



September 10, 2019

MEMORANDUM No. 2019-048

TO : ALL ELECTRIC COOPERATIVES
Attention: EC Board Presidents and General Managers

SUBJECT : Supreme Court Decision Declaring Power Supply Agreement (PSA) Applications with the Energy Regulatory Commission (ERC) on or after June 30, 2015 to Comply with Competitive Selection Process (CSP)

Attached, for your reference, is the Decision of the Supreme Court *En Banc* in G.R. No. 227670, promulgated on May 3, 2019, entitled, "**Alyansa Para sa Bagong Pilipinas, Inc. (ABP) vs. Energy Regulatory Commission (ERC), et al.,**" the dispositive portion of which reads, as follows:

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

SO ORDERED."

As a brief background, the DOE issued a Circular which took effect on June 30, 2015 entitled, "**Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA).**" Section 3 of this Circular provides that all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of Electric Cooperatives (ECs), the Third Party shall also be duly



recognized by the National Electrification Administration (NEA). On October 20, 2015, the ERC issued the CSP Guidelines and fixed a new date of effectivity for compliance with CSP from June 30, 2015 to November 7, 2015. On March 15, 2016, the ERC, for the second time, unilaterally postponed the effectivity of CSP in a Clarificatory Resolution, which restated the date of effectivity of the CSP Guidelines from November 7, 2015 to April 30 2016. The second postponement of the effectivity of CSP allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP. A petition for certiorari and prohibition with application for temporary restraining order and/or writ of preliminary injunction was brought before the Supreme Court (SC) by the ABP seeking to declare void the ERC Clarificatory Resolution and to disapprove the PSAs of the DUs submitted after November 7, 2015 for failure to conduct CSP.

The issue before the SC is whether or not the ERC has the statutory authority to postpone the date of effectivity of CSP thereby amending the 2015 DOE Circular which required CSP to take effect on June 30, 2015.

The SC granted ABP's petition and ruled that *"The ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular. As a result, the 90 PSAs submitted to the ERC after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. **The ERC must require CSP on all PSA applications submitted on or before 30 June 2015.**"* It ruled further that the postponement of the effectivity of CSP was without the approval, and even without coordination with the DOE, in clear and blatant violation of the DOE Circular mandating CSP.

To reiterate, all PSAs submitted to the ERC after the effectivity of the 2015 DOE Circular, on or after 30 June 2015, are required to undergo CSP.

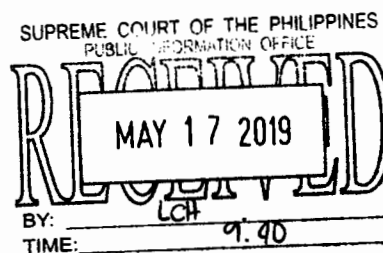
For your information and guidance.


EDGARDO R. MASONGSONG
Administrator





Republic of the Philippines
Supreme Court
Manila
EN BANC



**ALYANSA PARA SA BAGONG
PILIPINAS, INC. (ABP), represented
by Evelyn V. Jallorina and Noel
Villones,**

Petitioner,

- versus -

**ENERGY REGULATORY
COMMISSION, represented by its
Chairman, JOSE VICENTE B.
SALAZAR, DEPARTMENT OF
ENERGY, represented by Secretary
ALFONSO G. CUSI, MERALCO,
CENTRAL LUZON PREMIERE
POWER CORPORATION, ST.
RAPHAEL POWER GENERATION
CORPORATION, PANAY ENERGY
DEVELOPMENT CORPORATION,
MARIVELES POWER
GENERATION CORPORATION,
GLOBAL LUZON ENERGY
DEVELOPMENT CORPORATION,
ATIMONAN ONE ENERGY, INC.,
REDONDO PENINSULA ENERGY,
INC., and PHILIPPINE
COMPETITION COMMISSION,
Respondents.**

G.R. No. 227670

Present:

**BERSAMIN, C.J.,
CARPIO,
PERALTA,
DEL CASTILLO,
PERLAS-BERNABE,
LEONEN,
JARDELEZA,*
CAGUIOA,
REYES, A., JR.,
GESMUNDO,
REYES, J., JR.,
HERNANDO,
CARANDANG, and
LAZARO-JAVIER, JJ.**

Promulgated:
May 3, 2019

X ----- X

DECISION

CARPIO, J.:

The outcome of this case will greatly affect, for the next two decades, all consumers of electricity in the Philippines, which include the over 95 million Filipinos living in the Philippines as well as the millions of business enterprises operating in the Philippines.

* No part.

Section 19, Article XII of the 1987 Constitution provides: “**The State shall regulate or prohibit monopolies when the public interest so requires.** No combinations in restraint of trade or unfair competition shall be allowed.”

The State grants electricity distribution utilities, through legislative franchises, a regulated monopoly within their respective franchise areas. Competitors are legally barred within the franchise areas of distribution utilities. Facing no competition, distribution utilities can easily dictate the price of electricity that they charge consumers. To protect the consuming public from exorbitant or unconscionable charges by distribution utilities, the State regulates the acquisition cost of electricity that distribution utilities can pass on to consumers.

As part of its regulation of this monopoly, the State requires distribution utilities to subject to **competitive public bidding** their purchases of electricity from power generating companies. Competitive public bidding is **essential** since the power cost purchased by distribution utilities is entirely passed on to consumers, along with other operating expenses of distribution utilities. **Competitive public bidding is the most efficient, transparent, and effective guarantee that there will be no price gouging by distribution utilities.**

Indeed, the requirement of competitive public bidding for power purchases of distribution utilities has been adopted in the United States, Europe, Latin America, India, and many developing countries.¹ This requirement is primarily aimed at ensuring a fair, reasonable, and least-cost generation charge to consumers, under a transparent power sale mechanism between the generation companies and the distribution utilities.

Section 6, Article XII of the 1987 Constitution provides: “The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, **subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.**”

Indisputably, the use of electricity bears a vital social function. The State, in requiring competitive public bidding in the purchase of power by distribution utilities, has exercised its constitutional “duty x x x to intervene when the common good so demands.”²

¹ See Renewable Energy Auctions in Developing Countries (2013), https://www.irena.org/documentdownloads/publications/irena_renewable_energy_auctions_in_developing_countries.pdf; Electricity Auctions: An Overview of Efficient Practices (2011), <http://hdl.handle.net/10986/2346>; Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices (2008), https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/competitive_procurement.pdf [All accessed 4 March 2019].

² Another way for the State to intervene is to examine the accounts of public utilities. Section 22,

The breakdown of charges in a Manila Electric Company (**Meralco**) bill contains the following: **Generation Charge**, Transmission Charge, System Loss Charge, Distribution Charge (Meralco), Subsidies, Government Taxes, Universal Charges, FiT-All Charge (Renewable), and Other Charges. **The Power Supply Agreements (PSAs) involved in the present case were executed in April 2016 and have terms that range from 20 to 21 years.**

Section 43 of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (**EPIRA**), includes a description, in broad strokes, of the functions of the Energy Regulatory Commission (**ERC**): “The ERC shall **promote competition**, encourage market development, ensure customer choice and **discourage/penalize abuse of market power** in the restructured electricity industry.” Moreover, Section 2 of the EPIRA declares it a state policy to “**ensure the x x x affordability of the supply of electric power.**” Further, Section 45 of the EPIRA mandates the ERC to enforce safeguards to “**promote true market competition and prevent harmful monopoly and market power abuse.**” If the ERC violates its statutory functions, this Court, as mandated by Section 1, Article VIII of the 1987 Constitution,³ has the duty to strike down the acts of ERC whenever these are performed with grave abuse of discretion amounting to lack or excess of jurisdiction.

The Case

Alyansa para sa Bagong Pilipinas, Inc. (**ABP**), represented by Evelyn V. Jallorina and Noel Villones, filed G.R. No. 227670, a petition for *certiorari* and prohibition⁴ with an application for a temporary restraining order and/or writ of preliminary injunction. Named as respondents are the ERC, the Department of Energy (DOE), Meralco, Central Luzon Premiere Power Corporation (CLPPC), St. Raphael Power Generation Corporation (SRPGC), Panay Energy Development Corporation (PEDC), Mariveles Power Generation Corporation (MPGC), Global Luzon Energy Development

Chapter 4, Subtitle B, Title I, Book V of the Administrative Code of 1987 provides:

Section 22. *Authority to Examine Accounts of Public Utilities.* - (1) The Commission [on Audit] shall examine and audit the books, records and accounts of public utilities in connection with the fixing of rates of every nature, or in relation to the proceedings of the proper regulatory agencies, for purposes of determining franchise taxes;

(2) Any public utility refusing to allow an examination and audit of its books of accounts and pertinent records, or offering unnecessary obstruction to the examination and audit, or found guilty of concealing any material information concerning its financial status shall be subject to the penalties provided by law; and

(3) During the examination and audit, the public utility concerned shall produce all the reports, records, books of accounts and such other papers as may be required. The Commission shall have the power to examine under oath any official or employee of the said public utility.

³ This provision reads:

Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

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.

⁴ Under Rule 65 of the Rules of Court.

Corporation (GLEDC), Atimonan One Energy, Inc. (A1E), Redondo Peninsula Energy, Inc. (RPE), and the Philippine Competition Commission (PCC).

The petition seeks to declare as void ERC Resolution No. 1, Series of 2016 (**ERC Clarificatory Resolution**). The petition also seeks that this Court direct the ERC to disapprove the Power Supply Agreements (**PSAs**) of the Distribution Utilities (**DUs**) submitted after 7 November 2015 for failure to conduct Competitive Selection Process (**CSP**). The petition further asks the Court to order ERC to implement CSP in accordance with the Department of Energy (**DOE**) Circular No. DC2015-06-0008 (**2015 DOE Circular**) and ERC Resolution No. 13, Series of 2015 (**CSP Guidelines**).⁵

The Facts

On 11 June 2015, the DOE issued the 2015 DOE Circular entitled “**Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)**.” Sections 3 and 10 of the 2015 DOE Circular provide:

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

Under this Circular, CSPs for the procurement of PSAs of all DUs shall observe the following:

- (a) Aggregation for un-contracted demand requirements of DUs;
- (b) Annually conducted; and
- (c) Uniform template for the terms and conditions in the PSA to be issued by the ERC in coordination with the DOE.

Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and [the] DOE shall jointly issue the guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided. For clarity, the term aggregation as used in this Circular refers to the wholesale demand and energy requirements of DUs, and not of the Contestable Markets under Retail Competition and Open Access (RCOA) regime.

As used in this section, the un-contracted demand or energy requirements of the DUs shall refer to the energy and demand not yet procured

⁵ Rollo, p. 33.



individually or collectively by the DUs, excluding those energy and capacity covered by PSAs that have been filed for approval before the ERC.

x x x x

Section 10. Effectivity. **This Circular shall take effect immediately upon its publication** in two (2) newspapers of general circulation and **shall remain in effect until otherwise revoked.** (Boldfacing added)

Section 3 of the 2015 DOE Circular expressly and categorically mandates CSP, or competitive public bidding, whenever DUs secure PSAs. The 2015 DOE Circular took effect on 30 June 2015 upon its publication in two newspapers of general circulation. Section 3 expressly states that “[a]fter the effectivity of this Circular, all DUs shall procure PSAs only through CSP x x x.”

On 20 October 2015, Joint Resolution No. 1 (**Joint Resolution**), executed by the DOE and the ERC, reiterated the need to adopt a “**regime of transparent process in securing Power Supply Agreements.**” The fifth Whereas clause of the Joint Resolution provides:

WHEREAS, the DOE and ERC recognize the adoption of competitive selection as a policy that will encourage investments in the power generation business thereby ensuring electric power supply availability in **a regime of transparent process in securing Power Supply Agreements** (PSAs), which is an integral part of the power sector reform agenda. (Boldfacing added)

Under the Joint Resolution, the DOE and the ERC agreed that ERC shall issue the appropriate regulation **to implement** CSP. Section 1 of the Joint Resolution states:

Section 1. Competitive Selection Process. **Consistent with their respective mandates**, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of Power Supply Agreements (PSAs) by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. **Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulation to implement the same.** (Boldfacing and italicization added)

On the same date, 20 October 2015, the ERC issued the CSP Guidelines, which directed all DUs to conduct CSP in the procurement of their power supply for their captive markets.

The CSP Guidelines fixed a new date of effectivity for compliance with CSP. This is the first instance that the ERC unilaterally fixed a different date from 30 June 2015, **effectively postponing the date of effectivity of CSP from 30 June 2015 to 7 November 2015 or by 130 days:**

h

Section 4. Applicability. The CSP requirement herein mandated shall not apply to PSAs already filed with the ERC *as of the effectivity of this Resolution*. For PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.

This Resolution shall take effect immediately following its publication in a newspaper of general circulation in the Philippines.

x x x x (Boldfacing and italicization added)

Based on its provisions, the CSP Guidelines took effect on 7 November 2015, following its publication in the *Philippine Daily Inquirer* and the *Philippine Star*. Section 4 of the CSP Guidelines expressly provides that CSP **“shall not apply to PSAs already filed with the ERC *as of the effectivity of this Resolution*.”** Thus, the ERC no longer required CSP for all PSAs already filed with the ERC on or before 7 November 2015. Section 4 of the CSP Guidelines further states that “[f]or PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.”

On 15 March 2016, however, the ERC, for the second time, unilaterally postponed the date of effectivity of CSP. The ERC issued the ERC Clarificatory Resolution, which restated the date of effectivity of the CSP Guidelines from 7 November 2015 to 30 April 2016. Paragraph 1 of the ERC Clarificatory Resolution reads:

1. The effectivity of the CSP [Guidelines] is hereby restated to be 30 April 2016. All PSAs executed on or after the said date shall be required, without exception, to comply with the provisions of the CSP [Guidelines]. (Boldfacing added)

The second postponement of the effectivity of CSP from 7 November 2015 to 30 April 2016, or by 175 days, allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP.

The table below shows that the following PSAs between Meralco and its power suppliers were executed and submitted to the ERC **within 10 days prior the restated 30 April 2016 deadline.** According to the ERC Clarificatory Resolution, these PSAs are not required to comply with CSP.



Power Supplier	Power Purchaser	Amount of Power Purchased	Term of Agreement	Start of Negotiations	Date of PSA Execution	Date of Submission of Application to ERC
Redondo Peninsula Energy, Inc. (RPE)	Manila Electric Company (Meralco)	225 Megawatts (MW) ⁶	20 years ⁷	19 July 2012 ⁸	20 April 2016 ⁹	28 April 2016 ¹⁰
Atimonan One Energy, Inc. (A1E)	Meralco	2 x 600 MW (net) ¹¹	20 years and six months ¹²	3 rd or 4 th quarter of 2014 ¹³	26 April 2016 ¹⁴	28 April 2016 ¹⁵
St. Raphael Power Generation Corporation (SRPGC)	Meralco	Up to 400 MW ¹⁶	20 years and four months ¹⁷	Latter part of 2014 ¹⁸	26 April 2016 ¹⁹	28 April 2016 ²⁰
Panay Energy Development Corporation (PEDC)	Meralco	Up to 70 MW ²¹	20 years ²²	21 May 2014 ²³	26 April 2016 ²⁴	27 April 2016 ²⁵
Global Luzon Energy Development Corporation (GLEDC)	Meralco	600 MW ²⁶	20 years ²⁷	9 December 2014 ²⁸	27 April 2016 ²⁹	29 April 2016 ³⁰
Central Luzon Premiere Power Corporation (CLPPC)	Meralco	Up to 528 MW ³¹	21 years ³²	18 March 2015 ³³	26 April 2016 ³⁴	29 April 2016 ³⁵

⁶ Id. at 54, 329, 749.
⁷ Id. at 55, 750.
⁸ Id. at 501.
⁹ Id. at 329, 501.
¹⁰ Id. at 329.
¹¹ Id. at 77, 388.
¹² Id. at 77, 591.
¹³ Id. at 501.
¹⁴ Id. at 388.
¹⁵ Id.
¹⁶ Id. at 95, 445, 814.
¹⁷ Id. at 96, 814.
¹⁸ Id. at 502.
¹⁹ Id. at 445.
²⁰ Id.
²¹ Id. at 148, 698.
²² Id. at 148, 699.
²³ Id. at 501.
²⁴ Id. at 987-988.
²⁵ Id. at 988.
²⁶ Id. at 164.
²⁷ Id.
²⁸ Id. at 502.
²⁹ Id. at 988.
³⁰ Id.
³¹ Id. at 112, 646.
³² Id. at 112, 647.
³³ Id. at 503.
³⁴ Id. at 1326.
³⁵ Id.

Mariveles Power Generation Corporation (MPGC)	Meralco	Up to 528 MW ³⁶	21 years ³⁷	11 February 2015 ³⁸	26 April 2016 ³⁹	29 April 2016 ⁴⁰
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A1E and RPE are subsidiaries or affiliates of Meralco.⁴¹ In paragraph 3.71 of its Comment, Meralco stated that “[a]t the time of the signing of the A1E PSA, A1E was wholly-owned by Meralco PowerGen Corporation (‘PowerGen’), a wholly-owned subsidiary of Meralco. On the other hand, at the time of the signing of the RPE PSA, forty-seven percent (47%) of the total subscribed capital of RPE was owned by PowerGen, and three percent (3%) of its total subscribed capital was owned by the Meralco Pension Fund.”⁴²

CLPPC and MPGC are subsidiaries of SMC Global Power Holdings Corp. (SMC Global), the subsidiary of San Miguel Corporation (SMC) engaged in the construction and operation of various power projects.⁴³

In its Comment, Meralco admitted that “**no actual bidding is conducted**,”⁴⁴ and that “the PSAs entered into by Meralco undergo competitive selection and **thorough negotiations**, taking into consideration its specific and unique requirements.”⁴⁵ In short, no CSP was conducted through a third party recognized by the ERC as mandated in the 2015 DOE Circular.

Meralco also stated that, apart from the seven (7) PSAs between Meralco and its power suppliers, **there are eighty-three (83) other PSAs filed with the ERC during the period from 16 April 2016 to 29 April 2016, bringing the total PSAs excluded from CSP to ninety (90) PSAs.**

DATE	NO. OF PSAS	GENERATION COMPANIES
16 to 24 April 2016	4 PSAs	Mineral Power, Palm Concepcion, Astroenergy, GNPowder Kauswagan
25 April 2016	5 PSAs	GNPower Dinginin
26 April 2016	5 PSAs	GNPower Dinginin, Astroenergy
27 April 2016	4 PSAs	GNPower Dinginin

³⁶ Id. at 130.

³⁷ Id.

³⁸ Id. at 502.

³⁹ Id. at 1346.

⁴⁰ Id.

⁴¹ Id. at 346 (RPE), 411 (A1E).

⁴² Id. at 534.

⁴³ Id. at 1325 (CLPPC), 1345 (MPGC).

⁴⁴ Id. at 497.

⁴⁵ Id. Boldfacing added.

28 April 2016	10 PSAs	A. Brown, GNPower Dinginin, Southern Philippines Power, SMCPC, Surepep, Total Power, Upper Manupali Hydro
29 April 2016	55 PSAs	SMEC, MPGC, SCPC, SMCPC, LPPC, PEDC, GLEDC, CLPPC, A. Brown, AIE, Anda, Astronenergy, Delta P, GNPower Dinginin, GPower, Isabela Power, Levan Marketing, Mapalad Power, Minergy, RPE, SRPGC, Sunasia Energy, TeaM Energy, Trans-Asia, Unified Leyte Geothermal Energy, Western Power Mindanao ⁴⁶

Meralco further stated in its Comment:

1.41. Furthermore, apart from MERALCO, the following DUs and electric cooperatives also filed more than one PSA with the ERC during the second (2nd) half of April 2016: (a) Agusan del Sur Electric Cooperative, Inc.; (b) Bukidnon Second Electric Cooperative, Inc.; (c) Cagayan Electric Power & Light Company, Inc.; (d) Cotabato Light and Power Company; (e) Davao del Sur Electric Cooperative; (f) Iloilo 1 Electric Cooperative; (g) Ilocos Sur Electric Cooperative Incorporation; (h) Isabela I Electric Cooperative, Inc.; (i) Isabela II Electric Cooperative; (j) Leyte III Electric Cooperative, Inc.; (k) La Union Electric Cooperative, Inc.; (l) Pangasinan Electric Cooperative III; (m) Peninsula Electric Cooperative, Inc.; (n) Tarlac II Electric Cooperative, Inc.; (o) Zamboanga City Electric Cooperative, Inc.; and (p) Zamboanga del Sur Electric Cooperative, Inc.⁴⁷

The Issues

ABP raised the following issues:

- 1. Whether or not the ERC committed grave abuse of discretion in issuing the [ERC Clarificatory Resolution].
- 2. Whether or not the separate PSAs of Meralco with respondent generation companies should be disapproved for their failure to comply with the requirements of the [2015 DOE Circular] and the [CSP Guidelines].⁴⁸

⁴⁶ Id. at 506.
⁴⁷ Id. at 507.
⁴⁸ Id. at 17.

ABP's petition thus presents a purely legal issue: Does ERC have the statutory authority to postpone the date of effectivity of CSP, thereby amending the 2015 DOE Circular which required CSP to take effect on 30 June 2015?

The determination of the extent of the ERC's statutory authority in the present case is a purely legal question and can be resolved without making any finding of fact. The affirmative or negative resolution of this purely legal question will necessarily result in legal consequences, thus:

(a) If the Court rules affirmatively (that is, the ERC has the statutory authority to postpone the date of effectivity of CSP, and thereby ERC can amend the 2015 DOE Circular), then the legal consequence is that the 90 PSAs submitted to the ERC before the amended effectivity of CSP (30 April 2016) will serve as basis to pass on the power cost to consumers for the duration of the PSAs, whatever the duration of these PSAs.

(b) If the Court rules negatively (that is, the ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular), then the legal consequence is that the 90 PSAs submitted to the ERC after the effectivity of CSP on or after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. In such a case, the ERC will have to conduct CSP on all PSA applications submitted on or after 30 June 2015.

Clearly, there is no factual issue in dispute in the present case, and no factual issue has been raised by any of the parties. Thus, the present case can be resolved purely on the legal issue raised by ABP even as the resolution of this purely legal issue will necessarily result in legal consequences either way.

The Court's Ruling

We **GRANT** ABP's petition. The ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular. As a result, the 90 PSAs submitted to the ERC after the effectivity of CSP on or after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. The ERC must require CSP on all PSA applications submitted on or after 30 June 2015.



*Certiorari and Prohibition
As Remedy*

Petitioner ABP correctly filed a petition for *certiorari* and prohibition before this Court.

[T]he remedies of *certiorari* and prohibition are necessarily broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also **to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions.** This application is expressly authorized by the text of the second paragraph of Section 1, [Article 8 of the 1987 Constitution].⁴⁹ (Boldfacing and italicization added)

Not every abuse of discretion can be occasion for this Court to exercise its jurisdiction. Grave abuse of discretion means “such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, in other words where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it 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 or to act at all in contemplation of law. It is not sufficient that a tribunal, in the exercise of its power, abused its discretion, such abuse must be grave.”⁵⁰

The Dissenting Opinion of Justice Andres B. Reyes, Jr. would rather have this Court dismiss the petition. Justice Reyes asserts that the ERC, in issuing the ERC Clarificatory Resolution, acted within its jurisdiction⁵¹ and did not act with grave abuse of discretion amounting to lack or excess of jurisdiction.⁵² Justice Reyes claims that the ERC was exercising its quasi-legislative power, as granted by Sections 43 and 45 of the EPIRA and as defined in Sections 3 and 4 of the 2015 DOE Circular, when the ERC issued the ERC Clarificatory Resolution. Justice Reyes advances three reasons to justify his assertion that the ERC did not act with grave abuse of discretion amounting to lack or excess of jurisdiction.

First, the implementation of ERC Resolution No. 13 caused an avalanche of concerns and confusion from the stakeholders of the industry regarding the actual implementation of the provisions of the resolution, so much so that a multitude of [Distribution Utilities] DUs, mostly electric

⁴⁹ *Araullo v. President Benigno S. C. Aquino, III*, 737 Phil. 457, 531 (2014). Italicization in the original. Boldfacing added.

⁵⁰ *Pilipino Telephone Corporation v. NTC*, 457 Phil. 101, 113 (2003), citing *Benito v. Commission on Elections*, 402 Phil. 764 (2001).

⁵¹ Dissenting Opinion, Justice Andres B. Reyes, Jr., pp. 5-7.

⁵² *Id.* at 7-12.

cooperatives, sought for an exemption from the guidelines in the resolution.
x x x.

x x x x

Second, ERC did not “evade” its positive duty as provided for in the Constitution, the EPIRA, [the 2015 DOE Circular], or [the CSP Guidelines] as the petitioners would like the Court to believe. x x x.

x x x x

x x x ERC’s action on merely “restating” the date of effectivity of [the ERC Clarificatory Resolution] – its own resolution that has been in effect since April, 2016 – has not been shown to have been promulgated with grave abuse of discretion amounting to lack or excess of jurisdiction.

Third, it must also be emphasized that [the ERC Clarificatory Resolution] enjoys a strong presumption of its validity. x x x.⁵³

Justice Reyes’s Dissenting Opinion also finds no problem with the issuance and the contents of the ERC Clarificatory Resolution. According to Justice Reyes, under the Joint Resolution executed by the DOE and the ERC on 20 October 2015, the DOE and the ERC agreed that the ERC shall issue the appropriate regulation to implement CSP.”⁵⁴

Justice Reyes is correct – **consistent with their respective mandates under EPIRA**, the DOE and the ERC agreed that the ERC shall issue the appropriate regulation **to implement** CSP in accordance with the 2015 DOE Circular.⁵⁵ However, the ERC’s delegated authority is limited **to implementing or executing** CSP in accordance with the 2015 DOE Circular, **not postponing** CSP so as to freeze CSP for at least 20 years, effectively suspending CSP for one entire generation of Filipinos. The delegated authority **to implement** CSP does not include the authority **to postpone or suspend** CSP for 20 years, beyond the seven-year terms of office⁵⁶ of the ERC Commissioners postponing or suspending the CSP, and beyond the seven-year terms of office of their next successors, as well as beyond the six-year terms of office of three Presidents of the Republic.

The ERC’s exercise of its quasi-legislative power, which took the form of the issuance of the ERC Clarificatory Resolution, was done in excess of its jurisdiction. **The postponement of the effectivity of CSP was without the**

⁵³ Id. at 8-11.

⁵⁴ Id. at 9. Emphasis omitted.

⁵⁵ Section 1 of Joint Resolution No. 1 reads:

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

⁵⁶ Section 38, Republic Act No. 9136.

approval, and even without coordination with the DOE, in clear and blatant violation of Section 4 of the 2015 DOE Circular mandating CSP. The ERC has no power to postpone the effectivity of the 2015 DOE Circular. Under the 2015 DOE Circular, the ERC can only issue supplemental guidelines, which means guidelines to implement the 2015 DOE Circular, and not to amend it. Postponing the effectivity of CSP amends the 2015 DOE Circular, and does not constitute issuance of mere supplemental guidelines.

The issuance of the ERC Clarificatory Resolution was attended with grave abuse of discretion amounting to lack or excess of jurisdiction for the following reasons:

- (1) Postponing the effectivity of CSP from 30 June 2015 to 7 November 2015, and again postponing the effectivity of CSP from 7 November 2015 to 30 April 2016, or a total of 305 days, allowed DUs nationwide to avoid the mandatory CSP;**
- (2) Postponing the effectivity of CSP effectively freezes for at least 20 years the DOE-mandated CSP to the great prejudice of the public. The purpose of CSP is to compel DUs to purchase their electric power at a transparent, reasonable, and least-cost basis, since this cost is entirely passed on to consumers. The ERC's postponement unconscionably placed this public purpose in deep freeze for at least 20 years.**

Indisputably, the ERC committed grave abuse of discretion amounting to lack or excess of jurisdiction when the ERC postponed the effectivity of CSP. The postponement effectively prevented for at least 20 years the enforcement of a mechanism intended to ensure “transparent and reasonable prices in a regime of free and fair competition,” as mandated by law under EPIRA, a mechanism implemented in the 2015 DOE Circular which took effect on 30 June 2015.

In short, in the absence of CSP, there is no transparency in the purchase by DUs of electric power, and thus there is no assurance of the reasonableness of the power rates charged to consumers. As a consequence, all PSA applications submitted to the ERC on or after 30 June 2015 should be deemed not submitted and should be made to comply with CSP.

*Why the ERC Acted in Excess of its Jurisdiction:
Purpose of CSP and Significance of the
Postponement of the CSP Deadline*

The EPIRA was enacted on 8 June 2001. Among the EPIRA's declared State policies are, as stated in its Section 2:⁵⁷

⁵⁷ This provision reads:
Section 2. Declaration of Policy. – It is hereby declared the policy of the State:



X X X X

- (b) **To ensure the quality, reliability, security and *affordability* of the supply of electric power;**
- (c) **To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market; [and]**

X X X X

- (f) **To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power;**

x x x x (Boldfacing and italicization added)

The EPIRA mandates the DOE to “supervise the restructuring of the electricity industry.”⁵⁸ The EPIRA amended Section 5 of Republic Act No. 7638, or “The Department of Energy Act of 1992,” to allow the DOE to fulfill this new mandate under the EPIRA.

More importantly, Section 37 of the EPIRA includes the following in its enumeration of the DOE’s powers and functions:

- (a) **Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan x x x and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;**

X X X X

-
- (a) To ensure and accelerate the total electrification of the country;
 - (b) **To ensure the quality, reliability, security and affordability of the supply of electric power;**
 - (c) **To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market;**
 - (d) To enhance the inflow of private capital and broaden the ownership base of the power generation, transmission and distribution sectors;
 - (e) To ensure fair and non-discriminatory treatment of public and private sector entities in the process of restructuring the electric power industry;
 - (f) **To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power;**
 - (g) To assure socially and environmentally compatible energy sources and infrastructure;
 - (h) To promote the utilization of indigenous and new and renewable energy resources in power generation in order to reduce dependence on imported energy;
 - (i) To provide for an orderly and transparent privatization of the assets and liabilities of the National Power Corporation (NPC);
 - (j) To establish a strong and purely independent regulatory body and system to ensure consumer protection and enhance the competitive operation of the electricity market; and
 - (k) To encourage the efficient use of energy and other modalities of demand side management.
- Republic Act No. 9136, Section 37.

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

x x x x

(e) x x x [T]he DOE shall, among others,

x x x x

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

x x x x

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

x x x x

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

x x x x (Boldfacing and italicization added)

Under the EPIRA, it is the DOE that issues the rules and regulations to implement the EPIRA, including the implementation of the policy objectives stated in Section 2⁵⁹ of the EPIRA. Rules and regulations include circulars that have the force and effect of rules or regulations. Thus, pursuant to its powers and functions under the EPIRA, the DOE issued the 2015 DOE Circular mandating the conduct of CSP.

The 2015 DOE Circular, as stated in its very provisions, was issued pursuant to the DOE's power to "formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,"⁶⁰ where the State policy is to "[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power."⁶¹ Under the EPIRA, it is also the State policy to "ensure the x x x *affordability* of the supply of electric power."⁶² The purpose of the 2015 DOE Circular is to implement the State policies prescribed in the EPIRA. Clearly, the 2015 DOE Circular constitutes a rule or regulation issued by the DOE pursuant to its rule-making power under Section 37(p) of the EPIRA.

⁵⁹ See the complete enumeration of policies in note 57.

⁶⁰ 2015 DOE Circular, Second Whereas Clause, par. (d).

⁶¹ 2015 DOE Circular, First Whereas Clause, par. (d).

⁶² Republic Act No. 9136, Section 2(b).

The EPIRA also provides for the powers and functions of the ERC. Section 43 of the EPIRA mandates that the ERC “shall be responsible for the following key functions in the restructured industry:”

(a) *Enforce the implementing rules and regulations of this Act.*

x x x x

(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;*

x x x x (Boldfacing and italicization added)

Thus, the very first mandate of the ERC under its charter, the EPIRA, is to “[e]nforce the implementing rules and regulations” of the EPIRA as formulated and adopted by DOE. Clearly, under the EPIRA, it is the DOE that formulates the policies, and issues the rules and regulations, to implement the EPIRA. *The function of the ERC is to enforce and implement the policies formulated, as well as the rules and regulations issued, by the DOE.* The ERC has no power whatsoever to amend the implementing rules and regulations of the EPIRA as issued by the DOE. The ERC is further mandated under EPIRA to ensure that the “*pass through of bulk purchase cost by distributors is transparent [and] non-discriminatory.*”⁶³

Despite the ERC’s characterization as an “independent, quasi-judicial regulatory body,”⁶⁴ it is incorrect to conclude, as Justice Alfredo Benjamin S. Caguioa holds, that the ERC exercises “inherent and sufficient power,”⁶⁵ and “sufficient power, as the independent regulator of the industry,”⁶⁶ **to supplant or change**, as it did in the present case, policies, rules, and regulations prescribed by the DOE. **The power involved in the ERC’s implementation of the 2015 DOE Circular is not quasi-judicial but executive.** There are no adverse parties involved in the implementation by the ERC of the 2015 DOE Circular. The ERC does not adjudicate rights and obligations of adverse parties in the present case. The issue presented here involves the propriety of the exercise of the ERC’s **executive implementation** of the policies, as well as the rules and regulations of the EPIRA as issued by the DOE.

Moreover, the nature of the power involved in the ERC’s **postponement** of the effectivity of CSP as mandated in the 2015 DOE Circular is not quasi-judicial but delegated legislative power. Justice Caguioa

⁶³ Republic Act No. 9136, Section 43(o).

⁶⁴ Republic Act No. 9136, Section 38.

⁶⁵ Dissenting Opinion, Justice Caguioa, p. 11.

⁶⁶ Id. at 12. Emphasis omitted.

states that “**the ERC could solely issue**”⁶⁷ any resolution changing the dates of effectivity of CSP as set by the CSP Guidelines and the ERC Clarificatory Resolution “**because it was empowered by the law, i.e., the EPIRA.**”⁶⁸

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

Section 43. *Functions of the ERC.* - The ERC shall promote competition, encourage market development, ensure customer choice and discourage/penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:

- (a) Enforce the implementing rules and regulations of this Act;
- (b) Within six (6) months from the effectivity of this Act, promulgate and enforce, in accordance with law, a National Grid Code and a Distribution Code which shall include, but not limited to, the following:
 - (i) Performance standards for TRANSCO O & M Concessionaire, distribution utilities and suppliers: *Provided*, That in the establishment of the performance standards, the nature and function of the entities shall be considered; and
 - (ii) Financial capability standards for the generating companies, the TRANSCO, distribution utilities and suppliers: *Provided*, That in the formulation of the financial capability standards, the nature and function of the entity shall be considered: *Provided, further*, That such standards are set to ensure that the electric power industry participants meet the minimum financial standards to protect the public interest. Determine, fix, and approve, after due notice and public hearings the universal charge, to be imposed on all electricity end-users pursuant to Section 34 hereof;
- (c) Enforce the rules and regulations governing the operations of the electricity spot market and the activities of the spot market operator and other participants in the spot market, for the purpose of ensuring a greater supply and rational pricing of electricity;

⁶⁷ Id. at 25. Italicization in the original.

⁶⁸ Id.

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

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

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

- (i) For purposes of determining the rate base, the TRANSCO or any distribution utility may be allowed to revalue its eligible assets not more than once every three (3) years by an independent appraisal company: *Provided, however*, That ERC may give an exemption in case of unusual devaluation: *Provided, further*, That the ERC shall exert efforts to minimize price shocks in order to protect the consumers;
- (ii) Interest expenses are not allowable deductions from permissible return on rate base;
- (iii) In determining eligible cost of services that will be passed on to the end-users, the ERC shall establish minimum efficiency performance standards for the TRANSCO and distribution utilities including systems losses, interruption frequency rates, and collection efficiency;
- (iv) Further, in determining rate base, the TRANSCO or any distribution utility shall not be allowed to include management inefficiencies like cost of project delays not excused by *force majeure*, penalties and related interest during construction applicable to these unexcused delays; and
- (v) Any significant operating costs or project investments of TRANSCO and distribution utilities which shall become part of the rate base shall be subject to verification by the ERC to ensure that the contracting and procurement of the

equipment, assets and services have been subjected to transparent and accepted industry procurement and purchasing practices to protect the public interest.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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.

In the present case, where there is no exercise of the ERC's quasi-judicial powers, the ERC is legally bound to enforce the rules and regulations of the DOE as authorized under the EPIRA. The ERC has no independence or discretion to ignore, waive, amend, postpone, or revoke the rules and regulations of the DOE pursuant to the EPIRA, **as it is hornbook doctrine that rules and regulations issued pursuant to law by administrative agencies, like the DOE, have the force and effect of law.**⁶⁹ In fact, the first duty and function of the ERC under its charter is to “**enforce the implementing rules and regulations**” of the EPIRA as issued by the DOE. **Certainly, the ERC has no power to ignore, waive, amend, postpone, or revoke the policies, rules, regulations, and circulars issued by the DOE pursuant to the EPIRA.**

⁶⁹ *Victorias Milling Co., Inc. v. Office of the Presidential Assistant for Legal Affairs*, 237 Phil. 306 (1987).



In any event, even in quasi-judicial cases, the ERC is bound to apply the policies, rules, regulations, and circulars issued by the DOE as the ERC has no power to ignore, waive, amend, postpone, or revoke the policies, rules, regulations, and circulars issued by the DOE pursuant to the EPIRA. To repeat, the DOE's rules, regulations, and circulars issued pursuant to the DOE's rule-making power under the EPIRA *have the force and effect of law which the ERC is legally bound to follow, whether the ERC is exercising executive, quasi-legislative, or quasi-judicial powers.*

Pursuant to the DOE's mandate under the EPIRA,⁷⁰ the 2015 DOE Circular required all DUs to undergo CSP in procuring PSAs. The DOE

⁷⁰

Section 37 of the EPIRA reads:

SEC. 37. *Powers and Functions of the DOE.* – In addition to its existing powers and functions, the DOE is hereby mandated to supervise the restructuring of the electricity industry. In pursuance thereof, Section 5 of Republic Act No. 7638, otherwise known as “The Department of Energy Act of 1992,” is hereby amended to read as follows:

- (a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan and with the policies on environmental protection and conservation and maintenance of ecological balance, and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;
- (b) Develop and update annually the existing Philippine Energy Plan, hereinafter referred to as ‘The Plan’, which shall provide for an integrated and comprehensive exploration, development, utilization, distribution, and conservation of energy resources, with preferential bias for environment-friendly, indigenous, and low-cost sources of energy. The plan shall include a policy direction towards the privatization of government agencies related to energy, deregulation of the power and energy industry, and reduction of dependency on oil-fired plants. Said Plan shall be submitted to Congress not later than the fifteenth day of September and every year thereafter;
- (c) Prepare and update annually a Power Development Program (PDP) and integrate the same into the Philippine Energy Plan. The PDP shall consider and integrate the individual or joint development plans of the transmission, generation, and distribution sectors of the electric power industry, which are submitted to the Department: *Provided, however,* That the ERC shall have exclusive authority covering the Grid Code and the pertinent rules and regulations it may issue;
- (d) Ensure the reliability, quality and security of supply of electric power;
- (e) Following the restructuring of the electricity sector, the DOE shall, among others:
 - (i) Encourage private sector investments in the electricity sector and promote development of indigenous and renewable energy sources;
 - (ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;
 - (iii) In consultation with other government agencies, promote a system of incentives to encourage industry participants, including new generating companies and end-users to provide adequate and reliable electric supply; and
 - (iv) Undertake in coordination with the ERC, NPC, NEA and the Philippine Information Agency (PIA), information campaign to educate the public on the restructuring of the electricity sector and privatization of NPC assets.
- (f) Jointly with the electric power industry participants, establish the wholesale electricity spot market and formulate the detailed rules governing the operations thereof;
- (g) Establish and administer programs for the exploration, transportation, marketing, distribution, utilization, conservation, stockpiling, and storage of energy resources of all forms, whether conventional or non-conventional;
- (h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;
- (i) Develop policies and procedures and, as appropriate, promote a system of energy development incentives to enable and encourage electric power industry participants to provide adequate capacity to meet demand including, among others, reserve requirements;

issued on 11 June 2015 the 2015 DOE Circular which took effect upon its publication on 30 June 2015.

The 2015 DOE Circular recognized that under the EPIRA, the DOE has the mandate to **“formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,”**⁷¹ where the State policy is to **“[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power.”**⁷² The 2015 DOE Circular reiterated the EPIRA’s mandate that **“all Distribution Utilities (DUs) shall have the obligation to supply electricity in the least-cost manner to their Captive Market, subject to the collection of retail rate duly approved by the [ERC].”**⁷³

The 2015 DOE Circular mandated that DUs, including electric cooperatives, obtain their PSAs through CSP. Section 1 of the 2015 DOE Circular states the principles behind CSP:

Section 1. General Principles. Consistent with its mandate, the DOE recognizes that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs ensures security and certainty of electricity prices of electric power to end-users in the long-term. **Towards this end, all CSPs undertaken by the DUs shall be guided by the following principles:**

(a) **Increase the transparency needed in the procurement process to reduce risks;**

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

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

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

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

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

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

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

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

⁷¹ 2015 DOE Circular, Second Whereas Clause, par. (d).

⁷² 2015 DOE Circular, First Whereas Clause, par. (d).

⁷³ 2015 DOE Circular, Third Whereas Clause.



- (b) **Promote and instill competition in the procurement and supply of electric power to all end-users;**
- (c) **Ascertain least-cost outcomes that are unlikely to be challenged in the future as the political and institutional scenarios should change; and**
- (d) **Protect the interest of the general public.** (Boldfacing added)

In sum, the *raison d'être* of CSP is to ensure transparency and competition in the procurement of power supply by DUs so as to provide the least-cost electricity to the consuming public.

The clear text of Section 3 of the 2015 DOE Circular mandates the conduct of CSP after the Circular's effectivity on 30 June 2015.

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

x x x x (Boldfacing and italicization added)

Section 5 of the 2015 DOE Circular states the non-retroactivity of the Circular's effect.

Section 5. Non-Retroactivity. This Circular shall have prospective application and will not apply to PSAs with tariff rates already approved and/or have been **filed for approval by the ERC before the effectivity of this Circular.** (Boldfacing added)

Clearly, PSAs filed with the ERC **after** the effectivity of the 2015 DOE Circular must comply with CSP as only PSAs filed "**before the effectivity**" of the Circular are excluded from CSP.

Section 10 of the 2015 DOE Circular provides for its effectivity:

Section 10. Effectivity. **This Circular shall take effect immediately upon its publication** in two (2) newspapers of general circulation and shall remain in effect until otherwise revoked. (Boldfacing added)

The 2015 DOE Circular took effect upon its publication on 30 June 2015 in the *Philippine Daily Inquirer* and the *Philippine Star*.⁷⁴ Section 10 expressly declares that the "**Circular x x x shall remain in effect until otherwise revoked.**" Indisputably, CSP became mandatory as of 30 June 2015. **Taking**

⁷⁴ <http://www.nea.gov.ph/nea-ec-legal-conclave?download=1510%3Adoe-circular-no.-dc-2015-06-000-mandating-all-dus-to-undergo-competitive-selection-process-in-securing-psa> (Accessed 1 July 2018).

all these provisions together, all PSAs submitted to the ERC after the effectivity of the 2015 DOE Circular, on or after 30 June 2015, are required to undergo CSP.

Since the 2015 DOE Circular was issued solely by the DOE, it is solely the DOE that can amend, postpone, or revoke the 2015 DOE Circular unless a higher authority, like the Congress or the President, amends or revokes it. **Certainly, the ERC has no authority to amend, postpone, or revoke the 2015 DOE Circular, including its date of effectivity.**

The Joint Resolution executed by DOE and the ERC on 20 October 2015 reiterated that the ERC shall issue the appropriate regulation to implement CSP. **The Joint Resolution did not authorize the ERC to change the date of effectivity of the mandatory CSP. The Joint Resolution expressly mandated that the “ERC shall issue the appropriate regulation to implement” CSP.** The power “to implement” CSP does not include the power to postpone the date of effectivity of CSP, which is expressly mandated in the 2015 DOE Circular to take effect upon the publication of the Circular. In fact, to postpone is the opposite of “to implement.”

On the same date, 20 October 2015, the ERC issued the CSP Guidelines, which directed all DUs to conduct CSP in the procurement of their power supply for their captive markets. While the 2015 DOE Circular mandated CSP to take effect on 30 June 2015, **the ERC under the CSP Guidelines unilaterally postponed the date of effectivity of CSP from 30 June 2015 to 7 November 2015 or by 130 days.** This marks the first postponement by ERC of the effectivity of the mandatory CSP.

On 15 March 2016, however, the ERC, for the second time, unilaterally postponed the date of effectivity of the mandatory CSP. On this date the ERC issued the ERC Clarificatory Resolution, which restated the date of effectivity of CSP from 7 November 2015 to 30 April 2016. The second postponement of the effectivity of CSP from 7 November 2015 to 30 April 2016, or by 175 days, allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP.

*Why the ERC Acted in Excess of its Jurisdiction:
Required Coordination Between
the DOE and the ERC*

The 2015 DOE Circular explicitly stated the instances that required joint action of the DOE and the ERC:

1. Recognition of the Third Party that will conduct the CSP for the procurement of PSAs by the DUs;



2. Issuance of guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs;
3. Issuance of guidelines and procedures for the recognition or accreditation of the Third Party that conducts the CSP; and
4. Issuance of supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP.

These instances are in Sections 3 and 4 of the 2015 DOE Circular:

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

x x x x

Within one hundred twenty (120) days from the effectivity of this Circular, **the ERC and [the] DOE shall jointly issue guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided.** x x x.

x x x x

Section 4. Supplemental Guidelines. To ensure efficiency and transparency of the CSP Process [sic], **the ERC, upon its determination and in coordination with the DOE shall issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP.** The supplemental guidelines should ensure that any CSP and its outcome shall redound to greater transparency in the procurement of electric supply, and promote greater private sector participation in the generation and supply sectors, consistent with the declared policies under EPIRA. (Boldfacing and italicization added)

In all the foregoing instances, the ERC is mandated to act jointly with the DOE. All these instances merely implement CSP, and do not postpone CSP or amend the 2015 DOE Circular, which are beyond mere implementation of CSP. If the ERC cannot act by itself on certain instances in the mere implementation of CSP, then the ERC certainly cannot act by itself in the postponement of CSP or in the amendment of the 2015 DOE Circular.

We reiterate that the ERC unilaterally postponed the effectivity of the mandatory CSP **twice**. The ERC made the first unilateral postponement on 20 October 2015, when it stated that PSAs already filed with the ERC on or before 7 November 2015 were not required to undergo CSP. This first unilateral postponement was from 30 June 2015 to 7 November 2015, or a

period of postponement of 130 days. The ERC made a second unilateral postponement on 15 March 2016, when it restated the effectivity of the CSP Guidelines from 7 November 2015 to 30 April 2016, or a postponement of 175 days. **All in all, the ERC, by itself and without authorization from or coordination with the DOE, postponed the effectivity of the mandatory CSP for 305 days.**

The ERC thus amended, and not merely supplemented, the “guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP.”⁷⁵ This is contrary to what the 2015 DOE Circular clearly intended – that CSP shall take effect upon the Circular’s publication on 30 June 2015.

In its Comment to the present petition,⁷⁶ **the DOE denied any responsibility in the ERC’s restatement of the effective date in the ERC Clarificatory Resolution.** The DOE stated:

15. **DOE is not aware of the cut-off date shift.** There is nothing on record that shows that ERC, contrary to Section 4 of the [2015] DOE Circular, coordinated with DOE in “restating” the date of effectivity to a later date, or from 7 November 2015 to 30 April 2016 for a period of one-hundred and seventy-five (175) days.⁷⁷ (Boldfacing added)

In contrast, there is nothing in the ERC’s 60-page Comment⁷⁸ which disavowed DOE’s allegation of non-coordination. If anything, the ERC’s Comment underscored its assertion that **the ERC Clarificatory Resolution was solely issued by the ERC** supposedly as “a legitimate exercise of its quasi-legislative powers granted by law.”⁷⁹

We do not doubt that the ERC has the power to issue the appropriate regulation **to implement** CSP. This is clear from the EPIRA and the 2015 DOE Circular. Indeed, Justice Reyes in his Dissenting Opinion belabored this delegated power by underscoring the existence of the Joint Resolution. Justice Reyes misunderstood the delegation of power to mean that the Joint Resolution, by itself, is the required “coordination” in the implementation of CSP. Under this theory of Justice Reyes, the required “coordination” could take place **only once** upon the issuance of the Joint Resolution, and there can be no other coordination required in the future even if the ERC issues additional guidelines or regulations to implement CSP. This interpretation is obviously erroneous.

⁷⁵ 2015 DOE Circular, Section 4.

⁷⁶ *Rollo*, pp. 1140-1152. Filed by the DOE’s Assistant Secretary Gerardo D. Erguiza, Jr., Assistant Secretary Caron Aicitel E. Lascano, and Director III-Legal Services Arthus T. Tenazas.

⁷⁷ *Id.* at 1145.

⁷⁸ *Id.* at 1175-1234. Filed by the Office of the Solicitor General, and signed by Solicitor General Jose C. Calida, Assistant Solicitors General Raymund I. Rigodon and Henry S. Angeles, State Solicitor Lawrence Martin A. Albar, and Associate Solicitors Jose Angelo A. David, Lilibeth C. Perez-De Guzman, Maria Cristina T. Munding, and Patricia Anne D. Sta. Maria.

⁷⁹ *Id.* at 1193.



Moreover, **the ERC's power is neither absolute nor unbridled**. The ERC can only promulgate rules, but only insofar **as it is authorized**. Section 4(b) of Rule 3 of the Implementing Rules and Regulations of the EPIRA states:

Pursuant to Sections 43 and 45 of the Act, **the ERC shall promulgate such rules and regulations as authorized thereby**, including but not limited to Competition Rules and limitations on recovery of system losses, and shall impose fines or penalties for any non-compliance with or breach of the Act, these Rules and the rules and regulations which it promulgates or administers. (Boldfacing and italicization added)

The 2015 DOE Circular **specifically stated that the ERC's power to issue CSP guidelines and procedures should be exercised "in coordination with the DOE."** The purpose of such coordination was **"to ensure efficiency and transparency in the CSP."** In short, the ERC could not issue CSP guidelines and procedures without coordination with DOE. The DOE has expressly declared that the ERC did not coordinate with DOE in issuing the ERC Clarificatory Resolution. The ERC's unilateral postponement of CSP for 305 days, allowing DUs to avoid the mandatory CSP to the great prejudice of the public, was clearly without authority and manifestly constituted grave abuse of discretion. Moreover, the ERC's unilateral postponement of CSP egregiously prevented "transparency" and resulted in inefficiency by delaying the implementation of CSP.

In their Dissenting Opinions, Justice Reyes⁸⁰ and Justice Caguioa⁸¹ both use the DOE's letter dated 18 January 2016,⁸² which requested the ERC to

⁸⁰ Dissenting Opinion, Justice A. B. Reyes, Jr., p. 5.

⁸¹ Dissenting Opinion, Justice Caguioa, p. 32.

⁸² *Rollo*, p. 1516. The letter reads:
18 January 2016

HON. JOSE VICENTE B. SALAZAR
Chairman
ENERGY REGULATORY COMMISSION
Pacific Center Building, San Miguel Avenue,
Ortigas Avenue, 1500 Pasig City, Metro Manila

Subject: ABRECO'S Interim Power Supply Requirement

Dear Chairman Salazar:

We refer to the attached communication we received from the Abra Electric Cooperative, Inc. (ABRECO) dated 24 November 2015, seeking DOE's endorsement to ERC to allow ABRECO to directly negotiate with a power supplier for their short-term requirement in its quest for a secured and affordable power supply and to consequently relieve them from full exposure with the WESM.

In its attached letter to ERC, ABRECO mentioned that AES is considering a 2MW Interim supply for the EC's power requirements for the next three (3) years from 2016 to 2018. We welcome this as a positive move for the improvement of ABRECO's operations, thus, we are endorsing for ERC's consideration to allow ABRECO to directly negotiate with a power supplier for its short-term requirement, albeit the requirement for competitive selection process. This request is made in consideration of ABRECO's situation as an ailing EC and to prevent its vulnerability to volatile WESM prices given its supply [is] sourced from the WESM currently. This endorsement, however,

allow an electric cooperative (Abra Electric Cooperative, Inc. [ABRECO]) to directly negotiate with a power supplier despite the mandatory CSP, to justify the ERC's alleged power to amend the 2015 DOE Circular.

First, Justice Reyes overlooks the direction of the exercise of power in this instance: instead of the ERC acting alone, the DOE directed the ERC to take action on the matter. This letter proves that the power to amend the 2015 DOE Circular belongs to the DOE, not to the ERC. There is clearly a necessity for the ERC to coordinate with the DOE with regard to CSP matters.

Second, the DOE's endorsement to the ERC, as expressly stated in the DOE's letter dated 18 January 2016, "does not preclude the ERC from exercising its authority to evaluate ABRECO's PSAs and require further action, **such as subjecting ABRECO's PSA to a Swiss challenge.**" A Swiss challenge is "a hybrid mechanism between the direct negotiation approach and the competitive bidding route."⁸³ It is a system where "[a] third party can bid on a project during a designated period but the original proponent can counter match any superior offer."⁸⁴ **In short, a Swiss challenge is a form of public bidding**, and is recognized in the implementing rules of laws such as Republic Act No. 6957, "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes," as amended by Republic Act No. 7718,⁸⁵ and Executive Order No. 146,⁸⁶ "Delegating to the National Economic and Development Authority (NEDA) Board the Power of the President to Approve Reclamation Projects."⁸⁷

does not preclude the ERC from exercising its authority to evaluate the DUs Power Supply Agreements (PSAs) and require further action, such as, but not limited to subjecting ABRECO's PSA to a Swiss challenge.

For your consideration. Thank you.

Very truly yours,

(signed)
Zenaida Y. Monsada
Secretary

⁸³ *SM Land, Inc. v. Bases Conversion and Development Authority*, 741 Phil. 269, 288 (2014).

⁸⁴ Footnote 13 of *SM Land, Inc. v. Bases Conversion and Development Authority*, id.

⁸⁵ The term "Swiss Challenge" is also found in Section 3.2 of the Revised Implementing Rules and Regulations of Republic Act No. 6957, "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes," as amended by Republic Act No. 7718. Section 3.2 reads as follows:

Responsibility of the PBAC. – The PBAC herein created shall be responsible for all aspects of the pre-bidding and bidding process in the case of solicited proposals, and for the comparative bidding process (otherwise known as the "Swiss Challenge"), in the case of Unsolicited Proposals, including, among others, the preparation of the bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project.

⁸⁶ Repealed by Executive Order No. 74 (2019). The Philippine Reclamation Authority (PRA) shall be under the control and supervision of the Office of the President, while the power of the President to approve all reclamation projects shall be delegated to the PRA governing board.

⁸⁷ The term "Swiss Challenge" is also found in Section 6.2 of the Implementing Rules and

Third, even assuming that the DOE letter exempted one specific DU from CSP, it did not authorize ERC to postpone the effectivity of the mandatory CSP for 305 days for all other DUs nationwide.

Fourth, the term of exemption for ABRECO was only for three years, or from 2016 to 2018. The PSAs executed during ERC's unilateral 305-day postponement had terms that range from 20 to 21 years.

In view of the DOE's explicit assertion that the ERC did not coordinate with the DOE regarding the issuance of the ERC Clarificatory Resolution, and the ERC's corresponding silence on the same matter, we hold that the ERC's issuance of the ERC Clarificatory Resolution is void, because it was issued with grave abuse of discretion and in excess of its rule-making authority.

*Why the ERC Gravely Abused its Discretion:
Effective Twenty-Year Freeze
of the Mandatory CSP*

The PSAs between Meralco and its power suppliers were executed and submitted to the ERC within 10 days prior to the restated 30 April 2016 deadline. The data collated in the above-mentioned tables are, as indicated in the footnotes, found in the pleadings submitted by the pertinent parties. These are judicial admissions, and are not findings of fact. According to the ERC Clarificatory Resolution, these PSAs are not required to comply with CSP.

Obviously, the rationale behind CSP – to ensure transparency in the purchase by DUs of bulk power supply so as to provide the consuming public affordable electricity rates – **acquires greater force and urgency when the DU or its parent company holds a significant equity interest in the bulk power supplier**. Such a parent-subsidiary relationship, or even a significant equity interest in the bulk power supplier, does not lend itself to fair and arms-length transactions between the DU and the bulk power supplier.

Regulations of Executive Order No. 146, dated 13 November 2013, "Delegating to the National Economic and Development Authority (NEDA) Board the Power of the President to Approve Reclamation Projects." Section 6.2 reads as follows:

6.2. Reclamation projects identified under Sections 2.2.2, 2.3.2, 2.4 and 2.5, after undergoing a thorough review, evaluation and negotiation process and upon acceptance by the PRA Board, shall be subjected to a competitive challenge process ("Swiss Challenge") in accordance with existing laws such as but not limited to the BOT Law, NEDA JV Guidelines and based on the parameters as approved by the NEDA Board, upon recommendation of the PRA Board.

In all cases, the Public Bidding in Section 6.1 and competitive challenge process ("Swiss Challenge") under Section 6.2 shall be undertaken after the NEDA Board approval in compliance with the competitive bidding requirement of EO No. 146.



From Meralco's Comment, we see that the effect of the non-implementation of CSP is more widespread and far-reaching than what petitioners initially presented. **Non-implementation of CSP affects various areas of the country and not just Meralco's extensive service areas. Postponement of the effectivity of the mandatory CSP resulted in the exemption from CSP of a total of ninety (90) PSAs covering various areas of the country.** Under the ERC Clarificatory Resolution, the dates of submission put these PSAs outside the ambit of the mandatory CSP for **at least 20 years** based on the contract terms of these PSAs.

In effect, the ERC Clarificatory Resolution signaled to DUs to rush the negotiations and finalize their PSAs with power generation companies. **Meeting the extended deadline would then render the 2015 DOE Circular mandating CSP *inutile* for at least 20 years. We cannot, in conscience, allow this to happen. To validate the ERC's postponement of CSP under the CSP Guidelines and the ERC Clarificatory Resolution means to validate ERC's arbitrary and unauthorized act of putting into deep freeze, for at least 20 years, the principles behind CSP to the great prejudice of the public.**⁸⁸

*Why the ERC Gravely Abused its Discretion:
The Whereas Clauses of the
CSP Guidelines and of the ERC Clarificatory Resolution*

The ERC's Comment states: "It must be emphasized that the considerable amount of time, money, and effort it took to enter into a PSA would have been wasted if the CSP [Guidelines] took effect immediately."⁸⁹ Granting that negotiations for the PSAs took considerable time, the issuance of the 2015 DOE Circular and of the CSP Guidelines was not conjured on a whim. We find that ERC's Comment fails to consider the efforts of both the DOE and the ERC prior to the issuance of the 2015 DOE Circular as well as the CSP Guidelines.

As early as 5 December 2003, the DOE issued Department Circular No. 2003-12-011, entitled "Enjoining All Distribution Utilities to Supply Adequate, Affordable, Quality and Reliable Electricity," which reiterated the state policy that "all DUs must x x x take cognizance and assume full responsibility to forecast, assure and contract for the supply of electric power within their respective franchise areas to meet their obligations as a DU particularly to their Captive Market."⁹⁰ **Moreover, the DOE had conducted a series of nationwide public consultations on the proposed policy on**

⁸⁸ 2015 DOE Circular, Section I.

⁸⁹ *Rollo*, p. 1207.

⁹⁰ See 2015 DOE Circular, Fourth Whereas Clause.

competitive procurement of electric power for all electricity end-users.⁹¹

The dates and manner of consultations, as well as the acts of the DOE and the ERC, were specifically mentioned in the Whereas Clauses of the CSP Guidelines, thus:

x x x x

WHEREAS, on February 19, 2013, the ERC issued a Notice in ERC Case No. 2013-005 RM, entitled "In the Matter of the Promulgation of the Rules Governing the Execution, Review and Evaluation of Power Supply Agreements Entered Into by Distribution Utilities for the Supply of Electricity to their Captive Market" (PSA Rules), which was posted on the ERC's website, directing all interested parties to submit their respective comments on the first draft of the PSA Rules, not later than March 22, 2013;

WHEREAS, on various dates, the ERC received comments on the first draft of the PSA Rules from interested parties, namely: a) Cagayan Electric Power and Light Co., Inc. (CEPALCO); b) Visayan Electric Company, Inc. (VECO); c) Quezon Power (Philippines) Ltd. Co. (QPL); d) Power Source Philippines, Inc. (PSPI); e) National Grid Corporation of the Philippines (NGCP); f) Philippine Independent Power Producers Association, Inc. (PIPPA); g) Next Power Consortium, Inc.; h) SN Aboitiz Power Group (SNAP); i) Aboitiz Power Corporation (APC); j) Philippine Electricity Market Corporation (PEMC); k) Manila Electric Company (MERALCO); l) Department of Energy (DOE); m) Philippine Rural Electric Cooperatives Associations, Inc. (PHILRECA); and n) National Rural Electric Cooperative Association (NRECA);

WHEREAS, on October 16, 2013, the ERC issued a Notice of Posting and Publication in the aforementioned case, which was posted on the ERC's website, directing all interested parties to submit their respective comments on the second draft of the PSA Rules and setting the same for public consultations on December 2, 2013 in Pasig City for the Luzon stakeholders and on December 5, 2013 in Cebu City for the Visayas and Mindanao stakeholders;

WHEREAS, on various dates, the ERC received comments on the second draft of the PSA Rules from interested parties, namely: a) PHILRECA; b) CEPALCO; c) VECO; d) QPL; e) PSPI; f) NGCP; g) PIPPA; h) Next Power Consortium, Inc.; i) SNAP; j) APC; k) PEMC; l) MERALCO; m) DOE; and n) NRECA;

WHEREAS, on January 27, 2014, the ERC issued a Notice of Posting and Public Consultation setting the second draft of the PSA Rules for public consultations on February 18, 20 and 24, 2014 in Davao City, Cebu City and Pasig City for the Mindanao, Visayas and Luzon stakeholders, respectively;

WHEREAS, on February 18, 20 and 24, 2014, the ERC conducted public consultations wherein the comments of the interested parties were discussed;

⁹¹ See 2015 DOE Circular, Seventh Whereas Clause.



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

WHEREAS, on various dates, the ERC received position papers/additional comments from interested parties, namely: a) PIPPA; b) APC; c) Mindanao Coalition of Power Consumers; and d) Association of Mindanao Rural Electric Cooperatives, Inc. (AMRECO);

WHEREAS, Article III of the draft PSA Rules requires the DU to undertake a transparent and competitive selection process before contracting for the supply of electricity to its captive market;

WHEREAS, in October 2014, the DOE issued for comments its draft Circular on the proposed Demand Aggregation and Supply Auctioning Policy (DASAP);

WHEREAS, in the proposed DASAP, all DUS will be mandated to comply with the *auction requirement* prescribed therein and other rules and guidelines as may be prescribed in the implementation of the DASAP;

WHEREAS, by reason of the issuance of the DASAP and pending the finalization thereof, the ERC held in abeyance its action on ERC Case No. 2013-005 RM and final approval of the draft PSA Rules;

WHEREAS, on June 11, 2015, the Department of Energy (DOE) issued Department Circular No. DC2015-06-008, *Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)*;

WHEREAS, on October 20, 2015, the DOE and the ERC approved the issuance of a Joint Resolution embodying their agreement on the CSP, particularly, that the ERC shall issue the appropriate regulations requiring the DUs to undertake a CSP for the PSAs they will enter into for the supply to their captive markets;

WHEREAS, the ERC and the DOE are convinced that there is an advantage to be gained by having a CSP in place, in terms of ensuring transparency in the DUs’ supply procurement and providing opportunities to elicit the best price offers and other PSA terms and conditions from suppliers[.]⁹² (Boldfacing and italicization added)

In stark contrast to the extensive consensus-building which attended the drafting of the 2015 DOE Circular and the CSP Guidelines,

⁹² CSP Guidelines, Third to Seventeenth Whereas Clauses.

the ERC Clarificatory Resolution explicitly admitted that its issuance was *not* accompanied by any public consultation or focus group discussion. Rather, the ERC Clarificatory Resolution was unilaterally issued by the ERC, *without coordinating with DOE*, on the basis of “several letters from stakeholders.” The stakeholders had no way of knowing the concerns of their peers as there was no interaction or discussion among the stakeholders.

WHEREAS, since the publication of the CSP [Guidelines] on 06 November 2015, the [ERC] has received several letters from stakeholders which raised issues on the constitutionality of the effectivity of the CSP [Guidelines], sought clarification on the implementation of the CSP and its applicability to the renewal and extension of PSAs, requested a determination of the accepted forms of CSP, and submitted grounds for exemption from its applicability, among others.

WHEREAS, after judicious study and due consideration of the different perspectives raised in the aforementioned letters, with the end in view of ensuring the successful implementation of the CSP for the benefit of consumers, DUs, and GenCos, the [ERC] has resolved to allow a period of transition for the full implementation of the CSP [Guidelines] and, as such, restates the effectivity date of the CSP [Guidelines] to a later date[.]⁹³

The CSP Guidelines did not, in the words of the OSG, “take effect immediately.” Rather, it was the product of years of negotiation. The stakeholders were aware of the contents and the eventual implementation of CSP. Moreover, the CSP Guidelines, although signed on 20 October 2015, took effect on 7 November 2015, or 18 days after signing.

*Why the ERC Gravely Abused its Discretion:
Obligations of a Distribution Utility in the
Electric Power Industry*

The EPIRA divided the electric power industry into four sectors, namely: generation, transmission, distribution, and supply.⁹⁴ The distribution of electricity to end-users is a regulated common carrier business requiring a franchise.⁹⁵ We reiterate that the EPIRA mandates that a distribution utility has the obligation to supply electricity **in the least-cost manner to its captive market**, subject to the collection of distribution retail supply rate duly approved by the ERC.⁹⁶

Republic Act No. 9209 granted Meralco a congressional franchise to construct, operate, and maintain a distribution system for the conveyance of electric power to the end-users in the cities and municipalities of Metro Manila, Bulacan, Cavite, and Rizal, and certain cities, municipalities, and barangays in Batangas, Laguna, Quezon, and Pampanga. **Meralco’s**

⁹³ ERC Clarificatory Resolution, Seventh and Eighth Whereas Clauses.

⁹⁴ See Republic Act No. 9136, Section 5.

⁹⁵ See Republic Act No. 9136, Section 22.

⁹⁶ See Republic Act No. 9136, Section 23.

franchise is in the nature of a monopoly because it does not have any competitor in its designated areas. The actual monopolistic nature of Meralco's franchise was recognized and addressed by the framers of our Constitution, thus:

MR. DAVIDE: x x x

Under Section 15 on franchise, certificate, or any other form of authorization for the operation of a public utility, we notice that the restriction, provided in the 1973 Constitution that it should not be exclusive in character, is no longer provided. Therefore, **a franchise, certificate or any form of authorization for the operation of a public utility may be exclusive in character.**

MR. VILLEGAS: I think, yes.

MR. DAVIDE: It may be "yes." **But would it not violate precisely the thrust against monopolies?**

MR. VILLEGAS: The question is, we do not include the provision about the franchise being exclusive in character.

MR. SUAREZ: This matter was taken up during the Committee meetings. **The example of the public utility given was the MERALCO. If there is a proliferation of public utilities engaged in the servicing of the needs of the public for electric current, this may lead to more problems for the nation. That is why the Commissioner is correct in saying that that will constitute an exemption to the general rule that there must be no monopoly of any kind, but it could be operative in the case of public utilities.**

MR. DAVIDE: **Does not the Commissioner believe that the other side of the coin may also be conducive to more keen competition and better public service?**

MR. SUAREZ: **The Commissioner may be right.**

MR. DAVIDE: Does not the Commissioner believe that we should restore the qualification that it should not be exclusive in character?

MR. SUAREZ: In other words, under the Commissioner's proposal, Metro Manila, for example, could be serviced by two or more public utilities similar to or identical with what MERALCO is giving to the public?

MR. DAVIDE: That is correct.

MR. SUAREZ: The Commissioner feels that that may create or generate improvement in the services?

MR. DAVIDE: Yes, because **if we now allow an exclusive grant of a franchise, that might not be conducive to public service.**

MR. SUAREZ: We will consider that in the committee level.



MR. MONSOD: With the Commissioner's permission, may I just amplify this.

MR. VILLEGAS: Commissioner Monsod would like to make a clarification.

MR. MONSOD: I believe the Commissioner is addressing himself to a situation where it lends itself to more than one franchise. **For example, electric power, it is possible that within a single grid, we may have different distribution companies. So the Commissioner is right in that sense that perhaps in some situations, non-exclusivity may be good for the public.** But in the case of power generation, this may be a natural activity that can only be generated by one company, in which case, prohibiting exclusive franchise may not be in the public interest.⁹⁷ (Boldfacing added)

Section 5 of Republic Act No. 9209 provides that “[t]he retail rates to [Meralco’s] captive market and charges for the distribution of electric power by [Meralco] to its end-users shall be regulated by and subject to the approval of the ERC.” As the holder of a distribution franchise, Meralco is obligated to provide electricity **at the least cost** to its consumers. The ERC, as Meralco’s rate regulator, approves the retail rates - comprising of power and distribution costs - to be charged to end-users. As we have demonstrated above, both Meralco and the ERC have been remiss in their obligations. Going through competitive public bidding as prescribed in the 2015 DOE Circular is the only way to ensure a transparent and reasonable cost of electricity to consumers.

Lest we forget, the ERC is expressly mandated in Section 43(o) of the EPIRA of **“ensuring that the x x x pass through of bulk purchase cost by distributors is transparent.”** The ERC’s postponement of CSP twice, totaling 305 days and enabling **90 PSAs** in various areas of the country to avoid CSP for **at least 20 years**, directly and glaringly violates this express mandate of the ERC, resulting in the non-transparent, secretive fixing of prices for bulk purchases of electricity, to the great prejudice of the 95 million Filipinos living in this country as well as the millions of business enterprises operating in this country. This ERC action is a most extreme instance of grave abuse of discretion, amounting to lack or excess of jurisdiction, warranting the strong condemnation by this Court and the annulment of the ERC’s action.

Absent compliance with CSP in accordance with the 2015 DOE Circular, the PSAs shall be valid only as between the DUs and the power generation suppliers, and shall not bind the DOE, the ERC, and the public for purposes of determining the transparent and reasonable power purchase cost to be passed on to consumers.

⁹⁷

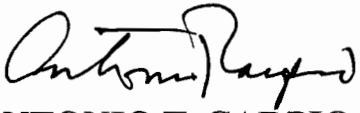
III RECORD, CONSTITUTIONAL COMMISSION 261-262 (13 August 1986).

On 1 February 2018, the DOE issued Circular No. DC2018-02-0003 entitled “**Adopting and Prescribing the Policy for the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreements for the Captive Market**” (2018 DOE Circular). The DOE prescribed, in Annex “A” of this 2018 DOE Circular, the DOE’s own CSP Policy in the procurement of power supply by DUs for their captive market (2018 DOE CSP Policy). Section 16.1 of the 2018 DOE CSP Policy expressly repealed Section 4 of the 2015 DOE Circular authorizing ERC to issue supplemental guidelines to implement CSP.

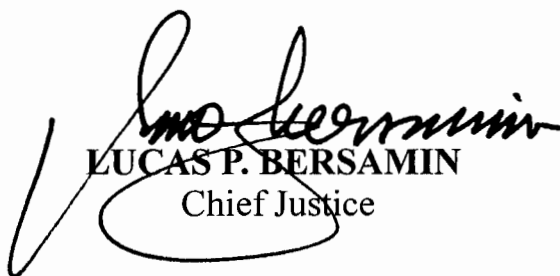
In short, the DOE *revoked* the authority it delegated to the ERC to issue supplemental guidelines to implement CSP, and the DOE itself issued its own guidelines, the 2018 DOE CSP Policy, to implement CSP under the 2015 DOE Circular. This means that the CSP Guidelines issued by the ERC have become *functus officio* and have been superseded by the 2018 DOE CSP Policy. Under its Section 15, the 2018 DOE CSP Policy is expressly made to apply to “**all prospective PSAs.**” The 2018 DOE Circular, including its Annex “A,” took effect upon its publication on 9 February 2018. Thus, the 90 PSAs mentioned in this present case must undergo CSP in accordance with the 2018 DOE Circular, in particular the 2018 DOE CSP Policy prescribed in Annex “A” of the 2018 DOE Circular.

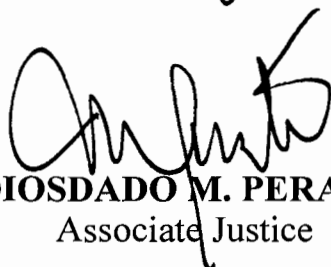
WHEREFORE, the petition for *certiorari* and prohibition is **GRANTED**. The first paragraph of Section 4 of Energy Regulatory Commission Resolution No. 13, Series of 2015 (CSP Guidelines), and Energy Regulatory Commission Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), are hereby declared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

SO ORDERED.


ANTONIO T. CARPIO
Associate Justice

WE CONCUR:

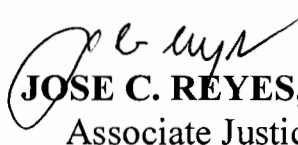

LUCAS P. BERSAMIN
 Chief Justice


DIOSDADO M. PERALTA
 Associate Justice

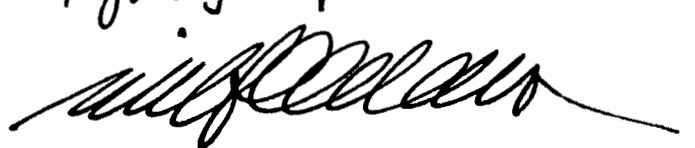
*Please see Separate Concurring
 opinion*
MP. Kent
ESTELA M. PERLAS-BERNABE
 Associate Justice

(no part)
FRANCIS H. JARDELEZA
 Associate Justice

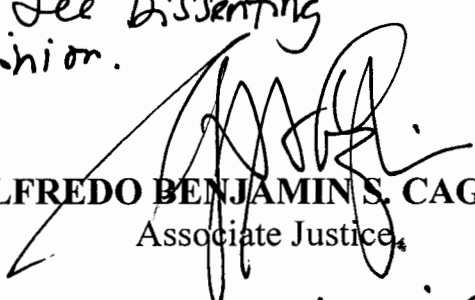
*See My dissenting
 opinion*
Reyes
ANDRES B. REYES, JR.
 Associate Justice

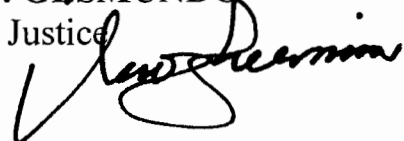

JOSE C. REYES, JR.
 Associate Justice

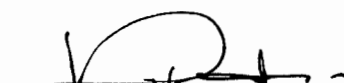

MARIANO C. DEL CASTILLO
 Associate Justice

*I concur.
 I join J. Carpio and J. Bersamin*


MARVIC M.V.F. LEONEN
 Associate Justice

*See Dissenting
 opinion.*

ALFREDO BENJAMIN S. CAGUIOA
 Associate Justice

*I certify that Justice Gismundo
 who is travelling on official business
 left his vote for the opinion of Justice
 Carpio.*
ALEXANDER G. GISMUNDO
 Associate Justice


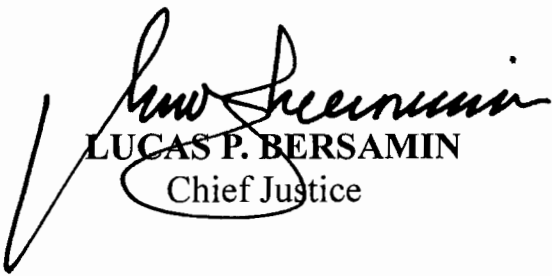

RAMON PAUL L. HERNANDO
 Associate Justice


ROSMARIE D. CARANDANG
Associate Justice


AMY C. LAZARO-JAVIER
Associate Justice

CERTIFICATION

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


LUCAS P. BERSAMIN
Chief Justice