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G.R. No. 214042 – FOUNDATION FOR ECONOMIC FREEDOM, INC., Petitioner, **v. ENERGY REGULATORY COMMISSION and NATIONAL RENEWABLE ENERGY BOARD**, Respondents.

G.R. No. 215579 – REMIGIO MICHAEL A. ANCHETA II, Petitioner, **v. ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY, NATIONAL TRANSMISSION CORPORATION, NATIONAL RENEWABLE ENERGY BOARD, and MANILA ELECTRIC COMPANY**, Respondents; **FOUNDATION FOR ECONOMIC FREEDOM, INC. and CITIZENWATCH, INC.**, Intervenors.

G.R. No. 235624 – ALYANSA NG MGA GRUPONG HALIGI NG AGHAM AT TEKNOLOHIYA PARA SA MAMAMAYAN (AGHAM) and ANGELO B. PALMONES, Petitioners, **v. ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY, NATIONAL TRANSMISSION CORPORATION, NATIONAL RENEWABLE ENERGY BOARD, and MANILA ELECTRIC COMPANY**, Respondents; **DEVELOPERS FOR RENEWABLE ENERGY FOR ADVANCEMENT, INC. (DREAM)**, Intervenor.

Promulgated:

August 13, 2024

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CONCURRING OPINION

GESMUNDO, *C.J.*:

I respectfully write in relation to the above-captioned consolidated cases.

I thank the distinguished Senior Associate Justice Marvic M.V.F. Leonen for his extensive *ponencia* on the said cases. I concur in the denial of the Petitions and with the upholding of the constitutionality and validity of the following:

1. Sections 6 and 7 of Republic Act No. 9513, otherwise known as the Renewable Energy Law;

2. The Energy Regulatory Commission's (ERC) July 27, 2012 Resolution No. 10, series of 2012 entitled "Resolution Approving the Feed-In Tariff Rates;"

3. ERC's Resolution No. 24, series of 2013 entitled "A Resolution Adopting the Guidelines on the Collection of the Feed-in Tariff Allowance and the Disbursement of the Fit-All Fund;"

4. ERC Order dated October 7, 2014, granting the National Transmission Corporation's (TRANSCO) application for provisional approval of the PHP 0.0406/kWh FIT Allowance effective January 2015 for all on-grid consumer billings;

5. ERC's Resolution No. 6, series of 2015 dated March 27, 2015, adjusting the Feed-in Tariff Rate for Solar Renewable Energy from PHP 9.68/kWh in 2012 to PHP 8.69/kWh;

6. ERC's Decision dated October 6, 2015 adjusting the Feed-in Tariff Rate for Wind Renewable Energy from PHP 8.53/kWh to PHP 7.40/kWh;

7. ERC's Resolutions No. 6 and 14, series of 2015;

8. ERC's Orders provisionally approving the 2016 and 2017 FIT Allowance at PHP 0.1240/kWh and PHP 0.1830/kWh,[1] respectively; and

9. Department of Energy (DOE) Certifications[2] dated April 30, 2014 and April 7, 2015.[3]

I write this concurring opinion to expound on my reasons for upholding the validity of the DOE Certifications dated April 30, 2014 and April 7, 2015.

These consolidated cases assail the validity of the Feed-In Tariff (FIT) System implemented by the ERC, DOE, National Renewable Energy Board (NREB), and the TRANSCO pursuant to Republic Act No. 9513 or the Renewable Energy Law.[4] "Under the FIT System, electric power industry

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1 *Ponencia*, pp. 117–118.
2 *Rollo* (G.R. No. 235624), pp. 76–78.
3 *Ponencia*, pp. 103–105.
4 *Id.* at 2.

participants who will source electricity from the generation of renewable energy are incentivized. One of the incentives is the Feed-In Tariff (FIT) – a guaranteed fixed amount of payment for a set period of time."[5]

The consolidated Petitions assailed, among others, the validity of ERC issuances on the ground that they were issued in violation of due process requirements. The *ponencia* declared that the ERC complied with the notice and hearing requirements. It observed that petitioner Alyansa ng mga Grupong Haligi ng Agham at Teknolohiya Para sa Mamamayan (AGHAM) did not deny that the ERC held hearings, public consultations, meetings, and focus group discussions, and proceedings as to its own issuances. Further, the *ponencia* noted that the ERC posted notices on its website, asking interested stakeholders to comment on the same. Finally, the *ponencia* found that the ERC issued its decisions and orders after consideration of all parties' contentions.[6]

Meanwhile, the consolidated Petitions also averred that the NREB failed to comply with the publication requirements for its Petition to Initiate Rule-Making for Adoption of Feed-In Tariff (Petition to Initiate), recommending the FIT and degression rates for each of the renewable resources.[7] Said Petition to Initiate "was filed to determine the FIT – the fixed amount that will be paid to renewable energy developers per kilowatt-hour should they choose to produce electricity from renewable energy resources."[8] It differs from the FIT Allowance, which is "the uniform charge on all electricity consumers who are supplied through the distribution or transmission network to share in the cost of the FIT,"[9] since it is the latter which directly affects electricity rates chargeable to end users. Thus, the *ponencia* held that the NREB sufficiently complied with publication requirements for its Petition to Initiate, having published the same twice, for two consecutive weeks, in two newspapers of general circulation in the Philippines. The last date of publication was not later than 10 days before the schedule of the first hearing.[10]

In addition, AGHAM contended that the DOE Certifications dated April 30, 2014 and April 7, 2015, which increased the installation targets of solar and wind energy, respectively, are in the nature of administrative rules since they increase the burden of electricity. It posited that the same were issued in violation of procedural due process because they did not comply

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5 *Id.* at 5.
6 *Id.* at 103–105.
7 *Id.* at 5.
8 *Id.* at 109.
9 *Id.*
10 *Id.* at 106, 109.

with the requirement of prior notice and hearing or public consultations, as required in Book VII, Chapter 2 of the Revised Administrative Code.[11]

On this point, the *ponencia* declared that the ERC complied with the notice and hearing requirements. It observed that AGHAM does not deny ERC's contention that the ERC held hearings, public consultations, and focus group discussions, and proceedings on its issuances. The ERC also posted notices on its website, with interested stakeholders being asked to comment. The ERC issued its decisions and orders only after consideration of all the parties' contentions. Thus, the issuances cannot be said to have been in violation of procedural due process.[12]

I concur with the findings of the *ponencia*. I would like to further elucidate my position on why there is no reason to invalidate the DOE Certifications. To my mind, the DOE Certifications are not subject to the notice and hearing requirements.

The Administrative Code of 1987 provides:

> Section 9. *Public Participation.* — (1) If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.
>
> (2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.
>
> (3) In case of opposition, the rules on contested cases shall be observed.

Meanwhile, case law instructs us that "[w]hen an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed. ***When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially increases the burden of those governed***, it behooves the agency to accord at

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[11] *Id.* at 103.
[12] *Id.* at 105.

least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law."[13]

The concerned DOE Certifications and the pertinent excerpts from the same are as follows:

1. DOE Certification dated April 30, 2014 entitled "Installation Target of Solar Energy Generation under the Feed-In Tariff (FIT) System"

> **NOW, THEREFORE,** premises considered, it is hereby certified that:
>
> 1. ***Installation Target for Solar Energy Generation under the FIT System.*** The installation target for solar energy generation under the FIT System shall now be 500 MW to include solar energy generation systems and technologies, such as but not limited to solar PV and CSP, for ground-mounted and/or rooftop installations[.][14] (Emphasis supplied)

2. DOE Certification dated April 7, 2015 entitled "Installation Target of Wind Energy Generation under the Feed-In Tariff (FIT) System"

> **NOW, THEREFORE,** premises considered, it is hereby certified that:
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> 1. ***Installation Target for Wind Energy Generation under the FIT System.*** The installation target for wind energy generation under the FIT System shall now be 400 MW[.][15] (Emphasis supplied)

For this purpose, ERC Resolution No. 16-10,[16] entitled "Resolution Adopting the Feed-In Tariff Rules" and referred to as the FIT Rules, defines an installation target as "the megawatt capacity per [Renewable Energy] Technology and the number of years that it shall be achieved as set by NREB."

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13 *Commissioner of Internal Revenue v. Michel J. Lhuillier Pawnshop, Inc.*, 453 Phil. 1043, 1058 (2003) [Per C.J. Davide, Jr., First Division].

14 *Rollo* (G.R. No. 235624), p. 78.

15 *Id.* at 82.

16 Dated July 12, 2010.

Section 5 of the FIT Rules provides for the determination of FITs. It states that the NREB shall propose FITs after taking into account the expected MW capacity for each technology that it shall set as installation targets and the numbers of years when this target shall be achieved, viz.:

> 5. Determination of FITs
>
> The FITs that NREB shall calculate and submit to the ERC for approval shall be in accordance with the methodology that the ERC shall adopt. For the initial FITs, the NREB may base its calculations on a reference cost study for each technology based on a real candidate project or a hypothetical one depending on the available information. The project to be chosen shall be representative of the average conditions of the renewable energy plant operating in compliance or at par with applicable international technical standards and practices for such technologies, and the pricing study shall consider also all non-price incentives in [Republic Act] No. 9513.
>
> ***The NREB shall propose the FITs taking into account the expected MW capacity for each technology that it shall set as installation targets and the number of years when this target shall be achieved.***
>
> The FITs shall cover the costs of the plant, including the costs of other services that the plant may provide, as well as the costs of connecting the plant to the transmission or distribution network, calculated over the expected lives of the plant, and provide for market-based weighted average cost of capital (WACC) in determining return on invested capital. (Emphasis supplied)

Meanwhile, Section 8 of the FIT Rules mandates the NREB to include in its recommendation of the FITs to the ERC a discussion on the installation targets per technology, ensuring that it is consistent with the Renewable Portfolio Standards and its rules:

> 8. Procedure for the Setting of the FITs
>
> Upon the effectivity of these Rules, the ERC shall issue a Notice of Rule-making for the establishment and fixing of the FITs in accordance with these Rules. The filing shall conform to the procedures in the ERC Rules of Practice and Procedure (ERC RPP) on Rule-making. ***In the said Notice, the ERC shall direct NREB within the period stated therein to submit its recommended FITs. In its submission, NREB shall provide discussion on the installation targets per technology, which it shall ensure are consistent with the Renewable Portfolio Standards (RPS) and whatever RPS Rules that will be established by the DOE and the details and results of its reference cost study for each technology.***

> If necessary, the ERC shall choose and appoint experts to assist it in the evaluation of the NREB's recommended FITs, with the cost of such engagement to be borne by NREB. (Emphasis supplied)

Considering the foregoing, the following are evident:

1. The installation targets, as established by the DOE Certifications dated April 30, 2014 and April 7, 2015, are relevant insofar as the NREB shall consider the same in recommending the FITs to the ERC. In so many words, the installation targets constitute only ***one of the factors*** for consideration or study of the NREB in arriving at the FITs to be recommended.

2. The DOE Certifications, which established the installation targets, are directed or addressed to the NREB and, by necessary implication, to the ERC. It is not addressed to the electric power industry participants.

In view of these observations, it is my considered view that the DOE Certifications do not substantially increase the burden of those governed, or the electric power industry participants. It is apparent that the DOE Certifications establishing installation targets merely provide for means to facilitate the implementation of the law, in this case Republic Act No. 9513. Since the installation targets merely constitute one factor for the determination of the FITs, its impact is already sufficiently addressed by the notice and hearing required at the level of the NREB and the ERC. As discussed previously, the esteemed *ponente* himself concluded that the NREB and the ERC were indeed compliant with these due process requirements.

Further, I respectfully submit that it would be unduly burdensome to require a separate notice and hearing for the setting of installation targets when the same may be questioned at the level of public participation for the respective issuances of the NREB and the ERC setting the FITs. To accord such an interpretation would unnecessarily add a secondary layer to the public consultations to be held, where none is required at the stage of setting the installation targets. It would be redundant and counterproductive to require the same.

In conclusion, there is no reason to invalidate the DOE Certifications as they are not subject to the notice and hearing requirements.

ACCORDINGLY, I vote to **DENY** the consolidated Petitions.

ALEXANDER G. GESMUNDO
Chief Justice