Republic of the Philippines
SUPREME COURT
Manila

En Banc

NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS, INC. AND BOSES NG KONSYUMER ALLIANCE, INC.,

Petitioners,

- versus -

ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY, JOINT CONGRESSIONAL ENERGY COMMISSION AND MANILA ELECTRIC COMPANY,

Respondents.

G.R. No. 264571

For: Certiorari, Prohibition and Injunction under Rules 58 and 65 (with prayer for a TRO and/or Writ of Preliminary Injunction)

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PETITION

Petitioners National Association of Electricity Consumers for Reforms, Inc. (NASECORE) and Boses Ng Konsyumer Alliance, Inc. (BKAI), by undersigned counsel, unto this Honorable Court, respectfully state:

Prefatory Statement

1. "As the spring cannot rise higher than its source, neither can a statute be at variance with the Constitution."[1]

2. This case is a direct, not collateral, attack on the constitutionality of certain issuances of the Energy Regulatory Commission and the Department of Energy – which are the causes of today's absurdly high electricity prices.

3. This case deals with the aftermath of the Supreme Court *en* banc decision in NASECORE vs. ERC *(*G.R. No. 163935, February 2, 2006*)*, which has been nullified by subsequent actions of public

[1] Republic vs. Bajao, G.R. No. 160596, March 20, 2009

respondents, without the same being expressly abandoned by this tribunal.

4. This case is, therefore, a continuation of G.R. No. 163935.

Nature and Basis of the Petition

5. This is a petition for injunction under Rule 58 and for certiorari and prohibition under Rule 65 of the Rules of Court questioning the constitutionality of **(i)** the amendment to Section 4(e), Rule 3 of the Implementing Rules and Regulations of the Republic Act No. 9136 or the "Electric Power Industry Reform Act of 2001" (IRR of EPIRA) and **(ii)** ERC Resolution No. 16, Series of 2009, which do away with the mandatory notice and hearing requirement in the filing of petitions for rate adjustments – both of which questioned issuances contravene the due process clause, State policy and express provisions of the EPIRA.

The Parties

6. Petitioner National Association of Electricity Consumers for Reforms, Inc. (NASECORE) is a corporation duly organized and existing, with office address at *Roxas Seafront Garden, Ortigas Street corner Roxas Boulevard, Pasay City, Metro Manila*, herein represented by its President, Petronilo L. Ilagan.

7. Petitioner Boses Ng Konsyumer Alliance, Inc. (BKAI) is a corporation duly organized and existing, with office address at *64B Aguirre Avenue, Pilar Village, Las Piñas City, Metro Manila*, herein represented by its President Rogelio G. Reyes.

8. Public respondent Energy Regulatory Commission (ERC) is impleaded in its official capacity as an agency of the government with regulatory and quasi-judicial powers over the energy sector, including electricity generation plants, distribution utilities and transmission utilities, with office address at *Exquadra Tower, 1 Jade Drive corner Exchange Road, Ortigas Center, Pasig City, Metro Manila.*

9. Public respondent Department of Energy (DOE) is impleaded in its official capacity as the department of the government which controls and supervises all programs of the government relative to energy exploration, development, utilization, distribution and conservation, with office address at the *Energy Center, Rizal Drive, Fort Bonifacio, Taguig City, Metro Manila.*

10. Public respondent Joint Congressional Energy Commission (JCEC)[2] is impleaded herein in its official capacity as the body created under Section 62 of the EPIRA to exercise oversight functions over energy regulation, including the adoption of Implementing Rules and Regulations thereof, with office address at the Senate, *GSIS Building, Financial Center, Diokno Boulevard, Pasay City.*

11. Private respondent Manila Electric Company (MERALCO) is a public utility engaged in electric distribution operating under a secondary franchise, with business address at *Lopez Building, Ortigas Avenue, Pasig City, Metro Manila.*

12. All the foregoing parties may be served with summons, notices, resolutions, orders and other processes of the Honorable Court at their respective addresses indicated above.

Facts

13. Petitioner National Association of Energy Consumers for Reforms, Inc. (NASECORE) is engaged in consumer advocacy, representing the interests of more than 20 Million electricity consumers in the country.

14. Petitioner Boses Ng Konsyumer Alliance, Inc. (BKAI) is likewise engaged in consumer advocacy in collaboration with NASECORE.

15. The interests of petitioners and their constituents are affected by the rise and fall of electricity prices, effected monthly and automatically, without due process of law.

16. Petitioners' electricity bills collected over the past twelve (12) months show the variable and volatile generation rates billed by private respondent MERALCO.[3] These rates were set pursuant to public respondent ERC's Resolution No. 16, Series of 2009, entitled *"A Resolution Adopting the Rules Governing the Automatic Cost Adjustment and True-Up Mechanisms and Corresponding Confirmation Process for Distribution Utilities".*

17. Such "Automatic Cost Adjustment" mechanisms, however, are unconstitutional if one were to follow the Court's landmark ruling in *NASECORE vs. ERC (*G.R. No. 163935, February 2, 2006*)*. This

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[2] Formerly known as the "Joint Congressional **Power** Commission" under Section 62 of the EPIRA

[3] Annexes "A" to "R"

decision has not been abandoned and is still in force and effect, as recapitulated below.

18. On 03 October 2022, petitioner NASECORE's president Pete Ilagan wrote respondent ERC about the slew of regulations which had the word "automatic" on their titles - which the consumer group blamed for the *"unabated, runaway increases in generation charges … which have pushed electricity consumers to the brink of desperation"*.

> "Allow us to address the unabated, runaway increases in generation charges by electric cooperatives which have pushed electricity consumers to the brink of desperation.
>
> It is our observation that the generation rates which have more than doubled in the past months in the provinces is directly attributed to the "PASS-ON "provision in the Power Supply Contracts of Privately Owned Distribution Utilities and Government -Controlled Electric Cooperatives.
>
> We would like to cite ERC Resolutions and Guidelines on the above cited subject, as follows:
>
> 1. Guidelines for the Automatic Adjustment of the Generation Rates and System Loss Rates by Distribution Utilities issued on 13 October 2004.
>
> 2. RESOLUTION No. 10-01, Series of 2004, ***"IN THE MATTER OF AMENDING THE GUIDELINES FOR THE AUTOMATIC ADJUSTMENT OF GENERATION RATES AND SYSTEM LOSS RATES BY DISTRIBUTION UTILITIES",*** issued on 20 October 2004.
>
> 3. RESOLUTION No. 10-04, Series of 2004, " ***IN THE MATTER OF AMENDING THE GUIDELINES FOR THE AUTOMATIC ADJUSTMENT OF GENERATION RATES AND SYSTEM LOSS RATES BY DISTRIBUTION UTILITIES" i***ssued on 27 October 2004.
>
> We would like to point out that these above cited Resolutions/Guidelines were effectively annulled by the **Supreme Court in its decision under G.R. No. 163935**…
>
> Based on the above cited Supreme Court decision, it is our expectation that the application of this "Automatic Adjustment of the GENERATION RATES AND SYSTEM LOSS RATES" by distribution utilities as well as Electric Cooperatives should have been stopped by the Commission." *(Emphasis author's)*

A copy of the above letter is hereto attached as **Annex "S".**

19. Respondent ERC, through its new Chair Monalisa C. Dimalanta responded to Pete Ilagan's letter by, ironically, invoking the Supreme Court Decision in G.R. No. 163935 (which actually favored the consumers), misconstruing the opinion of the Court and citing *obiters* that run counter to the rationale of the decision. Said letter dated 17 October 2022 states:

> "It can be recalled that the said Decision covers two (2) subject matters, namely: (i) SC voided ERC's Order dated 02 June 2004 in ERC Case No. 2004-112 which approved the increase of Manila Electric Company's (MERALCO) generation charge as contained in its Amended Application pursuant to ERC's Order dated 24 February 2003 in ERC Case No. 2003-44 wherein ERC adopted the GRAM; and (ii) SC's declaration that GRAM is ineffective…
>
> "In the case of Reso 16-2009, DUs are allowed to adjust generation rate on a monthly basis following a formula provided for by the ERC. The adjustment shall be subject to post confirmation process. It should be noted that Reso 16-2009 is based largely on the amended Section 4 (e), Rule III of the EPIRA IRR, *to wit*:
>
> xxx xxx xxx
>
> **"This Section 4 (e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance Section 36 of the Act.**
>
> **"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 ERC to avoid over/under recovery of charges."** *(Emphasis ERC's)*

A certified true copy of the above letter-legal opinion is hereto attached as **Annex "T".**

20. In a footnote to the above letter, ERC Chairman mentioned that the amendment was "adopted by the Joint Congressional Power Committee (now known as the Joint Congressional Energy Committee during its hearing last 21 June 2007."

21. Petitioner NASECORE president Pete Ilagan sought to find a copy of this amendment to Section 4 (e), Rule III of the EPIRA IRR o the EPIRA IRR. However, he could not find it in the DOE website. Neither could he find it in the ERC website, nor in related agencies such as the National Electrification Administration or National Power Corporation.

22. Finally, he went to the Senate. In a letter dated 29 November 2022, NASECORE wrote the Secretariat of the Senate Committee on Energy seeking a copy of the Resolution of the Joint Congressional Power Commission adopting the aforesaid amendment to Section 4 (e), Rule III of the EPIRA IRR.[4] This is in light of the JCPC's oversight functions over energy regulation under Section 62 of the EPIRA.

23. To petitioner's surprise, the Senate Legislative Records and Archives Service issued a Certification[5] on November 29, 2022 to the effect that:

> "The Senate Archives which is repository of official documents of the Senate does **not** have a copy of the requested resolution 'Copy of the Resolution of the Joint Congressional Energy Committee, 21 June 2007 (or thereabouts) Adopting an Amendment to Sec. 4 (E) Rule 3 of the Implementing Rules and Regulations of Republic Act 9136 (EPIRA).
>
> "The Senate Archives has a copy **only** of the Transcript of Committee Meeting (TCM) pertaining to the discussion on the proposed Section 4 (E) Rule 3 of the Implementing Rules and Regulations of Republic Act 9136 (EPIRA) as attached." *(Emphasis supplied)*

24. The transcript furnished by the Senate Archives to petitioners pertains to the Joint Congressional Power Commission meeting dated 07 June 2007, a certified true copy of which is hereto attached as **Annex "W".**

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[4] Annex "U"
[5] Annex "V"

25. There next arose the question of whether the amendment was published at all. Thus, petitioner NASECORE sent letters to respondents DOE and ERC, asking whether the amendment to the EPIRA IRR was published and, if so, when, copies of which are hereto attached as **Annexes "X"** and **"Y"**.

26. Only the ERC replied to the query in a letter dated 07 December 2022 to the following effect:

> "Based on our records, the said amendment, signed by the then Department of Energy (DOE) Secretary Raphael P.M. Lotilla dated 21 June 2007, was reported as published in the (1) Manila Standard Today, and (2) Manila Times, on 23 June 2007. However, only a photocopy is available on file (attached Annex A)."[6]

27. The DOE furnished petitioner a similar letter dated 07 December 2022 informing petitioners that "the DOE filed three (3) certified copies and an electronic copy of the amendments" with the UP Law Center, noting that the same was published in two (2) newspapers of general circulation, namely, Manila Standard Today and The Manila Times on 23 June 2007.[7]

28. This still leaves open the question why the Senate Archives has no copy of the resolution of the JCPC adopting the amendment in the exercise of its oversight functions under Section 62 of the EPIRA, there being only a "transcript" thereof.

Prior Proceedings

Proceedings in *NASECORE vs. ERC* (G.R. No. 163935)

29. The following is a recapitulation of the facts of the case in *National Association of Electricity Consumers for Reforms, Inc. vs. Energy Regulatory Commission* (G.R. No. 163935, 02 February 2006):

30. On October 30, 2001, the Energy Regulatory Commission (ERC) issued an Order requiring all distribution utilities to file their application for unbundled rates. In compliance therewith, respondent MERALCO filed on December 26, 2001 its application with the ERC for the approval of its unbundled rates and appraisal of

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[6] Annex "Z"
[7] Annex "BB"

its properties. The case was docketed as ERC Case No. 2001-900[7] and consolidated with ERC Case No. 2001-646.

31. Acting thereon, the ERC issued an Order and a Notice of Public Hearing both dated February 1, 2002 setting the case for initial hearing on March 11 and 12, 2002. In the same order, MERALCO was directed to cause the publication of the notice of public hearing at its own expense twice for two successive weeks in two newspapers of nationwide circulation, the last date of publication to be made not later than two weeks before the scheduled date of initial hearing.

32. The Office of the Solicitor General (OSG), the Commission on Audit and the Committees on Energy of both Houses of Congress were furnished with copies of the order and the notice of public hearing and were requested to have their respective duly authorized representatives present at the said hearing. Likewise, the Offices of the Municipal/City Mayors within MERALCO's franchise area were furnished with copies of the order and the notice of public hearing for the appropriate posting thereof on their respective bulletin boards.

33. At the initial hearing, representatives of MERALCO were present. Also at the said hearing were a representative from the OSG and oppositors to the application including Mr. Pete Ilagan, on behalf of herein petitioner NASECORE.

34. After a series of hearings, the ERC rendered the Decision dated March 20, 2003, approving MERALCO's unbundled schedule of rates effective on the next billing cycle. However, in the same decision, the ERC directed MERALCO, among others:

> "a. To discontinue charging the PPA [Purchased Power Adjustment] upon effectivity of the approved unbundled rates; any change in the cost of power purchased shall be reflected as deferred charges or credits which shall be recovered through the Generation Rate Adjustment Mechanism (GRAM) approved by the Commission for implementation per ERC Order effective February 24, 2003;"

35. In other words, MERALCO was directed to recover the costs of power purchased from the National Power Corporation (NAPOCOR) through a new adjustment mechanism called the Generation Rate Adjustment Mechanism (GRAM). Prior thereto, the said costs were recovered through the Purchased Power Adjustment (PPA) mechanism.

36. After taking into consideration the positions of the distribution utilities and the consumer groups, the ERC promulgated the Order

dated February 24, 2003 in ERC Case No. 2003-44. In the said order, the ERC adopted the Implementing Rules for the Recovery of Fuel and Independent Power Producer Costs: Generation Rate Adjustment Mechanism (GRAM) and the Implementing Rules for the Recovery of the Incremental Currency Exchange Rate Adjustment (ICERA). These implementing rules were all contained or incorporated in the aforesaid order.

37. The GRAM replaced the PPA insofar as the procedure for recovery of generation costs was concerned.

38. Thereafter, in consonance with the Decision dated March 20, 2003 in ERC Cases Nos. 2001-646 and 2001-900 and the Order dated February 24, 2003 in ERC Case No. 2003-44, respondent MERALCO filed with the ERC an amended application entitled *"In the Matter of the Application for the Recovery of the Independent Power Producer Costs under the Generation Rate Adjustment Mechanism (GRAM),"* docketed as ERC Case No. 2004-112.

39. Earlier, acting on respondent MERALCO's 1st application under the GRAM, the ERC, in the Order dated January 21, 2004 in ERC Case No. 2004-20, approved the generation charge of ₱3.1886 per kWh, inclusive of the deferred PPA.

40. In the amended application, respondent MERALCO averred that it had recalculated its proposed generation charge aimed at updating the generation charge of ₱3.1886 per kWh allowed in the January 21, 2004 Order to ₱3.4664 per kWh inclusive of the following:

    a. Computed Deferred Accounting Adjustment (DAA) of ₱0.0028 per kWh inclusive of the remaining balance in the DAA under the first GRAM;

    b. Deferred PPA of ₱0.1248 per kWh, increasing by ₱0.0022 from the ₱0.1226 previously authorized under ERC Case 2004-20. The increase is to account for the remaining 2 months (December 2003 and January 2004) IPP VAT savings passed on as part of the Mandated Rate Reduction (MRR).

41. Among others, respondent MERALCO averred that the proposed generation charge of ₱3.4664 per kWh was computed in conformity with the generation rate formula in Section 6[15] of the Implementing Rules for the Recovery of Fuel and Independent Power Producer Costs or the Generation Rate Adjustment Mechanism (GRAM), hereinafter referred to as the GRAM Implementing Rules. It thus prayed that the said proposed generation charge be approved for its implementation.

42. In the assailed Order dated June 2, 2004, the ERC approved the increase of respondent MERALCO's generation charge albeit only from ₱3.1886 to ₱3.3213 per kWh, the same to take effect immediately.

Petitioner NASECORE's Case in G.R. No. 163935

43. Petitioners NASECORE, et al. forthwith filed with the Supreme Court a petition for certiorari docketed as G.R. No. 163935 to nullify the said June 2, 2004 ERC Order for lack of requisite publication of respondent MERALCO's amended application, thereby depriving the petitioners of procedural due process. In addition, they invoke Section 4(e), Rule 3 of the Implementing Rules and Regulations (IRR) of the EPIRA which provides:

> "(e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement 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.
>
> This Section 4(e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance with Section 36 of the Act."

44. According to the petitioners, the June 2, 2004 ERC Order is devoid of any basis as respondent MERALCO did not comply with the requisite publication, i.e., its amended application was not published in a newspaper of general circulation. As a result of the omission, petitioners were not able to file their comments on respondent

MERALCO's amended application for the increase of its generation charge. Invoking the Court's pronouncements in Freedom from Debt Coalition v. ERC and MERALCO,[16] petitioners conclude that failure to comply with the publication requirement renders the June 2, 2004 ERC Order null and void.

Respondent MERALCO's Counter-arguments in G.R. No. 163935

45. Respondent MERALCO, for its part, in G.R. No. 163935, urged the Court to uphold the validity of the assailed ERC Order approving the increase of its generation charge. It contended, among others, that:

    1. Its amended application for the increase of its generation charge is excluded and/or exempted from the application of the publication requirement, among others, in Sec. 4(e), Rule 3 of the IRR of the EPIRA. The applicable rules are the GRAM Implementing Rules embodied in the ERC Order dated February 24, 2003. These rules govern any petition for the recovery of fuel and purchased power costs.

    2. The GRAM is an adjustment recovery mechanism which replaces the automatic recovery adjustment mechanisms (Fuel and Purchased Power Cost Adjustments) of NAPOCOR and the PPA of the distribution utilities. The GRAM would allow the periodic (quarterly) adjustment of the generation charge to reflect changes in fuel and purchased power costs after review by the ERC and before the costs are passed on to the customers.

    3. The authority of the ERC to promulgate the GRAM Implementing Rules is found in Section 43 of the EPIRA which requires the said regulatory body to, among others, "establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably..."

    4. Respondent MERALCO opines that to require it to comply with the requirements of Section 4(e), Rule 3 of the IRR of the EPIRA would defeat the reason behind the implementation of the adjustment mechanism which, quoting the ERC, is "to balance the need for timely recoveries of costs by the Utilities with the

Commission's need to review the reasonableness and prudence of such costs."

ERC's Counter-arguments in G.R. No. 163935

46. The ERC, through the Office of the Solicitor General (OSG), in G.R. No. 163935 defended the validity of its June 2, 2004 Order approving the increase of respondent MERALCO's generation charge from ₱3.1886 to ₱3.3213 per kWh effective immediately. According to the ERC:

    i. The said order was issued in accordance with the GRAM Implementing Rules it promulgated in the Order dated February 24, 2003 in ERC Case No 2003-44.

    ii. Section 43(f) of the EPIRA which, among others, expressly authorizes it to establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility. In relation thereto, Section 25 of the same law also provides that "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."

    iii. Section 43(u) thereof is also cited which vests the ERC with "the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector." Section 36 thereof directed the distribution utilities to file their revised rates for the approval by the ERC and that the distribution wheeling charges shall be unbundled from the retail rate and the rate shall reflect the respective costs of providing each service.

The Court's Ruling in G.R. No. 163935

47. The gist of the Supreme Court decision in G.R. No. 163935 is as follows:

    "The petition is granted.

"Contrary to the stance taken by the respondents, the amended application of respondent MERALCO for the increase of its generation charge is covered by Section 4(e), Rule 3 of the IRR of the EPIRA. For clarity, the said provision is quoted anew:

> "(e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement 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.
>
> This Section 4(e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance with Section 36 of the Act."

"The respondents contend that this provision applies only to independent rate applications and not to adjustment mechanisms like the GRAM; hence, respondent MERALCO's amended application for the increase of its generation charge is excluded and/or exempted from the application of the requirements of the above-quoted provision. This contention is erroneous. Section 4(e), Rule 3 of the IRR of the EPIRA could not be any clearer with respect to its coverage as it refers to "any application or petition for rate adjustment or for any relief affecting the consumers."

"In this connection, the EPIRA's definition of "retail rate" is instructive:

> (ss) "Retail Rate" refers to the total price paid by the end-users consisting of the charges for generation, transmission and related

ancillary services, distribution, supply and other related charges for electric service.

"Section 4(e), Rule 3 of the IRR of the EPIRA speaks of "any application or petition for rate adjustment" without making any distinctions. Hence, any application or petition that would result in the adjustment or change in the total price (retail rate) paid by the end-users, whether this change or adjustment is occasioned by the adjustment or change in the charges for generation, transmission, distribution, supply, etc., falls within its contemplation.

"In any case, that respondent MERALCO's amended application is covered by the said provision is mandated by the fact that the relief prayed for therein clearly affects the consumers as it results in the increase of the costs of their electricity consumption." *(NASECORE vs. ERC (G.R. No. 163935, February 2, 2006).*

Proceedings *after* the promulgation of G.R. No. 163935 on February 2, 2006.

48. Fast on the heels of the Supreme Court Decision in G.R. No. 163935, herein public respondents inaugurated a series of measures to defeat, negate, undermine and render ineffective and inutile the Court's ruling through blatant chicanery and rule-breaking.

49. First, sometime in June 2007, the then Joint Congressional Power Commission, upon the initiative of the Secretary of the DOE, convened to adopt an amendment to the IRR in the exercise of its oversight functions under Section 62 of the EPIRA. The purpose of the amendment was to do away with the cumbersome notice and hearing requirements in considering applications for rate adjustments. The amended Section 4(e), Rule 3 of the IRR of the EPIRA reads (in the DOE copy of the implementing rules):

> "Section 4. *Responsibilities of the ERC.* (e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement 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 the 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.
>
> This Section 4 (e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance Section 36 of the Act.
>
> **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 ERC to avoid over/under recovery of charges."**
>
> *(Emphasis supplied)*

50. However, there is no official copy of the Resolution of the JCPC adopting the amendment. Only a "transcript" thereof. As certified by the Senate Legislative Records and Archives Service on November 29, 2022[8]:

> "The Senate Archives which is repository of official documents of the Senate does **not** have a copy of the requested resolution 'Copy of the Resolution of the Joint Congressional Energy Committee, 21 June 2007 (or thereabouts) Adopting an

[8] Annex "V"

> Amendment to Sec. 4 (E) Rule 3 of the Implementing Rules and Regulations of Republic Act 9136 (EPIRA).
>
> "The Senate Archives has a copy **only** of the Transcript of Committee Meeting (TCM) pertaining to the discussion on the proposed Section 4 (E) Rule 3 of the Implementing Rules and Regulations of Republic Act 9136 (EPIRA) as attached."

51. The transcript provided petitioners pertains to the joint commission meeting of 07 June 2007, but in all of its 107 pages, it contains only a discussion of the possible wording of the amendment; but there is no record of the official adoption of the same by a vote of the Commission.

52. Petitioners sought to find proof of the existence and publication of the amendment to Section 4(e). Queries yielded this answer from the ERC:

> "Based on our records, the said amendment, signed by the then Department of Energy (DOE) Secretary Raphael P.M. Lotilla dated 21 June 2007, was reported as published in the (1) Manila Standard Today, and (2) Manila Times, on 23 June 2007. However, only a photocopy is available on file (attached Annex A).
>
> "Please note that under Section 37 (p) of Republic Act No. 9136 (EPIRA), it is within the DOE's mandate to formulate the EPIRA's implementing rules and regulations and, correspondingly, to publish said implementing rules and regulations for the same to be effective. Thus, the request for a copy of the amendment as published and any question pertaining to the details of the publication should be addressed to the DOE."[9]

53. The DOE sent a similar answer.[10] While there might be proof of the publication of the amendment by the DOE, still there is no proof that the JCPC, in the exercise of its powers under Section 62 of the EPIRA, actually adopted it in the form of a Resolution. The DOE cannot unilaterally introduce amendments to the IRR. Neither can the ERC. Amendments have to begin on the floor of the JCPC.

54. More importantly, and decisively, said amendment to the IRR is invalid as it operates as an amendment to the law itself, i.e., the EPIRA, the mother of all industry regulations – which a mere committee of Congress has no power to do. Even if composed of representatives of both houses, a rump committee does not

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[9] Annex "Z"
[10] Annex "AA"

constitute the whole of the legislature – plus the president of the Republic, which together have the power to make laws.

55. With the said dubious amendment as a fig leaf, public respondent ERC, under Chairperson Zenaida G. Cruz-Ducut promulgated Resolution No. 16, Series of 2009, inaugurating a regime of "automatic cost adjustments and true-up mechanisms" (with emphasis on the "automatic") – which had the effect of unshackling the power generators and transmission utilities from virtually all forms of regulation.

A certified true copy of Resolution No. 16, Series of 2009 is hereto attached as **Annex "BB".**

56. Under the above regulations, which are actually an oxymoron, power generators and transmission utilities need no longer file an application with the ERC for cost adjustments. They need only follow a complex formula under the GRAM or its successor AGRA, conjure a new rate and stick it to the consumers. Here are examples of the formulas, stultifying in their complexity:

FORMULA 1

$$GR = AGR + OGA$$

Where:

GR = Generation Rate expressed in Peso/kWh;

AGR = Adjusted Generation Rate calculated, as follows:

$$AGR = \frac{TGC}{TPG_{GR}}$$

Where:

$$TGC = [(GC_i + GC_{ii} + \cdots + GC_n) - 50\%\,(PPD_i + PPD_{ii} + \cdots + PPD_n) - PCR\,]$$

Section 3. Transmission Rate. The Transmission Rate (TR) shall be calculated and billed each calendar month by the DUs using the following formulae:

3.1. For Customer classes with TR expressed in Peso/kWh:

FORMULA 2.A

$$TR_N = \left(\frac{t_N}{TPG_{TR_N}} \right) + OTCA_N$$

Where:

TR_N = Transmission Rate expressed in Peso/kWh;

t_N = $PTC \times CP_N$;

FORMULA 2.C

$$TR_N = \left(\frac{t_N - \left(S_{TR_N} \times TKR_N \right)}{D_N} \right) + OTCA_N$$

Where:

TR_N = Transmission rate expressed in Peso/kW;

t_N = $PTC \times CP_N$;

57. In lieu of due process, applicants need only solve the above equations to determine and set the rates, on a monthly basis, under the questioned Resolution No. 16, Series of 2009 (**Annex "BB").**

58. There shall be no more notice and hearing, no more presentation of evidence, no more proving their cases by the standard of substantial evidence. Gone, too, is the consumers' right to intervene under Sections 23, 24 and 25 of the EPIRA, which NASECORE has exercised to good effect – winning favorable rulings from the ERC and the Supreme Court – with the ERC unceremoniously slamming the door on their faces.

59. Rate-setting has gone ***automatic.***

Material Dates

60. On 03 October 2022, petitioner NASECORE's president Pete Ilagan wrote respondent ERC about the slew of "regulations" which had the word "automatic" on their titles - which the consumer group blamed for the *"unabated, runaway increases in generation charges ...*

which have pushed electricity consumers to the brink of desperation".

> "Allow us to address the unabated, runaway increases in generation charges by electric cooperatives which have pushed electricity consumers to the brink of desperation.
>
> It is our observation that the generation rates which have more than doubled in the past months in the provinces is directly attributed to the "PASS-ON "provision in the Power Supply Contracts of Privately Owned Distribution Utilities and Government -Controlled Electric Cooperatives.
>
> We would like to cite ERC Resolutions and Guidelines on the above cited subject, as follows:
>
> 1. Guidelines for the Automatic Adjustment of the Generation Rates and System Loss Rates by Distribution Utilities issued on 13 October 2004.
>
> 2. RESOLUTION No. 10-01, Series of 2004, ***"IN THE MATTER OF AMENDING THE GUIDELINES FOR THE AUTOMATIC ADJUSTMENT OF GENERATION RATES AND SYSTEM LOSS RATES BY DISTRIBUTION UTILITIES",*** issued on 20 October 2004.
>
> 3. RESOLUTION No. 10-04, Series of 2004, " ***IN THE MATTER OF AMENDING THE GUIDELINES FOR THE AUTOMATIC ADJUSTMENT OF GENERATION RATES AND SYSTEM LOSS RATES BY DISTRIBUTION UTILITIES" i***ssued on 27 October 2004.
>
> We would like to point out that these above cited Resolutions/Guidelines were effectively annulled by the **Supreme Court in its decision under G.R. No. 163935**...
> Based on the above cited Supreme Court decision, it is our expectation that the application of this "Automatic Adjustment of the GENERATION RATES AND SYSTEM LOSS RATES" by distribution utilities as well as Eectric Cooperatives should have have been stopped by the Commission." *(Emphasis author's)*

A copy of the above letter is hereto attached as **Annex "S".**

61. Respondent ERC, through its new Chair Monalisa C. Dimalanta responded to Pete Ilagan's letter by, ironically, invoking the Supreme Court Decision in G.R. No. 163935 (which actually favored the consumers), misconstruing the opinion of the Court and citing *obiters* that run counter to the *ratio decidendi* of the decision. Said letter dated 17 October 2022 states:

> "It can be recalled that the said Decision covers two (2) subject matters, namely: (i) SC voided ERC's Order dated 02 June 2004 in ERC Case No. 2004-112 which approved the increase of Manila Electric Company's (MERALCO) generation charge as contained in its Amended Application pursuant to ERC's Order dated 24 February 2003 in ERC Case No. 2003-44 wherein ERC adopted the GRAM; and (ii) SC's declaration that GRAM is ineffective.
>
> On the first subject matter, by way of background, the ERC, in its Decision dated 02 March 2003, approved the unbundling rates of MERALCO with collatilla that the latter shall discontinue charging the Power Purchase Adjustment (PPA), and any change in the cost of power purchased shall be reflected as deferred charges or credits which shall be recovered through GRAM. Following ERC's Decision dated 20 March 2003, MERALCO filed its GRAM Application and later on, its Amended GRAM Application, proposing an increase in its generation rate. This was docketed as ERC Case No. 2004-112. The said application was approved by ERC through a voided Order dated 02 June 2004 in ERC Case No. 2004-112.
>
> The ERC's Order dated 02 June 2004 in ERC Case No. 2004-112 was declared void for failure to comply with Section 4 (e), Rule 3 of the Implementing Rules and Regulations (IRR) of Republic Act No. 9136, otherwise known as "Electric Power Industry Reform Act of 2001" (EPIRA) which requires prior publication of any rate application prior to any approval, *to wit:*
>
> Any application or petition for rate adjustment or for any relief affecting the consumers must be verified and accompanied with an acknowledgement of receipt of the 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.
>
> On the other hand, GRAM was declared ineffective as the said rule was not published in the Official Gazette or in a newspaper of general circulation. Neither was a copy of it filed with the Office of the National Administrative Register (ONAR).

> It should be emphasized that there was no declaration in the said SC Decision on the annulment of the GRAM or any declaration that it was invalid.
>
> To be precise, SC held that "the ERC is not, of course, precluded from promulgating rules, guidelines, or methodology, such as the GRAM, for the recovery by the distribution utilities of their fuel and purchased power costs. However, these rules, guidelines or methodology so adopted should conform to the requirements of pertinent laws, including Section 4 (e), Rule 3 of the IRR of the EPIRA."
>
> As pronounced in the said SC Decision, the GRAM is valid subject of ERC's quasi-legislative functions subject to conformity with the EPIRA-IRR. Thus, GRAM is a valid rule but is ineffective. Hence, the Order dated 02 June 2004 in ERC Case No. 2004-112 was declared void on the ground that it was issued based on an ineffective rule and the lack of publication of the Amended GRAM Application contrary to Section 4 (e), Rule III of the EPIRA IRR."

62. A certified true copy of the above letter-legal opinion is hereto attached as **Annex "T".**

63. Petitioners received the above letter-legal opinion on 24 October 2022.

QUESTIONED ORDERS AND ISSUANCES

64. Petitioners question the following rules and issuances of public respondents, to wit:

(1) The amendment to Section 4(e), Rule 3 of the IRR of the EPIRA, as adopted by respondents Joint Congressional Power Commission (now known as the Joint Congressional Energy Committee).

(2) Resolution No. 16, Series of 2009, entitled "A Resolution Adopting the Rules Governing the Automatic Cost Adjustment and True-Up Mechanisms and Corresponding Confirmation Process for Distribution Utilities" (**Annex "BB"**);

(3) Letter-legal opinion of respondent ERC, through Chairperson Monalisa C. Dimalanta dated 17 October 2022 (**Annex "T")**.

Grounds for Allowance of the Petition

I

THE AMENDMENT TO SEC. 4 (e), RULE III, OF THE IRR OF THE EPIRA IS UNCONSTITUTIONAL.

II

ERC RESOLUTION NO. 16, SERIES OF 2009, GOVERNING All FORMS OF AUTOMATIC COST ADJUSTMENT MECHANISMS IS LIKEWISE UNCONSTITUTIONAL, INVALID AND INEFFECTIVE.

Issues

I

WHETHER OR NOT THE AMENDMENT TO SEC. 4 (e), RULE III, OF THE IRR OF THE EPIRA IS CONSTITUTIONAL.

II

WHETHER OR NOT ERC RESOLUTION NO. 16, SERIES OF 2009, GOVERNING All FORMS OF AUTOMATIC COST ADJUSTMENT MECHANISMS IS LIKEWISE UNCONSTITUTIONAL, INVALID AND INEFFECTIVE.

Arguments and Discussion

I

THE AMENDMENT TO SEC. 4(e), RULE III, OF THE IRR OF EPIRA IS UNCONSTITUTIONAL.

65. This petition is a direct attack on the amendment to Section 4(e) Rule III of the implementing rules of EPIRA, which states:

> "Section 4. *Responsibilities of the ERC.* (e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement 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 the 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.

This Section 4 (e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance Section 36 of the Act.

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 ERC to avoid over/under recovery of charges."

(Emphasis supplied)

66. The aforesaid amendment is an act of subterfuge meant to defeat the law that gave it life and to circumvent the Supreme Court ruling in G.R. No. 163935. This is assuming that it was even validly issued and published, as even the Senate Archives does not have an official copy of the Resolution introducing the same, except for a "transcript" of the meeting of the JCPC on 07 June 2007 discussing the proposed amendment[11]. Needless to say, the DOE cannot unilaterally introduce amendments to the implementing rules, because the JCPC has oversight functions over energy regulation under Section 62 of the EPIRA.

67. To dispense with the requirement of notice and hearing (which the EPIRA requires of all applications for rate adjustments and which the Supreme Court deemed mandatory as part of the due process clause)

[11] Annex "W"

public respondents resorted to the expedient of amending the implementing rules. In direct contravention of the law.

68. Petitioners likewise question, directly, not collaterally, the validity of the slew of adjustment mechanisms descended from the above amendment to Section 4(e) of the EPIRA IRR, starting with Resolution No. 16, Series of 2009, entitled "A Resolution Adopting the Rules Governing the Automatic Cost Adjustment and True-Up Mechanisms and Corresponding Confirmation Process for Distribution Utilities".

69. Under the present regime, energy generators and distribution utilities alike can now set their rates, **monthly,** without seeking approval of the ERC, following a preset formula. As described by the ERC itself in its questioned legal opinion dated 17 October 2022:

> ***"In the case of Reso-2009, DUs (distribution utilities) are allowed to adjust generation rate on a monthly basis following a formula provided for by the ERC. The adjustment shall be subject to a post confirmation process."***[12]

70. It is respectfully submitted that all of the above regimes should be declared null and void for violation of the due process clause of the Constitution, as further argued hereafter.

71. How the ERC went down the slippery slope from strict regulation to no regulation is a cautionary tale of dereliction of duty that should not be countenanced.

72. As early as 2006, the Supreme Court directed the ERC to enforce the requirement of notice and hearing in the EPIRA. What happened is the opposite: the energy utilities now automatically set their rates on a ***monthly*** basis, without notice and hearing.

Due process cannot be taken out of regulation.

73. The *ratio decidendi* of the Supreme Court in G.R. No. 163935 (which is the antecedent to this case) runs as follows:

> "The petition is granted.
>
> Contrary to the stance taken by the respondents, the amended application of respondent MERALCO for the increase of its

[12] ERC letter-opinion dated 17 October 2022, Annex C, underscoring supplied

generation charge is covered by Section 4(e), Rule 3 of the IRR of the EPIRA. For clarity, the said provision is quoted anew:

> "(e) Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement 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.
>
> This Section 4(e) shall not apply to those applications or petitions already filed as of 26 December 2001 in compliance with Section 36 of the Act.

The respondents contend that this provision applies only to independent rate applications and not to adjustment mechanisms like the GRAM; hence, respondent MERALCO's amended application for the increase of its generation charge is excluded and/or exempted from the application of the requirements of the above-quoted provision. This contention is erroneous. Section 4(e), Rule 3 of the IRR of the EPIRA could not be any clearer with respect to its coverage as it refers to "any application or petition for rate adjustment or for any relief affecting the consumers."

xxx xxx xxx

Among the important requirements introduced under the foregoing process are: first, the publication of the application itself, not merely the notice of hearing issued by the ERC, in a newspaper of general circulation in the locality where the applicant operates and; second, the need for the ERC to consider the comments or pleadings of the customers and LGU concerned

in its action on the application or motion for provisional rate adjustment.

The Court reasoned that the publication and comment requirements are in keeping with the avowed policies of the EPIRA, to wit:

...[T]o protect the public interest vis-à-vis the rates and services of electric utilities and other providers of electric power, to ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability for greater operational and economic efficiency, to enhance the competitiveness of Philippine products in the global market, and to balance the interests of the consumers and the public utilities providing electric power through the fair and non-discriminatory treatment of the two sectors.

Clearly, therefore, although the new requirements are procedural in character, they represent significant reforms in public utility regulation as they engender substantial benefits to the consumers. It is in this light that the new requirements should be appreciated and their observance enforced.

The lack of publication of respondent MERALCO's amended application for the increase of its generation charge is thus fatal. By this omission, the consumers were deprived of the right to file their comments thereon. Consequently, the assailed Order dated June 2, 2004 issued by the ERC, approving the increase of respondent MERALCO's generation charge from ₱3.1886 to ₱3.3213 per kWh effective immediately, was made without giving the consumers any opportunity to file their comments thereon in violation of Section 4(e), Rule 3 of the IRR of the EPIRA.

Indeed, 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. In this case, the consumers have the right to be informed of the bases of respondent MERALCO's amended application for the increase of its generation charge in order to, if they so desire, effectively contest the same. The following pronouncements are quite apropos:

Obviously, the new requirements are aimed at protecting the consumers and diminishing the disparity or imbalance between the utility and the consumers. The publication requirement gives them enhanced opportunity to consciously weigh the application in terms of the additional financial burden which the proposed rate increase entails and the basis for the application. With the publication of the application itself, the consumers would right from the start be equipped with the needed information to determine for themselves whether to contest the application or

not and if they so decide, to take the needed further steps to repulse the application. On the other hand, the imposition on the ERC to consider the comments of the customers and the LGUs concerned extends the comforting assurance that their interest will be taken into account. Indeed, the requirements address the right of the consuming public to due process at the same time advance the cause of people empowerment which is also a policy goal of the EPIRA along with consumer protection.

It has also been stated that:

The requirement of due process is not some favor or grace that the ERC may dole out on a bout of whim or on occasion of charity. Rather, it is a statutory right to which the consuming public is entitled…

The requirement of publication in applications for rate adjustment is not without reason or purpose. It is ancillary to the due process requirement of notice and hearing. Its purpose is not merely to inform the consumers that an application for rate adjustment has been filed by the public utility. It is to adequately inform them that an application has been made for the adjustment of the rates being implemented by the public utility in order to afford them the opportunity to be heard and submit their stand as to the propriety and reasonableness of the of the rates within the period allowed by the Rule. Without the publication of the application, the consumers are left to second-guess the substance and merits of the application.

At this point, it should be stated that the Court is not convinced by respondent MERALCO's argument that to require it to comply with Section 4(e), Rule 3 of the IRR of the EPIRA would be a violation of its right to due process because it would be subjected to a long and tedious process of recovering its fuel and purchased power costs. In Freedom from Debt Coalition, the Court categorically upheld the ERC's power to grant provisional adjustments or power of interim rate-regulation. Such power is intended precisely for the ERC to, as Mr. Justice Reynato S. Puno in his Concurring and Dissenting Opinion succinctly put it, "be able to swiftly and flexibly respond to the exigencies of the times." He elucidated further on the raison d'etre of the power of interim rate-regulation particularly in the context of our country's economic history:

…Our economic history teaches us that the Philippines is vulnerable to the rapid fluctuations in the exchange rate. In recent years, we saw how numerous industries failed to survive the Asian financial crises fueled by the uncertainties of exchange rates. All these have had adverse financial impact on public utilities such as Meralco in terms of skyrocketing costs of debt servicing, and maintenance and operating expenses. A regulator such as the ERC should have sufficient power to respond in real

> time to changes wrought by multifarious factors affecting public utilities.
>
> Thus, respondent MERALCO's apprehension of being subjected to a long and tedious process with respect to the recovery of its fuel and purchased power costs is, in fact, addressed by the power of the ERC to grant provisional rate adjustments. The ERC is not, of course, precluded from promulgating rules, guidelines or methodology, such as the GRAM, for the recovery by the distribution utilities of their fuel and purchased power costs. However, these rules, guidelines or methodology so adopted should conform to the requirements of pertinent laws, including Section 4(e), Rule 3 of the IRR of the EPIRA.
>
> There is another compelling reason why reliance by respondent MERALCO and the ERC on the GRAM Implementing Rules is unavailing. To recall, they advance the view that the June 2, 2004 ERC Order is valid, notwithstanding the fact that respondent MERALCO's amended application was not published in a newspaper of general circulation, because the same was issued in accordance with the GRAM Implementing Rules which does not require such publication."

74. Particular emphasis is placed on the pronouncements that *"[t]he lack of publication of respondent MERALCO's amended application for the increase of its generation charge is thus fatal."* This is because *"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."*

75. Due process cannot be legislated out of existence. Certainly not by a mere administrative agency such as the ERC or a rump portion of Congress called "The Joint Congressional Power Commission".

76. If the Supreme Court declared unconstitutional the mere lack of publication of applications for setting rates, how much more doing away with notice and hearing entirely – and, worse, replacing it with monthly rate determined by a formula?

77. Due process is enshrined in the Constitution in Section 1, Article III thereof which states:

> "Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

78. The so-called "Automatic Cost Adjustment and True-Up Mechanisms" concocted by the ERC is incompatible with the due process clause. Due process is "a law which hears before it condemns,

which proceeds upon inquiry and renders judgment only after trial." *(U.S. v. Ling Su Fan, 10 Phil. 104, 111 [1908]).*

79. The "post-confirmation process" under Resolution No. 16, Series of 2009[13] is not a substitute for due process. In essence, it asks consumers to "pay now, ask questions later".

80. Due process is rooted in fairness. In *Vivo vs.* PAGCOR[14] The Supreme Court elucidated:

> "The essence of procedural due process is embodied in the basic requirement of notice and a real opportunity to be heard. In administrative proceedings, such as in the case at bar, procedural due process simply means the opportunity to explain one's side or the opportunity to seek a reconsideration of the action or ruling complained of. "To be heard" does not mean only verbal arguments in court; one may be heard also thru pleadings…
>
> In administrative proceedings, procedural due process has been recognized to include the following: (1) the right to actual or constructive notice of the institution of proceedings which may affect a respondent's legal rights; (2) a real opportunity to be heard personally or with the assistance of counsel, to present witnesses and evidence in one's favor, and to defend one's rights; (3) a tribunal vested with competent jurisdiction and so constituted as to afford a person charged administratively a reasonable guarantee of honesty as well as impartiality; and (4) a finding by said tribunal which is supported by substantial evidence submitted for consideration during the hearing or contained in the records or made known to the parties affected."

81. Due process is a hard-won right that broke the sword of kings. It dates back to the Magna Carta. Due process can only be denied at the risk of overthrowing Democracy itself. In *Macabingkil vs. Yatco*[15]*,* this Supreme Court ruled that "acts of Congress, as well as those of the Executive, can deny due process only under pain of nullity, and judicial proceedings suffering from the same flaw are subject to the same sanction, any statutory provision to the contrary notwithstanding."

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[13] Annex "BB", Resolution No. 16, Series of 2009 "A Resolution Adopting the Rules Governing the Automatic Cost Adjustment and True-Up Mechanisms and Corresponding Confirmation Process for Distribution Utilities";

[14] G.R. No. 187854, November 12, 2013, citing *Casimiro vs. Tandog*, G.R. No. 146137, June 8, 2005, 459 SCRA 624, 631.

[15] G.R. No. L-23174, September 18, 1967

82. Applied to the regime of energy regulation, due process simply means that power generators and distributors cannot simply automatically set their rates – i.e., gouge consumers by exacting payment from the hide of consumers, deciding unilaterally how deep to cut the knife, by following some abstruse formula, without the say-so of their victims, except their cries of outrage, after being wounded so very nearly mortally.

83. How can there be due process, when the industry players, instead of proving their case in court, merely follow this equation, for example:

FORMULA 1

$$GR = AGR + OGA$$

Where:

GR = Generation Rate expressed in Peso/kWh;

AGR = Adjusted Generation Rate calculated, as follows:

$$AGR = \frac{TGC}{TPG_{GR}}$$

Where:

$$TGC = [(GC_i + GC_{ii} + \cdots + GC_n) - 50\%\,(PPD_i + PPD_{ii} + \cdots + PPD_n) - PCR\,]$$

84. The average electricity consumer cannot make heads or tails of the process of computing the generation rate, where before they were fixed and denominated in exact amount per kilowatt hours in their electricity bills – as determined by the ERC after due notice and hearing.

85. With more reason then that there be notice and hearing, where the electricity consumers can present their own expert witnesses, well-versed in arcane mathematics and industry practices, to refute the numbers and technicalities juggled before their uncomprehending eyes.

A mere regulation cannot amend a law.

86. It is a legal truism that "as the spring cannot rise higher than its source, neither can a statute be at variance with the Constitution."[16]

87. Because the Joint Congressional Power Commission could not muster enough votes to amend the EPIRA which was enacted by Congress and signed by the president, it resorted to the stratagem of amending its implementing rules – by doing away with that part mandating the publication of applications for rate adjustments.

88. It so happens that the requirement of publication is etched into the law itself, Republic Act No. 9136 (the EPIRA). A mere regulation cannot amend the law. The joint commission did not merely trifle with the accessory but amputated the principal itself.

> "[W]e reaffirm the time-honored doctrine that, in case of conflict, the law prevails over the administrative regulations implementing it. The authority to promulgate implementing rules proceeds from the law itself. To be valid, a rule or regulation must conform to and be consistent with the provisions of the enabling statute. As such, it cannot amend the law either by abridging or expanding its scope. *(Dorea vs. Philippine Telegraph and Telephone Company, G.R. No. 152048, 07 April 2009)*

89. In case of conflict between a regulation and a statute, the statute must prevail.

> "A rule or regulation must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid. The rule-making power of a public administrative body is a delegated legislative power, which it may not use either to abridge the authority given it by the Congress or the Constitution or to enlarge its power beyond the scope intended. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute." *(Conte v. Palma, 332 Phil. 20 (1996) citing Kilusang Mayo Uno Labor Center v. Garcia, Jr., G.R. No. 115381, 23 December 1994, 239 SCRA 386.)*

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[16] Republic vs. Bajao, G.R. No. 160596, March 20, 2009; Heirs of Labanon vs. Provincial Assessor of Cotabato (G.R. NO. 160711, August 14, 2004)

90. A regulation cannot bastardize a statute to defeat its clear purpose and intent. This is what the ERC did, hand-in-glove with the joint commission of Congress, perpetrating an act of abortion that was dead on delivery – i.e., void *ab initio*.

> "As we have consistently ruled, if the statutory purpose is clear, the provisions of the law should be construed so as not to defeat but to carry out such end and purpose. For a statute derives its vitality from the purpose for which it is enacted and to construe it in a manner that disregards or defeats such purpose is to nullify or destroy the law." *(Pilipinas Kao vs. Court of Appeals, [G.R. No. 105014. December 18, 2001)*

91. The rule-making power of a regulatory agency, or of a commission of Congress, is limited in scope and confined to carrying out the law, not in circumventing, subverting or perverting it.

> "The authority to make IRRs in order to carry out an express legislative purpose, or to effect the operation and enforcement of a law is not a power exclusively legislative in character, but is rather administrative in nature. The rules and regulations adopted and promulgated must not, however, subvert or be contrary to existing statutes. The function of promulgating IRRs may be legitimately exercised only for the purpose of carrying out the provisions of a law. The power of administrative agencies is confined to implementing the law or putting it into effect. Corollary to this is that administrative regulation cannot extend the law and amend a legislative enactment. It is axiomatic that the clear letter of the law is controlling and cannot be amended by a mere administrative rule issued for its implementation. Indeed, administrative or executive acts shall be valid only when they are not contrary to the laws or the Constitution." *(Lokin vs. Comelec, G.R. Nos. 179431-32, June 22, 2010).*

The ERC misconstrued the Court's opinion in G.R. No. 163935.

92. Public respondent ERC, in its questioned legal opinion[17], insists in that the AGRA (Resolution No. 16-2009), which replaced the GRAM, is constitutional because: (1) the ERC has the power to promulgate rules and regulations under the EPIRA, (2) "there was no declaration in said SC Decision on the annulment of GRAM or any declaration that it was invalid."

93. The reasoning is off-tangent. As to the first, there is no question that the ERC has the power to promulgate rules. As to the second, the

[17] Annex "C"

statement is self-contradictory. The "SC Decision on the annulment of GRAM" was precisely that, a declaration that it was invalid.

94. The ERC orders approving the rate increases of MERALCO were struck down by this Court for failure to comply with the publication requirements on two aspects:

    (1) publication of the application of MERALCO for rate increases;
    (2) publication of GRAM itself in a newspaper of generation circulation.

95. To recapitulate the statements of the Supreme Court in G.R. No. 163935:

> "The requirement of publication in applications for rate adjustment is not without reason or purpose. It is ancillary to the due process requirement of notice and hearing. Its purpose is not merely to inform the consumers that an application for rate adjustment has been filed by the public utility. It is to adequately inform them that an application has been made for the adjustment of the rates being implemented by the public utility in order to afford them the opportunity to be heard and submit their stand as to the propriety and reasonableness of the of the rates within the period allowed by the Rule. Without the publication of the application, the consumers are left to second-guess the substance and merits of the application.
>
> xxx xxx xxx
>
> With respect to the GRAM Implementing Rules, its publication in the Official Gazette or in a newspaper of general circulation is mandated by the fact that these rules seek to implement key provisions of the EPIRA. More importantly, the GRAM Implementing Rules, insofar as it lays down the procedure by which generation costs of distribution utilities are recovered, affect ultimately the public as consumers of electricity and who pay the charges therefor.
>
> Clearly, the GRAM Implementing Rules affects the public inasmuch as it determines the costs of electricity consumption."

96. So much for the ERC's claim that GRAM was not declared invalid.

II
ERC RESOLUTION NO. 16, SERIES OF 2009, GOVERNING All FORMS OF AUTOMATIC COST ADJUSTMENT MECHANISMS IS UNCONSTITUTIONAL, INVALID AND INEFFECTIVE.

97. Petitioners replead and incorporate herein all of the foregoing discussion and further state:

98. Resolution No. 16, Series of 2009 of the Energy Regulatory Commission lays down the "RULES GOVERNING THE **AUTOMATIC** COST ADJUSTMENT AND TRUE-UP MECHANISMS AND CORRESPONDING CONFIRMATION PROCESS FOR DISTRIBUTION UTILITIES".[18]

99. Emphasis is placed on the "automatic". Said Rules, in the third Whereas clause, encompass:

> 1. Automatic Generation Rate and System Loss Adjustment Mechanism;
> 2. Transmission Rate Adjustment Mechanism;
> 3. Lifeline Rate Recovery Mechanism;
> 4. Local Franchise Tax Recovery Mechanism;
> 5. Local Business Tax Recovery Mechanism;
> 6. Guidelines for the Calculation of the Over or Under Recovery in the Implementation of Lifeline Rates by Distribution Utilities;
> 7. Guidelines for a True-Up Mechanism of the Over or Under Recovery in the Implementation of Inter-Class Cross Subsidy Removal by Distribution Utilities;
> 8. ERC Resolution No. 12, Series of 2005, "A Resolution Approving a New Policy on the Treatment of Prompt Payment Discount (PPD)";
> 9. Guidelines for the Calculation of the Over or Under Recovery in the Implementation of System Loss Rate by Distribution Utilities; and
> 10. Rules for the Calculation of the Over or Under Recovery in the Implementation of Transmission Rates.

100. Just about every kind of collection of electricity rates has been rendered automatic. For the past 16 years, the landmark *en banc* decision in G.R. No. 163935 has been honored in the breach. It has been circumvented to death. Starting with the clever amendment to Section 4 (e), Rule III of the IRR of the EPIRA which opened the floodgate to all these automatic rate-setting mechanisms.

101. It is respectfully submitted that such automatic rate setting mechanisms violate key policies and principles of the EPIRA, such as:

(1) Section 2(b) of the Declaration of Policies:

> "(b) To ensure the quality, reliability, security and affordability of the supply of electric power;"

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[18] Annex "BB"

(2) Section 23, laying down the "least cost" principle:

> "A distribution utility shall have the obligation to supply electricity in the least cost manner to its captive market, subject to the collection of retail rate **duly approved by the ERC."** *(Emphasis supplied).*

(3) Section 25, enshrining the "principle of full recovery":

> "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."

102. Moreover, the same amounts to abdication of duty by the ERC to subject all applications for rate adjustments to notice and hearing, pursuant to its functions under Sections 24 and 43, mandating:

> "Section 24. *Distribution Retail Wheeling Charge.* The retail wheeling rates of distribution utilities shall be filed with and approved by the ERC pursuant to paragraph (f) of Section 23 hereof."

> "Section 43. *Functions of ERC*...All notices of hearings to be conducted by the ERC 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." *(Emphasis supplied)*

103. To repeat, the requirements of notice and hearing as mandated by the EPIRA cannot be dispensed with by mere regulation.

104. Moreover, this automatic rate adjustment, together with the post-confirmation process, is diametrically opposed to the "principle of full recovery" which presupposes recovery of actual expenditures, not arbitrary costs taken out of thin air or based on fickle market forces.

105. Unless the Supreme Court explicitly abandons G.R. No. 163935, the same should be enforced no uncertain terms by pronouncing all forms of automatic rate-setting mechanisms as invalid and ineffective, being descended from unconstitutional forebear.

106. For the above reasons, G.R. No. 163935 should be re-affirmed by this Honorable Court. Such declaration is timely and imperative – in the face of runaway energy prices that have driven consumers to desperate straits.

107. To abandon the landmark decision – or render it inutile by omission – is to leave the economy in a perpetual state of crisis. This is like allowing drivers to set their own speed limits. Or the banks to set their own interest rates.

108. Granted, the generation companies need an efficient way of recovering their fuel costs in a summary manner. But the ERC can craft regulations within the limits of the EPIRA that address these concerns. For example, under the GRAM the ERC affords the distribution utilities a modicum of due process by issuing "provisional authority".

109. Additionally, the ERC can allow the parties to calculate their risks by entering into a fixed contract, allowing only an escape clause such as "change in circumstances," such as the one entered by San Miguel Global Power and MERLCO which is making the rounds of the news media today.

110. However, in the present state of affairs, as described by the ERC itself, "[in] the case of Reso-2009*, DUs (distribution utilities) are allowed to adjust generation rate on a* ***monthly basis*** *following a formula provided for by the ERC. The adjustment shall be subject to a post confirmation process."*[19] If there is to be a hearing at all, it is to take place after the effectivity of the rate, in a "post confirmation process". Hearing should not be an afterthought.

111. This hands-off policy, giving free rein to energy companies to set their rates *monthly*, by following a preset formula that only an Einstein can understand, amounts to abdication of a duty. It renders the word "Regulatory" in the Energy Regulatory Commission an oxymoron.

112. The present state of affairs cannot persist.

113. Public respondents are exercising judicial, quasi-judicial or ministerial functions and all the foregoing facts show that they are acting or have acted without or in excess of their jurisdiction, or with grave abuse of discretion.

114. There is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law.

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[19] ERC letter-opinion dated 17 October 2022, Annex "C", emphasis supplied

ALLEGATIONS IN SUPPORT OF THE APPLICATION FOR WRITS OF INJUNCTION AND PROHIBITION

Petitioners do hereby replead and incorporate herein the foregoing allegations insofar as they are material and relevant and further states that:

115. The set of "*Automatic Cost Adjustment and True-Up Mechanisms"* as enumerated by the ERC in Resolution No. 16, Series of 2009 (**Annex "I"**) threatens the rights of petitioner and persons similarly situated. It denies them due process of law, by forcing consumers to pay on a monthly basis, fluctuating amounts in an increasingly upward trend, based on abstract formulas, without the benefit of notice and hearing, as required by the EPIRA.

116. Under the questioned Resolution, the rates are collectible from the consumers immediately, subject only to a "post-confirmation process". This is not satisfactory. Due process is "a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." *(U.S. v. Ling Su Fan, 10 Phil. 104, 111 [1908]).*

117. Pursuant to the questioned rate-setting mechanisms, petitioners' electricity bills have ballooned, with monthly variations that on an average are on a steady, inexorable upward trajectory. Thus, as borne out by petitioners' electricity bills (hereto attached as **Annexes "A"** to **"R"**) covering a 12-month period, MERALCO's generation rate gyrated wildly from Php5.0435/kwh in November 2021 to Php 5.5343/kwh in December 2021 to Php 6.2277/kwh in June 2022, Php 6.7756 in July 2022, Php 6.9393 in October 2022 and P6.9917 in December 2022.

118. This Honorable Court may take judicial notice of news reports of electricity rates in the provinces skyrocketing to more than **P10/kwh** or double the rates in Metro Manila.

119. Petitioners' member-consumers cannot refuse to pay the bill; otherwise, they risk having their electricity cut. Even if they are able to pay the unconscionable electricity prices, it is at the expense of other basic necessities such as food, medicine and transportation.

120. Petitioners have a *right to be protected*, and such right consists of the right to due process, affecting life, liberty and property under the Constitution and associated rights under the Universal Declaration of Human Rights in international law, such as right to adequate standard of living, right to rest and leisure, as well as to social security.

121. The commission of the foregoing acts would work grave injustice and irreparable damage to petitioners which, by its nature, cannot be compensated in terms of money, as it involves his life and safety.

122. Respondents are doing, threatening, or are attempting to do, or are procuring or suffering to be done some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

123. The applicants are entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts either for a limited period or perpetually.

124. The commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicants.

PRAYER

WHEREFORE, premises considered, it is respectfully prayed that the Honorable Court:

(1) Upon the filing of the instant petition, issue a temporary restraining order and/or writ of preliminary injunction:

(1.1) Restraining and enjoining respondents ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY, THE JOINT CONGRESSIONAL ENERGY COMMISSION and MANILA ELECTRIC COMPANY from implementing, enforcing and/or executing the questioned amendment to Section 4 (e) of the Implementing Rules and Regulations of Republic Act No. 9136 or the "Electric Power Industry Reform Act of 2001"; and

(1.2) Restraining and enjoining the same respondents from implementing, enforcing and/or executing the questioned ERC Resolution No. 16, Series of 2009, entitled "A Resolution Adopting the Rules Governing the Automatic Cost Adjustment and True-Up Mechanisms and Corresponding Confirmation Process for Distribution Utilities"; and

(1.3) Restraining and enjoining the same respondents from implementing, enforcing and/or executing all forms of automatic cost adjustment and true-up mechanisms such

as, but not limited 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.

(2) After due notice and hearing, issue an order:

(2.1) Declaring the writ of preliminary injunction permanent;
(2.2) Declaring the questioned amendment to Section 4 (e) of the Implementing Rules and Regulations of Republic Act No. 9136 (EPIRA) and ERC Resolution No. 16, Series of 2009 as unconstitutional; and
(2.3) Declaring all forms of automatic cost adjustment and true-up mechanisms proceeding from the above unconstitutional issuances as invalid and ineffective.

OTHER remedies just and equitable in the premises are likewise prayed for.

Respectfully submitted…

Makati City for the City of Manila, 14 December 2022.

WILFREDO M. GARRIDO, JR.
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IBP No. 177305; 02-07-22; Makati
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Copy furnished:

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Ortigas Center, Pasig City

DEPARTMENT OF ENERGY
Energy Center, Rizal Drive
Fort Bonifacio, Taguig City

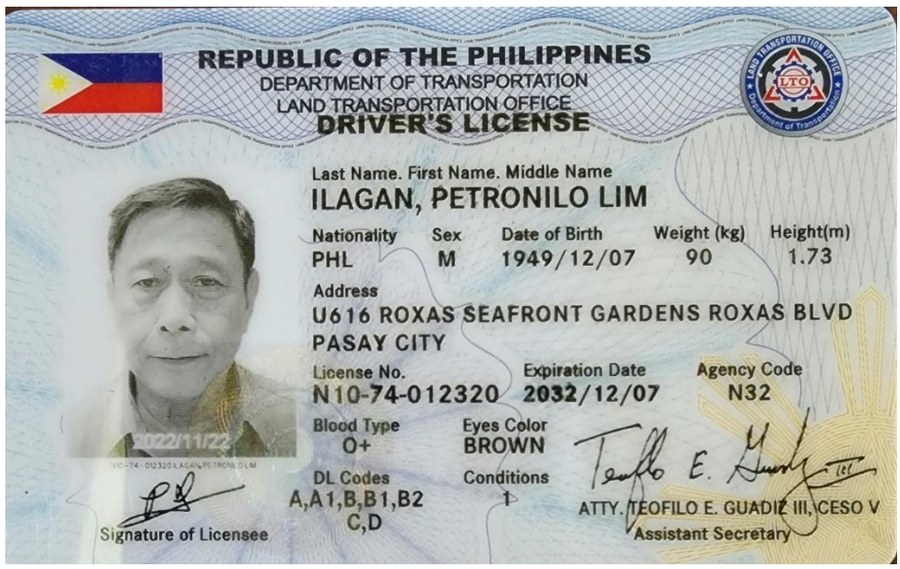
JOINT CONGRESSIONAL ENERGY COMMISSION
Senate, GSIS Building, Financial Center
Diokno Boulevard, Pasay City.

MANILA ELECTRIC COMPANY (MERALCO)
Lopez Building, Ortigas Avenue, Pasig City

EXPLANATION

I HEREBY EXPLAIN that I have furnished respondents copies of the foregoing pleading by registered mail, owing to the dearth of messengerial services.

Wilfredo M. Garrido, Jr.



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF TRANSPORTATION
LAND TRANSPORTATION OFFICE
DRIVER'S LICENSE

Last Name. First Name. Middle Name
ILAGAN, PETRONILO LIM

Nationality	Sex	Date of Birth	Weight (kg)	Height(m)
PHL	M	1949/12/07	90	1.73

Address
U616 ROXAS SEAFRONT GARDENS ROXAS BLVD
PASAY CITY

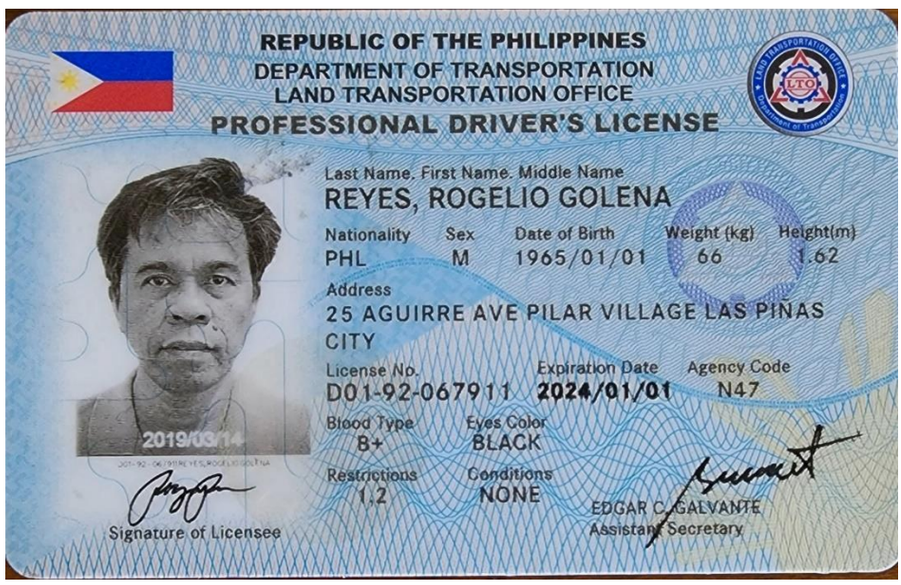
License No.	Expiration Date	Agency Code
N10-74-012320	2032/12/07	N32

Blood Type	Eyes Color
O+	BROWN

DL Codes	Conditions
A,A1,B,B1,B2 C,D	1

Signature of Licensee

ATTY. TEOFILO E. GUADIZ III, CESO V
Assistant Secretary



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF TRANSPORTATION
LAND TRANSPORTATION OFFICE
PROFESSIONAL DRIVER'S LICENSE

Last Name. First Name. Middle Name
REYES, ROGELIO GOLENA

Nationality	Sex	Date of Birth	Weight (kg)	Height(m)
PHL	M	1965/01/01	66	1.62

Address
25 AGUIRRE AVE PILAR VILLAGE LAS PIÑAS
CITY

License No.	Expiration Date	Agency Code
D01-92-067911	2024/01/01	N47

Blood Type	Eyes Color
B+	BLACK

Restrictions	Conditions
1,2	NONE

Signature of Licensee

EDGAR C. GALVANTE
Assistant Secretary


Republic of the Philippines
PROFESSIONAL REGULATION COMMISSION
PROFESSIONAL IDENTIFICATION CARD
LAST NAME ▶ BÁÑEGA
FIRST NAME ▶ GRACE
MIDDLE NAME ▶ FRUTO
REGISTRATION NO. ▶ 0090496
REGISTRATION DATE ▶ 10/19/2015
VALID UNTIL ▶ 05/23/2025
MECHANICAL ENGINEER

INTEGRATED BAR OF THE PHILIPPINES

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IBP Chapter
MAKATI

Date of Expiry
02.15.2021