

Title and Nature of the Petition:

IN THE MATTER OF THE APPLICATION FOR THE REFUND OF THE DIFFERENCES (EXCESSES) BETWEEN MERALCO AVERAGE MONTHLY GENERATION CHARGE AND THE ERC APPROVED NPC GENERATION CHARGE FROM JUNE 2003 TO JUNE 2006 MULTIPLIED BY THE KILOWATT-HOUR SALES OF MERALCO FOR THE CORRESPONDING MONTHLY PERIOD.

Petitioners:

NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS, INC. (NASECORE), represented by its President, PETRONILO ILAGAN, SIEGFRIEDO VELOSO, BONIFACIO DAZO, WILLIAM P. ESPIRITU and LEONARDO A. AURELIO,

Republic Act No. 9136 otherwise known as Electric Power Industry Reform Act (EPIRA):

Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA), was enacted into law in 2001. It was crafted precisely to ensure the quality, reliability and affordability of the supply of electricity by allowing open access to various players in the power industry. Among the intended benefits for the captive market is lower electric costs as it mandates distribution facility to supply electricity to its customers in a least cost manner, to wit:

"A distribution utility shall have the obligation to supply electricity **in the least cost manner** to its captive market, subject to the collection of retail rate duly approved by the ERC."¹

Republic Act No. 9209 (Meralco Franchise Law)

On June 9, 2003, Republic Act No. 9209 was signed into law, granting MERALCO a twenty-five (25) year consolidated franchise to operate and maintain a distribution system in some of the cities/municipalities of Metro Manila, Bulacan, Cavite and Rizal and certain cities/municipalities/barangays in Batangas, Laguna, Quezon and Pampanga.

Section 4 of Republic Act No. 9209 otherwise known as the "Meralco Franchise" provides for the responsibility of Meralco to the public, to quote:

"SEC. 4. Responsibility to the Public. - The grantee shall supply electricity to its captive market in the least cost manner. XXX"

Duty of MERALCO as Distribution Utility under the Laws:

Meralco, as a distribution utility, has under the EPIRA Law and Meralco Franchise is duty bound, **to supply electricity to its captive market in the least cost manner and to avoid abuse of market power.**

¹ Section 23, R.A. No. 9136

Allegations against MERALCO:

MERALCO disregarded the objectives of Republic Act No. 9136 and Republic Act No. 9209 when MERALCO started to charge from June 2003 to June 2006 its captive market higher electricity costs than that mandated by law.

NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS² (NASECORE)

NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS³ (NASECORE, for brevity) is a non-stock and non-profit organization registered under Philippine laws and engaged in consumer advocacy in the electricity industry. NASECORE is represented by its President, Petronilo L. Ilagan.

NASECORE is an organization whose objective is to promote, advance, and protect the interest of ordinary consumers. A substantial number of its members are customers of MERALCO because they reside within MERALCO's franchise.

Who is MERALCO?

It has a franchise to operate and maintain a distribution system in some of the cities/municipalities of Metro Manila, Bulacan, Cavite and Rizal and certain cities/municipalities/barangays in Batangas, Laguna, Quezon and Pampanga, pursuant to Republic Act No. 9209.

Illegal acts imputed to MERALCO:

Meralco has charged its captive market in the supply of the electricity not in the least cost manner in violation of section 23 of R.A. No. 9136 and Section 4 of R.A. No. 9209.

Facts of the Case:

Ogden Quezon Power, Inc. (“QPPL”)

August 12, 1994 - MERALCO entered into a Power Purchase Agreement (PPA) with Ogden Quezon Power, Inc. (now Quezon Power Philippines Ltd. which is hereinafter known as “QPPL” for brevity) wherein MERALCO agreed to purchase from QPPL its entire electrical capacity from its 433.4 megawatts coal-fired power plant for a period of twenty-five (25) years.

October 20, 1994, an application was filed by MERALCO before the “**ERB**” which was docketed as ERB Case No. 94-217, for the approval of the Power Supply Agreement/Power Purchase Agreement (PPA) for the purchase of electric power and energy entered by it with Ogden Quezon Power, Inc. (QPPL).

This application was approved on July 6, 1995 at the basic rate of P **1.7846/kWh** for its first year of operation; **P1.8690/kWh** on the second year; **P1.9398** on the 3rd year; and, **P2.0135/kWh** on the 4th year of its operation **subject to the condition that the rate of applicant per kWh should not exceed NPC's grid rate or the rate of all existing or future similar plant.**⁴. Comparison between the rate of Ogden (QPPL) and that of NPC, to wit:

“Based on the Board's evaluation, it would be

² Also an Intervenor in ERC Case Nos. 2001-900RC and 2001-646RC

³ Also an Intervenor in ERC Case Nos. 2001-900RC and 2001-646RC

⁴ Decision dated July 6, 1995, p. 9 in ERB Case No. 94-217

noted that Ogden's power rate is still way below that of NPC rate, to wit:

<u>YEAR</u>	<u>OGDEN</u>	<u>NPC</u>
1	1.7846	1.8643
2	1.8690	1.9433
3	1.9398	1.9965
4	2.0135	2.0682

First Gas Power Corporation - Sta. Rita ("FGPC-Sta. Rita")

MERALCO entered into another Power Purchase Agreement (PPA) with its First Gas Power Corporation - Sta. Rita (hereinafter known as "**FGPC-Sta. Rita**" for brevity), an IPP owned/controlled by **First Philippine Holdings Corporation (FPHC)** which also controls Meralco.

MERALCO undertook to purchase from FGPC - Sta. Rita the full capacity and energy to be produced by gas-fired power generating facility. The said agreement is under a long-term power off-take arrangement for a period of twenty-five (25) years beginning from the commencement of the commercial operations of the power plant in year 2000.

The said PPA was approved by the then ERB in its Decision dated June 11, 1997 "Since the purchase cost of MERALCO from FGPC is lower than the effective rate of NPC, the rates charged to applicant are just and reasonable." with an approved basic rate of **P1.4597/kWh**, to quote:

The then ERB also made a comparison between the rate of FGPC-Sta. Rita and that of NPC, as follows:

*"FGPC's: 1.4597/kWh is lower than
NPC's : P2.1908/kWh.*

First Gas Power Corporation - San Lorenzo ("FGPC-San Lorenzo")

MERALCO and FGPC-San Lorenzo executed a Power Purchase Agreement (PPA) on July 22, 1999 wherein the former shall purchase from the latter the capacity and energy to be produced by the San Lorenzo power plant. The said agreement shall be under a long-term arrangement for a period of twenty-five (25) years beginning from the commencement of its commercial operation in 2002.

It was approved in ERB Decision dated January 24, 2000, and the basic rate approved was P2.17/kWh at 83% load factor.

ERB made a comparison between the rate of FGPC-San Lorenzo and that of NPC, to wit:

"The resultant figures show that at 83% load factor, FGP's rate using condensate gas is P2.6413/kWh and 2.9160/kWh using natural gas. Likewise, at 90% load factor, the total charge at delivery point is P2.5832/kWh using condensate gas and P2.8486/kWh using natural gas. It is worthy to note that at 83% load factor a shift from using condensate gas to natural gas shows a difference of PO.2747/kWh while at 90% load factor, such shift shows a difference of PO.2654/kWh.

The projected NPC rate to Meralco at simulated

83% load factor in year 2002 is as follows:

<i>NPC rate at delivery point</i>	<i>P3.7573</i>
<i>Less: Wheeling Charge</i>	<i>0.1669</i>
<i>Ancillary Service</i>	<u><i>0.1669</i></u>
<i>Total (P /KWh)</i>	<u><i>P3.4224</i></u>

From the above projection of NPC rates to applicant Meralco, it is evident that the rate of FGP Corp. would still be lower than the rate of NPC. It must be emphasized, however, that the pipeline charge is payable only once the San Lorenzo plant has been converted into natural gas operation.”⁵

ERB approved PPA with 3 MERALCO IPPS because their rates were lower than that of the NPC. Ogden Quezon Power, Inc.(QPPL), First Gas Power Corporation - Sta. Rita (FGPC-Sta. Rita) and First Gas Power Corporation - San Lorenzo (FGPC-San Lorenzo)

The three (3) decisions of the Honorable Commissions from 1995 to 2000 in approving the applications of the above mentioned Power Purchase Agreements with MERALCO IPPs have recognized, acknowledged, used, and treated with finality the NPC rate as the benchmark in approving the individual rates of MERALCO IPPs in accordance with the intent and spirit of Executive Order No. 215 (“E.O. 215” for short) to determine the “*least cost*” of generation charge to be used by MERALCO for its consumers which was later carried on under Section 23 of the R.A. No. 9136 and Section 4 of R.A. No. 9209.

The passage of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA Law) in June of 2001 paved the way again of ensuring that the distribution utilities like MERALCO shall supply its captive market of lower electric costs as it mandates under Section 23 thereof that the distribution utility shall supply electricity to its customers in a least cost manner, to wit:

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

Under the same EPIRA Law, it mandated all distribution utilities, such as MERALCO, to file its revised rates for the approval of this Honorable Commission within six months from its effectivity in keeping with its policies of transparency and full accountability and to determine if the distribution utilities are charging their consumers in the least cost basis as mandated by the EPIRA Law.⁶

MERALCO filed its revised rates on December 26, 2001 before the Honorable Commission and the same was reviewed by the Honorable Commission.

In its Decision dated March 20, 2003, the ERC determined that the average costs of electric power bought by MERALCO for the period August 2002 to January 2003 were **PhP2.4664/kWh from NPC** and an average rate of **PhP4.2173/kWh from MERALCO IPPs**.

The MERALCO average generation rate arrived at the time of the ERC decision promulgated in March of 2003 was P3.1665, as shown in Table 1 below:

TABLE 1

⁵ Decision dated January 24, 2000, p. 14 in ERB Case No. 99-62

⁶ Section 36, Republic Act No. 9136

GENERATION COSTS FOR NPC and MERALCO IPPs in P/kWh			
	Sales Mix	Php/kWh	Wt.Ave. Rate
NPC	60%	2.4664	1.4802
Combined IPPs supply Month August 2002 to January 2003	40%	4.2173	1.6863
Weighted Average Cost			3.1665

The above Table 1 clearly shows that the least cost is the NPC rate of P2.4664/kWh pursuant to the doctrine enunciated by the former ERB using the NPC rate as the benchmark in arriving at the least cost and the generation costs.

On the other hand, the combined generation cost of MERALCO IPP's from August 2002 to January 2003 in Table I is not in the least cost basis.

The weighted average generation rate as shown in Table I is not sanctioned by R.A. No. 9136 and R.A. No. 9209. In fact, such weighted average generation rate is a distortion of the least cost provision under the said laws, and therefore, null and void.

The Table I above shows that ERC itself, it is respectfully submitted, has abandoned the correct application in determining the least cost in the supply of electricity and ignored the consistent doctrine enunciated in the Decisions of the former ERB using the NPC rate as the benchmark for determining the least cost.

But that is not all. The ERC Decision failed to explain why it has adopted the weighted average generation cost and how it will benefit the hapless consumers. Not only that. The ERC Decision is now perceived by the suffering consumers to be the instrument of Meralco's abuses and geometric increase in the generation charge.

On the basis of a Motion for Reconsideration by MERALCO, this weighted average generation cost was modified in the Decision dated May 30, 2003 of the Honorable Commission using the most current data available. Thus, the amount of P3.1665 was adjusted to **P3.3027/kWh** upon which the deferred Power Purchase Agreement (PPA) of P0.1002/kWh pursuant to ERC Order dated 29 May 2003, in ERC Case No. 2001-383 was added to arrive at the generation cost of **P3.4029**, the amount reflected then from June 2003 to June 2006 of the MERALCO bill, copies of which are hereto attached as **Annexes "D" to "D-35"**.

MERALCO is mandated under Section 23 of EPIRA Law to charge it's consumers of electricity generation charge in a least cost manner but the use of weighted average cost using the two rates coming from NPC and MERALCO owned-IPPs is clearly not in the least cost manner because **it is very clear that rates of MERALCO IPPs are way higher than NPC's rates.**

The clear violation of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 renders the said decision of the then ERC as void judgment. it follows that such a void judgment cannot constitute a bar to another case by reason of *res judicata*⁷ and may be attacked directly or collaterally.⁸ ***It cannot become final.***⁹

⁷ Municipality of Antipolo v. IAC, 133 SCRA 320

⁸ David v. Aguilizan 94 SCRA 707

⁹ MWSS v. Sison, 124 SCRA 394.

SUPPLY MONTH	AVERAGE RATE P/KWH			
	NPC	QPPL	FGPC- Sta. Rita	FGPC- San Lorenzo
Dec. 26 2003 to Jan. 25, 2004	3.36	5.03	1.53	4.2
Jan 26, 2004 to Feb. 25, 2004	3.69	4.19	4.25	3.89
Feb. 26, 2004 to Mar. 25, 2004	2.94	8.45	4.07	4.4
Mar. 26, 2004 to Apr. 25, 2004	3.08	6.05	4.03	3.91
April 26, 2004 to May 25, 2004	3.28	4.47	4.46	3.92
May 26, 2004 to June 26, 2004	3.47	4.66	4.03	4.75
June 26, 2004 to July 25, 2004	3.35	5.27	4.24	4.95
July 26, 2004 to Aug. 25, 2004	3.2	4.95	4.38	5.59
Aug. 26, 2004 to Sep.. 25, 2004	3.07	5.06	4.65	5.65
Sep. 26, 2004 to Oct. 25, 2004	4.89	5.27	4.64	5.39
Oct.. 26, 2004 to Nov. 25, 2004	5.01	4.93	4.81	4.84
Nov. 25, 2004 to Dec. 25, 2004	4.34	6.21	6.09	5.93

TABLE 2

Except for the periods Dec. 26 2003 to Jan. 25, 2004 and September 26-October 25, 2004, where only FGPC-Sta.Rita's rate were lower than the NPC rate, from December 26, 2003-December 25, 2004, the NPC rates, which are the least cost, were lower than the above-said rates of MERALCO IPPs.

From June of 2003 to June 2006, except for the period of Oct. 26, 2004 to Nov. 25, 2004, the above table clearly shows that MERALCO violated its legal obligation to supply electricity in the least cost manner when it purchased and/or sourced its power from MERALCO IPPs despite the fact that the NPC offers a generation rate which is less than MERALCO IPPs and therefore, at the least cost to petitioners and/or consumers of MERALCO.

Despite the fact that there is an available supply from NPC at a least cost to consumers, MERALCO purchased from it's IPP'S at a much higher rate than NPC's effective selling rates.

MERALCO's violations of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 arising from its acts of not supplying electricity to its customers in the least cost manner has resulted in excess or over payments to MERALCO in the total amount of **Forty Nine Billion Five Hundred Sixty Three Million Ninety Six Thousand One Hundred Fifty Two Pesos and Twenty Centavos (P49,563,096,152.20)** covering the period June 2003 to June 2006.

From June 2003 to April 2005, MERALCO unjustly accumulated from its consumers the total amount of **Thirty Seven Billion Two Hundred Million Pesos (P37,200,000,000.00)** excess or over payments arising from its acts of not supplying electricity to its customers in the least cost manner.

From the Table 3 below using the attached copies of the MERALCO billings from June 2003 to April 2005 containing therein its average generation rates in the same period shows the excess or over payments of its customers based on the monthly computation of the differences (excesses) between the average generation rate of

MERALCO and the NPC selling rate as the least cost basis, multiplied by the total monthly kilowatt-hour sales to its consumers, to wit:

TABLE 3

MONTH AND YEAR		Meralco Average General Rate	NPC Selling Rate	Diff.	KWH SALES	REFUNDABLE AMOUNT
2003						
June		3.4029	2.4009	1.0020	2,014,593,058	2,018,622,244.12
July		3.4029	2.4009	1.0020	2,060,887,304	2,065,009,078.61
August		3.4029	2.0065	1.3964	2,076,089,974	2,899,052,039.69
September		3.4029	2.0065	1.3964	2,020,023,240	2,820,760,452.34
October		3.4029	2.4962	0.9067	1,986,205,602	1,800,892,619.33
November		3.4029	2.4962	0.9067	2,079,547,855	1,885,526,040.13
December		3.4029	2.4897	0.9132	2,024,901,931	1,849,140,443.39
2004						-
January		3.4029	2.4897	0.9132	1,699,933,587	1,552,379,351.65
February		3.1886	2.3887	0.7999	1,962,302,238	1,569,645,560.18
March		3.1886	2.3887	0.7999	1,957,340,864	1,565,676,957.11
April		3.1886	2.3887	0.7999	2,106,403,493	1,684,912,154.05
May		3.1886	2.4614	0.7272	2,178,984,679	1,584,557,658.57
June		3.3213	2.5981	0.7232	2,151,596,186	1,556,034,361.72
July		3.3213	2.5981	0.7232	2,120,314,316	1,533,411,313.33
August		3.3213	2.5981	0.7232	2,137,511,764	1,545,848,507.72
September		3.4950	2.5981	0.8969	2,134,125,499	1,914,097,160.05
October		3.4950	3.9662	(0.471)2	2,145,267,085	
November		4.5700	3.9384	0.6316	2,075,286,505	1,310,750,956.56
December		4.5313	3.9384	0.5929	2,021,253,95	1,198,401,472.29
2005						-
January		4.7762	3.9834	0.7928	1,789,377,113	1,418,618,175.19
February		4.7753	3.9834	0.7919	1,913,662,731	1,515,429,516.68
March		4.4007	3.9834	0.4173	1,885,077,625	786,642,892.91
April		4.5259	3.9834	0.5425	2,072,538,892	1,124,352,348.91
SUB-TOTAL						37,200,000,000.00

TABLE 4

MAY 2005- JUNE 2006 BASED ON TIME OF USE					REFUNDABLE AMOUNT
2005	IPP's	NPC	Diff.	kWh	
May	4.5348	4.9486	(0.4138)	2,192,407,442	
June	4.8970	4.9996	(0.1026)	2,263,-00,149	
July	4.9119	4.3392	0.5727	2,154,533,244	1,233,874,641.79
August	4.9380	4.3700	0.5680	2,169,788,448	1,232,460,674.48
September	4.7437	4.3347	0.4090	2,135,470,235	873,442,804.36
October	4.7982	4.3927	0.4055	2,078,582,773	842,845,170.33
November	4.8294	4.3126	0.5168	2,048,875,524	1,058,958,366.28
December	4.7564	4.3180	0.4384	2,102,085,785	921,582,919.79
2006		-			
January	4.8437	4.6719	0.1718	1,808,043,181	310,662,800.89
February	5.0469	4.7348	0.3121	2,001,329,245	624,675,841.15
March	4.9915	4.7454	0.2461	2,014,339,348	495,820,072.56
April	4.9419	4.6018'	0.3401	2,095,655,115	712,787,606.63
May	4.9690	4.7669	0.2021	2,187,540,858	442,124,578.56
June	5.2177	4.7597	0.4580	2,217,447,449	1,015,606,212.66
SUB-TOTAL					9,764,841,689.47

REFUND		
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Thus, from July 2005 to June 2006, MERALCO's violations of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 arising from its acts of not supplying electricity to its customers in the least cost manner has resulted in amassing excess or over payments to MERALCO in the total amount of Nine Billion Seven Hundred Sixty Four Million Eight Hundred Forty One Thousand Six Hundred Eighty Nine Pesos and Forty Seven Centavos (P9,764,841,689.47).

Forty Nine Billion Five Hundred Sixty Three Million Ninety Six Thousand One Hundred Fifty Two Pesos and Twenty Centavos (P49,563,096,152.20)

Hence, petitioners seek the immediate lump-sum cash refund by MERALCO of the differences (OVER PAYMENTS) between its average monthly generation charge and the ERC-approved generation charge of NPC multiplied by the monthly kilowatt-hour sales of MERALCO from June 2003 to June 2006 pursuant to the general law that no one should unjustly enriched himself at the expense of others.¹⁰

Meralco is engaged in acts constituting abuse of market power and monopolistic scheme in violation of Section 23 of R.A. No. 9136 and Section 4 of R.A. No. 9209.

As mentioned earlier, MERALCO entered into Power Purchase Agreements with its three (3) IPPs, namely: Ogden Quezon Power, Inc.(QPPL), First Gas Power Corporation - Sta. Rita (FGPC-Sta. Rita) and First Gas Power Corporation - San Lorenzo (FGPC-San Lorenzo).

Despite the available NPC rate which is lesser than the cost of supply of electricity from the above-said MERALCO IPPs higher rate, MERALCO still obtained its supply of electricity from the said IPPs.

The obvious purpose of MERALCO of its acts of not supplying electricity to its customers in the least cost manner and continue sourcing its electricity supply from MERALCO IPPs instead from NPC's lesser rate is to unjustly benefit its own IPPs with whom it has a majority and controlling interests.

The majority and controlling interest of MERALCO are the family of Chief Executive Officer, Manuel Lopez ("Lopez Family" for short) of which judicial notice should be taken by this Honorable Commission.

The two (2) major stockholder and controlling interests of FGPC, when combined, are Lopez, Inc. and First Gas Holdings Corporation, both are domestic corporations duly organized and existing under and by virtue of Philippine laws.

The single major stockholder of First Gas Holdings Corporation is Benpress Holdings Corporation which holds 43% of the stockholdings, in addition to several Lopezes holding some stockholdings therein. The majority and controlling interest of Benpress Holdings Corporation are the Lopez Family of which judicial notice should be taken by this Honorable Commission.

Likewise, Lopez, Inc. is the proprietary corporation of the same Lopez Family who holds control of MERALCO.

Thus, the act of MERALCO in obtaining the supply electricity from FGPC despite of its higher rate than that of NPC, thereby violating the "least cost" provision of the EPIRA Law, is purposely not to benefit the consumers to which it serves but to unfairly benefit its own two (2) IPPs [First Gas Power Corporation - Sta. Rita (FGPC-

¹⁰ Article 19 and 22 of New Civil Code

Sta. Rita) and First Gas Power Corporation - San Lorenzo (FGPC-San Lorenzo)] with whom MERALCO has an interest to protect.

Relief sought:

1. Ordering MERALCO to immediately implement a lump sum cash refund in the amount of **Forty Nine Billion Five Hundred Sixty Three Million Ninety Six Thousand One Hundred Fifty Two Pesos and Twenty Centavos (P49,563,096,152.20)** representing the differences (excesses) between the MERALCO monthly generation charge and the ERC approved NPC Generation Rate from June 2003 - June 2006, multiplied by the kilowatt-hour monthly sales of MERALCO for the same period, with legal interest of 12% per annum commencing from the time of violation on June of 2003;
2. Ordering MERALCO to comply with its obligation under the law to source the least cost of electricity for its customers;
3. Ordering MERALCO to refrain from committing acts tantamount to abuse of market power and monopolistic scheme
4. Ordering MERALCO to pay the maximum penalty of Fifty Million Pesos (P50,000,000.00) each month from June 2003 to June 2006 for the violation of EPIRA Law;
5. Ordering MERALCO to pay the cost of suit and attorney's fees and professional fees for the under named legal counsels based on the principle of *quantum meruit*.