

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

IN THE MATTER OF THE
APPLICATION FOR AUTHORITY TO
RECOVER UNDER – RECOVERIES IN
THE GENERATION RATE, WITH
PRAYER FOR PROVISIONAL
AUTHORITY

(IN THE MATTER OF THE
APPLICATION FOR PRIOR
VERIFICATION OF OTHER
GENERATION RATES
ADJUSTMENTS UNDER SECTION 3,
ARTICLE IV OF THE GUIDELINES
FOR THE AUTOMATIC ADJUSTMENT
OF GENERATION RATES AND
SYSTEM LOSS RATES BY
DISTRIBUTION UTILITIES, WITH
PRAYER FOR PROVISIONAL
AUTHORITY)

ERC CASE NO. 2008- 038 RC

PANAY ELECTRIC COMPANY, INC.
(PECO) AND PANAY POWER
CORPORATION (PPC),

Applicants.

x-----x

D O C K E T E D
Date: **JAN 15 2009**
By: _____

ORDER

Before the Commission for resolution is the Motion to Dismiss the Petition on the ground that the cause of action is already barred by the principle of law of the case, or in the alternative, to Suspend the Proceedings by Reason of the Existence of Prejudicial Question/Issue re: finality of the Decision of the Commission in ERC Case Nos. 2002-07 and 2001-903 dated May 19, 2004 (Unbundling Case) of Atty. Romeo P. Gerochi.



STATEMENT OF FACTS

On July 3, 2008, the Panay Electric Company, Inc. (PECO) and the Panay Power Corporation (PPC) filed an application for prior verification of other generation rates adjustments under Section 3, Article IV of the Guidelines for the Automatic Adjustment of Generation Rates and System Loss Rates by Distribution Utilities, with prayer for provisional authority. After going over the allegations, the Commission deems it more appropriate to refer to the application as one for authority to recover under – recoveries in the generation rate, with prayer for provisional authority.

Having found said application sufficient in form and in substance with the required fees having been paid, an Order and a Notice of Public Hearing, both dated July 8, 2008, were issued setting the same for jurisdictional hearing, pre-trial conference and evidentiary hearing on July 29 and July 30, 2008.

During the July 29, 2008 initial hearing at the Iloilo Provincial Capitol Conference Hall, 5th Floor Capitol Bldg., Bonifacio Drive, Iloilo City, the following entered their appearances: 1) Atty. Norberto Manjares, Jr. and Atty. Norberto Manjares III, for PECO and PPC; and 2) Atty. Romeo Gerochi and Atty. Gil., for the Freedom from Debt Coalition (FDC) – Iloilo Chapter and Katulong ng Bayan.

In the said hearing, Atty. Gerochi, filed his "Opposition to the Petition". The Commission provisionally considered the following as Interveners subject, however, to the filing of the appropriate petitions to formalize their intervention,



within five (5) days from the date of the said initial hearing: 1) Atty. Gerochi; and
2) Atty. Gil.

Thereafter, PECO and PPC presented their proofs of compliance with the Commission's posting and publication of notice requirements which were duly marked as Exhibits "A" to "G", inclusive.

The Commission directed PECO and PPC and the Interveners to file their respective Memoranda within ten (10) days from the date of the initial hearing relative to the issue of suspension of the proceedings.

Atty. Gerochi moved for the dismissal or denial of the instant case on the ground that the cause of action therein is already barred by the principle of law of the case and in view of the alleged existence of a prejudicial question/issue re: the finality of the Decision of the Commission in the Unbundling Case (PECO's application for authority to revise/unbundle its rates) and the Resolution of the Court of Appeals (CA) in C.A. – G.R. SP. No. 89828. The said Decision precludes the re-litigation of the same issue on the generation rate to be charged by PECO to its consumers in view of the principle of law of the case. The Commission deferred the proceedings pending resolution of Atty. Gerochi's motion.

On August 7, 2008, in compliance with the directive of the Commission during the hearing held on July 29, 2008, Atty. Gerochi filed his "Opposition to the Petition" which was similar to the "Opposition to the Petition" he previously filed.

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On August 8, 2008, PECO and PPC filed their "Legal Memorandum" while Atty. Gerochi filed his "Memorandum" on August 11, 2008.

Subsequently, on August 19, 2008, PECO and PPC filed their "Comment (Ad Cautelam) to Memorandum with Motion to Expunge".

I S S U E S

- A. WHETHER OR NOT THE PROCEEDINGS ON THE INSTANT CASE SHOULD BE DISMISSED/DENIED ON THE GROUND THAT THE CAUSE OF ACTION IS ALREADY BARRED BY THE PRINCIPLE OF LAW OF THE CASE IN VIEW OF THE FINALITY OF THE DECISION OF THE COMMISSION ON PECO'S UNBUNDLING OF RATES APPLICATION**

- B. WHETHER OR NOT THE "MEMORANDUM" FILED BY ATTY. GEROCHI SHOULD BE EXPUNGED FROM THE RECORDS FOR FAILURE OF THE PROVISIONALLY ACCEPTED INTERVENER TO FILE THE APPROPRIATE PLEADING IN INTERVENTION**

D I S C U S S I O N

A. MOTION TO DISMISS OR SUSPEND

Atty. Gerochi contended that the instant case should be denied due course on the ground that the cause of action is already barred by the principle of law of the case. The Decision of the Commission in the Unbundling Case, affirmed by the Court of Appeals (CA) has already attained finality. This constitutes the law of the case, and as such could no longer be disturbed in the instant proceedings. The resolution of the issues which have already been litigated in the said Decision precludes the re-litigation of the same issues in the



instant case. He argued that one of the issues raised in the Unbundling Case is whether or not the stipulation in the original PPA should be observed or strictly enforced. This issue was already resolved by the Commission when it pegged PECO's generation rate at the NPC rate in the Visayas. The costs sought to be recovered in the instant case and alleged to be under-recoveries were the costs incurred by PPC when the Commission, in an already final Decision, ordered PECO and PPC to mutually observe the provision in their PPA that PPC shall charge PECO at a rate which shall be equal to or less, but not more, than the rates of the NPC. He further argued that the Commission cannot act on the instant case without modifying its aforecited final Decision.

Atty. Gerochi further argued that the instant case has no basis for it does not reflect the true cost of electricity incurred by PPC. During the period July 2001 to July 2002, PPC availed of the cheap electricity rates provided by NPC through its One-Day Power Sales Program (ODPS) in violation of the ODPS Implementing Rules and Regulations which disqualify Independent Power Producers from participating in the said program. While PPC accessed electricity at bargained rates provided in the said program, it sold the same to PECO at a rate even beyond the stipulated rates in their PPA. As such, PPC's generation charge to PECO was not reflective of the true cost of electricity incurred by PPC and it earned windfall profits totaling to PhP200 Million.

On the other hand, PECO and PPC averred that the instant case is not barred by the principle of the law of the case. They argued that while the under-recoveries sought to be recovered in the instant case may have resulted from the Decision in the Unbundling Case, the instant case is of a different nature from the Unbundling Case. The Unbundling Case was for the approval of the individual components of PECO's rates as of 2005, including the generation cost



component. They pointed out that the issue resolved therein is whether or not the individual charges for each service provided by PECO to its customers should be approved. On the contrary, the instant case is for the recovery of the under-recoveries within the mechanisms for recovery of generation costs allowed by the Commission and with due regard to the surrounding circumstances. They also contended that PECO was prevented from collecting the true cost of power as billed by PPC from the period from August 2005 to December 14, 2005.

PECO and PPC further argued that the instant case does not seek to modify or affect in any manner the Decision in the Unbundling Case and that amounts apart from the approved rates may be recovered without infringing on the finality of the prior approval of such rates citing a precedent on this matter which is ERC Case No. 2006-003, August 10, 2006 entitled "*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.*"

PECO and PPC's contentions are impressed with merit. The instant case is not barred by the principle of law of the case.

Rule 16 Section 1 Rules of Court of the Philippines, which applies suppletorily to the Commission's own Rules of Practice and Procedure, states that:

"Section 1. Grounds. – Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on the following grounds:

X X X



(f) That the cause of action is barred by a prior judgment or by the statute of limitations;

x x x."

As enunciated by the Supreme Court in the case of *Asia's Emerging Dragon Corp. v. DOTC, et.al.*:

"By law of the case is meant that whatever is once irrevocably established as the controlling legal rule or decision between the same parties in the case continues to be the law of the case so long as the facts on which such decision was predicated continue to be the facts of the case before the court (21 C.J.S. 330.) And once the decision becomes final, it is binding on all inferior courts and hence beyond their power and authority to alter or modify" (G.R. Nos. 169914 & 174166, April 18, 2008).

The Commission in its Decision in ERC Case Nos. 2002-07 and 2001-903 dated May 19, 2004 unbundled the rates of PECO and pegged PECO's generation charge based on the NPC rate in the Visayas. PECO filed Motions for Reconsideration of the said Decision. On April 25, 2005, the Commission issued an Order denying its Second Motion for Reconsideration. Subsequently, on May 23, 2005, PECO filed a Petition for Review with the Court of Appeals (CA) with Prayer for a Temporary Restraining Order (TRO). On May 27, 2005, the CA issued a Resolution granting a TRO for sixty (60) days without giving due course to the Petition. On July 29, 2005, the TRO expired. The Decision in the Unbundling Case became executory in August 2005 since an appeal with the CA from the decisions of quasi-judicial agencies shall not stay the judgment sought to be reviewed unless directed otherwise by the CA. On September 16, 2005, the CA issued a Decision on C.A. GR SP No. 89828 dismissing the Petition. Said Decision became final and executory after the lapse of fifteen (15) days from notice of the judgment with no Petition for Review on Certiorari having been filed in the Supreme Court. Hence, on August 2005, PECO began billing its customers at the NPC rate of PhP3.7491/kWh.



In an Order dated May 5, 1999 issued by the then ERB in ERB Case No. 98-30 provisionally approving the PPA between PPC and PECO, the Board held therein that *"throughout the term of the Agreement, Panay Power's rates to applicant shall be equal to or less than the rates offered by bulk power producers in the grid, such as NPC or its successor companies, provided that in the event that Panay Power's rates are no longer competitive with other bulk power producers, the parties agree to conduct mutual discussions to resolve or minimize the effects of non-competitiveness. Said agreements, shall however be subject to the ERB's approval."* Said pronouncement was culled from the terms of the original PPA itself particularly in Section 7.1 Article 7.

Considering the foregoing pronouncement of the Board, PPC's rates to PECO was benchmarked to the rates of NPC or other bulk power producers in the grid notwithstanding the agreed formulas provided for in the PPA for the computation of the monthly payments consisting of the following components: (1) Monthly Capacity Charge; (2) Monthly Energy Charge; and (3) Fuel Charge, until they come up with a new agreement approved by the Board.

In the Decision of the Commission in the Unbundling Case, it was held that *"provided in the event that PPC rate is no longer competitive with other bulk producers, the parties agreed to conduct mutual discussion to resolve or minimize PPC's competitiveness. Both parties failed to submit its re-negotiated PPA. Hence, the Commission calculated PECO's Generation Cost based on the most recent NPC rate in the amount of PhP3.7491/kWh, computed as follows":*



Generation Charge	PhP2.2907
Franchise and benefits to Host Communities	0.0177
Net FPCA	0.3100
ICERA	0.2207
Total Generation Charge	2.8391
Transmission Charge	0.9100
NPC rate per kWh	PhP3.7491

It was further held that "PECO's approved generation charge shall remain fixed until changes in NPC's generation rate are approved and authorized by the Commission pursuant to its Order dated January 26, 2004, ERC Case No. 2003-574 (GRAM) and ERC Case No. 2003-498 (ICERA), Order dated December 4, 2003. In view thereof, the Commission does not foresee the need for PECO to continue to implement its Power Purchase Adjustment (PPA) clause. Towards this end, the Commission hereby directs PECO to discontinue the implementation of its PPA upon the effectivity of the herein approved unbundled rates."

The finality of the Decision in the Unbundling Case is not being disputed in the instant case. The Commission was constrained to peg the Generation Charge of PECO at NPC rate since PECO failed to submit its renegotiated PPA at that time, thus, the original PPA is still controlling and PPC's rate should still be equal to or less than NPC rate in the grid. Notwithstanding the foregoing pronouncements, it does not necessarily follow that such Generation Charge of PhP3.7491/kWh is the only amount that it can charge to its consumers. Such rate was pegged for purposes only of determining the base generation charge of PECO in relation to the unbundling of its rates. Such Generation Charge is subject to adjustments as may be subsequently allowed by the Commission.



This application was filed precisely to seek the Commission's approval for such adjustment in PECO's generation charge.

In view of the foregoing discussions, the doctrine of the law of the case, or even *res judicata*, cannot find any application to this case.

B. MOTION TO EXPUNGE FROM THE RECORDS

PECO and PPC contended that the Memorandum dated August 5, 2008 filed by Atty. Gerochi must be expunged from the records for failure of the erstwhile provisionally accepted Intervener to file the appropriate pleading in intervention. He was accepted as an Intervener only on a provisional basis and on the condition that he files the appropriate pleading in intervention within five (5) days from the date of the initial hearing. As he failed to comply with the directive of the Commission, it necessarily follows that he cannot be considered an Intervener in the instant case, whether provisional or otherwise. It further follows that he can no longer participate in the present proceedings. He does not have the legal personality to file the said Memorandum. Hence, the "Memorandum" filed by Atty. Gerochi must be expunged from the records of the case.

Said contention deserves scant consideration.

The Commission requires that petitions to intervene shall be served on the original parties and filed not less than five (5) days prior to the time the proceeding is called for hearing, unless the notice of hearing fixes the time for filing such petitions, in which case such notice shall govern.



During the initial hearing of the instant case where Atty. Gerochi and Atty. Gil were provisionally allowed as interveners, they were given time to file the appropriate pleadings, such as Petition to Intervene, to formalize their appearances as such within five (5) days from the initial hearing. Atty. Gerochi was supposed to convert his "Opposition to the Petition" into one of petition to intervene while Atty. Gil was supposed to file written petition to intervene since he only manifested verbally to the Commission his intent to participate as intervener. The Commission further directed them to submit their respective "Memoranda" within ten (10) days therefrom containing comments on the issue of dismissal/denial of the instant case or suspension of the proceedings of the instant case in view of the existence of prejudicial question/issue.

Atty. Gerochi did not file a petition to intervene; instead, he filed an "Opposition to the Petition" which was similar to the "Opposition to the Petition" filed during the initial hearing and beyond the five (5) day reglementary period granted to him. Atty. Gil did not comply with the said directives of the Commission.

In the interest of justice, Atty. Gerochi is formally allowed as intervener in the instant case in spite of his failure to formalize his intervention by filing a petition to intervene and the belated filing of his "Opposition to the Petition" since there had been a considerable compliance on his part and manifestation his intent to participate in the proceedings as an intervener by filing a "Memorandum". However, Atty. Gil who was provisionally allowed as intervener but failed to comply with the directives of the Commission shall no longer be recognized as intervener but merely as an oppositor. As such, he may file



written comments at any stage of the proceedings before PECO and PPC rest their case.

It is a settled principle that *“rules of procedure are intended to promote rather than defeat substantial justice, and should not be applied in a very rigid and technical sense. Rules of procedure are merely tools designed to facilitate the attainment of justice. They are promulgated to aid the court in the effective dispensation of justice. The Court has the inherent power and discretion to amend, modify or reconsider a final judgment when it is necessary to accomplish the ends of justice. If the rigid application of the rules would frustrate rather than promote justice, it is always within the Court’s power to suspend the rules or except a particular case from its operation. The power to suspend or even disregard rules can be so pervasive and compelling as to alter even that which this Court itself has already declared to be final.”* (Heirs of Maura v. Lucila Jomo Obliesca, et.al., G.R. No. 14002, January 28, 2008).

WHEREFORE, the foregoing premises considered, the motion to dismiss or suspend the proceedings of the instant case filed by Atty. Gerochi is hereby **DENIED**. As regards the intervention sought, insofar as Atty. Gerochi’s interest, the same is hereby **GRANTED**. Accordingly, PECO and PPC’s “Motion to expunge Atty. Gerochi’s Memorandum from the Records” is hereby **DENIED**. On the other hand, Atty. Gil is hereby recognized merely as an oppositor.

Meanwhile, the continuation of the hearing of the instant case is hereby set on the following date and venue:

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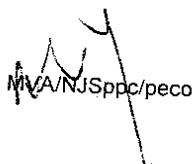
DATE	TIME	VENUE	PARTICULARS
February 3, 2009	Nine o'clock in the morning to three-thirty in the afternoon (9:00AM to 3:30PM)	Iloilo Provincial Capitol Conference Hall, 5 th Floor, Capitol Building, Bonifacio Drive, Iloilo City	Pre-trial Conference and Evidentiary Hearing

SO ORDERED.

Pasig City, January 14, 2009.

FOR AND BY THE AUTHORITY
OF THE COMMISSION:


ALEJANDRO Z. BARIN
Commissioner


MVA/NJSppc/peco

Copy Furnished:

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