

Republic of the Philippines
ENERGY REGULATORY COMMISSION
 San Miguel Avenue, Pasig City



IN THE MATTER OF THE APPLICATION AND APPROVAL OF THE AMENDMENT AGREEMENT TO THE POWER PURCHASE AGREEMENT BETWEEN PANAY ELECTRIC COMPANY, INCORPORATED (PECO) AND PANAY POWER CORPORATION (PPC), WITH PRAYER FOR PROVISIONAL AUTHORITY

ERC CASE NO. 2005-043 RC

PANAY ELECTRIC COMPANY, INCORPORATED (PECO),
 Applicant.

x ----- x

D O C K E T E D
 Date: APR 13 2007
 By: CR

ORDER

On October 27, 2006, Panay Electric Company, Incorporated (PECO) and Panay Power Corporation (PPC) filed their "Joint Compliance" as per Commission's directive in its Order dated December 17, 2006.

In the said compliance, PECO and PPC alleged, among others, that:

1. They computed the difference between the final authority and the provisional authority as follows:

| Billing Period | Total Cost base on Final Billing (PhP) | Payments made by PECO plus PPD and VAT (PhP) | Difference (PhP) |
|----------------|--|--|-----------------------|
| Dec. 2005 | 116,581,102.54 | 109,998,987.61 | 6,582,114.93 |
| Jan. 2006 | 236,616,926.71 | 204,331,806.92 | 32,285,119.79 |
| February | 213,198,877.25 | 180,361,687.95 | 32,837,189.30 |
| March | 265,607,665.77 | 209,205,630.43 | 56,402,035.34 |
| April | 256,680,179.33 | 238,330,211.76 | 18,349,967.57 |
| May | 269,488,422.53 | 249,280,318.50 | 20,208,104.03 |
| June | 270,248,166.05 | 251,804,331.81 | 18,443,834.24 |
| DM Memo | 2,484,045.91 | - | 2,484,045.91 |
| July | 258,148,338.78 | 256,009,071.44 | 2,139,267.34 |
| TOTAL | 1,889,053,724.87 | 1,669,322,046.42 | 189,731,678.45 |

2. PPC's right to receive the actual cost of power supplied to the consumers through PECO accrued upon its invoicing of the said power supplied, thus, it is entitled to impose legal interest at the rate of twelve percent (12%) per annum from the time the various monthly payments became due;
3. The differential was subjected at the rate of twelve percent (12%) per annum. The table below shows the computation of the interest due:

| Billing Period | Differential (PhP) | Interest Due (PhP) | Recoverable Amount (PhP) |
|----------------|-----------------------|----------------------|--------------------------|
| Dec. 2005 | 6,582,114.93 | 666,987.65 | 7,249,102.58 |
| Jan. 2006 | 32,285,119.79 | 2,862,613.95 | 35,147,733.74 |
| February | 32,837,189.30 | 2,900,618.39 | 35,737,807.69 |
| March | 56,402,035.34 | 4,248,953.33 | 60,650,988.67 |
| April | 18,349,967.57 | 1,217,214.52 | 19,567,182.09 |
| May | 20,208,104.03 | 1,151,861.93 | 21,359,965.96 |
| June | 18,443,834.24 | 897,599.93 | 19,341,434.17 |
| DM Memo | 2,484,045.91 | 120,890.23 | 2,604,936.14 |
| July | 2,139,267.34 | 82,005.25 | 2,221,272.58 |
| TOTAL | 189,731,678.45 | 14,148,745.18 | 203,880,423.63 |

4. The running balance of the recoverable amount was further subjected by a carrying charge of twelve percent (12%) until the proposed twenty-four (24) month recovery period is completed.

DISCUSSION

The issues to be resolved are: a) whether or not an interest may be imposed on the difference between the final authority and the provisional authority; and b) whether or not the proposed period within which to recover the differential amount is reasonable.

A. Whether or not an interest may be imposed on the difference between the final authority and the provisional authority

The Commission resolves in the negative. There is no legal basis for the imposition of interest on the difference between the final authority and the

provisional authority. In ERC Case No. 2006-003 RC [In the Matter of the Petition for the Recovery of Additional Cost Incurred Pursuant to the Emergency Measures Undertaken to Avoid Shut Down of Operations, with Prayer for Provisional Authority, Visayan Electric Company, Incorporated (VECO) – Petitioner], the Commission did not allow VECO to impose interest on the amount it advanced to prevent possible shut down. By analogy, with more reason the parties herein, likewise, should not be allowed to impose interest on the differential amount considering that they did not spend any amount which would eventually entitle them to impose said interest.

Further, nothing in the Commission's Order and Decision dated June 27, 2006 and March 10, 2006, respectively, allowed the imposition of interest on the differential amount.

PPC anchored its right to impose interest on Article 2209 of the New Civil Code of the Philippines, which provides that:

“Art. 2209. If the obligation consists in the payment of a sum of money, and the debtor incurs in delay, the indemnity for damages, there being no stipulation to the contrary, shall be the payment of the interest agreed upon, and in the absence of stipulation, the legal interest, which is six percent per annum.”
(Emphases provided.)

While the said Article speaks of the imposition of interest, this presupposes the existence of a creditor and debtor relationship. What is put in issue in this particular instance is the amount of interest to be collected, if and only there is delay on the part of the debtor, which cannot be given due course there being no pre-existing creditor and debtor relationship between the utility and its consumers. Hence, the provision quoted by PPC finds no application in the instant case.

Furthermore, there is no delay to speak of because the parties' right over the difference of the final authority and the provisional authority shall only accrue upon the approval of their proposed collection scheme, which is the subject of this Order.

It is also worth mentioning that Article 1956 of the NCC provides that:

"Art. 1956. No interest shall be due unless it has been expressly stipulated in writing."

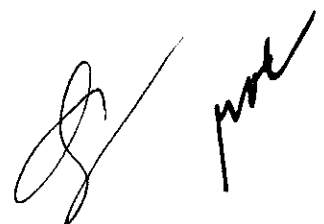
A thorough review of the arguments presented by PECO and PPC in its compliance revealed that there is no legal basis for the imposition of interest.

B. Whether or not the proposed period within which to recover the differential amount is reasonable

Be it noted that the Commission has already resolved to allow PPC to collect from PECO the difference between the final authority and the provisional authority in its Decision dated March 10, 2006.

The period of twenty-four (24) months within which to recover the difference between the final authority and the provisional authority as agreed between PECO and PPC is reasonable as this will mitigate the impact to the end-users.

PECO may recover the said difference through the Automatic Generation Rate Adjustment (AGRA).

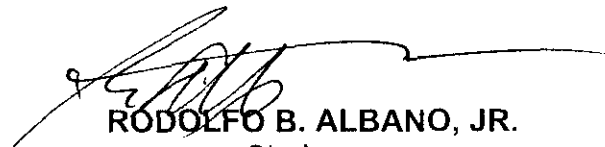


WHEREFORE, the foregoing premises considered, the Commission has resolved to:

- a) **ALLOW** PECO to recover the difference between the final authority and provisional authority through the AGRA as the parties may have agreed subject to the usual confirmation; and
- b) **DENY** the imposition of interest on the said difference.

SO ORDERED.

Pasig City, March 20, 2007.


RODOLFO B. ALBANO, JR.
Chairman


RAUF A. TAN
Commissioner


ALEJANDRO Z. BARIN
Commissioner

(On Leave)
MARIA TERESA R. CASTAÑEDA
Commissioner


JOSE C. REYES
Commissioner

Copy Furnished:

1. Panay Electric Company, Inc. (PECO)
J.M. Basa St., Iloilo City
2. Panay Power Corporation (PPC)
CTC Bldg., 2232 Roxas Blvd.,
Pasay City
3. Atty Honorato P. Sayno, Jr.
Counsel PECO
Room 207, 2nd Floor, Maryville Bldg.,
Delgado St., Iloilo City
4. The Solicitor General
134 Amorsolo St., Makati City
5. Commission on Audit
Quezon City
6. House Committee on Energy
Batasan Hills, Quezon City
7. Senate Committee on Energy
GSIS Bldg., Roxas Blvd,
Pasay City
8. National Power Corporation
BIR Rd., cor. Quezon Ave.,
Quezon City
9. Regulatory Operations Service