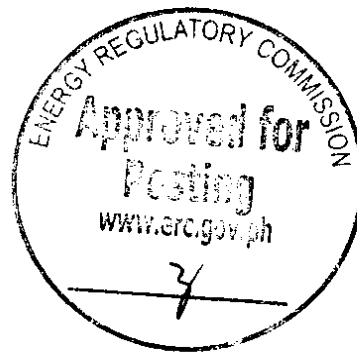


Republic of the Philippines
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City

IN THE MATTER OF THE PETITION
FOR DIRECT CONNECTION WITH
THE NATIONAL POWER
CORPORATION (NPC) AND THE
NATIONAL TRANSMISSION
CORPORATION (TRANSCO) WITH
PRAYER FOR PROVISIONAL
AUTHORITY AND ISSUANCE OF
TEMPORARY MANDATORY ORDER



ERC CASE NO. 2007-422 MC

PHILIPPINE HYDRO,
INCORPORATED (PHI),
Petitioner,

- versus -

NATIONAL POWER CORPORATION
(NPC), NATIONAL TRANSMISSION
CORPORATION (TRANSCO) and
ALBAY ELECTRIC COOPERATIVE,
INC. (ALECO),

Respondents.

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DOCKETED
Date: OCT 13 2008
By: [Signature]

DECISION

Before this Commission for resolution is the petition filed on July 10, 2007 by Philippine Hydro, Incorporated (PHI) for direct connection with the National Power Corporation (NPC) and the National Transmission Corporation (TRANSCO), with prayer for provisional authority and issuance of a temporary mandatory order.

In the said petition, PHI alleged, among others, the following:

- a. It is engaged in the business of constructing, operating, managing and rehabilitation of waterworks for distribution, supply and sale of potable water to domestic or local waterworks district; the maintenance, development, repairs and upgrading of water and wastewater facilities

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including water supply treatment, distribution of water, sewerage and sanitation, metering; the construction, maintenance and operation of all necessary and convenient buildings, structures, dams, reservoirs, conduits, aqueducts, tunnels, purification plants, water mains, pipes, pumping stations, machineries, sanitary sewerages and other waterworks and such other activities incidental to the foregoing;

- b. It entered into a contract with Legazpi City Water District (LCWD) for the supply of bulk water of 20,000 cu. meters a day. Its operation commenced in August 2007;
- c. The operation of its water treatment plant in Barangay Bugtong, Legazpi City requires a substantial amount of continuous and uninterrupted power supply, twenty four (24) hours a day and seven (7) days a week. Consequently, its expenses for energy consumption are substantial;
- d. In order to maintain business viability and provide better service to its customers, the operation of its water treatment facilities requires a steady and reliable supply of electric power. Any interruption would result in serious damage not only to its operations but also to residential, industries and business relying on the continuous and steady supply of water. Thus, a stable and reliable power supply at the least possible cost to it is imperative;
- e. Last November 30, 2006, the Provinces of Albay and Camarines Sur were devastated by typhoon "Reming" leaving thousands of families homeless, staggering damages and losses on human lives, properties and infrastructures. Considering the magnitude and ferocity of the havoc wrought by the calamity, Albay and Camarines Sur absorbed the most damaged at PhP 2 Billion. Respondent ALECO suffered tremendous damage on its facilities which resulted to widespread brownouts and insufficient supply of electricity;
- f. On June 30, 2007, it inquired with respondent ALECO if the latter can provide continuous and uninterrupted power supply to its water treatment plant;
- g. In response thereto, ALECO, through its General Manager, issued a letter dated July 5, 2007 stating that it cannot assure an uninterrupted power supply considering the present status of its distribution system;
- h. As a result thereof, it is compelled to source its entire power requirements from NPC through the transmission lines of TRANSCO in order to achieve a stable power supply at the least possible cost and avail of the benefits of the Time-Of-Use (TOU) rates being offered by NPC;
- i. For purposes of comparison, the effective TOU rate being charged by NPC as approved by the Commission in Luzon is PhP3.7655/kWh, while ALECO presently charges an estimated average of PhP8.0998/kWh. Despite its high rates, ALECO cannot maintain and provide Petitioner sufficient supply of power;
- j. In the event that the Commission approves the instant petition, it has the financial and technical capabilities to maintain the substation and sub-transmission lines that may be installed within its vicinity;

By

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- k. It prays that a provisional authority be issued directing NPC to provide Petitioner's plant with direct supply of electric power through the lines of TRANSCO effective until decision in this case attains finality; and
- l. After trial on the merits, a judgment be rendered declaring that it is entitled as a matter of law to secure direct connection power supply and connection from respondents NPC and TRANSCO and that the injunction be made permanent.

Having found said petition sufficient in form and in substance with the required fees having been paid, an Order and a Notice of Public Hearing, both dated July 11, 2007, were issued setting the same for hearing on August 2, 2007.

In the same Order, PHI was directed to cause the publication of the Notice of Public Hearing, at its own expense, once (1x) in a newspaper of general circulation in the Philippines, at least five (5) days before the scheduled date of initial hearing.

During the August 2, 2007 hearing, PHI, NPC and TRANSCO appeared.

At the said hearing, PHI presented its compliance with the Commission's publication requirement.

At the continuation of hearing on August 9, 2007, ALECO manifested that it interposed no objection on the prayer of PHI for the issuance of a provisional authority. It further manifested that it has not yet recovered from the damage sustained from the typhoon "Reming" and thus, it cannot guaranty to PHI the continuous supply of power considering the present status of its distribution system.



On August 15, 2007, the Commission issued an Order provisionally authorizing PHI to directly connect and source its power requirements from NPC through the regulated transmission lines of TRANSCO.

On October 3, 2007, ALECO filed its "Motion for Reconsideration" praying that the Commission's Order dated August 15, 2007 granting PHI's prayer for provisional authority to directly connect with NPC and TRANSCO be reconsidered and set aside, and that hearings be conducted to afford ALECO the opportunity to establish that it is financially and technically capable to provide sufficient, reliable and affordable electric power service to PHI.

On various dates, the parties submitted the following:

1. The "Pre-Trial Brief" filed by TRANSCO on July 27, 2007;
2. The "Motion for Postponement with Manifestation" filed by ALECO on July 31, 2007;
3. The "Comment" and "Pre-Trial Brief" both filed by NPC on August 9, 2007;
4. The "Comment" filed by TRANSCO on August 9, 2007;
5. The "Pre-Trial Brief" and "Comments" both filed by ALECO on August 21, 2007;
6. The "Entry of Appearance" filed by Dechavez Bugayong Concepcion and Sagayo Law Offices on November 21, 2007;
7. The "Urgent Omnibus Motion (For Early Resolution and to Set Case for Pre-Trial)" filed by ALECO on March 12, 2008; and
8. The "Pre-Trial Brief" filed by PHI on March 29, 2008.

During the May 29, 2008 hearing, the Commission conducted the pre-trial hearing where all the parties were directed to make stipulation of the facts and the issues relative to the instant petition. Accordingly, the following were the stipulations made by the parties:

I. Stipulation of Facts

1. ALECO is the holder of a franchise to distribute electric power in the Province of Albay.

II. Issues to be Resolved

a. PHI

1. Whether or not it may be allowed to directly connect to NPC and TRANSCO for its power requirements.
2. Whether or not ALECO is willing or able to match the reliability and rates of NPC.

b. TRANSCO and NPC

Whether or not PHI can be allowed to directly connect to NPC and TRANSCO without violating the franchise rights of ALECO.

c. ALECO

1. Whether or not it is allowed to collect wheeling charges.
2. Whether or not PHI is allowed to directly connect.

At the continuation of the hearing on June 16, 20 and 25, 2008, PHI presented its witness, Mr. Rolando G. Mangulabnan, Chief Operation Officer, who testified in support of its application particularly on matters relating to the operation of its water treatment facilities in Legaspi City and the need to a continuous and reliable supply of power. In the course thereof, additional documents were presented and marked as Exhibits "E" to "E-5", inclusive.

The direct examination having been terminated, ALECO, NPC and TRANSCO conducted their respective cross-examinations on the said witness during the hearings conducted on various dates. Thereafter, PHI was directed to file its formal offer of evidence.



On June 19 and 20, 2008, the Commission conducted an ocular inspection on the plant sites and electrical facilities of PHI, ALECO and TRANSCO subject of the instant petition.

At the July 11, 2008 hearing, ALECO presented its witness, Engr. Rhea M. Loquinario, Branch Electrical Engineer, who testified on the following:

1. The restoration of its electrical facilities after the Bicol Region was hit by Typhoon "Reming";
2. The major causes of its power interruptions;
3. The records and notices of power interruptions;
4. The scheduled power interruptions of TRANSCO;
5. The temporary supply of power to PHI; and
6. The authority of its General Manager to issue a waiver.

In the course of her testimony, additional documents were presented and marked as Exhibits "1" to "8", inclusive.

The direct examination having been terminated, PHI, NPC and TRANSCO conducted their respective cross-examinations on the said witness. Thereafter, ALECO was directed to file its formal offer of evidence.

During the July 14 and 25, 2008 hearing, TRANSCO presented its two (2) witnesses, Engr. Giovanni R.A. Galang, Manager of Transmission and Planning Services Department of the Corporate Planning Group, and Mr. Pedro A. Borja, Branch Manager of Albay-Sorsogon District 3, who both testified relative to the reliability of the transmission system of TRANSCO. In the course of their



testimony, additional documents were presented and marked as Exhibits "1" to "6-2", inclusive.

At the July 25, 2008 hearing, NPC manifested that it entered into an Operation and Management Agreement (OMA) with ALECO due to the outstanding obligation of the latter to NPC amounting to PhP1,603,823,118.91 and that it shall take over the operation and management of ALECO starting July 28, 2008.

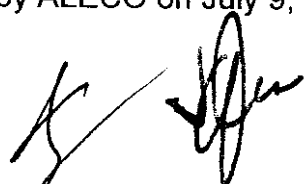
The direct examinations having been terminated, NPC and ALECO conducted their respective cross-examinations on the said witnesses on various dates.

At the continuation of the hearing on September 1, 2008, NPC presented its witness, Mr. Conrado D. Camagay, Division Manager, who testified on the reliability and capability of NPC to supply sufficient power to PHI. In the course, thereof, additional documents were presented and marked as Exhibits "1" to "1-A".

After NPC concluded its direct examination on the said witness, ALECO conducted its cross-examination. NPC was directed to file its formal offer of evidence.

In the meantime, the Commission noted the following submissions made by the parties:

1. The "Comment (to ALECO's Motion for Reconsideration)" filed by PHI on July 1, 2008;
2. The "Compliance" filed by ALECO on July 9, 2008;



3. The "Compliance" filed by TRANSCO on July 10, 2008;
4. The "Compliance" filed by NPC on July 10, 2008;
5. The "Formal Offer of Evidence" filed by PHI on July 21, 2008;
6. The "Formal Offer of Evidence" filed by ALECO on July 22, 2008;
7. The "Formal Offer of Evidence" filed by TRANSCO on September 4, 2008;
8. The "Formal Offer of Evidence" filed by NPC on September 15, 2008; and
9. The "Comment on Petitioner's Formal Offer of Evidence" filed by ALECO on September 19, 2008.

The respective formal offers of evidence filed by the parties are hereby admitted for being relevant and material in the resolution of this case.

DISCUSSION

The Commission is cognizant of the fact that there may be instances where an end-user's power requirement cannot be reliably provided by the existing distribution system of a franchised distribution utility (DU). Thus, such end-user may be allowed to source its power requirements directly from NPC through the regulated transmission service of TRANSCO.

PHI is a large end-user of electricity in Legaspi City. It is engaged in the business of constructing, operating, managing and rehabilitation of waterworks for distribution, supply and sale of potable water to domestic or local waterworks district and such other activities incidental to the foregoing.

It must be noted that PHI's petition for direct connection finds its basis on Section 3 (g) of Republic Act No. 6395, as amended, which provides that:



"Sec. 3. Power and General Functions of the Corporation – The powers, functions, rights and activities of the Corporation shall be the following:

x x x

g. x x x x; to sell electric power in bulk to: **1) industrial enterprises, 2) city, municipal or provincial system and other government institutions, 3) electric cooperatives, 4) franchise holders, and 5) real estate subdivisions; Provided, That the sale of power in bulk to industrial enterprises and real estate subdivisions may be undertaken by the Corporation when the power requirement of such enterprises or real estate subdivisions is not less than 100 kilowatts;** Provided, finally, That no restriction shall apply to sale of power in bulk to enterprises registered with the Board of Investments; x x x (Underscoring supplied)

The unreliability in the supply of power as well as its high costs are considered by PHI as major disincentives in its business operation. Being a power intensive industry, it requires a continuous supply of electricity at a reasonable cost in order to meet the demands of its customer and comply with its contract with the Local Water District of Legaspi City.

It was established that PHI is qualified to directly source its power requirements from NPC through TRANSCO being an industrial enterprise consuming more than 100 kilowatts.

ALECO has failed to substantiate its position that it has the capability to supply the power requirements of PHI. In the ocular inspection conducted by the Commission and the evidences presented by the parties, it was disclosed that ALECO has frequent power interruptions within its franchise area compared to TRANSCO. Thus, in its letter dated July 5, 2007 to PHI, ALECO stated that it "cannot assure an uninterrupted power supply considering the present status of our distribution system."



ALECO's existing obligation with NPC amounting to PhP1,603,823,118.91 and its present distribution system serve as a clear indication that it is financially and technically incapable of providing continuous and reliable power to PHI.

Records of this case reveal that PHI is required to deliver a minimum production capacity of 20,000 cubic meters per day of high quality potable water with Turbidity not exceeding 1.5 NTU in accordance with the Philippine National Standards for Drinking Water.

Any power interruption during its operation would result to serious damage to its business considering the long stoppage of production and damage to its equipment and thus, prejudicial to its customers. The frequent, sudden and unexpected power interruptions would affect the required Turbidity or quality of its production. Thus, a stable and reliable power supply at the least possible cost to Petitioner is crucial and indispensable to its business.

With respect to the issue on the exclusivity of franchise, the Supreme Court held in the case of Batangas II Electric Cooperative, Inc. versus Energy Industry Administration Bureau, Puyat Steel Corporation and National Power Corporation (G.R. No. 135925, December 22, 2004) that:

"Exclusivity is given by law with the understanding that the company enjoying it is self-sufficient and capable of supplying the needed service or product at moderate or reasonable prices. It would be against public interest where the firm granted a monopoly is merely an unnecessary conduit of electric power, jacking up prices as a superfluous middleman or an inefficient producer which cannot supply cheap electricity to power intensive industries. It is in the public interest when industries dependent on heavy use of electricity are given reliable and direct power at the lower costs thus enabling the sale of nationally marketed products at prices within the reach of the masses."

x x x

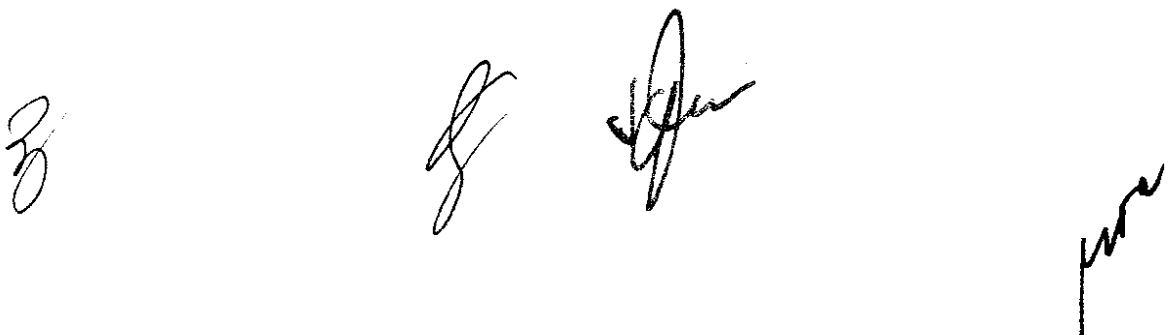


“To hold...that industries are absolute captive markets of the area, power franchise-holders (regardless of their capability to meet the demands of the market) is to stifle mercantile endeavors in particular and the nation’s economy in general, as industrial enterprises will be at the mercy of unscrupulous franchise-holders which can be lackadaisical in delivering the power requirements to its costumers without fear of losing its contracts to the NPC. Not only is this proposition unsound as it would be a turn-off to investors, it is likewise contrary to the spirit of the law aimed towards national electrification, most beneficial to the greater number of the populace.”

“Exclusivity of any public franchise has not been favored by this Court such that in most, if not all, grants by the government to private corporations, the interpretation of rights, privileges or franchises is taken against the grantee. x x x”.

As to the issue of whether or not ALECO is entitled to collect wheeling charges, the Commission resolves in the negative. Wheeling charge can only be imposed if the directly connected entity utilizes the facilities of a franchise holder or, in the case at bar, if PHI uses the distribution system of ALECO. It is worth mentioning that PHI has caused, at its own expense, the construction of the 3 MVA substation and connecting sub-transmission lines from its plant to TRANSCO’s tapping point to improve the delivery of electric power.

The Commission recognizes and fully agrees with the contention of PHI that the viability of its business and the quality of its service to its clients depend on the efficiency, affordability and reliability of the electric power supply. It is, thus, inevitable to approve the instant application given the nature and the impact of the business on the Philippine economy.



WHEREFORE, in view of the foregoing, the provisional authority granted to the Philippine Hydro Incorporated (PHI) on August 15, 2007 is hereby made **PERMANENT**.

SO ORDERED.

Pasig City, September 22, 2008.


ZENAIDA G. CRUZ-DUCUT
Chairperson


RAUF A. TAN
Commissioner


ALEJANDRO Z. BARIN
Commissioner

(On Official Travel)
MARIA TERESA A.R. CASTAÑEDA
Commissioner


JOSE C. REYES
Commissioner

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