

G.R. No. 227670 – ALYANSA PARA SA BAGONG PILIPINAS, INC. (ABP), represented by Evelyn v. Jallorina and Noel Villones, *Petitioner*, v. ENERGY REGULATORY COMMISSION, represented by its Chairman JOSE VICENTE B. SALAZAR, DEPARTMENT OF ENERGY, represented by Secretary ALFONSO G. CUSI, MERALCO, CENTRAL LUZON PREMIERE POWER CORPORATION, ST. RAPHAEL POWER GENERATION CORPORATION, PANAY ENERGY DEVELOPMENT CORPORATION, MARIVELES POWER GENERATION CORPORATION, GLOBAL LUZON ENERGY DEVELOPMENT CORPORATION, ATIMONAN ONE ENERGY, INC., REDONDO PENINSULA ENERGY, INC., and PHILIPPINE COMPETITION COMMISSION, *Respondents*.

Promulgated:

May 3, 2019

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### SEPARATE CONCURRING OPINION

**PERLAS-BERNABE, J.:**

I concur with the *ponencia* to the extent that the **respondent Energy Regulatory Commission (ERC) gravely abused its discretion when it issued ERC Resolution No. 01, Series of 2016,<sup>1</sup> which “restated” the date of effectivity of ERC Resolution No. 13, Series of 2015,<sup>2</sup>** entitled “A Resolution Directing All Distribution Utilities (DUs) to Conduct a Competitive Selection Process [(CSP)] in the Procurement of their Supply to the Captive Market.”<sup>3</sup> As will be herein discussed, absent the approval of and coordination with the Department of Energy (DOE), the ERC cannot suspend the effectivity of the CSP, which process was originally mandated under DOE Department Circular No. DC2015-06-0008,<sup>4</sup> entitled “Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)” (DOE Circular). However, as will be elaborated upon below, I qualify my concurrence in that: (a) only ERC Resolution No. 01, Series of 2016 – and not the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015 – should be declared null and void; and (b) pursuant to the doctrine of operative fact, the effects of the PSAs already approved prior to the invalidity of ERC Resolution No. 01, Series of 2016, notwithstanding their CSP non-compliance, should be recognized.

As background, the CSP is essentially a regulation on the “procurement of PSAs by the DUs [to ensure] security and certainty of

<sup>1</sup> Entitled “A RESOLUTION CLARIFYING THE EFFECTIVITY OF ERC RESOLUTION NO. 13, SERIES OF 2015,” issued on March 15, 2016.

<sup>2</sup> Issued on October 20, 2015.

<sup>3</sup> See *ponencia*, pp. 12-13.

<sup>4</sup> Issued on June 11, 2015.

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electricity prices of electric power to end-users in the long term.”<sup>5</sup> As presently defined in DOE Department Circular No. DC2018-02-0003<sup>6</sup> issued on February 1, 2018:<sup>7</sup>

- 3.8. “*Competitive Selection Process*” or “*CSP*” refers to the process wherein a Generation Company or, in the case of off-grid areas, New Power Provider, is awarded to supply electric power requirements of a DU through transparent and competitive bidding undertaken by a DU or by Aggregated DUs to secure supply of electricity based on the evaluation of criteria adopted by the DUs in accordance with the requirements of this Policy. For purposes of, and throughout the Policy, the terms “*Competitive Bidding*” and “*CSP*” shall have the same meaning and shall be used interchangeably.

The CSP traces its roots to the policies mandated under Republic Act No. 9136,<sup>8</sup> otherwise known as the “Electric Power Industry Reform Act of 2001” (EPIRA). Under the EPIRA, both the DOE and the ERC are authorized by law to issue and implement the proper rules in order to – among other policy objectives – “ensure transparent and reasonable prices of electricity **in a regime of free and fair competition** and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market.”<sup>9</sup> In particular, the DOE is tasked to formulate the rules “necessary to implement the objectives of [EPIRA],”<sup>10</sup> whereas “[p]ursuant to Sections 43 and 45 of the [EPIRA], the ERC shall promulgate such rules and regulations as authorized thereby, including but not limited to Competition Rules and limitations on recovery of system losses x x x.”<sup>11</sup>

As headlined in this case, the inaugural issuance meant to put the CSP in force is **DOE Department Circular No. DC2015-06-0008**, issued in June 2015. Section 3 thereof pertinently states that “[a]fter the effectivity of this circular [(which was on June 30, 2015 following its publication<sup>12</sup>)], **all DUs shall procure PSAs only through CSP** conducted through a Third Party duly recognized by **the ERC and the DOE.**”<sup>13</sup> In this regard, the same section provides that “**[w]ithin one hundred twenty (120) days from the effectivity of this Circular, the ERC and DOE shall jointly issue** the guidelines and procedures for the aggregation of the [uncontracted] demand requirements of the DUs and the process of recognition or accreditation of the Third Party that conducts the CSP x x x.”<sup>14</sup>

<sup>5</sup> DOE Circular, Section 1.

<sup>6</sup> Entitled “ADOPTING AND PRESCRIBING THE POLICY FOR THE COMPETITIVE SELECTION PROCESS IN THE PROCUREMENT BY THE DISTRIBUTION UTILITIES OF POWER SUPPLY AGREEMENT FOR THE CAPTIVE MARKET.”

<sup>7</sup> Section 3.8 of Department of Energy Circular No. DC2018-02-0003, Annex “A”.

<sup>8</sup> Entitled “AN ACT ORDAINING REFORMS IN THE ELECTRIC POWER INDUSTRY, AMENDING FOR THE PURPOSE CERTAIN LAWS AND FOR OTHER PURPOSES,” approved on June 8, 2001.

<sup>9</sup> EPIRA, Chapter I, Section 2 (c); emphasis and underscoring supplied.

<sup>10</sup> EPIRA, Chapter III, Section 37 (p).

<sup>11</sup> Section 4 (b), Rule 3 of the EPIRA IRR.

<sup>12</sup> See *ponencia*, p. 5.

<sup>13</sup> Emphases supplied.

<sup>14</sup> Emphases and underscoring supplied.

Related thereto, Section 4<sup>15</sup> of DOE Department Circular No. DC2015-06-0008 confers unto **the ERC the power to issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP.** Section 4, however, makes clear that still, the ERC shall exercise such power “upon its determination and in coordination with the DOE.”<sup>16</sup> In addition, Section 6<sup>17</sup> of the DOE Circular also provides that monitoring of the compliance with the conditions of the CSPs will be exercised jointly by both the DOE and the ERC.

Based on the foregoing, it is therefore apparent that DOE Circular No. DC2015-06-0008 provides for the adoption of the CSP, but leaves the issuance of **supplemental guidelines and procedures for its design and execution** to the ERC **after** it has coordinated with the DOE.

On October 20, 2015, or within one hundred twenty (120) days from the effectivity of the DOE Circular, the DOE and ERC issued Joint Resolution No. 1, which provides that the ERC, by agreement of the DOE and the ERC, “shall issue the **appropriate regulations to implement the [CSP].**”<sup>18</sup>

Given (1) the rule-making authority of the DOE and the ERC under the EPIRA, and (2) the circumstantial trajectory of the issuances on the CSP, it is thus fairly apparent that **the term “appropriate regulations” under Section 1 of Joint Resolution No. 1 should only pertain to the supplemental guidelines and procedures for the design and execution of the CSP<sup>19</sup> that the ERC is empowered to issue in coordination with the DOE.** To my mind, Section 1 should not be construed as a blanket grant of authority by the DOE to the ERC to issue whatever guidelines the latter deems fit for the implementation of the CSP. *To adopt this latter view would be tantamount to an isolated reading of a provision that is impervious to the context under which it was formulated. Worse, this construction tends to effectively undermine the DOE’s role in the process of promulgating rules to advance the EPIRA’s policy objectives on fair competition.*

In fact, it deserves pointing out that the ERC issued **Resolution No. 13, Series of 2015 on the same day (i.e., October 20, 2015) that Joint Resolution No. 1 was passed.** To recall, ERC Resolution No. 13, Series of 2015 is the resolution whose effectivity was “restated” by the assailed issuance herein, ERC Resolution No. 01, Series of 2016. In the “whereas clauses” of ERC Resolution No. 13, Series of 2015, DOE Circular No. DC2015-06-0008, which had originally set the parameters of authority of the

<sup>15</sup> Repealed under Section 16.1 of DOE Department Circular No. DC2018-02-0003.

<sup>16</sup> Underscoring supplied.

<sup>17</sup> Section 6. Monitoring, Enforcement and Compliance. The DOE through the Electric Power Industry Management Bureau (EPIMB), together with the ERC, shall monitor compliance with the conditions of the CSPs and the compliance with the provisions of PSAs.

<sup>18</sup> Joint Resolution No. 1, Section 1; emphasis and underscoring supplied.

<sup>19</sup> Notably, however, as discussed in the *ponencia*, this authority has already been revoked under DOE Circular No. DC2018-02-0003; see p. 36 of the *ponencia*.

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DOE and the ERC anent the implementation of the CSP, was explicitly recognized, viz.:

**WHEREAS**, on June 11, 2015, the Department of Energy (DOE) issued Department Circular No. [DC2015-06-0008], *Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)*;

**WHEREAS**, on October 20, 2015, the DOE and the ERC approved the issuance of a Joint Resolution embodying their agreement on the CSP, particularly, that the ERC shall issue the appropriate regulations requiring the DUs to undertake a CSP for the PSAs they will enter into for the supply to their captive market;

**WHEREAS**, the ERC and the DOE are convinced that there is an advantage to be gained by having a CSP in place, in terms of ensuring transparency in the DUs' supply procurement and providing opportunities to elicit the best price offers and other PSA terms and conditions from suppliers;

x x x x

As per its terms, ERC Resolution No. 13, Series of 2015 not only sets the guidelines for the design and execution of the CSP, but also clearly supplements DOE Department Circular No. DC2015-06-0008. Thus, it stands to reason that ERC Resolution No. 13, Series of 2015 is the embodiment of the phrase "appropriate regulations" contemplated under the Joint Resolution issued by both agencies to implement the CSP.

In this case, it is apparent that both the DOE and the ERC are intent on implementing the CSP. **DOE Department Circular No. DC2015-06-0008 already mandated that upon its effectivity on June 30, 2015, all DUs shall procure PSAs only through the CSP.** However, as noted in the *ponencia*, the ERC, unilaterally postponed the date of effectivity of the CSP from June 30, 2015 to November 7, 2015, marking the first postponement by the ERC of the effectivity of the mandatory CSP.<sup>20</sup> This appears to be in pursuance of the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015, which reads:

Section 4. Applicability. – The CSP requirement herein mandated shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution [(i.e., November 7, 2015)]. For PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.

The implementation of the CSP requirement was further stalled by the ERC for another five (5) months, particularly, up until April 30, 2016, through

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<sup>20</sup> See *ponencia*, p. 24.



the issuance of ERC Resolution No. 01, Series of 2016.<sup>21</sup> The main reason for this subsequent postponement was the “several letters from stakeholders”<sup>22</sup> received by the ERC expressing certain reservations anent the implementation thereof.

As I see it, ERC Resolution No. 01, Series of 2016 cannot qualify as a supplemental guideline for the design and execution of the CSP as contemplated under the ERC’s delegated authority pursuant to Section 4 of DOE Department Circular No. DC2015-06-0008. Contrary to the very nature of a supplemental guideline, ERC Resolution No. 01, Series of 2016 does not merely add or clarify the existing regulations on the CSP, but rather completely halts its implementation. Accordingly, it cannot fall under the phrase “appropriate regulations” under Section 1 of Joint Resolution No. 1, as agreed upon by the DOE and the ERC. To reiterate, the ERC was not given sole discretion under Joint Resolution No. 1 to promulgate whatever rules it deems fit to implement the CSP. This is, in fact, further confirmed by the Comment of the DOE itself wherein it denied any responsibility in the ERC’s restatement of the CSP’s date of effectivity:

15. **DOE is not aware of the cut-off date shift.** There is nothing on record that ERC, **contrary to Section 4 of the [2015] DOE Circular**, coordinated with DOE in “restating” the date of the effectivity to a later date, or from 7 November 2015 to 30 April 2016 for a period of one-hundred and seventy-five (175) days.<sup>23</sup>

In fine, since the ERC had no authority to suspend the implementation of the CSP on its own, it gravely abused its discretion in issuing ERC Resolution No. 01, Series of 2016 and hence, ought to be declared void.

The *ponencia*, however, proceeds to also invalidate the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015, as the said provision marked the first postponement of the CSP implementation from June 30, 2015 (as per the original DOE Circular) to November 7, 2015. As the dispositive of the *ponencia* reads:

**WHEREFORE**, the petition for *certiorari* and prohibition is **GRANTED**. The first paragraph of Section 4 of the Energy Regulatory Commission Resolution No. 13, Series of 2015 (CSP Guidelines), and the Energy Regulatory Commission Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), are hereby declared **VOID ab initio**. Consequently, all Power Supply Agreement applications submitted by Distribution Utilities to the Energy Regulatory Commission on or after 30 June 2015 shall comply with the Competitive Selection Process in accordance with the Department of Energy Circular No. DC2018-02-0003 (2018 DOE Circular) and its Annex “A”. Upon compliance with the Competitive Selection Process, the power purchase cost resulting from such compliance shall retroact to the date of effectivity of the complying Power

<sup>21</sup> See *id.*

<sup>22</sup> See 7<sup>th</sup> Whereas Clause, Resolution No. 01, Series of 2016.

<sup>23</sup> See *ponencia*, p. 26; emphasis supplied.

Supply Agreement, but in no case earlier than June 30, 2015, for purpose of passing on the power purchase cost to consumers.<sup>24</sup>

Respectfully, I disagree with the holding anent the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015 because the validity of ERC Resolution No. 13, Series of 2015 was not questioned in the present petition. In any case, it is my view that there was nothing infirm about the failure to implement the CSP by June 30, 2015 and postponing the same to November 7, 2015. This is because the CSP could not have been implemented by the time the original DOE Circular took effect on June 30, 2015 given that there were no proper implementing guidelines at that time. Based on the records, it was only upon the issuance of ERC Resolution No. 13, Series of 2015 (which took effect later on November 7, 2015) that concrete guidelines on the CSP were set. Notably, this latter ERC Resolution was issued on the same day Joint Resolution No. 1 was issued by both the DOE and the ERC, and in this joint resolution, the authority of the ERC to issue the appropriate guidelines to implement the CSP, *by agreement of the DOE and the ERC*, was recognized. In fact, there is an express statement by the DOE in the original DOE Circular that the ERC was still to issue supplemental guidelines and procedures for the design and execution of the CSP to properly guide the DUs; hence, the immediate effectivity of the CSP requirement could not be reckoned as of June 30, 2015. Accordingly, for these reasons, only ERC Resolution No. 01, Series of 2016 – and not the first paragraph of Section 4 of ERC Resolution No. 13, Series of 2015 – should be declared null and void.

Also, albeit not explicitly expressed in the *ponencia*, I caution against the wholesale invalidation of PSAs which were non-compliant with the CSP requirement at the time the said process should have been carried out, which date the *ponencia* pegs on June 30, 2015. Being in the nature of a selection and qualification requirement, compliance with the CSP to already existing – more so, implemented – PSAs appears to be impossible, unless one invalidates the entire contract. Logically speaking, it is highly impracticable to reverse the consummation of acts already done. This being the case, it may be prudent to recognize the validity of the effects of the PSAs already approved prior to the invalidity of ERC Resolution No. 01, Series of 2016, notwithstanding their CSP non-compliance. Lest it be misunderstood, this does not necessarily mean that the approved PSAs<sup>25</sup> shall be valid and effective for their entire full 20 or 21-year term. The compromise to this matter is to only recognize these contracts' validity up until a new DU, selected under the applicable CSP process, has qualified to take-over the obligations for the remaining period in accordance with the appropriate transitory regulations to be issued by the proper governing agency/agencies. To my mind, this approach balances out the legalistic attribution of the questioned issuance with the practical impact that the afore-discussed declaration would have on the power industry and on a larger scale, the consuming public in general.

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<sup>24</sup> Id. at 36.

<sup>25</sup> See id. at 29.

**ACCORDINGLY**, I vote to **GRANT** the petition based on the qualifications stated above. Energy Regulatory Commission Resolution No. 01, Series of 2016 should be declared **INVALID** for having been issued with grave abuse of discretion. Power Supply Agreements approved on or after November 7, 2015, despite non-compliance with the Competitive Selection Process (CSP) requirement, should not *per se* be invalidated, but shall be subject to the appropriate transitory regulations on the CSP to be issued by the proper governing agency/agencies.

  
**ESTELA M. BERLAS-BERNABE**  
Associate Justice