

REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

SPECIAL FOURTEENTH DIVISION

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,
Petitioners,

-versus-

CA-G.R. SP No. 108663

MANILA ELECTRIC COMPANY
(MERALCO),

Respondent.

x-----x

REPLY TO MERALCO's COMMENT
(With Urgent Prayer To Grant Restraining or Status Quo Order)

PETITIONERS, through counsel and unto this Honorable Court, by way of a reply to the Comment filed by respondent MERALCO, most respectfully aver:

1. The contention of respondent MERALCO that the Petition should be dismissed outright since it poses new issues not raised in the proceedings below has no basis whatsoever.

2. It should be noted that in their Motion for Reconsideration (Annex "C" of the Petition) of the assailed ERC Decision in ERC Case Nos. 2008-004 and 2008-

018 RC, petitioners stated that the grounds they are relying for the aforesaid motion are as follows:

“GROUNDS

THE HONORABLE COMMISSION MAY HAVE ERRED IN GRANTING MERALCO’S APPLICATION FOR TRANSLATION IN DISTRIBUTION RATES OF DIFFERENT CLASSES FOR THE FIRST AND SECOND REGULATORY YEARS OF THE ERC-APPROVED ANNUAL REVENUE REQUIREMENT UNDER THE PERFORMANCE BASED REGULATION FOR THE ENSUING REGULATORY PERIOD.

- a. THE PRESENT METHODOLOGY ADOPTED BY THE HONORABLE COMMISSION IN THE MERALCO CASE IS INCONSISTENT WITH AND CONTRARY TO THE INTENT AND SPIRIT OF THE ELECTRIC POWER INDUSTRY REFORM ACT OF 2001 (EPIRA) AND SHOULD THUS BE VOIDED.**
- b. THE PRESENT METHODOLOGY ADOPTED BY THE HONORABLE COMMISSION IN THE MERALCO CASE, WHILE ADMITTEDLY AN INTERNATIONALLY ACCEPTED METHODOLOGY AND ALLOWED BY THE DISTRIBUTION WHEELING RATES GUIDELINES, IS CONTRARY TO THE EPIRA LAW AND SHOULD THUS BE VOIDED.”**

3. A careful comparison of the issues raised in the earlier Petition with the afore-quoted grounds relied upon by the petitioners in their Motion for Reconsideration would reveal that indeed the issues raised in the present Petition are parallel to, if not substantially identical with, those in the earlier proceedings before the ERC. Petitioners concede, however, that the Petition articulated the issues with more particularity than the Motion for Reconsideration.

4. Ultimately, it must be stressed, that the focus should be on the undeniable fact that the bottom line issue here is the **REASONABLENESS** of the new rate which is an offshoot of the assailed ERC Decision granting MERALCO a new rate increase.

5. It is significant to note that the provisions of the EPIRA which petitioners

claim to have been violated when the PBR was adopted by the Energy Regulatory Commission, is specifically Section 43 (f) and Section 2 (b) and (f) of the EPIRA which read, respectively:

Sec. 43(f). -- The rate – setting methodology so adopted and applied must ensure a reasonable price of electricity.

Sec. 2 (b) -- To ensure the quality, reliability, security and affordability of the supply of electric power.

**Sec. 2 (f) -- To protect the public interests as it is affected by the rates and services of electric utilities and other providers of electric power.
(underscoring supplied)**

6. Moreover, in granting the Energy Regulatory Commission the authority to establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility under Section 43 (f) of the EPIRA, respondent MERALCO should be reminded that the thrust of the EPIRA is focused on the matter “**PROTECTING PUBLIC INTEREST**”, as this is the clear intent in the said provision.

7. Therefore, first and foremost, whatever rate setting methodology the Regulator adopts and rate it sets, this should clearly be to PROTECT public interest and the only way public interest can be best PROTECTED is through the setting of a distribution rate that is reasonable.

8. Petitioners firmly believe that all the issues raised by respondent MERALCO or by the public respondent should address the core issue of whether the rate approved and granted by the ERC to MERALCO is reasonable or not as this will determine if public interests is protected.

9. Petitioners further believe that **“PROTECTING PUBLIC INTERESTS”** must prevail over and above all the other issues so that whether or not petitioners were able to have specifically cited the issues before the Energy Regulatory Commission, is of less importance than protecting public interest which should be considered as of paramount importance. In other words, procedural technicality should give way to the full ventilation of the issue of determining the reasonableness of the rate so as to ensure protection of public interests.

10. Thus, in the said Motion for Reconsideration, petitioners in their preliminary statement stated that,

“When you tell your child, if you get good grades in school, I will increase your allowance.... that is performance-based!”

“When the regulator tells the public utility, if you increase your efficiency, improve the quality of your service, and lower your operating cost, I will reward you...that is performance based!”¹

BUT, when nothing has been shown and proven yet and the regulator still tells you, I will nonetheless reward you... no doubt that it is a deception!

The Honorable Commission, as vanguard against abuses on electric consumers must be so reminded that rate regulation calls for a careful consideration and analysis of the totality of facts and circumstances material to each application before any upward rate revision is rendered. It does not depend solely on the need of the public utility but all the stakeholders’ interest must be weighed because rate regulators should strike a balance between the clashing interests of the public utility and the consuming public and the balance must assure a reasonable rate of return to public utilities without being unreasonable to the consuming public.

To a consumer, the reasonableness of a rate is very hard to determine especially without the benefit of a formal education in the subject of regulation. Statements such as balancing the conflicting interest between the utilities and consumers do not establish clear standards in setting just and reasonable rates that will be fair to the consuming public while ensuring that the quality and reliability of service the utility is mandated to provide is not sacrificed. That is why, the consumer is always faced with the question of whether the rates approved by the regulator are sufficient to allow recovery of just and reasonable cost and a reasonable return on their investments based on the accepted cap of not more than 12% or are excessive, as these are all passed on to the consumers.

¹ SOURCE: www.erc.gov.ph/pdf/TWRG%20Hearing%2010-05.ppt. accessed on November 6, 2008.

What is reasonable or unreasonable then depends on a calculus of changing circumstances that ebb and flow with time. Yesterday cannot govern today, no more than today can determine tomorrow. In other words, since the present rate-setting methodology adopted by the Honorable Commission cannot guarantee that the rights of the consuming public will be protected as it caters solely to the purported need of the public utility to jack up its rates chargeable in the future as its rewards for improved efficiency and service in the past, the public will just sit idly in the sideline watching rates increasing incessantly and unabated since, the public utility had improved its services anyway.

Consider this. Based on the financial statements of MERALCO which are required for submission to this Honorable Commission, the Common Stockholders of MERALCO for the last Twenty-One (21) years earned 8,896% on their actual investment of only P441.6-million, computed as follows:

Year	Stock Dividends (in millions)	Cash Dividends (in millions)	Accumulated Undistributed Income (in millions)	Total Return on Investments (in millions)	Common Stockholders Paid Up Capital (in millions)	% Return on Investments
	(A)	(B)	(C)	(D=A+B+C)	(E)	(F=D/E)
1987					253.93	
1988	174.99					
1989					30.00	
1990	114.73					
1991	286.83					
1992	374.20	113.00			95.00	
1993	797.80	173.00			37.64	
1994	1,082.65	270.00			26.12	
1995	1,636.95	818.00				
1996	1,473.25	1,694.00			55.61	
1997	1,931.91	2,222.00				
1998		2,066.00				
1999		2,090.00			14.30	
2000	1,677.18	1,048.00				
2001						
2002					(70.00)	
2003						
2004						
2005					(4.00)	
2006					3.00	
2007	1,002.56	1,006.00	17,232.00			
TOTAL	10,553.16	11,500.00	17,232.00	39,285.06	441.60	8,896%

The table above shows that for a period of twenty-one (21) years, the stockholders of MERALCO earned 8,896% from their actual investments which is equivalent to a staggering average yearly return of 424%.

In fact, in 2007, MERALCO declared a cash dividend of P1-billion and a stock dividend of P1-billion and it has a P17.2-billion in undistributed income also in the same year. These staggering profits negate any arguments that MERALCO needs a rate increase under whatever rate methodology.

11. Moreover, based on Table II, page 11 of the Petition, in just 5 years, (2003-2007), MERALCO realized excessive profits in the amount of **P33.2 billion** which petitioners are now seeking to be refunded to the customers.

12. Further, despite the staggering and excessive profits that respondent Meralco has earned, its total annual capital requirement (capex) under the controversial Performance-Based Regulation Methodology is now sourced from or made part of its monthly charges to all its customers, instead of sourcing the same from its stockholders who are the owners of MERALCO.

13. In effect, the Energy Regulatory Commission and respondent MERALCO's stockholders passed on to the consumers the burden of providing the needed additional capital for its future capital requirements without crediting or recognizing such as **CONSUMER EQUITY**. In effect, respondent MERALCO's stockholders are now benefiting from the assailed rate increase which are now being collected from the consumers for its total capital requirement. In effect again, what the stockholders as owners of MERALCO are required to put up as additional equity, the consumers are the ones providing the additional funds through this rate increase which has caused the increase in their monthly electric bills. In effect finally, the stockholders of respondent MERALCO are realizing a windfall in the form of additional equity at the expense of the hapless consumers.

14. Clearly, the consumers are not only being oppressed, but being abused and being defrauded of their hard-earned money.

15. Lest it be forgotten, respondent MERALCO was granted a franchise

by Congress under Republic Act 9209 which states,

“AN ACT GRANTING THE MANILA ELECTRIC COMPANY A FRANCHISE TO CONSTRUCT, OPERATE, AND MAINTAIN A DISTRIBUTION SYSTEM FOR THE CONVEYANCE OF ELECTRIC POWER TO THE END-USERS IN THE CITIES/MUNICIPALITIES OF METRO MANILA, BULACAN, CAVITE, AND RIZAL, AND CERTAIN CITIES/MUNICIPALITIES/BARANGAYS IN BATANGAS, LAGUNA, QUEZON AND PAMPANGA”

16. It is well understood that a franchise is given to private corporations to perform a service inherently a government obligation in exchange for their capital invested in the service with a guaranteed return on this capital invested by the owner-investors. This makes their investment risk free.

17. As a franchise grantee, MERALCO was given a monopoly to operate in the areas specifically identified in the franchise in light of its supposed capability to provide the needed capital from their own pockets which is given a return and from borrowings, the cost, including the principal amount, of which is directly passed on to the consumers on a per kilowatt-hour basis through its monthly billings. It should be emphasized, however, that since borrowings and its costs are also guaranteed to be paid through the consumers' rate payments as these are factored in the ERC-approved rate, these should not be recognized or credited as MERALCO's capital but CONSUMERS' CAPITAL.

18. As such, the primary responsibility of the MERALCO owner-investors is for them to put up the required capital for its capital expenditures from their own pockets, as this is given a GUARANTEED return by the Regulator. Raising this capital requirement is a basic obligation of the franchise grantee and not of the

consumers who should be charged only for the reasonable cost of electricity.

19. The new capital that have been invested by the owner-investors, if there was any, should be reviewed and examined by the ERC after a certain period of time to determine whether the current rate given to the utility allows it to recover just and a reasonable costs and reasonable return on its own total capital invested in the service up to the maximum allowable cap of 12%. If after such review and examination by the ERC, the current rate is determined to be unable to provide the utility recovery of just and reasonable costs and a reasonable return on its total actual capital invested in the service, only then should an application for a rate increase be heard.

20. There is no truth to the claim of respondent MERALCO that petitioners did not ask the ERC to wait for the COA report on its audit of the books, records and account of MERALCO because petitioners have filed their Motion for Deferment which is equivalent to a motion to await the report on such COA audit. Said motion stated that:

“ The decision came at a time when Meralco’s current provisional rates is being audited by the Commission on Audit (COA) based on the Supreme Court directive so as to determine and establish its reasonableness. The result of the COA audit is very important because in the event that COA finds Meralco’s current rates unreasonable, another round of a possible refund will be expected and will again affect Meralco’s cash flow. This is going to be a big financial nightmare for Meralco, if ever;” (d. footnote, please: Motion for Deferment). (Annex “H”, Petition)

21. There is also no truth to the claim of respondent Meralco that petitioners did not raise any issue as to the excessive profits of MERALCO during the last five (5) years (paragraph 1.7 of MERALCO’s Comment) because petitioner unequivocally raised said issue in their Motion for Reconsideration filed with the ERC which partly

states:

“Moreover, Section 43 of the EPIRA which requires the ERC to, among others, "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. In this connection, INTERVENORS finds it relevant to show that any rate increase is unnecessary since, MERALCO can be seen as clearly financially viable even with present state of its fiscal status for the period 1990-2007, thus:

“However, based on INTERVENORS’s own computation using MERALCO’s Annual Reports submitted with the Securities and Exchange Commission, MERALCO’S Actual Return on Equity are as follows:

Year	True Net Income* (A)	Actual Beginning ** (B)	Equity	Actual Return (C=A/B)
2003	2,754,000.00	13,845,000.00		19.89%
2004	11,763,000.00	14,976,980.00		78.54%
2005	7,084,000.00	16,361,046.00		43.30%
2006	8,710,000.00	17,633,34.00		49.39%
2007	9,190,000.00	18,111,761.00		50.75%

(See supporting schedules - Attached B, B-1** and B-2)*

The table above shows that MERALCO’s operation is not only viable but extraordinarily profitable because as we look at the Actual Return On Equity column which consists of the actual investment of the stockholders, stock dividends, and undistributed income/retained earnings, we find that MERALCO’s earnings far exceeded the allowable cap of 12% Rate of Return.”

22. Clearly, the claims of respondent Meralco, which are belied by the records as cited above, are desperate attempts to mislead this Honorable Court and to justify its obvious untenable position. Fact is, MERALCO has unjustly enriched itself at the expense of the hapless consumers as the table above clearly shows.

23. The facts are clear and undisputed. Regardless of the rate setting methodology adopted by the ERC, what the petitioners are questioning is the reasonableness of the resultant rate which stemmed from the application of respondent MERALCO for a rate increase under the Performance-Based Regulation

which the ERC granted in the assailed Decision and Order.

24. The EPIRA is very clear in defining the mandate of the ERC in its rate setting function. Section 43 (f) thereof states:

“ 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 cost 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.” (emphasis supplied)

25. Thus, while the ERC has the sole authority to adopt alternative forms of internationally-accepted rate –setting methodology as it may deem appropriate, it also has the responsibility and obligation to protect the interest of the consumers, *i.e.*, the rate-setting methodology so adopted and applied must ensure a reasonable price of electricity.

26. It is the firm position of the petitioners that in the absence of a COA audit and review of the books, records and accounts of respondent MERALCO, its rates can never be established as reasonable hence, consumer interests is not protected.

27. *Chapter 4, Subtitle B, Title I, Book V of Executive Order No. 292 or*

the Administrative Code of 1987 expressly granted to the COA authority to conduct an audit of any public utility for rate-fixing purposes, to wit:

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

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

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

28. Thus, petitioners fully agree with the pronouncement of the Honorable Court that indeed the COA audit is necessary before the ERC can fix the rates when it annulled and set aside the ERC Decision dated 20 March 2003 and its Order dated 30 May 2003 in CA- G.R. SP No. 77559 (ERC Case Nos. 2001-646 and 2001-900). The relevant portions read:

“Relative to this duty, the COA Special Audits Office are tasked to perform an audit of the financial operations of public utilities and franchise grantees for rate determination and franchise tax purposes. Notwithstanding the silence of EPIRA on a COA audit, the importance of requiring the COA to perform its statutory function in connection with rate fixing of public utilities like MERALCO cannot be over-emphasized. The ERC admitted that it relied on the documentary evidence presented by MERALCO in resolving its applications for rate increase and rate unbundling. In denying the motions for the conduct of COA audit before the ERC approves the proposed rate increase and rate unbundling, the ERB explained that the established practice is to conduct such audit after the approval and effectivity of the new rates. This ratiocination is grossly erroneous and subvert the very purpose of the law in authorizing the COA to conduct an audit of the books, records and accounts of public utilities for determination of the rates of every nature. The grant of power is encompassing and the ERC cannot arrogate unto itself such authority upon its declaration that it is unnecessary during the pendency of the proceedings for rate increase application and in the absence of an specific provision in EPIRA for a COA audit. It bears to mention that even under Executive Order No. 172 and in previous rate increase adjustments involving public utilities, an audit by the COA provides the ERB with such needed assistance and competence in discharging its rate-fixing responsibilities.

Contrary to the ERC's view, the necessity and wisdom of a government audit in rate increase applications proceeds not simply from the legal basis of COA's power but is premised upon the essential nature and purpose of rate-fixing in order to arrive at just and reasonable levels which may be after the grant of provisional authority (to determine whether the rate applied for will generate a reasonable rate of return) or during proceedings to determine the accuracy of the rate base and necessity of the rate increase. The aim of an audit of public utilities in rate-fixing cases was explained by the Supreme Court in its Resolution denying MERALCO's motion for reconsideration of the Decision dated November 15, 2002 in G.R. Nos. 141369 and 141314."

29. However, the Supreme Court, in reversing the afore-cited CA decision, and thus affirming the ruling of ERC on the unbundled rates, which effectively increased the electricity cost to the consumers and the sound value of Meralco's net utility plant, was not unmindful of the deleterious effect of this Decision upon the poor, more so, in the absence of a COA audit. The Supreme Court showed its apprehension when it stressed:

"The concern for the poor is recognized as a public duty, and the protection of those marginalized members of society have always been 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 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."

30. Accordingly, the dispositive portion of the Decision categorically stated that *"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 rates."*

31. Worth noting, is that in both decisions of the Honorable Courts of Appeals and the Supreme Court, the essentiality of a COA audit was given emphasis in determining the reasonableness of the rate.

32. As of today, the COA audit of respondent MERALCO has yet to be released. Unfortunately, the assailed ERC decision which granted MERALCO a rate increase under the PBR was a palpable disobedience of the ERC to the afore-quoted directive of the Supreme Court that: "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."

33. The reinstatement, therefore, by the Supreme Court of the ERC consolidated Decision which granted a rate increase to MERALCO is provisional or subject to a resolutive condition in that the approved increased rates may be amended or totally disapproved by the respondent ERC upon a showing from the COA report that such rate increases are unnecessarily and/or unreasonable. Since the COA report has not been completed and submitted to ERC, it goes without saying that the MERALCO rates have remained provisional and therefore can not be used as a basis for any rate increase.

34. As to the issue of whether respondent MERALCO is entitled to raise its rate despite the fact that its operations during the last five years show excessive profits, the instant petition should be viewed as a standard objection to any application for a rate increase by a regulated public utility. An applicant whose operations have been extremely profitable has no right to ask for raise of its rates as this is against public interest. The burden of proof to show that the public utility is entitled to an increase in rate rests on the applicant public utility which should prove that the viability of its operation is financially imperiled.

35. Be that as it may, it should be stressed that it is well-settled that procedural rules or technicalities may be set aside in order to achieve substantial justice. (*Ginete vs. Court of Appeals*, 296 SCRA 38). In this case, the rigid application of the rules would result in gross miscarriage of justice to the multitudinous consumers.

36. The Supreme Court in *Sy vs. Court of Appeals*, a case involving declaration of nullity of marriage on the ground of psychological incapacity, had the occasion to expostulate on this doctrine:

“Although we have repeatedly ruled that litigants cannot raise an issue for the first time on appeal, as this would contravene the basic rules of fair play and justice, in a number of instances, we have relaxed observance of procedural rules, noting that technicalities are not ends in themselves but exist to protect and promote substantive rights of litigants. We said that certain rules ought not to be applied with severity and rigidity if by so doing, the very reason for their existence would be defeated. Hence, when substantial justice plainly requires, exempting a particular case from the operation of technicalities should not be subject to cavil.” (*Sy vs. Court of Appeals* 330 SCRA 550).

37. Significantly, to deprive the petitioners the opportunity to be heard in the present petition before this Honorable Court through the rigid implementation of the Rules would be an infringement of petitioners’ right consistent with the intent and spirit of EPIRA, *i.e.*, to ensure the widest participation of the people, directly or indirectly, in the instant case, which is a mere continuation of the proceedings before ERC:

“SEC. 75. Statutory Construction. – This Act shall, unless the context indicates otherwise, be construed in favor of the establishment, promotion, preservation of competition and people empowerment so that the widest participation of the people, whether directly or indirectly is ensured.”

38. In paragraph 1.14, page 42, of respondent MERALCO’s Comment, it is unfortunate that MERALCO viewed petitioners prayer for immediate rollback to the previous rate of P0.9657/kWh as a prayer for rate reduction.

39. Petitioners beg to disagree. A prayer for rate rollback may appear to be a prayer for a rate reduction, but they are two different things. A prayer for rate reduction can reduce a rate by any amount duly proven as reasonable and just. While a rate rollback has the sole purpose of reverting back to the previous rate, which is the logical course of the consumers opposing a rate increase. Naturally, if a rate increase is proven to be unreasonable, unnecessary and unjust, a prayer for rate rollback is in order and further a refund of what was collected from the rate increase decision should follow sans the filing of a case for refund with the ERC.

40. Thus, in *Republic of the Philippines vs. Manila Electric Company*, 391 SCRA 700, the Supreme Court, when it found that the rate increases granted by the then Energy Regulatory Board to MERALCO was excessive, ordered the rollback of MERALCO's rate by Php0.167 and in the same decision it ordered outright the refund of the MERALCO's excess collections starting with the applicant's billing cycles beginning February 1998:

“WHEREFORE, in view of the foregoing, the instant petitions are GRANTED and the decision of the Court of Appeals in CA-G.R. SP No. 46888 is REVERSED. Respondent MERALCO is authorized to adopt a rate adjustment in the amount of Php0.017 per kilowatthours, effective with respect to MERALCO's billing cycles beginning February 1994. Further, in accordance with the decision of the ERC dated February 16, 1998, the excess average amount of Php0.167 per kilowatthour starting with the applicant's billing cycles beginning February 1998 is ordered refunded to MERALCO's customers or correspondingly credited in their favor for the future consumption.”

41. Similarly, in *NASECORE, FOVA and FOLPHA vs. Energy Regulatory Commission and Manila Electric Company*, 499 SCRA 103, the Supreme Court, in addition to invalidating the rate recovery adjustment in the generation charge granted by the ERC to MERALCO, also ordered the outright refund of the excess collections

of MERALCO, viz:

“WHEREFORE, the Motion for Reconsideration dated February 17, 2006 of the ERC and the Motion for Reconsideration dated February 20, 2006 of MERALCO are DENIED with FINALITY.

“The Comment-in-Intervention dated March 6, 2006 of PEPOA and the Intervention dated March 27, 2006 of PIPPA are, likewise, DENIED.

“Consequently, upon finality of the Decision dated February 2, 2006, MERALCO is DIRECTED to REFUND to the affected consumers the amount of Php0.1327 per kwh (representing the unauthorized increase from Php3.1886 to Php3.3213 per kwh under the nullified ERC Order dated June 2, 2004) reckoned from when the same was charged and collected from the affected consumers. Instead of an actual refund, MERALCO may correspondingly credit in favor of the affected customers the appropriate amounts of their future consumption. The ERC is DIRECTED to ensure the proper execution of the judgment in this case.”

42. With respect to the refund or disgorgement of excess profits prayed for by the petitioners, it should be stressed that the ERC has been given a clear mandate under the EPIRA to motu proprio (without a case filed by the consumers) order a disgorgement or a refund of excess profits by any participant in the power industry, if warranted:

“Sec. 45. Cross Ownership, Market Power Abuse and Anti-Competitive Behavior. – xxx

“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.”

43. Unfortunately, ERC chose to ignore, to the detriment of the consumers, petitioners' Motion for Reconsideration which clearly showed the excessive profits realized by respondent MERALCO thus, compelling petitioners to seek the intervention of this Honorable Court with respect to MERALCO's excessive profits

which make its rate unreasonable and not affordable. There is another term used to described such unreasonable rate – OVERCHARGING. This was the compelling reason for the prayer to refund excess profits.

44. For a better appreciation of the issues petitioners’ raised in the instant Petition, hereunder are the various rates involved in the assailed ERC decision/order.

(A) The Supreme Court- declared provisional rate prior to the promulgation of the ERC Decision/Order being assailed in the instant Petition	Php0.9657/kWh
(B) The increase in rate under the PBR methodology which was approved and adopted under the assailed ERC Decision/Order	Php0.257/kWh
(C) The new rate being collected by MERALCO.	Php1.2227/kWh

45. It should be noted that the new rate (C) is composed of the base rate set under the RORB methodology (A) and the new increase in rate (B) set under the PBR methodology.

46. Since the base rate (A) under the RORB methodology was still provisional as ruled by the Supreme Court in *MERALCO vs. Lualhati*, then said rate cannot be accepted as just and reasonable until such time that respondent ERC has appropriately acted on the COA report which unfortunately has not been completed and submitted to date.

47. Thus, the new rate (C) under the PBR which was set based on or on top of a provisional rate (under the RORB methodology), meaning, not yet determined as reasonable and just, is naturally bloated and therefore, an unreasonable rate.

48. In the event that the review of the excessive RORB rate of 15.5% which was used in calculating the base rate (A) and the audit of COA determines that the Base rate (A) is unreasonable or exorbitant, the bloated rate or the resulting overcharge to the consumers is all the more aggravated by the assailed ERC decision which granted respondent MERALCO a rate increase (B). In fine, the consumers would be burdened not by one but two exorbitant rates, one on top of the other.

49. Therefore, the grant of the new rate increase to MERALCO under the PBR, without doubt, is in violation of the policy and the specific mandate of EPIRA “**to protect the public interests” and to “ensure a reasonable price of electricity.”**

50. More so, that based on Petitioners findings that MERALCO has realized excessive profits for the last five (5) years, in the amount of P33.2 billion.. Thus, the new increase in the respondent Meralco rates has further swelled the overcharges to the consumers.

51. This is absolutely unacceptable. Instead of a rollback of the provisional rate (A) and a refund of excessive profits, the Decision/Order of the ERC being assailed in this Petition has further increased the rate of MERALCO to Php1.2227/kWh (C), which is equivalent to a whopping 26.86% increase.

52. It is thus clearly shown that the still provisional rate (A) and the increase in rate (B) are inextricably linked with each another so that the increase in rate (B) cannot and should not be granted until the provisional rate (A) is determined to be reasonable and just. Only once this is done, can respondent ERC then determine if

said rate had become unreasonable and confiscatory as far as respondent MERALCO is concerned. It is only then that respondent MERALCO can claim that there is an imperative need, as a last resort, to raise its rates.

53. As to the contention of respondent MERALCO that since the assailed Decision/Order of the ERC are supported by substantial evidence they must therefore be accorded not only respect but finality, same is out of line as evidenced by the record of the case and respondent MERALCO's other discussion in its Comment.

54. There was no iota of evidence adduced by respondent MERALCO that its application to raise its rates is founded on a very urgent necessity, *i.e.* to ensure the viability of its operation. Particularly, there was no showing that respondent MERALCO's operations are no longer viable; that the respondent MERALCO had resorted to cost-reduction measures; and most importantly that respondent MERALCO had attempted but failed to raise additional capital through stocks-rights offering to its stockholders or through sale of stocks to the outside investors in the stock market. In other words, respondent MERALCO failed to show that out of the provisional rate implemented in May 2003, it was unable to recover just and reasonable costs and it was not earning a reasonable return on the actual capital it invested in the service thus, the need to hike its rate.

55. On the contrary, respondent MERALCO continuously donates valuable properties directly or through Meralco Foundation, keeps on increasing its investment on non-related businesses of subsidiaries and affiliates, maintains an unnecessary and extremely expensive pension plan for its employees and officers and advertises on inordinate and profligate fashion.

56. Moreover, respondent MERALCO's financial statements, which are being regularly submitted to ERC, show that respondent MERALCO is in a pink of health. The price of its shares of stocks in the stock market are hitting unprecedented heights. The struggle between two local giant conglomerates, San Miguel Corporation and Philippine Long Distance Telephone Company, to acquire MERALCO shows that respondent MERALCO is considered a "crown jewel" in the electricity distribution sector.

57. In its Comment, respondent MERALCO argues that the assailed ERC Decision/Order are supported by substantial evidence by merely claiming that the PBR methodology is being implemented in highly developed countries, like the United States, Great Britain, Australia and New Zealand.

58. MERALCO further argues that since the new rate was arrived at through the internationally accepted PBR rate setting methodology and that ERC approved the resultant rate using the said methodology, the consumers and this Honorable Court should accord respect and finality to the assailed ERC Decision/Order.

59. Petitioners again beg to disagree. It is the avowed national policy and mandate of the ERC to protect public interest under the EPIRA that regardless of the rate setting methodology so adopted and applied, ERC "must ensure a reasonable price of electricity." Sad to say, this had been conveniently overlooked, to say the least, in the promulgation of the assailed ERC Decision/Order in utter disregard to the interest of the consumers it is avowed to protect.

60. In other words, the PBR methodology or other rate setting methodology

for that matter should not and cannot be considered as the “be-all” and the “end-all” of the application for a rate hike by MERALCO or by any electric utility.

61. It is worth stressing at this point that the “be-all” and “end-all” of the price setting function of the ERC is to ensure that the rate resulting from any price increase is just, necessary, prudent and reasonable. What matters solely is that the rate that has been determined is just and reasonable and not that the methodology that was employed by the ERC is being used in highly developed countries.

62. It is well conceded that by reason of the special knowledge and expertise of the ERC over matters falling under its jurisdiction, as in the assailed ERC Decision, they are in the best position to pass judgment thereon. Thus, their findings of fact in that regard are generally accorded great respect, if not finality by the courts.

63. It bears emphasis, however, that it is also well settled that even decisions of administrative agencies which are declared “final” by law are not exempt from judicial review when so warranted (*Cosep vs. NLRC, 290 SCRA 704*). Factual findings of administrative agencies are not infallible and will be set aside when they fail the test of arbitrariness (*PAL vs. NLRC, 279 SCRA 445*), or upon proof of gross abuse of discretion, fraud or error of law (*Itogon Suyoc Miners vs. Office of the President, 270 SCRA 63*).

64. The adoption by respondent ERC of an internationally-accepted rate-setting methodology called the PBR, which it used as the basis for approving MERALCO’s application for rate increase, grossly failed to consider the necessity, justness, prudence and reasonableness of the rate increase essential in protecting

public interests.

65. For one, respondent ERC committed grave abuse of discretion and serious error of law in approving the rate hike application of MERALCO in a straight-jacketed manner by blindly following a foreign methodology, without regard to the specific provisions of the EPIRA and spirit of the law which call for the price of electricity to be both affordable and reasonable to protect public interests. Worse, respondent ERC disregarded and disobeyed the directive of the Supreme Court in *Meralco vs. Lualhati*, G.R. No. 166769 and G. R. No. 166818, promulgated on December 6, 2006 for it to request COA to audit the books, records and accounts of MERALCO so as to determine if the ERC-granted rate were reasonable and justified as ERC failed to determine the same as just and reasonable in its decision of May 2003 in the application of Meralco for its unbundled rates. Worst, ERC did not wait any longer but deliberately ignored the COA audit report as per the Supreme Court directive which was meant to, once and for all, determine the reasonableness of the unbundled rate it approved for Meralco in May 2003 and which ERC eventually used as the base rate in granting a rate increase under the assailed Decision/Order.

66. On another point, petitioners submitted documents in their Motion for Reconsideration showing that for the last twenty-one years (1987-2007), the MERALCO owner/investors have earned Eight Thousand Eight Hundred Ninety-Six percent (8,896%) on their actual investments. This was, however, conveniently brushed aside and ignored by the ERC in its assailed Decision/Order.

67. Surprisingly, respondent MERALCO did not refute Petitioners' evidence either in MERALCO's opposition to Petitioners' Motion for Reconsideration nor in their

Comment to the instant Petition. Under the Rules of Court, their failure to refute is considered an admission by silence (Sec. 31, Rule 130). Such being the case, it is as clear as in the rising of the sun in the east that MERALCO does not deserve any rate increase at all. As a matter of fact, if ERC had religiously, devotedly, and scrupulously exercised its regulatory powers, this excessive rate could have been discovered and corrected earlier thus, preventing MERALCO's excessive profits.

68. Petitioners' submission of the said documents will show that for every one thousand (Php1,000.00) peso investment, the MERALCO owner-investors earned a total of Eighty Eight Thousand Nine Hundred Sixty Pesos (Php88,960.00) in a span of only 21 years, the breakdown of which is as follows:

21 years from 1987-2007	<u>Amount</u> Per P1,000.00 investment	<u>Return</u>
Cash Dividends	(P11.5B/441.6M) P26,042.00	2.604%
Stock Dividends	(P10.553B/441.6) P 23,897.00 (@P10 par value)	2.390%
Accumulated Undistributed Income	(P17.232B/441.6M) P 39,021,00	3.902%
TOTAL	<u>Php88,960.00</u>	<u>8.896%</u>

69. Conclusively, if the investment (originally at Php1,000) is sold today in the current price quoted at the Philippines Stock Exchange, the MERALCO owner-investor would realize an additional profit of Php497,940.00 (2,489.7 shares @ Php200.00), or would give the owner-investors a whopping realizable profit of P522,982.00 out of his original P1,000.00 investment, computed as follows:

Cash dividends received	Php 26,042.00
Add: Proceeds from the sale of 2,489.7 shares @P200 at the Phil. Stock Exchange(PES)	Php <u>497,940.00</u>

Total Realizable Profit	Php523,982.00
Less: Original Investment	<u>Php 1,000.00</u>
Total Potential Profit	Php522, 982.00 =====

70. In addition, petitioners’ deeper analysis of the financial statements of respondent MERALCO would show that the total actual capital put up by the MERALCO owner- investors during the said period amounted only to Php Four Hundred Forty-One Million Pesos Six Hundred Thousand Pesos (P441.6M) while a portion of the excessive profits which was capitalized from the funds collected from the consumers through excessive ERB/ERC-approved rates amounted to Php Ten Billion Five Hundred Fifty-Three Million Pesos (P10.553B).

71. This capitalized portion and the customers deposits in the amount of Php Twenty One Billion Four Hundred Twenty Three Million Pesos (P21.423B) were both used in the MERALCO’s operations including the acquisition of additional plant and equipment which amounted to a total of Php31.976B, computed as follows:

Stock Dividends (due to excessive rates hence, belonging to the consumers)	Php10.553B
Customers Deposits	<u>21.423B</u>
	Php 31.976B =====

72. Surprisingly, these customer deposits, instead of being placed in an escrow account as a “trust fund”, was used by respondent MERALCO, as explained during public hearings at ERC, in its operations and in its acquisition of assets.

73. Petitioners’ study of MERALCO’s financial statements shows that the cost/value of these acquisitions were made part of the rate base thus, causing MERALCO’s rate base to bloat to the prejudice of the consumers who own these

deposits. This is so because the total cost/value of the assets is made the basis for the return so that if the asset or rate base is bloated, the return on investment of the MERALCO owner-investors will also be unreasonably higher thus, resulting to a higher rate per kilowatt-hour. In actuality, consumers are being overcharged because of this practice which is one of the reasons for MERALCO's excessive profits. In addition, consumers are also being defrauded because these deposits are not recorded as CONSUMERS EQUITY.

74. Thus, the resulting ratio between the actual capital of the MERALCO owner- investors (Php441M) and the capital sourced from the consumers (P31, 976M), is $(441/31,796)$ or **1:72.5**. In other words, for every one (Php1.00) peso capital of the owner-investor, the capital sourced from the consumers is Php Seventy-Two Pesos and Fifty Centavos (P72.50).

75. It should be noted that beside the fact that the RORB rate-setting methodology is mainly based on the appraisal (not on historical costs) of the plant and equipment of MERALCO by an appraisal company done every three (3) years, hired and paid by MERALCO hence, can not be considered independent in the strict sense of the word.

76. As shown in the calculations above, only 1.36% $(441/31,976)$ of the total cost of the plant and equipment of MERALCO, should be considered as MERALCO's investment entitled to a return. In other words, from the total rate base of MERALCO, only 1.36% of the said rate base should be considered for the account of MERALCO and the rest which is 98.64% of the rate base should be for the account of the consumers.

77. Petitioners strongly believe that 98.64% of the rate base should be recognized and recorded in MERALCO's book of accounts as Consumer Equity and that same percentage of MERALCO's net profit should likewise be credited as Consumers Equity.

78. Petitioner's position above is consistent with the declaration of the Supreme Court that the rate base which a public utility is entitled to a return should be the value of invested capital or property put by the investors :

"In determining the just and reasonable rates to be charged by a public utility, three major factors are considered by the regulating agency: a) rate of return; b) rate base and c) the return itself or the computed revenue to be earned by the public utility based on the rate of return and rate base. The rate of return is a judgment percentage which, if multiplied with the rate base, provides a far 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 state but by administrative and judicial pronouncements. This Court has consistently adopted a 12% rate of return for public utilities. The rate base, on the other hand, is an evaluation of the property devoted by the utility to the public service or the value of invested capital or property which the utility is entitled to a return. (Republic vs. Meralco, 391 SCRA 700).

79. For a better appreciation and understanding of the above calculations, reproduced hereunder (from page 5 above) is the tabulation of the income of the MERALCO investors for the last 21 years based on the amount of its invested capital, to wit:

Year	Stock Dividends (in millions)	Cash Dividends (in millions)	Accumulated Undistributed Income (in millions)	Total Return on Investments (in millions)	Common Stockholders Paid Up Capital (in millions)	% Return on Investments
	(A)	(B)	(C)	(D=A+B+C)	(E)	(F=D/E)
1987					253.93	
1988	174.99					
1989					30.00	
1990	114.73					
1991	286.83					
1992	374.20	113.00			95.00	
1993	797.80	173.00			37.64	
1994	1,082.65	270.00			26.12	
1995	1,636.95	818.00				

1996	1,473.25	1,694.00			55.61	
1997	1,931.91	2,222.00				
1998		2,066.00				
1999		2,090.00			14.30	
2000	1,677.18	1,048.00				
2001						
2002					(70.00)	
2003						
2004						
2005					(4.00)	
2006					3.00	
2007	1,002.56	1,006.00	17,232.00			
TOTAL	10,553.16	11,500.00	17,232.00	39,285.06	441.60	8,896%

Sources: Meralco Audited FS – See annex A to A-16)

80. Looking at the table above, specifically under the paid-up capital or capital invested column, MERALCO'S paid-up capital amounted to Php Two Hundred Eighty-Three Million and Nine Hundred Thirty Thousand Pesos (P283,930,000.00) only from 1987-1989 while its declared stock dividends from 1988-1990 amounted to Php Two Hundred Eighty-Nine Million and Seven Hundred Twenty-Thousand Pesos (P289,720,000.00). This shows that as early as 1990, MERALCO had already recovered entirely its investments from 1987-1989 which normally should have been recovered in at least ten (10) years.

81. However, if we add the stock dividend declared in 1991 in the amount of P286.83M to the P289.72M total stock dividend declared from 1988-1990, we can see that MERALCO had realized a return of P576.55M or **203%** (P576.55/P283.93) in four (4) years alone. And if we are to add all the stock dividends from 1988 to 2007 in the amount of P10.553 billion, we can see that MERALCO had realized a return of 2,390% in 21 years or an average yearly return of 113% as against the allowable maximum return of only 12% a year.

82. Therefore, if these stock dividends were to be traded at the Philippine Stock Exchange at the current market price of P200 per share, these stock dividends

would amount to (P10.553B/P10 par value per share = P1.0553B x P200) Php Two Hundred Eleven Billion (P211B).

83. And if we are to consider the cash dividends declared and paid to the owner-investors of MERALCO from 1992-2007 which amounted to a total of P11.5B, it will show that the owner-investors MERALCO had realized a return of 2,793% in 21 years or an average yearly return of 133% as against the allowable maximum return of 12%.

84. This return of P11.5 billion in the form of cash dividends from 1992-2007 or 133% per year is far way beyond the 12% maximum allowable return per year, meaning the owner-investors have already received this profit from their respective investment. Thus, Petitioners repeatedly mention the amount of P441.6 million as the only total paid-up capital of the owner-investors of MERALCO.

85. These exclude the accumulated undistributed income of P 17.232B as of December 31, 2007 which gave the owner –investors of MERALCO a return of 3,902% in 21 years or an average yearly return of 185%. All in all, the owner-investors of MERALCO earned a total of Php Thirty Nine Billion Two Hundred Eighty-Five Million Pesos (P39,285,000.00) from a total paid up capital of Php Four Hundred Forty-One Million Six Hundred Thousand Pesos (P441.6M) only thus, giving the owner-investors of MERALCO a staggering return of 8,896% on their capital in a span of 21 years or an average yearly return of 423.6% as against the maximum allowable yearly return of only 12%. This is without consideration of the current price of the MERALCO stocks from a par value of P10 per share to P200 per share at the stock exchange this time thus, giving the owner-investors of MERALCO a mind-boggling windfall of (P190/P10) 1,900%. **Where is rate regulation here?**

86. For the above reasons, the petitioners cannot agree to the restrictive and myopic understanding of respondent MERALCO of the RORB methodology by excluding and ignoring the very definition of the Supreme Court in its decision which states,

“In determining the just and reasonable rates to be charged by a public utility, three major factors are considered by the regulating agency: a) rate of return; b) rate base and c) the return itself or the computed revenue to be earned by the public utility based on the rate of return and rate base. 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 state but by administrative and judicial pronouncements. This Court has consistently adopted a 12% rate of return for public utilities. The rate base, on the other hand, is an evaluation of the property devoted by the utility to the public service or the value of invested capital or property which the utility is entitled to a return. (Republic vs. Meralco, 391 SCRA 700).

87. Clearly, RORB as defined above refers to three major factors, namely: a.) rate of return, b.) rate base, c.) the return itself, which respondent MERALCO refuses to acknowledge in order hiding its excessive rates and profits.

88. As to the rate of return, the decision quoted above says that the Court has consistently adopted a 12% rate of return for all public utilities. Petitioners computation above shows that respondent MERALCO earned a return of 8,896% in a span of 21 years or an average yearly return of 423.6%. If we deduct the 12% from this, the excess return will be 411.6%. Clearly, the rate of return of MERALCO is a lot higher than what the Supreme Court prescribes as the reasonable return for the capital invested by the owner-investors of MERALCO.

89. As to the rate base, logic dictates that the actual capital invested by the owner-investor in MERALCO or the value of its acquired assets devoted to public service represent the rate base upon which the return is applied. In this case,

only P441.6 million was the total paid up capital of the MERALCO owner-investors from 1987-2007, as the table above shows in light of the cash dividends already received by the MERALCO owner-investors. Therefore, MERALCO's share in the rate base should only be equivalent to P441.6 million or 1.36%.

90. And as to the return itself, respondent MERALCO realized and earned an average yearly return of 423% or a whopping P 1.87 billion, instead of only P52.992 million a year (P441.6 x 12%). MERALCO's return of 423% is even a lot higher than the yield in the "five-six" practice of the usurers, which gives a return of 240% a year.

91. These returns are reprehensible, revolting, and infuriating as these are way far beyond the maximum allowable return on capital for regulated utilities like respondent MERALCO thus, resulting to a lack of consumer protection which can only be best described as a REGULATORY FAILURE, to say the least, or a REGULATORY CAPTURE, at most!

92. As if these are not yet enough, the ERC had the temerity to grant respondent MERALCO an unwarranted and unmerited rate increase of 26% under the assailed Decision/Order.

93. If by reason of the rates granted using the RORB methodology, the investors were able to earn a total of Eight Thousand Eight Hundred Ninety-Six (8,896%) percent return on their capital from 1987 to 2007 while the consumers are being burdened by incessant and exorbitant rate increases who could not do anything because MERALCO is a monopoly (since it is the only public utility in Metro Manila and in neighboring provinces) the scale, therefore, is not balanced. Ergo, the

rates of MERALCO are unreasonable and unjust. Indubitably, this is the reason why the price of electricity in the Philippines is so high, second to Japan in the whole of Asia.

**ALLEGATIONS IN SUPPORT OF THE URGENT
PRAYER TO GRANT RESTRAINING
OR STATUS QUO ORDER ON THE COLLECTION OF THE
RATE INCREASE OF P0.2570/KWH**

1. Petitioners most respectfully reiterate, replead and incorporate by reference all the allegations contained herein-above and in their Petition dated May 28, 2009.

2. The avowed state policy under the EPIRA law is to protect the consumers at all times and to ensure that the price of electricity are reasonable.

3. Thus, the Petitioners who are customers of respondent MERALCO have a clear RIGHT to a just and reasonable rate and to expect that ERC, as the vanguard against abuses by electric utilities, should make a careful consideration, evaluation and analysis of the totality of facts and circumstances material to each application for a rate hike before any upward rate revision is rendered. It is worth stressing that in any application for rate adjustment, it is only the recovery of just and reasonable costs and reasonable return on applicant's capital invested in the service that should be the main consideration as the Honorable Court has oft-repeated in its various decisions.

4. Under the Performance Based Regulation rate-setting methodology (PBR), aside from providing reasonable operating expenses and a reasonable return

on the utility's invested capital in the service which must not exceed the maximum allowable cap of 12%, said methodology included the capital requirement of MERALCO in determining the rate it can charged its customers. On this score alone, the rate increase granted to MERALCO was unjust and unreasonable to the consumers, palpably violative of the EPIRA law, hence, A VIOLATION OF THE RIGHT OF THE CONSUMERS which must be rejected outright.

5. Moreover, the rate increase granted in 2003 under the Return on Rate Base (RORB) methodology was still provisional since the COA report on its audit of the accounts, books and records of MERALCO has not been submitted yet and therefore, has not yet been acted upon by the ERC as per directive of the Supreme Court under G.R. No. 166769 and G.R. No. 166818.

6. Additionally, the previous rate of MERALCO which was granted in May 2003 had a Return On Rate Base (RORB) of 15.5% which, too, was way beyond the maximum allowable cap of 12% for public utilities, viz:

“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 return for public utilities. (Republic vs. MERALCO, 591 SCRA 700).

7. Lastly, but not the least, based on the financial statements of respondent MERALCO, there is no imperative need on its part to resort to a rate increase under the PBR or whatever methodology for that matter because it has been realizing a rate of return on its capital of an average of Fifty-two (52%) percent per year for the last five (5) years. This is way beyond the cap of 12%. Hence, there is no urgent necessity on its part to ask for any rate increase considering that it had enjoyed and continue to enjoy “EXCESSIVE PROFITS”.

8. It is significant to note that the increase of Php0.257/kWh under the assailed EC Decision/Order translates to at least Five Hundred Sixty Million (Php560,000,000.00) Pesos per month (Php0.257 x 2.2B kWh, average monthly sales) extra burden on the consumers who are already suffering even before the present global financial crisis.

9. Historically, it takes at least two (2) years for a present petition to be resolved, hence, the unnecessary, unjust and unreasonable additional payment by the consumers to MERALCO for the said period would amount to Thirteen Billion Five Hundred Sixty-Nine Million Pesos (P13,569,000,000) pesos.

10. The assailed rate increase has allowed respondent MERALCO to collect the said amount which Petitioners have shown in the instant petition to be unnecessary, unjust and unreasonable and which have already resulted to IRREPARABLE DAMAGE to the MERALCO consumers.

11. Petitioners believe that if the collection of the rate increase of P0.2570/kWh is not immediately restrained but allowed to continue until the final resolution of the instant Petition, the irreparable damage may grow to unparalleled level of consumer deprivation.

12. Based on the track record of MERALCO in refunding its over-collections from its customers, it takes at least five (5) years before the full amount is given back to the consumers.

13. At present, MERALCO has yet to complete several refunds ordered by the Supreme Court and the ERC, to wit:

a. Excessive rate as ordered by the Supreme Court in the case of

Republic vs. Meralco, 401 SCRA 130, in the amount of Php30,200,000,000.00.

- b. Over recovery of currency adjustment by MERALCO as ordered by the ERC in ERC Case No. 2001-900 dated September 28, 2008 in the amount of Php3,924,922,762.58.
- c. Refund of the meter deposits to all customers as ordered by the ERC as provided in the Magna Cata for Residential Electricity Consumers of 2004 in the amount of Php2,879,000,000.00.

14. Additional proof of MERALCO's excessive profits is its maintenance of unnecessary and extremely expensive non-contributory retirement plan for all its regular and permanent employees on top of the legally mandated contributions to the Social Security System (SSS), to wit;

Year	Retirement Cost
2000	1,100,000,000.00
2001	1,142,000,000.00
2002	1,142,000,000.00
2003	2,400,000,000.00
2004	2,586,000,000.00
2005	1,577,000,000.00
2006	1,784,000,000.00
2007	2,837,000,000.00
2008	1,869,000,000.00
TOTAL	16,437,000,000.00

15. Moreover, it has been observed that MERALCO had been transferring its funds in the establishment of various subsidiaries, affiliates and joint venture, instead of using these funds to keep and maintain the rate in its current level, if not to reduce the same. Below are the companies referred to:

SUBSIDIARIES	Ownership
Corporate Information Solutions (CIS)	100%
Meralco Energy Inc, (MEI)	100%
e-Meralco Ventures, Inc. (eMVI)	100%
Asian Center for Energy Management (ACEM)	100%
Meralco Financial Services Corporation (Finserv)	100%
Republic Surety and Insurance Co. (RSIC)	100%
Lighthouse Overseas Insurance Company, Limited	100% (Bermuda)

MESCOR and Subsidiaries	97%
CEDC	65%
Rockwell Land Corporation (Rockwell)	51%

AFFILIATES

First Private Power Corporation and Subsidiary (FPPC)	40%
Batangas Cogeneration Corporation (BatangasCogen)	38%(ceased operation)
General Electric Philippines and Meter Instrument Company, Inc (GEPMICI)	35%

JOINT VENTURE

Soluziona	50%
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16. The excessive profits of respondent MERALCO in the amount of P33,266,802,000.00 in the last five years, its unnecessary and extremely expensive non-contributory retirement plan for all its regular and permanent employees and its investments in the above subsidiaries and affiliates which do not redound to the interests of the consumers are all reflective of MERALCO's callousness and insensitivity to the plight of the consumers, ninety percent (90%) of which are marginalized and impoverished.

17. It should be noted that in case this Honorable Court grants the urgent prayer of the petitioners for the issuance of a restraining or status quo order, same would not affect the viability of MERALCO which the EPIRA guarantees since as per evidence or record, MERALCO has been overcharging the consumers resulting in its excess profits for the period 2003 to 2007 in the amount of Php33,266,802,000.00 which is also being sought to be recovered in the present petition. Hence, there would be no clear prejudice or INJURY that may be caused on MERALCO.

18. That the restraining or status quo order that may be issued by this Honorable Court will only restore the parties to the condition immediately prior to the issuance of the assailed ERC Decision/Order.

P R A Y E R

WHEREFORE, premises considered, it is most respectfully prayed that upon receipt of the instant Reply to MERALCO's Comment with urgent prayer for restraining or status quo order, an Order be issued by this Honorable Court restraining MERALCO from further collecting the rate increase of Php0.257 granted by the ERC in its assailed Decision/Order.

Petitioners also most respectfully reiterate their prayer in their Petition dated May 08, 2009 that this Honorable Court declare as null and void the assailed 29 May 2008 Decision and the 13 April 2009 Order of Respondent Energy Regulatory Commission in ERC Case Nos. 2008-004RC and 2008-018RC granting a new rate in the amount of P1.227 per kilowatt-hour.

Petitioners further pray, without prejudice to the COA audit required by this Honorable Court and the Supreme Court, that after annulling and setting aside the aforementioned Decision and Order of respondent ERC, this Honorable Court order the following:

- a. The immediate rate rollback to the previous rate of P0.9657/kWh;
- b. The immediate refund of the collection by respondent MERALCO of the difference between the new MERALCO rate (P1.2227/kWh) which was initially collected during the May 2009 billing cycle and the previous provisional rate of P0.9657/kWh.
- c. The immediate refund of the excess profits of respondent MERALCO to its customers in the amount of P33,266,802,000.00 during the period 2003-2007.

Makati City for Manila, Philippines, 22 September 2009.

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EXPLANATION
(Pursuant to Section 11, Rule 13
1997 Rules of Civil Procedure)

The foregoing *Reply to Meralco's Comment* was served to the other parties thru registered mail with return card instead of personal service, due to the distance of their offices and lack of personnel to effect personal service.

LEONARDO A. AURELIO

13/tls