

Republic of the Philippines
COURT OF APPEALS
Manila

<p>NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS (NASECORE), represented by PETRONILO ILAGAN, FEDERATION OF VILLAGE ASSOCIATIONS (FOVA), represented by SIEGFRIEDO VELOSO, and FEDERATION OF LAS PIÑAS VILLAGE ASSOCIATIONS (FOLVA), represented by BONIFACIO DAZO, <i>Petitioners,</i></p> <p>- versus -</p> <p>MANILA ELECTRIC COMPANY (MERALCO) and ENERGY REGULATORY COMMISSION (ERC) <i>Respondents.</i></p> <p>x-----x</p>	<p>CA G.R. SP NO. 108663 Petition for Review under Rule 43 of the 1997 Rules of Civil Procedure (ERC Case Nos. 2008-004 RC and 2008-018 RC)</p>
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PETITION

COME NOW PETITIONERS, assisted by counsel, and to this Honorable Court respectfully states:

PREFATORY STATEMENT

On 26 June 2001 the Electric Power Industry Reform Act also known as R.A. 9136 or EPIRA Law was enacted to ensure that it would translate to a lower cost of electricity as well as the good quality and reliable supply of electric power. Years after, several amendatory bills have been submitted by legislators from both houses citing the following reasons and observations in their explanatory notes:

“Nevertheless, the passage of EPIRA law were attended with an increase in electric bills, confusion in the implementation and enforcement of the provisions of the law which eventually caused a haphazard market behavior in the electric power industry

The EPIRA Law, which was originally intended to reduce the electricity cost and lift the burden of the consumers was not met and evidently became anti-poor, anti-people, benefiting only a selected number of power generators and distributors”¹.

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“From 1998 to 2002, the electric bills of end-users for the same usage tripled, increasing by 201%.xxx

It is no coincidence therefore, that the passage of the EPIRA was accompanied by increases in electric bills.”²

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In the Fourteenth (14th) Congress new amendatory bills to the EPIRA were filed stating that:

“xxx It resulted in electricity cost that is burdensome on the part of consumers. At the same time, the issues the law originally intended to resolve were not properly addressed”³

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“Six (6) years after its enactment, the promise of the EPIRA is now popularly known as a broken promise, with the never-ending spiraling cost of power and electricity”⁴

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“Today, power consumers suffer under the ever-increasing cost of electricity. Now, in the House of Representatives, the very same proponents of R.A. 9136 are presently pushing for the amendment of the EPIRA law due to the continuous and rapid rise in the price of power, which may reach unmanageable”⁵

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¹ Senate Bill No. 1929 introduced by Sen. Juan Ponce Enrile, co-sponsored by House Bill No. 3823 introduced by Rep. Imee Marcos and House Bill No. 3856 introduced by Rep Danny Suarez during the 13th Congress

² Senate Bill No. 1062 and 899 introduced by Senator Edgardo Angara during the 13th Congress and 14th Congress respectively and House Bill No. 180 introduced by Rep Juan Edgardo M. Angara during the 14th Congress

³ Senate Bill No. 1234 introduced by Sen. Juan Ponce Enrile during the 14th Congress

⁴ Senate Bill No. 160 introduced by Sen Jinggoy Estrada

⁵ Senate Bill No. 308 introduced by Sen Jinggoy Estrada

“After the Electric Power Industry Reform Act (EPIRA) was passed into law, every electric consumer became optimistic that the cost of power will go down in a manageable level. Five years have passed since its enactment into law, and yet, charges made by distribution companies continue to escalate”⁶

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Common among all these amendatory bills was the objective to lessen the hardship and burden on all hapless and captive electricity consumers stemming from the high cost of power.

Regrettably, the public are not well informed of the recent two ERC Orders involving both the National Power Corporation (Napocor) provisional rate increase and the Manila Electric Corporation (MERALCO) rate increase under the Performance Based Regulation (PBR) rate setting methodology. These two whammys will have a great impact on the budget of every household which definitely will make life more difficult for all energy consumers at a time when the world is reeling from a global financial crisis.

Any increase in the prices of gasoline, rice and pandesal is readily felt and therefore people immediately react and protest. However, the aforementioned increases of NAPOCOR and MERALCO rates did not meet any whimper or protest from the public.

Why?

The pricing of electricity is quite complicated not only to ordinary people but also to those who have high level of education and expertise. A casual inspection of the monthly bills being sent by MERALCO characterized by many charges would readily explain the reason for this.

⁶ Senate Bill No. 52 introduced by Sen. Lito Lapid

It is also observed that ERC lacks transparency in fully explaining the true impact of the rate increase it granted, presumably in order to avoid resistance by the public. Needless to stress, ERC should be always candid and forthright to the public about their decisions on rate increases because of their profound repercussion on consumers' life. What is more, ERC tends to highlight more the good effect of the rate increase to MERALCO in terms of its improved financial resources, without regard to its injurious effect on consumers in terms of higher, unjust and unreasonable electricity bills.

It has been observed as well that whenever there is an increase, the explanation of the ERC, MERALCO and NAPOCOR (which are naturally self serving) are the ones given full and prominent media coverage; in contrast, the reactions of various consumer groups are either completely ignored or given a scanty or sketchy report.

Before the aforesaid twin increases by NAPOCOR and MERALCO, the Philippines was already known to already have the highest cost of electricity in Asia second only to Japan. After these increases, it is not far fetched that the country will have the highest cost of electricity, second to none, in this part of the world.

On this premise, this Petition is respectfully submitted.

I **NATURE OF THE PETITION**

1.1 The Petitioners respectfully elevate for Review, pursuant to Rule 43 of the 1997 Rules of Civil Procedure, the Decision dated 29 May 2008, a certified copy of which is hereto attached as ANNEX "A" and the Order dated 13 April 2009, a copy of which is hereto attached as ANNEX "B" of the Energy Regulatory Commission in ERC Case Nos. 2008-004RC and 2008-018RC entitled *"In the Matter of the Application for Approval of the Annual Revenue Requirement and the Performance Incentive Scheme in Accordance with*

the Provisions of the Rules on Setting Distribution Wheeling Rates (RDWR)” and “In the Matter of the Application for Approval of A.) The Maximum Average Price for the 2nd Regulatory Period (MAP₂₀₀₉); and B.) The Translation into Distribution Rates of Different Customer Classes for the First Regulatory Year of the ERC-Approved Annual Revenue-Requirement for MERALCO under the Performance Based Regulation (PBR) for the Regulatory Period 2007-2011”. By reason of the aforesaid Decision and Order of the ERC, the distribution charges of MERALCO was increased.

II **PARTIES**

2.1 PETITIONERS National Association of Electricity Consumers for Reforms (NASECORE), Federation of Village Association (FOVA) and Federation of Las Piñas Village Association (FOLVA) are associations whose members are consumers of respondent Manila Electric Company (MERALCO). They may be served with summons and other court processes at NASECORE’S office address at 10 Bayside Court Compound, 680 Quirino Avenue, Tambo, Parañaque City.

2.2 Respondent Manila Electric Company (“MERALCO” for brevity) is a corporation organized and existing under Philippine laws, with business address at Meralco Avenue corner Ortigas Avenue, Ortigas Commercial Complex, Pasig City. It may be served with summons and other court processes through its legal counsel Atty. Jose Ronald Valles 7th Floor, Lopez Building, Meralco Avenue corner Ortigas Avenue, Ortigas Commercial Complex, Pasig City .

2.3 Respondent Energy Regulatory Commission (ERC for brevity) is a government agency created under Section 38 of the Electric Power Industry

Reform Act (Republic Act No. 9136), with business address at Pacific Center Building San Miguel Avenue, Ortigas Center, Pasig City, where it may be served with processes and notices of this Honorable Court.

III

TIMELINESS OF THE PETITION

- 3.1** On 23 October 2008, NASECORE received a copy of the assailed Decision (Annex "A" hereof dated May 29, 2008);
- 3.2** On 07 November 2008, NASECORE filed a Motion for Reconsideration of the aforesaid Decision, a copy of which is hereto attached as **ANNEX "C"**;
- 3.3** On 28 April 2009, NASECORE received the assailed Order (Annex "B" hereof) dated 13 April 2009, denying its Motion for Reconsideration;
- 3.4** NASECORE has therefore fifteen (15) days, or until 13 May 2009, to file the instant petition for review (*Section 4, Rule 43, 1997 Rules of Civil Procedure*).
- 3.5** On 11 May 2009, Petitioner filed a Motion for Extension of Time of fifteen (15) days from 13 May 2009, or up to and until 28 May 2009, within which to file the instant petition and at the same time paying in full the docket and other lawful fees as evidenced by the attached original copies of official receipts marked as **ANNEXES "D", "D-1", "D-2", "D-3" and "D-4"**.
- 3.6** Thus, this petition is being filed within the period (May 28, 2009) prescribed by the Rules.

IV

BRIEF STATEMENT OF FACTS/CASE

**ON THE APPROVED UNBUNDLED RATES AND
RETURN ON RATE BASE (RORB) METHODOLOGY**

4.1 On 30 May 2003, the ERC approved MERALCO's application for rate increase and unbundling of its rates under ERC Case No. 2001-646 and ERC Case No. 2001-900 which also granted MERALCO an increased in its RORB rate from 12% (the cap hereto applicable to all public utilities) to 15.5%.

4.2 However, the ERC acknowledged that this increase in MERALCO's RORB rate might result in excessive profits to MERALCO, thus, it reserved its (ERC) right to review the assumptions used in granting the said rate, viz:

“At this juncture, the Commission deems it proper to point out that it reserves its right to revisit the assumption used in computing the WACC, whenever circumstances will so warrant.”

4.3 It is worth stressing that as of today, six (6) years after it qualifiedly approved the MERALCO increase, the ERC has not reviewed the financial statements of MERALCO to determine if the assumptions it used in granting the rate increase in 2003 is reasonable as far as the consumers are concerned. Which review, if it was conducted, should have included scrutinizing official receipts of huge expenses in order to determine whether these are recoverable or not based on the ERC's criteria that they must be, (a) necessary; (b) recurring; and (c) redounding to the interest of the consumers.

4.4 The said ERC decisions, however, were brought to the Court of Appeals by the (Oppositors) questioning the aforementioned decisions.

4.5 Interestingly, this Honorable Court in its CA-G.R. SP No. 77559 Decision dated 22 July 2004 annulled the Decision and Order of the ERC mainly on the ground that COA should first conduct an audit of the books, records and accounts of MERALCO before ERC can fix rates. The dispositive portion of the said Decision states:

“WHEREFORE, premises considered, the present petition is hereby PARTLY GRANTED. The challenged Decision dated March 20 2003 and May 30 2003 of the Energy Regulatory Commission (ERC) in ERC Case Nos. 2001-646 and 2001-900 are hereby both ANNULLED and SET ASIDE. The Case is hereby REMANDED to the ERC for further proceedings, and the ERC is further ORDERED to direct Commission on Audit (COA) to audit the books, records and accounts of MERALCO pursuant to Section 22, Chapter 4, Subtitle B, Title I, Book V of Executive Order No. 292 (Administrative Code of 1987).

4.6 At this point, Petitioners manifest its clear understanding that the COA audit of the books of accounts of MERALCO referred specifically to the years prior to the ERC Decision of March 20 and May 30, 2003 in order to determine whether the consumer rate payments which provided revenues to MERALCO allowed the latter reasonable or excessive profits. Said audit would have also revealed whether there was a need for a rate increase or not.

4.7 On 13 August 2004 ERC filed a motion to: (1) to intervene; (2) to plead not through the Office of the Solicitor General; (3) to admit attached motion for reconsideration; and (4) to be heard orally upon said motion for reconsideration. On 17 August 2004 MERALCO filed its Motion for Reconsideration of the abovementioned Decision. Respondents filed its consolidated Comment/Opposition to the ERC and MERALCO motions on 15 October 2004.

4.8 This Honorable Court resolved the motions for reconsideration filed by MERALCO and the ERC in its Resolution/Order dated 24 January 2005. The dispositive portion of the Order reads:

“WHEREFORE, premises considered, the motion for reconsideration of MERALCO is hereby DENIED, for lack of merit. The motions for intervention filed by the ERC and individual intervenors Veloso, et al., are likewise both DENIED

Needless to state, the motions: (1) to admit attached motion for reconsideration; (2) to plead not through the Office of the Solicitor General; and (3) to be heard orally upon said motion for reconsideration filed by the ERC are hereby all DENIED”.

4.9 However, upon appeal by the Respondents, the Supreme Court reversed the Decision of this Court but directed the ERC *“to request the Commission on Audit (COA) to undertake a complete audit on the books, records and accounts of MERALCO relative to its provisionally-approved rate increase and unbundled rates.”*

4.10 Again, Petitioners is of the understanding that the COA audit of MERALCO, as directed by the Supreme Court, specifically refers to the book of accounts showing the collections under the provisionally-approved rate increase and unbundled rates and under the ERC Decisions of March 20 and May 30, 2003.

4.11 In the meantime, an analysis of the audited financial statements of MERALCO reveals that the profits of MERALCO for the years 2003 to 2007 (during the implementation of the rate increase granted by the ERC in 2003) far exceeded the generally acceptable 12% rate of returns on actual capital or equity of public utilities, viz:

TABLE 1
Manila Electric Company
Return on Actual Capital or Equity
For the Years 2003 to 2007

(in Thousand Pesos, except the yearly return on capital)

	Capital	Adjusted Income Before Tax	Yearly Return on Capital (%)
<u>Year</u>	<u>A</u>	<u>B</u>	<u>C=B÷A</u>
2003	13,845,000	4,494,000	32.45%
2004	14,976,980	12,162,000	81.20%
2005	16,351,046	7,590,000	46.42%
2006	17,633,534	9,134,000	51.80%
2007	18,111,751	9,579,000	52.89%

Obviously, MERALCO had earned income in excess of what is generally considered just and reasonable during the said five year period in the aggregate sum of Thirty Three Billion Two Hundred Sixty Six Million Eight Hundred Two Thousand (Php33,266,802,000) Pesos, the breakdown of which follows:

TABLE 2
Meralco's Excess Income
(In Thousand Pesos)

	Adjusted Income Before Tax	Allowable Income (12%)	Excess Income
<u>Year</u>	<u>A</u>	<u>B</u>	<u>C=A-B</u>
2003	4,494,000	1,661,400	2,832,600
2004	12,162,000	1,797,238	10,364,762
2005	7,590,000	1,962,126	5,621,874
2006	9,134,000	2,116,024	7,017,976
2007	9,597,000	2,173,410	7,423,590
TOTAL	EXCESS INCOME		<u>33,266,802</u>

Schedules A, B, and B-1 showing the detailed computation of the above Table 2 are hereto attached as ANNEXES "E", "F" and "G", respectively.

ON THE NEW RATE SETTING METHODOLOGY

4.12 On 11 January 2008 MERALCO filed its first application for translation of annual revenue requirements into distribution of rates docketed under ERC Case No. 2008-004RC. Petitioners filed their respective interventions on time and hearings were made.

- 4.13 On 01 April 2008 MERALCO filed its second application for translation of annual revenue requirements into distribution of rates docketed with ERC Case No. 2008-018RC. Petitioners filed their respective interventions on time and hearings were made.
- 4.14 On 29 May 2008 ERC rendered the assailed Decision (Annex "A" hereof) for ERC Case Nos. 2008-004RC and 2008-018RC, which was received by NASECORE on 23 October 2008, approving a new rate in the amount of P1.2280 per kilowatt-hour from the former rate of P1.083 per kilowatt-hour which the Supreme Court declared as provisional.⁷
- 4.15 On 24 October 2008 NASECORE filed its Motion for Deferment of the distribution rates (distribution, supply and metering charges) increase, a copy of which is hereto attached as ANNEX "H".
- 4.16 On 27 October 2008 ERC issued an Order approving NASECORE's Motion for the deferment of the implementation of the increase in Meralco's distribution rates, a copy of which is hereto attached as ANNEX "I".
- 4.17 Feeling aggrieved and not satisfied with the ERC Decision, on 07 November 2008, Petitioners filed its consolidated Motion for Reconsideration. (Annex "C" hereof)
- 4.18 On 13 April 2009 ERC issued its Order, Annex "B" hereof, denying petitioners' Motion for Reconsideration.

Hence, this Petition.

⁷ page 28 of the May 29, 2008 ERC decision.

V **ISSUES**

5.1 Petitioners respectfully submit that the issues in this case, which are the grounds relied upon for the review sought, are the following:

- I. **Whether or not the ERC should first review the assumptions it used in the grant of an increased RORB rate (from 12% to 15.5%) in MERALCO's last rate increase in order to determine if the said increase resulted in excessive profits to MERALCO (a conclusive proof that the consumers are being overcharged), as ERC promised in its Order dated May 30, 2003.**

- II. **Whether or not the ERC should have waited for the COA report relative to the audit it conducted on the books, records, and accounts of MERALCO, in order to determine if the provisional rate increase being charged by MERALCO to its customers is just and reasonable under ERC Case Nos. 2001-900 and 2001-646 as per directive of the Supreme Court under G.R. No. 166769 and G.R. No. 166818.**

- III. **Whether or not the ERC should instead order motu proprio a reduction of rate and a disgorgement of excess profits of MERALCO as mandated under the penultimate paragraph of Section 45 of the EPIRA LAW.**

VI **DISCUSSION/ARGUMENTS**

I. WHETHER OR NOT THE ERC SHOULD FIRST REVIEW THE ASSUMPTIONS IT USED IN THE GRANT OF RORB RATE (FROM 12% TO 15.5%) IN MERALCO'S LAST RATE INCREASE IN ORDER TO DETERMINE IF THE SAID INCREASE RESULTED IN EXCESSIVE PROFITS TO MERALCO (A CONCLUSIVE PROOF THAT THE CONSUMERS ARE BEING OVERCHARGED), AS ERC PROMISED IN ITS ORDER DATED MAY 30, 2003.

6.1 Under Section 43 (f) of the Electric Power Industry Reform Act of 2001 (EPIRA), one of the functions given to the ERC under the law is to set the rates of electricity distribution utilities, viz:

“43. Functions of the ERC. – The ERC shall promote competition, encourage market development, ensure customers 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. Toward this end, it shall be responsible for the following key functions in the restructured industry:

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(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 reasonable price of electricity”. xxx (Underscoring ours).

6.2 To further reinforce the obligation of the ERC to protect consumers from rates that are unjust and unreasonable, the said law emphatically provides that the ERC must ensure the affordability of electric power (Section 2[c]), ensure transparency and reasonableness of its price (Section 2 [d]), and at all times ensure consumer protection (Section 2 [f] and [j]).

6.3 It is crystal clear therefore, that the function of the ERC to fix rates involves a balancing of the investor and the consumer interests. However, considering that the business and operations of a public utility are imbued with public interests since it is engaged in public service, the question is: should not public interests prevail over private profits?

6.4 Elsewise stated, the rate fixed should guarantee the viability of the distribution utility and at the same time ensure that the rates are not only just and reasonable, but also AFFORDABLE to the public. In short, as pointed out by the Supreme Court, "rate regulation is the art of reaching a result that is GOOD for the public utility and is BEST for the public".⁸

6.5 While the power to fix rates is a legislative function, whether exercised by the legislature itself or delegated through an administrative agency, a determination of whether the rates so fixed are reasonable and just is a purely judicial question and is subject to the review of the courts. (*Republic vs. MERALCO, 391 SCRA 700*).

6.6 In the last rate increase granted by the ERC to MERALCO, (ERC Case Nos. 2001-646 and 2001-900) the ERC gave back to MERALCO the corporate income tax previously disallowed as a recoverable expense by the Supreme Court in the case of Republic vs. MERALCO, 391 SCRA 700 and 401 SCRA 130, by raising MERALCO's RORB rate from 12% (the cap heretofore applicable to all public utilities) to 15.5%.

⁸ Supreme Court Decision dated November 15, 2002 (G.R. No. 141314 and G.R. No. 141369)

6.7 In the original Decision (dated March 20, 2003) of the ERC in the aforementioned cases, the ERC initially denied the request of MERALCO to increase its RORB rate (from 12% to 15.5%), explaining that:

“The burden of proof is on MERALCO to provide substantial evidence in support of its requested relief. In its application, MERALCO provides little evidence to substantiate its proposed rate of return. A mere mathematical calculation without explanation, analyses, justification, or supporting testimony does not constitute substantial evidence. Therefore, the Commission is unable to accept the proposed rate of return.

In future petitions where the level of return is at issue, MERALCO should file with such petition detailed evidence and testimony to establish its proposed rate of return. The evidence should include a complete explanation of the methodology being proposed along with all the analyses relied upon in arriving at the proposed return.

The Commission recognizes that if income tax is not allowed as a recoverable item, then the 12% cap on rate of return established in current jurisprudence may no longer be reasonable. However, given the lack of substantial evidence provided by MERALCO in support of its proposed rate of return, the Commission maintained the rate of return at 12%.

The treatment of income tax may change depending on the final Decision of the Supreme Court.”

6.8 However, when the ERC resolved the Motion for Reconsideration of MERALCO which merely submitted additional mathematical calculation which are not even applicable to the local environment, the petitioners were shocked to learn that the ERC turned its back and arbitrarily reversed its previous position not to increase the cap on the RORB rate of MERALCO and instead succumb to the importuning of MERALCO.

6.9 The ERC yielded into the unmitigated desire for more profit of MERALCO and forgot that it is supposed to guarantee merely the viability of

MERALCO's operation and to protect the interest of the consuming public by making sure that the rates should be just, reasonable and affordable.

6.10 This is a clear circumvention (what was denied and removed by the Supreme Court, was given back by the ERC) of the ruling of the Supreme Court in *Republic vs. MERALCO*, *ibid*, that:

“The ERB correctly ruled that income tax should not be included in the computation of operating expenses of a public utility. Income tax paid by a public utility is inconsistent with the nature of operating expenses. In general, operating expenses are those which are reasonably incurred in connection with business operations to yield revenue or income. They are items of expenses which contribute or are attribute to the production of income or revenue. As correctly put by the ERB, operating expenses should be a requisite of or necessary in the operation of a utility, recurring, and it redounds to the service or benefit of customers.

Income tax, it should be stressed, is imposed on an individual or entity as a form of excise tax or a tax on the privilege of earning income. In exchange for the protection extended by the Senate to the taxpayer, the government collects taxes as source of revenue to finance its activities. Clearly, by its nature, income tax payments of a public utility are not expenses which contribute to or are incurred in connection with the production of profit of a public utility. Income tax should be borne by the taxpayer alone as they are payments made in exchange for benefits received by the taxpayer from the State. No benefit is derived by the customer of a public utility for the taxes paid by such entity and no direct contribution is made by the payment of income tax to the operation of a public utility for purposes of generating revenue or profit. Accordingly, the burden of paying income tax should be Meralco's alone and should not be shifted to the consumers by including the same in the computation of its operating expenses.

The principle behind the inclusion of operating expenses in the determination of a just and reasonable rate is to allow the public utility to recoup the reasonable amount of expenses it has incurred in connection with the services it provides. It does not give the public utility the license to indiscriminately charge any and all types of expenses incurred without regard to the nature thereof, i.e., whether or not the expense is attributable to the production of services by the public utility. To charge consumers for expenses incurred by a public utility which are not related to the service or benefit derived by the customers from the public utility is unjustified and inequitable.”

6.11 The ERC's changed of position is also a drastic departure from the long standing pronouncements of both the government regulators and the courts consistently adopting a 12% cap on the rate of return for public utilities, viz:

"The rate of return is a judgment percentage which, if multiplied with the rate base provides a fair return on the public utility for the use of its property for service to the public. The rate of return of a public utility is not prescribed by statute but by administrative and judicial pronouncements. This Court has consistently adopted a 12% rate of return for public utilities." (Republic vs MERALCO, 391 SCRA 700)

6.12 As a matter of fact, at the height of electric power crisis in 1993, Section 3(d) of Power Crisis Act (R.A. 7648) authorized the President to increase temporarily the rate of return on rate base of NAPOCOR to not more than 12% of rate base. This shows that 12% should be the maximum rate of return, whether during the usual time or when there is a electric power crisis. And this cap is applicable to all public utilities without exception.

6.13 To assure the petitioners that the increased RORB rate (15.5%) granted to MERALCO is not yet final, hence, may be reconsidered in the future, the ERC declared that:

"At this juncture, the Commission deems it proper to point out that it reserves its right to revisit the assumptions used in computing the WACC whenever circumstances will so warrant.

"MERALCO's customers have a right to receive safe, reliable, and adequate service at a reasonable rate. To this end, MERALCO should view a petition for an increase in rate to be the last recourse. In future filings, MERALCO should be reminded that it has the burden of proving that all reasonable and appropriate cost-cutting measures have been taken before resorting to a petition to increase rates."

6.14 Unfortunately, six (6) years later and despite the fact that the financial statements of MERALCO have been reflecting year after year that it is amassing gargantuan profits, hence, a clear indication that the consumers are being overcharged, the ERC has remained oblivious of its duty to protect the consumers and forgot its promise to revisit the assumptions it used in computing the Weighted Average Cost of Capital (WACC) which became the basis for fixing the Return On Rate Base (RORB) of 15.5% it gave MERALCO under ERC Case Nos. 2001-900 and 2001-646, and which resulted, among others, in a rate increase which was implemented in June 2003.

6.15 In the light of this negligence of the ERC to revisit the assumptions it used in computing the WACC as it promised, the reasonableness of the rate increase it granted under ERC Case Nos. was never established and therefore, does not stand on solid ground or basis for granting another rate increase.

6.16 Therefore, the grant of a new rate resulting to an increase under the assailed Decision/Order in the amount of P1.2227 per kilowatt-hour to MERALCO further aggravates the negligence of the ERC causing immeasurable hardships especially to the multitude of marginalized consumers.

As the Supreme Court had said:

*“In third world countries like the Philippines, equal justice will have a synthetic ring unless the economic rights of the people, especially the poor, are protected with the same resoluteness as their right to liberty. The cases at bar are of utmost significance for they concern the right of our people to electricity and to be reasonably charged for their consumption. In configuring the contours of this economic right to a basic necessity of life, the Court shall define the limits of respondent MERALCO, a giant public utility and a monopoly, to charge our people for their electric consumption. The question is: should public interest prevail over private profits? (Republic vs. MERALCO, *ibid.*)”*

II. **WHETHER OR NOT THE ERC SHOULD WAIT FOR THE COA REPORT RELATIVE TO THE AUDIT IT CONDUCTED ON THE BOOKS, RECORDS AND ACCOUNTS OF MERALCO FOR THE YEARS 2004 TO 2007, TO DETERMINE IF THE PROVISIONAL RATE BEING CHARGED BY MERALCO TO ITS CUSTOMERS IS JUST AND REASONABLE**

6.17 In the Decision of this Honorable Court in the case of *“Lualhati et al vs. MERALCO”*, docketed as CA-GR SP No. 77559 dated 22 July 2004, the Decision of the ERC (Case Nos. 2001-646 and 2001-900), which granted the previous rate increase of MERALCO, was annulled and set aside mainly on the ground that COA SHOULD FIRST conduct an audit of the books, records and accounts of MERALCO before ERC can fix rates.

6.18 However, upon appeal by MERALCO, the Supreme Court, in the case entitled *“MERALCO vs. Lualhati, et al. G.R. Nos. 166769 and 166818, 510 SCRA 455*, set aside the aforesaid decision of this Honorable Court, viz:

“WHEREFORE, the petition is GRANTED. The 22 July 2004 Decision and 24 January 2005 Resolution of the Court of Appeals in CA-G.R. SP No. 77559 are hereby SET ASIDE. The ERC Decision dated 20 March 2003 and its Order dated 30 May 2003 in ERC Case Nos. 2001-646 and 2001-900 are REINSTATED subject to the above disquisition.

The Energy Regulatory Commission is, thus, directed to request the COA to undertake a complete audit on the books, records and accounts of MERALCO relative to its provisionally-approved rate increases and unbundled rates.

SO ORDERED.”

6.19 The Supreme Court held that the aforesaid ruling is subject to the following conditions:

“WHEREFORE, the petition is GRANTED. The 22 July 2004 Decision and 24 January 2005 Resolution xxx.

However, while ruling in said manner, this Court is cognizant that such ruling has far reaching effects and is of

utmost significance to the public, especially to the poor, who face the threat of deeper wallowing in the quagmire of financial distress once the burden of electricity rate increases is passed on to them. Better judgment, therefore, calls for this Court to temper the rigidity of its decision.

Although affirming the decision and the order of the ERC approving the rate increases for electricity, this Court is not closing its eyes to the fundamental principle of social justice so emphatically expressed by the late President Magsaysay in his statement: "He who has less in life should have more in law."

The concern for the poor is recognized as a public duty, and the protection of the rights of those marginalized members of society have always dutifully been pursued by the Court as a sacred mission. Consistent with this duty and mission, the Court deems it proper to approve the rate increases applied for by MERALCO provisionally, i.e., MERALCO to impose provisional rate increases while directing the ERC, at the same time, to seek the assistance of COA in conducting a complete audit on the books, records and accounts of MERALCO to see to it that the rate increases that MERALCO has asked for are reasonable and justified. Stated otherwise, the provisional rate increases will continue to be subject to its being reasonable and just until after the ERC has taken the appropriate action on the COA Report."

6.20 In effect, both the Supreme Court and this Honorable Court are in agreement that COA should audit the books, records and accounts of MERALCO. Their difference lies in the fact that the Honorable Court of Appeals ruled that there must be a PRE-AUDIT while the Supreme Court required a POST-AUDIT with a condition that the rates granted to MERALCO shall remain provisional until such time that the ERC has taken appropriate action on the audit report of COA which shall determine the reasonableness of the rates.

6.21 Only upon the prodding of petitioner NASECORE through formal letters, did the ERC act and comply with the directive of the Supreme Court and COA has started already the audit of the books, records and accounts of MERALCO in September 2008. Unfortunately, to date, COA has not submitted its report on the audit it undertook which is meant to determine

whether the rate increase granted to MERALCO under ERC Case Nos. 2001-900/2001-646, is both just and reasonable.

6.22 Thus, the previous rate of MERALCO under ERC Case Nos. 2001-900/2001-646 which was on a floating status, so to speak, is subject to a resolutive condition that it may be AMENDED or TOTALLY DISAPPROVED by the ERC upon a showing from the COA report that said rate is not just and reasonable.

6.23 Thus, in the absence of this COA audit report required both by this Honorable Court and the Supreme Court, the decision of the ERC granting MERALCO a new rate increase under ERC Case Nos. 2008-004RC and 2008-018RC, on top of the rate declared by the Supreme Court as provisional, is not only incorrect, but also a clear case of disrespect to and contempt of the highest Court of the land, to say the least.

6.24 Because of this, petitioners are confused and wondering why ERC had the temerity to grant a new rate increase to MERALCO when the result of the COA audit, being essential in determining the reasonableness of MERALCO's rate and in addressing the issue of its rates declared conditional by the Supreme Court, was not yet submitted.

6.25 Further, considering that MERALCO's operation appears very much viable, that MERALCO has not shown that it has already taken reasonable and appropriate cost-cutting measures yet, therefore, a rate increase at this point is far from reasonable and necessary.

6.26 Moreover, ERC should have not granted a rate increase to MERALCO because MERALCO has been amassing gargantuan profits way above the

reasonable 12% return on its invested capital due, among others, to the arbitrary and unlawful increase in its RORB rate from 12% to 15.5%.

6.27 This Honorable Court, should therefore temper the unmitigated cupidity of the respondents to further swell its already bloated excessive profit at the expense of the hapless consuming public who has no alternative supplier of electricity other than MERALCO.

6.28 It is observed that rate increases are regarded by MERALCO as purely business and nothing personal; but to the ordinary consumers, any rate increase is a highly personal matter. It may mean skipping meals, or the children unable to go to school or inability to buy needed medicines for the sick members of the family.

III. WHETHER OR NOT THE ERC SHOULD INSTEAD ORDER MOTU PROPRIO A REDUCTION OF RATE AS MANDATED UNDER THE PENULTIMATE PARAGRAPH OF SECTION 45 OF THE EPIRA LAW AND REFUND OF THE EXCESS PROFITS OF MERALCO IN LIGHT OF PETITIONERS' FINDINGS BASED ON MERALCO'S FINANCIAL STATEMENTS.

6.29 The rates granted by the ERC to MERALCO under ERC Case Nos. 2001-646 and 2001-900, which the Supreme Court has declared provisional until and after the ERC has taken the proper action on the COA report as to its being reasonable and just (MERALCO vs. Lualhati) relies heavily on pure estimates and forecasts of revenues and costs submitted by the applicant and revaluation of assets done by a so-called "independent appraisers". But how could the appraisers be independent when it was Meralco which engaged and paid for their services? This being the case, ERC should have treated

MERALCO's application for rate increase with skepticism to protect the consuming public as it is mandated by law.

6.30 According to Section 43 (f) of the EPIRA LAW, the rates must be set by using the RORB methodology. Under the said law, it is provided that the ERC may adopt alternative forms of internationally accepted rate-setting methodology as ERC may deem appropriate, provided that the rate-setting methodology so adopted and applied must ensure a reasonable price of electricity.

6.31 It is also provided in Section 45 of the said law that:

“The ERC shall motu proprio monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior by any participant in the electric power industry. Upon finding that a market participant has engaged in such act or behavior, the ERC shall stop and redress the same. Such remedies shall, without limitation, include the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits and imposition of fines and penalties pursuant to this Act.”

6.32 It is impossible to know if the rates set under the former RORB Methodology, was accurate until the said rate is implemented. In other words, nobody can claim that RORB or any other methodology used in setting the rate is infallible or 100% accurate.

6.33 Since it is the public utility, as an applicant that is the one that submits forecasts and estimates in support of its application to increase rates there is a normal tendency on its part to bloat same to ensure its maximum profitability.

6.34 On the part of the consumers, they merely accept the new rate as approved by the ERC since electricity is a very basic need of all people and that power distribution is a monopoly within its franchise area. They are the “captive

market” so to speak. Moreover, the consumers are confident that the ERC has been conscientiously and scrupulously protecting their interests as enjoined by the EPIRA Law.

6.35 Petitioner nevertheless examined and analyzed the financial statements of MERALCO for the years 2003 to 2007 and were shocked to learn that MERALCO has realized excess profits in the total amount of **P33,266,802,000.00 for the period 2003-2007, instead of P 9,710,198,000.00** or ,an average of 52% a year, i.e., way above the 12% profit/return generally allowed public utilities. (Please see Tables 1 and 2, paragraph 4.11, this Petition).

6.36 Since the financial statements of a utility corporation uses historical figures, hence the actual, the result of its operations in the implementation of the new rates becomes more accurate than the forecast and estimates submitted by an applicant for its proposed rate increase under the ERRC-adopted rate setting methodologies.

6.37 The U.S. Supreme Court has held that the result reached after implementing the rate-set or fixed, and not the rate setting methodology employed, is the controlling factor in determining if the rates granted to a public utility is just and reasonable, viz:

“The regulatory commission can employ any method so long as the result was reasonable to consumer and investor.” (National Power Commission vs. Hope Natural Gas Co., 320 US 58 [194], cited in the Concurring Opinion, J. Castro, Republic vs. Medina, 41 SCRA 644, 695 [1971]).

6.38 The doctrine established in said case has been termed the “END RESULT DOCTRINE.”

6.39It is axiomatic that the excess profits of a public utility is a result of overcharging of customers through an unjust and unreasonable rate. There is no other way such excessive profits could be explained.

6.40In fine, MERALCO succeeded in wangling from the ERC through self-serving, convoluted and faulty mathematical calculations and analyses a rate that will not only guarantee that its operations shall be viable but a rate that will give it astronomical profits at the expense of the consuming public which it is obligated to serve.

6.41Hence, instead of increasing anew the rates of MERALCO, the ERC should have retained the provisional rate of P1.083/per kilowatt-hour and waited for the COA audit report which would determine whether said rate was just and reasonable or not.

6.42Further, the most logical move that ERC should have done, in compliance with its mandate of protecting electricity consumers from any acts of profiteering as can easily be seen from MERALCO's financial statements which are regularly submitted to ERC, was to order a refund of the amount of P 33,266,802.00, as shown in table 2 above.

P R A Y E R

WHEREFORE, premises considered, it is most respectfully prayed that a decision be rendered by this Honorable Court declaring as null and void the assailed 29 May 2008 Decision and the 13 April 2009 Order of the Energy Regulatory

Commission in ERC Case Nos. 2008-004 RC and 2008-018RC granting a new rate in the amount of P1.2227 per kilowatt-hour, Annexes "A" and "B" hereof.

Further, without prejudice to the COA audit required by this Honorable Court and the Supreme Court, it is likewise prayed by herein petitioners that after annulling and setting aside the aforementioned Decision and Order of the ERC, this Honorable Court order the following:

- a. The immediate rate rollback to the previous rate of P1.083/kWh.
- b. The immediate refund of the collection by MERALCO of the difference between the new MERALCO rate and the previous provisional rate (P1.2227/kWh – P1.083/kWh) which was initially collected during the May 2009 billing cycle.
- c. The immediate refund of the excess profits of MERALCO to its customers in the amount of Php33,266,802,000.00 during the period 2003-2007.

Petitioners also pray for such other reliefs and remedies just and equitable under the premises.

Respectfully submitted.

Parañaque City for Manila, this ___day of May 2009.

**National Association of Electricity
Consumers for Reforms, Inc (NASECORE)**
Petitioner
10 Bayside Court Compound
680 Quirino Ave., Tambo Paranaque City

By: **PETRONILO L. ILAGAN**
President

**Federation of Las Piñas Village Association
(FOLVA)**
Petitioner
50 C.V. Starr Avenue, Philamlife Village
Las Pinas City

By: **BONIFACIO C. DAZO**
President

Federation of Village Association (FOVA)
Petitioner
Clubhouse, Don Jesus Boulevard, Alabang
Hills Village

By: **SIEGFRIEDO A. VELOSO**
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IBP Lifetime No. 05020
MCLE Compliance No. II-0002792

VERIFICATION and CERTIFICATION OF NON-FORUM SHOPPING

We, NASECORE represented by Petronilo L. Ilagan, FOLVA represented by Bonifacio Dazo, and FOVA represented by Siegfriedo Veloso all of legal age, and subscribing under oath, depose and say:

1. We are the PETITIONERS in the above-entitled case;
2. We caused the preparation of the foregoing Petition, a copies of Secretary's Certificate to file this Petition for are attached as Annex "J"; "K" and "L";
3. We have read the petition and avers that the contents thereof are true and correct of our own knowledge and based on authentic documents and that all its Annexes are faithful reproduction of the original ;
4. We hereby certify that we have not commenced nor caused the commencement of any other action or proceeding involving the issues raised herein before the Regional Trial Court, the Supreme Court, the Court of Appeals or different Divisions thereof, or any other tribunal or agency, and that to the best of our knowledge, no such action or proceedings is pending before the Regional Trial Court, the Supreme Court, the Court of Appeals or different Divisions thereof, or any other tribunal or agency; and that if we should learn that a similar action or proceeding has been filed or pending before the Supreme Court, the Court of Appeals or different Divisions thereof, or any other tribunals or agency, we shall notify this Honorable Court of Appeals within five (5) days from such notice;

SUBSCRIBED AND SWORN to before me this _____ day of _____ 2009, affiants exhibited their _____ as follows:

	Driver's License No.	Place of Issue
PETRONILO L. ILAGAN <i>President, NASECORE</i>	N10-74-012320	LTO – East Avenue
BONIFACIO C. DAZO <i>President, FOLVA</i>	N04-55-007185	LTO – East Avenue
SIEGFRIEDO A. VELOSO <i>Director for External Affairs, FOVA</i>	N18-60-028113	LTO – East Avenue

Doc. No. _____
Page No. _____
Book No. _____

Series of 2009.

Copy Furnished:

Legal Services
Energy Regulatory Commission
15th Floor, Pacific Center Bldg
San Miguel Avenue, Pasig City

Atty. Jose Ronald V. Valles
Counsels for Meralco

7th Floor, Lopez Building
Ortigas Avenue, Pasig City

Office of the Solicitor General
134 Amorsolo St., Legaspi Village
Makati City

EXPLANATION

Copies of this Petition were served upon respondents' counsel and other parties by registered mail due to distance and lack of messengers

AFFIDAVIT OF SERVICE

I, MARIA ASUMPTA M. ACEBUQUE of legal age, Filipino, and with office address at 10 Bayside Court Compound, 680 Quirino Avenue, Tambo, Parañaque City after having been duly sworn to in accordance with law, depose and state that:

1. I am the corporate secretary of National Association of Electricity Consumers for Reforms, Inc., with office address at 10 Bayside Court Compound, 680 Quirino Avenue, Tambo, Paranaque City.
2. Today, 28 May 2009, I served by registered mail with return card copies of the Petition in the case entitled "*National Association of Electricity Consumers for Reforms, Inc. et al, Petitioners vs. Energy Regulatory Commission (ERC) and Manila Electric Company (MERALCO) Respondents*", to be filed with the Court of Appeals upon:

<u>Name</u>	<u>Address</u>	<u>Manner of Service</u>
Legal Services Energy Regulatory Commission	15 th Floor, Pacific Center Bldg San Miguel Avenue, Pasig City	Registered Mail with return card
Atty. Jose Ronald V. Valles Counsel for Meralco	7 th Floor, Lopez Building Ortigas Avenue, Pasig City	Registered Mail with return card
Office of the Solicitor General	134 Amorsolo St., Legaspi Village Makati City	Registered Mail with return card

FURTHER AFFIANT SAYETH NONE.

Affiant

SUBSCRIBED AND SWORN to before me this ____ day of May, 2009 at Parañaque City affiant exhibiting to me her Passport No. QQ0229500 issued at Department of Foreign Affairs-Manila on 21 April 2005.

Doc. No. ____;
Page No. ____;
Book No. ____;

Series of 2009.

SECRETARY'S CERTIFICATE

I, MARIA ASUMPTA ACEBUQUE, a duly elected, qualified and incumbent Corporate Secretary of National Association of electricity Consumers for Reforms, Inc (NASECORE), a non-stock corporation duly organized and existing under and by virtue of the laws of the Philippines, do hereby certify that:

At the regular meeting of the Board of Directors of the NASECORE duly convened and held on 04 May 2009 at NASECORE's office address in No. 10 Bayside Court Compound, 680 Quirino Avenue, Tambo, Parañaque City at which meeting a quorum was present, acted throughout and voted, the following resolutions were approved:

"THEREFORE, BE IT RESOLVED, that the Board of Directors of NASECORE approve, as it hereby approves, the filing of the **Petition for Review** on the ERC Case Nos. 2008-004RC and 2008-18RC's Decision dated 29 May 2008 and Order dated 23 April 2009.

RESOLVED FURTHERMORE, that Mr. Petronilo Ilagan, President of NASECORE was empowered, and is hereby empowered to sign, execute, verify and deliver on behalf of NASECORE the said **Petition for Refund**, any papers and instruments that he may deem appropriate and necessary, for the furtherance of NASECORE's interest and may designate someone, in his behalf, in case he may not be available."

WITNESS THE SIGNATURE of the undersigned as such officer of the Association and its corporate seal hereunto affixed on this 28th day of May, 2009.

MARIA ASUMPTA ACEBUQUE
Corporate Secretary

Republic of the Philippines)
Paranaque City) S.S

SUBSCRIBED AND SWORN to before me this ____ day of May, 2009 at Paranaque City affiant exhibiting to me her Passport No. QQ0229500 issued at Department of Foreign Affairs-Manila on 21 April 2005.

Doc. No. _____

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