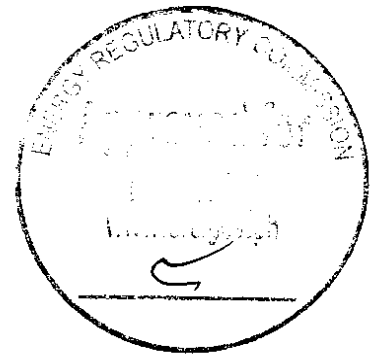


Republic of the Philippines
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City



**IN THE MATTER OF THE PETITION FOR
THE AMENDMENT OF RESOLUTION
NO. 16, SERIES OF 2008 ENTITLED A
RESOLUTION ADOPTING POLICIES TO
GOVERN THE TRANSITION SUPPLY
CONTRACTS WHICH HAVE BEEN
ASSIGNED AND TRANSFERRED TO THE
NATIONAL POWER CORPORATION
SUCCESSOR GENERATING COMPANIES**

ERC Case No. 2009-002 RM

**MASINLOC POWER PARTNERS CO., LTD.,
Petitioner.**

X-----X

D O C K E T E D
Date: **JUN 24 2009**
By: _____

D E C I S I O N

The instant case stemmed from a "Petition to Initiate Rule Making" filed by Masinloc Power Partners Co., Ltd. (MPPCL) to initiate amendments to Resolution No. 16, Series of 2008 issued by the Commission.

The factual background of the case is as follows:

As a result of the ongoing privatization of the National Power Corporation (NPC), several of its generation assets have been assigned and transferred to NPC Successor Generating Companies (SGCs). Transition Supply Contracts (TSCs) were assigned to these SGCs, including some TSCs which are set to expire even before one (1) year from introduction of open access. Thus, upon the behest of the industry players and being cognizant of the need to clarify policies relative thereto, including the rates that should be applied, the Commission promulgated several policies intended to apply to these assigned TSCs.

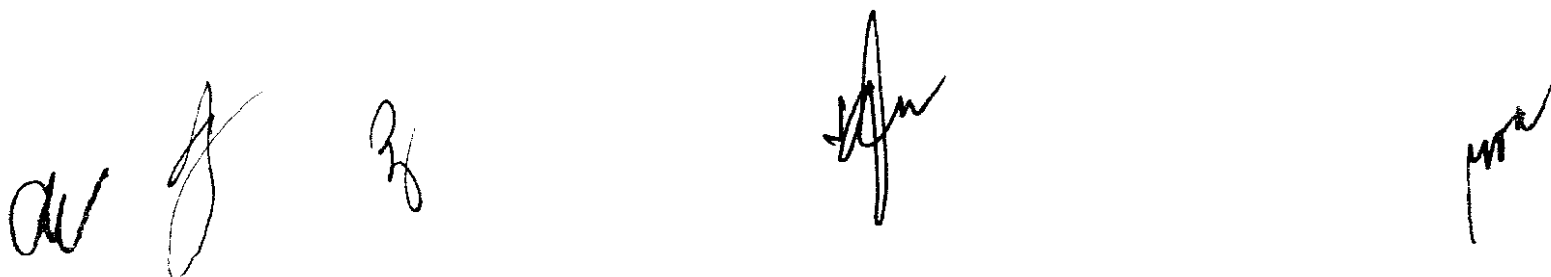
A draft "Resolution Adopting Policies to Govern the Extension of TSCs" (First Draft) was posted on the ERC website on 27 June 2008 to solicit comments from industry stakeholders.

Among the parties that submitted their respective comments on the first draft were the Manila Electric Company (MERALCO), Power Sector Assets and Liabilities Management Corporation (PSALM), NPC and Cagayan Electric Power and Light Company, Inc. (CEPALCO).

Taking into consideration the relevant issues raised by the concerned parties, another draft Resolution was posted on the Commission website on 22 October 2008 to solicit comments from concerned stakeholders.

MERALCO, SN Aboitiz, Emerald Energy Corporation, Northeast Luzon Electric Cooperatives Association (NELECA) and the Philippine Power Producers Association (PIPPA) members Aboitiz Power Corporation, First Gen Corporation, Masinloc Power Partners Corporation Ltd. (MPPCL), and PSALM submitted their comments thereon to the Commission on 11 November 2008. On 19 November 2008, these comments were discussed in a public consultation during which the Commission encouraged the submission of supplemental comments until 26 November 2008.

Among the significant issues discussed during the public consultation were the following:

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1. Whether or not there is an automatic conversion of said TSCs into bilateral contracts upon expiration;
2. Clarification on the possible return of distribution utilities to the NPC upon expiration of TSCs;
3. Application of the NPC-Time of Use (TOU) rate to the billing periods that the TSC is in effect including the recovery of the Generation Rate Adjustment Mechanism (GRAM) and the Incremental Currency Exchange Rate Adjustment (ICERA); and
4. The provision for the Mandated Rate Reduction (MRR).

On 24 December 2008, the Commission issued Resolution No. 16, Series of 2008 entitled "A Resolution Adopting Policies to Govern Transition Supply Contracts Which Have Been Assigned and Transferred to NPC Successor Generating Companies". The said Resolution became effective on 31 January 2009 or fifteen (15) days after its publication in a newspaper of general circulation. The Resolution contained the following policies of the Commission with respect to assigned TSCs:

1. No extensions of the TSCs are allowed except for TSCs set to expire within six (6) months from the effectivity of the said Resolution;
2. A corresponding penalty or sanction was made applicable should the parties fail to file a negotiated bilateral contract prior to the expiration of its TSC;
3. The NPC-TOU rate shall be adjusted with any decrease or increase approved by the Commission;
4. The NPC effective rate and any over/under recovery covering the test periods prior to Closing Date, specifically the GRAM and ICERA, would be for the account of NPC; and
5. Since the NPC rates continue to apply to the parties under the assigned TSCs pursuant to Section 72 of the EPIRA, the MRR shall continue to apply and be enjoyed by the end-users during the term of the assigned and transferred TSCs.



On 22 January 2009, MPPCL filed its "Petition to Initiate Rule Making" specifically on the issue of the MRR under Section 10 of the said Resolution, viz:



"10. Section 72 of the EPIRA on the Mandatory Rate Reduction (MRR) shall continue to be implemented. The NPC successor generating companies shall shoulder the MRR from the time of their respective Closing Dates, unless the parties agree otherwise. Any MRR accruing after the Notice of Award and prior to the Closing Date shall be for the account of NPC. Thus, residential end-users of the affected [Distribution Utilities] DUs shall continue to enjoy the rate reduction of thirty centavos per kilowatthour (PhP0.30/kWh) and the implementation of the same shall terminate upon the expiration of the original term of the assigned and transferred TSCs." (Insertion Supplied)

Thus, on 4 February 2009, the Commission posted on its website a Notice to solicit comments from concerned stakeholders giving them until 17 February 2009 to submit the same. The Notice also invited participation in the scheduled public hearing/consultation in accordance with the provision of the Commission's Rules of Practice and Procedure.

Pre-trial Briefs were filed by the MERALCO, NPC and SN Aboitiz on 16, 18, 19 February 2009, respectively. A "Petition for Intervention with Entry of Appearance" was likewise filed by MERALCO on 16 February 2009.


AP Renewables, Inc. (APRI) filed its "Petition for Intervention" on 19 February 2009. On even date, PSALM, APRI, SN Aboitiz, and MERALCO submitted their respective "Comments."

The second public hearing/consultation was conducted on 24 February 2009.



The Petition filed by MPPCL mainly focused on the argument that the MRR should not be a liability of the NPC Successor Generating Company (SGC). It argued that the intent behind Section 72 of the EPIRA is for the MRR to be derived from 'NPC rates' defined as the charges imposed specifically by NPC on its customers. It further averred that the deliberations in the House of Representatives on the EPIRA support this intent to limit the MRR to those rates actually imposed by NPC and that Section 72 was enacted as a guarantee by the legislators to the residential end-users that the assumption by the National Government of NPC's financial obligations would result in lower power rates. It also stated that the absorption of NPC's debts was made to be the "operative mechanism" which shall allow and guarantee the implementation of the MRR. Thus, given that no debts of SGCs were absorbed by the government and they did not benefit from the assumption of NPC debts, the very rationale of MRR of lowering power rates and the benefit/incentive that guarantees the financial feasibility of its implementation are inexistent.

Moreover, MPPCL contended that it is NPC which the EPIRA obliges to offer and grant the MRR, hence, the obligation to pay the MRR is not possible to be assigned from a review of the wording of the law and the intent of Congress. Finally, it asserted that EPIRA's thrust towards the privatization of NPC generating assets is contrary to the imposition of the MRR on the SGCs and that by requiring SGCs to shoulder the MRRs, the Commission has totally veered away to the primary purpose of the TSCs which is to assure investors of a guaranteed market for the electricity produced from the privatized NPC generation assets.



SN Aboitiz echoed that the MRR is indeed the result of the government's absorption of NPC's financial obligation as declared in the EPIRA as well as during the deliberations in the House of Representatives. Further, the MRR should not be considered as an obligation, incentive, discount or condition to be assumed by the SGCs upon assumption of the TSCs. In addition, the MRR is not a component of the Basic Energy Charge or among the discounts like prompt payment discounts that the Parties have expressly identified in the assignment. Neither does Section 72 of the EPIRA provide that the MRR is to be assigned or transferred to the buyers of the NPC generation assets. Hence, the MRR should not be considered as an obligation assumed by the SGCs upon assignment of the TSCs.

In the same manner, APRI asserted that the obligation of the NPC granted by the EPIRA was not and could not be passed on by virtue of assignment of the TSCs to the SGCs. The Asset Purchase Agreement (APA) does not provide for the assignment of NPC's obligation to grant the MRR. Neither does the EPIRA provide that the obligation of NPC shall be absorbed by the assignees of TSCs.

Furthermore, APRI claimed that the imposition of additional burden on APRI and the other SGCs, in the form of MRR, is contrary to the principle of prospectivity of statutes. As the grant of MRR was neither imputed in the bid submitted to PSALM nor included in the terms and conditions of the purchase of the generating assets under the APA, the obligation therefor should not unduly be passed on to the SGCs.



PSALM averred that during the 15 March 2000 deliberations in the House of Representatives on the EPIRA, it was disclosed that the MRR was intended by the legislators to exist only during the transition period. As quoted from Representative Ledesma:

“What we hope to do is, because the national government is in fact going to absorb a significant amount of the debt of NAPOCOR, because of that, the other side of the coin of the absorption of the national government of the debt of NAPOCOR, we can in fact ensure a mandated rate reduction while the transition period is being set up, while the systems are being set up, while the operation of the spot market is being set up, and while the privatization is going to be set up.”

PSALM further added that the MRR gives NPC a built-in advantage over the SGCs and other generation entities. This is contrary to EPIRA’s vision of a competitive electric power industry. If its implementation is continued, the tendency of the consumers is to go back and source their power from NPC given its lower rates due to the MRR.

On the other hand, NPC submitted that the relations among NPC, the SGCs and the assigned TSC customers are subject to the provisions of the APA between PSALM and the SGCs, while the Deed of Assignment is among NPC, PSALM and the SGC for the transfer of the TSC. Thus, upon execution of the APA between PSALM and the NPC-SGCs for the sale of the power plants, NPC agreed to the assignment of certain TSCs and other power supply contracts (PSCs). The winning bidder was given access to the power plant and other information relevant to its operation prior to its Closing Date. Likewise, prior to the submission of their bids for the power plants, prospective bidders were given



due diligence period to check both the power plants and all contracts, among other things.

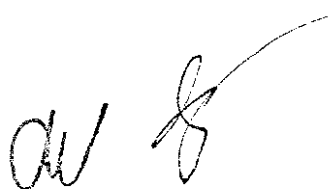
Likewise, NPC argued that in a separate Deed of Assignment, NPC assigned the TSCs and other PSCs to the buyer where the latter as the assignee, has undertaken that it will “perform and be bound by the obligations and assume the rights of the Assignor under the said PSCs as if the Assignee was a party to the contracts in place of Assignor at the time it was entered into by the latter.” Further, when the Deeds of Assignment took effect upon turnover, the SGC steps into NPC’s place as if the SGC was the original party to the TSC.

For its part, MERALCO emphasized that like the lifeline discount, the MRR was granted for the benefit of the residential electricity end-users. Thus, regardless of whether the responsibility of the MRR lies with NPC or the SGC, MERALCO residential customers should continue to enjoy the MRR as mandated under the EPIRA.

Based on the aforementioned arguments and comments submitted by the interested parties, the Commission has identified several issues for resolution, to wit:

1. Has the assignment of the TSCs rendered nugatory the mandated rate reduction under the EPIRA?
2. If not, which entity should shoulder the cost of providing the MRR?

On the basis of the arguments raised herein, the Commission finds MPPCL’s petition partially meritorious.



In resolving the said issues, the Commission found legal basis in Section 72 of the EPIRA, which states that:

“Section 72. Mandated Rate Reduction. – Upon effectivity of this Act, residential end-users shall be granted a rate reduction from NPC rates of thirty centavos per kilowatt-hour (P0.30/kWh). Such reduction shall be reflected as a separate item in the consumer billing statement.”

It must be pointed out that the obligation to extend the MRR subsists during the term of the assigned TSC. The assignment of these TSCs should in no case be interpreted to mean the cessation of the grant of the MRR which is a benefit intended by the lawmakers to the ordinary end-users. However, to obviate any confusion as to whether the MRR is automatically transferred to the SGCs upon the assignment of the TSCs, the same must be expressly indicated as an assigned obligation apart from the other general obligations stipulated in the TSC, APA and/or Deed of Assignment.

The Commission perused the deliberations of the lawmakers leading to the crafting of the EPIRA which were offered by the Petitioner and the other parties in support of their arguments. The deliberations read in part, thus:

REP. LEDESMA:

“xxx xxx xxx

Now, with structural reforms and competition and deregulatory reforms, we now lean to the tariff reforms. The tariff reforms, first of all, will provide for the fears of most of our Members in this Chamber, that we will be able to immediately lower residential rates. How do we do this? By the absorption of the national government of the initial 150 billion of the debt we can mandate at least a five percent rate reduction.

xxx xxx xxx



We are also going to put in the tariff reform phase the provision of the NPC firm transition contracts. These firm transition contracts will essentially provide a rate cap so that aside from the mandated rate reductions, the NPC-IPPs, the existing IPPs and the GENCOs cannot in fact increase generating rates for the life of the transition phase.¹

While it is true that the absorption by the National Government of the NPC debts allowed the enjoyment by the end-users of the MRR, the clear intent of the lawmakers in imputing the same in the tariff rates is to effectively lower the electricity residential rates. Well-settled is the rule that resort to legislative deliberations is allowable when the statute is crafted in such a manner as to leave room for doubt on the real intent of the legislature.² Thus, a further reading of the deliberations would clearly reveal that foremost in the minds of the legislators is the reduction of residential tariffs for the benefit of end-users and the absorption is one of the instruments fashioned to allow the direct reduction in the form of the MRR. Coupled with this is the adoption of the scheme to introduce transition supply contracts with fixed rates with the intention likewise of putting a cap on these rates. This is the plain and unmistakable spirit of and reason for the passage of Section 72.

Thus, taking out the MRR from the TSC rates would in effect result to an increase in the TSC rates, which would be contrary to the intended tariff reform of providing TSCs with caps on the rates. More importantly, to discontinue the grant of the MRR merely by reason of the transfer of the TSCs to SGCs would run counter to the consumer protection clause under the EPIRA and the mandate of the Commission to protect long term consumer interests.

¹ April 5, 2000, House of Representatives deliberations on EPIRA

² Southern Cross Cement Corporation vs. Philippine Cement Manufacturers Corp., G.R. No. 158540, 08 July 2004



As a mechanism to lower the electricity tariff rates, particularly those affecting residential end-users, the Commission indubitably declares that the MRR should still be enjoyed by the customers covered by the assigned and transferred TSCs to SGCs until the expiration of the term indicated in the assigned TSCs.

It must be stressed that the Commission has taken the initiative to propose and adopt policies due to the failure of the parties, specifically PSALM and NPC, to implement and provide clear arrangements to resolve issues corollary to the assignment of TSCs.

Thus, the more contentious issue that the Commission is called upon to rule on is which entity, among the SGCs, NPC and PSALM, should be responsible for the grant of the MRR. The First Draft previously stated the Commission's proposed policy on the TSC as follows:

"For the duration of the assigned TSCs, the NPC successor generating companies shall continue to implement Section 72 of the EPIRA and the residential end-users of all the affected distribution utilities shall continue to enjoy the rate reduction of thirty centavos per kilowatt-hour (PhP0.30/kWh) subject to the execution of a written instrument between NPC and the concerned NPC successor generating company containing the assumption of such obligation. In the absence of such written instrument, the rights of the residential end-users shall not be impaired and NPC shall bear the cost of the rate reductions implemented by the NPC successor generating company. However, should the extension of the original term of the assigned and transferred TSC be made by the concerned DU and the NPC successor generating company, the latter shall bear the cost of the rate reduction as a result of implementing Section 72 of the EPIRA."



In consideration of the comments brought to fore by the stakeholders, the Commission revised the same to reflect the following:

“Section 72 of the EPIRA on the Mandatory Rate Reduction (MRR) shall continue to be implemented. The NPC successor generating companies shall shoulder the MRR from the time of their respective Closing Dates, unless the parties agree otherwise. Any MRR accruing after the Notice of Award and prior to the Closing Date shall be for the account of NPC. Thus, residential end-users of the affected DUs shall continue to enjoy the rate reduction of thirty centavos per kilowatthour (PhP0.30/kWh) and the implementation of the same shall terminate upon the expiration of the original term of the assigned and transferred TSCs.”

In the absence of clear arrangements made prior to the bidding process, the Commission deems that NPC and PSALM should be made to initially bear the MRR, including any MRR accruing after the Closing Date. The same may, however, be borne by the SGCs, subject to written agreement to that effect.

Thus, after due deliberation, the Commission finds merit in the petition to amend Section 10 of Resolution No. 16, Series of 2008 to reflect the foregoing policy on the treatment of the MRR.

WHEREFORE, PREMISES CONSIDERED, the Commission hereby partially grants the “Petition to Initiate Rule Making” filed by Masinloc Power Partners Co., Ltd. (MPPCL). Section 10 of Resolution No. 16, Series of 2008 on the issue of the MRR is amended to read, as follows:

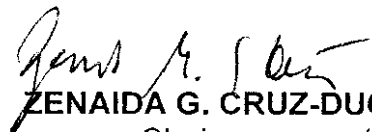
“Section 72 of the EPIRA on the Mandated Rate Reduction (MRR) shall continue to be implemented. The NPC successor generating companies shall implement the same subject to the execution of a written instrument between NPC and/or PSALM and the concerned NPC successor generating company specifically containing the assumption by the latter of such obligation. In the absence of such



specific written instrument, the rights of the residential end-users shall not be impaired and NPC and/or PSALM shall bear the cost of the rate reductions implemented by the NPC successor generating company. Thus, residential end-users of the affected DUs shall continue to enjoy the rate reduction of thirty centavos per kilowatthour (PhP0.30/kWh) and the implementation of the same shall terminate upon the expiration of the term of the assigned and transferred TSCs. If, after the expiration of the TSC's term, the NPC successor generating company shall continue to supply the requirements of the affected DU under an extension as allowed by the ERC, the obligation to provide the MRR shall cease, unless otherwise stipulated upon by the NPC successor generating company and the affected DU, in which case the cost of implementing the MRR shall be borne by the NPC successor generating company."

SO ORDERED.

Pasig City, 18 May 2009.


ZENAIDA G. CRUZ-DUCUT
Chairperson


RAUF A. TAN
Commissioner


ALEJANDRO Z. BARIN
Commissioner


MARIA TERESA A.R. CASTAÑEDA
Commissioner


JOSE C. REYES
Commissioner

Copy Furnished:

1. **National Power Corporation**
Agham Road, Diliman,
Quezon City
2. **Power Sector Assets and Liabilities Management Corporation**
2nd Floor, SGV II Bldg., Ayala Avenue,
Makati City
3. **Puyat Jacinto and Santos**
Counsel for SN Aboitiz Power, Incorporated
12F Manilabank Building,
6772 Ayala Avenue, Makati City
4. **First Gen Corporation**
3rd Floor Benpress Bldg., Exchange Road corner MERALCO Ave.,
Ortigas Center, Pasig City
5. **Masinloc Power Partners Corporation, Ltd.**
30F Philamlife Tower,
Paseo de Roxas, Makati City
6. **Romulo Mabanta Buenaventura Sayoc and Delos Angeles**
Counsel for Emerald Energy Corporation
30th Floor, Citibank Tower,
Paseo de Roxas, Makati City
7. **Philippine Independent Power Producers Association**
c/o Bauang Private Corporation
2/F Benpress Bldg., Exchange Road corner MERALCO Ave.,
Ortigas Center, Pasig City
8. **Manila Electric Company**
Lopez Building, MERALCO Ave.,
Ortigas Center, Pasig City
9. **Cagayan Electric Power and Light Company**
Suite A, 8th Floor Strata 100 Building
Emerald Ave., Ortigas Center, Pasig City
10. **Northern Luzon Electric Cooperative Association**
c/o Counsel for NELECA
8F Strata 100, F. Ortigas Jr. Road,
Ortigas Center, Pasig City