

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



PHILIPPINE FOREMOST MILLING CORPORATION, represented by its Executive Vice President Engr. Erwin Que,

Complainant,

-versus-

ERC CASE NO. 2004-327

PANAY ELECTRIC COMPANY INC., (PECO),

Respondent.

x-----x

D O C K E T E D
Date: DEC 16 2005
By: [Signature]

DECISION

Before the Commission for resolution is a controversy between Philippine Foremost Milling Corporation (Foremost Milling) and Panay Electric Company (PECO) surrounding the putting up of electric poles, transmission wires and other forms of construction relative to an agreement for the supply of electricity entered into by Foremost Milling with National Power Corporation (NPC) and National Transmission Corporation (TRANSCO).

The antecedent facts are as follows:

Foremost Milling is engaged in flour milling and manufacture of animal feeds with a contract for the supply of electric power with PECO. In the course of their contract for the provision of electric power, increases in the electricity rates were imposed by PECO which Foremost Milling felt to be detrimental to their operations. Foremost Milling allegedly sought rate adjustments with PECO but this was denied. It, therefore, sought electric power supply from NPC and TRANSCO. Foremost Milling entered into a Memorandum of Agreement and

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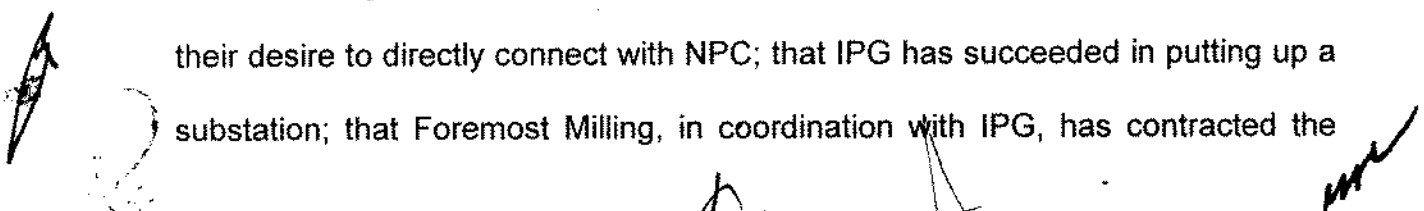
Contract (MAC) with NPC and TRANSCO on September 25, 2003 for the supply and purchase of electricity in bulk at a rate lower than that charged by PECO.

Relative to the said contract, Foremost Milling applied for the necessary permits, purchased the required materials and hired a private contractor Ferrowelds Construction Incorporated (Ferrowelds) to construct the improvements. According to Foremost Milling, as soon as the construction of the project commenced, PECO started putting up electric posts parallel or adjacent to those installed by Ferrowelds for Foremost Milling, thereby hampering the latter's work. This was allegedly done to harass, obstruct and prejudice the agreement entered into between Foremost Milling and NPC and TRANSCO. Foremost Milling allegedly sought to negotiate for an amicable solution so that it may continue its construction unhampered. PECO however, allegedly refused to entertain any suggestions.

Foremost Milling filed on September 27, 2004 a "*Petition for Injunction with a Prayer for Issuance of a Cease and Desist Order*" pending hearing on the merits, enjoining and/or restraining respondent PECO from harassing and causing acts of obstruction to the construction of the aforesaid transmission lines.

Acting on the said petition, on September 28, 2004, the Commission issued an Order setting this case for hearing on October 21, 2004.

On October 4, 2004 PECO filed a letter-complaint dated September 17, 2004 alleging that the Iloilo Provincial Government (IPG), Foremost Milling and HEVA Management and Development Corporation (HMDC) have manifested their desire to directly connect with NPC; that IPG has succeeded in putting up a substation; that Foremost Milling, in coordination with IPG, has contracted the



services of Ferrowelds in setting up, parallel to existing distribution facilities of PECO, its own poles and sub-transmission lines; that said sub-transmission facilities will eventually connect to TRANSCO's 69KV lines at Brgy. Mansaya, Lapaz, Iloilo City wherein NPC's 69 KV supply is situated. PECO, thus, requested the Commission to investigate its complaint. It further prayed that pending final result of the Commission's investigation, a provisional order be issued against the said entities to cease and desist from continuing the acts complained of and that after investigation, an order be issued making the injunction permanent.

PECO, in its letter dated September 16, 2004 argued that the abovementioned set-up is a blatant violation of laws, rules and regulations by all the parties involved and prejudicial to its interest and its customer(s), as well as to the interest of the general public for the following reasons:

- a) Direct connection allowed under the NPC Charter has been accordingly modified by the provisions of the Electric Power Industry Reform Act (EPIRA) and its Implementing Rules and Regulations (IRR) on the ownership and operation of sub-transmission lines;
- b) Direct connection will cause gross financial loss to PECO;
- c) Direct connection under the set-up being implemented by the IPG and Foremost Milling tacitly allowed by NPC/TRANSCO is contrary to law and prejudicial to public safety;
- d) The set-up would allow an end-user to become and act as an electric distributor itself; and
- e) The set-up will ultimately hurt the customers of PECO in general.

On October 21, 2004, the initial formal hearing of the case was held wherein the parties, notwithstanding their petition and letters to the Commission,

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jointly manifested the possibility of an amicable settlement and moved that a status quo order be issued. Said motion was granted.

On November 10, 2004, PECO submitted its "Answer/Comment with Counter-Claim and Counter-Charge with Prayer for Issuance of Cease and Desist Order". It prayed that pending hearing on the merits, a cease and desist order be issued enjoining (a) NPC, TRANSCO, and Foremost Milling to effect a direct connection and/or bulk sale of electricity; and (b) Foremost Milling and Ferrowelds to establish a sub-transmission system connecting Foremost Milling to NPC. It likewise prayed that a decision be rendered: (1) Making the injunction permanent; (2) Declaring the MOA for direct connection and/or bulk sale of electricity between NPC, TRANSCO and Foremost Milling as illegal; (3) Declaring the facilities being constructed by Foremost Milling and Ferrowelds as subtransmission facilities and declaring the same to be illegal; (4) Directing Foremost Milling to pay PECO actual damages in the amount of P2,000,000; and (5) Directing Foremost Milling to pay attorney's fees of P100,000, and the cost of litigation.

On November 16, 2004, a conference was set by the Commission to discuss the terms/conditions of a possible amicable settlement between Foremost Milling and PECO.

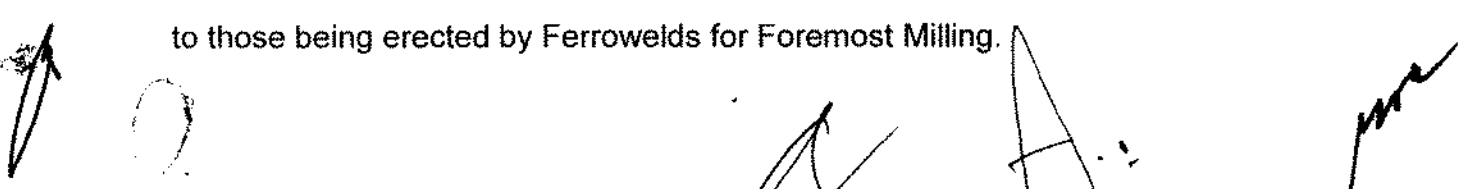
On November 22, 2004, the Commission issued an Order directing the parties to maintain the **status quo** such that "Foremost Milling should, in the meantime, stop the construction of the transmission lines, above and below ground, pending the resolution of the case."

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On December 6, 2004, Foremost Milling filed a "*Manifestation and Motion for the Issuance of Status Quo Order*" seeking reconsideration of and clarification to the Order of the Commission dated November 22, 2004. On December 8, 2004, the Commission received PECO's "Urgent Ex-Parte Motion for the Issuance of a Status Quo Order". Foremost Milling's "*Manifestation and Motion*" was in response to PECO's "*Urgent Ex-Parte Motion*".

On December 9, 2004, a hearing was set and Foremost Milling manifested therein that it was, at that time, currently negotiating an amicable settlement with PECO and moved that it be allowed to amend its complaint/petition to include its application for direct connection so that all the issues would be joined. Said Motion was granted in an Order dated December 17, 2004.

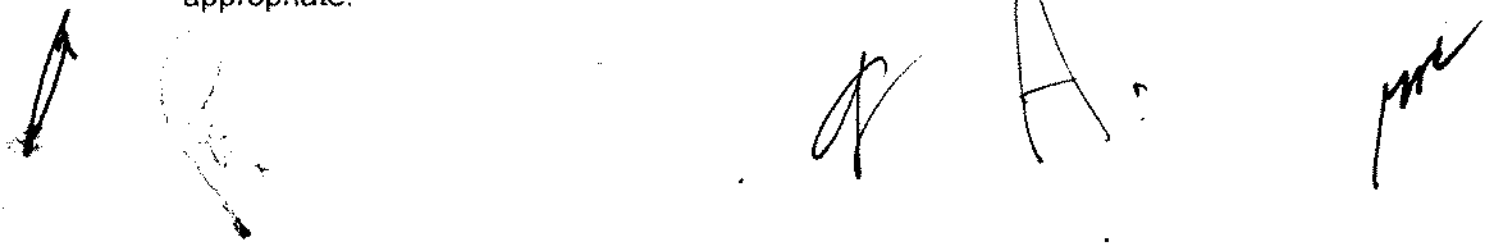
In its "*Amended Complaint*", filed on January 12, 2005, Foremost Milling reiterated its allegations in its petition and added that due to PECO's wanton and highly malicious action of harassing and continuously obstructing the establishment of its transmission system thru TRANSCO in preparation of its direct connection, Foremost Milling suffered huge and tremendous losses in its operation. It also contended that the obstruction would result in an injustice to Foremost Milling as it will be forced to undertake labor-saving schemes that could displace a number of its employees to offset the unrealized benefits exerted from direct connection; increase prices of farm products to the detriment of its farmer-customers; down-size and/or reduce production that would ultimately affect the surrounding community. It also reiterated its prayer for a Cease and Desist Order to enjoin PECO from putting up electric posts adjacent to those being erected by Ferrowelds for Foremost Milling.



The Commission noted the "*Manifestation and Motion*" filed by Foremost Milling, also on January 12, 2005, wherein it alleged that NPC and TRANSCO are indispensable parties since one of the prayers of PECO in its counter-charge is for the declaration of nullity of the MOA for direct connection and/or bulk sale of electricity entered into by and among NPC, TRANSCO and Foremost Milling and that the two corporations be directed to file their respective answers to PECO's counter-charge.

In its "*Comment*", filed on February 8, 2005, TRANSCO contends that the bulk sale of power and direct connection is mandated under paragraph (b) Section 9 of Republic Act 9136 (EPIRA) as well as Section 3(g) of Republic Act No. 6395 (Revised Charter of NPC). It also argued that the power of NPC to sell electricity in bulk and to effect direct connection was not affected by the EPIRA because there was nothing in the said law or its Implementing Rules and Regulations that abolished or modified the same.

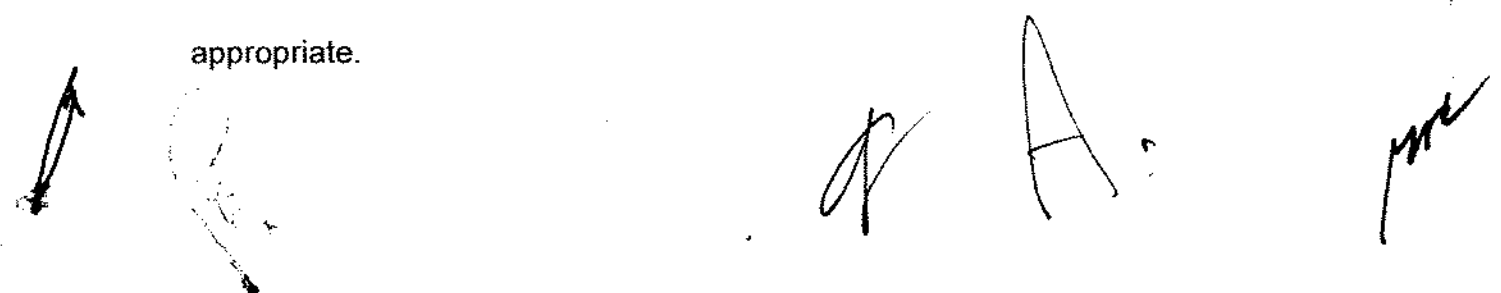
NPC, in its "*Comment*" dated February 8, 2005, emphasized its power under its Charter [Section 3(g) of Republic Act No. 6395] to sell electric power in bulk to industrial enterprises provided that the requirement of such establishment is not less than 100 kilowatts. It contended that Presidential Decree 380 (P.D.380), as amended by Presidential Decree 395 (P.D. 395), granted NPC the legal authority to directly service the electric power needs of industrial enterprises, provided the electric franchise in the area has been given an opportunity to be heard and that it is incapable or unwilling to match the reliability and rates of NPC for directly serving said enterprises. It also cited several other instances where bulk power supply or direct connection was deemed appropriate.

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At the April 21, 2005 hearing, Foremost Milling presented their witnesses,

namely:

1. Engr. Erwin Que, Foremost Milling's Vice-President and General Manager who affirmed the affidavit he executed which served as his direct testimony (Affidavit "A" and "A-1"). Said affidavit provided for the grounds relied upon by Foremost Milling for its decision to connect directly to NPC and TRANSCO and to seek injunction of PECO's acts to prevent such direct connection, to wit: a) the higher rates of PECO as compared to NPC; b) the unreliability of the electric supply of PECO that has adverse effects on Foremost Milling's production; c) PECO's refusal, despite due request, to lower its rates and improve its service(s); d) direct connection with NPC was resorted to because of such high rates and unreliable service and for Foremost Milling's survival; and e) PECO's acts to prevent the direct connection.
2. Mr. Sisenando Helera, Plant Manager of Foremost Milling, who affirmed the affidavit he executed which served as his direct testimony (Exhibit "J"). Said affidavit contained information on the power interruptions; comparison of production targets and actual production of Foremost Milling during the occurrences of power interruptions; alleged harassment and obstruction by PECO during the construction of transmission facilities by putting up of its own electric poles close and adjacent to those of Foremost Milling even if PECO already had existing electric poles and transmission lines in that area. Photographs and sketch plans showing Foremost Milling's and PECO's respective electric poles; and
3. Mr. Avelino Pacifico, employee of Ferrowelds, who affirmed the affidavit he executed which served as his direct examination (Exhibit "Q"). Said affidavit contained allegations of PECO's harassment and obstruction of petitioner's construction of transmission facilities and the company hired by Foremost Milling to undertake the construction of transmission lines of the company for direct connection with the TRANSCO.

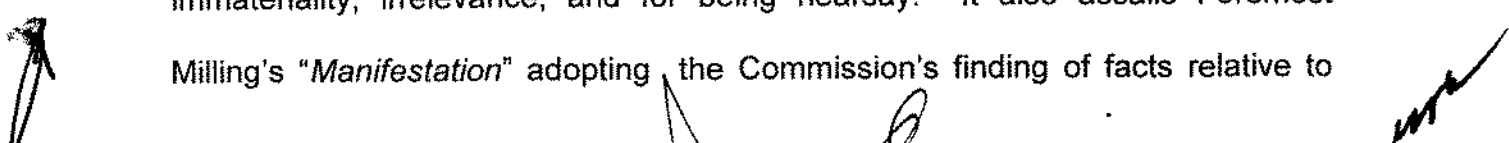
In the course of the hearing, additional documents were presented and duly marked as Exhibits "A" to "Q-2" intended to prove the unreliability of PECO's electric service and the resulting production deficit incurred by Foremost Milling; PECO's various rate increases which are higher, instead of being equal to or lower, than NPC's rates; the terms and conditions of the direct bulk supply of electricity by NPC and TRANSCO to Foremost Milling; that PECO was duly informed of Foremost Milling's intention to directly purchase electric power from

NPC; the cost of investment incurred by Foremost Milling with the implementation of the direct connection; and that PECO did not seek the Commission's prior approval for the erection of poles within the road right-of-way at Iloilo Airport Direct Road and Deep Sea Port Road, Lapaz, Iloilo City.

On the May 12, 2005 hearing, PECO conducted its cross-examination on the remaining three (3) witnesses of petitioner. The cross-examination delved, among others, on the reliability of supply of power, power outages and its effect, comparison of rates of NPC, TRANSCO and PECO, and construction of transmission facilities by Foremost Milling. In the course of their testimonies additional documents were presented and marked as Exhibit "S" to "U" for petitioner and Exhibits "1" to "11-D" for respondent.

On May 19, 2005, Foremost Milling filed its "*Formal Offer of Evidence*" (FOE).

In response thereto, on July 4, 2005, PECO filed its "*Comments and Objections to Petitioner's Formal Offer of Evidence*". It stated that the evidence offered by Foremost Milling was self serving and failed to establish PECO's inefficiency in the absence of comparable evidence with other power distributors and suppliers. It added that the intent to prove PECO's unreliability did not reflect the real cause of power outages but merely assumes that they were purely attributable to PECO. It objected to the admission of the evidence offered to prove NPC and TRANSCO rates were lower, arguing that these are inadmissible for not being validated and are mere estimates. It objects to other evidence offered due to lack of proof of genuineness and due execution, immateriality, irrelevance, and for being hearsay. It also assails Foremost Milling's "*Manifestation*" adopting the Commission's finding of facts relative to





PECO's rates compared to those of NPC contending that the Decision in ERC Case Nos. 2002-07 and 2001-903 has been elevated to the Court of Appeals on questions of fact and law.

The Commission admitted the Foremost Milling's Documentary and Testimonial Evidence in an Order dated July 21, 2005.

On August 19, 2005, PECO presented its first witness, Mr. Bienvenido G. Anatan, its current Head of Engineering and Operations. Mr. Anatan affirmed the affidavit he executed which served as his direct examination (Exhibit "12"). He testified to the reliability of PECO in the supply of electric service to Foremost Milling and that it was NPC which could not provide a steady reliable electric service, and that PECO's rates reflect the true cost of power and that the allowance of the direct connection application of Foremost Milling would harm the remaining consumers of PECO due to higher rates.

On the September 2, 2005 hearing, PECO marked the affidavit of its second witness, Mr. Wilfred Billena, the General Manager of Iloilo I Electric Cooperative (ILECO I), along with its attachments as Exhibits "21" and "22". His testimony was offered to prove the unreliability of the NPC electrical service. Mr. Billena was not present to be cross-examined at the hearing. Foremost Milling reserved its right to cross-examine said witness. PECO promised to present the witness in the next hearing for such cross-examination.

PECO's third witness, Mr. Ariel Arman V. Lapus, Vice-President for commercial Group of Panay Power Corporation (PPC), was presented on the September 14, 2005 hearing. He affirmed the Affidavit (Exhibit "23") he executed which served as his direct examination. His testimony was offered to prove



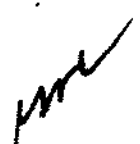



PPC's reliability and capability to supply the demand of PECO, and to the fact that Iloilo City's increasing power supply demand is being addressed by the evaluation of the possibility of the construction and operation of a coal plant within Panay Island in addition to the Diesel Powered Plant constructed by Mirant Global Corporation (Mirant) through its subsidiary Avon River Power Holdings (Avon River). Mr. Billena was again absent in the said hearing to be cross-examined. This constitutes a waiver on his part.

PECO submitted its "*Formal Offer of Evidence*" (FOE) on October 3, 2005. Foremost Milling filed its "*Comments and Objections*" thereto, which were admitted by the Commission.

Foremost Milling presented rebuttal evidence through its witness, Atty. Eldrid C. Antiquiera. He affirmed his Affidavit (Exhibit "BB") and his participation in securing the documents annexed thereto (Exhibits "V", "W", "X", "Y" to "Y-1", "Z" to "Z-3" & "AA" to "AA-6"). The evidence shows the power and development plans and programs of the NPC and TRANSCO in Panay Island. In particular, the President of NPC certified to the guaranteed reliability of the NPC to supply the power requirement of Foremost Milling for the entire term of its direct connection to NPC.

Foremost Milling submitted its "*Formal Offer of Rebuttal Evidence*" on November 17, 2005. No comments or objections thereto were made by PECO.



The primordial issue in this case is the validity of the agreement for the direct connection of Foremost Milling with NPC and TRANSCO. The propriety of the cease and desist order is a collateral issue which will be resolved along with the issue of direct connection.



It is an established principle that the exclusive nature of any public franchise is not favored and that in all grants by the government to private corporations, the interpretation of rights, privileges or franchises is taken against the grantee. (CEPALCO vs. NPC, G.R. No. 72085, December 28, 1989)

It is likewise well settled in several Decisions of the Supreme Court that sale in bulk by NPC of energy direct to industrial enterprises is valid subject to requirements of a hearing (or an opportunity for such a hearing) where it is established that the affected franchise holder is incapable or unwilling to match the reliability and rates of NPC. Put in simple terms, The Supreme Court recognizes the validity of direct connections to the NPC provided that the legitimate franchise holder(s) (utilities) were not deprived of due process to show that it is willing and able to provide the service requirements of their industrial customers with reasonable rates to accompany the same.

The Commission takes judicial notice of its own Decision in the unbundling case(s) [ERC Case Nos. 2002-07 and 2001-903] for which PECO applied, which Decision is hereby adopted and incorporated by way of reference and as part of this Decision the finding of facts and the resolution therein. In that case(s), rates allowed to be charged by PECO is to be pegged at NPC rates. Said Decision was raised on appeal to the Court of Appeals on May 23, 2005, affirmed this Commissions decision on September 16, 2005. It stressed therein the doctrine that findings of administrative or regulatory agencies on matters which are within their technical expertise are generally accorded not only respect but at times even finality if such findings and conclusions are supported by substantial evidence and that rate fixing calls for a technical examination and a specialized review of specific details which the courts are ill-equipped to enter, hence, such matters are primarily entrusted to the administrative or regulating authority.



(Republic vs. Manila Electric Company, 401 SCRA 130). The Court of Appeals stated that they find no reason to deviate from this principle.

PECO, by virtue of that unbundling case(s), ERC Cases 2002-07/2001-93, is allowed to charge the following rates:

Panay Electric Company, Inc. ERC Case No. 2002-07 (2001-93) RATE SCHEDULE								
		Residential	Intermediate	Commercial	Power	City Gov't	Street Lighting	Other Gov't
Generation Charge	PhP/kWh	3.7481	3.7491	3.7491	3.7491	3.7491	3.7491	3.7491
Distribution Charge	PhP/kWh	0.4934	0.4450	0.4534	0.2099	0.5438	0.5383	0.6193
	PhP/kW				68.36			
Supply Charge	PhP/kWh	0.1758						
	PhP/Cust./Mo.		37.07	37.07	37.07	37.07	37.07	37.07
Metering Charge	PhP/kWh	0.1947						
	PhP/Cust./Mo.	5.00	46.05	359.64	853.63	46.05	46.05	46.05
System Loss Charge	PhP/kWh	0.4433	0.4433	0.4433	0.4433	0.4433	0.4433	0.4433
Inter-Class Cross-Subsidy	PhP/kWh	(0.1275)	0.2925	0.1530	0.0290	0.0073	(0.0121)	0.2628
Lifetime Rate Subsidy	PhP/kWh	0.0614	0.0614	0.0614	0.0614	0.0614	0.0614	0.0614
Environmental	PhP/kWh	0.0025	0.0025	0.0025	0.0025	0.0025	0.0025	0.0025
Missionary	PhP/kWh	0.0373	0.0373	0.0373	0.0373	0.0373	0.0373	0.0373

Note: plus national and local franchise tax

The Power Purchase Agreement (PPA) between PECO and Panay Power Corporation (PPC) was approved in ERB Case No. 98-30. Based on the PPA, PPC rate to PECO should be equal or less than NPC, otherwise, PPC and PECO should re-negotiate the PPA and seek ERC's approval thereof. This was never done by PPC and PECO, notwithstanding the repeated requests of Philippine Foremost for the adjustment of PECO's rate. This is a violation by PECO of its obligation to its consumers, including Philippine Foremost.

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Records show that PECO's rates are almost double than that offered by NPC. Despite PECO's protestations to the findings of fact in its unbundling case(s) [ERC Case Nos. 2002-07 and 2001-903] and the argued inadmissibility of the "unvalidated" evidence of Foremost Milling pertaining to NPC rates, it admitted indirectly, through the testimony of one of its witnesses, Engr. Anatan, and in one of its pleadings, that the rates it is charging its customers is indeed higher than NPC. It averred through, Mr. Anatan that the NPC rates do not reflect the true cost of power arguing that NPC rates are subsidized and it is unrealistic and unreasonable to compare PECO's rates with NPC's rates. PECO merely relies on its assumption that NPC, by its "non-profit" nature, can afford to continue its business at a huge loss, therefore NPC can give lower rates. Moreover, PECO failed to controvert Foremost Milling's allegations and evidence relative to its excessive billings/unjustified increases in rates.

Anent the issue of reliability of electric power supplied by PECO, it failed to show that it can provide steady and reliable power supply to Foremost Milling. It merely presented documents relative to NPC'S capacity to provide sufficient power to cover the Cebu-Negros-Panay (CNP) Grid arguing to that effect that there is no guarantee that NPC may be able to provide Foremost Milling its needs for its efficient operation, which are all speculative. It failed to show by incontrovertible evidence that the blackouts or power outages complained of and documented by Foremost Milling was not caused by the breakdown of the machinery of its IPP. In fact, by its own admission, there were power outages scheduled in rotation due to the breakdown of two (2) of its machinery. PECO, by its own accord, failed to prove that it can ensure steady and reliable supply of power to Foremost Milling. Even its allegation that PPC (Mirant) is evaluating putting up Diesel/Coal Fired Power Plants is self-serving.

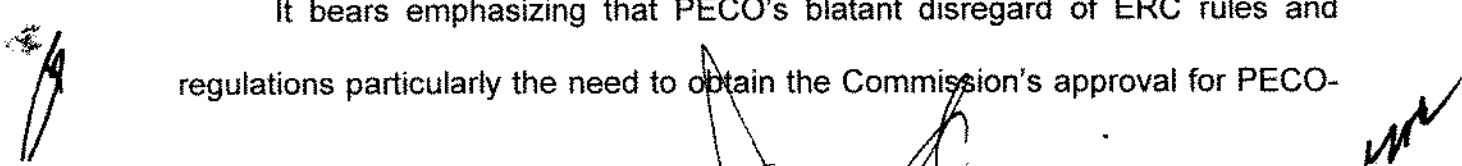
In paragraph 12 of his Affidavit (Exhibit "23"), PECO's witness Ariel Arman V. Lapus, Vice President for the Commercial Group of Mirant, admitted that there are instances when PPC is unable to generate power in full or in part.

It is noted that PECO alleged that there is an "internal arrangement" between IPG and Foremost Milling regarding the use of the former's substation and that PECO registered its vehement objection thereto. Perusal of the evidence on records (Pages 66-70 of the TSN of the hearing dated May 12, 2005) show that initially the agreement between TRANSCO and Foremost Milling was exclusive (point to point) and that IPG requested to tap from that line considering that they too were contemplating direct connection. Foremost Milling also testified therein that there was a verbal agreement to enable IPG to tap into the Foremost Milling's line. However, Foremost Milling, under oath, averred that it was willing to ensure that the line that it is constructing is exclusive for its own use. PECO will thus be assured of the exclusivity of the use of Foremost Milling's sub-transmission lines.

Finally, PECO failed to controvert the fact that it refused to or did not match NPC's reliability and rates despite due notice. Records show that as early as 2001, PECO was already informed of the intention of IPG, HEVA, and Foremost Milling to establish direct connection with NPC.

Notably, even during the hearing of this case, efforts were exerted to amicably settle the differences of Foremost Milling and PECO but to date no agreement has been reached.

It bears emphasizing that PECO's blatant disregard of ERC rules and regulations particularly the need to obtain the Commission's approval for PECO-



PPC renegotiated rates is one of the fundamental reasons why PECO was illegally charging rates from its customers, including Foremost Milling.

There is no concrete showing that PECO exerted efforts in preventing the exodus of these customers to NPC. It is thus deemed to have waived its preemptive right to provide said customers or specifically Foremost Milling with its power requirements. It cannot now be allowed to effectuate any act that would prevent Foremost Milling to continue with direct connection in the guise of the exercise of such right.

It is noted that it was admitted in one of the hearings on this case that PECO put up its electric poles adjacent to those being erected by Foremost Milling's for no apparent reason and even without immediate need or use for it, and purportedly it was merely for "future customers". Thus, logically there was no other reason for PECO to put up such poles other than to prevent/obviate Foremost Milling's direct connection.

WHEREFORE, premises considered, the Memorandum of Understanding executed between Foremost Milling and NPC for the bulk sale of power supply by way of direct connection is hereby **APPROVED** for implementation.


Accordingly, PECO is hereby ordered to **CEASE** and **DESIST** from doing any and all acts that would prevent or deter Foremost Milling from the installation of its electric poles, wires and transformers to effectuate the direct connection with NPC.

Additionally, Foremost Milling is hereby ORDERED to maintain the exclusivity of the use of its sub-transmission lines after construction and upon commencement of its use.

Damages prayed for is hereby DISMISSED for lack of jurisdiction.

SO ORDERED.

Pasig City, December 12, 2005.



RODOLFO B. ALBANO, JR.



OLIVER B. BUTALID
Commissioner



JESUS N. ALCORDO
Commissioner



RAUF A. TAN
Commissioner



ALEJANDRO Z. BARIN
Commissioner