G.R. No. 248061 - More Electric and Power Corporation, *Petitioner* **vs. Panay Electric Company, Inc.,** *Respondent*

G.R. No. 249406 – Republic of the Philippines, *Petitioner-Oppositor*, **More Electric and Power Corporation,** *Petitioner* **vs. Panay Electric Company, Inc.,** *Respondent.*

Promulgated: September 15, 2020

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DISSENTING OPINION

LAZARO-JAVIER, *J.*:

> ***Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use***[1]
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> ***Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public--in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property--and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly, I respectfully dissent.***
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> ....
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> ***Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.***[2]

I dissent.

Summary

First. Sections 10 and 17 of Republic Act No. 11212 (RA 11212) (2019) are unconstitutional on their face. These provisions constitute **bills of attainder**. The **attainted person** is PECO.

PECO is **singled out**. It is expressly identified as the **wrongdoer**. Upon it, **legislative punishment** as this was **historically understood** has been imposed. As well, the **non-punitive legislative purpose** has been **far outweighed** by the **legislative intent to punish** and the **legislative punishment accordingly exacted**. As clearly and succinctly recounted in the **congressional deliberations**, the **non-punitive legislative purpose arose**

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[1] This epigraph is from the title of a law journal article authored by Prof. Carol L. Zeiner and published in 28 Va. Envtl. L.J. 1 (2010).

[2] Dissent, Justice Sandra Day O'Connor, *Kelo v. City of New London*, 545 U.S. 469 (U.S. June 23, 2005).

only from and **was the result only** of the **punishment** Sections 10 and 17 have envisioned to inflict.

The **punishment** is the **legislative determination** of **what otherwise** would have been a **judicial function** of the **propriety of confiscating** or **expropriating PECO's properties** resulting from the non-renewal of PECO's franchise and the **propriety** of **allowing such confiscation** or **expropriation** to favor the new franchise holder, MORE.

Second. Sections 10 and 17 violate the **equal protection of the laws**. They have been **tailored to target** and **single out** PECO and its properties. Sections 10 and 17 apply to **no other entity but** PECO and its facilities. ***Biraogo v. The Philippine Truth Commission of 2010***[3] supports my claim.

Third. As my reply to Justice Caguioa's well-meaning Opinion will show, the assailed provisions betray a **mere incidental and pretextual public use and necessity** to the taking of PECO's properties.

I. Sections 10 and 17 are bills of attainder.

The challenged provisions read:

> SECTION 10. Right of Eminent Domain. — Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the power of eminent domain insofar as it may be reasonably necessary for the efficient establishment, improvement, upgrading, rehabilitation, maintenance and operation of its services. The grantee is authorized to install and maintain its poles wires, and other facilities over, under, and across public property, including streets, highways, parks, and other similar property of the Government of the Philippines, its branches, or any of its instrumentalities. **The grantee may acquire such private property *as is actually necessary* for the *realization of the purposes* for which this franchise is granted, *including, but not limited to poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment* previously, currently or actually used, or intended to be used, or have been abandoned, unused or underutilized, or which obstructs its facilities, *for the operation of a distribution system* for the conveyance of electric power to end users *in its franchise area***: Provided, That proper expropriation proceedings shall have been instituted and just compensation paid:
>
> Provided, further, That upon the filing of the petition for expropriation, or at any time thereafter, and after due notice to the owner of the property to be expropriated and the deposit in a bank located in the franchise area of the **full amount of the assessed value** of the property or properties, the grantee shall be entitled to immediate possession, operation, control, use and disposition of the properties sought to be expropriated, including the power of demolition, if necessary, notwithstanding the pendency of other issues before the court, including the final determination of the amount of just compensation to be paid. The court may appoint a representative from the ERC as a trial commissioner in determining the

[3] 651 Phil. 374 (2010).

amount of just compensation. The court may consider the tax declarations, current audited financial statements, and rate-setting applications of the owner or owners of the property or properties being expropriated in order to determine their assessed value.

....

SECTION 17. Transition of Operations. — In the public interest and to ensure uninterrupted supply of electricity, **the current operator, Panay Electric Company, Inc. (PECO)**, shall in the interim be authorized to operate the existing distribution system within the franchise area, as well as implement its existing power supply agreements with generation companies that had been provisionally or finally approved by the ERC until the establishment or acquisition by the grantee of its own distribution system and its complete transition towards full operations as determined by the ERC, which period shall in no case exceed two (2) years from the grant of this legislative franchise.

Upon compliance with its rules, the ERC shall **grant PECO the necessary provisional certificate of public convenience and necessity (CPCN) covering such interim period.** The applicable generation rate shall be the provisional or final rate approved by the ERC.

This provisional authority to operate during the transition period shall not be construed as extending the franchise of PECO after its expiration on January 18, 2019, and **it shall not prevent the grantee from exercising the right of eminent domain over *the distribution assets existing at the franchise area as provided in Section 10 of this Act***. During such interim period, the ERC shall **require PECO to settle the full amount** which the ERC has directed to refund to its customers in connection with all the cases filed against it.

To reduce the length of the transition period, the ERC and all agencies issuing the requisite licenses shall prioritize all applications relevant to the establishment and operation of the distribution system under its franchise.

The grantee shall, as far as practicable and subject to required qualifications, **accord preference to hiring former employees of PECO** upon commencement of business operations.

An information dissemination campaign regarding public services and operations of the grantee shall be made to all end-users in the franchise area.

The grantee and PECO shall jointly ensure that employees not hired by the grantee shall receive all separation and/or retirement benefits they are entitled to in accordance with applicable laws.

The DOE shall, during the transition, ensure that there will be uninterrupted supply of electricity in the existing franchise area.

A. Essence of a bill of attainder

Bills of attainder have often been associated with criminal statutes. There is however **no reason not to use** the proscription against them to **civil statutes** that mirror what bills of attainder do in the criminal setting.

Functionally and traditionally, bills of attainder as well as ex post facto laws have been invoked to nullify civil statutes or regulations.[4]

The **essence** of a bill of attainder is the **substitution of a legislative for a judicial determination of the legitimacy of a deprivation**. The constitutional ban against bills of attainder serves to implement the **principle of separation of powers** by **confining legislatures to rule-making** and thereby **forestalling legislative usurpation of the judicial function.**

History in perspective, **bills of attainder** were employed **to suppress government takings of life or property involving unpopular causes** and **political minorities,** and it is **against this evil** that the constitutional prohibition is directed. Thus:

> ON reviewing the U.S. Constitution, **it is easy to assume that the document contained no takings protection language prior to the addition of the Fifth Amendment**, as part of the Bill of Rights. **In reality, however, a takings protection was inserted directly into the body of the Constitution in 1787. This was the ban on bills of attainder**, found in Article I, Sections 9 and 10. **A bill of attainder is an egregious taking of life or property by an arbitrary legislative act, and the ban on bills of attainder was primarily meant to protect the people from such arbitrary takings by the government.** During the antebellum period, construing the ban on bills of attainder as a takings protection was well known, and lawyers and judges frequently referred to this ban. It was only after the Civil War that this commonly understood takings protection faded gradually into disuse, primarily because of the Fourteenth Amendment's incorporation doctrine. Today, this protection is all but forgotten.
>
> **Recognizing the ban on bills of attainder as a takings protection greatly aids in understanding several constitutional issues that have otherwise not been fully understood.** For example, seeing the ban on bills of attainder as a takings protection helps in understanding why the Eleventh Amendment's passage was in large measure a reaction to potential attainder lawsuits against the states. We also better understand why the ban on *ex post facto* laws only needed to apply to criminal matters, and **more clearly see how takings law/attainders were a driving force for separating governmental powers, particularly between the legislature and the judiciary**. Finally, we can better understand why many of the founders - particularly James Madison - so greatly feared factions as the greatest threat to the new republic. In short, the ban on bills of attainder illuminates the early workings of the new constitutional republic in America.
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> **This article mostly draws from the founders' comments at the Constitutional Convention and the antebellum case law that treats the ban on bills of attainder as a takings protection. The jurists' and practitioners' statements in these early cases - including comments**

[4] *United States v. Certain Funds Contained in Account No. 600-306211-066, 1993 U.S. Dist. LEXIS 21006*, *64-65 (E.D.N.Y. November 12, 1993): "The Constitution makes no civil or criminal distinction for determining the applicability of the Ex Post Facto Clauses. Further, an analysis of the historical background of the. Ex Post Facto Clauses suggests that the framers intended the clauses reach all retrospective laws, regardless of whether they were deemed purely criminal in nature. See Jane H. Aiken, Ex Post Facto in the Civil Context, 81 Ky. L.J. 323-32 (1993);" Notes and Comments: The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, The Yale Law Journal (1962) 330; Ex Post Facto in the Civil Context: Unbridled Punishment, Jane H. Aiken, Kentucky Law Journal (1992) 323.

> **from such luminaries as John Marshall and Daniel Webster - demonstrate their understanding of the ban on bills of attainder as a takings protection, independent of the Fifth Amendment** or any other state takings language. Likewise, their statements about the ban on bills of attainder clarify the other constitutional doctrines discussed in this article.
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> **Even though the antebellum era has long since passed, the concept that the ban on bills of attainder is a takings protection and its clarification of other constitutional doctrines has value for us today. There is no compelling reason why the antebellum understanding of bills of attainder is any less legitimate now than back then.** To be sure, the Fifth Amendment protections now apply to state takings due to the Fourteenth Amendment's incorporation doctrine. But this application in no way negates the ongoing potential effectiveness of using the ban on bills of attainder in the Constitution as a takings protection. **Indeed, there will be times that the ban on bills of attainder will be a better fit for a particular judicial problem than the Fifth or Fourteenth Amendments. Examples could include legislation targeting** unpopular groups or **groups holding property which the government wants. Accordingly, courts today should consider applying this provision of the Constitution as a takings protection, just as the courts formerly did.** If they do, the courts will discover that it will not only serve to protect the innocent from arbitrary takings, but that it will also help clarify constitutional doctrines today as it did in former times. Indeed, this is one of the greatest benefits that can come from using the ban on bills of attainder as a takings protection, since many constitutional doctrines today are often confused and misunderstood.[5]

The provision against bills of attainder **came about** in this historical factual context – the American revolutionary war needed funding and legislation provided that **funding by taking the property of named persons as wrongdoers.**[6] The drafters of the American Constitution were aware that these legislations were "arbitrary and represented a **dangerous power of government to take land**, and wanted to ensure that such wholesale takings did not occur in the future. Hence, the Constitutional Convention adopted the ban on bills of attainder without dissent."[7]

The protection against bills of attainder **primarily protected property rights**, which had been greatly abused by such wartime enactments.[8] Individuals needed to be **protected from egregious takings** by the state – this **protection** was the **ban on bills of attainder**, which "restricted all legislative takings failing to meet the standards of due process, compensation, and public use."[9] This protection was conceived to be a **judicial** one, a protection coming **from the courts.**[10]

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[5] Duane Ostler, "The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles," 42 U. Tol. L. Rev. 395, 395 at Lexis Advance Singapore Research, https://advance.lexis.com/document/?pdmfid=1522471&crid=c9e9433a-d581-4959-adc9-58aae2d19815&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A53DS-K060-00CV-N0FX-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr0&pdicsfeatureid=1517130&pditab=allpods&ecomp=gd3Jk&earg=sr0&prid=3548c525-b477-4a9b-9e1a-6019ca35b64f.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

In the United States of America, bills of attainder, including bills of pains and penalties, are constitutionally prohibited under Article I, Sections 9 and 10 of its *Constitution*.

B. Elements of a Bill of Attainder

The **elements of a bill of attainder** are: (i) the **singling out of a definite class,** (ii) the **imposition of a burden on it, without** or **far outweighing any non-punitive legislative purpose**, and **a legislative intent to do so**, and (iii) the **lack of judicial trial.**[11] These elements **stigmatize** statute or any of its provisions as a **bill of attainder**.

i. Singling out of a definite class

If the statute sets forth a **generally applicable rule** decreeing that **any person** who commits certain acts or possesses certain characteristics shall not enjoy a right or a privilege, and **leaves to courts the task of deciding what persons** have committed the specified acts or possessed the specified characteristics, the statute is **valid**.

But if the statute ***designates in no uncertain terms the persons* who possess the feared characteristics** and **therefore cannot enjoy the right or privilege**, for example, members of the Communist Party, or here, respondent PECO, the **legislative act**, *no matter what its form*, that applies either to ***named individuals*** or ***easily ascertainable members* of a group** in such a way as to **deprive** these individuals or groups of **any right**, civil or political, **without judicial trial**, is a **bill of attainder** prohibited by the Constitution.

ii. Imposition of a burden, without or far outweighing any non-punitive legislative purpose, and a legislative intent to do so

In ***Cummings v. Missouri***,[12] the United States Supreme Court held that **depriving** or **confiscating one's property** has been **understood historically** as **punishment**.

Presently, in the United States, there is **no longer a requirement for the legislature to convict a person of a specified crime** or **to inflict the historical punishments of pain and/or death** in order for a statute to constitute a bill of attainder. American law has **never precluded** the possibility that **new burdens and deprivations might be legislatively fashioned** that are inconsistent with the bill of attainder guarantee; there is as well **no more need** for the **offending statute** to **include** any ***formal* legislative pronouncement** of **moral blameworthiness** or ***formal* intent to punish** the **targeted individual, group, or corporation.**[13] The **question is**

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[11] *Acorn v. United States*, 618 F. 3d 125 (2010, CA 2nd circuit).
[12] 71 U.S., 277 (1867).
[13] *Nixon v. Administrator of General Services et al.*, 433 U.S. 425, [1977] Singapore LEXIS 24 (U.S. June 28, 1977) at pp. 26, 29; *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F. 3d 338, [2002] Singapore

whether the legislation has a **punitive objective** ***or*** a **legitimate, non-punitive, legislative purpose**. Where such **legitimate legislative purposes** do **not** appear or are **far out-weighed** by an **intention to cause deprivation**, it is **reasonable to conclude** that **punishment of individuals disadvantaged** by the enactment was the **purpose** of the decision makers.[14]

Consolidated Edison Co. of N.Y., Inc. v. Pataki[15] held that "[w]here such legitimate legislative purposes do **not** appear," it is already "reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decision makers," there are **nonetheless several other tests** set out in American jurisprudence for determining **whether a statute is punitive or non-punitive**. Therefore, if one follows American jurisprudence, one **must** also **consider whether** the provision **could still be construed as amounting** to a legislative determination of guilt and punishment.

In ***Consolidated Edison Co. of N.Y., Inc.***, a public utility **wished to pass on the costs of a power outage** to the consumers. A replacement generator had been purchased fifteen (15) years prior to the outage, but was not installed until the defective generator finally failed. A prior agreement was in place whereby Consolidated Edison could **pass certain costs on to its ratepayers in the form of temporary rate increases** subject to statutory review by the New York Public Service Commission. The Assembly and Senate, however **passed a bill** without amendment, thus:

> §1. ...By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the **Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests** of his customers. **Therefore it would not be in the public interest for the company to recover from ratepayers any costs** resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.

The prohibition on recovering the cost extended to base rates "or any other rate recovery mechanism."

The appellate court stated that an **indispensable element** of a bill of attainder is the fact that **it defines past conduct as wrongdoing** and then **imposes punishment on that past conduct**. The court considered **three (3) factors** in determining **whether the statute was punitive**:

(1) whether it fell within the **historical meaning of legislative punishment**,

(2) whether, viewed in terms of the **type and severity of burdens imposed**, it could **reasonably be said to further non-punitive** legislative purposes, and

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LEXIS 10762 (2nd Cir. June 5, 2002), at p. 10; *United States v. Lovett*, 328 U.S. 303, 1946 Singapore LEXIS 2280 (U.S. June 3, 1946), at pp. 2-3.

[14] *Nixon, ibid* at 26.

[15] 292 F. 3d 338, [2002] Singapore LEXIS 10762 (2nd Cir. June 5, 2002), at hn 15.

(3) whether it evinced an **intent to punish**.

The court focused on the last two (2) criteria, finding that **eliminating harm to innocent third parties** is a **purpose consistent with punishment**, and that **general and specific deterrence** are **traditional justifications for punishment**. The court determined that a **quite substantial proportion of the costs** in question **could have been passed on unchallenged in a routine** generator replacement. **Nothing but punishment could justify preventing** Consolidated Edison from **passing these costs** on to ratepayers. The court also found that the **legislative history clearly evinced an intent to punish**.

Consolidated Edison is also **remarkable** in the **clearly punitive intentions** voiced by the **legislators themselves** and the **inference** which can be **drawn from the language** of the provision itself. Clearly, the court in that case was of the view that **the legislature had concluded** that the **act of the public utility in failing to replace the generator was worthy of sanction**, and **viewed the legislation as imposing that sanction**.

United States v. Lovett,[16] concerned a provision which decreed that **no salary or other compensation was to be paid to certain employees** of the Government, **specified by name**, unless they were again appointed by the President with the advice and consent of the Senate. The individuals in question allegedly had communist leanings. The court found that the **purpose of the legislation** was **permanently to bar** those individuals **from government service because of** what Congress thought about **their political beliefs**. The court further stated that **the provision achieved the same purpose as would a statute which designated the conduct as criminal**. The court, too, rejected the argument that the section did not provide for the dismissal of the individuals, but merely forbade governmental agencies to compensate them for any work.

Lovett is notable because **the subjects of the provision were singled out from other government employees because of their political views**, and **were publicly blacklisted**. There was sufficient evidence to conclude that the **legislative intention** was **to punish the subjects for their beliefs** and **to make an example of them in order to deter others**.

In the same vein, ***Acorn v. United States*** mentioned that the element of **punishment** involved the consideration of **three (3) interdependent factors**:

> (1) whether the challenged statute falls within the **historical meaning of legislative punishment (historical test of punishment)**; (2) whether the statute, "viewed in terms of **the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes" (functional test of punishment)**; and (3) whether **the legislative record "evinces a [legislative] intent to punish" (motivational test of punishment)**. Selective Serv. Sys., 468 U.S. at 852, 104 S.Ct. 3348. All three factors need not be satisfied to prove that a law constitutes

[16] 328 U.S. 303, 1946 Singapore LEXIS 2280 (U.S. June 3, 1946).

> "punishment;" rather, "th[e] factors are the evidence that is weighed together in resolving a bill of attainder claim." Con. Edison, 292 F.3d at 350.

According to ***Acorn***, "the Supreme Court has recognized that certain types of punishment are 'so **disproportionately severe** and so **inappropriate to nonpunitive ends** that they **unquestionably have been held** to fall within the proscription of the [Bill of Attainder Clause]'." **Confiscation of one's property** is one that has **long been recognized** as a type of punishment.

The **functional test of punishment** looks at the **type and severity of the burdens imposed**. Essentially, it answers the **question**, *what will happen to the attainted entity, will it close shop and eventually be driven out of any business whatsoever and into bankruptcy?* Thus:

> "A **grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where** the statute bears **some minimal relation** to nonpunitive ends." Id.; accord Con. Edison, 292 F.3d at 350 ("Where a statute establishing a punishment declares and imposes that punishment on an identifiable party ... we look beyond simply a **rational relationship** of the **statute to a legitimate public purpose** for **less burdensome alternatives** by which the **legislature could have achieved** its **legitimate nonpunitive objectives**."

The **motivational test of punishment** examines the **intent of the legislators** in enacting the statute - upon the **legislature's determination** that the **attainted entity** was **guilty of abusive and fraudulent** practices. This test looks for the **declaration of guilt** of the attainted entity **by the legislature during its deliberations** or **in the statute itself** and a **congressional trial to determine such guilt**. The **standard of proof** is **clear legislative intent to punish**.

To summarize, the **test of punishment** involves two (2) steps. **First**, identify if the legislation **looks at past conduct as a wrongdoing. Second**, determine if the legislation **imposes burdens or deprivations** on that **past conduct**. To complete the second step in the test, **consider** the **three (3) factors** in resolving **whether the statute is punitive**: (a) whether it fell within the **historical meaning of legislative punishment**, (b) whether, viewed in terms of the **type and severity of burdens imposed**, it could **reasonably be said to further non-punitive** legislative purposes, and (c) whether it evinced an **intent to punish**.

Lastly, in ***Cummings v. Missouri***,[17] it was held that a legislation is nonetheless a bill of attainder **even if** the persons or entities are **singled out** and **punished only indirectly**, that is, the punishment does **not directly follow** from the ascription of wrongdoing in the legislation. Thus:

> **If the clauses** of the second article of the constitution of Missouri, to which we have referred, **had in terms declared that Mr. Cummings**

[17] Supra note 12.

> **was guilty**, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, **and, therefore, should be deprived** of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be **no question** that the clauses would constitute a **bill of attainder** within the meaning of the Federal Constitution. **If these clauses**, instead of mentioning his name, **had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection.** And, **further, if these clauses had declared that all such priests and clergymen should** be so held guilty, and **be thus deprived, provided they did not**, by a day designated, **do certain specified acts, they would be no less within the inhibition** of the Federal Constitution.
>
> In all these cases there would be the **legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice** by the established tribunals.
>
> The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance.
>
> The **existing clauses presume the guilt** of the priests and clergymen, **and adjudge the deprivation** of their right to preach or teach **unless the presumption be first removed by their expurgatory oath** – in other words, **they assume the guilt** and **adjudge the punishment conditionally**. The clauses supposed differ only in that **they declare the guilt instead of assuming it. The deprivation is effected with equal certainty** in the one case as it would be in the other, **but not with equal directness.** The **purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly.** The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the **rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised**. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

iii. Lack of judicial trial

To illustrate, the **proper** procedure for the taking of private property and the **improper** manner of doing it have been **spelled out,** as follows:

> If a legislature or state agency wants to take property, the **proper** procedure entails **designating the property to be taken, filing a lawsuit identifying the property and its owners**, and **allowing the owners to contest the compensation** that the legislature or state agency offers. This procedure essentially refers the consummation of **the taking to the judiciary**. This process happens all the time today and is relatively well understood. Other than the initial designation of land to be taken, **the entire procedure takes place in the judicial branch**.

> A **bill of attainder seeks to bypass** this procedure. It **identifies the property to be taken**, and then **brazenly takes it**, frequently with **the excuse that the legislature is merely punishing an unworthy individual or group**. No meaningful procedure is allowed for protest, and compensation is ignored. A structural check on legislative aggrandizement is the very heart and soul of the ban on bills of attainder and the essence of the separation of powers. As Justice Chase said in *Calder v. Bull*:
>
> These **acts [of attainder] were legislative judgments**; and **an exercise of judicial power** ... The **ground** for the **exercise of such legislative power** was this, that **the safety of the kingdom depended on the death, or other punishment, of the offender**: as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder.
>
> Justice Chase's articulation corresponded with the understanding of his fellow jurists and practitioners during the antebellum period. Attorneys making arguments to the courts during this time often identified **the ban on bills of attainder** as a **legislative intrusion into the judicial sphere**, and as a **takings protection**.

C. Application of the Bill of Attainder test to Sections 10 and 17 of RA 11212

Here, we **have exactly in the assailed provisions the objectionable** bills of attainder.

> ***First, the language of Sections 10 and 17 and legislative history of RA 11212*** **single out PECO** ***as a*** **wrongdoer** ***for the*** **confiscation** ***of its properties by*** **MORE** ***for the latter's*** **take-over** ***and*** **immediate benefit and use,** ***despite the*** **availability of other means and properties** ***for this purpose and*** **bypassing existing regulations** ***that address concerns about allegedly mismanaged organizations.***
>
> ***Second, through Sections 10 and 17 and its deliberations, Congress has*** **already determined:**
>
> **(i) the existence of all the elements justifying the expropriation of PECO's properties *by* MORE,**
> **(ii) *as well as* the propriety of MORE's take-over *and* immediate use of and benefit from these properties,**
>
> ***and thus, has*** **made the judicial proceedings for expropriation** ***by MORE against PECO a*** **mere ceremonial procedure.**
>
> ***Third, the*** **legislative confiscation** ***of PECO's properties for*** **MORE's take-over** ***and*** **immediate benefit and use** ***is the*** **punishment** ***for PECO's alleged wrongdoings,*** **which in turn** ***is a*** **direct outcome** ***of the non-renewal of its franchise and the award of the franchise to MORE.***

***Fourth, the* non-punitive legislative purpose *for the legislative confiscation of PECO's properties for MORE's take-over, benefit and use* is far-outweighed *by the* legislative intent to deprive PECO of its properties.**

For one, the* public purpose for the confiscation *arose* solely *from the* utter inability *of MORE as the new franchise holder* to provide the facilities and technical knowhow *to* establish, operate, *and* maintain *its franchise requirements.

But for *this* utter inability of MORE, *there would have been* NO non-punitive legislative purpose *for the legislative confiscation of PECO's properties for MORE's take-over, benefit, and use. The non-punitive legislative purpose* was a created or manufactured need *when Congress* allowed *a* non-equipped and ill-prepared entity to take-over the franchise *and* authorized *a* business plan *that* plainly revolved around the take-over *of the* existing franchise holder's properties.

As a result, *it is* reasonable to conclude *that the* punishment of PECO *as the entity disadvantaged by RA 11212 is the* legislation's only preponderant purpose.[18]

***Equally important, the* condemnation of PECO's properties *lock, stock, and barrel, is* clearly overbroad in relation to the purported legitimate purpose of RA 11212 *as it* unnecessarily precludes PECO from using its properties for other business purposes.**

***Fifth, the* congressional deliberations *on the precursors of RA 11212* make it crystal clear *that* Sections 10 *and* 17 exhibit all the elements *of a* bill of attainder.**

***First, the language of Sections 10 and 17 and legislative history of RA 11212* single out PECO *as a* wrongdoer *for the* confiscation *of its properties by* MORE *for the latter's* take-over *and* immediate benefit and use.**

The *Explanatory Note* for the precursor of RA 11212, House Bill No. 8132, **identifies** PECO as a **wrongdoer** in this manner:

> The **quality of service of PECO has been wanting**. Among the **complaints against PECO** are: overbilling/overcharging, arrogant personnel/poor customer relations, distributor related outages, inadequately maintained lines, inadequate investment in distribution facilities, and inordinate delay in the restoration of power services, among others.

Section 10 refers to the institution of expropriation proceedings and does **not expressly** identify PECO as the object of the confiscation. That

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[18] *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, supra note 15.

PECO however is the **object of Section 10** is **clarified by Section 17** when it referred to PECO and its facilities. Besides, Section 10's **reference to** MORE's **franchise area** means **no other than PECO and its properties.**

Quoted below extensively, the **deliberations** on RA 11212 make it **clear** as day that **PECO's properties** are the **object of the legislated confiscation** for MORE's **take-over** and **immediate benefit and use**.

Of late, Senator William Gatchalian's statements have **confirmed the singling out** of franchise holders for the **imposition of penalties** against them for **alleged past infractions**. He was quoted to have said:

> In fact, he said, any legislator could seek a review of Meralco's franchise as part of Congress' oversight authority even before the power distributor could apply for an extension.
>
> "Based on our experience with ABS-CBN, the sins of the past can come and haunt you. In other words, during the deliberations of its franchise, this type of violation can be a basis for the revocation or non-extension of (Meralco's) franchise," Gatchalian said.
>
> "This could be a 'bad record' against (Meralco) ... It could be a hindrance (for securing a new franchise)," he cautioned.[19]

Second, through Sections 10 and 17 and its deliberations, Congress has **already determined:**

(i) the existence of all the elements justifying the expropriation of PECO's properties *by* MORE,
(ii) *as well as* the propriety of MORE's take-over *and* immediate use of and benefit from these properties,

and thus, has **made the judicial proceedings for expropriation *by MORE against PECO a*** **mere ceremonial procedure.**

The **texts** of Sections 10 and 17, together with the **deliberations** on these provisions, **have** already **decreed** the **presence** of all the **elements** for the **valid expropriation** of **PECO's properties**.

Congress has said that there is **public use** for the **confiscation** lock, stock and barrel of PECO's properties. The *ponencia* **echoes** this legislative

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[19] Philippine Daily Inquirer at Read more: https://newsinfo.inquirer.net/1329086/gatchalian-meralco-may-also-lose-franchise#ixzz6WeGn3oEg last accessed August 31, 2020.

determination. This contradicts the **doctrine** that **the determination of whether a given use is a public use is a judicial function.**[20]

This **legislative** determination **disregards** the **crucial fact** that the **public use** would **NOT have** come about, or would **not** have arisen or **not** have been created, **but for** the **legislatively endorsed business plan** of **MORE** as the new franchise holder **simply to take over PECO's properties** as it did not have the facilities to **establish, operate,** and **maintain** its franchise.

Would **this type** of public use **legitimately fall** within the rubric of **public use** for eminent domain purposes, when **public use** was brought about by bringing in a new franchise holder that can discharge the franchise ***only by taking over*** the assets of the immediately preceding franchise holder? The fact is that **the courts have been boxed in** and **painted into a corner** to **acknowledge** and **affirm this type** of **public use** because of the urgency to provide continuity in the provision of electricity to the people in the franchise area.

So far as the element of **public use** is concerned, the **courts can no longer decide otherwise** when Congress **has resolved** the **presence** of this element. The **court proceedings for expropriation** have become a **fait accompli** with the outcome **already decided** by **legislative fiat.**

The **next element** already **resolved by Congress** to exist is **genuine public necessity**. Section 10 **expressly mentions** that the taking of PECO's properties is **actually necessary** for the **establishment, operation,** and **maintenance** of MORE's franchise.

Section 10 lists PECO's *"poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment,"* as **being actually necessary** for the alleged public use the franchise is supposed to realize. Section 17 **reinforces** this **determination** of **genuine public necessity** when it **mentions PECO** and **authorizes** the **expropriation** of properties within the franchise area **that are actually necessary** for the franchise, namely, those mentioned in Section 10.

So did the **congressional deliberations** quoted below, which **confirmed** that the **only way for MORE** to **establish, operate,** and **maintain** its franchise is **for it to take over PECO's properties**.

What is problematic about Section 10 and Section 17 is the **preclusion** of any debate on the **genuine public necessity** of **expropriating** PECO's *"poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment."* Section 10 is categorical – it **mentions** the foregoing properties as examples of those

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[20] *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 199 Ill. 2d 225, 237, 768 N.E.2d 1, 8, 2002 Ill. LEXIS 299, *17, 263 Ill. Dec. 241, 248 (Ill. April 4, 2002).

properties that are "**actually necessary** for the realization of the purposes for which this franchise is granted." Section 10 and Section 17 **forestall a judicial determination** as to the **genuine public necessity** for the taking of these properties.

In ***Vanhorne's Lessee v. Dorrance***,[21] the public **necessity** warranting the transfer of properties from one private owner to another private owner, as in the present case, **must be nothing short** of "**urgent cases**, or **cases of the first necessity**." This **type of condemnation cannot be likened** "to the case of personal property taken or used in time of war or famine, or other extreme necessity[, or] to the temporary possession of land itself, on a pressing public emergency, or the spur of the occasion. In the latter case there is no change of property." Hence, **condemnation** of one's property **ought to be** a **remedy of last resort**.

De la Paz Masikip v. The City of Pasig[22] explains that the requisite of **genuine public necessity** is defeated by the **existence of properties** and **remedies other than** or **alternative to expropriation**:

> In this case, petitioner contends that respondent City of Pasig failed to establish a **genuine necessity** which **justifies the condemnation** of her property. While she does not dispute the intended public purpose, nonetheless, she insists that **there must be a genuine necessity for the proposed use and purposes**. According to petitioner, **there is already an established sports development and recreational activity center** at Rainforest Park in Pasig City, **fully operational and being utilized by its residents**, including those from Barangay Caniogan. Respondent does not dispute this. **Evidently, there is no "genuine necessity" to justify the expropriation.**
>
> **The right to take private property for public purposes necessarily originates from "the necessity" and the taking must be limited to such necessity.** In *City of Manila v. Chinese Community of Manila*, we held that the very foundation of the right to exercise eminent domain is a genuine necessity and that necessity must be of a public character. Moreover, **the ascertainment of the necessity must precede or accompany and not follow, the taking of the land**. In *City of Manila v. Arellano Law College*, we ruled that **"necessity within the rule that the particular property to be expropriated must be necessary**, does not mean an absolute but only a reasonable or practical necessity, **such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and the property owner** consistent with such benefit."
>
> **Applying this standard**, we hold that respondent City of Pasig has **failed to establish that there is a genuine necessity to expropriate** petitioner's property. Our scrutiny of the records shows that the Certification issued by the Caniogan Barangay Council dated November 20, 1994, the basis for the passage of Ordinance No. 42 s. 1993 authorizing the expropriation, indicates that the intended beneficiary is the Melendres Compound Homeowners Association, a private, non-profit organization,

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[21] 2 U.S. 304 (1795), 2 U.S. 304 (F Cas) 2 Dall. 304.
[22] 515 Phil. 364, 374-376 (2006).

not the residents of Caniogan. It can be gleaned that the members of the said Association are desirous of having their own private playground and recreational facility. **Petitioner's lot is the nearest vacant space available.** The purpose is, therefore, not clearly and categorically public. **The necessity has not been shown, especially considering that there exists an alternative facility for sports development and community recreation in the area**, which is the Rainforest Park, available to all residents of Pasig City, including those of Caniogan.

The right to own and possess property is one of the most cherished rights of men. It is so fundamental that it has been written into organic law of every nation where the rule of law prevails. **Unless the requisite of genuine necessity for the expropriation of one's property is clearly established, it shall be the duty of the courts to protect the rights of individuals to their private property.** Important as the power of eminent domain may be, the inviolable sanctity which the Constitution attaches to the property of the individual requires not only that the purpose for the taking of private property be specified. **The genuine necessity for the taking, which must be of a public character, must also be shown to exist.**

Sections 10 and 17 are **all-encompassing** in that they already ***a priori*** **authorize** the condemnation of *"poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment"* even during the *transition period* **without any showing** of a **genuine public necessity** in that **there are no alternatives** to taking them.

PECO's situation is **akin to** those early cases that litigated the **ban against bills of attainder**:

Daniel Webster was one of the most articulate critics in **opposing legislative attempts to justify bills of attainder with the claim that whatever the legislature did satisfied due process or the law of the land**. Webster gave his views on this issue in the **cases involving Dartmouth College**. Webster acted as counsel for the college in arguments before both the New Hampshire Supreme Court in 1817 and on appeal to the U.S. Supreme Court in 1819. As described in ***Trustees of Dartmouth College v. Woodward***, the **New Hampshire legislature passed a law that fundamentally altered the college's corporate form**. It is significant that **this was not a state college, but a wholly private one**. The **legislature expanded the number of trustees from 12 to 21, transferred college property to the new trustees**, and **authorized the treasurer to retain and hold college property against the will of the original trustees**. Webster decried the legislation as unauthorized. He noted that **in passing this bill, the legislature had targeted a single entity for improper treatment, passing sentence upon the college as if the legislature were a court promulgating a judgment**. Webster alluded to Blackstone, noting that the New Hampshire acts "have no relation to the community in general, and which are rather sentences than laws."

In response to New Hampshire's claim that its acts satisfied due process because the legislature created the law of the land, Webster noted:

Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of

attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. It would tend directly to establish the union of all powers in the legislature.

Therefore, when the legislature acts in a judicial capacity and passes a bill of attainder taking private property, and then seeks to proclaim itself above challenge in doing so, the legislature denies due process and engages in the most egregious of takings. The ban on bills of attainder was designed specifically to protect private property from such an eventuality. For Webster, New Hampshire's actions in respect to the college and the taking of its property constituted a due process/law of the land violation, and defied the separation of powers precisely because the legislature exceeded its authority and acted as a judicial body.

The 1838 Maryland case Regents of the ***University of Maryland v. Williams*** forcefully restated this point. In this case, the court decried **state legislation whereby the university's property was taken and given to a new board of trustees**, just as in Dartmouth College. The court commented on the **legislature's improper intrusions on judicial power** in these words:

If the transferring one person's property to another, by a special and particular act of the legislature, is a [sic] depriving him of his property, by or according to the law of the land, then any legislative judgment or decree, in any possible form, would be according to the law of the land, although there existed at the time no law of the land upon the subject, and that too by a tribunal possessing no judicial power, and to which all such power is denied by the constitution. Such a construction would tend to the union of all the powers of the government in the legislature, and to impart the attribute of omnipotency to that department, contrary to the genius and spirit of all our institutions; and the office of courts would be not to declare the law or to administer the justice of the country, but to execute legislative judgments and decrees, not authorized by the constitution.[23]

....

In sum, the ban on bills of attainder is, in many ways, the quintessential declaration of the need for a separation of powers. If bills of attainder are allowed, then the legislature is supreme, and neither the judiciary nor any other body can question or set aside the legislature's acts. The ban on bills of attainder bridged the gap between the separation of powers embodied by the Constitution's framework and takings law as described in the Fifth Amendment. **Bills of attainder are judicial acts by the legislature, in which the legislature defies takings law by taking property without following the proper method. A taking needs to be consummated in a certain way, and a bill of attainder is the wrong way.** A legislature may not sit as a judicial body and declare whatever it does as satisfying due process or the law of the land. Hence, a proper understanding of the intent and scope of the ban on bills of attainder clarifies the separation of powers and increases an understanding of its true meaning

[23] Duane Ostler, supra note 5 at 420-422.

> as an unbreachable dividing line separating the reach of the different branches of government.[24]

There are **existing alternatives** for the properties **already adjudged** by RA 11212 as being **"actually necessary."** To be sure, MORE can obtain **buildings** other than PECO's to establish and run its franchise. This is **also true** for PECO's *poles, wires, cables, transformers, switching equipment and stations, infrastructure, machineries and equipment.* There is **no conclusive showing** of **genuine public necessity** to expropriate these items – yet Sections 10 and 17 have already determined that they are **actually necessary** for expropriation.

As MORE admitted during the Committee Hearings (see below for a more extensive treatment):

> Well, the other option is definitely MORE Power is ready to build its own distribution assets, 'no. We can provide our own personnel and, well, again, as also mentioned during the last, I think, during the last two hearings, 'no, we were saying that personnel is not really that difficult to source, 'no, since it is readily available in the market."

MORE also acknowledged that it can allegedly build its facilities and operate the franchise in **only a year's time**: *"... since I think capital is not a problem for us, if let's say, we're given at least a year, I mean I think we can ... we can actually come up with the system. Because like, let's say, substations, there are mobile standby substations that we can use immediately, deploy immediately while, let's say, building the permanent substations, 'no. So, I guess, again, I mean, since capital is not a problem for us then, I think at least a year would be more or less right..."*

This shows the **lack of genuine public necessity** for the taking, which Sections 10 and 17 **have unfortunately already adjudged to be present** to justify the condemnation.

Mere convenience for MORE is not what is required by law as the basis of **genuine public necessity**. Even in the face of necessity, **if it can be satisfied without expropriation**, the same should not be imposed. The **convenience of the condemning party has never been the gauge** for the exercise of eminent domain.

The true standard for **genuine public necessity** is **adequacy**. Hence, when there is **already an existing adequate alternatives**, as in this case, even when the alternatives, for one reason or another, be inconvenient, the need to expropriate is **entirely unjustified**.

Lastly, Section 10 has as well **determined** a **presumptive amount for the just compensation to be paid** by MORE to PECO.

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[24] *Id.* at 423.

The deliberations have also **pegged an amount for just compensation** (see below).

Congress has to **peg the amount of just compensation** because this **amount** would be **added to MORE's billings** to its consumers as a means of **reimbursing itself** of such payment, and therefore, would ultimately **impact on** MORE's **viability** as a franchise.

Reducing the judicial expropriation proceedings to a mere ceremonial function

What is clear from both the language of Sections 10 and 17 and the legislative intent as expressed during the Committee Hearings is the **singling out of PECO** and the **determination by legislative fiat of the presence of all the elements to validate the taking of its properties**.

RA 11212 has resolved the elements of public use and genuine public necessity, and the presumptive quantum of just compensation. Thus, the statute has rendered any court proceeding on expropriation to be merely ceremonial.

Third, the* legislative confiscation *of PECO's properties for* MORE's take-over *and* immediate benefit and use *is the* punishment *for PECO's alleged wrongdoings*, which in turn *is a* direct outcome *of the non-renewal of its franchise and the award of the franchise to MORE.

To stress, the element of **punishment** in the bill of attainder test **does not mean** that the legislature has to convict a person of a specified crime or to exact punishments of pain or death.

Burdens and deprivations upon targeted persons or entities, without any formal legislative pronouncement of moral blameworthiness or formal intent to punish, may **constitute punishment** depending on this **test – whether** the **legislation** has a **punitive objective** *or* a **legitimate non-punitive legislative purpose**.

Where the **legitimate legislative purpose** is **non-existent** or is **far out-weighed** by an **intention to cause deprivation**, it is **reasonable to conclude**, that **punishment of individuals disadvantaged** by the enactment was the **purpose** of the legislators.

As stated, the **test** involves two (2) steps. First, identify if the legislation **looks at past conduct as a wrongdoing**. Second, determine if the legislation **imposes burdens or deprivations** upon that **past conduct**. To complete the

second step in the test, **consider** the **three (3) factors** in resolving **whether the statute is punitive**:

(1) whether it fell within the **historical meaning of legislative punishment** (historical test),

(2) whether, viewed in terms of the **type and severity of burdens imposed**, it could **reasonably be said to further non-punitive** legislative purposes (functional test), and

(3) whether it evinced an **intent to punish** (motivational test).

Here, Sections 10 and 17 of RA 11212 **originated from** the alleged **wrongdoings** of **PECO** as a franchise holder. Upon this alleged **past misconduct**, **burdens and deprivations** are imposed: the **non-renewal** of PECO's franchise, the **award** of the franchise to **MORE**, and the latter's **take-over** of **PECO's** properties through **expropriation** whose **propriety Congress has already determined** through the assailed provisions.

This **fulfils** the **first step** of the **test**.

As regards the **second step**, I first focus on the **historical meaning of legislative punishment** or the **historical test of punishment**. According to the **congressional deliberations** quoted below, the **legislative confiscation** of PECO's properties has been decreed to **eliminate harm to innocent third parties** and **to the viability of MORE as the new franchise holder**, i.e., the continuous supply of electricity to consumers by **MORE**. It may also be reasonably presumed that Congress wants to send a message *via* the legislated condemnation of properties to franchise holders to shape up or ship out, *i.e.*, **general** and **specific deterrence**. Together with the **protection of people and communities**, **deterrence** is the **traditional** and **historical justification** for **punishment**.

As borne by the **congressional deliberations** (see below), **routine expropriation clauses** in franchise grants do **not** function as the **principal and primary backbone** for the establishment, operation, and maintenance of a franchise. This type of clause does **not** settle the propriety of expropriation and allows **courts to determine** the propriety of expropriation. But **routine expropriation clauses** are **unlike Sections 10** and **17** of RA 11212 where **Congress has already put the bind on courts to complete the expropriation of PECO's properties** to ensure the supply of electricity in the franchise area. **Nothing but punishment justifies** the **compulsion** and **urgency** to expropriate **PECO's** properties.

I will also quote Senator William Gatchalian's statements which **confirm** the claim that **PECO** has been punished not only through the non-renewal of its franchise (which Congress admittedly has the constitutional

authority) but also through the **expropriation of PECO's properties** *via* Sections 10 and 17. The Honorable Senator is quoted to have said:

> As of March, Meralco had 6.4 million residential accounts, or 92 percent of the total in its franchise area in Metro Manila and neighboring provinces. Commercial customers accounted for 530,864 (8 percent) connections and industrial customers, 10,580 (0.2 percent).
>
> "I'm pleased with the swift resolution (of the ERC) to impose a fine … But the penalty of P19 million, for me, is just a drop in the bucket for Meralco," Gatchalian said.
>
> "I think the almost P300 million in penalty is reasonable enough because their violation is nonconformity to the orders of the ERC," the senator said.
>
> "If they still resist, I will advise ERC to mete out heftier fines and find other ways to penalize (Meralco)," he said in a separate radio interview.
>
> No breakdown of charges
>
> Gatchalian assailed Meralco and other power distributors for their continued failure to clearly explain to their customers the breakdown of monthly charges, such as the collection of environmental fee and feed-in-tariff allowance and a universal tax on all electric consumers.
>
> He said the recent decision of the House of Representatives to deny ABS-CBN's application for a new franchise should be a lesson to all holders of legislative licenses.
>
> In fact, he said, any legislator could seek a review of Meralco's franchise as part of Congress' oversight authority even before the power distributor could apply for an extension.
>
> "Based on our experience with ABS-CBN, the sins of the past can come and haunt you. In other words, during the deliberations of its franchise, this type of violation can be a basis for the revocation or non-extension of (Meralco's) franchise," Gatchalian said.
>
> "This could be a 'bad record' against (Meralco) … It could be a hindrance (for securing a new franchise)," he cautioned.[25]

***Fourth, the* non-punitive legislative purpose *for the legislative confiscation of PECO's properties for MORE's take-over, benefit and use* is far-outweighed *by the* legislative intent to deprive PECO of its properties.**

For one, the* public purpose for the confiscation *arose* solely *from the* utter inability *of MORE as the new franchise holder

[25] Philippine Daily Inquirer, https://newsinfo.inquirer.net/1329086/gatchalian-meralco-may-also-lose-franchise#ixzz6WeIQ9nuC last accessed August 31, 2020.

to provide the facilities and technical knowhow *to* establish, operate *and* maintain *its franchise requirements.*

But for *this* utter inability of MORE, *there would have been* NO non-punitive legislative purpose *for the legislative confiscation of PECO's properties for MORE's take-over, benefit and use. The non-punitive legislative purpose* was a created or manufactured need *when Congress* allowed *a* non-equipped and ill-prepared entity to take-over the franchise *and* authorized *a* business plan *that* plainly revolved around the take-over *of the* existing franchise holder's properties.

As a result, *it is* reasonable to conclude *that the* punishment of PECO *as the entity disadvantaged by RA 11212 is the* legislation's only preponderant purpose.[26]

***Equally important, the* condemnation of all of PECO's properties *lock, stock and barrel, is* clearly overbroad in relation to the purported legitimate purpose of RA 11212 *as it* unnecessarily precludes PECO from using its properties for other business purposes.**

I shift now to the **functional test of punishment** – whether, viewed in terms of the **type and severity of burdens imposed**, it could **reasonably be said to further non-punitive** legislative purposes.

The **functional test of punishment** balances the backdrop of the **confiscatory nature** of RA 11212 against its **non-punitive purpose**. The **latter** refers to the **uninterrupted provision and distribution of electricity to consumers in the franchise area**.

Less burdensome alternatives, however, could have been resorted to by Congress **to achieve this non-punitive** objective. For one, it could have required the winning franchisee to **be ready with its own facilities**; for another, it could have left the determination of the propriety of expropriation to the courts, without having to determine by itself that **expropriation** is the key to **MORE's** assumption as franchise-holder and that **all the elements of expropriation** are already present *vis-à-vis* **PECO's** properties.

Indeed, while **I acknowledge that Congress has a legitimate interest** in ensuring the uninterrupted supply of electricity in the franchise area –

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[26] *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, supra.

(i) the **specificity of the affected party** – PECO,

(ii) the **uniqueness of the congressional action** – as **admitted by the Energy Regulatory Commission** during the congressional deliberations (see below), and

(iii) the **breadth of the restrictive action** in this case – **the wholesale condemnation of PECO's properties**, since these **properties are its only properties** and **will result in its bankruptcy** as a **business entity** ***regardless of the nature of its subsequent business or businesses*** PECO engages in,

all these render Sections 10 and 17 disproportionately severe and thus punitive under the **functional test of punishment**.

Worse, the **public use** and **necessity** for the **confiscation** of PECO's properties **arose solely** from the **utter inability** of **MORE** as the new franchise holder **to provide the facilities and technical knowhow to establish, operate, and maintain** its franchise requirements. **But for this utter inability** of **MORE**, there would have been **NO non-punitive legislative purpose** for the legislative confiscation of **PECO's** properties for **MORE's** take-over, benefit, and use. The non-punitive legislative purpose was **a created or manufactured need** when Congress **allowed** a non-equipped and ill-prepared entity to take-over the franchise and **authorized** a business plan that **plainly revolved around the take-over** of the existing franchise holder's properties.

Thus, it is **reasonable to conclude** that **the punishment of PECO** as the entity disadvantaged by RA 11212 is **the legislation's only preponderant purpose**.

Equally troublesome, the condemnation of **PECO's properties** lock, stock, and barrel, is **clearly overbroad** in relation to the purported legitimate purpose of RA 11212. This legislated approach **unnecessarily precludes** PECO from dedicating and using its properties for business purposes other than the distribution of electricity in the franchise area.

Fifth, the **congressional deliberations** ***on the precursors of RA 11212*** **make it crystal clear** ***that*** **Sections 10** ***and*** **17 exhibit all the elements** ***of a*** **bill of attainder.**

The **legislative intent to punish** or the **motivational test of punishment** unearths Sections 10 and 17 as products of congressional deliberations which show the **intent** to **single out PECO, adjudge it as guilty of wrongdoings**, and **confiscate its properties for MORE's convenient takeover**.

The congressional deliberations **revolved around MORE's business plan** to **take over** the operations and properties of **PECO** – simply **because MORE has none of the facilities AND personnel to establish, operate and maintain its franchise**. The intent behind RA 11212 is to **impose burdens** and **deprivations** upon, and to **make a sacrifice** out of, **PECO**. Specifically:

1. ***Takeover by MORE of PECO's facilities once franchise is granted to the former since MORE does not have the facilities to operate its franchise:***

MR. CASTRO. Your Honor, well, what we are hoping is that if their franchise will not be granted or the extension will not be granted, **we are hoping to--well, if granted the franchise-- to operate and maintain the distribution system of their existing network**, Your Honor.

REP. UYBARRETA_ So, on the assumption that on January 2019 **the current franchise of PECO will not be renewed, then you will take over**.

MR. CASTRO. Your Honor, that is the...

REP. UYBARRETA. Yeah, that is the premise because you are applying.

MR. CASTRO. Yes, Your Honor.

REP. UYBARRETA. **And do you have the necessary infrastructures to supply the customer needs of Iloilo?**

MR. CASTRO. At the moment, well, I would say we don't have it but if given the... granted the franchise and well, the existing franchise holder is also... Well; if the franchise is extended, well, we are considering to also put up our own infrastructure, Your Honor.

REP. UYBARRETA. What is the current growth as far as demand is concerned of Haila ctty?

MR. CASTRO. I am sorry, Your Honor, the current growth of?

REP. UYBARRETA. Demand, as far as power is...

(MS. AIDA P. MOLINYAWE TOOK OVER)

....

REP. UYBARRETA You mentioned earlier iyong reduction of rates, iyong customer service, iyong upgrading of customer satisfaction, iyong pagbabawas natin ng brownout and instances. Well, these are all good for the consumers and gusto rin namin iyon. But here in our... the Committee, we would like to be assured that the... ultimately the customers of Iloilo City hindi mapre-prejudice. lyon naman lang po ang gusto namin dito.

We are one with you as far as that aspect is concerned. Kasi mahirap na... alam mo po pag pinag-uusapan natin ang mahal na kuryente, madali tayong umangal. But ang hindi natin nare-realize ang pinakamahal na kuryente ay iyong walang kuryente. And we're talking about inflation here, mahal ang gastusin sa bigas, marami ang nagugutom. Pera pag dineprayb(deprive) ninya iyong mga kababayan natin from Iloilo na mapanood iyong Probinsiyano, patay tayong lahat diyan. **That's the reason why we're trying to help you**

achieve your goals also. So, you mentioned wala kayong infrastructure right now. Wala kayong substation, wala kayong linya currently, and you intend to take... to supply them by year 2017... ah, 2019. Doon lang po ako may worry na ano. Kasi, well, you can contract although until such time that your amendments are approved the Securities and Exchange Commission, then you can contract with suppliers. But again iyong goal ninyo is to distribute and by distribution you need all these infrastructures and facilities. You need the substation na pagdadalahan n'yo, para icascade ninyo, ibaba ninyo, you need the 69 KB lines. You need secondary and collateral lines. You need all the transformers to bring it down to the consumers. Kaya sabi ko nga po sa inyo eh mahirap tayong hindi natin mabigyan iyong Iloilo ng kuryente. So, can you just enlighten this Representation and also this Committee on the exact plan as far as MORE Corporation is concerned?

MR. CASTRO. Yes, Your Honor. Thank you for that comment, Your Honor. **Yeah. Again, our base case, I would say, is the... if the franchise of PECO will end and we may have... well, we will be granted the franchise, 'no, is, well, we will take over the assets of PECO, 'no. And, well, these are... Your Honor, that's correct that, well, depriving consumers of power, 'no, is... well, our primary... well, is not... well, may not be good. It's not really good. But what we have in mind, Your Honor, is that in the long term, 'no, when... if we are able because we are confident that we will be able to bring down the rates, 'no.** I mean, given the basket of suppliers that they have now as was flashed earlier, they are not taking advantage. Or the consumers are not even taking advantage of the low power that is being provided by the... that is available in the open market, 'no. And... sorry.

2. ***Because PECO's facilities are already sufficient to run the distribution of electricity within the franchise area, the legislative intent is to determine with finality the existence of*** **public use** ***and*** **genuine public necessity,** ***regardless of the*** **presence of alternatives** ***to avoid the*** **manufactured** ***public use and necessity of expropriation.***

....

REP. UYBARRETA. (Continuing) ... kabisado. Ilan bang ... ilan ... do you have a manufacturing plant there, do you have a mall, do you have big factories?

MR. CASTRO. Your Honor, the customer profile ... well, Iloilo ... well, the franchise area is about 66,000 customers. And from the official records that we have seen that are publicly available, there is only one big customer, all the rest. .. well, I would say distributed between residential, commercial establishments, government offices, 'yun. So, it's a... well, definitely there are commercial, especially recently when Megawide or Megaworld, Ayala and all the others started to put up the malls the last two... well, three to four years. The... well, rather, the customer profile has already... well, for commercial has already increased but in terms of industrial, I would say it is on the low side, Your Honor.

REP. UYBARRETA. **And these malls that you mentioned, are they sourcing their power sa current franchise holder or are they directly connected?**

MR. CASTRO. Yes, Your Honor. They are sourcing their power from the current franchise holder, Your Honor.

REP. UYBARRETA. So it is, more or less, safe to presume that the bulk of the revenue comes from these three malls that you mentioned?

MR. CASTRO. Well, if we lump the commercial establishments together *vis-a-vis* the whole customer profile, well, I would say that, yes. I mean, it's a significant contribution coming from the commercial. .. what you call this, commercial portion, Your Honor.

REP. UYBARRETA. **Given the franchise area that you are applying for and the customer mix and profile, in your estimate, how many substation do you need? Kasi part of the problem as far as outages are concerned is the lack of substation, so I think it's within your CapEx plan, so how many do you ...**

MR. CASTRO. Your Honor, well, per our technical, the existing five actually are sufficient for now. But, I think, well, what we believed in is that there are improvements and upgrades that are needed in the substations. And may I pass, well, the floor to our chief technical officer, please, Mr. Chair?

THE CHAIRPERSON. Mr. Guevarra is recognized.

MR. AMADOR T. GUEVARRA (Chief Technical Officer, MORE Minerals Corporation). Mr. Chair, **In the substations, we have five existing substations but for the growth we are thinking, we need to upgrade the 50 MVA substation there in order to cater and we can deliver more reliable power supply there in Iloilo. We need to upgrade the 50 MVA. That's what we saw in the existing substation there in PECO.**

REP. UYBARRETA. So, you were talking about the existing.

MR. GUEVARRA. Yeah.

REP. UYBARRETA. We're not talking about new ones. We're just talking about existing. 'Yung sa PECO ba 50 'yung pinakamatass nila? Anong pinakamababa nila, 10?

MR. GUEVARRA. Ten, yeah. Ten MVA, Your Honor.

REP. UYBARRETA. Ang pinakamababa nila?

MR. GUEVARRA. Yeah.

REP. UYBARRETA. Ilan 'yung 10 nila? Ilan 'yung 50 nila?

MR. CASTRO. Sorry, Your Honor. Well, we don't have that data for now, Your Honor.

3. *The* legislative intent *is to ascribe* public use *and* genuine public necessity *to the condemnation of PECO's properties and to peg the* amount of just compensation, *regardless of a court proceeding.*

REP. UYBARRETA. Mr. Chair, over and above what they presented today and the business plan, can we also get from them a more technical report and plan regarding how they intend to distribute electricity to the franchise area that they are applying for. Kasi ganito lang po iyan, at the end of the day, we are answerable to the consumers of the franchise area that you are applying for, while they are saying that it's hard to reinvent the wheel, pero alam naman po natin and meron palang existing franchise ngayon doon and why fix something that is not broken. That's just my concern. But I also advance the concept that we... the customer is the boss. Ultimately, kung anong ikabubuti ng consumer, doon tayo and part of our oversight function here is to safeguard the interest of the consumers. We are... I am asking hard questions because, ultimately, si Chairman ko ang sisisihin kung sakaling maano tayo. So, Mr. Chair, if I may just be allowed a few more question, just for my satisfaction?

THE CHAIRPERSON. Please proceed.

REP. UYBARRETA. **In the event, Boss, na you take over na ano, how do you intend to buyout the assets from the present franchise holder?**

MR. CASTRO. Your Honor, well, based on the ...

REP. UYBARRETA. Kasi currently sila ang may-ari, hindi ba, Boss?

MR. CASTRO. Yes.

REP. UYBARRETA. So, ang ano na lang natin diyan is that pag wala na silang silbi, eh, sooner or later they have to sell it to someone and pinakamagandang bentahan, eh, kayo. Ang problema lang kung ... eh, paano kung hindi ibenta sa inyo?

MR. CASTRO. Yes, Mr. Chair, Your Honor. Well, based on the financial statements that we've seen of PECO, the hard assets or... yeah, the hard assets out of that about three billion of total assets, the hard assets that's directly related to the business is about 460 or 480 million pesos.

REP. UYBARRETA. Four hundred sixty?

MR. CASTRO. If I'm not mistaken it's in the region of 460 to 480 million pesos, Your Honor. So, well, if there will be an offer, then, definitely, we can ... well, we will buy the assets and to the extent that we think would be justifiable. Because at the end of the day, well, whatever the price is, is a price to certain extent that would be reflected into the bills of the consumers, anyway.

REP. UYBARRETA. Yes. That's where I'm getting to.

MR. CASTRO. Yes, Your Honor.

REP. UYBARRETA. Kasi ang promise ninyo kanina is to lower the rates.

MR. CASTRO. Yes, Your Honor.

REP. UYBARRETA. But, again, your exposure and your expenditure will ... ipa-pass ... ano natin iyan, pass on iyan sa ganun. So, medyo balansehin natin.

MR. CASTRO. Yes, Your Honor. Definitely, we will ... what do you call this, we will have to agree on what that price is because as I was mentioning earlier, Your Honor, well, if it's priced too much and it will be reflected in the rates, anyway, and it wouldn't help in bringing down the rates for the consumers, then we may have to opt for other... other option which is maybe through ... well, if we put up our own ...

REP. UYBARRETA. Yeah.

MR. CASTRO. ... system.

REP. UYBARRETA. That's the only option that you have, actually.

MR. CASTRO. Yes, Your Honor.

REP. UYBARRETA. Kaya nga I'm concerned about the timeline kasi we know how... how long a distribution system is.

MR. CASTRO. Yes, Your Honor. We also recognize that.
REP. UYBARRETA. Do you know what I'm driving at?

MR. CASTRO. Yes, Your Honor.

REP. UYBARRETA. And secondly, alam ba natin kung ilan 'yung empleyado nung PECO?

MR. CASTRO. Your Honor, if... well, based on the official records, it's says about 88 employees...

MR. CASTRO. (Continuing) ... 88 employees, Your Honor.

4. *MORE has* none of the technical people *to run the franchise, hence, it was* a fait accompli for MORE to condemn, *as Section 10 and Section 17* condemn *PECO's properties and* decree *the hiring of PECO's staff.*

REP. UYBARRETA. And currently, this MORE Minerals Corporation, how many ang staff ninyo ngayon?

MR. CASTRO. Well, Your Honor, for now since, well, it is only very recent that we've activated it and yeah, since the mining has never operated, so we actually don't have any people and staff under the current setup, Your Honor. So, right now, to answer your question, actually what we have are the technical people that are with us here and as I've mentioned in the last... during the Jast hearing, there are talents that are actually available in the market, now whom we think are able to... would be able to help us in this corporation, Your Honor.

REP. UYBARRETA. Well, ito lang, in the event lang, we are not saying with absolute certainty pa naman dito, we are all under the ano, in the event na ano, are you open to absorbing employees coming from PECO?

MR. CASTRO. Your Honor, also in the event that if we will be given the franchise, granted the franchise, yes. I mean, you have our commitment that we will, we will absorb.

....

REP. TAMBUNTING. Thank you, Mr. Chair. I would like to ask this question sa ERC. Sabi ni Cong. Caloy na ang nagiging problema, what happens in a scenario wherein one has the franchise and the other one has the asset, anong magiging remedy ng ERC diyan? Anong ruling ninyo diyan? Paano ninyo didiskartehan iyan?

MR MAATUBANG. ML Chair, Your Honor, actually, we have submitted that in our position paper, Your Honor, and already discussed that during the previous hearing, Your Honor, that in the event that there are two DUs in one geographical location, there will be economies of scale, that problem. So, in the end, there will be a problem with the consumers. **And in terms of assets, Your Honor, that's the problem, the other one has no assets on how it will be delivered their electricity and the other one has the assets.**

REP. TAMBUNTING. In the event that only one will be given the franchise, ang isang assumption mo riyan sa statement mo,dalawa sila.

MR. MAATUBANG. Yes, Sir.
REP. TAMBUNTING. Ngayon, kung isa lang, paano?

MR. MAATUBANG. That's the problem, Your Honor. So that will be a problem in terms of regulation, in terms of prices because there will be economies of scales in terms of rate regulations, Your Honor. **And at the same time, the one with no asset, Your Honor, basically they will ... there's the option to tap the other one for the billing of the service which is being done right now, like for the sales in our electric cooperatives.** That would also be a scenario, Your Honor.

REP. TAMBUNTING. So iyong mga... ang precedence niyan will be the winning franchise holder will have to negotiate with the one with the asset and acquire. Ganyan ang mangyayari diyan. Iyong. mga cooperatives na sinasabi mo kapag, may nananalong iba, siya ang bumibili nung asset nung natalo. Tama ba iyon? Iyon ba ang precedence niyon?

MR. MAATUBANG. No, Your Honor. I am just only saying that **in case there are two DUs, then one DU that has no assets, has to.,. has an option to wheel its power to the other one. So they will have to rent the distribution utility to deliver its power to its customers**, Your Honor.

REP. GATCHALIAN. Mr. Chair, can we ask if that is allowable by law, what you are saying?

MR. MAATUBANG. Yes, right now it's open access, Your Honor. That is allowed, Your Honor.

REP. TAMBUNTING. You know, when we award a franchise, only Congress has the power to take it back because you cannot rise above sa source. Kung ang sinabi namin ikaw ang franchise holder, you cannot sublease your franchise and give it to somebody else without informing Congress because that's not transferable. So I don't think that is allowed. Your opinion, I think, is not really happening na ang prangkisa ha, prangkisa that emanates from Congress is being transferred to a different entity without the knowledge of Congress or permission from Congress.

MR. MAATUBANG. No, Your Honor, what I am saying is that in terms of access of electricity. For example, if an end-user wants to get power from other sources other than the DU, they can wheel that power to the host DU.

REP. GATCHALIAN. Mr. Chair, I think ERC has an attorney here, their legal. So maybe the question of Congressman Tambunting is better answered by Attorney Arjay.

MR. ARJAY LOUIE B. CUANAN (Attorney III, Energy Regulatory Commission). Yes, good morning, Mr. Chair. Good morning to the Members of the Committee. Actually, the question is if there is a precedent already, if the legislative franchise has been transferred or subleased to other cooperatives. Is that right?

REP. TAMBUNTING. Yes.

REP. GATCHALIAN. Is that allowable by law and is there a precedent already that happened before, for the appreciation of the Committee?

5. *The* forced condemnation by legislation *of PECO's properties to* serve the business interests of MORE *as the new franchisee is* unprecedented *and the* first of its kind *in franchise law-making and regulation.*

MR. CUANAN. Yes. Regarding the first question, Your Honor, the law explicitly provides that it is not allowed to transfer or to lease the legislative franchise that has been granted by, Congress, without the permission or without the consent of the Congress itself, their granting power.

With respect to the second question, we actually don't have the idea yet if there is ... if the said subleasing of legislative franchise has been happening because as what we've said, this is not. .. this is prohibited by law.

REP. TAMBUNTING. So can we go back to the first question which is, what happens if one has the franchise and the person, the incumbent whose franchise will lapse and has the assets but with no franchise, so one has the permission, the permit but the other one has the asset. What is now...how would ERC rule on this?

MR. CUANAN. Actually, Your Honor, as we speak today, we have not ruled on that particular, we have not encountered such particular issue so far, where there is a franchise holder and the other one has the asset. So probably, the existing franchise holder will take over or will buyout the assets of the old franchise holder.

REP. GATCHALIAN. So, if they will take over, through a corporate takeover, then hindi na ho nila kailangan humarap ngayong umaga dito, So they will take over the company...

REP. GATCHALIAN. (Continuing) ... the company if they want to, the corporate entity if they wanna take over the assets only without the corporate entity. And the corporate itself, the PECO, already has a franchise eh. So, why are you applying a new franchise here, if that's your intention, ha? We're just trying to understand.

MR. CUANAN. Sorry, Your Honor. I think PECO has a separate juridical entity. If they want to maintain, I mean they want to have a juridical... separate juridical personality from PECO, the existing franchise holder, so they need to secure a franchise.

REP. GATCHALIAN. So, hindi na ho applicable iyong sinagest(suggest) ni Engineer Maatubang and the question of the Honorable Tambunting about **Company A who has the asset and Company B... but losing, 'no, and Company B who has the liquidity but wants to take over the asset**. So, that's what we're trying to connect here and if that is allowable also by law, kayong ERC ang makakasagot diyan.

MR. CUANAN. Okay. For that, Your Honor, MORE Corporation has to secure legislative franchise. And if they will be given that franchise or granted that franchise then, probably, they can secure or buyout the assets of PECO, which is the existing franchise holder, if in case PECO will ... PECO's franchise will not be renewed. Okay, Mr. Chairman.

REP. GATCHALIAN. So, the asset only, not including the franchise. What if PECO's franchise was renewed?

MR. CUANAN. Actually, we have not encountered that, Your Honor. We have no precedent on that because... we have actually one which is Bicol Light which is already... which is still pending before the Senate. But we have not encountered a situation where there are two distribution utilities within the geographical area.

THE CHAIRPERSON. Okay, before that, the Chair would like to recognize Congressman Montoro.

I have just one additional question. Iyong pinaka... from what I understand iyong pinaka-question kasi, paano iyong transition period, for example nga sa scenario na ma-approve ang MORE? And then, let's say, hindi ma-renew kaagad iyong PECO since January mag-e-expire na, sino'ng magsu-supply ng kuryente, habang iyong MORE o iyong period na iyon na mag-expire ang PECO? Ano iyong MORE kunwari magse-set up pa nu'ng kanilang infra ng equipment, siyempre mag..medyo may kakailanganin na time iyon eh especially if hindi naman bibilhin iyong assets na existing. So, sino'ng magsu-supply sa Panay? Like, iyong ERC ba nagbibigay ba kayo ng provisional authority na mag-operate muna sila until such time na ready na iyong MORE? Or, papaano ang magiging set-up? Hindi naman puwedeng mag-brownout iyong Panay.

REP. TEODORO G. MONTORO. Mr. Chair, can I?

REP. TAMBUNTING. I think... yes. So, is it. .. Attorney, I think the... to amend, 'no, the question really is, what if there is a standoff and they don't want to sale to the winning bidder? What... how would you rule? Would you give a PA to them pending the approval, the sale?

MR. CUANAN. Sir, may I just hand over the floor to Engineer Maatubang?

MR. MAATUBANG. Your Honor, if that is the case, Your Honor, there will be a problem in regulations in terms of how we will regulate the two distribution utilities, That's the... that's what our concern here that was submitted in this Honorable Commission.

REP. TAMBUNTING. I think very specific naman po iyong tanong. Iyong tanong is kung hindi sila magka". alam nating magkakaproblema kaya nga ho kami nagtatanong sa inyo, 'no. Alam namin may problema. Ngayon, ano hong magiging solusyon ho n'yo? Ano'ng magiging ruling n'yo diyan? Magbibigay ba kayo ng provisional permit? "0, sige, tuloy ka muna, PECO, habang nagtatayo iyong nanalong", winning franchise owner:'

MR. CUANAN. Sir, since we don't encounter yet this particular issue, can we refer this yet to the Committee, if ever, I mean, to the Commission, if ever? Give us an opportunity to confer the matter to the Commission. Because our existing policy is we grant Certificate of Public Convenience and Necessit... Necessity and Convenience to the distribution utility and that is based on the legi... or dependent on the legislative franchise being granted by the Congress. So, if the franchise is denied, so immediately ipso facto the CPCN is also denied.

REP. TAMBUNTING. Correct.

....

Mr. Chair, we are walking on very thin ice here, sabi nga ng ERC, ***this is the very first time that this is happening***. Kasi nga po, ang distribution and transmission business is a natural monopoly, accepted po iyan in any country and all over the world that **distribution and transmission is a natural monopoly kasi po sa laki ng gastos para mag set up ng facilities. I heard that MORE committed that they will be able to put up their facilities, their complete distribution facilities within one year, I don't want to debunk that or ano, I just wish them well. But we know for a fact that just to set up one substation entails a lot of years and months, that's just one substation. And during last hearing, it was stated that for one distribution utilities to be able to supply the need of the franchise area that we are referring to or we are discussing here, a minimum of five substations will be required. That is capital intensive. We are not even talking about the distribution lines. We are not even talking about 'yung mga capacitor, 'yung mga transformers, the meters, the new meters, the new lines that will be put in. Again, kaya I just appeal for us to be very, very careful in deciding this. I will go for any move to give better service to any given consumers. I'm all for that. But I'm also on the side of caution kasi nga ano eh, I have nothing against MORE**, if they can promise better service, I'm all for that kasi at the end of the day, we are all here for the welfare of the consumers. But I just caution that kasi hindi natin napag-uusapan 'yung aspeto na 'yon that the signal that we will be ending to the lending institution and to the investors, kung ano man ang gagawin natin dito, will have repercussion on that. That's just my manifestation, Mr. Chair.

....

MR. OFALSA. (Continuing)...EPIRA po, RA 9136, may third party valuation po na isa-submit on the valuation of the assets. But for now po, when a... sa existing policy ng ERC in existing distribution utilities, we have guidelines using a standard on how we value the

assets po. Katulad po sa electric cooperatives, we use the NEA guidelines on the valuation of the assets. For private utilities for purposes of performance-based regulated, we use po iyong SKM valuation namin. This is more on technical valuation of the existing assets of all distribution utilities po.

REP. TAMBUNTING. So, in previous take overs, this is the same formula that was used.

MR. OFALSA. Wala pa kasi kami, Sir, I do not recall of any take overs of distribution. Siguro, Sir, in the past, iyong mga maliliit, ano, iyong mga una...

REP. TAMBUNTING. Iyong hindi pa tayo ipinapanganak.

MR. OFALSA. Yes, opo, mayroon po sigurong ganoon. Pero in my experience po sa ERC, we did not encounter any take overs of existing franchise utility po.

6. ***The* expropriation of PECO's assets *is* the only means for MORE *to be able* to establish and operate *its franchise. Congress* has determined a priori, *or prior to any court proceedings, that expropriation* must *take place so that MORE is able to establish and operate its franchise. Otherwise,* without PECO's assets in MORE's hands, *the people in the franchise area will have no electricity.***

MR. CUANAN. So, the corporation cannot proceed with the distribution activity.

REP. TAMBUNTING. So, you're trying to say that the person with the franchise has the upper hand?

MR. CUANAN. Sorry, Sir?

REP. TAMBUNTING. In any area, the person with the franchise has the upper hand.

MR. CUANAN. Yes, Sir.

REP. TAMBUNTING. Now, question, is expropriation also a possibility?

MR. CUANAN. Expropriation for?

REP. TAMBUNTING. For the asset.

MR. CUANAN. You mean, the...

REP. TAMBUNTING. A winning franchise holder...
MR. CUANAN. A winning franchise holder will expropriate the...

REP. TAMBUNTING. Yes.

MR. CUANAN. We will. include that one, Sir, in the...

REP. TAMBUNTING. You don't have an answer. Thank you very much.
MR. CUANAN. Yes. We don't have an answer right now. Sorry.

REP. TAMBUNTING. Thank you very much, Mr. Chair.

THE CHAIRPERSON. Congressman Montoro.

REP. MONTORO. Thank you, Mr. Chair. Magandang umaga po sa lahat. Just a point of clarification, Mr. Chair. To the applicant, have you tried... nakipag-usap ba kayo doon sa ano sa currently holder ngayon? Do they know na nag-submit kayo?

MR. CASTRO. Mr. Chair, Your Honor, well, we have not yet, well, gone formally to PECO regarding this, Your Honor.

REP. MONTORO. Exactly, Mr. Chair, magkakaroon tayo ng problema rito later on kasi wala pa silang communication or formal communication with that current holder. So, siguro in the meantime, I move for deferment muna dahil kailangan munang... we have to... for the next meeting, I move that the holder will be present here para magkaroon tayo ng ano. Baka magkaroon tayo ng problema later on. Mag-aano tayo tapos sila pa ang may hawak.[27]

x x x x

REP. UNABIA. So, Mr. Chair, I understand the franchise of PECO will expire on January, 2019? Can I ask MORE Minerals Corporation, if ever, Mr. Chair, if ever they will be granted a franchise, 'no, how long can you put up your, say, for example, DU or distribution to Iloilo, if ever?

....

MR. ROEL Z. CASTRO (President, MORE Minerals Corporation). Good morning, Honorable Committee and Honorable Chair. To the question of the F1onorable Unabia, **if we were to put up our own system I think it would take about a year, more or less. But, again, I mean, we are still looking at the ... at the mode wherein we could ...we could take over the assets, of course, with just compensation to the existing franchise holder, Mr. Chair. Thank you.**

....

REP. PANCHO. Ilang years po? Kasi ang sabi po nila ay it will take them at least a year to construct iyong mga bagong mga infrastructure nila. So, ilan po ang nakikita ninyo na ideal number of years na kailangan nating ibigay para doon sa winding period?

MS. GINES. Your Honors, ang isa pong alternative to them putting up is to, iyon na nga po, take over the current facilities but subject to the payment of just compensation. Kasi mayroon din naman pong portion of the cost of those facilities na equity ng PECO and then you also have the obligations. So, iyon po iyong isang alternative para ho dire-diretso iyong service po ng kuryente. Pero iyon na nga po ang sinabi ko ho kanina, strictly speaking po. Kaya po sabi ko po kanina, strictly speaking, iyon po talaga iyong legal implication without a franchise. But I don't think na pagdating po ng alas onse... 11:59 ng gabi, eh, talagang magsha-shutoff. Hindi naman po. Hindi naman po siguro ganoon ang mangyayari.

....

REP. UYBARRETA. Just, actually, I will not be asking too much question already because except for the fact that I requested for a technical report which I got this morning. However, just to.. for us as the Committee on Franchise, to have a wider perspective of what we are doing right now. Iyong sinabi kanina that both DUs will be operating at a loss, in layman's term, ang sinasabi doon is pahabaan ng pisi, kung sino 'yung makakatagal na lugi magpatakbo ng negosyo at mag-survive, iyon 'yung matitira. Mr. Chair, that's a very dangerous business practice. Mahirap po if we are enticing investors to come in in our country at sasabihin natin, "Pahabaan kayo ng pisi, eh anyway parehas kayong lugi eh." That's a very dangerous business concept for us. Now, just so that we will have a bigger

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[27] Committee Hearing, Committee on Legislative Franchises, September 12, 2018.

picture also. I'm pretty sure because of my experience sa DUs and the electric cooperatives, I'm pretty sure that the existing franchise has existing loans, one hundred percent ako sure diyan, one hundred and ten percent sure ako diyan, they have existing loans because most of the time, when you upgrade or even repair your facilities, you take in loan and then you apply that sa capex application, ina-apply sa ERC and then the ERC would give them the proper rate and a time frame or a time table to recover. Naka-apply po. Now, assuming this thing will happen, ang bigger question natin is, ano ang mangyayari sa existing loans ng existing franchise holder? Are we giving a very bad signal to the investors and to the lending institutions that we have?

Mr. Chair, we are walking on very thin ice here, sabi nga ng ERC, ***this is the very first time that this is happening***. Kasi nga po, ang distribution and transmission business is a natural monopoly, accepted po iyan in any country and all over the world that **distribution and transmission is a natural monopoly kasi po sa laki ng gastos para mag set up ng facilities. I heard that MORE committed that they will be able to put up their facilities, their complete distribution facilities within one year, I don't want to debunk that or ano, I just wish them well. But we know for a fact that just to set up one substation entails a lot of years and months, that's just one substation. And during last hearing, it was stated that for one distribution utilities to be able to supply the need of the franchise area that we are referring to or we are discussing here, a minimum of five substations will be required. That is capital intensive. We are not even talking about the distribution lines. We are not even talking about 'yung mga capacitor, 'yung mga transformers, the meters, the new meters, the new lines that will be put in. Again, kaya I just appeal for us to be very, very careful in deciding this. I will go for any move to give better service to any given consumers. I'm all for that. But I'm also on the side of caution kasi nga ano eh, I have nothing against MORE**, if they can promise better service, I'm all for that kasi at the end of the day, we are all here for the welfare of the consumers. But I just caution that kasi hindi natin napag-uusapan 'yung aspeto na 'yon that the signal that we will be ending to the lending institution and to the investors, kung ano man ang gagawin natin dito, will have repercussion on that. That's just my manifestation, Mr. Chair.

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MR. OFALSA. (Continuing)...EPIRA po, RA 9136, may third party valuation po na isa-submit on the valuation of the assets. But for now po, when a... sa existing policy ng ERC in existing distribution utilities, we have guidelines using a standard on how we value the assets po. Katulad po sa electric cooperatives, we use the NEA guidelines on the valuation of the assets. For private utilities for purposes of performance-based regulated, we use po iyong SKM valuation namin. This is more on technical valuation of the existing assets of all distribution utilities po.

REP. TAMBUNTING. So, in previous take overs, this is the same formula that was used.

MR. OFALSA. Wala pa kasi kami, Sir, I do not recall of any take overs of distribution. Siguro, Sir, in the past, iyong mga maliliit, ano, iyong mga una...

REP. TAMBUNTING. Iyong hindi pa tayo ipinapanganak.

MR. OFALSA. Yes, opo, mayroon po sigurong ganoon. Pero in my experience po sa ERC, we did not encounter any take overs of existing franchise utility po.

REP. TAMBUNTING. Mr. Chair, may I ask the More representatives? Do you agree with the formula presented by ERC?

MR. CASTRO. Your Honors, yes, we agree with the formula. Now, however, still I think... well, when it comes... because there has been no experience on private company take over and... well, and let me just say that. ..just going back to that question... to the answer earlier that there has to be just compensation and I think this is related to that, Mr. Chair. The question is if, let's say, the asking price of the... well, of the existing asset owner is too high that would jeopardize the rate, ano, to the end consumer, still I think... well, an approach might not be totally acceptable because, at the end of the day, it's gonna be the consumers who will take it. So, that's why I think there has to be a deeper study on who actually owns really the assets, I mean, upon take over. Because as you correctly pointed out, part of it has already been recovered. In fact, if... well, from the distribution assets right now, if, let's say, there are assets that are fully recovered which means that consumers have already paid for it over a period of time, the question is does it still ... make sure that it's still owned by PECO wherein...

REP. TAMBUNTING. Correct.

MR. CASTRO. ... well, a company like us who would be negotiating for just compensation be included in the asset-based.[28]

x x x x

REP. TAMBUNTING. Thank you very much, Atty. Jan. For the transition plan which has been submitted to the ComSec, maybe we can ask Mr. Roel Castro to expound on this, with the permission of the Chair.

THE CHAIRPERSON. Mr. Castro, do you have a presentation or...

MR. ROEL Z. CASTRO (President, MORE Electric and Power Corporation). Good morning, Your Honors. Yes, we have a short presentation on the transition plan.
REP. TAMBUNTING. Please proceed.

MR. CASTRO. Next, please. So, upon granting of franchise, Monte Oro Power will negotiate with PECO for the purchase of its distribution assets. Assuming that there is... that it is positive then we will apply for the certificate of Public Convenience and Necessity and we will deploy technical personnel to conduct the operations improvement plan; develop the planning and control processes for operations and maintenance; deploy security; and conduct a total system and network audit. Should the negotiation be successful, as stated during the last hearing, we are... actually we are open and we would like to hire the existing personnel of PECO; develop a total distribution network development plan; implement the processes to determine the cost-effective capital investments, establish maintenance program; create the corporate planning group to establish and optimize management processes. Now, if there is a failure to reach an agreement, which means that PECO and MORE Power cannot... well, has no agreement on terms, MORE Power will file an expropriation case, 'no, the right to expropriate is integral part of the franchise if approved, and MORE Power will definitely pay just compensation to PECO as determined by the court.

Well, if we're still on the premise that there is a failure to reach an agreement, MORE Power will have a standby quick maintenance and response team which we are in the process of putting together that we can readily deploy in case there will be a need, in case of emergency situations where major installation like substations will be compromised. We are also in the process of already looking for a possible mobile standby substations that will be backed-up by the emergency response team. And these are facilities that are readily available. Now, for the technical and operational readiness, our... well, we're contemplating

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[28] Committee Hearing, Committee on Legislative Franchises, September 18, 2018.

that the emergency response team which is made up of engineers, technicians, and specialists who will man important facilities/like substations are ready on call for a 24/7 deployment. Standby mobile substations in case of emergency, third-party line maintenance team and crew is also being ... we're in the process of already getting these team. The third party meter readers, as well as, we will make sure that the customer relations desk would be available 24/7 also in cooperation with the different media outlets to make sure that if there are questions or maybe any confusion ...

MR. CASTRO. (Continuing) ... confusion from the customer side, we will be able to respond to those queries. **Well, the other option is definitely MORE Power is ready to build its own distribution assets, 'no. We can provide our own personnel and, well, again, as also mentioned during the last, I think, during the last two hearings, 'no, we were saying that personnel is not really that difficult to source, 'no, since it is readily available in the market.** Now, on human resources, MORE Power will hire the services of the current employees who may be willing to work with us. MORE Power will hire a competent local HR Manager and, as we speak now, we actually already have applications from different... from a number of HR practitioners from Iloilo, 'no, to lay down the process of employment and among this, priority is really giving the training and development of its employees. Plans and programs-well, this is on the assumption that, well, the... we're able to come in which is... which has been laid down in the plans and programs that we've submitted to the Committee. We will make a thorough system audit. Prepare the necessary repair maintenance and even... well, from the audit, I think we'll be able to already find out if what are the improvements, immediate medium-term and long-term improvements, that will be needed. And immediately deploy the SCADA system throughout the franchise area. Well, on the distribution plan, well, I think these are some details already which we can move to the next. So, in conclusion, MORE Power will be prepared to implement the following from transition period and bring it to normal operations as soon as possible. Again, the smooth transition of normal operations including hiring of deserving employees, infusion of sufficient funding, develop and design the new distribution system, develop/implement new set of maintenance operating rules, the balance of energy, continuous training, improve responsiveness increase system, reliability and bring down the systems loss. With that, I'd like to thank the Committee for giving us the opportunity to present the transition plan. Thank you.

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REP. PADUANO. It's still pending in the Committee. Now, Mr. Chair, just an observation during the presentation of the MORE. Kasi nandun nakalagay, ongoing 'yung negotiation with the PECO para... to take over. So, ang tanong ko, Mr. Chair, ano na ngayon ang status ng negotiation? Kasi, Mr. Chair, 'pag binigyan natin ng prangkisa itong MORE, it follows dapat handa sila. Kasi the consumers in Panay Island, hindi puwedeng maghintay, hindi ba? Hindi puwedeng maghintay. 'Yung question nung expropriation, if we give them the franchise. But what if... what if. .. if we also renew the franchise, 'di ba? If we... if this Committee and this House will renew their franchise, it follows na mas nauna 'to, ang PECO, mas sila ang nagsisimula sa ngayon, 'di ba? Sa ngayon sila. Of course, it is allowed, it's a free competition. But 'yung point ko, 'yung sinasabi niyong negotiation in the presentation, siguro naman dapat malaman natin kung ano na ang status ng negotiation. And nandito rin pala 'yung mga taga-PECO. Kasi, Mr. Chair, 'yun 'yung sinasabi ko, eh, if we grant MORE because free competition natin, now... and we also grant the renewal, it follows 'yung PECO naghahanda pa. If negotiation between PE... no, 'yung MORE, if negotiation between PECO and MORE failed kung i-grant natin ang PECO and there is a pending bill in this Committee. So, Mr. Chair, I just want to be clarified about the ongoing negotiation. 'Wag muna tayo pumunta doon sa question nung granting of franchise kasi, what if it failed? I-expropriate niyo, eh, there's a pending application in this Committee, this House. So, medyo may problema tayo doon. Kaya 'yung position or proposal, 'yung negotiation, medyo may problema tayo if PECO will not negotiate with you. Walang compromise, walang agreement. Now, the question is, are you prepared?

Kung kompetisyon, okay. No problem with that. But 'yung sinasabi ko existing ... existing ngayon 'yung PECO and they are applying for renewal. 'Yun lang 'yung... 'yun lang 'yung medyo mahirap kong intindihin, 'no. Hindi ko maintindihan na ongoing 'yung negotiation, nag-apply din sila, 'yung PECO, for renewal. So... Thank you, Mr. Chair.

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MR. CASTRO. Well, next... sorry, Mr. Chair, next slide, please. Well, there was no mention that there is an ongoing negotiation, I mean, just to clarify. What we said is that, upon granting of the franchise, we will start... we will negotiate with PECO. So, there has been no statement about an ongoing negotiation.

Mr. Chair. Atty. Benny?

MR. TAN. Your Honor, we would prefer to negotiate so... we are not sure if we'll get our franchise so it would be presumptuous to negotiate now. Once it becomes clear that we will be able to get our franchise, we have to hurdle Senate pa. Then, we will negotiate with PECO. You mentioned the possibility that PECO will also get its franchise. Yeah, in that situation, it will be an open competition, so we will not be able to... to acquire their distribution assets. We will have to build our own distribution assets in such situation where there are two franchise holder for the same area, Your Honor.

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MR. OFALSA. Okay. The letter is dated September 25, 2018, addressed to Honorable Franz E. Alvarez, Chairperson, Committee on Legislative Franchise. "During the House Representatives' Committee on Legislative Franchises hearing on House Bill No. 8132 last September 12, 2018, the Energy Regulatory Commission was directed to submit its supplemental position paper on the said bill. In compliance with the said directive, please find attached ERC's Supplemental Position Paper in response to the queries and additional information requested during the hearing. We hope that the Committee will consider the same during the deliberation of this piece of legislation. Thank you." Signed by Chairperson and CEO, Agnes V.S.T. Devanadera.

The letter... the title of this position is ERC's Supplemental Position Paper on House Bill No. 8132, AN ACT GRANTING THE MORE MINERALS CORPORATION A FRANCHISE TO ESTABLISH, OPERATE AND MAINTAIN FOR COMMERCIAL PURPOSES AND IN THE PUBLIC INTEREST A DISTRIBUTION SYSTEM FOR THE CONVEYANCE OF ELECTRIC POWER TO END-USERS IN THE CITY OF ILOILO, IN THE PROVINCE OF ILOILO.

During the Committee on Legislative Franchises' hearing on House Bill 8132 last September 18, 2018, legal issues and operational concerns on the occurrence of any of the following scenarios were raised, namely....

We go now to scenario number two - where franchise is granted to MMC and PECOs franchise is not renewed. PECO is the existing franchise electric utility with exclusive authority to operate and maintain a distribution system in Iloilo City. As such, PECO owns the only existing distribution assets in Iloilo City. In the event that PECO's franchise is not renewed and another entity that is MMC is given the franchise to operate and maintain a distribution system in Iloilo City, a question was raised on whether PECO will be allowed to operate the existing distribution system during the transition phase of MORE Minerals. As earlier pointed out in the supplemental position paper, an entity operating and maintaining a distribution system must first secure a franchise. In the case of PECO, once existing franchise expires, it may no longer engage in the business of distribution of electricity and ERC has no legal basis to issue any authority to PECO for the latter to operate its distribution system. As ERC has no authority over PECO after the expiration of the latter's franchise, the ERC will defer to the wisdom of the Congress on

whether to grant PECO a legislative franchise that will allow PECO to continue operating its distribution system.

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MR. INOCENCIO FERRER, JR. (Board Member, Panay Electric Company). Good morning, Mr. Chairman. Sorry but I have flu, 'no, so my voice is not very clear. I am Atty. Inocencio Ferrer, Jr. I represent PECO and the majority of the Board Members of PECO. Mr. Chairman, we have previously filed several letters opposing the House Bill of Congressman Gus Tambunting. And **in answer directly to the question of whether or not PECO is amenable to selling its assets or the company to MORE, I can categorically say... state that after conferring with the majority owners of PECO, they are not amenable to sell their assets and they will contest and bring to court any move by MORE to use the government power to expropriate their assets and give it to a private entity**. It is our position, Mr. Chairman, that **based on the presentation of the President of MORE, he actually admitted that they don't have any assets on the electrical power distribution. He admitted that. In fact, his only plan is to buy us out and if we refuse to sell, then he will invoke the government... the government... he will use the government to expropriate our assets and award it to a private entity. Number two, the President of MORE admitted now, that's why I wanted him to admit it under oath that they don't have any personnel. They don't have any technicians, experts in the field of electric power distribution and their only plan is to hire our employees.** Third, Your Honor, I don't think what he presented is a rollout plan. **Usually, a rollout plan tells the Honorable Members the year-to-year activities of MORE to purchase equipment, to install equipment, to apply for permits on the barangay level, the city level to install their infrastructure. They should present that to the Chairman year-to-year. Every year how much assets they will buy. Every year, how many employees they will hire. Every year, how many equipment that they will purchase. But they have not submitted a rollout plan. Instead, what they are actually telling the public is they will invoke the power of the Constitution to expropriate our property and to award it to a private entity.** I think, Your Honor, that will violate the Anti-Graft Law. Anyway, we will question that in the Supreme Court. Your Honor, may I, again, ask the Chairman to distribute the various opposition... the various opposition submitted to this Honorable Committee against... the opposition against... the very strong opposition against the application of MORE. **In fact, the biggest association of power distributors, electric power distributors, in the Philippines submitted a very, very strong objection. They are the expert in the field and this association, PEPOA, they are called PEPOA, and PEPOA is a Private Electric Power Operators Association of the Philippines, the only expert association of private operator, strongly oppose the application of MORE because they don't have any assets. MORE does not have a single asset on the ground now in Iloilo City, nothing. Their only plan is just to expropriate our property and allow the government to pay us in court.** Second, the Private Electric Power Operators Association, which represents all. .. all the private electric power distributors in the country, strongly supported the House Bill of Congressman Xavier Jesus Romualdo, House Bill 6023, in favor of PECO.... Finally, Your Honor, **at that time that MORE filed its application on August 22, less than 40 days ago, MORE was a mining company. It was a mining company with only 2.5 million pesos capital and it did not have a single experience or track record in electric power distribution. Therefore, at that time they filed the application, they were not entitled. They were not qualified. And if they are now submitting the amendment of their Article, it merely states that they have... what? Two hundred fifty million pesos and they are going to try to takeover a multi-billion peso existing electric power distribution.** That is incredible...

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MR. CASTRO. Thank you very much, Your Honor. Well, just to reiterate, well, what we've stated during the first hearing. **Yes, while we still don't have the ... I would say, the... the**

full complement, but, well, at the officers' level, we actually have an experienced general manager of an electric cooperative which is about three times, at least three times bigger than PECO, with a customer base of over 200 thousand, and by experience, was able to bring down systems losses from double digit to single digit, 'no. We have another general manager of another electric coop who will be joining us very soon. Again, his experience is a customer base four times bigger than that of PECO. PECO is about 60 thousand. This another GM that we are-and I'm not yet in the position to name him-actually has been managing electric coop of another urbanized area of about 225 thousand customers, ano. And experience would show na in his management, he was able to bring down systems losses and was able to turn around the... the financials of this utility from barely negative to positive. Also together with us is a former Undersecretary of Energy and former NAPOCOR President, Cyril Del Callar, who is very much acquainted with the power industry from the very time he joined, well, his law profession in the power industry and up to this date. Well, on the... on the owner's side, Monte Oro was also ... we were part owner of the National Grid Corporation of the Philippine, when we privatized TransCo, 'no. And NGCP, we won the bid for 3.95 billion U.S. Dollars and we were able to ... well, we had... we have the capital, we had the we were able to comply with what was needed on the financial side, needed by the by the government that's why we were awarded that franchise for the National Grid Corporation of the Philippines. And as we had... we have the capital, we had the we were able to comply with what was needed on the financial side, needed by the by the government that's why we were awarded that franchise for the National Grid Corporation of the Philippines. And as we....

REP. A. M. BRAVO. Thank you very much, idol. **Assuming that MORE is capable of putting up the infrastructure, questioning their capability maybe, well, not proper as of this present as made mentioned by the author that it requires first a franchise so that they will be able to build up the facilities. Assuming that they are capable of building up and maybe to ... after such build up they will be ready to propel the business in favor of the consumer it will take how many years do you think to do it?**

MR. CASTRO. Well, in our...

REP. A. M. BRAVO. On an assumption that PECO will not sell.

MR. CASTRO. Mr. Chair, Honorable Chair, in our opinion, well, **since I think capital is not a problem for us, if let's say, we're given at least a year, I mean I think we can ... we can actually come up with the system. Because like, let's say, substations, there are mobile standby substations that we can use immediately, deploy immediately while, let's say, building the permanent substations, 'no. So, I guess, again, I mean, since capital is not a problem for us then, I think at least a year would be more or less right**, Mr. Chair. Thank you.

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REP. ANICETO JOHN D. BERTIZ. Idol ko 'yun si Bravo, pero I'm so honored that I was called. Good morning po, good morning, Mr. Chair. Actually, my question is in line with the... just a follow-up question with Congressman Anthony Bravo. Of course, it is incumbent for us, for this Committee to know what are the transitory plans and I would like to ask more... no, I mean, **I will not ask more but the MORE Mineral Corporation to know about what is your immediate plan because our worry is from now until January when PECO expires, what will be your immediate plan?** Because you know, that's the only time you will start putting up your electric posts, whatsoever, power plant, et cetera, et cetera, clearances, right of way, issues, trees to be cut, DENR, et cetera, et cetera. So, ano 'yung mangyayari? Comes January, na ano ang mangyayari doon sa ilang libong consumers or users ng existing power plant? So I just would like to know what is your immediate '" because, you know, we cannot leave those thousands of families, you know, push them back to the dark ages especially in Iloilo. Thank you, Mr. Chair.

THE CHAIRPERSON. Mr. Castro.

MR. CASTRO. Your Honor, well, we presented earlier the transition plan when the hearing started, 'no, but just to summarize, it's well, **once we are granted of franchise, in good faith we would negotiate with PECO on the purchase of their distribution assets. If there's a failure in that respect, well, there is the imbedded in the franchise, the expropriation.** Well, the other option actually is that we can come up in well, as stated earlier, within a year, at least we can come up with our own facilities, Mr. Chair. That in essence are the three points that we've presented earlier. Thank you.[29]

I purposely quoted at length the congressional deliberations to prove that the **business plan** has ***all along*** been to **take PECO's properties at all costs** since these **properties**, as ***cleverly decreed*** in ***Section 10***, are **those properties "actually necessary"** for the **establishment** and **operation** of **MORE's** franchise. It has to be **that way** because petitioner **MORE** has **none of the facilities** to distribute electricity to consumers.

Expropriation is a **foregone** conclusion; it is the **only way** by which **MORE** as the new franchisee can **establish and operate** the distribution of electricity; **without expropriation**, since **PECO** is not willing to sell its assets, Iloilo residents will suffer a **black-out**. The **impact** of Section 10 and Section 17, as their **respective texts** prove and as envisioned by the **legislators**, is to **render** the **condemnation** a **fait accompli**, and the provision on **expropriation proceedings** a **ceremonial procedure**.

That the legislative record reveals much concern about protecting the business of **MORE** by **volunteering the taking of PECO's properties** is **nothing but consistent with** House Bill 8132's conclusion that *"[t]he quality of service of PECO has been wanting. Among the complaints against PECO are: overbilling/overcharging, arrogant personnel/poor customer relations, distributor related outages, inadequately maintained lines, inadequate investment in distribution facilities, and inordinate delay in the restoration of power services, among others."*

PECO's representative was even **invited** to give a statement on **MORE's** application for a franchise in what appeared to be a **congressional trial** of **PECO's** alleged failings. Apart from the non-renewal of its franchise and the award thereof to **MORE**, the **takeover of PECO's properties by MORE** is the **legislative punishment** for **PECO's** purported failings.

MORE's business plan and congressional intent are **relevant** to the **conclusion** that **Sections 10** and **17** are **indeed bills of attainder** because they **follow the template** as to **why bills of attainer are enacted** and **why they should be banned**. The **template** has been elucidated as follows:

> **We have just seen the danger that arises when a legislature acts in a judicial capacity and enacts bills of attainder to take private property, while simultaneously asserting that its actions are consistent**

[29] Committee Hearing, Committee on Legislative Franchises, September 26, 2018.

with the law of the land. That discussion was missing only one important ingredient - **motive**. This section discusses **factions as the motive for legislative defiance of due process.** Once again, the ban on bills of attainder is by far the best aid in understanding why factions are so dangerous.

Why would a legislature be tempted to defy due process, take property without compensation, and declare that its acts are above judicial review? What possible motive could elected officials have for such misguided behavior? Factions are the answer. For a surprisingly clear statement as to why this is so, we turn to governmental genius James Madison. If anyone understood the workings and dangers of government, he did. Madison directly linked property takings, governmental factions, and rogue legislatures acting in a judicial capacity.

The occasion for Madison's interweaving of these topics was The Federalist No. 10. This is perhaps the single most famous of the Federalist papers penned by Madison, Hamilton, and Jay, and is best known for discussing the dangers of factions. What is less known is that this essay also related directly to bills of attainder and eminent domain takings as well.

In the middle of The Federalist No. 10, Madison made the seemingly innocent comment that **"no man is allowed to be a judge in his own cause." This seems self-evident. How can a man judge whether he is worthy of punishment? But Madison then took this simple concept one step further and applied it to the workings of government - more specifically, the legislature.** He said: "[A] body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?" In other words, Madison raised the very point discussed by Webster and Hamilton above. **The legislature is tempted constantly to step into the judicial sphere, unless something prevents it from doing so.** While Webster and Hamilton spoke in terms of individualized legislation, such as bills of attainder targeted at persons or small groups of people, Madison spread the canvas farther. Was not the same principle true when large groups were targeted for unfair treatment as well? Could not such far-reaching laws also be bills of attainder?

And just what were the groups that comprised opposing factions? Madison gave the answer in no uncertain terms: **"The most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests** in society." Madison was no communist, however, and he was not in any way criticizing an unequal distribution of property or asserting that there should be a redistribution of the same to make everyone equal. For him, such a proposition would be impossible, since the acquisition of property was derived from the very unique personalities of individual men. He referred to this concept as "the diversity in the faculties of men, from which the rights of property originate." Then came his key point - that **it was the government's job to protect and preserve such individual faculties, which in turn would forever preserve factions**:

> The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, **the possession of different degrees and kinds of property immediately results; and from the influence**

of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

What type of government would preserve property factions as necessary and unavoidable elements of society, **while at the same time preventing them from controlling the legislature** and exceeding its powers through bills of attainder? A large republic, answered Madison in The Federalist No. 10 - **a republic in which small groups of representatives from large and distant population centers would effectively hold each other in check.**

Of course, Madison believed that **the most effective way the Congress could accomplish this task was through a legislative veto,** as he had originally proposed. This legislative veto, **however, had been overturned and replaced with a judicial veto over unacceptable state acts, such as the ban on bills of attainder.** Madison still hoped and believed that the structure of the federal republic, combined with the limits in Article I, Section 10, would provide the needed protection against factions. He stated in the Federalist No. 44:

> Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation... **Very properly, therefore, has the convention added this constitutional bulwark in favor of personal security and private rights ... The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences,** in cases affecting personal rights, **become jobs in the hands of enterprising and influential speculators ...**

Madison was not the only one who said that the ban on bills of attainder was the chief vehicle to overcome the dangers of factions. Justice Iredell in *Minge v. Gilmour* said:

> **In times of violent faction or confusion of any kind, men are often prompted, if they can, to destroy their adversaries under the color of the law.** The numerous acts of attainder in England, and other arbitrary parliamentary punishments, show how necessary it was for a wise people, forming a constitution for themselves, **to guard against tyrannies like these.**
>
> ....
>
> In sum, **the greatest fear of the founding generation was that the factions** - which are always present in society, and **which arise because of unavoidable differences in property ownership** - would **use the government itself to oppress** their fellow citizens. The founders hoped that the nature of America's large republic would overcome this problem. But if the republic failed to do so fully, **a very specific ban on egregious, faction-based takings legislation could also be used as a protection. This protection was the ban on bills of attainder.**[30]

D. Conclusion

Admittedly, the use of the ban on bills of attainder as a takings protection has long faded. Nonetheless, it does not need to be that way. As has been said:

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[30] *Id.* at 423-425, 427.

> **The ban on bills of attainder still stands as a bulwark of liberty to those whose property is arbitrarily taken by an unjustified legislative act.** The provision itself has not changed, but only our understanding of it. **The provision can protect** both persons and groups who for a time are unpopular - such as those of Japanese descent in World War II, suspected communists in the 1950s, or suspected terrorists today - as well as **persons or groups that own property the government wants, and then exerts pressure to obtain. Courts today should not be afraid to apply this unique and powerful tool as it was applied in the days of our early history.** And when they do, courts will discover that it clarifies many other constitutional principles as well.[31]

II. Sections 10 and 17 violate the equal protection clause.

In ***Biraogo v. The Philippine Truth Commission of 2010***,[32] the Court nullified then President Aquino's Executive Order No. 1 creating the Truth Commission and tasking it to investigate reported cases of graft and corruption allegedly committed during the presidency of President Macapagal-Arroyo. The Court held that this executive rule violated the equal protection clause, *viz.*:

> The equal protection clause is aimed at all official state actions, not just those of the legislature. Its inhibitions cover all the departments of the government including the political and executive departments, and extend to all actions of a state denying equal protection of the laws, through whatever agency or whatever guise is taken.
>
> It, however, does not require the universal application of the laws to all persons or things without distinction. What it simply requires is equality among equals as determined according to a valid classification. Indeed, the equal protection clause permits classification. **Such classification, however, to be valid must pass the test of reasonableness. The test has four requisites: (1) The classification rests on substantial distinctions; (2) It is germane to the purpose of the law; (3) It is not limited to existing conditions only; and (4) It applies equally to all members of the same class.** "Superficial differences do not make for a valid classification."
>
> For a classification to meet the requirements of constitutionality, it must include or embrace all persons who naturally belong to the class....
>
> The classification must not be based on existing circumstances only, or so constituted as to preclude addition to the number included in the class. It must be of such a nature as to embrace all those who may thereafter be in similar circumstances and conditions. It must not leave out or "under include" those that should otherwise fall into a certain classification....
>
> **Applying these precepts to this case, Executive Order No. 1 should be struck down as violative of the equal protection clause. The clear mandate of the envisioned truth commission is to investigate and find out the truth "concerning the reported cases of graft and corruption during the previous administration" only.** The **intent to single out the previous administration is plain, patent and manifest.**

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[31] *Id.* at 428.

[32] 651 Phil. 374 (2010).

> Mention of it has been made in at least three portions of the questioned executive order. Specifically, these are....
>
> **In this regard, it must be borne in mind that the Arroyo administration is but just a member of a class, that is, a class of past administrations. It is not a class of its own.** Not to include past administrations similarly situated constitutes arbitrariness which the equal protection clause cannot sanction. **Such discriminating differentiation clearly reverberates to label the commission as a vehicle for vindictiveness and selective retribution.**
>
> ....
>
> To reiterate, in order **for a classification to meet the requirements of constitutionality, it must include or embrace all persons who naturally belong to the class. "Such a classification must not be** based on existing circumstances only, or **so constituted as to preclude additions to the number included within a class,** but **must be of such a nature as to embrace all those who may thereafter be in similar circumstances** and conditions. Furthermore, all who are in situations and circumstances which are relative to the discriminatory legislation and which are indistinguishable from those of the members of the class must be brought under the influence of the law and treated by it in the same way as are the members of the class."

Here, Sections 10 and 17 are directed **only** against respondent **PECO**. While the language of these provisions may be construed to refer to property owners other than **PECO**, the congressional deliberations **made it very clear and categorical** that **the take-over is solely with regard to PECO and its properties**. The **overriding intent** is the ***legislated*** **taking, condemnation of expropriation of PECO's assets** and **no other entity's properties**, because **this is petitioner MORE's business plan** as it has **none of the facilities** to establish and operate the distribution of electricity within its franchise area. This is the same **evil** that ***Biraogo*** has railed against, the **singling out** of a person for the **imposition of burdens** that and whenever **the singled out person is not willing to accept**.

Indeed, what **differentiates** respondent **PECO** from other property owners? **PECO** is **not the only entity** that has *"poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment."* As admitted by petitioner **MORE**,

> Well, the other option is definitely MORE Power is ready to build its own distribution assets, 'no. We can provide our own personnel and, well, again, as also mentioned during the last, I think, during the last two hearings, 'no, we were saying that personnel is not really that difficult to source, 'no, since it is readily available in the market.
>
> ... since I think capital is not a problem for us, if let's say, we're given at least a year, I mean I think we can ... we can actually come up with the system. Because like, let's say, substations, there are mobile standby substations that we can use immediately, deploy immediately while, let's say, building the permanent substations, 'no. So, I guess, again, I mean, since capital is not a problem for us then, I think at least a year would be more or less right...

Hence, there is **no basis** for Sections 10 and 17 to **single out** PECO for the **take-over** and **condemnation** of its properties and to drive it altogether from doing **other legitimate businesses** as regards its assets.

III. Response to Key Points in the Ponencia.

With the kind indulgence of my friend, the revered *ponente*, Justice Reyes, Jr., may I politely reply.

The *ponencia* admits:

> x x x x
>
> At the same time, Section 17 expressly provides that, even as PECO is operating the distribution system, this interim arrangement shall not prevent MORE from acquiring the system through the exercise of the right of eminent domain. Thus, after R.A. No. 11212 took effect on March 9, 2019, MORE filed on March 11, 2019 a Complaint for Expropriation with the Regional Trial Court of Iloilo City, Branch 37 (Iloilo RTC), over the distribution system of PECO in Iloilo City.
>
> x x x x
>
> x x x x Ownership was co-existent with the franchise. x x x x

The reference to an expropriation proceeding now before the trial court strengthens the view that **MORE** has been true to its business plan of **merely taking over PECO's properties** to establish, operate and maintain its franchise. The *ponencia*'s statement that "[o]wnership was co-existent with the franchise" further proves that the **confiscation of PECO's properties** is the **Congress' primordial means** of supporting **MORE's** franchise.

> Expropriation by MORE of the distribution system of PECO is for a genuine public purpose
>
> The next legal issue is whether expropriation by MORE of PECO's distribution asset under Section 10 and Section 17 of R.A. No. 11212 is for a genuine public purpose. To reiterate, while it is Congress that defines public necessity or purpose, the Court has the power to review whether such necessity is genuine and public in character, by applying as standards the constitutional requirements of due process and equal protection.
>
> In its assailed decision, the RTC held that while R.A. No. 11212 authorizes MORE to expropriate the private property of PECO and to apply the same to the public purpose of power distribution, such identified public purpose is not genuine for ultimately it is the private interest of MORE that will be served by the expropriation. In other words, the expropriation is an ill-disguised corporate takeover.
>
> x x x x

> Even without these developments in Western jurisprudence, the genuineness of the public purpose of the expropriation of the distribution system of PECO can be determined from R.A. No. 11212 itself.
>
> Expropriation under Section 10 and Section 17 of R.A. No. 11212 is not only for the general purpose of electricity distribution. A more distinct public purpose is emphasized: the protection of the public interest by ensuring the uninterrupted supply of electricity in the city during the transition from the old franchise to the new franchise. This distinct purpose has arisen because MORE is the new franchise holder in a city whose public space is already burdened by an existing distribution system, and that distribution system cannot continue to serve a public use for it is owned by the old franchise holder.
>
> x x x x
>
> The public necessity of ensuring uninterrupted electricity is implicit in Section 10, which authorizes MORE to expropriate the existing distribution system to enable itself to efficiently establish its service. This distinct public necessity is reiterated in Section 17 under which MORE may initiate expropriation proceedings even as PECO is provisionally operating the distribution system. In fact, this distinct public necessity of ensuring uninterrupted electricity is the very rationale of the ERC in granting PECO a provisional CPCN. The provisional CPCN is the legal basis of PECO's continued operation of the distribution system. PECO cannot deny that such distinct necessity to ensure uninterrupted electricity supply is public and genuine.
>
> x x x x
>
> x x x x In sum, expropriation by MORE of the distribution system of PECO under Sections 10 and 17 serves both the general public interest of conveying power and electricity in Iloilo City and the peculiar public interest and security of ensuring the interrupted supply of electricity. The RTC erred in declaring these provisions unconstitutional.

The discussion in the *ponencia* **validates** what I have been saying all along that **Congress** through Sections 10 and 17 has already **determined** and **settled** the issues inherent in an **otherwise judicial** expropriation proceeding. The court expropriation case has become and will be **a *fait accompli***, a **ceremonial figurehead**.

Additionally, the **public purpose** for the expropriation **did not arise** because, to quote the *ponencia*, "MORE is the new franchise holder in a city whose public space is already burdened by an existing distribution system, and that distribution system cannot continue to serve a public use for it is owned by the old franchise holder."

Rather, the **public use *came about*** because MORE **has had none of the facilities and the people** to establish, operate and maintain the franchise. The fact that PECO has its facilities in the franchise area **does not justify** the expropriation, because there **would have been no use for these facilities *if***

only MORE has been equipped and ***skilled*** to **perform** the **franchise it sought and was awarded.**

It is **unfair** and **out-of-line** to turn the tables on **PECO** when it is **MORE** that has no equipment and people to make its franchise useful to the people it is intended to serve.

The *ponencia* claims that:

> In her Dissenting Opinion, Justice Javier extends the concept of bill of attainder to cover Sec. 10 and Sec. 17 in that these legislations purportedly single out PECO and subject the latter to punishment without the benefit of trial. **This conception bills of attainder is problematic for, as correctly pointed out by Justice Leonen in his dissent, a legislative franchise is not a right but a special privilege the grant, amendment, repeal or termination of which is granted to Congress by no less than the Constitution.** Consequently, the termination of a franchise by its expiration is not a deprivation of a right or property that amounts to punishment. There is no question that the franchise of PECO was allowed to lapse because of its failure to render competent public service. No prior judicial trial of the performance of PECO is required before Congress may decide not to renew PECO's franchise. The power of this Court to subject to judicial review the constitutionality of a franchise legislation does not include the power to choose the franchise holder. That is not our place in the constitutional scheme of things.

With due respect, it is indeed problematic that the *ponencia* has completely **misconstrued** and **misappreciated** the point of my dissent. What I claim to be bills of attainder are Section 10 and Section 17 of **MORE's** franchise, and **certainly not** the denial of **PECO's** franchise. The latter is **not** the subject matter of this case and therefore I cannot have assailed or challenged it in my dissent. In any event, the grant or denial of a franchise begins and ends with Congress – that is a given.

What I point out as **bills of attainder** are **Section 10 and Section 17 RA 11212**, which have **burdened PECO** with the **fait accompli expropriation or taking** of its property in a manner that **dispenses with the judicial trial** on whether public use and public necessity are present in the take-over of PECO properties. Here, it was Congress itself that **has become no only the initial but also the final arbiter** of what **essentially** has **always been** a **judicial function**.

To be sure, the denial of PECO's franchise and the grant of franchise to MORE **did not have** to come with the **added burden to PECO** of a **legislatively determined** expropriation of PECO's assets. The **two actions** are **actually separable** from each other, and hence, a challenge on the latter **does not amount to** an attack on the former.

The *ponencia* also holds:

> Justice Javier argues that Sec. 10 and Sec. 17 virtually enable MORE to piggyback on PECO in order to establish and operate its franchise. Every legislative franchise enables the franchise holder to expropriate with the view of building its distribution system. Even PECO obtained the franchise from De La Rama along with the authority to use public spaces for the installation of its distribution system. MORE is authorized to acquire the assets of PECO and any other assets of any other entity that might be available as these are be necessary for the discharge of its public franchise.

There is a huge difference between a consensual acquisition of another's property and a forcible or coercive take-over thereof. The latter is an exercise of State power that the *Constitution* restrains. While a legislation may authorize its exercise and **initially** determines the propriety of its exercise, it is a **court decree** that **makes the ultimate lawfully binding determination** on the basis of the existence of public use and public necessity and the payment of just compensation. In the case at bar, **the process has been skewed** because Section 10 and Section 17 of RA 11212 themselves, as confirmed by the legislative deliberations, **have adjudged with finality** the existence of the elements that should have been the court's prerogative to adjudicate. Even the Court, though it is **not** the expropriation court, **has already found** in the present case and on the basis or upon the lead of Section 10 and Section 17, that the take-over is for a public use and publicly necessary.

Thus, while I sincerely appreciate the *ponencia*'s discussion on the points I have raised, I **still cannot find myself** to agree with both the rationale and the conclusion it has reached. I maintain my dissent.

IV. Thoughts on Justice Caguioa's Opinion.

As always, my friend and senior colleague's thoughts have sharpened the points of discussion.

One. I agree with Justice Caguioa that "the power of expropriation is by no means absolute." But the power of eminent domain is **not only limited** by *public use* and *just compensation;* **genuine public necessity** and the **proscription against bills of attainder** similarly restrict the exercise of this State power.

Two. I disagree with the thought that "the Constitution does not sanction the taking of a private [property]" only if "the **sole** purpose" thereof is to transfer it to another private party. **Sole** means only, one and only, single, solitary, lone, unique. But, as the Opinion itself cites, **even** the **confluence** of **private and public** benefits, **not solely** the conferment of private benefits, may destroy the public use claim of an expropriation "when the purported public use is merely incidental or pretextual, thereby serving as a guise to favor private interests." **Clearly**, the fact that there is a **gloss of public use** to a taking **does not end** the debate simply because it is **not the sole** purpose of the taking to benefit a private party. The **incidental or pretextual public use defense** has been explained in this manner:

> When determining the limits of the government's right to take private property, we will defer to the General [***36] Assembly's exercise of those powers. Id. at 543; SWIDA, 199 Ill. 2d at 236 ("Great deference should be afforded the legislature and its granting of eminent domain authority."). Under SWIDA, **that deference evaporates when the public purpose behind the taking is a pretext, when a municipality uses eminent domain as a weapon to forcibly transfer property from one private owner to another**. See SWIDA, 199 Ill. 2d at 240 ("While [SWIDA's] activities here were undertaken in the guise of carrying out its legislated mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use."); *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 478, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) (noting government would not be allowed "to take property under the mere pretext of a public purpose, **when its actual purpose was to bestow private benefit**."); cf. *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) (finding **"pretext" to be valid affirmative defense to condemnation** for economic redevelopment).
>
> Recognizing the difference between a valid public use and a sham can be challenging. But **a telling feature of sound public use** in the context of economic redevelopment is **the existence of a well-developed, publicly vetted, and thoughtful economic development plan. Such a plan was present in Kelo**,545 U.S. at 483-84, and Gutknecht, 3 Ill. 2d at 542-43, **but absent in SWIDA**, 199 Ill. 2d at 240 ("SWIDA did not conduct or commission [***37] a thorough study of the parking situation at [the racetrack]. Nor did it formulate any economic plan requiring additional parking at the racetrack."). **A taking will likely pass constitutional muster where done in furtherance of a sound economic development plan, rather than** [****432] [**522] **the plan retroactively justifying the taking**. Cf. *Romeo v. Cranston Redevelopment Agency*, 105 R.I. 651, 254 A.2d 426, 433 (R.I. 1969) ("governing bodies must either plan for the development or redevelopment of urban areas or permit them to become more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly" (internal quotation marks omitted)).[33]

As has been copiously quoted and also explained at length, **MORE's business plan** from the beginning has been to **take over PECO's** properties. There was **no** well-developed, publicly vetted, and thoughtful plan as **the idea was simply to take** and **justify this taking by retroactively referring to MORE's business plan** of simply taking over PECO's properties.

In ***Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.***,[34] a government agency sought to expropriate private parcels of land to be conveyed to a private race track which would then build additional parking spaces for its clientele. The court ruled that the public benefits arising from the parking spaces were merely incidental and pretextual to the profit motivation of the private race track. Thus:

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[33] *City of Chicago v. Eychaner*, 2015 IL App (1st) 131833, P70-P71, 26 N.E.3d 501, 521-522, 2015 Ill. App. LEXIS 37, *35-37, 389 Ill. Dec. 411, 431-432 (Ill. App. Ct. 1st Dist. January 21, 2015).

[34] 199 Ill. 2d 225, 238-242, 768 N.E.2d 1, 9-11, 2002 Ill. LEXIS 299, *20-27, 263 Ill. Dec. 241, 249-251 (Ill. April 4, 2002).

If this taking were allowed to stand, it may be true that spectators at Gateway would benefit greatly. **Developing additional parking could benefit the members of the public who choose to attend events at the racetrack, as spectators may often have to wait in long lines of traffic to park their vehicles and again to depart the facility. We also acknowledge that a public use or purpose may be satisfied in light of public safety concerns.** See *Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n*, 16 Ill. 2d 539, 158 N.E.2d 766 (1959). The public is allowed to park on the property in exchange for the payment of a fee. **Gateway's racetrack may be open to the public, but not "by right."** Gaylord, 204 Ill. at 584. It is **a private venture designed to [*239] result not in a public use, but in private profits**. If this taking were permitted, **lines to enter parking lots might be shortened and pedestrians might [***21] be able to cross from parking areas to event areas in a safer manner. However**, we are **unpersuaded** that these facts alone are sufficient **to satisfy the public use requirement**, especially in light of evidence that **Gateway could have built a parking garage structure on its existing property**.

We have also recognized that **economic development is an important public purpose**. See *People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 38 Ill. Dec. 154, 403 N.E.2d 242 (1980); *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 11 Ill. Dec. 307, 368 N.E.2d 915 (1977); *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972). SWIDA presented extensive testimony that **expanding Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region. However, "incidentally, every lawful business does this."** Gaylord, 204 Ill. at 586. Moreover, nearly a century ago, Gaylord expressed the long-standing rule that **"to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement**. [***22] " Gaylord, 204 Ill. at 584.

This case is strikingly similar to our earlier decision in *Limits Industrial R.R. Co. v. American Spiral Pipe Works*, 321 Ill. 101, 151 N.E. 567 (1926). In Limits Industrial, this court held that a railroad could not exercise eminent domain authority to acquire property for the purpose of expanding its facilities. Despite a certificate of convenience and necessity issued by the Illinois Commerce Commission, we found the proposed spur track and public [**10] [****250] freight house provided **minimal public benefit and principally benefitted the railroad itself and a few other business entities**. Limits Industrial, 321 Ill. at 109-10. Similarly, it is incumbent upon us to question SWIDA's findings as to the parking situation at Gateway and **determine whether [*240] the true beneficiaries of this taking are private businesses and not the public**.

We do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose. As was the case in Limits Industrial, **members of the public are not the primary intended beneficiaries of this taking**. Limits Industrial, 321 Ill. at 109-10. [***23] **This condemnation clearly was intended to assist Gateway in accomplishing their goals in a swift, economical, and profitable manner.**

Entities such as SWIDA must always be mindful of expediency, cost efficiency, and profitability while accepting the legislature's charge

to promote development within their defined parameters. However, **these goals must not be allowed to overshadow the constitutional principles** that lie at the heart of the power with which SWIDA and similar entities have been entrusted. As Justice Kuehn stated in dissent in the appellate court, "If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, **the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain.**" 304 Ill. App. 3d at 556 (Kuehn, J., specially concurring).

While the activities here were undertaken in the guise of carrying out its legislated mission, **SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation** [***24] at Gateway. **Nor did it formulate any economic plan requiring additional parking** at the racetrack. SWIDA advertised that, **for a fee, it would condemn land at the request of "private developers" for the "private use"** of developers. In addition, SWIDA entered into **a contract** with Gateway **to condemn whatever land "may be desired** *** by Gateway." Clearly, [*241] the **foundation of this taking is rooted not in the economic and planning process** with which SWIDA has been charged. **Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing** NCE's land at an acceptable negotiated price. **It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.**

This point is further emphasized by the fact that **other options were available to Gateway that could have addressed many of the problems** testified to by Pritchett, Ortbals and others. Gateway could have built a parking garage structure on its existing property rather than develop the land owned by NCE. **However, when Gateway discovered that the cost of constructing a garage on land it already owned was substantially higher than [***25] using SWIDA as its agent to take NCE's property for open-field parking, Gateway chose the easier and less expensive avenue.**

As a result of the acquisition of NCE's property, Gateway could realize an estimated increase of $ 13 to $ 14 million in projected revenue per year. While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion [**11] [****251] of the eminent domain power of the government. Using the power of the government for purely private purposes to allow Gateway to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

The legislature intended that SWIDA actively foster economic development and expansion in Madison and St. Clair Counties. 70 ILCS 520/2(g), 5 (West 1998). However, the actions of SWIDA in this case blur the lines between [*242] a public use and a private purpose. A highway toll authority may justify the use of eminent domain to ensure that motorists

> have reasonable access [***26] to gas stations. Illinois Toll Highway Comm'n, 16 Ill. 2d at 546. **Does the highway authority's power include the ability to use eminent domain authority to take additional land for a car wash, and then a lube shop? Could the authority then use its power to facilitate additional expansions for a motel, small retail shops, and entertainment centers? The initial, legitimate development of a public project does not justify condemnation for any and all related business expansions.**
>
> SWIDA contends that the "wisdom *** of the legislation and 'the means of executing the project' are beyond judicial scrutiny 'once the public purpose has been established.' It is that purpose which controls and not the 'means' or 'mechanics' of how the purpose is carried out." We disagree. The Constitution and the essential liberties we are sworn to protect control. In its wisdom, the legislature has given SWIDA the authority to use eminent domain power to encourage private enterprise and become involved in commercial projects that may benefit a specific region of this state. While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, "the government [***27] does not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, 73 L. Ed. 2d 868, 885, 102 S. Ct. 3164, 3178 (1982). The power of eminent domain is to be exercised with restraint, not abandon.

Here, **Sections 10 and 17 have become the default broker for MORE**. The latter could have discovered that the cost of building facilities for the distribution of electricity was substantially higher than using these assailed provisions as its agent to take **PECO's** properties. **MORE** chose the easier and less expensive avenue to exercise its franchise.

Three. It has been explained that:

> **Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.** The takings before us, however, would be **executed pursuant to a "carefully considered" development plan**. 268 Conn., at 54, 843 A.2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, as was true of the statute challenged in Midkiff, 467 U.S., at 245, 81 L. Ed. 2d 186, 104 S. Ct. 2321, **the City's development plan was not adopted "to benefit a particular class of identifiable individuals**."[35]

Here, the **actual purpose** for the expropriation of **PECO's** properties has been to bestow a **private benefit** on **MORE's** exercise of its franchise that it could not have fulfilled otherwise. **But for MORE's inability** to provide the facilities and technical knowhow to establish and operate its franchise, and **MORE's ultimate business plan to take-over and raid PECO's** facilities, the expropriation of **PECO's** properties would **not** have come to pass and would not have been **made** necessary. Verily, Sections 10 and 17 have been **meant to operationalize** a **business plan** to **benefit** a **particular class of identifiable individuals – MORE.**

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[35] Kelo, supra.

Four. On pages 4 to 5 of his Opinion, Justice Caguioa **confirms** that the **expropriation of PECO's properties** has its **roots** in the **perceived shortfalls** in **PECO's services**. His Opinion **rounds up the expropriation provisions to facts associated with the non-renewal of PECO's franchise, the award of the franchise to MORE**, and **PECO's alleged poor services** that gave birth to all its woes. In other words, **PECO** has been singled out with the expropriation of its properties without a judicial trial.

Five. Much like the *ponencia*, the Opinion echoes Sections 10 and 17 that the expropriation of **PECO's** properties – **including, but not limited** to its poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment – is intended for public use and demanded by public necessity. With this determination, **what else are we to expect from the lower court hearing the expropriation proceedings?** This confirms what I have been saying all along that **PECO has been singled out** and **punished for its alleged poor services** through the **take-over of its properties** whose **validity and legitimacy** have been **settled by legislative fiat** through Sections 10 and 17.

ACCORDINGLY, I vote to **DISMISS** the petitions and **AFFIRM** the trial court's Judgment dated July 1, 2019, declaring Sections 10 and 17 of Republic Act No. 11212 **UNCONSTITUTIONAL** for being bills of attainder and for being violative of the equal protection clause.

AMY C. LAZARO-JAVIER
Associate Justice

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court