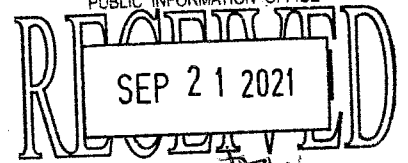




SUPREME COURT OF THE PHILIPPINES  
PUBLIC INFORMATION OFFICE



BY: JAN  
TIME: 10:50

Republic of the Philippines  
Supreme Court  
Manila

EN BANC

PHILIPPINE CHAMBER OF COMMERCE AND INDUSTRY, G.R. No. 228588  
SAN BEDA COLLEGE  
ALABANG INC., ATENEO DE  
MANILA UNIVERSITY, and  
RIVERBANKS DEVELOPMENT  
CORPORATION,  
Petitioners,

MAYNILAD WATER SERVICES,  
INC., SILIGAN WHITE CAP  
SOUTHEAST ASIA, INC., and  
FASTECH ELECTRONIQUE,  
INC.,  
Petitioners-in-Intervention,

JOCELYN FORGE, INC. and  
LYCEUM OF THE PHILIPPINES  
– BATANGAS CAMPUS,  
Petitioners-in-Intervention,

-versus-

DEPARTMENT OF ENERGY,  
HON. ALFONSO G. CUSI, in his  
official capacity as Secretary of the  
DEPARTMENT OF ENERGY,  
ENERGY REGULATORY  
COMMISSION and HON. JOSE  
VICENTE B. SALAZAR, in his  
official capacity as Chairperson of  
the ENERGY REGULATORY  
COMMISSION, and HON.  
ALFREDO J. NON, HON.

**GLORIA VICTORIA C. YAP-  
TARUC, HON. JOSEFINA  
PATRICIA M. ASIRIT, and HON.  
GERONIMO D. STA. ANA, in  
their official capacity as incumbent  
Commissioners of the ENERGY  
REGULATORY COMMISSION,**  
Respondents.

**NATIONAL ASSOCIATION OF  
ELECTRICITY CONSUMERS  
FOR REFORMS, INC.  
(NASECOR),**  
Intervenor,

**AC ENERGY HOLDINGS, INC.,**  
Intervenor,

**RETAIL ELECTRICITY  
SUPPLIERS ASSOCIATION OF  
THE PHILIPPINES, INC. (RESA),**  
Intervenor,

**PHINMA ENERGY  
CORPORATION,**  
Intervenor.

X-----X  
**SILLIMAN UNIVERSITY,**  
represented by its president, **DR.  
BEN S. MALAYANG III,**  
Petitioners,

X-----X  
**G.R. No. 229143**

-versus-

**DEPARTMENT OF ENERGY and  
ENERGY REGULATORY  
COMMISSION,**  
Respondents.

X-----X  
**BATANGAS II ELECTRIC  
COOPERATIVE, INC.,  
PENINSULA ELECTRIC  
COOPERATIVE, INC.,  
CAMARINES SUR I ELECTRIC  
COOPERATIVE, INC., ILOILO I  
ELECTRIC COOPERATIVE,**

X-----X  
**G.R. No. 229453**

Present:

**PERALTA, Chief Justice,**  
**PERLAS-BERNABE,**

**INC., AKLAN ELECTRIC LEONEN,  
COOPERATIVE, INC., CAPIZ CAGUIOA\*,  
ELECTRIC COOPERATIVE, GESMUNDO,  
INC., ANTIQUE ELECTRIC HERNANDO,  
COOPERATIVE \* INC., and CARANDANG,  
LEYTE III ELECTRIC LAZARO-JAVIER,  
COOPERATIVE, INC., INTING,  
Petitioners, ZALAMEDA,  
LOPEZ, M.,  
DELOS SANTOS,  
-versus- GAERLAN,  
ROSARIO, and  
LOPEZ, J., JJ.**

**DEPARTMENT OF ENERGY and  
ENERGY REGULATORY  
COMMISSION,  
Respondents.**

**Promulgated:** *Ana-Lith Paper-Joblet*

March 2, 2021

X-----X

## DECISION

**LEONEN, J.:**

Subordinate legislation from specialized administrative agencies must “be germane to the objects and purposes of the law and . . . in conformity with, the standards prescribed by the law”<sup>1</sup> to be held as a valid exercise of delegated legislative authority.

The Department of Energy is the agency tasked with formulating rules and regulations that will animate the policy objectives of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA). The Energy Regulatory Commission, in turn, is tasked with implementing the EPIRA rules and regulations as formulated and issued by the Department of Energy. It is not empowered to supplant the Department of Energy’s policies, rules, and regulations with its own issuances.<sup>2</sup>

This Court resolves these consolidated Petitions from electricity end-users and electric cooperatives under EPIRA. They claim that Department of Energy Circular No. DC2015-06-0010 and Energy Regulatory Commission Resolution Nos. 5, 10, 11, and 28, all series of 2016, are unconstitutional for usurping legislative authority, violating the right to due process, equal protection clause, and non-impairment clause, as well as being an unreasonable exercise of police power.

\* No part.

<sup>1</sup> *Gerochi v. Department of Energy*, 554 Phil. 563, 585 (2007) [Per J. Nachura, En Banc].

<sup>2</sup> *Alyansa Para Sa Bagong Pilipinas v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, <<http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc].

On June 8, 2001, the EPIRA was signed into law. It provided “a framework for the restructuring of the electric power industry, including the privatization of the assets of [National Power Corporation], the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities.”<sup>3</sup>

In line with the EPIRA, the Department of Energy and the Energy Regulatory Commission issued several administrative issuances allowing electricity end-users in the contestable market to freely choose from the qualified retail electricity suppliers, including local retail electricity suppliers and distribution utilities within their franchise area.<sup>4</sup>

On June 19, 2015, the Department of Energy issued Department Circular No. DC2015-06-0010<sup>5</sup> (Department Circular), which provided policies for the full implementation of Retail Competition and Open Access. The Department of Energy noted that only about 35% of the total number of contestable customers had chosen their retail electricity supplier and registered with the Philippine Electricity Market Corporation.<sup>6</sup> This slow movement impacted its preparation of the Distribution Development Plan, particularly in demand forecasting.<sup>7</sup>

Thus, the Department Circular mandated all contestable customers with a monthly average peak demand of one megawatt (MW) which were still sourcing electricity from distribution utilities, to secure a retail supply contract from any of the following energy suppliers by June 25, 2016:

Section 1. Compliance to Full Contestability by Contestable Customers with Average Demand of One (1) MW and Above.

All [Contestable Customers], which are currently being served by their franchised [Distribution Utilities], are mandated to secure their respective [Retail Service Contracts] no later than 25 June 2016, with any of the following:

- (a) *Any licensed [Retail Electricity Supplier];*

<sup>3</sup> Republic Act No. 9136 (2001), sec. 3.

<sup>4</sup> *Rollo* (G.R. No. 228588), pp. 3330–3332. DOE Department Circular No. DC2011-06-0006 (Creating the Steering Committee Defining the Policies for the Commencement of Retail Competition and Open Access; DOE Department Circular No. DC2012-05-0005 (Prescribing the General Policies for the Implementation of Retail Competition and Open Access); DOE Department Circular No. DC2012-11-0010 (Providing for Additional Guidelines and Implementing Policies for Retail Competition and Open Access and Amending Department Circular No. DC2012-05-0005; and DOE DC2013-07-0013 (Providing Supplemental Policies to Empower the Contestable Customers Under the Regime of Retail Competition and Open Access and Ensure Greater Competition in the Generation and Power Supply Sectors of the Philippine Electric Power Industry).

<sup>5</sup> *Id.* at 142–147, Providing Policies to Facilitate the Full Implementation of Retail Competition and Open Access (RCOA) in the Philippine Electric Power Industry.

<sup>6</sup> *Id.* at 143, DOE D.C. No. DC2015-06-0010 (2015), sixth Whereas Clause.

<sup>7</sup> *Id.* at 143, DOE D.C. No. DC2015-06-0010 (2015), seventh Whereas Clause.

- (b) *Any Generation Company*, currently owning and operating power generation facilities, duly issued a Certificate of Compliance (COC) by the [Energy Regulatory Commission] and is offering to serve the power requirements of any [Contestable Customers]: *Provided*, That it secures a [Retail Electricity Supplier] license from the [Energy Regulatory Commission];
- (c) *Any Prospective Generation Company*. As used in this Circular, a Prospective Generation Company shall refer to any Person or Entity that power generation project is undergoing construction or planned and has been included in the [Department of Energy's] Power Development Plan (PDP);

Any [Retail Supply Contract] that the [Contestable Customer] entered into with a Prospective Generation Company shall be deemed compliant with the Mandatory Contestability prescribed in this Circular;

The [Contestable Customer] and its counterparty [Retail Electricity Supplier], Generation Company or Prospective Generation Company shall submit to [the Department of Energy] and [Energy Regulatory Commission] their signed [Retail Supply Contract] for assessment, monitoring, policy and rule-making purposes particularly on the timelines and effectivity date of the [Retail Supply Contract].<sup>8</sup> (Emphasis supplied)

The Department Circular likewise gave a similar deadline to end-users with a monthly average peak demand ranging from 750 kilowatt (kW) to 999 kW to secure a retail supply contract with a retail electricity supplier.<sup>9</sup> It lowered the contestability threshold from one MW to below 750 kW and directed end-users with an average demand of 501 kW to below 750 kW to choose their retail electricity suppliers by June 26, 2018, subject to the Energy Regulatory Commission's evaluation of the retail market's performance.<sup>10</sup>

The Department Circular also directed the Energy Regulatory Commission to issue the necessary rules and procedures to resolve any displaced contract capacity or energy that the distribution utilities may experience due to the mandatory migration of their customers to Retail Competition and Open Access.<sup>11</sup>

On March 8, 2016, the Energy Regulatory Commission issued Resolution No. 5<sup>12</sup> (ERC Resolution No. 5), which adopted the Rules Governing the Issuance of Licenses to Retail Electricity Suppliers and Prescribing the Requirements and Conditions Therefor.<sup>13</sup> Its Section 3 provided those that may be retail electricity suppliers:

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<sup>8</sup> Id. at 143–144, DOE D.C. No. DC2015-06-0010 (2015), sec. 1.

<sup>9</sup> Id. at 144–145, DOE D.C. No. DC2015-06-0010 (2015), sec. 2.

<sup>10</sup> Id. at 145, DOE D.C. No. DC2015-06-0010 (2015), sec. 3.

<sup>11</sup> Id. at 145–146, DOE D.C. No. DC2015-06-0010 (2015), Sec. 4.

<sup>12</sup> Id. at 149–150, A Resolution Adopting the 2016 Rules Governing the Issuance of Licenses to Retail Electricity Suppliers (RES) and Prescribing the Requirements and Conditions Therefor.

<sup>13</sup> Id. at 151–172.

## Section 3. Who may become a [Retail Electricity Supplier]

In accordance with the Act and its [Implementing Rules and Regulations], any of the following may become a [Retail Electricity Supplier];

- a. Generation Company or Affiliate thereof;
- b. An Affiliate of a [Distribution Utility] with respect to the latter's Contestable Market within or outside its Franchise Area, subject to restrictions imposed by the [Energy Regulatory Commission] on market share limits and the conduct of business activities;
- c. Retail Aggregators;
- d. An Independent Power Producer (IPP) Administrator; and
- e. Any other Person intending to engage in the selling, brokering[,] or marketing of electricity to the Contestable Market, consistent with the Act and its [Implementing Rules and Regulations].

The [Energy Regulatory Commission] shall not be precluded from imposing additional restrictions contained in separate rules issued, or still be issued by it. The [Energy Regulatory Commission], for justifiable reasons, may likewise exempt compliance by a [Retail Electricity Supplier] license holder to specific license conditions, taking into account the actual operations of such [Retail Electricity Supplier] license holder.<sup>14</sup>

On May 12, 2016, the Energy Regulatory Commission issued Resolution No. 10<sup>15</sup> (ERC Resolution No. 10), which adopted the Revised Rules for Contestability.<sup>16</sup> It mandated end-users with an average monthly peak demand of at least one MW to enter into a retail supply contract with a retail electricity supplier by December 26, 2016. It also mandated end-users with an average monthly peak demand of at least 750 kW to enter into a retail supply contract with a retail electricity supplier by June 26, 2017. It then allowed for retail aggregation by June 26, 2018, in which electricity suppliers may contract with groups of end-users with an aggregate demand of at least 750 kW per group.<sup>17</sup>

Also on May 12, 2016, the Energy Regulatory Commission issued Resolution No. 11<sup>18</sup> (ERC Resolution No. 11), which imposed restrictions on distribution utilities and retail electricity suppliers in the Competitive Retail Electricity Market. It forbade distribution utilities from participating as suppliers in the contestable market and gave local retail electricity suppliers three years to wind down their business. It also barred them from entering into new retail supply contracts:

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<sup>14</sup> Id. at 152.

<sup>15</sup> Id. at 174–175.

<sup>16</sup> Id. at 176–194.

<sup>17</sup> Id. at 181, Revised Rules for Contestability, sec. 1(1.2).

<sup>18</sup> Id. at 196–198, A Resolution Imposing Restrictions on the Operations of Distribution Utilities and Retail Electricity Suppliers in the Competitive Retail Electricity Market.

NOW THEREFORE, pursuant to its mandate to promote competition and protect customer interests and to establish the ultimate goal of achieving a robust and competitive retail electricity market, the ERC hereby RESOLVES to ADOPT the following:

1. *No Distribution Utility (DU) shall engage in the Supply of Electricity to End-users in the Contestable Market unless such supply is made in its capacity as a Supplier of Last Resort (SOLR).*
2. *All Local Retail Electricity Suppliers (Local RES) shall wind down their business within three (3) years from effectivity [of] the instant Resolution. Existing Retail Supply Contracts (RSCs) entered into with their respective Contestable Customers shall remain valid until the expiration of the said contracts subject to the winding down period. Accordingly, no new RSCs shall be signed and executed after the effectivity of this Resolution.*

During the said winding down period, the Local RES shall continue to comply with all reportorial requirements prescribed by the Commission.

3. No [Retail Electricity Supplier] shall be allowed to supply more than thirty percent (30%) of the total average monthly peak demand of all contestable customers in the [Competitive Retail Electricity Market]. The level demand shall be determined by the [Energy Regulatory Commission] on a quarterly basis which should be posted on the website every 30<sup>th</sup> of the month following the quarter.
4. No [Retail Electricity Supplier] shall be allowed to transact more than fifty percent (50%) of the total energy transactions of its Supply business, with its affiliate Contestable Customers.

Any [Retail Electricity Supplier] not in compliance with this safeguard shall be given a period of two (2) years from 26 December 2016 to comply therewith: *Provided further*, That in no case shall it be allowed to execute any [Retail Service Contracts] with Affiliates, nor renew its [Retail Service Contracts] with the said affiliates unless such execution or renewal no longer amounts to a breach of the aforementioned safeguard.<sup>19</sup>

On November 15, 2016, the Energy Regulatory Commission issued Resolution No. 28<sup>20</sup> (ERC Resolution No. 28), which amended the mandatory contestability date for end-users with an average monthly peak demand of at least one MW. Originally set on December 26, 2016 per the Revised Rules for Contestability, the deadline was moved to February 26, 2017.<sup>21</sup> However, ERC Resolution No. 28 did not amend the mandatory contestability deadlines for end-users with an average monthly peak demand of at least 750 kW and 500 kW.

On December 27, 2016, petitioners Philippine Chamber of Commerce and Industry, San Beda College Alabang, Inc., Ateneo de Manila University,

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<sup>19</sup> Id. at 197.

<sup>20</sup> Id. at 200–203, Revised Timeframe for Mandatory Contestability, Amending Resolution No. 10 (2016) or the Revised Rules for Contestability.

<sup>21</sup> Id. at 202.

and Riverbanks Development Corporation filed a Petition for Certiorari, Prohibition, and Injunction<sup>22</sup> (First Petition) against respondents Department of Energy, Energy Regulatory Commission, and their respective officers. Petitioners claim to be end-users that have migrated to the contestable market to be able to freely choose from the retail electricity suppliers, including local retail electricity suppliers and distribution utilities, within their franchise area.<sup>23</sup>

The First Petition asserts that under Section 31 of the EPIRA, any migration of electricity end-users to the contestable market is voluntary,<sup>24</sup> as supported by congressional deliberations.<sup>25</sup> It argues that respondents abandoned the clear policy of the EPIRA, which was to promote competition through greater end-user choice,<sup>26</sup> when they issued the “patently unconstitutional” Department Circular, as well as ERC Resolution Nos. 5, 10, 11, and 28.<sup>27</sup>

The First Petition emphasizes that under ERC Resolution No. 10, an end-user that fails to enter into a retail supply contract before the deadline will be physically disconnected from its distribution utility. The same resolution also prohibited distribution utilities from supplying electricity, except as suppliers of last resort, which would “compel them to pay a 10% premium over the higher contract price and [Wholesale Electricity Spot Market] price.”<sup>28</sup> It also prohibited local retail electricity suppliers from entering into new retail supply contracts.<sup>29</sup>

The First Petition alleges that because of the assailed issuances, petitioners are forced to abrogate their current electricity supply contracts and negotiate on an unequal footing with the retail electricity suppliers accredited by respondent Energy Regulatory Commission.<sup>30</sup>

On January 17, 2017,<sup>31</sup> this Court directed respondents to comment on the First Petition.

On January 30, 2017, Silliman University filed its own Petition for Certiorari<sup>32</sup> (Second Petition), also seeking to nullify the assailed Department Circular and ERC Resolution No. 10, as amended.<sup>33</sup>

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<sup>22</sup> Id. at 3–129.

<sup>23</sup> Id. at 4–5.

<sup>24</sup> Id. at 31.

<sup>25</sup> Id. at 32–36.

<sup>26</sup> Id. at 36–38.

<sup>27</sup> Id. at 4.

<sup>28</sup> Id. at 49.

<sup>29</sup> Id. at 48–49.

<sup>30</sup> Id. at 50.

<sup>31</sup> Id. at 408–409.

<sup>32</sup> *Rollo* (G.R. No. 229143), pp. 3–22.

<sup>33</sup> Id. at 3–4.



Petitioner Silliman University narrates that it received its Certificate of Contestability from respondent Energy Regulatory Commission on October 12, 2012. Pursuant to the deadline imposed in the Department Circular, it sought proposals from retail electricity suppliers, but failed to receive any firm proposals at a competitive rate. On April 12, 2016 it wrote respondent Energy Regulatory Commission, asking to be exempted from being a mandatory contestable customer.<sup>34</sup> When this request was denied,<sup>35</sup> it filed this Second Petition.

The Second Petition alleges that the Department Circular and ERC Resolution No. 10 are both invalid forms of subordinate legislation since they exceeded the mandate of the law they sought to implement. It points out that the EPIRA does not compel contestable customers to enter into retail supply contracts, as its language is merely permissive; on the other hand, the assailed issuances force contestable customers to contract with retail electricity suppliers.<sup>36</sup>

The Second Petition asserts that the Department Circular and ERC Resolution No. 10 went beyond the executive's power to regulate commerce.<sup>37</sup> It adds that by forcing contestable customers to enter into contracts with the 23 licensed retail electricity suppliers, respondents are creating a virtual oligopoly, which is contrary to the principles of free enterprise and anti-trust under the Constitution.<sup>38</sup>

Finally, the Second Petition claims that as a shareholder of Negros Oriental Electric Cooperative 2,<sup>39</sup> petitioner enjoys rights as a co-owner and should not be forced to enter into a retail supply contract when it could patronize its own electric cooperative.<sup>40</sup>

On February 16, 2017, petitioners Batangas II Electric Cooperative, Inc., Peninsula Electric Cooperative, Inc., Camarines Sur I Electric Cooperative, Inc., Iloilo I Electric Cooperative, Inc., Aklan Electric Cooperative, Inc., Capiz Electric Cooperative, Inc., Antique Electric Cooperative, Inc., and Leyte III Electric Cooperative, Inc., all registered electric cooperatives, filed a Petition for Certiorari, Prohibition, and Injunction<sup>41</sup> (Third Petition) against respondents. They likewise seek to nullify the Department Circular and ERC Resolution Nos. 5, 10, 11, and 28.<sup>42</sup>

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<sup>34</sup> Id. at 5.

<sup>35</sup> Id. at 6.

<sup>36</sup> Id. at 9–12.

<sup>37</sup> Id. at 12–13.

<sup>38</sup> Id. at 14.

<sup>39</sup> Id. at 4.

<sup>40</sup> Id. at 17–18.

<sup>41</sup> *Rollo* (G.R. No. 229453), pp. 3–36.

<sup>42</sup> Id. at 4.

The Third Petition argues that under the EPIRA's Retail Competition and Open Access, end-users that switch to the contestable market may choose their electricity supplier from either a retail electricity supplier or a local retail electricity supplier. It stresses that before the assailed issuances, local retail electricity suppliers of distribution utilities or electric cooperatives were not required to obtain licenses to operate within their existing franchise area. However, in defiance of the EPIRA, the assailed issuances prohibited them from contracting with contestable customers, even within their franchise areas.<sup>43</sup>


The Third Petition underscores that such prohibition will cause electric cooperatives to lose some of their current clients and future business opportunities,<sup>44</sup> depriving them of their right to engage in a legitimate business.<sup>45</sup> Petitioners' constitutional right to equal protection is also allegedly violated, as the issuances discriminate against distribution utilities and electric cooperatives.<sup>46</sup> It likewise raises that the issuances violate the constitutional guarantee of non-impairment of contracts.<sup>47</sup>

The Third Petition also claims that the assailed issuances are not valid exercises of police power because they do not serve the public interest and even impede, rather than foster, free and open competition by removing electric cooperatives and distribution utilities from the qualified retail electricity suppliers for contestable customers. It adds that excluding electric cooperatives and distribution utilities from the contestable market will raise electricity rates in the captive market.<sup>48</sup>

The Third Petition advances that the assailed issuances are void for usurping legislative functions, as they went beyond the scope of the EPIRA by prohibiting distribution utilities and electric cooperatives from participating in the contestable market.<sup>49</sup>

On February 21, 2017,<sup>50</sup> the Court issued a Temporary Restraining Order enjoining respondents from implementing the assailed issuances:

NOW, THEREFORE, effective immediately and continuing until further orders from this Court, You, respondents Department of Energy (DOE), DOE Secretary Alfonso G. Cusi, Energy Regulatory Commission [ERC], ERC Chairperson Jose Vicente B. Salazar and ERC Commissioners Alfredo J. Non, Gloria Victoria C. Yap-Taruc, Josefina Patricia M. Asirit and Geronimo D. Sta. Ana, your agents, representatives, or persons acting in your place or stead, are hereby ENJOINED from



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<sup>43</sup> Id. at 12–16.

<sup>44</sup> Id. at 16–17.

<sup>45</sup> Id. at 18–20.

<sup>46</sup> Id. at 25–28.

<sup>47</sup> Id. at 28.

<sup>48</sup> Id. at 20–22.

<sup>49</sup> Id. at 23–25.

<sup>50</sup> *Rollo* (G.R. No. 228588), pp. 417–420.

implementing and enforcing DOE Circular No. DC2015-06-0010, Series of 2015, ERC Resolution No. 5, Series of 2016, ERC Resolution No. 10, Series of 2016, ERC Resolution No. 11, Series of 2016, and ERC Resolution No. 28, Series of 2016.<sup>51</sup>


On March 1, 2017,<sup>52</sup> this Court consolidated all three Petitions.

Two Petitions-in-Intervention<sup>53</sup> assailing the same issuances from respondents Department of Energy and Energy Regulatory Commission were also filed before this Court.

Petitioners-intervenors Maynilad Water Services, Inc., Silgan White Cap Southeast Asia, Inc., and Fastech Electronique, Inc. claim to be captive customers that purchase electricity from Manila Electric Company but are negotiating with retail electricity suppliers.<sup>54</sup> On the other hand, petitioners-intervenors Jocelyn Forge, Inc. and Lyceum of the Philippines-Batangas assert that they are also captive customers that have reached a monthly average peak of demand of approximately 750 kW.<sup>55</sup>

As current captive customers with an average monthly peak demand of approximately 750 kW to 999 kW, both groups of petitioners-intervenors express concern about the effect that Phase Two of the assailed issuances, or the mandatory switching by customers with an average monthly peak demand of 750 kW to 999 kW, will have on them since it restricted their choice of suppliers while also decreeing the mandatory migration of all qualified contestable customers.<sup>56</sup>

Both Petitions-in-Intervention claim that this Court's Temporary Restraining Order, meant to maintain status quo and prevent the forcible migration into the contestable market, was erroneously interpreted by respondents and the Philippine Electricity Market Corporation to include even voluntary switching or migration into the contestable market. As such, voluntary switching was held in abeyance and petitioners-intervenors were prevented from contracting with their chosen retail electricity suppliers.<sup>57</sup> Thus, they ask this Court to clarify that the Temporary Restraining Order only covered the mandatory migration to the contestable market and excluded voluntary migration.<sup>58</sup>



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<sup>51</sup> Id. at 418–419.

<sup>52</sup> Id. at 964–965.

<sup>53</sup> Id. at 911–930 and 1594–1611.

<sup>54</sup> Id. at 915.

<sup>55</sup> Id. at 1598.

<sup>56</sup> Id. at 915–919 and 1598–1601.

<sup>57</sup> Id. at 919–922 and 1602–1604.

<sup>58</sup> Id. at 927–928 and 1608–1609.

In their Comment,<sup>59</sup> respondents Department of Energy and Energy Regulatory Commission, represented by the Office of the Solicitor General, claim that the assailed issuances were issued in the exercise of their quasi-legislative power; hence, Rule 65 is an improper remedy since it is a remedy available against a tribunal, board, or officer exercising judicial or quasi-judicial functions.<sup>60</sup> They also claim that the cases cited by petitioners, supporting their claim that certiorari is the appropriate remedy, were exceptional cases that invoked this Court's expanded jurisdiction and do not apply to quasi-legislative acts issued by administrative agencies.<sup>61</sup>

Respondents state that petitioners prematurely availed of a petition for certiorari under Rule 65 considering they failed to first exhaust the available administrative remedies under the Energy Regulatory Commission Rules of Procedure and Practice, the available speedy, plain, and adequate remedy.<sup>62</sup> Respondents also point out that there is no actual case that would require judicial review, or *prima facie* evidence of grave abuse of discretion, in promulgating the assailed issuances.<sup>63</sup>

Respondents also assail petitioners' standing in the First Petition, saying that being compelled to migrate to the contestable market did not cause them direct or potential injury.<sup>64</sup>

On the substantive issues, respondents assert that they acted within the bounds of law when they issued the assailed issuances. They claim that Section 31 of the EPIRA requires end-users upon reaching threshold electricity demand to migrate from the captive market to the contestable market. They further claim that the EPIRA granted respondent Department of Energy encompassing quasi-legislative authority to formulate rules and regulations, as well as "awesome"<sup>65</sup> regulatory powers to exercise other powers necessary or incidental to implement the EPIRA and restructure the electric power industry.<sup>66</sup>

Respondents aver that distribution utilities have no statutory right to supply electricity in the contestable market. Instead, it is respondent Energy Regulatory Commission that has the power to determine the supplier in the contestable market.<sup>67</sup> Respondents claim that distribution utilities are only authorized to supply electricity in the captive market and not in the contestable market.<sup>68</sup> They allege that the previous allowance for

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<sup>59</sup> Id. at 440–523. On April 4, 2017 respondents adopted its Comment to the First Petition for the Third Petition. *See rollo* (G.R. No. 228588), pp. 712–716.

<sup>60</sup> Id. at 462–463.

<sup>61</sup> Id. at 465–466.

<sup>62</sup> Id. at 463–465.

<sup>63</sup> Id. at 466–468.

<sup>64</sup> Id. at 468–470.

<sup>65</sup> Id. at 472.

<sup>66</sup> Id. at 470–472.

<sup>67</sup> Id. at 464–465.

<sup>68</sup> Id. at 477–478.

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distribution utilities to provide electricity supply in the contestable market, despite the wording of the EPIRA, was only a temporary measure to address a projected gap in the supply, and was only meant until the gap could be addressed by the incoming retail electricity suppliers.<sup>69</sup>

Respondents maintain that the assailed issuances were not issued to recognize the statutory right of contestable customers to choose their electricity supplier, but formed part of restructuring the electric industry that respondent Energy Regulatory Commission implemented per its mandate under the EPIRA to facilitate the establishment of the Retail Competition and Open Access.<sup>70</sup>

Respondents assert that the migration of contestable customers to the contestable market is mandatory. They claim that the phrase “shall allow” under Section 31 of the EPIRA should be read in relation to the provision’s entirety.<sup>71</sup> They also claim that it will be difficult to create a substantial contestable market that will entice business entities to engage in supplying electricity if end-users are given the option to voluntarily migrate from captive market to the contestable market.<sup>72</sup> They also state that the mandatory migration will foster competition in the supply sector, which would lower electricity prices and not, as petitioners fear, create a “virtual cartelization” of the contestable market.<sup>73</sup>

Respondents maintain that the issuances on physical disconnection or the payment of premiums for failure to timely execute a retail supply contract are valid, considering the mandatory migration to the contestable market of the affected end-users required by the EPIRA.<sup>74</sup> However, they manifested that respondent Energy Regulatory Commission has already proposed amending the supplier of last resort premium from the original rate of 10% to 2% for the first and second billing periods, 6% for the third and fourth billing periods, and 8% for the fifth and sixth billing periods. Further, the premium will not be imposed until three months after the mandatory contestability period of February 26, 2017.<sup>75</sup>

Respondents assert that the assailed issuances do not violate the non-impairment clause because a franchise is in the nature of a grant, which is not covered by the non-impairment clause.<sup>76</sup> They also maintain that the issuances were valid exercises of police power delegated to them by Congress.<sup>77</sup>

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<sup>69</sup> Id. at 487.

<sup>70</sup> Id. at 486.

<sup>71</sup> Id. at 493–494.

<sup>72</sup> Id. at 500.

<sup>73</sup> Id. at 496–497.

<sup>74</sup> Id. at 503–504.

<sup>75</sup> Id. at 505.

<sup>76</sup> Id. at 507.

<sup>77</sup> Id. at 508–509.

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Respondents claim that the issuance of a status *quo ante* order or temporary restraining order is not warranted because, first, petitioners have no clear and unmistakable legal right that ought to be protected since the issuances were valid. Second, the EPIRA authorizes distribution utilities to supply electricity without a license only in the captive market; the local retail electricity suppliers, or the supply arms of distribution utilities, do not have a statutory right to supply electricity in the contestable market.<sup>78</sup>

Respondents claim that petitioners failed to show that they will suffer any grave and irreparable injury if injunctive relief is not issued. However, they point out that even if petitioners successfully prove that they will suffer injury, that injury is not irreparable because it is pecuniary in nature and can be compensated. Respondents emphasize that with the issuance of a temporary restraining order, it is the public that will suffer grave and irreparable injury because the implementation of the Retail Competition and Open Access will once again be delayed.<sup>79</sup>

In their Consolidated Comment<sup>80</sup> to the Second and Third Petitions, respondents reiterate that the assailed issuances are consistent with the EPIRA's objective of complete migration of all end-users from the captive market to the contestable market.<sup>81</sup> They further assert that allowing distribution utilities in the contestable market will defeat the essence of open access.<sup>82</sup> They point out that the franchise of distribution utilities and electric cooperatives is limited to their captive customers; hence, they cannot point to a right to operate in the contestable market.<sup>83</sup> The previous permission granted to distribution utilities to supply electricity to the contestable market was merely an interim measure in view of the necessary transition toward the desired scenario of full migration.<sup>84</sup>

Respondents likewise deny that the assailed issuances violated petitioners-intervenors' freedom to contract because contestable customers have other options aside from entering into retail supply contracts with retail electricity suppliers.<sup>85</sup> They also assert that the issuances do not violate the non-impairment clause, as the latter does not apply to non-finalized power supply agreements and retail supply contracts,<sup>86</sup> or the right to property, as distribution utilities have no constitutional right to supply electricity to the contestable market.<sup>87</sup>

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<sup>78</sup> Id. at 514–515.

<sup>79</sup> Id. at 515–517.

<sup>80</sup> Id. at 1052–1132.

<sup>81</sup> Id. at 1070–1075.

<sup>82</sup> Id. at 1081–1083.

<sup>83</sup> Id. at 1083–1088.

<sup>84</sup> Id. at 1090–1094.

<sup>85</sup> Id. at 1095–1102.

<sup>86</sup> Id. at 1110–1113.

<sup>87</sup> Id. at 1113–1116.

The National Association of Electricity Consumers for Reforms, Inc. (NASECORE),<sup>88</sup> AC Energy Holdings, Inc. (AC Energy),<sup>89</sup> and PHINMA Energy Corporation (Phinma)<sup>90</sup> then filed their respective Comments-in-Intervention.

NASECORE and AC Energy both maintain that Section 31 of the EPIRA granted respondents the power to define the contestable market,<sup>91</sup> with NASECORE adding that mandatory migration is also included.<sup>92</sup> NASECORE points out that the EPIRA itself categorically states in Section 75 that its provisions should “be construed in favor of the establishment, promotion, preservation of competition[,] and people empowerment so that the widest participation of the people, whether directly or indirectly, is ensured.”<sup>93</sup> Meanwhile, AC Energy avers that mandatory migration is the only logical interpretation in light of the legislative intent of full contestability down to the household level, in effect freeing all end-users from the captive market.<sup>94</sup>

For its part, Phinma asserts that the prohibition on a distribution utility from directly participating in the contestable market was the only way to assure a free and competitive electricity marketplace.<sup>95</sup>

NASECORE then proclaims that the assailed issuances were reasonable state regulations<sup>96</sup> and valid exercises of respondents’ police power<sup>97</sup> to dismantle the existing monopoly and provide end-users with “fair and reasonable electricity prices brought about by retail competition.”<sup>98</sup>

Additionally, NASECORE underscores that the assailed issuances, in prohibiting distribution utilities<sup>99</sup> and local retail electricity suppliers from participating in the contestable market, did not violate the equal protection clause because there were substantial differences between local retail electricity suppliers and retail electricity suppliers, and end-users in the captive market and contestable market.<sup>100</sup>

Finally, AC Energy and Phinma both contend that the voluntary migration to the contestable market is not in issue; hence, this Court’s

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<sup>88</sup> Id. at 612–636.

<sup>89</sup> Id. at 972–1051.

<sup>90</sup> Id. at 1640–1671.

<sup>91</sup> Id. at 621–624 and 1010–1015.

<sup>92</sup> Id. at 621–622.

<sup>93</sup> Id. at 623.

<sup>94</sup> Id. at 1012.

<sup>95</sup> Id. at 1664.

<sup>96</sup> Id. at 615.

<sup>97</sup> Id. at 618–629.

<sup>98</sup> Id. at 620.

<sup>99</sup> Id. at 624–625.

<sup>100</sup> Id. at 630–631.

decision should only be limited to the matters raised, such as the mandatory migration and prohibition of distribution utilities from the captive market.<sup>101</sup>

In their respective replies,<sup>102</sup> petitioners and petitioners-intervenors insist that the assailed issuances are *ultra vires*<sup>103</sup> for amending the EPIRA in a way that is not germane to the purpose of the law.<sup>104</sup> Petitioner Silliman University underscores that while the EPIRA's ultimate goal was to allow for contestability up to the household level, the "democratization of the market cannot be done undemocratically."<sup>105</sup>

Petitioners also assert that the assailed issuances violated their freedom to contract.<sup>106</sup> They supposedly gave unfair negotiating leverage to the accredited retail electricity suppliers, which merely had to sit back and wait for the end-users, the ones being forced to enter into lopsided negotiations to meet the enforced deadline.<sup>107</sup>

Finally, petitioners maintain that this Court's issuance of a temporary restraining order led to an increase in the number of registered contestable customers in the contestable market as greater market competition resulted, which, in turn, enticed the qualified end-users to voluntarily migrate to the contestable market.<sup>108</sup> They stress that "a market that promotes greater end-user choice and allow[s] the most number of qualified suppliers to compete for petitioners' and other end-users' business"<sup>109</sup> was what was most beneficial to end-users and what was intended by the EPIRA.<sup>110</sup>

On December 19, 2017, the Office of the Solicitor General<sup>111</sup> manifested that it would no longer be representing respondent Department of Energy, but clarified that it would still be acting on respondent Energy Regulatory Commission's behalf:

3. The OSG also manifests that it will only be representing the ERC in this case from hereon, as the Department of Energy (DOE) has communicated to the OSG its recent views in the present case last 22 November 2017. Upon an in-depth study of the case, the OSG manifests before the Honorable Court that it maintains and shares the ERC's views that (a) the local retail electricity suppliers (RES) of distribution utilities (DUs) should be prohibited from participating as suppliers in the contestable market pursuant to Republic Act No. 9136 ("EPIRA"), and (b)

<sup>101</sup> Id. at 997-999 and 1634-1636.

<sup>102</sup> Id. at 1320-1404, 2244-2301, 2342-2412, 2851-2932 [Philippine Chamber of Commerce]; 3252-3263, 3264-3272 [Maynilad]; 1882-1904, 3689-3699 [Batelec]; and 3582-3612 [Silliman].

<sup>103</sup> Id. at 1348-1360, 1892-1895, 3256-3259, and 3598-3604.

<sup>104</sup> Id. at 3267-3268.

<sup>105</sup> Id. at 3600.

<sup>106</sup> Id. at 1325-1337, 1902-1903, 3604-3609.

<sup>107</sup> Id. at 1341-1342.

<sup>108</sup> Id. at 2865-2866.

<sup>109</sup> Id. at 2868.

<sup>110</sup> Id. at 2870.

<sup>111</sup> Id. at 3112-3121.

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the migration of end-users, upon reaching the threshold for contestability under Section 31 of the EPIRA, to the contestable market is mandatory.<sup>112</sup>

On April 5, 2018, respondent Department of Energy filed a separate Comment<sup>113</sup> to the consolidated Petitions and Petitions-in-Intervention, with motion for early resolution. It admits that after reviewing its assailed Department Circular and comparing it with its previous Retail Competition and Open Access-related issuances, it found the Department Circular to be inconsistent with the EPIRA, particularly with its requirement for the mandatory migration to the contestable market.<sup>114</sup>

Respondent Department of Energy says that it manifested to the Office of the Solicitor General its intention to issue new policy directives which would more accurately reflect the EPIRA, but the Office of the Solicitor General said it would maintain its original position and would only represent respondent Energy Regulatory Commission moving forward.<sup>115</sup>

Respondent Department of Energy states that all of its Retail Competition and Open Access-related issuances<sup>116</sup> prior to the assailed Department Circular consistently upheld the customers' power of choice to migrate to the contestable retail market.<sup>117</sup> It admits that its assailed Department Circular departed from the intent of the EPIRA when it restricted the participation of distribution utilities in the supply sector to its captive customers.<sup>118</sup>

Respondent Department of Energy states that on November 29, 2017, it issued Department Circular Nos. DC2017-12-0013<sup>119</sup> and DC2017-12-0014.<sup>120</sup> These issuances supposedly revoked and rectified the policies in the assailed Department Circular to reflect the true intent of the EPIRA.<sup>121</sup> Respondent adds that with its rectification, the guidelines issued by respondent Energy Regulatory Commission became devoid of legal basis:

23. With the rectification by DOE of its RCOA policies primarily those that are contained in DOE DC2015-06-0010, the regulatory guidelines anchored and issued in accordance thereof, now stand without legal basis. Under Section 4 of Republic Act No. 7638 (otherwise known as the Department of Energy Act of 1992) the responsibility and authority to "prepare, integrate, coordinate, supervise and control all plans, programs[,] projects, and activities of the Government relative to energy

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<sup>112</sup> Id. at 3114.

<sup>113</sup> Id. at 3325–3339.

<sup>114</sup> Id. at 3328.

<sup>115</sup> Id. at 3328.

<sup>116</sup> Id. at 3330–3332.

<sup>117</sup> Id.

<sup>118</sup> Id. at 3332–3334.

<sup>119</sup> Id. at 3340–3342.

<sup>120</sup> Id. at 3343–3345.

<sup>121</sup> Id. at 3334–3336.

exploration, development, utilization, distribution[,] and conservation” is vested with the DOE.<sup>122</sup>

Thus, respondent Department of Energy asserts that there was no longer any justiciable issue for the Court’s consideration, rendering the case moot.<sup>123</sup>

The issues for this Court’s resolution are:

First, whether or not the assailed issuances should be struck down for being *ultra vires*; and

Second, whether or not the Petitions have been mooted by respondent Department of Energy’s revocation of its assailed Department Circular.

## I

Electricity is recognized as a basic necessity “whose generation and distribution is imbued with public interest”;<sup>124</sup> thus, providing electricity to the entire country, especially the rural areas, has always been a principal concern of the government.<sup>125</sup>

Prior to the EPIRA, all electricity end-users belonged to the captive market, as they could not choose their electricity suppliers and had no option but to be serviced by the electricity supplier that had jurisdiction over the area. But with the EPIRA enacted and the Retail Competition and Open Access implemented, end-users down to the household level would soon be able to choose their own electricity suppliers. This is apparent in Section 31 of the EPIRA:

SECTION 31. *Retail Competition and Open Access.* — Any law to the contrary notwithstanding, retail competition and open access on distribution wires shall be implemented not later than three (3) years upon the effectivity of this Act, subject to the following conditions:

- (a) Establishment of the wholesale electricity spot market;
- (b) Approval of unbundled transmission and distribution wheeling charges;
- (c) Initial implementation of the cross subsidy removal scheme;
- (d) Privatization of at least seventy (70%) percent of the total capacity of generating assets of NPC in Luzon and Visayas; and
- (e) Transfer of the management and control of at least seventy percent (70%) of the total energy output of power plants under

<sup>122</sup> Id. at 3336.

<sup>123</sup> Id.

<sup>124</sup> *Manila Electric Co. v. Spouses Chua*, 637 Phil. 80,101 (2010) [Per J. Brion, Third Division].

<sup>125</sup> *NPC Employees Consolidated Union v. National Power Corporation*, 550 Phil. 199 (2007) [Per J. Sandoval-Gutierrez, First Division].

contract with [National Power Corporation] to the [Independent Power Producers] Administrators.

Upon the initial implementation of open access, the [Energy Regulatory Commission] shall allow all electricity end-users with a monthly average peak demand of at least one megawatt (1MW) for the preceding twelve (12) months to be the contestable market. Two (2) years thereafter, the threshold level for the contestable market shall be reduced to seven hundred fifty kilowatts (750kW). At this level, aggregators shall be allowed to supply electricity to end-users whose aggregate demand within a contiguous area is at least seven hundred fifty kilowatts (750kW). Subsequently and every year thereafter, the [Energy Regulatory Commission] shall evaluate the performance of the market. On the basis of such evaluation, it shall gradually reduce the threshold level until it reaches the household demand level. In the case of electric cooperatives, retail competition and open access shall be implemented not earlier than five (5) years upon the effectivity of this Act.

Retail Competition and Open Access paved the way for the creation of the Competitive Retail Electricity Market, where qualified end-users in the contestable market and retail electricity suppliers can directly enter into electricity supply contracts with each other. The EPIRA anticipated that robust competition among retail electricity suppliers in the contestable market will eventually lead to lower electricity rates and improved services.

The controversy before us hinges on the proper interpretation of “shall allow” in Section 31, in relation to the transfer of a qualified end-user to the contestable market.

Petitioners contend that the migration is merely voluntary,<sup>126</sup> as evidenced by congressional deliberations<sup>127</sup> on the EPIRA law and the EPIRA’s policy of promoting competition through greater end-user choice.<sup>128</sup>

On the other hand, respondents assert that the migration is mandatory, as supported by the EPIRA itself. They posit that the assailed issuances providing for mandatory migration fall under respondent Department of Energy’s power and function under the EPIRA to formulate rules and regulations to implement the objectives of the law.<sup>129</sup>

Respondents are mistaken.

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<sup>126</sup> *Rollo* (G.R. No. 228588), pp. 90–91; and *rollo* (G.R. No. 229143), pp. 9–12.

<sup>127</sup> *Rollo* (G.R. No. 228588), pp. 32–34.

<sup>128</sup> *Id.* at 36–38.

<sup>129</sup> *Id.* at 471–474.

It is well established that when the law is clear and unambiguous, “it should be applied as written.”<sup>130</sup> Further, the statute must be construed as a whole to give effect to all its provisions.<sup>131</sup> *National Tobacco Administration v. Commission on Audit*<sup>132</sup> instructs:

Cardinal is the rule in statutory construction “that the particular words, clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts and in order to produce a harmonious whole. A statute must be so construed as to harmonize and give effect to all its provisions whenever possible.” And the rule — that statute must be construed as a whole — requires that apparently conflicting provisions should be reconciled and harmonized, if at all possible.<sup>133</sup> (Citations omitted)

A plain interpretation of the phrase “shall allow” implies that an end-user has requested to transfer to the contestable market to the Energy Regulatory Commission for its approval. The use of “shall” prior to “allow” signifies that it is mandatory upon the Energy Regulatory Commission to grant the request if the applicant end-user meets all of the requisites for transfer to the contestable market. Nothing in Section 31 insinuates that an end-user’s transfer to the contestable market is automatic.

Department of Energy Circular No. DC2012-05-0005 (Prescribing the General Policies for the Implementation of the Retail Competition and Open Access) supports the voluntary transfer to the contestable market by recognizing the contestable customer’s choice of its electricity supplier and directing respondent Energy Regulatory Commission to certify the eligible contestable customers before the implementation of the retail competition and open access:

Section 4. Customer’s Choice. Upon Open Access Date, a [*Contestable Customer (CC)*] shall be allowed to choose where to source its electricity. For this purpose, a CC can source from a Generation Company, a Supplier, an affiliate of a [*Distribution Utility (DU)*] which has constituted itself as a Supplier, or the Supply Business of a Distribution Utility (DU) within its franchise area.

4.1. All CCs shall only deal with a supplier of electricity duly licensed by the ERC. This includes DUs that have structurally or functionally unbundled their business into Wire and Supply businesses, duly approved by the ERC.

4.2. The ERC shall certify all eligible CCs at least six (6) months prior to the initial implementation of the RCOA. For this purpose, all DUs

<sup>130</sup> *Commissioner of Internal Revenue v. Apo Cement Corp.*, 805 Phil 441, 460 (2017) [Per J. Leonen, Second Division], citations omitted.

<sup>131</sup> *National Tobacco Administration v. Commission on Audit*, 370 Phil. 793 (1999) [Per J. Purisima, En Banc].

<sup>132</sup> 370 Phil. 793 (1999) [Per J. Purisima, En Banc].

<sup>133</sup> Id. at 808.

are hereby mandated to provide DOE, ERC[,] and PEMC the list of CCs including pertinent information, such as but not limited to load profile for the last twelve (12) months, name of customers, among others.

4.3. The PEMC is hereby directed to register all eligible CCs certified by the ERC within three (3) months prior to Open Access Date.<sup>134</sup> (Emphasis supplied)

Department of Energy Circular No. DC2012-11-0010 (Providing for Additional Guidelines and Implementing Policies for Retail Competition and Open Access and Amending Department Circular No. DC2012-05-0005)<sup>135</sup> then tasked respondent Energy Regulatory Commission with, among others, specifying the contestable market by issuing certificates of contestability “to electricity end-users with an average twelve months peak demand of one (1) megawatt and above[.]”<sup>136</sup>

Notably, “mandatory contestability” was only mentioned for the first time in Department Circular No. DC2012-11-0010, but this was used alongside “customer choice” and with reference to the Retail Open Competition Access’s promotion of genuine competition and customer choice:

**Section 7. Mandatory Contestability and Customer Choice.** Consistent with the EPIRA, the RCOA should promote genuine competition, greater efficiency, customer choice, and the true cost of electricity. For this purpose, the power of choice is conferred to Contestable Customers subject to the rules and regulations prescribed herein as well as to subsequent issuances by the DOE.

Accordingly, all Contestable Customers shall be allowed to choose where to source its supply of electricity. For this purpose, any Contestable Customer may source its electricity supply requirements from a Supplier duly licensed by ERC, a Local Supplier duly authorized by ERC to perform such, or through the WESM. In the latter case, the Contestable Customer shall be responsible to manage its registration and compliance with the WESM Rules and Manuals, and managing its own risks as well.

As a general policy, a Contestable Customer can have one Supplier of electricity per Metering Point. Thus, any Contestable Customer may have several contracted Suppliers based on the number of its Metering Points. However, should a Contestable Customer opts (sic) to enter into a (sic) multiple supply contracts even with only single Metering Point, it shall be allowed, provided arrangements shall be consistent with the Circular and

<sup>134</sup> DOE Department Circular No. DC2012-05-0005 (2012), sec. 4, <[https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc\\_2012-05-0005.pdf](https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc_2012-05-0005.pdf)> (Last accessed on January 19, 2021).

<sup>135</sup> DOE Department Circular No. DC2012-11-0010 (2012) <[https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc\\_2012-11-0010.pdf](https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc_2012-11-0010.pdf)> (Last accessed on January 20, 2021).

<sup>136</sup> DOE Department Circular No. DC2012-11-0010 (2012), sec. 5(a)(iv).

the Retail Rules to be promulgated by the DOE, and ERC rules and regulations.<sup>137</sup> (Emphasis in the original)

In Department of Energy Circular No. DC2013-07-0013<sup>138</sup> (Providing Supplemental Policies to Empower the Contestable Customers under the Regime of Retail Competition and Open Access and Ensure Greater Competition in the Generation and Supply Sectors of the Philippine Electric Power Industry), respondent Department of Energy noted the concerns raised by a significant number of contestable customers that they were having difficulty obtaining offers for retail supply contracts from retail electricity suppliers,<sup>139</sup> as well as the perception of the Retail Competition Open Access as a suppliers' market.<sup>140</sup> This prompted it to issue supplemental policies to empower contestable customers and promote "greater competition in the generation and supply sectors in order to achieve the objectives of [Retail Competition and Open Access.]"<sup>141</sup>

Like the previous department circulars, Department Circular No. 2013-07-0013 also emphasized customer choice, with the contestable customer at liberty to source its electricity supply from licensed and authorized local retail electricity suppliers "and, on its option, directly through the Wholesale Electricity Spot Market."<sup>142</sup>

Additionally, Department Circular No. DC2013-07-0013 empowered contestable customers to switch to a more favorable contract with another retail electricity supplier, but counterbalanced this with a matching option for the incumbent retail electricity suppliers to retain their respective retail supply contracts by matching the new offer.<sup>143</sup>

This reflects the EPIRA's underlying objective of creating a free and

<sup>137</sup> DOE Department Circular No. DC2012-11-0010 (2012), sec. 7.

<sup>138</sup> DOE Department Circular No. DC2013-07-0013 (2013) <[https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc\\_2013-07-0013.pdf](https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc_2013-07-0013.pdf)> (Last accessed on January 20, 2021).

<sup>139</sup> DOE Department Circular No. DC2013-07-0013, fourth Whereas clause, <[https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc\\_2013-07-0013.pdf](https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc_2013-07-0013.pdf)> (Last accessed on January 20, 2021).

<sup>140</sup> DOE Department Circular No. DC2013-07-0013 (2013), sixth Whereas clause.

<sup>141</sup> DOE Department Circular No. DC2013-07-0013 (2013), seventh Whereas clause.

<sup>142</sup> DOE Department Circular No. DC2013-07-0013 (2013), sec. 1.

<sup>143</sup> DOE Department Circular No. DC2013-07-0013 (2013), sec. 2 provides:

Section 2. Supply Contract and Customer Switching. Regardless of the contract period of the RSC entered into by a CC and its RES, such RSC shall provide "Customer Switching" provision whereby the CC shall be allowed to terminate its RSC with its incumbent RES should there be a competitive supply contract package that is more responsive to the needs of the CC. The incumbent RES shall have the right to retain the RSC provided that it can match the superior offer to the CC.

Notwithstanding and consistent with Section 8 of DOE Circular No. DC2012-11-0010, the initial switch of a CC to its new Supplier shall only be allowed six (6) months after the full RCOA Commercial Operation Date. The actual switching shall be based on a considerable period of time as may be determined by the RES and the CC, but should not exceed the applicable notification requirement by the CRB, as provided in the same DOE Circular.

Towards this end, the ERC shall provide the necessary guidelines in determining competitiveness of an RSC. The competitiveness of a supply contract package may include determination on among other things, price, quality of power, and value added services.

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competitive market that will provide reliable electricity at reasonable prices.<sup>144</sup> The concept of “true market competition” is echoed repeatedly in the EPIRA, with Section 2(c) of the law declaring it a State policy “[t]o ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability[.]”

In its Comment with Motion for Early Resolution,<sup>145</sup> respondent Department of Energy admits that upon further scrutiny of the assailed issuances, it found palpable inconsistencies with the EPIRA, particularly on the mandatory migration of eligible end-users to the contestable market and the prohibition imposed on distribution utilities from supplying electricity outside their captive market.<sup>146</sup> It state:

15. In all the above-cited issuances, the power of choice of the customers was consistently upheld in that the option of whether or not to migrate to the Contestable Retail Market (CREM) was given to them. This brings us to the core of DC2015-06-0010 which departed from the previous policy issuances of the DOE and provided for **mandatory** migration of eligible customers to the CREM. Thus:

**“Section 1. Compliance to Full Contestability by Contestable Customers with Average Demand of One (1) MW and Above.** All CCs which are currently being served by their franchised DUs, are mandated to secure their respective RSCs **not later than 25 June 2016.**”

**Section 2. Contestability of End-Users with Average Demand from 750kW and above.**

- a. All CCs with average demand ranging from 750kW and 999kW for the preceding 12-month period, are mandated to secure their RSCs with a RES no later than 25 June 2016;
- b. Effective 26 June 2016, all Aggregators shall be allowed to compete with RES, Generation Companies[,] [and] Prospective Generation Companies;
- c. In the case of retail aggregation, any CCs within a contiguous area may individually or collectively aggregate their electricity supplier requirements to an Aggregator duly licensed with the ERC. The aggregated demand shall in no case be lower than 750kW.<sup>147</sup> (Emphasis in the original)

*Equi-Asia Placement, Inc. v. Department of Foreign Affairs*<sup>148</sup> stressed that the resulting complexities of modern life called for the exercise of delegated legislative authority by specialized administrative agencies. Nonetheless, regulations issued under the power of subordinate legislation must still conform to the law it seeks to enforce:

<sup>144</sup> Republic Act No. 9136 (2001), sec. 2.

<sup>145</sup> *Rollo* (G.R. No. 228588), pp. 3325–3337.

<sup>146</sup> *Id.* at 3328.

<sup>147</sup> *Id.* at 3332.

<sup>148</sup> 533 Phil. 590 (2006) [Per J. Chico-Nazario, First Division].

All that is required for the valid exercise of this power of subordinate legislation is that the regulation must be germane to the objects and purposes of the law; and that the regulation be not in contradiction to, but in conformity with, the standards prescribed by the law. Under the first test or the so-called completeness test, the law must be complete in all its terms and conditions when it leaves the legislature such that when it reaches the delegate, the only thing he will have to do is to enforce it. The second test or the sufficient standard test, mandates that there should be adequate guidelines or limitations in the law to determine the boundaries of the delegate's authority and prevent the delegation from running riot.<sup>149</sup> (Citations omitted)

Thus, to be a valid delegation of legislative power, the subordinate legislation issued by specialized administrative agencies such as respondents must "be germane to the objects and purposes of the law and . . . in conformity with, the standards prescribed by the law."<sup>150</sup>

The EPIRA champions customer choice and allows contestable customers to choose from either franchise holders<sup>151</sup> who have unbundled<sup>152</sup> their business or non-regulated electricity suppliers.<sup>153</sup> Clearly, as respondent Department of Energy itself admits,<sup>154</sup> the mandatory migration of qualified end-users to the contestable market required in the assailed issuances finds no basis in the law they seek to implement.

## II

The EPIRA reorganized the electric power industry by dividing it into

<sup>149</sup> Id. at 607–608.

<sup>150</sup> *Gerochi v. Department of Energy*, 554 Phil. 563, 585 (2007) [Per J. Nachura, En Banc].

<sup>151</sup> Republic Act No. 9136 (2001), sec. 4(q) provides:

Section 4. *Definition of Terms.*—

(q) "Distribution Utility" refers to any electric cooperative, private corporation, government-owned utility or existing local government unit which has an exclusive franchise to operate a distribution system in accordance with this Act;

<sup>152</sup> Republic Act No. 9136 (2001), sec. 36 provides:

Section 36. *Unbundling of Rates and Functions.*— Within six (6) months from the effectivity of this Act, NPC shall file with the ERC its revised rates. The rates of NPC shall be unbundled between transmission and generation rates and the rates shall reflect the respective costs of providing each service. Inter-grid and intra-grid cross subsidies for both the transmission and generation rates shall be removed in accordance with this Act.

Within six (6) months from the effectivity of this Act, each distribution utility shall file its revised rates for the approval by the ERC. The distribution wheeling charges shall be unbundled from the retail rate and the rates shall reflect the respective costs of providing each service. For both the distribution retail wheeling and supplier's charges, inter-class subsidies shall be removed in accordance with this Act.

Within six (6) months from the date of submission of revised rates by NPC and each distribution utility, the ERC shall notify the entities of their approval.

Any electric power industry participant shall functionally and structurally unbundle its business activities and rates in accordance with the sectors as identified in Section 5 hereof. The ERC shall ensure full compliance with this provision.

<sup>153</sup> Republic Act No. 9136 (2001) sec. 4(xx) provides:

Section 4. *Definition of Terms.* - (xx) "Supplier" refers to any person or entity authorized by the ERC to sell, broker, market or aggregate electricity to the end-users;

<sup>154</sup> *Rollo* (G.R. No. 228588), pp. 3332–3334.



generation, transmission, distribution, and supply sectors.<sup>155</sup> It then required electric power industry participants to “functionally and structurally unbundle [their] business activities and rates”<sup>156</sup> to correspond to the reorganized sectors.

For the supply side, the EPIRA included public utilities like distribution utilities and electric cooperatives as part of the supply sector and exempted them from procuring a license from respondent Energy Regulatory Commission:

SECTION 29. Supply Sector. — The supply sector is a business affected with public interest. *Except for distribution utilities and electric cooperatives with respect to their existing franchise areas, all suppliers of electricity to the contestable market shall require a license from the ERC.*

For this purpose, the ERC shall promulgate rules and regulations prescribing the qualifications of electricity suppliers which shall include, among other requirements, a demonstration of their technical capability, financial capability, and creditworthiness: Provided, That the ERC shall have authority to require electricity suppliers to furnish a bond or other evidence of the ability of a supplier to withstand market disturbances or other events that may increase the cost of providing service.

Any law to the contrary notwithstanding, supply of electricity to the contestable market shall not be considered a public utility operation. For this purpose, any person or entity which shall engage in the supply of electricity to the contestable market shall not be required to secure a national franchise.

The prices to be charged by suppliers for the supply of electricity to the contestable market shall not be subject to regulation by the ERC.

Electricity suppliers shall be subject to the rules and regulations concerning abuse of market power, cartelization, and other anti-competitive or discriminatory behavior to be promulgated by the ERC.

In its billings to end-users, every supplier shall identify and segregate the components of its supplier’s charge, as defined herein. (Emphasis supplied)

Taking its cue from the EPIRA and its emphasis on customer choice, Department Circular No. DC2012-05-0005 allowed distribution utilities which unbundled their business or constituted itself as a supplier, to supply electricity in the contestable market: P

Section 4. Customer’s Choice. Upon Open Access Date, a [Contestable Customer] shall be allowed to choose where to source its electricity. For this purpose, *a [Contestable Customer] can source from a Generation Company, a Supplier, an affiliate of a [Distribution Utility] which has*

<sup>155</sup> Republic Act No. 9136 (2001), sec. 5.

<sup>156</sup> Republic Act No. 9136 (2001), sec. 36(4).

*constituted itself as a Supplier, or the Supply Business of a Distribution Utility (DU) within its franchise area.*

4.1. All [Contestable Customers] shall only deal with a supplier of electricity duly licensed by the [Energy Regulatory Commission]. This includes [Distribution Utilities] that have structurally or functionally unbundled their business into Wire and Supply businesses, duly approved by the [Energy Regulatory Commission].

4.2. The [Energy Regulatory Commission] shall certify all eligible [Contestable Customers] at least six (6) months prior to the initial implementation of the [Retail Competition and Open Access]. For this purpose, all [Distribution Utilities] are hereby mandated to provide [Department of Energy], [Energy Regulatory Commission] and [Philippine Electricity Market Corporation] the list of [Contestable Customers] including pertinent information, such as but not limited to load profile for the last twelve (12) months, name of customers, among others.

4.3. The [Philippine Electricity Market Corporation] is hereby directed to register all eligible [Contestable Customers] certified by the [Energy Regulatory Commission] within three (3) months prior to Open Access Date.

....

#### Section 13. Protection for Captive Customers.

13.1. Consistent with its mandate under the EPIRA, [Distribution Utilities] shall secure Supply Contracts in the least cost manner for its Captive Customers.

13.2. *[Distribution Utilities] may continue to provide electricity services to [Contestable Customers] within its franchise area as a local Supplier, a separate entity.*<sup>157</sup> (Emphasis supplied)

Department Circular No. DC2012-05-0005 also allowed bundled distribution utilities to have limited participation in the contestable market as suppliers of last resort.<sup>158</sup>

Subsequently, Department of Energy Circular No. DC2012-11-0010 revised Section 2 of DC2012-05-0005 to include “Local Supplier” in its Definition of Terms, recognizing the participation of unbundled distribution utilities as suppliers within their franchise area:

<sup>157</sup> DOE Department of Energy Circular No. DC2012-05-0005 <[https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc\\_2012-05-0005.pdf](https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc_2012-05-0005.pdf)> (Last accessed on January 22, 2021).

<sup>158</sup> DOE Department of Energy Circular No. DC2012-05-0005 (2012), sec. 10 provides: Section 10. Supplier of Last Resort. The franchised DU shall act as the Supplier of Last Resort (SOLR) in instances of Last Resort Supply Event. To cover the requirement of the Last Resort Supply Event, the DU-SOLR shall source electricity to be supplied to the CC through WESM or any available supply in the market.

4.2 A new definition is hereby added to Section 2 of Department Circular No. DC2012-05-0005, as follows:

l) "Local Supplier" refers to the non-regulated supply business of a Distribution Utility (DU) catering to the Contestable Customers within its franchise area, duly authorized by the [Energy Regulatory Commission]. This shall also include the Philippine Economic Zone Authority (PEZA) and the PEZA-accredited Utility Ecozone Enterprises in the public and private Economic Zones (EZs), respectively.

It also restated the distribution utilities' status as suppliers of last resort, with the addition that they were allowed to become suppliers of last resort even outside their franchise areas in exceptional circumstances.<sup>159</sup>

Department Circular No. DC2013-07-0013 then listed local retail electricity suppliers, or the "non-regulated business segment of the [distribution utility],"<sup>160</sup> as among the Energy Regulatory Commission-approved suppliers that contestable customers can choose from,<sup>161</sup> acknowledging the participation of unbundled distribution utilities in the contestable market.

Respondent Department of Energy again admits that when it came to the participation of distribution utilities in the supply sector, the assailed issuances "made a substantial departure from the intent and letter of the EPIRA":<sup>162</sup>

<sup>159</sup> DOE Department of Energy Circular No. DC2012-11-0010 (2012), sec. 11 provides:

Section 11. Supplier of Last Resort (SOLR). In the event that the Supplier is not able to perform its obligations to its Contestable Customers consistent with this Circular, the franchised DU shall act as the SOLR in the Last Resort Supply Event as defined in this Circular. However, should (sic) the franchised DU is deemed not capable to perform the SOLR service, the ERC, prior to the full RCOA Commercial Operation Date, shall designate another DU which will perform the SOLR function for the affected Contestable Customers. The SOLR may source electricity to be supplied to the Contestable Customers through the WESM or any available source of energy supply. The SOLR shall be allowed to recover their costs attributable to its SOLR services.

Notwithstanding, the ERC shall design a mechanism to prevent the occurrence of a Last Resort Supply Event, which may include, among others, adequate due diligence on the technical and financial capability, and other parameters used in the issuance of Supplier License. The CRB, on the other hand, shall issue timely notification of Suppliers' compliance with the prudential requirement pursuant to the WESM Rules.

<sup>160</sup> ERC Case No. 2010-008 RM (Revised Rules for the Issuance of Licenses to Retail Electricity Suppliers (RES), sec. 6 provides:

Section 6. *Definition of Terms* - ...

Local Retail Electricity Supplier (Local RES) - The non-regulated business segment of the DU catering to the Contestable Market only within its franchise area, or Persons authorized by appropriate entities to supply electricity within their respective Economic Zones.

<sup>161</sup> DOE Department of Energy Circular No. DC2013-07-0013 (2013), sec. 1 provides:

Section 1. Customer Choice. Consistent with the objectives of EPIRA and its Implementing Rules and Regulations (EPIRA-IRR), and other applicable rules and regulations, a CC may source its electricity supply requirements from ERC-licensed RES, ERC-authorized Local RES; and, on its option, directly through the Wholesale Electricity Spot Market (WESM). Further, a CC shall be allowed to enter into a Retail Supply Contract (RSC) with a prospective Generation Company; provided, that the Generation Company is issued a Certificate of Compliance (COC) by the ERC and successfully registered as a Trading Participant in the WESM; and provided, further, that before the effective date of the RSC, the Generating Company shall have secured a Supplier's license from the ERC.

<sup>162</sup> *Rollo* (G.R. No. 228588), p. 3332.

16. DC2015-06-0010, likewise, made a substantial departure from the intent and letter of the EPIRA in terms of the supply side as implemented in the earlier DOE issuance by the (sic) restricting participation of DUs in the supply sector. Thus, while DC2012-05-0005 upholds the policy of customer choice, to wit:

**Section 1. Declaration of Policy.** Consistent with the EPIRA it is hereby declared that the transition to RCOA should promote genuine competition, greater efficiency, customer choice, and the true cost of electricity.

For this purpose, the power of choice of supplier as envisioned in the EPIRA is hereby provided to Contestable Customers (CCs) subject to the rules and regulations herein discussed as well as to subsequent rules and regulations as may be promulgated by the DOE.

x x x

**Section 4. Customer Choice.** Upon Open Access Date, a CC shall be allowed to choose where to source its electricity. For this purpose, a CC can source from a Generation Company, a Supplier, an affiliate of a DU which has constituted itself as a Supplier, or the Supply Business of a Distribution Utility (DU) within its franchise area.

4.1. All CCs shall only deal with a supplier of electricity duly licensed by the ERC. This includes DUs that have structurally or functionally unbundled their business into Wire and Supply businesses, duly approved by the ERC.”

DC2015-06-0010, on the other hand, has laid down the policy of prohibiting DUs from engaging in the supply business beyond its captive customers. Thus:

**Section 5. Licensing of Retail Electricity Suppliers.** Pursuant to the EPIRA, any entity engaged in the distribution of electricity to End-Users shall provide open and non-discriminatory access to its distribution system. To ensure compliance with this EPIRA provision, and that all players are afforded a level playing field, the DOE is cognizant that ERC is in the process of reviewing its guidelines taking into account the following:

x x x

(h) Prohibiting DU to engage in the Supply Business beyond its Captive Customers. Provided, that the existing Local RES after the effectivity of this Circular may continue to perform its Local RES function until

expiration of its RSCs entered into with CCs  
as of the effectivity of this Circular. . . .

17. Finally, to further highlight the inconsistencies of DC2015-06-0010 with the EPIRA, Section 29, in conjunction with Section 36 all of the EPIRA, allows DUs to register as RES, provided they comply with the unbundling requirements mandated by law. Thus:

SEC. 29. Supply Sector. - The supply sector is a business affected with public interest. Except for distribution utilities and electric cooperatives with respect to their existing franchise areas, all suppliers of electricity to the contestable market shall require a license from the ERC.

SEC. 36. Unbundling of Rates and Functions. x x x

x x x

Any electric power industry participant shall functionally and structurally unbundle its business activities and rates in accordance with the sectors as identified in Section 5 hereof. The ERC shall ensure full compliance with this provision. . . .

Notwithstanding the above-quoted provisions of the EPIRA, DC2015-06-0010 provides, as a matter of policy, that DUs cannot engage in the supply business beyond its captive customers.<sup>163</sup> (Emphasis in the original)

Undoubtedly, the assailed issuances are *ultra vires* for going beyond the limits of authority conferred to respondent administrative agencies. They should, therefore, be struck down.

### III

Respondent Department of Energy claims that, in any case, since it issued Department Circular Nos. DC2017-12-0013<sup>164</sup> and DC2017-12-0014,<sup>165</sup> the assailed issuances have been rectified, mooting any real justiciable controversy for this Court's resolution.<sup>166</sup>

Respondent is mistaken.

This Court's power of judicial review is limited to an actual case or controversy,<sup>167</sup> or a conflict of legal rights or opposite legal claims capable

<sup>163</sup> Id. at 3332–3334.

<sup>164</sup> Id. at 3340–3342.

<sup>165</sup> Id. at 3343–3345.

<sup>166</sup> Id. at 3336.

<sup>167</sup> CONST., art. VIII, sec. 1 states:

Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave

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of judicial resolution and a specific relief.<sup>168</sup> The controversy must be real and must require a specific relief that this Court can grant.<sup>169</sup>

A case is rendered moot when there is no longer a conflict of legal rights which would entail judicial review. This Court is precluded from ruling on moot cases, where no justiciable controversy exists. However, exceptions do exist. In *David v. Arroyo*:<sup>170</sup>

Courts will decide cases, otherwise moot and academic, if: *first*, there is a grave violation of the Constitution; *second*, the exceptional character of the situation and the paramount public interest is involved; *third*, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and *fourth*, the case is capable of repetition yet evading review.<sup>171</sup> (Citations omitted)

Here, while the repealing Department Circulars may have modified or repealed portions of the assailed Department Circular, respondent Energy Regulatory Commission continues to assert that distribution utilities should be prohibited from participating in the contestable market, and that the migration of qualified end-users to the contestable market is mandatory.<sup>172</sup> Clearly, there remains a continuing controversy which requires judicial resolution.

Both repealing Department Circulars were issued as a result of this Court's Temporary Restraining Order on the assailed issuances, to provide guidance to the affected end-users and suppliers.<sup>173</sup>

Department Circular No. DC2017-12-0013 allowed the voluntary participation or voluntary migration of end-users with a monthly average peak demands of 750 kW and above and 500 kW to 749 kW into the contestable market, as well as voluntary demand aggregation:

**Section 1. Voluntary Participation of Contestable Customers (CC) with Average Peak Demand of 750 kW and above in the Retail Market.** Upon the effectivity of this Circular, all CCs with a monthly average peak demand of 750 kW and above, for the preceding 12 months, may participate in the Retail Market. Participation in the Retail Market shall require a Retail Supply Contract (RSC) between a CC and Retail Electricity Supplier (RES) and registration of the RSC in the WESM.

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abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

<sup>168</sup> *David v. Macapagal-Arroyo*, 522 Phil. 705, 753 (2006) [Per J. Sandoval-Gutierrez, En Banc] citing Isagani A. Cruz, *Philippine Political Law*, 259 (2002 ed.).

<sup>169</sup> *Land Bank of the Philippines v. Fastech Synergy Philippines, Inc.*, 816 Phil. 422 (2017) [Per J. Leonen, Second Division].

<sup>170</sup> 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez, En Banc].

<sup>171</sup> *Id.* at 754.

<sup>172</sup> *Rollo* (G.R. No. 228588), p. 3114.

<sup>173</sup> *Id.* at 3340–3341 and 3343–3344.

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**Section 2. Voluntary Participation of Contestable Customers with Average Peak Demand of 500 kW to 749 kW in the Retail Market.** By 26 June 2018 or on an earlier date specified by the ERC, all eligible electricity End-users to become CCs with a monthly average peak demand of 500 kW to 749 kW for the preceding 12 months may voluntarily participate in the Retail Market.

**Section 3. Voluntary Demand Aggregation.** By 26 December 2018 or on an earlier date specified by the ERC, electricity End-users within a contiguous area whose aggregate average peak demand is not less than 500 kW for the preceding 12-month period may aggregate their demand to be part of the Contestable Market and may voluntarily enter into RSC with the Aggregators. Aggregators as defined in the EPIRA, refers to a person or entity, engaged in consolidating electric power demand of End-Users in the Contestable [M]arket, for the purpose of purchasing and reselling electricity on a group basis.<sup>174</sup> (Emphasis in the original)

The voluntary participation or migration of contestable customers to the contestable market in Department Circular No. DC2017-12-0013 is contrary to the directive of mandatory migration contained in the assailed issuances. Thus, its repealing clause<sup>175</sup> abolished Sections 1 and 2 of the assailed Department Circular, which read:

**Section 1. Compliance to Full Contestability by Contestable Customers with Average Demand of One (1) MW and Above.**

All [Contestable Customers], which are currently being served by their franchised [Distribution Utilities], are mandated to secure their respective [Retail Supply Contracts] no later than 25 June 2016, with any of the following:

- (a) Any licensed [Retail Electricity Supplier];
- (b) Any Generation Company, currently owning and operating power generation facilities, duly issued a Certificate of Compliance (COC) by the [Energy Regulatory Commission] and is offering to serve the power requirements of any [Contestable Customers]: *Provided*, That it secures a license from [Energy Regulatory Commission];
- (c) Any Prospective Generation Company. As used in this Circular, a Prospective Generation Company shall refer to any Person or Entity that power generation project is undergoing construction or planned and has been included in the DOE's Power Development Plan (PDP);

Any [Retail Supply Contract] that the [Contestable Customer] entered into with a Prospective Generation Company shall be deemed compliant with the Mandatory Contestability prescribed in this Circular;

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<sup>174</sup> Id. at 3341.

<sup>175</sup> Id. at 3342. DOE Department of Energy Circular No DC2017-12-0013 (2017), sec. 9 provides: Section 9. Repealing Clause. Section 4 of DC2012-05-0005, Section 7 of DC2012-11-0010, Section 1, Section 2 of DOE Circular No. DC2015-06-0010 and DOE Circular No. DC2016-04-0004 are hereby repealed or modified accordingly. Except insofar as may be manifestly inconsistent herewith, nothing in this Circular shall be construed as to repeal any of the mechanisms already existing or responsibilities already provided for under existing rules.

The [Contestable Customer] and its counterparty [Retail Electricity Supplier], Generation Company or Prospective Generation Company shall submit to [Department of Energy] and [Energy Regulatory Commission] their signed [Retail Supply Contract] for assessment, monitoring, policy and rule-making purposes particularly on the timelines and effectivity date of the [Retail Supply Contract].

The [Department of Energy] and [Energy Regulatory Commission] shall recognize such compliance of the [Contestable Customers] to the Mandatory Contestability if any of the following conditions are met:

- (a) The [Contestable Customer] has entered into an [Retail Supply Contract] with any existing [Retail Electricity Supplier];
- (b) The [Contestable Customer] has entered into an [Retail Supply Contract] with any Generation Company: *Provided*, That the [Retail Supply Contract] shall be effective only upon the Generation Company's acquisition of a [Retail Electricity Supplier] license from the [Energy Regulatory Commission];
- (c) The [Contestable Customer] has entered into a Forward [Retail Service Contract] with a Prospective Generation Company, with the following conditions:
  - (i) The effectivity date of the [Retail Supply Contract] has been clearly spelled out;
  - (ii) The [Retail Supply Contract] shall indicate the commitment of the Prospective Generation Company to commence the commercial operations of its power project on or before the effectivity date of the [Retail Supply Contract];
  - (iii) Notwithstanding any [Retail Supply Contract] signed by a [Contestable Customer] with a Prospective Generation Company, the concerned franchised [Distribution Utility] shall continue to serve the electricity requirements of the [Contestable Customer] until the [Retail Supply Contract] between the [Contestable Customer] and the Prospective Generation Company has become effective; and
  - (iv) The Prospective Generation Company has secured its [Retail Electricity Supplier] license from the [Energy Regulatory Commission].

Any Prospective Generation Company that fails to comply with the provisions of its Forward [Retail Supply Contract] with the [Contestable Customer] shall be imposed with fines and penalties, and an alternative [Retail Electricity Supplier] shall be appointed by the [Energy Regulatory Commission] to supply the affected [Contestable Customer], which shall be given a (sic) six (6) months to secure a new [Retail Electricity Supplier].

## **Section 2. Contestability of End-Users with Average Demand from 750 kW and Above.**

- (a) All [Contestable Customers] with an average demand ranging from



750 kW and 999 kW for the preceding 12-month period, are mandated to secure their [Retail Supply Contracts] with a [Retail Electricity Supplier] no later than 25 June 2016;

- (b) Effective 26 June 2016, Aggregators shall be allowed to compete with [Retail Electricity Supplier], Generation Company and Prospective Generation Company;
- (c) In the case of retail aggregation, any [Contestable Customers] within a contiguous area may individually or collectively aggregate their electricity supply requirements to an Aggregator, duly licensed by the [Energy Regulatory Commission]. The aggregated demand shall in no case be lower than 750 kW.

Aggregators, as defined in the EPIRA, refers to a person or entity, engaged in consolidating electric power demand of End-users in the contestable market, for the purpose of purchasing and reselling electricity on a group basis. The Aggregator may secure the same through a Competitive Supply Procurement (CSP) process to be prescribed by the [Energy Regulatory Commission] in a separate issuance.

- (d) To ensure timely implementation and continuity of the contestability in the Supply Sector, the [Energy Regulatory Commission] shall promulgate the applicable guidelines on retail aggregation.<sup>176</sup> (Emphasis in the original)

Department Circular No. DC2017-12-0014,<sup>177</sup> in turn, modified the assailed Department Circular by repealing the prohibition on distribution utilities to supply electricity beyond its captive customers. Its Section 7<sup>178</sup> repealed Section 5(h) of the assailed Circular, which had provided:

**Section 5. Licensing of Retail Electricity Suppliers.** Pursuant to the EPIRA, any entity engaged in the distribution of electricity to End-users shall provide open and non-discriminatory access to its distribution system. To ensure compliance with this EPIRA provision, and that all players are afforded a level playing field, the DOE is cognizant that [the Energy Regulatory Commission] is in the process of reviewing its guidelines, taking into account the following:

.....

(h) Prohibiting [Distribution Utilities] to engage in the Supply Business beyond its Captive Customers: *Provided*, That the existing Local [Retail Electricity Suppliers] after the effectivity of this Circular may continue to perform its Local [Retail Electricity Supplier] function until expiration of its [Retail Supply Contracts] entered into with [Contestable

<sup>176</sup> Id. at 143–145.

<sup>177</sup> Id. at 3343–3345.

<sup>178</sup> Id. at 3345. DOE Department Circular No. DC2017-12-0014, sec. 7 provides:

Section 7- Repealing Clause. Section 5(h) of DOE Circular No. DC2015-06-0010 is hereby repealed or modified accordingly. Except insofar as may be manifestly inconsistent herewith, nothing in this Circular shall be construed as to repeal any of the mechanisms already existing or responsibilities already provided for under existing rules.

Customers] as of the effectivity of this Circular.<sup>179</sup> (Emphasis in the original)

In contrast, Department Circular No. DC2017-12-0014 allowed distribution utilities to supply contestable customers within its franchise area:

**Section 4. Distribution Utilities as Local RES.** Distribution Utilities (DU) may provide electricity services to [Contestable Customers] within its franchise area as a Local [Retail Electricity Supplier], upon authorization from the [Energy Regulatory Commission]; Provided, that the [Distribution Utility] shall comply with the unbundling provisions of the RA 9136 and Rule 10 of the rules and regulations to implement Republic Act No. 9136.<sup>180</sup> (Emphasis in the original)

Its Section 2 also included an affiliate of a distribution utility among the possible electricity suppliers that may enter into a retail supply contract with a contestable customer. Affiliates were not previously included in the now repealed Section 1 of Department Circular No. DC2015-06-0010. Section 2 of Department Circular No. DC2017-12-0014 reads:

**Section 2. Licensing of Retail Electricity Suppliers.** Subject to the qualifications set by the [Energy Regulatory Commission] in accordance with the EPIRA and its implementing rules, any of the following entities may be considered to become a [Retail Electricity Supplier]:

- a. A Generation Company or Affiliate thereof;
- b. An Affiliate of a Distribution Utility;
- c. Retail Aggregators;
- d. An [Independent Power Producer] Administrator; and
- e. Any Prospective Generation Company. A Prospective Generation Company shall refer to any person or entity which has a power generation project that is undergoing construction or that is planned to be constructed which project is included in the [Department of Energy's] Power Development Plan (PDP) as committed power project;
- f. Any other Person authorized by the [Energy Regulatory Commission] to engage in the selling, brokering or marketing of electricity to the Contestable Market, consistent with the EPIRA and its implementing rules and regulations.

In order to serve the Contestable Customers, individually or as an aggregate demand, these entities shall secure a [Retail Electricity Supplier] license from the [Energy Regulatory Commission].

Consistent with the EPIRA and its implementing rules and regulations and subject to further qualifications of the [Energy Regulatory Commission], any other persons authorized by the [Energy Regulatory Commission] to engage in the selling, brokering or marketing of electricity to the

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<sup>179</sup> Id. at 146.

<sup>180</sup> Id. at 3344.

Contestable Customer shall likewise secure a license as [Retail Electricity Supplier].<sup>181</sup>

With the assailed Department Circular No. DC2015-06-0010 having been repealed, the assailed Energy Regulatory Commission Resolutions, which were regulatory guidelines to the Department Circular, have become bereft of legal basis. As respondent Department of Energy admits:

23. With the rectification by the DOE of its RCOA policies primarily those that are contained in DOE DC2015-06-0010, the regulatory guidelines anchored and issued in accordance thereof, now stand without legal basis. Under Section 4 of Republic Act No. 7638 (otherwise known as the Department of Energy Act of 1992) the responsibility and authority to “prepare, integrate, coordinate, supervise and control all plans, programs[,] projects, and activities of the Government relative to energy exploration, development, utilization, distribution and conservation” is vested with the DOE.<sup>182</sup>

When the EPIRA became effective on June 26, 2001, it sought “to provide a framework for the restructuring of the electric power industry”<sup>183</sup> to attain its underlying objective of creating a free and competitive market that will provide reliable electricity at reasonable prices.<sup>184</sup>

The EPIRA then gave respondent Department of Energy the power “to supervise the restructuring of the electricity industry”<sup>185</sup> and amended Republic Act No. 7638 to reflect the Department’s new powers and functions.

The EPIRA abolished the Energy Regulatory Board and created respondent Energy Regulatory Commission, a quasi-judicial and independent regulatory body, in its stead.<sup>186</sup> Respondent Energy Regulatory Commission was then tasked with promoting competition, encouraging market development, ensuring customer choice, and penalizing abuse of market power in the restructured electricity industry.<sup>187</sup>

Both respondents possess similar mandates in that they are the administrative agencies tasked with supervising and overseeing the energy sector. However, in differentiating their functions, *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission*<sup>188</sup> explained that respondent Department of Energy formulates the rules and regulations to implement the

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<sup>181</sup> Id.

<sup>182</sup> Id. at 3336.

<sup>183</sup> *Phil. Federation of Electric Cooperatives (PHILFECO) v. Ermita*, January 27, 2015, G.R. No. 178082 (Notice) [En Banc].

<sup>184</sup> Republic Act No. 9136 (2001), sec. 2.

<sup>185</sup> Republic Act No. 9136 (2001), sec. 37.

<sup>186</sup> Republic Act No. 9136 (2001), sec. 38.

<sup>187</sup> Republic Act No. 9136 (2001), sec. 43.

<sup>188</sup> G.R. No. 227670, May 3, 2019, <<http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc].

EPIRA. Respondent Energy Regulatory Commission then enforces these rules and regulations.<sup>189</sup> *Alyansa* stressed that respondent Energy Regulatory Commission “has no independence or discretion to ignore, waive, amend, postpone, or revoke the rules and regulations of the DOE pursuant to the EPIRA.”<sup>190</sup>

*Alyansa* likewise expounded on the complementary functions of respondents under the EPIRA:

Under the EPIRA, it is the DOE that issues the rules and regulations to implement the EPIRA, including the implementation of the policy objectives stated in Section 2 of the EPIRA. Rules and regulations include circulars that have the force and effect of rules or regulations. Thus, pursuant to its powers and functions under the EPIRA, the DOE issued the 2015 DOE Circular mandating the conduct of CSP.

The 2015 DOE Circular, as stated in its very provisions, was issued pursuant to the DOE's power to “formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,” where the State policy is to “[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power.” Under the EPIRA, it is also the State policy to “ensure the x x x affordability of the supply of electric power.” The purpose of the 2015 DOE Circular is to implement the State policies prescribed in the EPIRA. Clearly, the 2015 DOE Circular constitutes a rule or regulation issued by the DOE pursuant to its rule-making power under Section 37(p) of the EPIRA.

The EPIRA also provides for the powers and functions of the ERC. Section 43 of the EPIRA mandates that the ERC “shall be responsible for the following key functions in the restructured industry:”

(a) Enforce the implementing rules and regulations of this Act.

.....

(o) Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all retail suppliers;

.....

Thus, the very first mandate of the ERC under its charter, the EPIRA, is to “[e]nforce the implementing rules and regulations” of the EPIRA as formulated and adopted by DOE. Clearly, under the EPIRA, it is the DOE that formulates the policies, and issues the rules and regulations, to implement the EPIRA. The function of the ERC is to enforce and implement the policies formulated, as well as the rules and regulations issued, by the DOE. The ERC has no power whatsoever to

<sup>189</sup> Id.

<sup>190</sup> Id.

amend the implementing rules and regulations of the EPIRA as issued by the DOE. The ERC is further mandated under EPIRA to ensure that the “pass through of bulk purchase cost by distributors is transparent [and] non-discriminatory[.]”<sup>191</sup> (Citations omitted)

Clearly, then, respondent Department of Energy, with its mandate of supervising the restructuring of the electricity industry, is the agency tasked with formulating rules and regulations to give life to EPIRA’s policy objectives. Respondent Energy Regulatory Commission, for its part, is tasked with implementing the rules and regulations formulated and issued by respondent Department of Energy. It cannot supplant respondent Department of Energy’s policies, rules, and regulations with its own issuances.<sup>192</sup>

Finally, with the promulgation of Department Circular Nos. DC2017-12-0013 and DC2017-12-0014, which abolished the assailed issuances, respondent Energy Regulatory Commission is duty bound to provide regulatory support<sup>193</sup> by issuing the appropriate guidelines pursuant to its mandate under the EPIRA to “[e]nforce the implementing rules and regulations’ of the EPIRA as formulated and adopted by [respondent Department of Energy].”<sup>194</sup>

**WHEREFORE**, the Petitions are **GRANTED**. Department of Energy Circular No. DC2015-06-0010, series of 2015, and Energy Regulatory Commission Resolution Nos. 5, 10, 11, and 28, all series of 2016, are declared **VOID** for being bereft of legal basis. Respondent Energy Regulatory Commission is **DIRECTED** to promulgate the supporting guidelines to Department Circular Nos. DC2017-12-0013 and DC2017-12-0014.

**SO ORDERED.**



**MARVIC M.V.F. LEONEN**  
Associate Justice

<sup>191</sup> Id.

<sup>192</sup> Id.

<sup>193</sup> DOE Department Circular No. DC2017-12-0013 (2017), sec. 4 states:

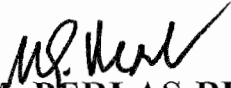
Section 4. Regulatory Support. For the proper implementation of the policies set herein, the ERC is hereby enjoined to promulgate the supporting guidelines, including but not limited to, the licensing of the RES and Retail Aggregation: Provided, That such guidelines shall specify sanctions and penalties that may be imposed to electric power industry participants for violations of the promulgated policies and guidelines. [Also found in Section 5 of Department Circular No. DC2017-12-0014].

<sup>194</sup> *Alyansa Para Sa Bagong Pilipinas v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, <<http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc].

WE CONCUR:



**DIOSDADO M. PERALTA**  
Chief Justice



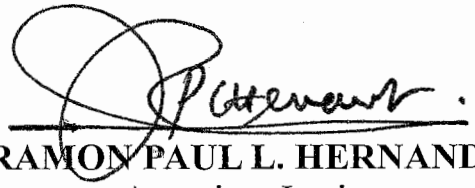
**ESTELA M. PERLAS-BERNABE**  
Associate Justice

No part

**ALFREDO BENJAMIN S. CAGUIOA**  
Associate Justice



**ALEXANDER G. GESMUNDO**  
Associate Justice



**RAMON PAUL L. HERNANDO**  
Associate Justice



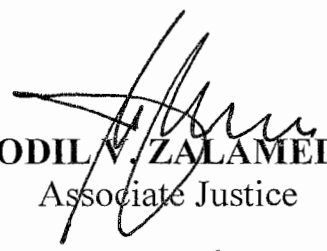
**ROSMARID D. CARANDANG**  
Associate Justice



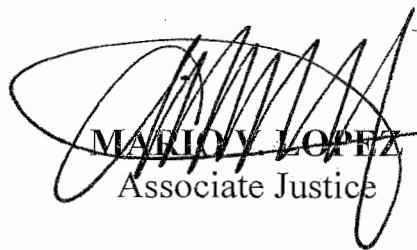
**AMY C. LAZARO-JAVIER**  
Associate Justice



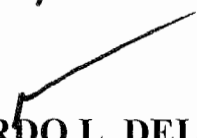
**HENRI JEAN PAUL B. INTING**  
Associate Justice



**RODIL V. ZALAMEDA**  
Associate Justice



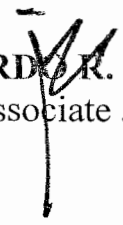
**MARIOLY LOPEZ**  
Associate Justice



**EDGARDO L. DELOS SANTOS**  
Associate Justice



**SAMUEL H. GAERLAN**  
Associate Justice




**RICARDO R. ROSARIO**  
Associate Justice



**JHOSEP Y. LOPEZ**  
Associate Justice

**CERTIFICATION**

I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the court.



**DIOSDADO M. PERALTA**  
Chief Justice

*ANNA-LI R. PAPA-GOMBIO*  
ANNA-LI R. PAPA-GOMBIO  
Deputy Clerk of Court En Banc  
CCC En Banc, Supreme Court