remedies before the courts can intervene.[82]

The third issue pertains to an alleged grave abuse of discretion by the Energy Regulatory Commission in issuing its December 9, 2013 Letter.

Petitioners Bayan Muna, et al. question the act of the Energy Regulatory Commission in approving the request within one working day even with the unprecedented rate increase of ₱4.14 per kWh.[83] Congress has even filed a bill to investigate the matter.[84] MERALCO's letter did not also include any document to support its claim.[85] They also submit that the Energy Regulatory Commission should have treated MERALCO's letter as a waiver of the automatic pass-on of charges under the amended Section 4(e), Rule III of the implementing rules and regulations of the EPIRA Law, assuming the amendment is valid.[86]

Petitioners NASECORE, et al. focus on an alleged violation of the consumers' constitutional right to due process. They submit that the Energy Regulatory Commission acted with grave abuse of discretion in allowing MERALCO to automatically collect its November 2013 supply generation costs from its consumers without prior publication.

Respondent MERALCO counters this, arguing the Commission did not violate petitioners' right to due process when it issued its December 9, 2013 Letter as it acted in accordance with the existing rules.[87] MERALCO asserts it did not intend to "waive" its "right" to automatically pass the generation costs in its December 5, 2013 Letter, but only sought guidance

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79 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14738, SNAP Memorandum; *at* 14853, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15316–15320, AP Renewables Memorandum; at 15419–15421, Panasia Memorandum; at 15619–15620, GNPower Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24111–24113, PSALM Memorandum.

80 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14738, SNAP Memorandum; at 14853–14854, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15316–15320, AP Renewables Memorandum; *at* 15421, Panasia Memorandum; at 15649, Northern Renewables Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24004, 1590 Memorandum.

81 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14739, SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15322–15323, AP Renewables Memorandum; at 15414–15418, Panasia Memorandum.

82 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14762, SNAP Memorandum; at 14352–14353, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), p. 15322, AP Renewables Memorandum; at 15654, Northern Renewables Memorandum; *at* 15619–15620, GNPower Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24010–24012, 1590 Memorandum; at 24113–24114, PSALM Memorandum.

83 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14658–14659, Bayan Muna Memorandum.

84 Id.

85 Id. at 14658.

86 Id. at 14660.

87 *Rollo* (G.R. No. 210245, vol. XXIII), p. 15034, MERALCO Memorandum.

from the Energy Regulatory Commission on a staggered collection.[88] MERALCO submits that the inclusion of carrying costs did not except its request from the rules on automatic adjustments.[89] In any case, the Commission's approval of a staggered collection benefits the consumers in cushioning the rate increase. There were no indications of collusion in the market when MERALCO made its request.[90]

Meanwhile, public respondents Energy Regulatory Commission and Department of Energy argue that the former complied with its mandate to ensure distribution utilities supply electricity in the least cost manner. The Commission claims it prescribes a rate application process for each type of generation source, and these processes involve compliance with the notice and hearing requirements under Section 4(e), Rule III of the implementing rules and regulations of EPIRA.[91]

Public respondents add that the Energy Regulatory Commission's December 20, 2013 Order has modified the December 9, 2013 Letter by directing "MERALCO to maintain its generation rate at ₱7.37 per kWh for the affected billing periods until further notice and approval of its application for the recovery scheme."[92]

The Energy Regulatory Commission contends that there was no grave abuse of discretion on its part, much less a relinquishment of regulatory power.[93] It explains that it strictly complied with the notice, hearing, and publication requirements in its review and evaluation of power supply agreements submitted for its approval.[94] It was allegedly guided by the principle on "full recovery of prudent and reasonable economic costs" in rendering its Order.[95]

Therma Mobile, Inc. and Therma Luzon, Inc. are generation companies with existing power supply agreements with MERALCO. They argue that the December 9, 2013 Letter of the Energy Regulatory Commission was not issued with grave abuse of discretion. Instead, the letter complied with the required approval by a sufficient number of the Commission's members.[96] The act of the Energy Regulatory Commission was also based on valid rules, such as the AGRA Rules and Section 4(e), Rule III, of the implementing rules and regulations of EPIRA.[97] They add that it is not grave abuse of discretion that the economists and engineers

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88 Id. at 15037.
89 Id. at 15041.
90 Id. at s15044.
91 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22384, Energy Regulatory Commission and Department of Energy Memorandum.
92 Id. at 22385.
93 Id. at 22413–22414.
94 Id. at 22415.
95 Id.
96 Id. at 15505–15506, TMO and TLI Memorandum.
97 Id. at 15507.

were not consulted as the appointment of the Energy Regulatory Commission's members is enough assurance that they are competent in the field.[98]

The fourth issue refers to the amendment of Section 4(e), Rule III of the implementing rules and regulations of EPIRA and its effect on the right to due process.

Petitioners Bayan Muna et al. submit that the amendment violates the due process clause. They claim that publication affords both sides an opportunity to explain, and this is the essence of due process.[99] Moreover, rules and regulations must be germane to the purpose of the law they implement, and it is a state policy under Section 2(c) of EPIRA to ensure transparency and reasonability of electricity prices.[100]

Petitioners NASECORE et al. submit that despite the amendment, publication of applications for rate adjustments is indispensable. The constitutional right to due process is deemed written into every statute, contract, regulation, or undertaking.[101] They also argue that the amendment violates the declared policy behind 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 efficient and enhance competitiveness of Philippine products in the global market."[102] They add that the implementing rules and regulations cannot amend or substitute the law itself. Thus, all subsequent issuances of the Energy Regulatory Commission pursuant to the amendment are similarly void.[103]

Petitioners NASECORE et al. add that Section 5 of Republic Act No. 9209, MERALCO's mega franchise, provides that the "rates charged by the grantee to the end-users shall be made public and transparent." Section 4 of the law also provides that MERALCO "shall supply electricity to its captive market in the least cost manner" and "shall not engage in any activity that will constitute an abuse of market power such as but not limited to, unfair trade practices, monopolistic schemes and any other activities that will hinder competitiveness or business and industries."[104]

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98 Id.

99 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14663, Bayan Muna Memorandum.

100 Id.

101 *Rollo* (G.R. No. 210255, vol. I), p. 26, NASECORE Petition; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24219, NASECORE Memorandum.

102 *Rollo* (G.R. No. 210255, vol. I), p. 22, NASECORE Petition, *citing* Section 2(c) of the EPIRA Law; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24220, NASECORE Memorandum.

103 *Rollo* (G.R. No. 210255, vol. I), p. 24. NASECORE Petition; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24221, NASECORE Memorandum.

104 *Rollo* (G.R. No. 210255, vol. I), pp. 24–25, NASECORE Petition; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24221–24223, NASECORE Memorandum.

Lastly, they also contend that MERALCO voluntarily waived the automatic nature of generation rate increases when it requested Energy Regulatory Commission's permission for a staggered increase.[105] The least the Energy Regulatory Commission could do was to direct MERALCO to publish its intended rate increase and set the matter for hearing.[106] MERALCO's letter also includes a request for carrying costs, making publication and hearing required.[107]

They explain that post-verification of rate adjustments cannot substitute the due process requirements of publication and hearing. According to petitioners, post-verification is discretionary as the Energy Regulatory Commission can opt not to conduct it.[108] Moreover, due process as a safeguard should be preventive rather than remedial after the harm has been done.[109]

On the other hand, respondent MERALCO submits that the Department of Energy and the Energy Regulatory Commission complied with due process requirements when they promulgated the rules in the exercise of their quasi-legislative functions.[110] It argues that petitioners NASECORE et al.'s reliance on the 2006 *NASECORE v. Energy Regulatory Commission*[111] case is misplaced as Rule III, Section 4(e) of the Implementing Rules and Regulations of EPIRA had not yet been amended at that time.[112] This provision was amended so that electricity demands are addressed real time.[113]

Public respondents Energy Regulatory Commission and Department of Energy argue that the automatic adjustment of generation rates has legal basis and is consistent with Section 25 of the EPIRA.[114] They explain that MERALCO's December 5, 2013 Letter was not an application for rate adjustment. It merely sought clearance to implement a staggered collection of the November 2013 generation cost derived using the AGRA mechanism.[115] Thus, the December 9, 2013 Letter of the Energy Regulatory Commission did not fix a rate nor approve an adjusted generation cost. The AGRA Rules explicitly provides for automatic adjustment of generation costs, without need of prior verification and confirmation by the Commission.[116] Rule III, Section 4(e) of the Implementing Rules and

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105 *Rollo* (G.R. No. 210255, vol. XXVIII), p. 24236, NASECORE Memorandum.
106 Id.
107 Id. at 24241.
108 Id. at 24238.
109 Id.
110 *Rollo* (G.R. No. 210245, vol. XXIII), p. 15026, MERALCO Memorandum.
111 517 Phil. 23–67 (2006) [Per J. Callejo, Sr., En Banc].
112 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 15029–15030, MERALCO Memorandum.
113 Id. at 15031.
114 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22375, Energy Regulatory Commission and Department of Energy Memorandum.
115 Id. at 22375.
116 *See* Section 2, Article III of the *Guidelines for the Automatic Adjustment of Generation Rates and System Loss Rates by Distribution Utilities* or the AGRA Rules. The AGRA Rules were later replaced by the *Rules Governing the Automatic Cost Adjustment and True-up Mechanisms and Corresponding*

Regulations of EPIRA on publication and hearing requirements does not apply.[117]

Public respondent Energy Regulatory Commission adds that it did not interpret MERALCO's invocation of the AGRA rules' exception clause[118] as a waiver of MERALCO's right to apply the automatic pass-through of costs. MERALCO's request was to stagger the collection of November 2013 generation costs and not to be prohibited from automatically passing it on to the end-users.[119]

It explains that the AGRA mechanism allows distribution utilities, such as MERALCO, to recover their actual allowable purchased power costs. The Energy Regulatory Commission did not create this to favor some market participant and prejudice end-users.[120] Its precursor, the Purchased Power Adjustment, has long been recognized as valid in this jurisdiction.[121] The AGRA Rules also includes monthly reportorial requirements so the Commission can monitor strict compliance with the rules and ensure that automatic adjustments are made for cost recovery only.[122] Passed-on charges are also subject to a post-verification and confirmation process.[123]

Public respondents emphasize that there was no pronouncement in the 2006 *NASECORE v. Energy Regulatory Commission* case that lack of publication is invalid *per se* or violative of the due process clause.[124] The Energy Regulatory Commission took its cue from the resolution of that case and amended Rule III, Section 4(e) of the Implementing Rules and Regulations of EPIRA to address the need for an effective and flexible rate adjustment mechanism.[125] This amendment, which excludes the AGRA mechanism from publication and comment requirements, underwent public consultation, deliberations, and approval by the Joint Congressional Power Commission.[126]

In view of this amendment, there is no more impediment to the automatic monthly adjustment of generation rates by distribution utilities. This allows distribution utilities to timely pay their suppliers and avoid

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Confirmation Process for Distribution Utilities adopted in Resolution No. 16, Series of 2009, of the Energy Regulatory Commission.

117 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22377, Energy Regulatory Commission and Department of Energy Memorandum.

118 Section 1, Article VIII of the AGRA Rules provides that the "ERC may allow an exception from any provisions of these Guidelines, if such exception is found to be in the public interest and is not contrary to law or any other related rules and regulations."

119 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22378, Energy Regulatory Commission and Department of Energy Memorandum.

120 Id. at 22381.

121 Id. at 22380–22381.

122 Id. at 22382.

123 Id.

124 Id. at 22401.

125 Id. at 22402.

126 Id. at 22403–22405

carrying costs ultimately passed on to the consumers.[127] It also avoids the logistical constraints of holding a hearing for every application for cost recovery.[128] This amendment is in line with the EPIRA's policy for "affordability of supply" and "greater operational and economic efficiency."[129]

In any case, the distribution utilities' determination of the pass-through charges is still subject to reportorial requirements and post-verification process by the Commission.[130] In fact, the application for approval of power supply agreement between distribution utilities and generation companies, which provides for the computation of generation cost payable, was also subjected to publication and notice requirements under Rule III, Section 4(e) of the implementing rules and regulations of EPIRA.[131]

Market operator Philippine Electricity Market Corporation agrees that the Department of Energy has the power to amend the implementing rules and regulations pursuant to Sections 37 and 77 of the EPIRA. It also argues that the Energy Regulatory Commission followed the teachings in the 2006 *NASECORE* case when it drafted the 2009 AGRA rules.[132]

The generation companies with existing power supply agreements with MERALCO also contend that the relevant rules allowing automatic generation rate adjustment do not violate due process.[133] The requirement for publication and notice is only in the implementing rules and regulations of EPIRA, not the law itself.[134] Rule III, Section 4(e) of the implementing rules and regulations of EPIRA has been amended and now specifically excludes automatic generation rate adjustments from publication requirements.[135] Therma Mobile, Inc. and Therma Luzon, Inc. add that petitioners' collateral attack of these provisions should not be allowed.[136]

The generation companies that have no bilateral contract with MERALCO but traded in the Wholesale Electricity Spot Market argue that the amendment, the AGRA Rules, and the Resolution Nos. 10-01 and 10-04, series of 2004 of the Energy Regulatory Commission were validly enacted under its mandate in the EPIRA.[137] Some even argue that the AGRA Rules

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127 Id. at 22407.
128 Id. at 22408.
129 Id. at 22409.
130 Id. at 22406.
131 Id. at 22412–22413.
132 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15246, PEMC Memorandum.
133 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15531, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), p. 15725. SMEC Memorandum; at 15927, Masinloc Memorandum; at 15783, Sem-Calaca Memorandum.
134 *Rollo* (G.R. No. 210245, vol. XXV), p. 15920, Masinloc Memorandum.
135 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15536–15537, TMO and TLI Memorandum.
136 Id. at 15508, TMO and TLI Memorandum.
137 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14858–14859, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), p. 15361-15363, AP Renewables Memorandum; at 15654, 15660–15661,

are beneficial to consumers because the delay in approving generating costs makes it subject to carrying costs that will eventually be shouldered by the consumers.[138]

These generation companies believe that the invalidity of the Energy Regulatory Commission's issuances should only affect the distribution utilities and not the generation companies.[139] Some believe that MERALCO and the Energy Regulatory Commission followed the rules and therefore did not violate the due process rights of petitioners when the Commission issued its December 9, 2013 Letter.[140] They also believe that the approval of MERALCO's request does not preclude the Commission from regulating anticompetitive practices and abuse of market power.[141]

Intervenor PEPOA argues that the amendment of Section 4(e) Rule III of the implementing rules and regulations of EPIRA was a valid expression of legislative intent.[142] It adds that petitioners' argument of due process violation is misleading. It explains that power supply agreements undergo a full-blown notice and hearing process when they are submitted for approval.[143] Any uncontracted energy may be bought from the market, priced through a methodology formulated by the Department of Energy, and approved by the Energy Regulatory Commission in accordance with Section 30 of the EPIRA.[144] Automatic adjustments are also subject to a periodic verification and confirmation process by the Commission. It adds that the Energy Regulatory Commission issued Resolution No. 16, series of 2009, known as the *Rules Governing the Automatic Cost Adjustment and True-Up Mechanism and Corresponding Confirmation Process for Distribution Utilities*. These rules grant end-users a refund for over-recovery, and distribution utilities a collection of under-recovery.[145]

The fifth issue is on the alleged surrender of regulatory powers by the Energy Regulatory Commission.

Petitioners Bayan Muna, et al. contend that the Energy Regulatory Commission abandoned its duty under the EPIRA to protect electricity consumers and penalize market power abuse and anticompetitive practices.[146] Petitioners submit that "anticompetitive behavior" as used in the EPIRA includes "monopolies," "combinations in restraint of trade," and

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Northern Renewables Memorandum; at 15627, GNPower Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24008–24009, 24012–24014, 1590 Memorandum.

138 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15628, GNPower Memorandum.

139 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14770, SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), p. 15398, Renewables Memorandum.

140 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15352–15356, AP Renewables Memorandum; at 15438. Panasia Memorandum; at 15647, Northern Renewables Memorandum.

141 Id. at 15356–15358, AP Renewables Memorandum.

142 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14799, PEPOA Memorandum.

143 Id. at 14799.

144 Id.

145 Id. at 14803–14804.

146 Id. at 14666, Bayan Muna Memorandum.

"unfair competition" found in the Constitution and penal code.[147] The Energy Regulatory Commission's Competition Rules and Complaint Procedures also mention tacit agreements and collusion.[148]

They add that the Energy Regulatory Commission violated its mandate under the EPIRA to protect the public from market power abuse and anti-competitive practices when it approved MERALCO's request despite clear indications of irregularities, such as the simultaneous shutdowns, unprecedented rate hike, and the Department of Energy's decision to investigate for suspected collusion and price manipulation.[149]

Petitioners NASECORE, et al. contend that the automatic rate adjustment amounts to a surrender by the Energy Regulatory Commission of its regulatory functions under Section 25 of the EPIRA law.[150] They argue it also amounts to a violation of the rule that delegated authority cannot be further delegated.[151]

MERALCO disagrees. It alleges that the AGRA Rules provides for post-verification of rate increases, and there are remedies under the EPIRA in case of price manipulation and market abuses.[152]

Meanwhile, public respondents Energy Regulatory Commission and Department of Energy stand by the position that the December 9, 2013 Letter did not render nugatory the Commission's investigation of any alleged collusion or anticompetitive conduct by market participants.[153] Section 45 of the EPIRA grants the Commission authority to penalize any market power abuse, and other corrective actions.[154] The Energy Regulatory Commission did not surrender its investigative power, and allegations of regulatory failure are misplaced.[155]

The Energy Regulatory Commission adds that it conducted spot inspections of the power plants shortly after it learned of the outages during the Malampaya shutdown. It also conducted ocular technical inspections of seven power plants on December 12, 17, and 18 to verify the forced and

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147 Id. at 14671.

148 Id. at 14672.

149 Id. at 14673.

150 SECTION 25. *Retail Rate.* – The retail rates charged by distribution utilities for the supply of electricity in their captive market shall be subject to regulation by the ERC based on the principle of full recovery of prudent and reasonable economic costs incurred, or such other principles that will promote efficiency as may be determined by the ERC.
Every distribution utility shall identity and segregate in its bills to end-users the components of the retail rate, as defined in this Act.

151 *Rollo* (G.R. No. 210255, vol. I), pp. 27–28, NASECORE Petition; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24225, NASECORE Memorandum.

152 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 15046–15047, MERALCO Memorandum.

153 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22385, Energy Regulatory Commission and Department of Energy Memorandum.

154 Id. at 22387.

155 Id. at 22389.

scheduled outages.[156] Consequently, it issued show cause orders to seven power plants for failure to comply with Item 12 of their Certificates of Compliance on written disclosures to the Commission within three days on any event, resulting in a material change affecting the company.[157]

Meanwhile, the Department of Energy conducted coordination meetings with the relevant government agencies and industry participants to ensure electricity supply during the Malampaya shutdown.[158] On December 18, 2013, it wrote five power plants that went on forced outage during the Malampaya shutdown to submit incident reports. These plants were reminded on their responsibility to immediately inform the Department of any unexpected shutdown and their estimated resumption of operation.[159] They add that in case there is breach of EPIRA provisions, the Energy Regulatory Commission will consider, among others, the state policy for quality, reliability, security, and affordability of power supply in its re-computation of the generation rate.[160]

The generation companies with existing power supply agreements with MERALCO argue that their supply agreements, which provide the formula for generation charges, are first approved by the Energy Regulatory Commission.[161] The *Rules Governing the Automatic Cost Adjustment and True-up Mechanisms and Corresponding Confirmation Process for Distribution Utilities* also provides for a verification process to avoid any over or under recovery of charges.[162] Provisional approval of pass-through generation charges also complies with substantive due process as it is fair, reasonable, and just given the volatility of generation costs.[163] Thus, the system of automatic rate adjustments to recover generation costs is not a surrender by the Energy Regulatory Commission of its regulatory functions.[164]

Meanwhile, Intervenor PEPOA argues that the December 9, 2013 Letter of the Energy Regulatory Commission qualified its allowance of MERALCO's request by stating that MERALCO's November 2013 generation costs remain subject to confirmation and post-verification proceedings. Thus, there was no regulatory failure or grave abuse of discretion on the part of the Energy Regulatory Commission.[165]

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156 Id. at 22386.
157 Id.
158 Id.
159 Id. at 22387.
160 Id. at 22388.
161 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15535, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), p. 15725, SMEC Memorandum.
162 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15531, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), pp. 15726–15727, SMEC Memorandum; at 15927–15928, Masinloc Memorandum; at 15783, Sem-Calaca Memorandum.
163 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15532, TMO and TLI Memorandum.
164 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15541, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), p. 15936, Masinloc Memorandum; at 15784. Sem-Calaca Memorandum.
165 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14805–14806, PEPOA Memorandum.

The Association also contends that the Energy Regulatory Commission is currently investigating any collusion or price manipulation in the market. The Petitions with this Court are thus prematurely filed pending the outcome of the Energy Regulatory Commission's fact-finding investigation.[166]

The sixth issue is on the constitutionality of Sections 6 and 29 of the EPIRA on public utilities.

Petitioners Bayan Muna, et al. argue that the deregulation of the generation and supply sectors prevents the State from intervening when the common good requires, such as when intervention is pursuant to Article XII, Section 6 of the Constitution.[167] The State has no authority over these sectors in relation to the affordability and reasonability of electricity prices.[168] Moreover, deregulation renders the State helpless with respect to generation charges by the oligopolistic generation sector.[169]

They also submit that it is a false notion that the public is not a direct client of these sectors. Their charges are passed on to the public.[170] In any case, having a limited clientele does not exclude a business from the definition of a common carrier.[171] Petitioners also reiterate that *North Negros Sugar Co. v. Hidalgo*[172] held that the issue of whether one is a public utility is a matter of judicial determination.[173]

They add that the flawed legal structure of the power industry resulted in the high-power costs as the elements of a perfect competition are not present.[174]

MERALCO counters that the constitutionality of Sections 6 and 29 of the EPIRA is a political question beyond judicial review. It was neither raised at the earliest opportunity nor is it the *lis mota* of this case.[175] In any case, these are constitutional and consistent with the State's policy of encouraging an open and competitive electricity market.[176]

MERALCO submits that generation companies are businesses imbued

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166 Id. at 14806.
167 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14678, Bayan Muna Memorandum.
168 Id. at 14679.
169 Id. at 14680.
170 Id.
171 Id. at 14681.
172 63 Phil. 664 (1936) [Per J. Recto, En Banc].
173 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14682, Bayan Muna Memorandum.
174 Id. at 14684–14685, Bayan Muna Memorandum.
175 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14999, MERALCO Memorandum.
176 Id, at 15010–15011.

with public interest and are still subject to the Energy Regulatory Commission's regulatory powers.[177] EPIRA's determination that generation companies are not public utilities simply means that they are not subject to the constitutional restrictions on nationality and the legislative franchise requirement.[178]

Public respondents Energy Regulatory Commission and Department of Energy submit that a resolution on the constitutionality of Sections 6 and 29 is unnecessary to dispose of the merits in this case. Even if these sections are declared unconstitutional, this will not provide petitioners the primary reliefs sought.[179] In any case, the legislative determination declaring that the generation and supply sectors are not public utilities involves a policy direction. As such, it is not justiciable.[180]

According to public respondents, the claim that Sections 6 and 29 emboldened market manipulation and collusion to jack up power rates does not justify judicial review. It is not the very *lis mota* of the case.[181] Moreover, the Energy Regulatory Commission is the body mandated under the EPIRA to penalize market power abuse and anti-competitive practices.[182] The constitutionality questions should have been filed with the lower courts before judicial review was invoked.[183]

Public respondents also argue that the terms "generation company," "power generation," "supply of electricity," and "supplier" as defined in the EPIRA could not be considered public utility operations.[184] These companies do not serve an indefinite public, and they have discretion as to whom it will provide their services or products.[185] The regulation of the generation companies and suppliers does not mean they are public utilities.[186] The declaration in the EPIRA by Congress that these sectors are not public utilities is constitutionally and jurisprudentially valid.[187] There is also nothing in Section 13(b) of Commonwealth Act No. 146 as amended, which defines "public service," that explicitly declares generation companies and suppliers as public utilities.[188]

Assuming these companies are included in Section 13(b) of Commonwealth Act No. 146, Congress has impliedly repealed this provision

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177 Id. at 15016.
178 Id. at 15025.
179 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22368, Energy Regulatory Commission and Department of Energy Memorandum.
180 Id. at 22370.
181 Id. at 22373.
182 Id. at 22371.
183 Id. at 22372.
184 Id. at 22418.
185 Id. at 22419–22420.
186 Id. at 22423.
187 Id. at 22430.
188 Id. at 22432.

insofar as power generation and supply companies.[189] This policy determination made in the EPIRA is consistent with the State's goal in Article XII, Section 1 of the Constitution for a more equitable distribution of opportunities for all sectors of the economy.[190]

Market operator Philippine Electricity Market Corporation similarly argues that the generation and supply sectors are still subject to the regulatory powers of the Energy Regulatory Commission.[191] Thus, there is no basis to petitioners' theory that these sections emboldened the generation and supply sectors to manipulate the market and collude to jack up the power rates. In any case, under the doctrine of separation of powers, the remedy if there is a defect in the system is not with the judicial department.[192]

The generation companies with power supply agreements with MERALCO also stand by the constitutionality of Sections 6 and 29 of the EPIRA. The declaration by Congress in Sections 6 and 29 that the generation and supply sectors are not public utilities is a policy determination. It is outside the ambit of judicial review.[193] This legislative declaration is consistent with jurisprudence on the definition of a public utility as these sectors do not service the general public.[194] Nevertheless, the generation and supply sector are still businesses imbued with public interest and sufficient regulatory mechanisms by the Commission were included in the EPIRA.[195]

Respondents First Gas, et al. add that Section 6 of the EPIRA is constitutional as it has a valid legislative purpose, i.e., the need for a competitive and open market as realized from the experience of when the government had a monopoly of power generation through the National Power Corporation.[196]

They emphasized that contrary to the requisites of what constitutes public utilities, they do not cater to the general indefinite public but only to those who purchase power from them and that the general public has no legal right to require the services of a particular generation company.[197]

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189 Id. at 22436.
190 Id. at 22445.
191 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15250, PEMC Memorandum.
192 Id. at 15251.
193 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15544.,TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), p. 15733, SMEC Memorandum; at 15762–15764, Sem-Calaca Memorandum.
194 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15546–15548, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), pp. 15733–15735, SMEC Memorandum; at 15958–15959, Masinloc Memorandum; at 15772–15773, Sem-Calaca Memorandum.
195 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15555, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), pp. 15736–15737, SMEC Memorandum; at 15961–15962, Masinloc Memorandum; at 15766–15768, Sem-Calaca Memorandum.
196 *Rollo* (G.R. No. 210245, vol. XXV), pp. 16065–16069, FGP Memorandum.
197 Id. at 16070–16071; id. at 15846, QPPL Memorandum.

They contend that there was no bar to the legislature's competence to determine what constitutes public utilities.[198] They argue that the State has not abandoned its power to regulate generation companies as the EPIRA is replete with regulatory mechanisms even if generation companies are not considered public utilities.[199]

The generation companies with no bilateral contracts with MERALCO but traded in the Wholesale Electricity Spot Market similarly argue that Sections 6 and 29 are constitutional.[200]

First, these sections cannot be subjected to judicial review because the requisites for judicial review have not been met.[201]

Second, there is no constitutional provision that mandates the classification of generating companies as public utilities.[202] The due process clause and the economic provisions in the constitution are likewise not violated.[203] The economic provisions are not self-executing provisions and cannot be made a basis to declare a law unconstitutional.[204]

Third, the classification of generation companies as public utilities is *non sequitur* to the regulation of electricity prices.[205]

Fourth, the decision to consider generation companies as public utilities lies with the legislature.[206]

Fifth, even if the Congress decides that this is of policy concern, the classification of generation companies as public utilities is a superfluity because there are business activities with public interests but are not public utilities. This includes generation companies. Despite not being public

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198 Id. at 16071–16072, FGP Memorandum.

199 Id. at 16073–16077; id. at 15836, QPPL Memorandum.

200 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14746–14751, SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15363-15364, AP Renewables Memorandum; at 15427, Panasia Memorandum; at 15661–15662, Northern Renewables Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24095–24096, PSALM Comment.

201 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14746–14752. SNAP Memorandum; at 14853, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15364–15341, AP Renewables Memorandum; at 15652–15653, Northern Renewables Memorandum; at 15623–15624. GNPower Memorandum; *Rollo* (G.R. No. 210255, vol. XXVIII), p. 24006, 1590 Memorandum; at 24115–24118, PSALM Memorandum.

202 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15364, AP Renewables Memorandum,

203 Id. at 15375–15378.

204 Id. at 15376–15377.

205 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14748, 14750–14752, SNAP Memorandum; at 14856, Trans-Asia Memorandum; *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15330–15333, AP Renewables Memorandum.

206 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14753, SNAP Memorandum; at 14854, Trans-Asia Memorandum; *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15341–15342, AP Renewables Memorandum, 15371–15372; at 15429, Panasia Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24116–24118, PSALM Memorandum.

utilities, they are nonetheless subject to government regulation.[207]

The generation sector is also not a public utility because it does not offer their goods to the general public. Rather, they sell to the distribution utilities.[208]

Intervenor PEPOA submits that Section 29 of the EPIRA only applies to suppliers selling to the *contestable* market[209] under the regime of retail competition and open access.[210] On the other hand, MERALCO collects generation charges for its *captive* market. Petitioners do not represent the interests of the contestable market, otherwise they would have impleaded suppliers of the contestable market. Thus, petitioners do not have the legal personality to question this provision.[211]

As regards Section 6 of the EPIRA, the Association argues that power generation is no longer a natural monopoly and can be undertaken by more than one entity.[212] The energy sector was thus unbundled under the EPIRA. The generation sector was declared open and competitive to keep pace with increasing demand. A requirement to secure franchise would only create barriers to entry.[213] In any case, generation costs of distribution utilities to their captive market is still subject to the regulation of the Energy Regulatory Commission. The deregulation of the generation sector prices only applies to the contestable market. As the petitioners do not represent the interests of the contestable market, they allegedly have no legal personality to question its constitutionality.[214]

The last two issues involve the temporary restraining order issued by this Court, and whether petitioners are entitled to the reliefs prayed for.

Petitioners NASECORE, et al. submit that the illegal collection or imposition of the automatic rate adjustment by MERALCO amounts to unjust enrichment. Consequently, amounts collected pursuant to the assailed Resolutions of the Energy Regulatory Commission must be refunded,

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207 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14759, SNAP Memorandum; at 14856–14858, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15373–15374, AP Renewables Memorandum; at 15429, Panasia Memorandum; at 15664–15665, Northern Renewables Memorandum; at 15625–15626, GNPower Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24016–24017, 1590 Memorandum.

208 *Rollo* (G.R. 210245, vol. XXIV), p. 15430, Panasia Memorandum; at 15363–15372, AP Renewables Memorandum; at 15664, Northern Renewables; at 15625, GNPower Memorandum; *rollo* (G.R. No. 210245, vol. XXIII), pp. 14756–14759, SNAP Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24016, 1590 Memorandum.

209 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14786, PEPOA Memorandum; PEPOA cited Section 31 of the EPIRA in that end-users are considered part of the contestable market "when their average peak demand for power for a certain period reaches a certain level."

210 Id. at 14786.

211 Id. at 14787.

212 Id.

213 Id. at 14789.

214 Id. at 14792.

reckoned from 2004.[215] A committee headed by the Commission on Audit may be created to conduct an audit for this purpose, and the amount of refund determined by the committee may be deposited in an escrow fund.

On the doctrine of operative fact raised by some respondents, petitioners NASECORE et al. submit that this doctrine does not apply. They cite *Chavez v. Judicial Bar Council* in that this doctrine is the exception rather than the rule, being based on equitable and not on legal grounds.[216] MERALCO has a statutory obligation to verify that the components of the retail rates are the least cost components, especially costs passed-on.[217] The implementing rules and regulations of EPIRA and the AGRA Rules on automatic generation rate adjustments cannot supplant or substitute the EPIRA and MERALCO's mega franchise.[218] MERALCO failed in its duty and acted outside the bounds of fair play in imposing the rate increase to its captive market, thus, the doctrine of operative fact cannot be applied.[219] Instead, Article 22 of the Civil Code on unjust enrichment applies.[220]

On the other hand, MERALCO argues that petitioners NASECORE et al.'s prayer for refund has no basis as MERALCO collected these adjustments in accordance with valid laws and rules.[221] A refund would also be contrary to the doctrine of operative fact.[222]

On the temporary restraining order issued, MERALCO submits that petitioners failed to establish the essential requisites for its grant. Petitioners have no clear legal right to stop MERALCO's collection of the pass-through charges.[223] Any injury it might suffer is quantifiable, and if proven, is fully compensable by refund. On the other hand, it is MERALCO that will suffer irreparable damage if the temporary restraining order is not lifted.[224]

Public respondents Energy Regulatory Commission and Department of Energy contend that petitioners are not entitled to the reliefs sought as there was no grave abuse of discretion in the grant of MERALCO's request.[225] Moreover, public respondents are conducting investigations. If there is any finding of collusion by power industry players, the unjustified rate increase will not be passed on to the consumers.[226]

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215 *Rollo* (G.R. No. 210255, vol. I), p. 29, NASECORE Petition; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24226, NASECORE Memorandum.
216 *Rollo* (G.R. No. 210255, vol. XXVIII), pp. 24229–24230, NASECORE Memorandum.
217 Id. at 24232.
218 Id. at 24233.
219 Id.
220 Id.
221 *Rollo* (G.R. No. 210245, vol. XXIII), p. 15051, MERALCO Memorandum.
222 Id. at 15054–15057.
223 Id. at 15059–15060.
224 Id. at 15069–15071.
225 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22448, Energy Regulatory Commission and Department of Energy Memorandum.
226 Id. at 22448–22449.

On petitioners NASECORE, et al.'s prayer for refund of all automatically adjusted generation costs collected since 2004, public respondents argue that petitioners should have contested these rates in an original petition with the Commission pursuant to Rule 5, Section 4 of the Energy Regulatory Commission Rules of Practice and Procedure. In any case, a refund would violate the doctrine of operative fact. [227] However, as regards the temporary restraining order, public respondents submit that it is consistent with public interest that this is not lifted. [228]

Meanwhile, the generation companies with power supply agreements with MERALCO pray for the lifting of the temporary restraining order. They similarly argue that petitioners failed to establish the requisites for its issuance, such as a clear right that should be protected.[229] They submit that sustaining the injunctive relief is more damaging to the public as the interest rates will ultimately be passed-on to them.[230] Power producers pressed by financial constraints may also close, which is detrimental to national economy.[231]

Coal plant Quezon Power Phils. Ltd. Co. adds that should any provision of the EPIRA and its implementing rules and regulations be invalidated, it should not be adversely affected as it "has already provided electricity to MERALCO and incurred the costs relative thereto."[232] It asserted that MERALCO's obligation to its customers is separate and distinct from its obligation to generation companies.[233] Under the operative fact doctrine, generation companies should not be made to refund collections already been made.[234]

Lastly, the generation companies with no bilateral contracts with MERALCO but traded in the Wholesale Electricity Spot Market emphasize that NASECORE's claim for refund should not be charged against them, as pleaded by MERALCO. These generation companies believe the blame should not be shifted to them merely because they traded in the Wholesale Electricity Spot Market.[235] They did not do anything illegal when they sold electricity at the spot market, thus, they should not be held liable.[236] Uniquely, they do not have contracts with MERALCO that make them solidarily liable for any refund that MERALCO might need to make.[237]

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227 Id. at 22449–22450.
228 Id. at 22448.
229 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15561, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV), p. 15743, SMEC Memorandum; at 15981–15986, Masinloc Memorandum.
230 *Rollo* (G.R. No. 210245, vol. XXV), p. 15987, Sem-Calaca Memorandum.
231 *Rollo* (G.R. No. 210245, vol. XXIV), p. 15564, TMO and TLI Memorandum.
232 *Rollo* (G.R. No. 210245, vol. XXV), p. 15855, QPPL Memorandum.
233 Id. at 15856.
234 Id. at 15856–15860.
235 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14764; *rollo* (G.R. No. 210245, vol. XXIV), p. 15393, SNAP Memorandum.
236 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14764, SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15393–15395, AP Renewables Memorandum.
237 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14768–14769, SNAP Memorandum.

They also raise the doctrine of operative fact.[238]

Their greatest concern is the full payment for the electricity MERALCO obtained through the spot market. They argue that they complied with the rules of the Wholesale Electricity Spot Market and applicable regulations at that time. Hence, they should not be denied compensation for their services.[239] MERALCO's obligation to pay the generation companies for the electricity supply obtained from the Wholesale Electricity Spot Market should persist, despite MERALCO's inability to collect from its consumers because it is a perfected contract of sale.[240]

They add that MERALCO's argument of unjust enrichment is incorrect as it has a duty to pay.[241] Notwithstanding the temporary restraining order imposed against it, MERALCO should still pay them for the electricity supplied.[242]

Trans-Asia Power Generation Corporation emphasizes that purchasing power from the Wholesale Electricity Spot Market comes with attendant risks, and MERALCO should bear those business risks instead of passing off those risks to the generation companies who participated in the spot market.[243]

Northern Renewables and 1590 Energy Corporation argue the business judgment rule in that the State should not interfere with business judgments made by corporations. This includes decisions made by the participants in the Wholesale Electricity Spot Market.[244]

All the generation companies with no bilateral contract with MERALCO but traded in the Wholesale Electricity Spot Market pray for the lifting of the temporary restraining order as against their ability to collect payments through the Wholesale Electricity Spot Market.[245]

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238 Id. at 14771. SNAP Memorandum; *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15400–15401, AP Renewables Memorandum; at 15667, Northern Renewables Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), p. 24019, 1590 Memorandum.

239 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14767, SNAP Memorandum; Id. at 14860. Trans-Asia Memorandum; *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15395–15396, AP Renewables Memorandum; *Rollo* (G.R. No. 210255, vol. XXVIII), p. 24023, 1590 Memorandum.

240 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14859–14860, 14862, Trans-Asia Memorandum; at 14768. SNAP Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), pp. 15397–15399, AP Renewables Memorandum; at 15442, Panasia Memorandum; at 15670–15672, Northern Renewables Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24021–24023, 1590 Memorandum.

241 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14862, Trans-Asia Memorandum.

242 Id. at 14769, SNAP Memorandum.

243 Id. at 14863, Trans-Asia Memorandum.

244 *Rollo* (G.R. No. 210245, vol. XXIV), pp. 15673–15674, Northern Renewables Memorandum; *Rollo* (G.R. No. 210255, vol. XXVIII), pp. 24023–24024, 1590 Memorandum.

245 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14772, SNAP Memorandum; at 14864, Trans-Asia Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), p. 15401, AP Renewables Memorandum; at 15441, Panasia Memorandum; at 15665, 15676, Northern Renewables Memorandum; *rollo* (G.R. No. 210255, vol. XXVIII), pp. 24018–24020, 24026, 1590 Memorandum.

I

Jurisdiction of this court is different from justiciability of the issues raised.

Jurisdiction refers to the constitutional or statutory competence of a court to hear and decide specific cases. Absent this competence, any act of a court would be a legal nullity, and thus, unenforceable. The basis of the court's jurisdiction can be the subject matter,[246] the type of action,[247] the parties, or the procedure or remedy involved.[248] Jurisdiction over the responding party needs to be acquired upon service of coercive process by the court.[249]

Justiciability, on the other hand, results from the exercise of jurisdiction.

Even if a court has jurisdiction to hear and decide a case, it may decline to do so for policy reasons. These reasons may be derived from its reading of the role of courts in our constitutional order, such as the doctrine of justiciability of constitutional issues. Others may refer to judicial policy, such as deference to the initial action of administrative bodies or to the concept of alter egos of the executive. Other matters of justiciability refer to procedural devices to make the administration of justice more efficient. This includes the doctrine of hierarchy of courts when several courts have original but concurrent jurisdiction.

While jurisdiction is imperative, justiciability is not. In the same manner that judicial policy has been established, precedents that sketch the exceptions exist.

These consolidated cases were commenced through petitions for certiorari and prohibition under Rule 65. These are not Rule 43 or 45 petitions. None of the parties seek this Court's competence to set the

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246 Batas Pambansa Blg. 129 or the Judiciary Reorganization Act of 1980 specifies the subject-matter of the Court of Appeals, the Regional Trial Court, Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts. Presidential Decree No. 1083, meanwhile, defines the jurisdiction of Shari'a District and Circuit Courts. Presidential Decree No. 1606, as amended by Republic Act No. 8249, states the jurisdiction of the Sandiganbayan. Lastly, Republic Act No. 1125, as amended by Republic Act No. 9282, defines the jurisdiction for the Court of Tax Appeals.

247 An action can either be civil or criminal. Batas Pambansa Blg. 129, as amended by Republic Act No. 7691, assigns the court of origin for civil cases based on the amount of the claim involved.

248 Article VIII of the Constitution enumerates the procedure or remedies that could be availed of before this Court, which includes an appeal by certiorari under Rule 45 of the Rules of Court, review of judgments and final orders or resolution of the Commission on Elections or Commission on Audit under Rule 64, or certiorari, prohibition, and mandamus via Rule 65. This Court also has original jurisdiction over extraordinary writs such as *habeas corpus, amparo, data* or *kalikasan*.

249 Jurisdiction over the defendant in a civil case is acquired through service of summons (RULES OF COURT, Rule 14). Jurisdiction over the accused in a criminal case is either through voluntary appearance or through a legally effected arrest (RULES OF COURT, Rule 113).

amount of generating costs to be paid by the consumer for the month of November 2013. Rather, all the petitions allege that the respondents gravely abused their discretion in the manner they approved the rates, amounting to acts in excess of jurisdiction.

Article VIII, Section 5 of the Constitution provides that this Court has the power to "[e]xercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus."

The grant of original jurisdiction cannot be removed by law[250] or by any rule of procedure. Since these are Petitions for certiorari and/or prohibition, there is no doubt that this Court has jurisdiction.

Therefore, the doctrine of primary administrative jurisdiction does not apply. While it is true that Section 43(u) of Republic Act No. 9136 gives the Energy Regulatory Commission original and exclusive jurisdiction over rate contests, the question in this case is whether the Energy Regulatory Commission failed to do its job.

Section 43(u) of the EPIRA provides:

> (u) The [Energy Regulatory Commission] shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the [Energy Regulatory Commission] in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.
>
> All notices of hearings to be conducted by the [Energy Regulatory Commission] for the purpose of fixing rates or fees shall be published at least twice for two successive weeks in two (2) newspapers of nationwide circulation.[251]

This provision cannot be interpreted to exclude this Court from its constitutionally mandated original jurisdiction over petitions for certiorari. This provision applies when the party contesting the rates does so on grounds other than whether the Energy Regulatory Commission acted with grave abuse of discretion. Hence, it applies when a consumer questions errors in the computation of transmission charges,[252] distribution wheeling charges,[253] and retail rates.[254] This is implied in Section 43(f) of the EPIRA:

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250 CONST., art. VIII, sec. 2.

251 Republic Act No. 9136, (2001) sec. 43(u).

252 Republic Act No. 9136, (2001) sec. 4(aaa):
"Transmission Charge" refers to the regulated cost or charges for the use of a transmission system which may include the availment of ancillary services." *See also* sec. 19.

253 Republic Act No. 9136, (2001) sec. 4(p):
"Distribution Wheeling Charge" refers to the cost or charge regulated by the [Energy Regulatory Commission] for the use of a distribution system and/or the availment of related services." *See also*

> (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 efficiency or inefficiency of the regulated entities. (Emphasis supplied)

The remedies provided under Section 43(u) of the EPIRA apply when there are errors in computation based on the established methodologies of the Energy Regulatory Commission as stated in Section 43(f). The Energy Regulatory Commission even provides for clear rules of procedure for application of general rates under Rule 20(A) of its Rules of Practice and Procedure, which allows for contestability from the consumers.[255] Individual consumer complaints are covered by Rule 5, Section 4 and Rule 20(E) of the Energy Regulatory Commission's Rules of Practice and Procedure. However, individual consumer complaints are not the same as a complaint over adverse actions of energy sector participants and the Energy Regulatory Commission that affect the greater public. Such actions might already involve grave abuse of discretion. The remedy to determine if such grave abuse of discretion exists lies with this Court.

The doctrine of exhaustion of administrative remedies, on the other hand, goes into the justiciability of the issues. Certiorari is a discretionary writ, along with it is this Court's choice as to when it will be more prudent to accord deference to administrative agencies. This doctrine has settled exceptions, namely:

> (a) where there is estoppel on the part of the party invoking the doctrine; (b) where the challenged administrative act is patently illegal, amounting to lack of jurisdiction; (c) where there is unreasonable delay or official inaction that will irretrievably prejudice the complainant; (d) where the amount involved is relatively small so as to make the rule impractical and oppressive; (e) where the question involved is purely legal and will ultimately have to be decided by the courts of justice; *(f) where judicial intervention is urgent; (g) when its application may cause great and irreparable damage; (h) where the controverted acts violate due process;* (i) when the issue of non-exhaustion of administrative remedies has been rendered moot; *(j) when there is no other plain, speedy and adequate remedy; (k) when strong public interest is involved;* and, (l) in quo warranto proceedings.[256] (Emphasis supplied, citations omitted).

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sec. 24.

254 Republic Act No. 9136, (2001) sec. 4(aa):
"Retail Rate" refers to the total price paid by end-users consisting of the charges for generation, transmission and related ancillary services, distribution, supply and other related chargers for electric service." *See also* sec. 25.

255 Energy Regulatory Commission's Rules of Procedure, rule 6, secs. 1 to 2.

256 *Republic v. Lacap,* 546 Phil. 87, 97–98 (2007) [Per J. Austria-Martinez, Third Division]. One of the earlier cases that compiled the list of exceptions to the doctrine of exhaustion of administrative remedies is *Sunville Timber Products v. Abad* (283 Phil. 400 (1992) [Per J. Cruz, First Division]). Included in the exceptions enumerated in *Sunville* is when the subject of the controversy is private land. *Lacap* included more grounds when it considered grounds (c), (h), and (i).

The doctrine of exhaustion of administrative remedies does not apply as this case falls under exceptions in (f), (g), (h), (j), and (k).

First, judicial intervention is urgent because petitioners sought a temporary restraining order.[257] It is prohibited to enjoin the implementation of the EPIRA except by order of this Court, either by injunction or a restraining order.[258] Under the law, petitioners can only seek injunctive relief from this Court, hence, judicial intervention is necessary and indispensable.

In *Aquino v. Luntok,*[259] this Court ruled that the doctrine on exhaustion of administrative remedies does not apply because a temporary restraining order and an injunction were involved. This Court ruled that "[w]hatever circumstances warranted the grant of injunction in the court below would be no different than the circumstances [that] created the urgency, and there can ordinarily be no better judge to determine the existence thereof than the . . . court itself."[260]

Second, applying the doctrine on exhaustion of administrative remedies may cause great and irreparable damage to the captive customers of MERALCO who will be forced to pay the November and December 2013 generation charges. Even if it has been argued that the damage is capable of pecuniary estimation and, therefore could be subject to a refund, many indigent Filipinos living in MERALCO's franchise area will be forced to pay their extraordinarily high electricity bills. There will be opportunity costs[261] on top of the cost of paying the amount on the bill. A higher-than-usual electricity bill could translate to some families choosing to forego their measly savings, medical expenses, or even food on their table. Some will probably choose to forego electricity service altogether. These combined opportunity costs for a significant portion of the Filipino population are incapable of pecuniary estimation. By the time they have been refunded, these Filipinos would already be bankrupt, sick, or malnourished. These irreparable damages could accompany the delay if this Court waits for administrative remedies to be exhausted.

Third, the controverted acts violated due process. When MERALCO and the Energy Regulatory Commission deprived the consumers from participating in the concerns raised in MERALCO's December 5, 2013 Letter, they violated due process under the EPIRA. Petitioners argued that the violation of their due process rights was part of the grave abuse of discretion committed by respondents.

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257 *Rollo* (G.R. No. 210245, vol. I) pp. 656–659, Bayan Muna Amended Petition; Amended Petition in G.R. No. 210255, pp. 32–35.

258 Republic Act No. 9136 (2001), sec. 78.

259 263 Phil. 57 (1990) [Per J. Regalado, Second Division].

260 Id. at 64.

261 *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS (19th ed., 2009), p. 669. Opportunity cost is "[t]he value of the best alternative use of an economic good."

Fourth, there is no other plain, speedy, and adequate remedy. There is no other tribunal where petitioners could raise grave abuse of discretion and seek an injunction against the Energy Regulatory Commission.

In a similar case,[262] an administrative agency officer's "utter disregard of the principle of due process" made this Court conclude that there was no longer a plain, speedy, or adequate remedy available despite the availability of an appeal.[263] Thus, even if this Court presumes that there are other remedies available before the Energy Regulatory Commission, such will not be plain, speedy, or adequate considering that the Energy Regulatory Commission acted in disregard of the consumers' right to due process under the EPIRA.

Finally, this Court can relax the doctrine on exhaustion of administrative remedies because strong public interest is involved in this case.

MERALCO's franchise area covers the whole Metro Manila, as well as several cities and municipalities in the provinces of Bulacan, Cavite, Rizal, Laguna, Quezon, and Pampanga.[264] It is so vast that it is often referred to as a "mega franchise," covering approximately 4.6 million residential customers.[265] The building blocks of our national economy, our industries, and businesses rely on the services that MERALCO provides, considering that a majority of business headquarters and factories are located in these areas.

Clearly, the magnitude of MERALCO's franchise area approximates the strength of the public interest involved. Consumers and business entities are always interested in the fluctuations of the price of electricity. They affect all of us. This Court must address the issues of this case to serve this strong public interest.

Still on justiciability, respondents argued against petitioners' constitutional attack on Sections 6 and 29 of the EPIRA.

Petitioners Bayan Muna, et al. question the constitutionality of Sections 6 and 29 of the EPIRA in declaring that the generation and supply sectors are not public utilities, and that their charges are beyond the Energy Regulatory Commission's regulation.[266]

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262 *National Development Company v. Collector of Customs,* 118 Phil. 1265 (1963) [Per J. Bautista Angelo].

263 Id. at 1271.

264 Republic Act No. 9209 (2003), sec. 1.

265 As published in the MERALCO website <https://www.meralco.com.ph>.

266 *Rollo* (G.R. No. 210245, vol. I) pp. 651–656. Bayan Muna Amended Petition.

As correctly pointed out by respondent-in-intervention PEPOA[267] and some generation companies,[268] Section 29 of the EPIRA only applies to electricity suppliers of the *contestable* market[269] under an open access and retail competition regime:[270]

> SECTION. 29. *Supply Sector.* – The supply sector is a business affected with public interest. Except for distribution utilities and electric cooperatives with respect to their existing franchise areas, all suppliers of electricity to the contestable market shall require a license from the [Energy Regulatory Commission].
>
> For this purpose, the [Energy Regulatory Commission] shall promulgate rules and regulations prescribing the qualifications of electricity suppliers which shall include, among other requirements, a demonstration of their technical capability, financial capability, and creditworthiness: *Provided,* That the [Energy Regulatory Commission] shall have authority to require electricity suppliers to furnish a bond or other evidence of the ability of a supplier to withstand market disturbances or other events that may increase the cost of providing service.
>
> Any law to the contrary notwithstanding, *supply of electricity to the contestable market shall not be considered a public utility operation.* For this purpose, any person or entity which shall engage in the supply of electricity to the contestable market shall not be required to secure a national franchise.
>
> The prices to be charged by suppliers for the supply of electricity to the contestable market shall not be subject to regulation by the ERC.
>
> Electricity suppliers shall be subject to the rules and regulations concerning abuse of market power, cartelization, and other anti-competitive or discriminatory behavior to be promulgated by the [Energy Regulatory Commission].
>
> In its billings to end-users, every supplier shall identify and segregate the components of its supplier's charge, as defined herein. (Emphasis supplied)

Since petitioner party-list representatives "are supposed to represent the marginalized sectors of the society, it is obvious that they do not represent the contestable market."[271] They have no legal standing to assail the constitutionality of Section 29 in this case, which involves MERALCO's generation charges to its *captive* market. The supply sector was not even

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267 *Rollo* (G.R. No. 210245, vol. XXIII), pp. 14786–14787. PEPOA Memorandum.

268 *Rollo* (G.R. No. 210245, vol. XXV), pp. 15715–15716. SMEC Memorandum.

269 Republic Act No. 9136 (2001), sec. 4(h):
"Contestable Market" refers to the electricity end-users who have a choice of a supplier of electricity as may be determined by the [Energy Regulatory Commission] in accordance with this Act.

270 EPIRA Implementing Rules and Regulations, rule 4(vvv):
"Retail Competition" refers to the provision of electricity to a Contestable Market by Suppliers through Open Access.

271 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14787, PEPOA Memorandum.

impleaded as a party respondent.[272]

Petitioners even conceded lack of an actual case to assail the constitutionality of Section 29 of the EPIRA:

> JUSTICE LEONEN:
> Okay. Section 29 covers suppliers?
>
> [REPRESENTATIVE] COLMENARES:
> Yes, Your Honor
>
> *JUSTICE LEONEN:*
> *Do you have an actual case?*
>
> *[REPRESENTATIVE] COLMENARES:*
> *No, Section 29?*
>
> *JUSTICE LEONEN:*
> *Yes.*
>
> *[REPRESENTATIVE] COLMENARES:*
> *No, Your Honor.*
>
> *JUSTICE LEONEN:*
> *No. You are charging MERALCO, is MERALCO a supplier under the definition of the EPIRA?*
>
> *[REPRESENTATIVE] COLMENARES:*
> *I don't think so, Your Honor.*
>
> JUSTICE LEONEN:
> So should we act on your plea that Section 29 also be stricken down, there is no actual case?
>
> [REPRESENTATIVE] COLMENARES:
> Well, if it is a patently clear that Section 6 is unconstitutional...
>
> JUSTICE LEONEN:
> But that is not the doctrine that we have enunciated that it must be justiciable, that it cannot be hypothetical situation. Because come what may there may be a supplier out there under the definition in EPIRA which might make a good argument that it should not also be a public utility.
>
> [REPRESENTATIVE] COLMENARES:
> Well, the supply sector I think will be, is constituted right now, Your Honor, so we believe it's also timely for the Court to rule on Section 29.
>
> JUSTICE LEONEN:
> Timely but not justiciable yet?
>
> [REPRESENTATIVE] COLMENARES:

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[272] *Rollo* (G.R. No. 210245, vol. XXIV), p. 15501, TMO and TLI Memorandum.

> Well, that is our position, Your Honor, for that issue, Your Honor, but, of course, the Honorable Court can decide.[273] (Emphasis supplied)

On the other hand, respondents counter that the constitutionality of Sections 6 and 29 involves a political question beyond judicial review. It was not raised at the earliest opportunity and is not the *lis mota* of this case.[274]

Public respondents add that addressing the issue on the constitutionality of these EPIRA provisions is not necessary to dispose this case on the merits, and it will not provide petitioners the primary reliefs they sought.[275]

Respondents are correct.

It is not the whole Section 6 of the EPIRA that is under challenge but only the portion declaring the generation sector as not public utilities.

Petitioners' fear that this declaration removed the generation sector outside the ambit of state regulation is without basis. They even conceded during oral arguments that several standards are found in Section 6, and in Energy Regulatory Commission's approved rules and regulations governing the generation sector for being a business affected with public interest:

> JUSTICE LEONEN:
>
> Have you studied the approvals of [Energy Regulatory Commission] of the bilateral contracts of MERALCO?
>
> [REPRESENTATIVE] COLMENARES:
>
> I have not read a bilateral contract, You Honor.
>
> JUSTICE LEONEN:
>
> Not one?
>
> [REPRESENTATIVE] COLMENARES:
>
> Not one, Your Honor. In fact, I thought for a while that is a very difficult document to come around.[276]

As regards Section 6:

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273 TSN dated January 21, 2014, pp. 86–87.

274 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14999, MERALCO Memorandum; *rollo* (G.R. No. 210245, vol. XXIV), p. 15500–15502, TMO and TLI Memorandum; *rollo* (G.R. No. 210245, vol. XXV) pp. 15722–15723, SMEC Memorandum.

275 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22368, Energy Regulatory Commission and Department of Energy Memorandum.

276 TSN dated January 21, 2014, p. 101.

JUSTICE LEONEN:
Let's look at Section 6 of the EPIRA law.

[REPRESENTATIVE] COLMENARES:
Yes, Your Honor.

JUSTICE LEONEN:
Because you did flash it but I think you missed out on some of the other paragraphs of Section 6.

[REPRESENTATIVE] COLMENARES:
Yes, I'm not familiar, we are studying EPIRA like many of us but yes, Section 6 thus in fact mentioned that it shall not be regulated, Your Honor.

. . .

JUSTICE LEONEN:
Yes. It's a business affected with public interest therefore the kind of regulation that applies to it is different from any ordinary business, like the fish ball vendor. But for a generation company therefore, let's go to second paragraph. It states that before it operates it must secure from the Energy Regulatory Commission a certificate of compliance pursuant to the standards set forth in this Act. Would you know that this standard also include many other rules and regulations that have been approved by the ERC? Is this not correct?

[REPRESENTATIVE] COLMENARES:
It's probably true, You Honor.[277] (Emphasis supplied)

II

The Petitions docketed as G.R. Nos. 210245 and 210255 were filed as special civil actions for certiorari and prohibition under Rule 65. Petitioners allege grave abuse of discretion on the part of the Energy Regulatory Commission in issuing its letter approving MERALCO's proposal for staggered collection of generation rate increase to cover its November 2013 generation costs.

In MERALCO's December 5, 2013 Letter Request, it discussed that Article III, Section 2 of the AGRA rules allows it to automatically reflect in its customers' December 2013 billings the full generation costs for the November 2013 supply month calculated using the adjustment formula in the AGRA Rules. MERALCO proposed to stagger its collection of this ₱4.15/kWh rate increase to mitigate its effects on the consumers, but that it be allowed to recover carrying costs, which will result from its deferral of collecting the full amount. MERALCO then invoked the exception clause of the AGRA Rules, which reads "[w]here good cause appears, the [Energy Regulatory Commission] may allow an exception from any provisions of

[277] Id. at pp. 70–71.

these Guidelines, if such exception is found to be in the public interest and is not contrary to law or any other related rules and regulations."[278]

A petition for certiorari is proper when "any tribunal, board[,] or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law."[279]

The special civil action of prohibition, meanwhile, may be availed of when "the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial[,] or ministerial functions, are without or in excess of its or [their] jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law."[280]

Common for both remedies are the following requisites, namely: (1) the board was exercising quasi-judicial functions; (2) its action or proceeding was done with grave abuse of discretion; and (3) there was no other plain, speedy, and, adequate remedy.

Many administrative agencies are granted quasi-judicial power under their charters or statute. This refers to "the power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law."[281] In the exercise of such function, administrative agencies must "investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them as basis for their official action and exercise of discretion in a judicial nature."[282] They need to hear both sides and consider all evidence presented before making a determination on the factual questions raised, consistent with the requirements of due process.

The December 5, 2013 Letter of MERALCO proposed the imposition of carrying costs. This is not part of generation rate adjustments subject of the AGRA Rules invoked by MERALCO, but a result of its proposal to stagger the collection of the unprecedented generation rate hike it sought to impose on its captive market. This letter triggered the Energy Regulatory Commission's quasi-judicial function to decide, with the governing laws as

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278 AGRA Rules, art. VIII, sec. 1.

279 RULES OF COURT, Rule 65, sec. 1.

280 RULES OF COURT, Rule 65, sec. 2.

281 *SMART Communications, Inc. v. National Telecommunications Commission*, 456 Phil. 145, 156 (2003) [Per J. Ynares-Santiago, First Division].

282 Id. at 157, *citing* J. Bellosillo, Separate Opinion in *Commissioner of Internal Revenue v. Court of Appeals*, 329 Phil. 987 (1996) [Per J. Vitug, First Division].

guide, on whether these factual questions on staggered collection and carrying costs should be allowed.

The requirement that there be no other plain, speedy, and adequate remedy is related to the doctrine on exhaustion of administrative remedies.

Preliminary resort to administrative processes available before filing a suit before our courts gives the administrative body every opportunity to decide matters within its jurisdiction and correct any error it may have made.[283] The failure to comply first with this requirement of undergoing the administrative grievance machinery in place and completing all administrative redress available is fatal to a litigant's cause of action.[284]

This brings us to the last requisite on grave abuse of discretion. This Court has ruled that there is grave abuse of discretion warranting the issuance of a writ when "respondent judge, tribunal[,] or board evaded a positive duty, or virtually refused to perform the duty enjoined or to act in contemplation of law."[285] There is grave abuse of discretion when acts are done "contrary to the Constitution, the law[,] or jurisprudence," or when they are executed in a capricious manner that amounts to lack of jurisdiction.[286]

In relation to administrative agencies, this Court has applied a deferential policy, such that findings of administrative agencies are generally respected unless there was arbitrariness that amounted to a grave abuse of discretion:

> Time and again this Court has ruled that in reviewing administrative decisions, the findings of fact made therein must be respected as long as they are supported by substantial evidence, even if not overwhelming or preponderant; that it is not for the reviewing court to weigh the conflicting evidence, determine the credibility of the witnesses or otherwise substitute its own judgment for that of the administrative agency on the sufficiency of evidence; that the administrative decision in matters within the executive jurisdiction can only be set aside on proof of grave abuse of discretion, fraud or error of law. Petitioner [Energy Regulatory Board] is in a better position to resolve petitioner Shell's application, being primarily the agency possessing the necessary expertise on the matter. The power to determine whether the building of a gasoline retail outlet in a trading area would benefit public interest and the oil industry lies with the [Energy Regulatory Board] not the appellate

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283 *Province of Zamboanga del Norte v. Court of Appeals*, 396 Phil. 709, 717 (2000) [Per J. Pardo, First Division].

284 Id., *citing Paat v. Court of Appeals*, 334 Phil. 146 (1997) [Per J. Torres, Jr., Second Division].

285 *Spouses Delos Santos v. Metropolitan Bank and Trust Company*, 698 Phil. 1, 16 (2012) [Per J. Bersamin, First Division].

286 *Freedom from Debt Coalition v. Energy Regulatory Commission*, 476 Phil. 134, 215 (2004) [Per J. Tinga, En Banc] *citing Republic v. Cocofed*, 423 Phil. 735 (2001) [Per J. Panganiban, En Banc] and *Tañada v. Angara*, 338 Phil. 546 (1997) [Per J. Panganiban, First Division].

courts.[287]

The determination of any grave abuse of discretion by a government instrumentality falls within this Court's expanded power of judicial review. This is clear in the Constitution:

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and *to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.*[288] (Emphasis supplied)

The Energy Regulatory Commission acted with grave abuse of discretion when it acted on and approved MERALCO's December 5, 2013 Letter despite lack of notice to the public of such proposal.

III

MERALCO's December 5, 2013 Letter Request was approved by the Energy Regulatory Commission in its December 9, 2013 Letter after only one working day. Aside from the fact that it was not published, the concerned parties were neither notified of the generation rate increase and its circumstances, nor were they given the opportunity to comment on the matter.

In the 2004 case of *Freedom from Debt Coalition v. Energy Regulatory Commission*,[289] this Court granted the petition for certiorari, finding the Energy Regulatory Commission order that approved a ₱0.12/kWh generation rate increase without complying with Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations on notice and publication requirements as a "blatant and inexcusable breach of the very rules which the [Energy Regulatory Commission] is mandated to observe and implement."[290]

An application for generation rate increase was also involved in the 2006 case of *NASECORE v. Energy Regulatory Commission*,[291] where this Court similarly granted the petition for certiorari, prohibition, and injunction.

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287 *Energy Regulatory Board v. Court of Appeals*, 409 Phil. 36, 53–54 (2001) [Per J. Ynares-Santiago, First Division] *citing Lo v. Court of Appeals*, 378 Phil. 818 (1999) [Per J. Mendoza, Second Division] *further citing Timbancaya v. Vicente*, 119 Phil. 169 (1963) [Per J. Reyes, En Banc]; and *Itogon-Suyoc Mines v. Office of the President*, 336 Phil. 804 (1997) [Per J. Padilla, En Banc]. *See also Veloso v. Commission on Audit*, 672 Phil. 419 (2011) [J. Peralta, En Banc], *citing Yap v. Commission on Audit*, 633 Phil. 174 (2010) [J. Leonardo-De Castro, En Banc].

288 CONST., art. VIII, sec. 1.

289 476 Phil. 134 (2004) [Per J. Tinga, En Banc].

290 Id. at 215.

291 517 Phil. 23 (2006) [Per J. Callejo, Sr., En Banc].

In this case, the Energy Regulatory Commission approved a generation rate increase from ₱3.1886/kWh to ₱3.3213/kWh even if MERALCO's amended application was not published, giving no opportunity for the consumers to comment on the application. This Court discussed how "the basic postulate of due process ordains that the consumers be notified of any application, and be apprised of its contents, that would result in compounding their economic burden."[292]

However, as pointed out by respondents, the Department of Energy has already amended Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations in 2007. The amended provision has excluded certain rate adjustments from its coverage:

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

NASECORE and its co-petitioners argue that despite the amendment, the publication of applications for generation rate adjustments is indispensable.[293] They submit that "the amendment made is *per se* illegal for being violative of the intendments, provisions[,] and the declared State Policy behind the EPIRA."[294]

On the other hand, public respondents contend that the notice requirements under Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations do not apply to MERALCO's December 5, 2013 Letter, which was not a rate adjustment application but a "mere request for a staggered implementation of its automatically adjusted generation cost[.]"[295] Moreover, this provision of the EPIRA Implementing Rules and Regulations was validly amended to exclude the AGRA mechanism, among others, from publication and hearing requirements.[296]

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292 Id. at 55.

293 *Rollo* (G.R. No. 210255, vol. XXVIII), p. 24219, NASECORE Memorandum.

294 Id.

295 *Rollo* (G.R. No. 210255, vol. XXIV), p. 22375, Energy Regulatory Commission and Department of Energy Memorandum.

296 Id. at 22403–22406.

Respondent-in-intervention PEPOA added that with 140 distribution utilities in the Philippines, each with generation costs varying from month to month, "[i]t will be physically impossible for the [Energy Regulatory Commission] to hear all the applications for the approval of the generation costs of these distribution utilities on a monthly basis and subjecting each of them to a full-blown notice and hearing[.]"[297]

The amendment of Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations was a policy decision made by the Department of Energy within the ambit of its functions. In any case, the legality and constitutionality of this amendment cannot be collaterally attacked in these consolidated petitions.[298] Since no direct proceeding has been filed questioning the validity of this amendment, the presumption on the validity of laws must stand.[299]

I disagree, however, with the assertion that the general rule for notice requirements under Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations does not apply in this case. The December 5, 2013 Letter of MERALCO should have been made public.

The AGRA Rules invoked by MERALCO in its December 5, 2013 Letter provides for the adjustment formula for generation rate.[300] Carrying costs is not a factor included in the formula to compute the generation rate. It was only mentioned in the formula once, under the definition of Other Generation Rate Adjustments, in that "[t]he [Other Generation Rate Adjustments] shall not be subject to any carrying charge."

MERALCO's December 5, 2013 Letter proposed to collect carrying costs as a result of its proposal to stagger the collection of its generation rate increase for the November 2013 supply month. It even invoked the exception clause of the AGRA Rules.

This should have alerted the Energy Regulatory Commission that what was involved was not a simple automatic generation rate adjustment. Additional costs were being proposed outside of the adjusted generation rates contemplated under the AGRA Rules.

Effectively, this may be considered as a rate application, or at the very

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297 *Rollo* (G.R. No. 210245, vol. XXIII), p. 14799, PEPOA Memorandum.

298 *See Vivas v. Monetary Board of the Bangko Sentral ng Pilipinas*, 716 Phil. 132, 153 (2013) [Per J. Mendoza, Third Division], *citing Gutierrez v. Department of Budget and Management*, 630 Phil. 1 (2010) [Per J. Abad, En Banc].

299 Id., *citing Dasmariñas Water District v. Leonardo-De Castro*, 587 Phil. 403 (2008) [Per J. Corona, En Banc].

300 AGRA Rules, art. III, sec. 1.
The formula is: GR = AGC + OGA, where: GR = Generation Rate to be charged per kWh; AGC = Adjusted Generation Cost, automatically computed without need of prior [Energy Regulatory Commission] verification and confirmation, . . . ; and OGA = Other Generation Rate Adjustments[.]

least, an application "for any relief affecting the consumers" under Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations, which requires compliance with the publication and hearing requirements:

> SECTION 4. *Responsibilities of the [Energy Regulatory Commission].*
>
> (e) Any application or petition for rate adjustment or *for any relief affecting the consumers* must be verified, and accompanied with an acknowledgment of receipt of a copy thereof by the LGU Legislative Body of the locality where the applicant or petitioner principally operates together with the certification of the notice of publication thereof in a newspaper of general circulation in the same locality. (Emphasis supplied)

Notice to the public of MERALCO's December 5, 2013 Letter proposal is a statutory right, clearly provided in Rule 3, Section 4(e) of the EPIRA Implementing Rules and Regulations.

Notice to the public is also consistent with the EPIRA provisions on transparency of prices:

> SECTION 2. *Declaration of Policy.* – It is hereby declared the policy of the State:
>
> . . .
>
> (c) *To ensure transparent and reasonable prices of electricity* in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market;
>
> . . .
>
> SECTION 43. *Functions of the [Energy Regulatory Commission].* – The [Energy Regulatory Commission] shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the [Energy Regulatory Commission] 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:
>
> . . .
>
> (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;[301] (Emphasis supplied)

The majority, through Justice Alfredo Benjamin S. Caguioa,

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[301] Republic Act No. 9136 (2001).

maintained that the rate hike sought by MERALCO's being exempt from verification, notice, publication, and hearing requirements is demonstrated by how, in its December 9, 2013 Letter, "the [Energy Regulatory Commission] was clear in its directive that MERALCO should apply separately for its recovery of carrying costs."[302] It added that "this was a correct response as the computation of the Generation Rate under the AGRA Mechanism does not include carrying costs."[303]

The majority's assertion, unfortunately, conflates causes with effects. The Energy Regulatory Commission's *ensuing and subsequent* denial of whatever attached items MERALCO sought the Energy Regulatory Commission to approve does not alter the original nature of MERALCO's plea for relief. Precisely, this shows that MERALCO *simultaneously* sought something *beyond* perfunctory rate adjustment – that it was applying for a relief that would have affected consumers beyond bare rate adjustment.

The staggered scheme demonstrates this as well; it shows complexity beyond otherwise routine adjustment. It cannot be conclusive, as the majority maintained, that the Energy Regulatory Commission correctly approved staggered recovery. Otherwise, the generation rate would have been applied as a whole, thereby causing greater prejudice to consumers.[304] It is presumptuous to peremptorily believe that MERALCO's proposition—to the exclusion of other options—was the best option. The danger of believing MERALCO's representations as ineluctably optimum is precisely the reason why the opportunity to hear from others, as would be facilitated by notice and hearing, is vital.

MERALCO's inability to avail of such additional relief does not alter the fact that beyond an automatic rate adjustment, it proposed a staggered scheme integral to the recovery of carrying costs. Such recovery was elemental to MERALCO's proposed design as, precisely, it was a consequence of what it asserted to be the deferred recovery of ₱3 billion. Whatever the Energy Regulatory Commission's eventual action, it remains that MERALCO did not merely seek a plain rate adjustment.

What should control is the character of the relief sought, not the subsequent regulatory action. The former is the cause, the latter is merely its offshoot. Whichever way the Energy Regulatory Commission ruled on MERALCO's application did not alter the nature of that application when MERALCO first brought it before the Energy Regulatory Commission.

Ultimately, as noted by Justice Amy C. Lazaro-Javier, the fatal flaw is less in the outcome of the Energy Regulatory Commission's actions, but

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302 Ponencia, p. 22.
303 Id.
304 Id.

more in the manner by which it reached that outcome. Thus, "[t]ainted as the process was, the outcome must also be set aside."[305] The sheer speed at which the Energy Regulatory Commission moved in favor of MERALCO's plea demonstrates an abject inability to act in keeping with its mandate, the imperative of public interest, and the vast competencies vested in it. The sorely haphazard manner by which it discharged its function—if it can ever truly be spoken of as a "discharge" of its function—indicates "evasion of positive duty or ... virtual refusal to perform the duty enjoined by ... law."[306] It is this instance of grave abuse of discretion that this Court should invalidate.

IV

The circumstances surrounding the Energy Regulatory Commission's approval of MERALCO's December 5, 2013 Letter further demonstrate how the Energy Regulatory Commission acted with grave abuse of discretion.

First, all parties admit that the November 2013 generation charge was the highest recorded increase. MERALCO stated in its December 5, 2013 Letter to the Energy Regulatory Commission that "it is cognizant of the financial burden such rate spike will place on its customers" and that the increase of ₱4.15 per kwh is due to an "abrupt increase in generation cost."[307] The generation charge was the highest recorded increase since the EPIRA was passed in 2001. Data available from 2008 to 2013 show this clearly:[308]

Billing Month	Generation Charge	Price Increase or (Decrease)	Rate of Change of the Price
2008			
January	₱4.4275		
February	₱4.1946	₱(0.23)	-5%
March	₱4.3885	₱0.19	5%
April	₱4.9073	₱0.52	12%
May	₱4.8754	₱(0.03)	-1%
June	₱4.4520	₱(0.42)	-9%
July	₱4.4112	₱(0.04)	-1%
August	₱4.4300	₱0.02	0%
September	₱4.4174	₱(0.01)	0%
October	₱4.7319	₱0.31	7%

[305] J. Lazaro-Javier's Reflections, p. 1

[306] *United Coconut Planters Bank v. Looyuko*, 560 Phil. 581, 592 (2007) [Per J. Austria-Martinez, Third Division].

[307] *Rollo* (G.R. No. 210225, vol. 1), p. 257, MERALCO's Letter dated December 5, 2013.

[308] Figures are rounded off to two decimal points. Data as published monthly from the MERALCO website accessed on February 28, 2022 at <https://company.meralco.com.ph/news-and-advisories/rates-archives>.

Billing Month	Generation Charge	Price Increase or (Decrease)	Rate of Change of the Price
November	**₱5.0323**	₱0.30	6%
December	₱4.5793	₱(0.45)	-9%
2009			
January	₱4.5007	₱(0.08)	-2%
February	₱4.4503	₱(0.05)	-1%
March	₱4.4750	₱0.02	1%
April	**₱5.0205**	₱0.55	12%
May	₱4.4235	₱(0.60)	-12%
June	₱4.2583	₱(0.17)	-4%
July	₱4.2620	₱0.00	0%
August	₱4.0986	₱(0.16)	-4%
September	₱4.0166	₱(0.08)	-2%
October	₱3.9011	₱(0.12)	-3%
November	₱4.2286	₱0.33	8%
December	₱4.2029	₱(0.03)	-1%
2010			
January	₱3.9175	₱(0.29)	-7%
February	₱4.9303	₱1.01	26%
March	₱5.8417	₱0.91	18%
April	**₱6.7699**	₱0.93	16%
May	₱5.5123	₱(1.26)	-19%
June	₱5.5967	₱0.08	2%
July	₱5.6546	₱0.06	1%
August	₱6.0962	₱0.44	8%
September	₱5.4119	₱(0.68)	-11%
October	₱4.3140	₱(1.10)	-20%
November	₱5.2940	₱0.98	23%
December	₱4.9781	₱(0.32)	-6%
2011			
January	₱4.7439	₱(0.23)	-5%
February	₱4.8623	₱0.12	2%
March	₱4.8461	₱(0.02)	0%
April	₱5.0474	₱0.20	4%
May	₱5.0161	₱(0.03)	-1%
June	₱5.5265	₱0.51	10%
July	₱5.2871	₱(0.24)	-4%
August	₱5.3721	₱0.09	2%
September	₱5.2051	₱(0.17)	-3%
October	₱5.3470	₱0.14	3%
November	**₱5.7881**	₱0.44	8%
December	₱5.5145	₱(0.27)	-5%
2012			
January	₱5.4643	₱(0.05)	-1%
February	₱5.5774	₱0.11	2%

Billing Month	Generation Charge	Price Increase or (Decrease)	Rate of Change of the Price
March	₱5.3348	₱(0.24)	-4%
April	₱5.6621	₱0.33	6%
May	₱5.5983	₱(0.06)	-1%
June	₱6.1375	₱0.54	10%
July	₱6.4549	₱0.32	5%
August	**₱6.7397**	₱0.28	4%
September	₱5.3965	₱(1.34)	-20%
October	₱5.4979	₱0.10	2%
November	₱5.6311	₱0.13	2%
December	₱5.4817	₱(0.15)	-3%
2013			
January	₱5.7910	₱0.31	6%
February	₱5.2414	₱(0.55)	-9%
March	₱5.1865	₱(0.05)	-1%
April	₱5.3873	₱0.20	4%
May	₱5.4704	₱0.08	2%
June	₱5.6580	₱0.19	3%
July	₱5.3269	₱(0.33)	-6%
August	₱5.0479	₱(0.28)	-5%
September	₱5.1747	₱0.13	3%
October	₱4.6832	₱(0.49)	-9%
November	₱5.6673	₱0.98	21%
December	**₱9.1070**	**₱3.44**	**61%**

As seen in the table above, there was a 61% increase for the December 2013 billing month, which reflects generation rates in November 2013. MERALCO must have recognized that the rate of the increase for its November 2013 generation charge was extraordinary and unprecedented. Otherwise, it would not have taken the course of action suggested in its December 5, 2013 Letter to the Energy Regulatory Commission. MERALCO would have just charged its consumers through the operation of the AGRA. However, it knew that its consumers would react, hence, the December 5, 2013 Letter.

As a regulator, the Energy Regulatory Commission should have been concerned with this increase stated in MERALCO's letter as it was unprecedented, and a great matter of concern. It should have initiated investigations even prior to the Joint Congressional Committee. The mention of such high increase by MERALCO should have triggered the Energy Regulatory Commission to make relevant inquiries to protect the public. The Energy Regulatory Commission does not need a complaint from a concerned citizen or for the rates to be charged against the consumers before it could act. It has an array of regulatory powers stated under EPIRA that it could have used to investigate and mitigate the price increase.

Broad policy declarations in the EPIRA require the State 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."[309] The State is also required to "establish a strong and purely independent regulatory body and system to *ensure consumer protection* and enhance the competitive operation of the electricity market."[310]

Section 25 of the EPIRA states that "retail rates charged by distribution utilities for the supply of electricity in the captive market shall be *subject to the regulation by the [Energy Regulatory Commission.*]"

Under Section 43(f) of the EPIRA, one of the Commission's key functions is to "*[i]n the public interest*, establish and enforce a methodology for setting. . . retail rates for the captive market of a distribution utility. . . The rate-setting methodology so adopted and applied must ensure a *reasonable price of electricity.*"

Moreover, Section 43(k) of the EPIRA mandates the Commission to "[m]onitor and take measures in accordance with this Act to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant." Related to this is Section 43(o), which directs it to "[m]onitor the activities in the generation. . . 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[.]"

Section 6 of the EPIRA allows the Energy Regulatory Commission to require generation companies to submit their financial statements to determine the existence of market power abuse or anticompetitive behavior.

An unprecedented generation price increase should have summoned the use of any of these functions of the Energy Regulatory Commission as price is a primary signal of market conditions.[311] There are several possibilities for an unprecedented price increase. It could have been caused by a single or a combination of these possibilities. The Energy Regulatory Commission cannot rely on a single party's assertion of the possible cause of such an exorbitant price increase. It has the power to initiate its investigation *motu proprio*. The investigative power vested in it through

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309 Republic Act No. 9136 (2001), sec. 2(c).

310 Republic Act No. 9136 (2001), sec. 2(j).

311 The other signal is the quantity demanded and supplied. *See* PAUL A. SAMUELSON AND WILLIAM D. NORDHAUS, ECONOMICS 57 (EIGHTEENTH EDITION, 2006).

EPIRA[312] is broad enough to cover the situation.

In this case, the Energy Regulatory Commission only relied on MERALCO's blatant assertion that it was the Malampaya shutdown and the forced outages that caused the price increase. It repeated its folly in *Freedom from Debt Coalition v. Energy Regulatory Commission,*[313] wherein it merely relied on the assertions of MERALCO in its application of rate increase.

In *Freedom from Debt Coalition,* the Energy Regulatory Commission issued a provisional authority for rate increase without taking the oppositions into consideration. This Court ruled that this was tantamount to grave abuse of discretion. The requirement to consider other parties in a provisional approval will "address the right of the consuming public to due process and at the same advance the cause of people empowerment which is also a policy goal of the EPIRA along with consumer protection."[314]

Even beyond procedural niceties, the Energy Regulatory Commission has the power to inquire into the price increase *motu proprio.* After the December 5, 2013 Letter, it did not even question what caused an increase beyond MERALCO's projections made in October 2013. In a letter, MERALCO clearly stated that it only expected a generation charge of ₱7.86 per kwh for November 2013. That was already MERALCO's projected generation charge, considering all the circumstances that they alleged will cause the price increase. Instead of ₱7.86 per kwh, the final generation charge based on the billings stood at ₱9.107 per kwh. It should have been the Energy Regulatory Commission's function to raise the question on why it was ₱9.107 and not ₱7.86. Instead of asking this question and pushing an investigation on this matter, the Commission immediately approved MERALCO's request.

It is clear from the text of the EPIRA that the Energy Regulatory Commission should be guided by public interest. The public would have been interested in raising the proper questions with respect to retail rates of electricity. It is the Energy Regulatory Commission's role to know the industry benchmark in terms of the rate of increase in generation charges and detect anomalies when the rate of increase is an outlier. Only the

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312 Republic Act No. 9136 (2001), sec. 43(r)(s):
(r) In the exercise of its investigative and 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 anti-competitive behavior and/or market power abuse and any violation of rules and regulations issued by the ERC.

313 476 Phil. 134 (2004) [Per J. Tinga, En Banc].

314 Id. at 209.

Commission could set an industry benchmark. As an administrative agency, it was created to understand the multifarious and complex issues that the legislature cannot anticipate when they craft laws.

Aside from how the unprecedented increase in generation rates did not rouse the Energy Regulatory Commission's suspicion, the Commission even approved MERALCO's request with considerable speed of one working day. MERALCO's December 5, 2013 Letter was received by the Docket/Records Section of the Commission on the same date, a Thursday, at 11:05 a.m.[315]

On December 9, 2013, Monday, MERALCO orally presented before the Energy Regulatory Commission its proposed cost recovery deferment. On the same day, the Energy Regulatory Commission issued a letter "[granting] MERALCO the clearance it seeks to stagger implementation of its generation cost recovery[.]"[316] The letter was signed by the Commission's chairperson, Zenaida G. Cruz-Ducut, and two of its commissioners, namely, Alfredo J. Non and Josefina Patricia A. Magpale-Asirit.

This means that from the time the request was received, assuming that the commissioners took cognizance of such request at the receiving time stamp of 11:05 a.m. on Thursday, the Commission only took approximately two and a half days to arrive at a decision granting the request.

The Energy Regulatory Commission's decision to clear MERALCO of its request seems to be based solely on the December 5, 2013 Letter and the presentation of MERALCO on December 9, 2013. The presentation of MERALCO to the Commission "suggested two other options,"[317] aside from the suggestion of MERALCO in its letter. The Energy Regulatory Commission's letter suggests that it tied itself to the three options MERALCO gave them:

a. **Option 1:** MERALCO will: "1) collect a generation charge of P7.90 per kwh in its December 2013 billing to its customers; and 2) defer to February 2014 the recovery of PhP3 Billion, representing a portion of the generation costs for the supply month of November 2013 not passed to customers in December 2013, subject to inclusion of the appropriate carrying charge."[318]

b. **Option 2:** MERALCO will "[cap] the generation charge for the December billing at PhP7.67/kWh and [implement] the

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315 Id. at 257, MERALCO's Letter dated December 5, 2013.
316 *Rollo* (G.R. No. 210255, vol. 1), p. 94. ERC's Letter dated December 9, 2013.
317 Id.
318 Id. at 257. MERALCO's Letter dated December 5, 2013.

deferred cost recovery in the February 2014 billing[.]"[319]

c. **Option 3:** MERALCO will "[cap] the generation charge for the December billing at PhP7.67/kWh and [implement] the deferred cost recovery in the x x x February and March 2014 billings."[320]

Nothing in the December 9, 2013 Letter of the Energy Regulatory Commission suggests that it considered other views on the matter. The evaluative process and legal bases cannot be extracted either. The premises laid by MERALCO in its December 5, 2013 Letter and its presentation were accepted by the Commission, hook, line, and sinker.

For example, in the letter of MERALCO, it stated that "[w]hile MERALCO is prepared to reflect the true cost of generation. . . it is cognizant of the financial burden such rate spike will place on its customers during this Christmas season and considering further that the prices of basic commodities have already registered substantial increases."[321] This was echoed in the Energy Regulatory Commission's letter when it stated that it is "well-aware of the huge impact that MERALCO's generation charge adjustment will have on the retail rates to its customers. Given that there are also reported increases in the prices of other commodities[.]"[322] It can be seen by the similarity in the flow of thought and language in both letters that the Energy Regulatory Commission only considered MERALCO's side on this matter. Despite recognizing that consumers will be affected, the Commission still rendered a decision without even considering the consumers opinion on the matter.

The December 5, 2013 Letter of MERALCO required an evaluative process. It was not a ministerial duty for the Energy Regulatory Commission to grant or deny MERALCO's request. Its duty in this case is quasi-judicial. Hence, it "involves (a) taking and evaluation of evidence; (b) determining facts based upon the evidence presented; and (c) rendering an order or decision supported by the facts proved."[323]

Beyond its quasi-judicial function, the Energy Regulatory Commission also had the mandate to investigate. Such power to inquire and investigate complements its adjudicatory function. In the case of *Secretary of Justice v. Lantion,*[324] this Court had the opportunity to tackle the interrelationship between the quasi-judicial functions and investigatory power of administrative agencies:

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319 Id. at 94. ERC's Letter dated December 9, 2013.
320 Id.
321 Id. at 257, MERALCO's Letter dated December 5, 2013.
322 *Rollo* (G.R. No. 210255, Vol. 1), p. 94.
323 *Secretary of Justice v. Lantion,* 379 Phil. 165, 198 (2000) [Per J. Melo, En Banc].
324 379 Phil. 165 (2000) [Per J. Melo, En Banc].

> *Inquisitorial power, which is also known as examining or investigatory power, is one of the determinative powers of an administrative body which better enables it to exercise its quasi-judicial authority[.]* This power allows the administrative body to inspect the records and premises, and investigate the activities, of persons or entities coming under its jurisdiction[,] or to require disclosure of information by means of accounts, records, reports, testimony of witnesses, production of documents or otherwise[.]
>
> The power of investigation consists in gathering, organizing, and analyzing evidence, which is a useful aid or tool in an administrative agency's performance of its rule-making or quasi-judicial functions. Notably, investigation is indispensable to prosecution.[325] (Citations omitted)

Considering that the request of MERALCO would affect consumers, a party with relatively conflicting interests, it was the duty of the Energy Regulatory Commission to use its quasi-judicial function to involve the consumers. At the same time, it should have used its investigatory powers to ensure that the bases for MERALCO's request were not plagued with infirmities.

Administrative proceedings, despite being characterized as "quasi-judicial," are not as technical as proceedings in court. In the case of *Ang Tibay v. The Court of Industrial Relations,*[326] this Court defined guidelines for proceedings in administrative bodies. The case involved the Court of Industrial Relations, characterized by this Court as "more an administrative board than a part of the integrated judicial system[.]"[327] This Court devised the "cardinal primary rights which must be respected"[328] for due process in administrative proceedings. These are:

> (1) The first of these rights is *the right to a hearing*, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof[.]
>
> (2) Not only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts but *the tribunal must consider the evidence presented*[.]
>
> (3) "While the duty to deliberate does not impose the obligation to decide right, it does imply a necessity which cannot be disregarded, namely, that of *having something to support its decision.* A decision with absolutely nothing to support it is a nullity, a place when directly attached[.]"
>
> (4) Not only must there be some evidence to support a finding or

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325 Id. at 198.
326 69 Phil. 635 (1940) [Per J. Laurel, En Banc].
327 Id. at 639.
328 Id. at 642.

> conclusion. . . but the *evidence must be "substantial[.]"*
>
> . . . .
>
> (5) The decision must be *rendered on the evidence presented at the hearing, or at least contained in the record* and disclosed to the parties affected. . . .
>
> (6) The [administrative body] or any of its judges [or decision-makers], therefore, *must act on its or his own independent consideration of the law and facts of the controversy*, and not simply accept the views of a subordinate in arriving at a decision. . . .
>
> (7) The [administrative body] should, in all controversial questions, *render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decisions rendered. . . .*[329] (Emphasis supplied, citations omitted)

In rendering its December 9, 2013 Letter, the Energy Regulatory Commission violated these cardinal primary rights.

First, the presentation of MERALCO could not constitute as a "hearing" contemplated by this Court in *Ang Tibay*. Only one party presented evidence in this case, other interested parties were disenfranchised.

Second, since the consumers were unable to present their perspective, the evidence they could have adduced were not considered.

Third, the decision of the Energy Regulatory Commission was unsupported by independent thinking and merely echoed the perspective of MERALCO. Even the Energy Regulatory Commission's choice to deny carrying costs for March 2014 was not explained.

Fourth, there was no substantial evidence. Substantial evidence was elaborated in *Ang Tibay:*

> ***"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."*** . . . The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. . . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial

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329 Id. at 642–644.

evidence. . . .[330] (Emphasis supplied, citations omitted)

The Energy Regulatory Commission should have considered substantial evidence before it decided to clear MERALCO of its request. The value ₱9.107 per kwh should have been investigated further. It should have inspected closely MERALCO's billing statements from the generating companies that it has Power Supply Agreements or Power Purchasing Agreements with.[331] It should have examined the bidding patterns that are available from the PEMC.[332] The Energy Regulatory Commission should have looked back at the minutes of the coordination meetings for the Malampaya shutdown.[333] It should have taken into consideration the technical conditions of the power plants with respect to outages. It should have studied the technical reports of these power plants and checked if they are consistent with the story that the numbers in the billings and biddings show.

The Commission has the power to gather all these facts to produce a conclusion acceptable to a reasonable mind. It should have the resources to compute, if given all the verifiable factual circumstances, that ₱9.107 should be the price of a kilowatt hour of electricity for the November 2013 billing month.

It would have taken more than two and a half days to gather all these facts, and even much more time to evaluate, study, and consider them. To a reasonable mind, taking into consideration the facts given by only one party, in this case MERALCO, does not constitute substantial evidence. However, it was clear from the records that the Energy Regulatory Commission, in arriving at the December 9, 2013 Letter, only considered two things (1) the letter of MERALCO dated December 5, 2013; and (2) MERALCO's presentation on December 9, 2013.[334] There were no supporting documents to MERALCO's letter dated December 5, 2013. The reasonable conclusion that could be derived here was that the Energy Regulatory Commission did not consider substantial evidence in arriving at its decision.

Fifth, while it complied with the requisite that an administrative body must confine itself with the evidence on record, the Energy Regulatory Commission is still at fault for restricting the record. By not extending the reception of evidence to other parties aside from MERALCO, it evaded compliance with this requisite. The Energy Regulatory Commission did not secure additional evidence it could have used to come up with a more well-reasoned and acceptable decision. In *Ang Tibay,* this court stated that confining decision-making to evidence on record "should not, however,

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330 Id. at 642–643.
331 Annex of Billing Statements.
332 Compliance of PEMC regarding bidding on November 2013.
333 Compliance Annexes.
334 TSN dated February 11, 2014, pp. 65–66.

detract from [the administrative body's] duty actively to see that the law is enforced, and for that purpose, to *use the authorized legal methods of securing evidence and informing itself of facts material and relevant to the controversy.*"[335] The Energy Regulatory Commission could have secured additional evidence for itself, but it refused to do so. It acted in haste for no clear or apparent reason.

It has been admitted by the Energy Regulatory Commission during oral arguments that none of the commissioners were economists or engineers.[336] These are the very same commissioners who approved MERALCO's request in the December 9, 2013 Letter. To make matters worse, even if there were economists and engineers in the Energy Regulatory Commission, it did not consult these inhouse experts in arriving at the decision to clear MERALCO of its request.[337]

Sixth, while the signatories of the December 9, 2013 Letter were the chairperson and two commissioners of the Energy Regulatory Commission, based on the oral arguments, it would seem that the commissioners were reliant on their subordinate's opinion and understanding of the situation. When Energy Regulatory Commission Chairperson Zenaida Ducut was called to explain the meaning of a provisional approval of a Power Supply Agreement, Chairperson Ducut referred the matter to the Commission's Executive Director, Atty. Saturnino Juan.

> JUSTICE LEONEN:
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> Good afternoon, Chair Ducut. There was a reservation of the [Energy Regulatory Commission] in terms of your approval of the Therma Mobile and MERALCO contract, may I know what that provision was.
>
> CHAIRPERSON DUCUT:
>
> Good afternoon, Your Honor, the walk-away provision of the Power Supply Agreement, Your Honor.
>
> JUSTICE LEONEN:
>
> Yes. Can you explain to us that kind of a provision? . . .
>
> CHAIRPERSON DUCUT:
>
> Your Honor, when the contract is not approved as it is, then one of the parties may withdraw from the contract.
>
> JUSTICE LEONEN:
>
> No, I don't think that is what is contained in your provisional approval. It has something to do with whether or not the power company may sell their capacity that they sold to MERALCO, is that not correct?
>
> CHAIRPERSON DUCUT:
>
> I'm sorry, Your Honor . . . (interrupted)

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335 *Ang Tibay v. The Court of Industrial Relations*, 69 Phil. 635, 643 (1940) [Per J. Laurel, En Banc].
336 TSN dated February 11, 2014, pp. 63–64.
337 TSN dated February 11, 2014, pp. 64–65.

> JUSTICE LEONEN:
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> I am confused, Therma Mobile contract and MERALCO are one of the components of this particular case and I am surprised that the [Energy Regulatory Commission] is not aware of its provisional approval of the contract that there were reservations that were made, because that has something to do with the nomination process also.
>
> CHAIRPERSON DUCUT:
>
> Your Honor, with your kind indulgence, may I request the Executive Director to answer it, Your Honor?
>
> JUSTICE LEONEN
>
> Okay, please. Thank you, Chair. Thank you. You may go back to your seat.[338]

Chairperson Ducut's reliance on Director Juan's knowledge over the simplest questions raises some serious doubts on the independent thinking of the Energy Regulatory Commission. It makes it possible that the chairperson and the commissioners relied on Director Juan's understanding of the Power Supply Agreement between Therma Mobile Inc. and MERALCO. It also makes it possible that the Commission arrived at the December 9, 2013 decision taking into consideration Director Juan's opinion on the matter, among other things.[339] Yet, the Energy Regulatory Commission should be reminded that it should fully understand the complexities of the situation, its implications, and effects before rendering a decision.

Seventh, the Energy Regulatory Commission did not resolve the proceedings by answering all controversial questions and raising the various issues that could affect the different parties. Even if an administrative agency, such as the Energy Regulatory Commission, is presumed to have the competence and expertise in dealing with issues regarding electricity, considering the complexity of the issue involved and an interplay of transactions between various parties (generation, distribution and consumers), it is incredible that it could consider all the complexities of the issues in a small amount of time.

With all these considerations to bear in mind, the Energy Regulatory Commission should have balanced the exercise of caution with the apparent urgency of the situation. Rendering a decision too quickly makes the decision vulnerable to being questioned as grave abuse of discretion. The Energy Regulatory Commission disregarded its mandate under the EPIRA and the guidelines set by this court in administrative proceedings. It should have skirted the creativity of MERALCO in presenting a letter instead of a formal pleading. It should have required MERALCO to substantiate its request with documents for it to be able to arrive at a more credible decision.

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[338] TSN dated February 11, 2014, pp. 92–93.

[339] TSN dated February 11, 2014, p. 65. Director Juan admitted to being present during the decision-making process of the ERC on December 9, 2014.

In addition to considering the usual standards of administrative proceedings, the Energy Regulatory Commission should have evaluated MERALCO's request following its own rules and its own resolutions:

First, on the Implementing Rules and Regulations of EPIRA, Rule III, Section 4(e) states that:

> *Any application or petition* for rate adjustment or *for any relief affecting the consumers* must be *verified*, and accompanied with an *acknowledgment of receipt of a copy thereof by the LGU Legislative Body* of the locality where the applicant or petitioner principally operates together with the *certification of the notice of publication* thereof in a newspaper of general circulation in the same locality.
>
> The ERC may grant provisionally or deny the relief prayed for not later than seventy five (75) calendar days from the filing of the application or petition, based on the same and the supporting documents attached thereto and such comments or pleadings the consumers or the LGU concerned may have filed within thirty (30) calendar days from receipt of a copy of the application or petition or from the publication thereof as the case may be.
>
> Thereafter, the ERC shall conduct a formal hearing on the application or petition, giving proper notices to all parties concerned, with at least one public hearing in the affected locality, and shall decide the matter on the merits not later than twelve (12) months from the issuance of the aforementioned provisional order. (Emphasis supplied)

It was already discussed that the Energy Regulatory Commission did not follow this procedure before it issued the Letter dated December 9, 2013.

Second, on ERC's Rules of Practice and Procedure.[340] The purpose of these rules is "to aid anyone who wishes to appear before the Energy Regulatory Commission and participate in any proceeding before it."[341] The rules apply "to all proceedings before the Commission where the Commission is required under prevailing laws, rules and guidelines to hold a hearing or *to afford to the parties to the proceeding before it an opportunity for a hearing before making a decision.*"[342] While the rules allow for certain exceptions from following the rules "in the broader interest of justice,"[343] it is reasonable that the Energy Regulatory Commission reason out such "broader interest of justice" before reneging on its own rules of procedure.

The rules define "applicant" as the party who files "for permission or authorization which the Energy Regulatory Commission may give under the

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340 ERC Resolution No. 38, series of 2006.
341 ERC Resolution No. 38, series of 2006, Rule 1, Section 1.
342 ERC Resolution No. 38, series of 2006, Rule 1, Section 2.
343 ERC Resolution No. 38, series of 2006, Rule 1, Section 3.

statutory authority delegated to it."[344] The rules likewise state that an "application" should "contain a concise statement of the authorization applied for and the ultimate facts that would qualify or entitle the applicant to the grant of the authorization sought."[345] These broad definitions characterize MERALCO's role in filing the Letter dated December 5, 2013. MERALCO was an applicant because it was asking the Commission's permission or authorization. It cannot defer the generation costs or impose carrying costs without the Commission's authorization. The Letter dated December 5, 2013 fits the definition of an application under the rules.

In addition, the letter could directly be classified as "other applications affecting the consumers."[346] This Court could concede that the request of MERALCO was not a rate application in its technical sense, however, the rules also contemplate applications or petitions affecting the consumers. It is clear in MERALCO's letter that their decision to stagger was because the high generation charge will affect consumers. This should have set in motion the application of the Rules of Practice and Procedure in terms of its formal requirements, pleadings, pre-filing requirements, service and filing, notice of hearings, hearings, rules of evidence, among others.

Third, on the Competition Rules and Complaint Procedure (Energy Regulatory Commission Resolution No. 45, series of 2006). These rules contemplate the EPIRA's prohibition against price or market manipulation. It may be conceded that, given the facts available, price or market manipulation is not conclusive in this case. However, the extraordinarily high generation charge might be an indicium of price or market manipulation. The rules "prescribe the manner in which the [Energy Regulatory Commission] will investigate *possible* violations thereof consistent with the requirement of due process."[347]

In this case, the Energy Regulatory Commission could have used the Competition Rules when MERALCO claimed that it has done everything to mitigate the price hike linked to the planned Malampaya shutdown. One of the remedies that MERALCO claims to have undertaken is entering into a Power Supply Agreement with Therma Mobile, Inc. The Energy Regulatory Commission provisionally approved this Power Supply Agreement. One of the provisions that it had reservations about was Article 4.1.2, a provision under the heading "Supply of Power." In this provision, MERALCO effectively took control over the contracted capacity it has with Therma Mobile. It states:

> 4.1.2. Unless otherwise expressly permitted by this Agreement, Power Supplier shall not, *without Meralco's prior written consent*, sell,

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344 ERC Resolution No. 38, series of 2006, Rule 2, Section 2.
345 ERC Resolution No. 38, series of 2006, Rule 5, Section 3.
346 ERC Resolution No. 38, series of 2006, Rule 6, Section 2.
347 ERC Resolution No. 45, series of 2006.

> divert, transfer, dedicate, reserve or assign all or any portion of the Contract Capacity and Associated Energy to any Person other than Meralco, except that before Operations Effective Date or during the period when the Agreement is suspended under Section 6.5.1, Power Supplier may, without Meralco's prior written consent.[348] (Emphasis supplied)

When asked during oral arguments why the Energy Regulatory Commission had reservations about Article 4.1.2, Director Juan explained that it was because it was unusual for Power Supply Agreements to have such provision:

> JUSTICE LEONEN:
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> 4.1.2, the contract read: "Unless otherwise expressly permitted by this agreement, power suppliers shall not, without MERALCO's prior written consent, sell, divert, transfer, dedicate, reserve or assign, all or any portion of the contract capacity and associated energy. It is there, right?
>
> ATTY. JUAN:
>
> Yes, Your Honor.
>
> JUSTICE LEONEN:
>
> And the [Energy Regulation Commission] expressed reservations with respect to this, is that not correct?
>
> ATTY. JUAN:
>
> Yes, Your Honor.
>
> JUSTICE LEONEN:
>
> Yes, why?
>
> ATTY. JUAN:
>
> This is not common provision in Power Supply Agreements. Usually, in Power Supply Agreements, it is the generator that will have the discretion or leeway in nominating or offering in the market its obligation. It's just to satisfy the requirement of the distribution utility off-taker, Your Honor.
>
> JUSTICE LEONEN:
>
> So, my curiosity, our curiosity is, why didn't the [Energy Regulatory Commission] simply disapprove this provision?
>
> ATTY. JUAN:
>
> At that time, Your Honor, this will have to be looked into further and analyzed if there is anything irregular. . . .[349]

Director Juan's response indicated an awareness of the Energy Regulatory Commission that a distribution utility exercises complete control over the power supply of a generation company. In addition, they also find such control unusual and "highly irregular." Control over supply controls the price, and the Competition Rules define that a price-fixing provision is,

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348 Power Supply Agreement.

349 TSN dated February 11, 2014, pp. 94–95.

by its nature, anti-competitive.[350]

Even if it were to assume that the situation is outside the ambit of the Competition Rules, the Energy Regulatory Commission had an obligation to enforce the reservations it had on the Power Supply Agreement between MERALCO and Therma Mobile, Inc. It should have clarified that pending a final approval of the Agreement, the provisions that the Energy Regulatory Commission had reservations on are not valid. Any action taken with respect to those provisions should have been voided, and if irreversible, subjected to penalties. However, the Energy Regulatory Commission blatantly turned a blind eye and allowed MERALCO and Therma Mobile, Inc. to operate freely under the Power Supply Agreement.

As a general rule, this Court will defer judicial review of actions of administrative agencies unless there is a clear showing of grave abuse of discretion. It recognizes that administrative agencies were created to regulate activities based on their special knowledge and training or specific field of expertise. These skills and knowledge are not presumed vested in courts of general jurisdiction, not even in the Supreme Court of the Philippines. In *Nestle Philippines Inc. v. Court of Appeals,*[351] a case involving the interpretation of a statute by an administrative body, this Court stated that it should defer to the interpretation of the administrative agency.

> 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* the Court stressed that executive officials are presumed to have familiarized themselves with all the 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.[352] (Citations omitted)

Aside from interpretation of statutes relating to the administrative agency, this Court defers to factual findings of administrative agencies. Administrative agencies are presumed to view facts in light of their special knowledge and expertise. In *Gordon v. Veridiano II,*[353] this Court acknowledged that:

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350 ERC's Competition Rules and Complaint Procedures, Rule 4, Section 2.
351 280 Phil. 548 (1991) [Per J. Feliciano, First Division].
352 Id. at 556–557.
353 249 Phil. 49 (1988) [Per J. Cruz, First Division].

> Settled is the rule that the factual findings of administrative authorities are accorded great respect because of their acknowledged expertise in the fields of specialization to which they are assigned. Even the courts of justice, including this Court, are concluded by such findings ***in the absence of a clear showing of a grave abuse of discretion***[.][354] (Emphasis supplied, citations omitted)

Gordon reminds us that this Court could engage in judicial review, be it factual or legal, of actions of administrative agencies when there is a clear showing of grave abuse of discretion.

The Energy Regulatory Commission in this case showed grave abuse of discretion when it rendered the December 9, 2013 Letter. Such grave abuse of discretion was not cured by its subsequent actions. Even if the Commission issued an order dated March 3, 2014 in ERC Case No. 2012-021 MC,[355] this is not enough to correct the grave abuses of discretion it committed in issuing the December 9, 2013 Letter. It should have considered the matters discussed in its order dated March 3, 2014, before it could decide on whether to deny or grant MERALCO's request for deferment and carrying costs.

There is grave abuse of discretion when there is "an evasion of positive duty or to a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law." In *United Coconut Planters Bank v. Looyuko*:[356]

> By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law.
>
> Grave abuse of discretion refers not merely to palpable errors of jurisdiction; or to violations of the Constitution, the law and jurisprudence. It refers also to cases in which, for various reasons, there has been a gross misapprehension of facts.[357] (Citations omitted)

The EPIRA demands that the Energy Regulatory Commission be a more proactive agency. In the EPIRA's declaration of policy, the State must "ensure transparent and reasonable prices of electricity in a regime of free

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354 Id. at 59.

355 In the Matter of the Prices in the Wholesale Electricity Spot Market (WESM) for the Supply Months of November and December 2013 and the Exercise by the Commission of its Regulatory Powers to Intervene and Direct the Imposition of Regulated Prices Therein without Prejudice to the Ongoing Investigation on the Allegation of Anti-Competitive Behavior and Possible Abuse of Market Power Committed by Some WESM Participants.

356 560 Phil. 581 (2007) [Per J. Austria-Martinez, Third Division].

357 Id. at 591–592.

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."[358] This means that the law requires the Energy Regulatory Commission, as an agency of the State, to be accountable to the public by using its powers to ensure that there is transparency in the pricing of electricity, whether for generation, transmission, or distribution.

The demand for the Energy Regulatory Commission to be a proactive agency is further validated by the fact that what is involved in this case is the captive market for electricity. Electricity consumers of the captive market cannot choose their source of electricity.[359]

In a captive market, there is no perfect competition. Consumers cannot move to a different distribution utility if they are unhappy with the service of MERALCO. Even if MERALCO becomes inefficient or set the prices too high, the consumers are left with no choice but to pay the price of inefficiencies. Otherwise, they will be left with no electricity.

The inefficiency of MERALCO in ensuring that the service they provide is in the least cost adversely affects its consumers. Inefficiencies impose an unnecessary burden absorbed by all its customers. This unnecessary burden is referred to as negative externalities. Negative externalities are a type of market failure wherein an individual or a firm's actions impose an undue cost on others.[360] If left alone, individual customers are going to internalize these negative externalities and pay for costs they did not intend to incur.[361]

One way to correct negative externalities is to enforce property rights.[362] However, MERALCO's customers are so atomized that individually, they will not be able to enforce legal provisions pertaining to MERALCO providing their service in a least cost manner. A single MERALCO consumer will not have the resources to be able to gather evidence to show that pricing is anomalous.

That is why government intervention is necessary in this case. Government intervention is another way to correct negative externalities.[363] In this case, the performance of a regulatory body of its functions will

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358 Republic Act No. 9136 (2001), sec. 2(c).

359 Republic Act No. 9136 (2001), sec. 4(c).

360 *See* JOSEPH STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR (THIRD EDITION), p. 80.

361 Id. at 218. Stiglitz discusses this part in relation to environmental policy but the concept of externalities applies to any situation wherein an individual is forced to incur costs (or in the event that the externalities are positive, forced to benefit). Externalities tend to bring down social utility if society is forced to incur marginal costs, or bring up social utility if society will be benefitted by the externality. *See also,* Ronald Coase, *The Problem of Social Cost,* 3 J.L. &ECON 1 (1960).

362 Id. at 218–220.

363 Id. at 221–234.

provide this balance. It has enough resources and the mandate to ensure that inefficiencies are kept at a minimum. If the Energy Regulatory Commission only uses its functions under the EPIRA to its full extent, the fact that the captive market can never be characterized by perfect competition will not be an issue. The customers of MERALCO could rely on the Commission to ensure that their rights are protected and that MERALCO does not take advantage of its market power.

The majority laments that the preceding consideration of how the Energy Regulatory Commission could have gone about its proactive role is an excessive exploration of "a better course of action than what the agency did."[364] It further maintains that this amounts to this Court "supplant[ing] its wisdom upon a regulatory agency."[365]

This preceding discussion, however, would not be this Court's act of supplanting judicial-legal wisdom for administrative-technical expertise. Rather, it is the Court merely considering prudent actions well-within not only the Energy Regulatory Commission's competence but, more importantly, its mandate. It is a definite duty devolved upon the Commission as a regulatory mechanism to "ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability."[366] This is a positive duty enjoined by law, evasion of which or refusal to perform it amounts to grave abuse of discretion. To carry it out, the Commission is vested with a wide array of powers and prerogatives.

It is reasonable to inquire how the Energy Regulatory Commission — with many prerogatives at its call and with vast material, human, and intellectual resources available to it—endeavored to fulfill its mandate. So too, it is reasonable to impugn the Energy Regulatory Commission for acts that demonstrate how it acted in a manner quite contrary to its mandate. To recall, the Energy Regulatory Commission took all of a single working day to favorably act on MERALCO's letter, foreclosed any chance of considering countervailing views or approaches, tied itself to nothing but the three options MERALCO itself proposed, and nipped an otherwise evaluative process in its proverbial bud. It was never even critical of the calculated value of ₱9.107 per kWh. These circumstances speak volumes about how it abandoned its tasks. Its course of action demonstrates infidelity to duty and grave abuse of discretion.

V

The Energy Regulatory Commission cannot take a passive position in

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364 Ponencia, p. 7.
365 Id.
366 Republic Act No. 9136 (2001), sec. 2(c).

this case. It represents the public interest because an individual ordinary citizen cannot go up against energy industry giants. The captive market is already the passive participant in the energy industry. It is a price taker. If the generation companies and MERALCO remain unregulated, the consumer has to either just grin and bear the high prices of electricity or go without electricity. That is why Energy Regulatory Commission's regulatory extent under the EPIRA is broad enough to allow it to be proactive, to protect the consumers. It must check if there has been anticompetitive behavior or abuse of market power that could be detrimental to the consumers.

In *Ang Tibay,* this Court clearly stated that "[u]nlike a court of justice, which is essentially passive, acting only when its jurisdiction is invoked and deciding only cases that are presented to it by the parties litigant, the function of [an administrative body], as will appear from perusal of its organic law, is more *active, affirmative and dynamic.*"[367]

It is obvious that the Energy Regulatory Commission was created under the EPIRA to be an "active, affirmative[,] and dynamic" commission. The Energy Regulatory Commission itself agrees with this:

> JUSTICE LEONEN:
>
> So, in the EPIRA structure, in the legal structure, who does the consumer depend on in order that there are eyes into the industry and that therefore the industry is regulated on their behalf?
>
> ATTY. JUAN:
>
> The [Energy Regulatory Commission], Your Honor.
>
> JUSTICE LEONEN:
>
> Yes, so therefore, the [Energy Regulatory Commission] was constructed not only as a passive regulator, one that accepts filing and then rules on these particular cases much like courts, but it is unlike a court, it is *quasi-judicial, quasi-legislative,* it is also a very active regulator as per the text of the EPIRA, is that not correct?
>
> ATTY. JUAN:
>
> Yes, Your Honor.[368]

Under the EPIRA, the electric power industry was divided into four sectors, namely, generation, transmission, distribution, and supply.[369] Prior to the EPIRA, these sectors overlapped and the government had full control over generation and transmission under the National Power Corporation. Under EPIRA, the unbundling of the sector required restructured governance. EPIRA provided an organizational structure for the different agencies that will execute the EPIRA.

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367 *Ang Tibay v. The Court of Industrial Relations,* 69 Phil. 635, 640 (1940) [Per J. Laurel, En Banc].
368 TSN dated February 11, 2014, p. 72.
369 Republic Act No. 9136 (2001), sec. 5.

The National Transmission Company "assume[d] the electrical transmission function of the National Power Corporation."[370] It had the mandate "for the planning, construction and centralized operation and maintenance of its high voltage transmission facilities, including grid interconnections and ancillary services."[371] The functions and responsibilities of the National Transmission Company are enumerated under Section 9 of the EPIRA. The EPIRA also provides for the privatization of National Transmission Company "either through an outright sale or a concession contract."[372] Currently, the concession contract is held by the National Grid Corporation of the Philippines, under Republic Act No. 9511.

The Wholesale Electricity Spot Market is responsible for creating a "market [that] shall provide the mechanism for identifying and setting the price of actual variations from the quantities transacted under contracts between sellers and purchasers of electricity."[373] The market operates in such a way that distribution utilities are able to address demand in excess of its contracted capacity. "The market operator shall be an ***autonomous*** group, to be constituted by the [Department of Energy], with equitable representation from the electric power industry participants, initially under the administrative supervision of [National Transmission Company]."[374] After a transition period of one year, the Department of Energy and the electric power industry participants should yield the operation of the market to an independent entity.[375]

The *Department of Energy* was created under Republic Act No. 7638. In addition to its functions enumerated in its charter, the EPIRA mandates it "to supervise the restructuring of the electricity industry." It is charged with the "planning and implementation of a comprehensive program for the efficient supply and economical use of energy." It is also required to provide an annual Philippine Energy Plan, which should include a Power Development Program.

The Energy Regulatory Commission is an "independent, quasi-judicial regulatory body."[376] Its predecessor is the Energy Regulatory Board. The Energy Regulatory Commission is primarily tasked with the regulation of the electric power industry. Aside from its functions enumerated under Section 43, it is tasked with several other functions through the EPIRA, such as granting certificates of compliance of generation companies,[377] granting

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370 Republic Act No. 9136 (2001), sec. 8.
371 Republic Act No. 9136 (2001), sec. 8.
372 Republic Act No. 9136 (2001), sec. 21.
373 Republic Act No. 9136 (2001), sec. 30.
374 Republic Act No. 9136 (2001), sec. 30.
375 Republic Act No. 9136 (2001), sec. 30.
376 Republic Act No. 9136 (2001), sec. 38.
377 Republic Act No. 9136 (2001), sec. 6.

franchises to operate subtransmission assets,[378] approval of transmission charges,[379] and the regulation of the distribution sector,[380] among others.

The Energy Regulatory Commission is composed of a chairperson and four commissioners who hold nonrenewable terms of seven years.[381] The compensation and emoluments received by the chairperson and the commissioners were improved. The chairperson receives the salaries, allowances, and benefits equivalent to those of a Chief Justice of the Supreme Court while the commissioners receive the equivalent of those of a Supreme Court Associate Justice.[382]

It is clear under the provisions of the EPIRA that one of the Energy Regulatory Commission's primary mandates is the promotion of consumer interests. "The [Energy Regulatory Commission] shall handle consumer complaints and *ensure the adequate promotion of consumer interests.*"[383] While it is stated in a broad manner, there are no similar provisions pertaining to the sectors comprising the electric power industry. The law distinctly puts at a premium the adequate promotion of consumer interests.

The regulatory functions of the Energy Regulatory Commission are enumerated in Section 43 of the EPIRA. It includes (a) enforcement of the implementing rules and regulations of EPIRA; (b) promulgation of the National Grid Code and a Distribution Code; (c) enforcement of the Wholesale Electricity Spot Market rules; (d) determination of the level of cross subsidies in existing retail rate until it is removed under the operation of the law; (e) amendment or revocation of the authority to operate of any person or entity for failure to comply with the EPIRA's provisions; (f) *establishment and enforcement of a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility*; (g) ensuring that universal charges of National Transmission Company or any distribution utility shall bear no cross subsidies between grids, within grids, or between classes of customers; (h) review and approval of changes on the terms and conditions of service of National Transmission Company or any distribution utility; (i) allowance of the National Transmission Company to charge user fees for ancillary services to all electric power industry participants or self-generating entities connected to the grid; (j) setting of a lifeline rate for the marginalized end-users; (k) *monitoring and taking measures to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant;* (l) imposing fines or penalties for non-compliance or breach of the EPIRA; (m) taking any action delegated to it pursuant to the EPIRA; (n) submitting to the Office of the President an

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[378] Republic Act No. 9136 (2001), sec. 8.
[379] Republic Act No. 9136 (2001), sec. 19.
[380] Republic Act No. 9136 (2001), sec. 22.
[381] Republic Act No. 9136 (2001), sec. 38.
[382] Republic Act No. 9136 (2001), sec. 39.
[383] Republic Act No. 9136 (2001), sec. 41.

annual report containing such matters or cases referred to it and the actions and proceedings undertaken; (o) *monitoring the activities in the generation and supply of electric power industry with the end view of promoting free market competition;* (p) acting on applications for or modifications of certificates of public convenience and/or necessity, licenses or permits of franchised electric utilities; (q) acting on applications for cost recovery and return demand side management projects; (r) *in the exercise of its investigative and quasi-judicial powers, acting 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 acts;* (s) inspecting the premises, books of accounts and records of any person or entity at any time, in the exercise of 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 Energy Regulatory Commission; (t) performing such other regulatory functions as are appropriate and necessary in order to ensure the successful restructuring and modernization of the electric power industry; and (u) having the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the Energy Regulatory Commission in the exercise of the above mentioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.

The Power Sector Assets and Liabilities Management is a government-owned and –controlled corporation "which shall take ownership of all existing [National Power Corporation] generation assets, liabilities, IPP contracts, real estate and all other disposable assets." Its principal purpose is "to manage the orderly sale, disposition and privatization of [National Power Corporation] generation assets, real estate and other disposable assets, and [independent power producer] contracts with the objective of liquidating all [National Power Corporation] financial obligations and stranded contract costs in an optimal manner."[384]

It is clear that in the governance structure of the electric power industry, it is the Energy Regulatory Commission that has the most number of tasks. It is the only regulatory body. It is the only body whose primary task is the protection of the consumers.

VI

In line with this task of protecting consumers, EPIRA operationalized the antitrust provision of our Constitution. Under the Constitution, "[t]he State shall regulate or prohibit *monopolies* when the public interest so requires. No *combinations in restraint of trade* or *unfair competition* shall

[384] Republic Act No. 9136 (2001), sec. 49.

be allowed."[385]

Jurisprudence has defined *monopoly* as follows:

> The simplest form of monopoly exists when there is only one seller or producer of a product or service for which there are no substitutes. In its more complex form, monopoly is defined as the joint acquisition or maintenance by members of a conspiracy, formed for that purpose, of the power to control and dominate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.[386] (Citation omitted)

The Revised Penal Code characterizes *combinations in restraint of trade.* Under Article 186, it is illegal for any person to "enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market."[387] The law likewise punishes "making transactions prejudicial to lawful commerce," or "increasing the market price."[388]

Under the Intellectual Property Code, *unfair competition* is a criminal offense. It is characterized by the act of "[a]ny person who shall employ deception or any other means contrary to good faith by which he shall pass off the goods manufactured by him . . . for those of the one having established such goodwill, or who shall commit any acts calculated to produce said result."[389]

EPIRA's protection of consumers from anticompetitive behavior and abuse of market power enforces Article XII, Section 19 of the Constitution. The constitutional provision is also reflected in the EPIRA's Implementing Rules and Regulations, the Energy Regulatory Commission's Competition Rules and Complaint Procedures, and Wholesale Electricity Spot Market Manual.

The presence of an antitrust provision in our Constitution means that our State relies on a perfectly competitive market to improve the Filipino people's welfare. The State has regard for "free interplay of market forces" as it "keen on promoting free competition and the development of a free market."[390] If a consumer has a choice between competing firms selling the same product, a consumer will choose the firm that will sell the product at

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385 CONST., art. XII, sec. 19. (Emphasis supplied)

386 *Garcia v. Corona,* 378 Phil. 848 (1999) [Per J. Ynares-Santiago, En Banc].

387 REV. PEN. CODE, art. 186 (1).

388 REV. PEN. CODE, art. 186(3).

389 INTELLECTUAL PROP.CODE, sec. 168.2.

390 *Energy Regulatory Board v. Court of Appeals,* 409 Phil. 36, 46 (2001) [Per J. Ynares-Santiago, First Division]. Principles were enunciated in light of the deregulation of the downstream oil industry.

the cheapest price. If consumers get the cheapest price, they will have more money to spend on other things. In turn, the firms will compete to make their operations efficient to capture consumers' patronage. As explained by this court in *Tatad v. Secretary of the Department of Energy*:[391]

> Beyond doubt, the Constitution committed us to the free enterprise system but it is a system impressed with its own distinctness. Thus, while the Constitution embraced free enterprise as an economic creed, it did not prohibit per se the operation of *monopolies* which can, however, be *regulated in the public interest.* Thus too, our free enterprise system is not based on a market of pure and unadulterated competition where the State pursues a strict hands-off policy and follows the let-the-devil devour the hindmost rule. *Combinations in restraint of trade* and *unfair competitions* are *absolutely proscribed* and the proscription is directed both against the State as well as the private sector. This distinct free enterprise system is dictated by the need to achieve the goals of our national economy as defined by Section 1, Article XII of the Constitution which are: more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged. It also calls for the State to protect Filipino enterprises against unfair competition and trade practices.
>
> *Section 19. Article XII of our Constitution is anti-trust in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies.* Competition is thus the underlying principle of Section 19, Article XII of our Constitution which cannot be violated by R.A. No. 8180. We subscribe to the observation of Prof. Gellhorn that the objective of anti-trust law is "to assure a competitive economy, based upon the belief that through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services, and thus matches their desires with society's opportunity costs." He adds with appropriateness that there is a reliance upon "the operation of the 'market' system (free enterprise) to decide what shall be produced, how resources shall be allocated in the production process, and to whom the various products will be distributed. The market system relies on the consumer to decide what and how much shall be produced, and on competition, among producers to determine who will manufacture it."
>
> Again, we underline in scarlet that the fundamental principle espoused by Section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed

[391] 346 Phil. 321 (1997) [Per J. Puno, En Banc].

with suspicion.[392] (Emphasis supplied, citations omitted)

However, not all markets can be perfect. There could be market failure or a combination of market failures that could characterize a market, which prevents it from being perfectly competitive.[393] There could be monopoly or market power. There could be externalities. In addition to these, it is also possible that there might be severe information asymmetry wherein the buyer is not privy to the same level of information that a seller has. In this case, MERALCO knows more about its power suppliers and the generating companies than the consumer does. All these market failures interact to the disadvantage of consumer welfare and economic efficiency.

In these instances, government regulation is required. "Regulation restrains the unfettered market power of firms."[394] The public interest objectives of regulation include (1) regulating firm behavior to "prevent abuses of market power by monopolies"; (2) "remedy informational failures"; and (3) "correct externalities."[395] Regulation exists to address the different forms of market failures and to protect the public when it cannot rely on a perfectly competitive market. Regulation can be done through "control of prices, entry and exit conditions, and standards of service."[396]

Aside from regulation, another way to address market failures is through an antitrust policy. An antitrust policy is designed to "provide consumers with the economic benefits of vigorous competition."[397] There are two ways that an antitrust policy dismantles anticompetitive abuses: (1) by "prohibit[ing] certain kinds of business conduct, such as price fixing, that restrain competitive forces," and (2) by "restrict[ing] some market structures, such as monopolies, that are considered most likely to restrain trade and abuse their economic power in other ways."[398] Hence, Article XII, Section 19 of our Constitution is an antitrust policy because it prohibits unfair competition and restricts monopolies.

The EPIRA provides for both regulatory measures and antitrust measures to guard against market failures surrounding the electric power industry. The EPIRA's antitrust objective is to prohibit "abuse of market power" and "anti-competitive behavior."[399]

Instead of prohibiting a "monopoly," as stated in the Constitution, the EPIRA, cognizant of the fact that distribution utilities are monopolies, used the term "abuse of market power." Under the Energy Regulatory

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392 Id. at 367–368.
393 ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 38–42 (6th ed., 2016).
394 PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 201 (19th ed., 2009).
395 Id.
396 Id.
397 Id. at 203.
398 Id.
399 Republic Act 9136 (2001), sec. 43(k)

Commission's Competition Rules and Complaint Procedure, it refers to abuse of market power as "misuse of market power." The Rules state that "a [p]erson that has a substantial degree of power in a Market shall not misuse that power."[400]

Abuse of market power or misuse of market power is still parallel to the reason why our Constitution prohibits or regulates monopolies. It is when monopolies abuse their market power that it becomes harmful to society. Monopolists could take advantage of its position, even if it is a natural monopoly. A natural monopoly is when "a single firm, a monopoly, can supply the industry output more efficiently than can multiple firms."[401] Electricity distribution utilities are an example of a natural monopoly. There are a lot of distribution utilities, but they are monopolies in their respective franchise areas.

The Constitution is adamant in prohibiting monopolies completely because some industries are inevitably monopolies. Hence, the wording under the Constitution is "regulate *or* prohibit." By checking against abuse of market power, EPIRA is regulating a monopoly instead of prohibiting it completely.

It is also possible that what is involved is an oligopoly, such as the generation sector. While EPIRA aimed for the generation sector to be in perfect competition, there are several barriers to entry to become a generation company. The generation sector, if not monitored and regulated, has a propensity to abuse its market power. The Constitution does not refer to oligopolies, but they also have market power. If such market power is abused or misused, it will have the same deleterious effects to society as a monopoly that abuses market power.

Instead of using "combinations in restraint of trade" or "unfair competition," as stated in our Constitution and as restated in our Revised Penal Code and the Intellectual Property Code, the EPIRA uses the parlance "anti-competitive behavior," which is similar to the "combinations in restraint of trade" or "unfair competition." Under the Energy Regulatory Commission's Competition Rules, anticompetitive agreements are those that (1) "would have, or would likely to have, the effect of substantially lessening competition in a Market" or (2) "is a price-fixing provision."[402]

The Constitution disallows combinations in restraint of trade and unfair competition because it is antithetical to the free market ideal, which this State subscribes to. Penalizing anticompetitive behavior achieves the similar objective of a free market enterprise. Anticompetitive acts have the

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400 ERC's Competition Rules and Complaint Procedures, Rule 5, Sec. 1.
401 PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 668–669 (19th ed., 2009).
402 ERC's Competition Rules and Complaint Procedures, Rule 4, Sec. 1.

effect of restraining trade. The EPIRA's Implementing Rules and Regulations likewise considers anticompetitive behavior as unfair trade practices.

Under the EPIRA Implementing Rules and Regulations, there is a lengthy enumeration of anticompetitive behavior and other unfair trade practices:

> SECTION 8. *Anti-Competitive Behavior and Other Unfair Trade Practices.* — The [Energy Regulatory Commission] shall promulgate Competition Rules prohibiting, and specifying appropriate penalties and other remedies for, any contract, combination or conspiracy that unreasonably restricts competition in any market for electricity, or any conduct that constitutes an abuse of market power or an attempted monopolization of any market for electricity, including but not limited to the following:
>
> (a) Fixing prices of products or services: Electric Power Industry Participants that are competitors shall not enter into any agreement or understanding, tacit or explicit, to fix, peg or stabilize the price of any product or service. *Price fixing shall be deemed to include agreements on bids, price floors, price ceilings, pricing formulas and resale prices, and agreements on credit or any other terms of a transaction between a buyer and a seller.*
>
> (b) Fixing output of products or services: Electric Power Industry Participants that are competitors shall not enter into any agreement or understanding, tacit or explicit, to fix, limit or otherwise determine their output of any product or service.
>
> (c) Customer, Product, Service or Territorial Divisions: Electric Power Industry Participants that are competitors shall not enter into any agreement or understanding, tacit or explicit, as to the customers or the geographic territories they will serve, or the products or services they will sell.
>
> (d) Tying: Electric Power Industry Participants shall not use a position of market power to condition the sale of one product or service on the purchase of another product or service. No Distribution Utility shall make access to its Distribution System contingent upon the purchase of generation, metering, billing or other services.
>
> (e) Physical or Economic Withholding: *Electric Power Industry Participants shall not use physical operating practices or bidding strategies that limit the market participation of a generation unit under conditions that will result in significant increases in market prices.*
>
> (f) Discriminatory provision of regulated distribution or transmission services: Regulated distribution and transmission services shall be provided on a basis that is not unduly discriminatory. Examples of unduly discriminatory behavior include, but not limited to the following:
>
> > (i) A Distribution Utility or TRANSCO or its Buyer or Concessionaire refuses to interconnect Generation Company, IPP

> Administrator, or Supplier other than for reasons of system security or reliability or reasonable financial or credit considerations pursuant to the Grid or Distribution Codes or commission of acts constituting grounds for suspension of the service under any applicable rule and regulation.
>
> (ii) A Distribution Utility or TRANSCO or its Buyer or Concessionaire gives a Generation Company, IPP Administrator, or Supplier, including without limitation any of the Distribution Utility's Affiliates, any preference or advantage over any other Generation Company, IPP Administrator, or Supplier in processing a request for Transmission or Distribution of Electricity.
>
> (iii) A Distribution Utility or TRANSCO or its Buyer or Concessionaire gives a Generation Company, IPP Administrator, or Supplier, including without limitation any of the Distribution Utility's Affiliates, any preference or advantage in the dissemination or disclosure of customer or transmission or Distribution System information, and any such information that has not been made available to all Electric Power Industry Participants at the same time and in a non-discriminatory manner.
>
> (iv) A Distribution Utility or TRANSCO or its Buyer or Concessionaire provides any preference or advantage to any Supplier in the disclosure of information about operational status and availability of the Distribution System and transmission system.
>
> (v) A Distribution Utility does not provide all regulated services, and does not apply Distribution Wheeling Charges to any Supplier that is not an Affiliate, in the same manner as it does for itself or its Affiliates. TRANSCO or its Buyer or Concessionaire shall provide all regulated services and shall apply Transmission Charges to any Electric Power Industry Participant in the same manner as it does for PSALM or NPC.
>
> (g) Misrepresentation or false advertising of a Distribution Utility: A Distribution Utility or its Affiliate shall not state or imply that any distribution service provided to an Affiliate is inherently superior, solely on the basis of Affiliate's relationship with the Distribution Utility, to that provided to any other Supplier.
>
> (h) Cross-Subsidization: Consistent with Section 26 of the Act, a Distribution Utility shall not use its revenues or resources from regulated distribution services to reduce the cost or price of its competitive services (generation or supply).[403]

Under the Wholesale Electricity Spot Market Market Surveillance, Compliance and Enforcement Market Manual, the following acts constitute anticompetitive behavior:

> 7.4.3 The following conduct of a WESM member shall, among others, be considered as Anti-Competitive Behavior when such conduct significantly

[403] EPIRA Implementing Rules and Regulations, rule 11, sec. 8.

affects prices in the WESM:

> (a) Physical withholding or the refusal to offer to sell, or schedule, the maximum available output of reserve to the WESM, by a facility available and capable of producing such output or reserve. This type of conduct may, among others, include:
>
> > (i) Falsely declaring that a generation facility has been forced out of service, or has otherwise become unavailable or has constraints that limits its output or reserve; or
> >
> > (ii) Operating a generating unit in real-time to produce an output level that is less than the System Operator's dispatch instruction.
>
> (b) Economic withholding or submitting of bids for a facility that are unjustifiably high so that the facility output or reserve is not, or will not, be dispatched, or so that the bid will set the price.

During the proceedings of this case, it became apparent that several electric power participants engaged in anticompetitive behavior as enumerated in the EPIRA Implementing Rules and Regulations and the Wholesale Electricity Spot Market Market Manual. Dr. Maria Joy V. Abrenica, identified these in her *amicus* brief:

First, there was capacity withholding on the part of Malaya Thermal Power Plant. The action of Power Sector Assets and Liabilities Management Corporation in allowing Malaya to be in open-breaker status during the Malampaya shutdown constitutes anticompetitive behavior under the Wholesale Electricity Spot Market Market Manual.[404] Power Sector Assets and Liabilities Management Corporation was represented during the coordination meetings with respect to the Malampaya shutdown, and was aware that there might be a tightness in supply.[405] Despite its awareness, it still withheld the capacity of the Malaya Thermal Power Plant, which contributed to the increase in generation prices during the November 2013 billing month.[406]

MERALCO also engaged in capacity withholding with respect to Thermal Mobile Inc.'s capacity.[407] The Power Supply Agreement between MERALCO and Thermal Mobile Inc. was unusual because MERALCO instructed Thermal Mobile Inc. on how to bid at the Wholesale Electricity Spot Market.[408] Thermal Mobile Inc. was classified as a peaking plant and MERALCO instructed it to bid the ceiling during off-peak hours (₱62.00) and to bid low during peak hours.[409] Due to the tightness of supply in November to December 2013, the market cleared Thermal Mobile Inc.'s bid

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404 Dr. Maria Joy Abrenica's *Amicus Curiae* Memorandum, pp. 21–23.
405 Id.
406 Id. at 23.
407 Id. at 24.
408 Id.
409 Id.

45 times.[410] This is a breach of the WESM Market Manual.

Dr. Abrenica also referred to MERALCO's behavior with Thermal Mobile Inc. as "a form of vertical restraint . . . . Vertical restraints refer to contractual provisions that limit one party's decision. They are deemed anticompetitive if they either restrict competition or constitute abuse of dominant position."[411] It is clear in Appendix F of MERALCO's Power Supply Agreement with Thermal Mobile Inc. that MERALCO was going to submit a day-ahead nomination of price and quantity offers, which should be followed by Thermal Mobile Inc. in bidding at the WESM. The usual practice for distribution utilities is to nominate the quantity only, not both the price and quantity. MERALCO exercises the same level of control with respect to Quezon Power Philippines Ltd. Co., First Gas Power Corp. and FGP Corporation's power plants. Such provision allowing for both price and quantity nomination by the distribution utility gives MERALCO "effective control over [those power plants'] capacity."[412] As such these power plants "may be considered as belonging to MERALCO."[413]

All these acts were committed by these industry players supposed to be under the auspices of the Energy Regulatory Commission. Thermal Mobile Inc. and MERALCO flagrantly entered into a price-fixing scheme violative of EPIRA Implementing Rules and Regulations, Rule 11, Section 8(a), under a Power Supply Agreement that was provisionally approved by the Energy Regulatory Commission. The price-fixing provisions were not even subject to reservations from the Energy Regulatory Commission. This is outright regulatory failure.

VII

Petitioners' concern that the generation sector is outside of the Energy Regulatory Commission regulation is baseless. Power generation is not a public utility but a "business affected with public interest" still subject to regulation:

> SECTION 6. *Generation Sector.* – Generation of electric power, a business affected with public interest, shall be competitive and open.
>
> Upon the effectivity of this Act, any new generation company shall, before it operates, *secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.*
>
> Any law to the contrary notwithstanding, power generation shall

410 Id. at 18.
411 Id. at 26.
412 Id. at 28.
413 Id.

> not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.
>
> Upon implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.
>
> Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.
>
> *The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their financial statements.*[414] (Emphasis supplied)

This Court has discussed that under the EPIRA, "the generation of electric power, a business affected with public interest, was opened to private sector and any new generation company is required to secure a certificate of compliance from the [Energy Regulatory Commission], as well as health, safety and environmental clearances from the concerned government agencies."[415]

Opening up the generation sector to private enterprises recognizes that this sector is not a natural monopoly.

There is a natural monopoly "when production technology, such as relatively high fixed costs, causes long-run average total costs to decline as output expands."[416] This involves high barriers to entry due to expensive capital, technical requirements, and the like. It is premised on the idea that competition will not work,[417] as more suppliers will just result in higher prices.

Public utilities have been issued franchise monopolies under the belief that they are natural monopolies.[418] In the 1928 case of *Batangas Transportation v. Orlanes,*[419] for example, this Court cited Section 775 of Pond on Public Utilities in that public utilities are natural monopolies:

> Section 775 of Pond on Public Utilities, which is recognized as a standard authority, states the rule thus:

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414 Republic Act No. 9136 (2001), sec. 49.

415 *IDEALS v. PSALM*, 696 Phil. 486, 537–538 (2012) [Per J. Villarama, Jr., En Banc].

416 Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 THE REVIEW OF AUSTRIAN ECONOMICS 43, 43 (1996).

417 HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW (1985), p.34.

418 Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 THE REVIEW OF AUSTRIAN ECONOMICS 43, 43 (1996).

419 52 Phil. 455 (1928) [Per J. Johns, En Banc]

> "The policy of regulation, upon which our present public utility commission plan is based and ***which tends to do away with competition among public utilities as they are natural monopolies***, is at once the reason and the justification for the holding of our courts that the regulation of an existing system of transportation, which is properly serving a given field, or may be required to do so, is to be preferred to competition among several independent systems. While requiring a proper service from a single system for a city or territory in consideration for protecting it as a monopoly for all the service required and in conserving its resources, no economic waste results and service may be furnished at the minimum cost. The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates."[420] (Emphasis supplied)

However, there are those who submit that the natural monopoly theory was but "an *ex post* rationale for government intervention."[421] During the late 1800s to early 1900s, there was plenty of competition in the public utility industries.[422] During the period when the first government franchise monopolies were being issued, "the large majority of economists understood that large-scale, capital intensive production did *not* lead to monopoly, but was an absolutely desirable aspect of the competitive process."[423]

In the United States, for example, the natural monopoly theory, which submits that competition will not work for public utility industries, was contradicted by the long running existence of competition in the electric industry.[424] In his study of electric utility competition, economist Walter J. Primeaux found that "contrary to natural monopoly theory, costs are actually lower where there are two firms operating"[425] and "customers have gained substantial benefits from the competition compared to cities where there are electric utility monopolies."[426]

This supports the move toward deregulation of the power generation and supply sectors in this country under the EPIRA. However, the fact that public utilities are not natural monopolies does not mean that the market conditions are always fit for free competition.

Laissez-faire directly translates to "leave us alone," which means "that

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420 Id. at 467.

421 Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 THE REVIEW OF AUSTRIAN ECONOMICS, 43, 43 (1996).

422 Id. at 44.

423 Id. at 43.

424 Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 The Review of Austrian Economics 43, 53 (1996).

425 Id. *citing* WALTER J. PRIMEAUX, JR., DIRECT ELECTRIC UTILITY COMPETITION: THE NATURAL MONOPOLY MYTH 175 (New York: Praeger, 1986).

426 Id.

government should interfere as little as possible in economic affairs and leave economic decisions to the private decision making of buyers and sellers."[427] Its primary advocate, Adam Smith, refers to an "invisible hand" that directs individuals, motivated by their own interests, to promote a mutually beneficial end to society.[428]

This Court has discussed how *laissez-faire* as a policy has long been rejected in this jurisdiction,[429] giving way to government intervention and control in the economic arena in its commitment toward general welfare.

The 1975 case of *Philippine Virginia Tobacco v. Court of Industrial Relations*[430] involved employees' claim for overtime compensation, which was awarded by respondent court. The petitioner elevated the case arguing that it was exercising governmental functions, thus, beyond respondent court's jurisdiction.[431] In its discussion on government functions, this Court mentioned how the government used to come in for certain areas and initiatives "because it was better equipped to administer for the public welfare than is any private individual or group of individuals":

> The irrelevance of such a distinction considering the needs of the times was clearly pointed out by the present Chief Justice, who took note, speaking of the reconstituted Agricultural Credit Administration, that functions of that sort "may not be strictly what President Wilson described as 'constituent' (as distinguished from 'ministrant'), such as those relating to the maintenance of peace and the prevention of crime, those regulating property and property rights, those relating to the administration of justice and the determination of political duties of citizens, and those relating to national defense and foreign relations. Under this traditional classification, such constituent functions are exercised by the State as attributes of sovereignty, and not merely to promote the welfare, progress and prosperity of the people – these latter functions being ministrant, the exercise of which is optional on the part of the government." Nonetheless, as he explained so persuasively: ***"The growing complexities of modern society, however, have rendered this traditional classification of the functions of government quite unrealistic, not to say obsolete. The areas which used to be left to private enterprise and initiative and which the government was called upon to enter optionally, and only 'because it was better equipped to administer for the public welfare than is any private individual or group of individuals,' continue to lose their well-defined boundaries and to be absorbed within activities that the***

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427 PAUL SAMUELSON, ECONOMICS 25 (Eighteenth Edition, 2006)

428 "Every individual endeavors to employ his capital so that its produce may be of greatest value. He generally neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, only his own gain. And he is in this led by an invisible hand to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it." Adam Smith, The Wealth of Nations (1776), as cited in PAUL SAMUELSON, ECONOMICS 25 (Eighteenth Edition, 2006).

429 *See Philippine Association of Service Exporters v. Drilon,* 246 Phil. 393, 406 (1988) [Per J. Sarmiento, En Banc]; *See also J.M. Tuason & Co. v. Land Tenure Administration,* 142 Phil. 293 (1970) [Per J. Fernando, En Banc]; *Ermita-Malate Hotel and Motel Associations, Inc. v. City of Manila,* 127 Phil. 306, 324 (1967) [Per J. Fernando, En Banc].

430 160 Phil. 431 (1975) [Per J. Fernando, En Banc].

431 Id. at 439.

government must undertake in its sovereign capacity if it is to meet the increasing social challenges of the times. Here as almost everywhere else the tendency is undoubtedly towards a greater socialization of economic forces. Here of course this development was envisioned, indeed adopted as a national policy, by the Constitution itself in its declaration of principle concerning the promotion of social justice." Thus was laid to rest the doctrine in *Bacani vs. National Coconut Corporation*, based on the Wilsonian classification of the tasks incumbent on government into constituent and ministrant in accordance with the laissez faire principle. That concept, then dominant in economics, was carried into the governmental sphere, as noted in a textbook on political science, the first edition of which was published in 1898, its author being the then Professor, later American President, Woodrow Wilson. He took pains to emphasize that what was categorized by him as constituent functions had its basis in a recognition of what was demanded by the "strictest [concept of] laissez faire, [as they] are indeed the very bonds of society." The other functions he would minimize as ministrant or optional.

It is a matter of law that in the Philippines, the laissez faire principle hardly commanded the authoritative position which at one time it held in the United States. As early as 1919, Justice Malcolm in *Rubi vs. Provincial Board*, could affirm: "The doctrines of *laissez faire* and of unrestricted freedom of the individual, as axioms of economic and political theory, are of the past. The modern period has shown a widespread belief in the amplest possible demonstration of government activity." The 1935 Constitution, as was indicated earlier, continued that approach. ***As noted in Edu vs. Ericta: "What is more, to erase any doubts, the Constitutional Convention saw to it that the concept of laissez-faire was rejected. It entrusted to our government the responsiblity of coping with social and economic problems with the commensurate power of control over economic affairs.*** Thereby it could live up to its commitment to promote the general welfare through state action." Nor did the opinion in Edu stop there: "To repeat, our Constitution which took effect in 1935 erased whatever doubts there might be on that score. Its philosophy is a repudiation of *laissez-faire*. One of the leading members of the Constitutional Convention, Manuel A. Roxas, later the first President of the Republic, made it clear when he disposed of the objection of Delegate Jose Reyes of Sorsogon, who noted the 'vast extensions in the sphere of governmental functions' and the 'almost unlimited power to interfere in the affairs of industry and agriculture as well as to compete with existing business' as 'reflections of the fascination exerted by [the then] current tendencies' in other jurisdictions. He spoke thus: "My answer is that this constitution has a definite and well defined philosophy, not only political but social and economic[.] If in this Constitution the gentlemen will find declarations of economic policy they are there because they are necessary to safeguard the interests and welfare of the Filipino people because we believe that the days have come when in self-defense, a nation may provide in its constitution those safeguards, the patrimony, the freedom to grow, the freedom to develop national aspirations and national interests, not to be hampered by the artificial boundaries which a constitutional provision automatically imposes."[432] (Emphasis supplied, citations omitted)

In an age of technological advancement and development, the private

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[432] Id. at 441–443.

sector is better suited to assist the state in providing goods and services that further public interest. Private sector participation in nation building is recognized and encouraged under Article II, Section 20 of the Constitution:

> SECTION 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

Of course, businesses imbued with public interest are still subject to government regulation. Thus, a middle ground, where relevant government agencies come in to highly regulate such businesses imbued with public interest is justified.

JG Summit Holdings v. Court of Appeals[433] recognized that there are businesses that may be regulated for public good, but such regulation per se does not make it a public utility.[434]

An example of a business imbued with public interest and highly regulated is the banking industry. This is because it is "impressed with public interest and great reliance is made on the bank's sworn profession of diligence and meticulousness in giving irreproachable service."[435]

As early as 1920, the Court ruled in *United States v. Tan Piaco*[436] that "[p]ublic use is not synonymous with public interest."[437] The applicable law then interpreted by the Court was Section 14 of Act No. 2307.[438] Section 14 provides that "[t]he term '*public utility*' is hereby defined to include every individual, copartnership, association, corporation or joint stock company. . . that now or hereafter may own, operate, manage, or control any common carrier, railroad, street railway. . . engaged in the transportation of passengers, cargo, . . . *for public use*." According to this Court, "the essential feature of public use is that it is not confined to privileged individuals, but is open to the indefinite public."[439]

In 1927, *Santos v. Public Service Commission*[440] discussed how Section 14 of Act No. 2307 has been superseded by Section 13 of Act No. 3108. This now provides that "[t]he term '**public service**' is hereby defined

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433 458 Phil. 581 (2003) [Per J. Puno, Special First Division].

434 Id. at 603.

435 *Solidbank v. Spouses Tan*, 548 Phil. 672, 678 (2007 [First Division, J. Corona] *citing Prudential Bank v. Court of Appeals*, 384 Phil. 817 (2000) [Per J. Quisumbing, Second Division]; *Bank of the Philippine Islands v. Casa Montessori International*, 474 Phil. 298 (2004) [Per J. Panganiban, First Division]. *See also Gonzales v. PCIB*, 659 Phil. 244 (2011) [Per J. Velasco, Jr., First Division]; and *Citibank N.A., v. Atty. Dinopol*, 650 Phil. 188 (2010) [Per J. Mendoza, Second Division].

436 40 Phil. 853 (1920) [Per J. Johnson, First Division].

437 Id. at 856.

438 As amended by Section 9 of Act No. 2694 (1917).

439 *U.S. v. Tan Piaco*, 40 Phil. 853, 856 (1920) [Per J. Johnson, First Division]. *See also Iloilo Ice and Cold Storage v. Public Utility Board*, 44 Phil. 551, 557 (1923) [Per J. Malcolm, First Division].

440 50 Phil. 720 (1927) [Per J. Malcolm, First Division].

to include every individual copartnership, association, corporation, or joint-stock company. . . that now or hereafter may own, operate, manage, or control within the Philippine Islands, *for hire or compensation,* any common carrier, railroad, street railway. . . engaged in the transportation of passengers, cargo[.]"[441] In 1932, this Court explained that "the idea of public use is implicit in the term 'public service.'"[442]

The 1936 case of *North Negros Sugar v. Hidalgo*[443] involved a road constructed by plaintiff on its own land to connect the mill site to the provincial road. This road was made accessible to the general public. Motor vehicles were charged a passage fee of ₱0.15, but defendant refused to pay this toll. This Court held that "[t]he road in question being a public utility, or, to be more exact, a private property affected with a public interest, it is not lawful to make arbitrary exceptions with respect to its use and enjoyment."[444] In his Concurring and Dissenting Opinion, Justice Laurel explained that the term 'public utility' has a technical meaning in this jurisdiction, referring to enterprises enumerated in Section 13 of Act No. 3108, as amended. According to Justice Laurel, "[t]he difficulty arises because 'public utility' is confused with 'public interest.'"[445]

Jurisprudence has also clarified that a legislative franchise is not necessary before each public utility may operate, as certain administrative agencies have been granted the authority to issue licenses for the operation of certain public utilities.[446]

In 2003, *Republic v. MERALCO*[447] held that "[t]he business and operations of a public utility are imbued with public interest" and that "a public utility is engaged in public service—providing basic commodities and services indispensable to the interest of the general public."[448]

On the other hand, *JG Summit Holdings v. Court of Appeals*[449] issued later in 2003 discussed how "the fact that a business is affected with public interest does not imply that it is under a duty to serve the public."[450] According to this Court, "[w]hile the business may be regulated for public good, the regulation cannot justify the classification of a purely private enterprise as a public utility."[451]

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441 Id. at 722–723.
442 *Luzon Brokerage v. Public Service Commission*, 57 Phil. 536, 548 (1932) [Per J. Butte, En Banc].
443 63 Phil. 664 (1936) [Per J. Recto, En Banc].
444 Id. at 691.
445 Id. at 703.
446 *Albano v. Reyes*, 256 Phil. 718, 725 (1989) [Per J. Paras, En Banc]; *Metropolitan Cebu Water District v. Adala*, 553 Phil. 432, 444 (2007) [Per J. Carpio-Morales, En Banc].
447 449 Phil. 118 (2003) [Per J. Puno, Third Division].
448 Id. at 123.
449 458 Phil. 581 (2003) [Per J. Puno, Special First Division]
450 Id. at 603.
451 Id.

The evolution of jurisprudence shows a trend to recognize the difference between public utilities and businesses imbued with public interest. While public utilities are necessarily businesses imbued with public interest, the inverse is not always true.

The existence of businesses imbued with public interests as a separate class must be emphasized. The urgency in deregulating industries to attract private investors in these businesses should not be delayed by what may be described as an archaic definition of public utilities. Deregulation in certain industries is economically feasible. Moreover, it suffices that the applicable laws for businesses imbued with public interests already provide that they are highly regulated industries.

VIII

The December 9, 2013 Energy Regulatory Commission Letter approval was issued with grave abuse of discretion. Thus, it must be nullified. I maintain that any further consideration, if appropriate, of factual questions relating to a proposal by MERALCO for a staggered collection of rate increases and whatever resulting carrying costs, in order that it may recover generation costs, must be in keeping with the parameters this Opinion has discussed. Further determinations in such manner fall under the Energy Regulatory Commission's jurisdiction as it is the administrative authority in charge of issues such as electricity rate increase applications. This includes due notification of the December 5, 2013 Letter request—and other similar requests—as well as strict compliance with all the procedural requisites provided under the law, rules, and regulations.

Further to the December 9, 2013 Letter approval, the Energy Regulatory Commission filed a manifestation and motion attaching a copy of its March 3, 2014 order in the case docketed as ERC Case No. 2014-021MC. The Commission rendered this March 3, 2014 order even if it was still in the process of "completing its findings on the possible abuse of market power which could have negatively impacted on the prices of electricity in the market."[452] It acknowledged that it was based on an unfinished investigation,[453] and yet it included a *fallo* voiding the Luzon Wholesale Electricity Spot Market prices and imposing regulated prices instead.[454]

According to respondents, the Energy Regulatory Commission also did not notify the affected parties about ERC Case No. 2014-021MC, in violation of their right to due process. Most of them manifested before this

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[452] ERC March 3, 2014 Order, p. 21.
[453] ERC March 3, 2014 Order, p. 5.
[454] ERC March 3, 2014 Order, pp. 32–33.

Court that they filed petitions to intervene[455] in ERC Case No. 2014-021MC, and motions for reconsideration of the March 3, 2014 order,[456] to challenge its premature and erroneous findings. Thus, the March 3, 2014 Energy Regulatory Commission order should similarly be nullified considering the circumstances of its issuance.

ACCORDINGLY, for having been issued with grave abuse of discretion, I vote to **DECLARE** as **NULL** and **VOID** both the December 9, 2013 Energy Regulatory Commission Letter approving MERALCO's December 5, 2013 Letter proposal, as well as its March 3, 2014 Order.

MARVIC M.V.F. LEONEN
Associate Justice

CERTIFIED TRUE COPY
MARIFE M. LOMIBAO-CUEVAS
Clerk of Court
Supreme Court

[455] TLI Counter-Manifestation and Urgent Motion dated March 26, 2014, p. 4; and AP Renewables Counter-Manifestation dated April 3, 2014, p. 2

[456] SNAP Magat Counter-Manifestation dated April 3, 2014, p. 2; and SMEC Manifestation dated April 3, 2014, p. 2.