



Republic of the Philippines  
Supreme Court  
Manila

FIRST DIVISION

NOTICE

Sirs/Mesdames:

*Please take notice that the Court, First Division, issued a Resolution dated March 18, 2021 which reads as follows:*

**“G.R. No. 255477 – POWER FOR PEOPLE CONVENOR GERARD ARANCES, KONSUYER NATIONAL COORDINATOR VICTOR MORILLO, PHILIPPINE MOVEMENT FOR CLIMATE JUSTICE (PM CJ) INC., joined and represented by its National Coordinator BIBIANO RIVERA, JR., SANLAKAS, joined and represented by its President MARIE MARGUERITE LOPEZ, and FREEDOM FROM DEBT COALITION, joined and represented by its President RENE OFRENEO, petitioners, versus HON. ALFONSO CUSI, in his capacity as Secretary of the DEPARTMENT OF ENERGY, and ATTY. FERDINAND DOMINGO, in his capacity as Chairman of MANILA ELECTRIC COMPANY’S THIRD PARTY BIDS AND AWARDS COMMITTEE, respondents.**

This is a Petition for *Certiorari* (with Urgent Application for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction)<sup>1</sup> directly filed with the Court against respondents Alfonso Cusi, in his capacity as the Secretary of the Department of Energy (DOE), and Atty. Ferdinand Domingo, in his capacity as the Chairman of the Manila Electric Company (Meralco) Third Party Bids and Awards Committee (TPBAC). Petitioners essentially assail Meralco’s procurement of a Power Supply Agreement (PSA) for the uncontracted demand of 1,800 MW baseload capacity.

In particular, petitioners argue that the provisions in the Terms of Reference (TOR) are glaringly unfavorable to consumers of

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<sup>1</sup> *Rollo*, pp. 3-67.

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electricity, which violate Meralco's obligation to supply electricity in the least-cost manner. Petitioners thus seek to nullify the Competitive Selection Process (CSP) for the procurement of the 1,800 MW contract capacity.<sup>2</sup>

After a careful study of the allegations and the records of this case, the Court resolves to dismiss the petition for violating the doctrine of hierarchy of courts.

At the onset, it bears noting that petitioners directly filed their petition with the Court, alleging that direct recourse is proper since the issues raised are of transcendental importance and involve public welfare. They further opine that the petition raises only pure questions of law.<sup>3</sup>

The ground of transcendental importance, by itself, does not suffice to justify the direct resort to the Court. As the Court *en banc* clarified in *Gios-Samar, Inc. v. Department of Transportation and Communications*,<sup>4</sup> (*Gios-Samar*) the doctrine of hierarchy of courts is not a matter of mere policy but a constitutional imperative proceeding from the considerations of due process. Since the Court is not equipped to receive evidence at the first instance, filing the petition directly with the Court would adversely affect the parties' due process rights as this denies them a complete and definitive resolution of the controversy. The Court further elucidated in *Gios-Samar* as follows:

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

Objective justice also requires the ascertainment of all relevant facts before the Court can rule on the issue brought before it. Our pronouncement in *Republic v. Sandiganbayan* is enlightening:

**The resolution of controversies is, as everyone knows, the *raison d'être* of courts. This essential function is accomplished by *first*, the**

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<sup>2</sup> Id. at 66.

<sup>3</sup> Id. at 5-7.

<sup>4</sup> G.R. No. 217158, March 12, 2019, 896 SCRA 213.

**ascertainment of all the material and relevant facts from the pleadings and from the evidence adduced by the parties, and *second*, after that determination of the facts has been completed, by the application of the law thereto to the end that the controversy may be settled authoritatively, definitely and finally.**

**It is for this reason that a substantial part of the adjective law in this jurisdiction is occupied with assuring that all the facts are indeed presented to the Court; for obviously, to the extent that adjudication is made on the basis of incomplete facts, to that extent there is faultiness in the approximation of objective justice.** It is thus the obligation of lawyers no less than of judges to see that this objective is attained; that is to say, that there [be] no suppression, obscuration, misrepresentation or distortion of the facts; and that no party be unaware of any fact material and relevant to the action, or surprised by any factual detail suddenly brought to his attention during the trial. x x x<sup>5</sup> (Emphasis in the original)

Thus, more than the “special and important reasons” invoked to justify the direct resort to the Court, the Court’s exercise of its power of judicial review depends on the nature of the question raised by the parties – a question that should be purely legal in nature.

Here, while petitioners allege that the issue raised is a pure question of law, a careful review of the petition reveals the contrary: the controversy is actually factual in nature. Petitioners claim that respondents gravely abused their discretion for allowing the CSP of Meralco to proceed even when the TOR contains “glaringly unfavorable [terms] for petitioners and Meralco’s other electricity consumers”<sup>6</sup> and failed to result in the “least cost electricity.”<sup>7</sup> They further aver that the TOR for the 1,200 MW and 500 MW contracts contained provisions that guarantee lower electricity rates for consumers than those provided in the TOR for the 1,800 MW capacity.<sup>8</sup> Simply put, petitioners assail the TOR for Meralco’s procurement of 1,800 MW contract capacity for not containing terms, which in their view, should be more beneficial to Meralco’s customers.

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<sup>5</sup> Id. at 288-290.

<sup>6</sup> *Rollo*, p. 31.

<sup>7</sup> Id.

<sup>8</sup> Id. at 12-16.

Petitioners further raise numerous contentions on the most advantageous terms for Meralco's procurement of PSAs, which necessitate the assessment of, among other things, the costs necessary to generate the required capacity, the expected energy consumption of electricity consumers within Meralco's franchise area for the period of the PSA, and a historical analysis of Meralco's current PSAs with other Generation Companies (GenCos). In fact, the Judicial Affidavit<sup>9</sup> of petitioner Gerard Arances was attached to the petition for purposes of establishing petitioners' factual assertions, including the heavily fluctuating generation rates in Meralco's previous PSAs with other GenCos that employed the two-part tariff structure.<sup>10</sup> Thus, for all intents and purposes, the Court is asked to draw its own conclusion on how Meralco can sufficiently meet the power requirements of customers in its franchise area, while supplying electricity in the least-cost manner.

**These issues are evidently factual in nature, the resolution of which requires the Court to inquire into the wisdom of the Meralco TPBAC TOR for the 1,800 MW contract capacity.** However, without a complete and settled factual determination, the Court can only surmise and speculate on the merits of the challenged terms in the TOR. Petitioners' direct recourse to the Court is therefore fatal to their petition.

The prematurity of the petition is further highlighted by petitioners' own admission that the DOE has yet to act on their letter protesting the TOR.<sup>11</sup> In its letter<sup>12</sup> dated February 5, 2021, the DOE informed petitioners that it is reviewing their position paper on the unfavorable terms of the TOR, and their official position on the matter would be communicated to petitioners upon completion of said review. Without waiting for the DOE's action on the matter, petitioners proceeded to file this petition on February 19, 2021.

Petitioners attempt to justify the immediate recourse to the Court by reasoning out that the approaching opening of bids compelled them to dispense with the DOE's response.<sup>13</sup> But the CSP is not completed by the receipt and opening of bids. GenCos that submit the winning bid are required to undergo a post-qualification process to determine compliance with the TOR and other bidding documents.<sup>14</sup> The Energy Regulatory Commission (ERC) is further

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<sup>9</sup> Id. at 206-228.

<sup>10</sup> Id. at 219.

<sup>11</sup> Id. at 22.

<sup>12</sup> Id. at 163.

<sup>13</sup> Id. at 6.

<sup>14</sup> Department of Energy, Department Circular No. DC2018-02-0003, Sec. 8.8.4.

mandated to review the parties' compliance with the requirements of the CSP<sup>15</sup> and thereafter, to evaluate and approve the resulting PSA.<sup>16</sup> Significantly, the Electric Power Industry Reform Act of 2001 (EPIRA) vests the ERC with the following functions:

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

x x x x

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

x x x x

(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;

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<sup>15</sup> Id. at Sec. 12.2.

<sup>16</sup> Republic Act No. 9136, AN ACT ORDAINING REFORMS IN THE ELECTRIC POWER INDUSTRY, AMENDING FOR THE PURPOSE CERTAIN LAWS AND FOR OTHER PURPOSES [otherwise known as the "Electric Power Industry Reform Act of 2001"], Sec. 45(b).

- (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; x x x

x x x x

**(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[.]** (Emphasis supplied)

Guided by its mandate under the EPIRA, the ERC's review of the resulting PSA encompasses all aspects of the transaction, including the details on the procurement process that resulted in the selection of the GenCo,<sup>17</sup> as well as the stipulations on pricing and its impact on the overall rates of the Distribution Utility once the contract is approved.<sup>18</sup> With the conduct of the CSP underway, and pending the ERC's subsequent review of the PSA, the reasonableness of the electricity rates resulting from the challenged TOR of Meralco for the 1,800 MW baseload capacity is yet to be determined. It is therefore clearly premature for the Court to take cognizance of the petition and supplant any term prescribed by the Meralco TPBAC.

In the same vein, the Court cannot grant petitioners' application for an injunctive relief. Petitioners failed to establish that they are entitled to the reliefs demanded in the petition.<sup>19</sup> Neither were they able to show the material and substantial invasion of a right sought to be protected.<sup>20</sup> The application for a temporary restraining order and writ of preliminary injunction is therefore denied.

**WHEREFORE,** premises considered, the petition is **DISMISSED.**

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<sup>17</sup> A RESOLUTION PROMULGATING THE ENERGY REGULATORY COMMISSION'S RULES OF PRACTICE AND PROCEDURE, ERC Resolution No. 38, Series of 2006, Rule 20(B), Sec. 2(n).

<sup>18</sup> Id. at Sec. 1; See also J. Caguioa, Dissenting Opinion in *Alyansa para sa Bagong Pilipinas, Inc. v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, accessed at <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>>.

<sup>19</sup> RULES OF COURT, Rule 58, Sec. 4(a).

<sup>20</sup> In *Cayabyab v. Dimson*, G.R. No. 223862, July 10, 2017, 830 SCRA 520, 528, the Court enumerated the following requisites for a preliminary injunctive relief: (a) the invasion of right sought to be protected is material and substantial; (b) the right of the complainant is clear and unmistakable; and (c) there is an urgent and paramount necessity for the writ to prevent serious damage.

**SO ORDERED.”**

**By authority of the Court:**

  
**LIBRADA C. BUENA**  
Division Clerk of Court  
RTB

by:

**MARIA TERESA B. SIBULO**  
Deputy Division Clerk of Court  
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