

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



**BATANGAS PAPER
CORPORATION (BPC)**
Complainant,

- versus -

ERC CASE NO. 2017-033 CC

**GNPOWER LIMITED
COMPANY (GNPOWER)
AND MANILA ELECTRIC
COMPANY (MERALCO),**
Respondents.

D O C K E T E D
Date: JAN 14 2019
By: [Signature]

X-----X

ORDER

Before the Commission for resolution is the “*prayer for the issuance of a Temporary Restraining Order (TRO) and/or Writ of Preliminary Injunction*” filed by Batangas Paper Corporation (BPC) against respondents GN Power Limited Company (GNPower) and Manila Electric Company (MERALCO).

Factual Antecedents

On 11 December 2017, BPC filed a verified *Complaint* against respondents GNPower and MERALCO for the refund of the total amount of PhP12,171,764.50 plus legal interest, representing the unauthorized and illegal assessment and collection of Distribution Utility Wheeling Charges (DUWC), with prayer for the issuance of a Temporary Restraining Order (TRO) and/or Writ of Preliminary Injunction. The pertinent allegations of the *Complaint* are hereunder quoted as follows:

1. Plaintiff is a corporation duly organized and existing under and by virtue of Philippine laws, with principal office address at Lonian Compound near LIIP, Mamplasan Exit, SLEX, Biñan, Laguna.
 - 1.1. The complainant is primarily engaged in the business of manufacturing and distributing papers, cartons and other similar products, and, as such, operates and

[Handwritten signature]

maintains a paper plant/factory at Makban Road, Barangay San Felix, Sto. Tomas, Batangas.

2. Respondent Manila Electric Company (hereinafter, the respondent "*MERALCO*") is a public utility corporation duly-organized and existing under and by virtue of Philippines laws, with principal office address at the MERALCO Bldg., Ortigas Avenue, Pasig City, where it may be served with summons and other legal processes.
 - 2.1. Respondent MERALCO is a so-called Distribution Utility (DU), which as an exclusive franchise to operate a distribution system in the particular location where the complainant is presently operating and maintaining its paper factory in Sto. Tomas, Batangas.
3. Respondent GNPowder Ltd. Co. (hereinafter, the respondent "*GNPower*") is a duly-registered limited partnership organized and existing under and by virtue of Philippine laws, with principal office address at 1905 Orient Square Bldg., Don Francisco Ortigas Jr. Road, Ortigas Center, Pasig City, where it may be served with summons and other legal processes.
 - 3.1 Respondent GNPowder is a Retail Electricity Supplier (RES), which solely and exclusively provides all of the complainant's power needs and/or electricity requirements at its paper factory located in Brgy. San Felix, Sto Tomas, Batangas by virtue of an existing Master Power Purchase Sale Agreement (MPPSA) between the herein complainant and respondent GNPowder.
4. At all times material to this complaint, the complainant has been a Directly Connected and Contestable Customer by legal contemplation, as evidenced by the Certificate of Contestability issued by this Honorable Commission no less, a copy of which is hereto attached as Annex "A".
5. In connection with the complainant's actual use and/or consumption of the power and/or electricity that is being exclusively provided to it by respondent GNPowder as its Retail Electricity Supplier (RES), the latter sends Billing Statements to the complainant on a monthly basis, which the complainant is duty-bound to pay and/or settle in full within the period stipulated in the billing invoices.
6. During the particular billing period beginning 26 March 2017 to date, the complainant received a total of seven (7) separate Billing Statements from the respondent GNPowder, *to wit*: Billing Statements Nos. 00654, 00727, 00832, 00913, 00971, 0001087 and 0001208, which have an aggregate billing amounts of USDOLLARS: ONE MILLION THREE HUNDRED ONE THOUSAND FIVE HUNDRED EIGHTEEN AND 64/100 (US\$1,301,518.64) and PESOS: THIRTY MILLION SIX HUNDRED FIFTY TWO THOUSAND SIX HUNDRED NINETY FOUR & 06/100 (₱30,652,694.06), respectively. Copies of said Billings Statements are hereto attached as Annexes "B" to "B-6", inclusive.



- 6.1 As can be gleaned from even a cursory examination of the afore-cited Billing Statements, the complainant is invariably billed therein for so-called "*Distribution Utility Wheeling Charges*," which, upon complainant's initial inquiry with the respondent GNPow, were supposedly due to respondent Meralco by virtue of the latter's putative ownership of the subtransmission lines through which the electricity being provided by respondent GNPow to the herein complainant purportedly passes.
- 6.2 As further explained to the complainant, it is supposedly the legal and contractual duty of respondent GNPow to include such charges in its Billing Statements and to collect the said amount for and on behalf of respondent Meralco, as well as to, thereafter, remit such payments to respondent Meralco upon actual collection thereof.
7. Believing in good faith on the accuracy of the afore-enumerated Billing Statements coming from respondent GNPow, and, in particular, that any and all charges stated therein were, indeed, due and demandable from the complainant, the latter religiously paid and/or settled in full the amounts stated and/or being collected in the said Billing Statements. Copies of the Official Receipts attesting to the complainant's actual payment of the amounts stated in the above-enumerated Billing Statements Nos. 00654, 00727, 00832, 00913, 00971 are hereto attached as Annexes "C" to "C-9", inclusive, while copies of the Deposit Slips showing the complainant's latest payments for Billing Statements Nos. 0001087 and 000128 are hereto attached as Annexes "C-10 to "C-13", inclusive.
8. Of late, however, the complainant discovered, much to its surprise and dismay, that the respondent Meralco is, in truth and in fact, NOT the real and/or bonafide owner of the subtransmission lines for which the latter has been collecting Distribution Utility Wheeling Charges from the complainant.
- 8.1 Indeed, this Honorable Commission can take judicial notice of the fact that, up until now, the respondent Meralco has yet to acquire lawful ownership over such subtransmission lines.
- 8.2 Not being the real and bonafide owner of the subject subtransmission lines, it follows to law and to reason that respondent Meralco has absolutely no legal authority to charge and/or collect such Distribution Utility Wheeling Charges from the herein complainant.
9. In any event, and by express provision of the relevant Resolutions issued by this Honorable Commission anent the sale, transfer and/or acquisition of subtransmission assets, particularly Resolution No. 15, Series of 2011, the Distribution Utility (DU) - - like the respondent Meralco in this case, cannot validly charge and/or assess a Directly Connected customer and/or end-user - - like the herein complainant, for such "*Distribution Utility Wheeling Charges*" until and unless the Directly Connected

46

customer's existing Power Supply Contract with an Independent Power Producer - - like the herein respondent GNPower, had already expired, and, further, that the requisite Distribution Wheeling Service Agreement is actually executed and/or concluded between the Distribution Utility and the Directly Connected end-user.

- 9.1 In the instant case, the complainant's Master Power Purchase Sale Agreement with respondent GNPower is still very much in force and in effect, and would not expire until 31 August 2031 at the earliest.
 - 9.2 Moreover, there is as yet no Distribution Wheeling Service Agreement that has actually been concluded between the complainant on the one hand, and respondent Meralco on the other.
10. Perforce, there is neither legal nor contractual basis for the Distribution Utility Wheeling Charges being assessed the herein complainant in the Billing Statements afore-enumerated.
 11. As it were, however, the respondent Meralco has actually succeeded in collecting, albeit illegally, the sum total of PESOS: TWELVE MILLION ONE HUNDRED SEVENTY ONE THOUSAND SEVEN HUNDRED SIXTY FOUR & 50/100 (₱12,171,764.50) from the herein complainant as and by way of Distribution Utility Wheeling Charges.
 - 11.1 Considering that respondent Meralco's actual collection of the said amount of ₱12,171,764.50 as Distribution Utility Wheeling Charges was NOT only bereft of both legal and factual bases, but, quite the contrary, was altogether unauthorized and downright illegal, it behooves respondent Meralco to immediately return and/or refund the entirety of the said collected amount to the herein complainant.
 - 11.2 Parenthetically, the herein respondents may be, as they ought to be, precluded from henceforth billing, assessing and/or collecting such Distribution Utility Wheeling Charges from the herein complainant.
 12. Prior to the actual filing of the instant case, the complainant exerted utmost effort to stop and/or preclude the herein respondent Meralco from assessing the former for such otherwise baseless and unwarranted Distribution Utility Wheeling Charges, as well as to convince said respondent Meralco to return the amounts previously paid by complainant therefor, but all such efforts have come to naught, hence, the filing of the instant complaint.

**ALLEGATIONS IN SUPPORT OF THE
PRAYER FOR THE ISSUANCE OF A
TEMPORARY RESTRAINING ORDER AND/OR
WRIT OF PRELIMINARY INJUNCTION**

13. Complainant repleads by reference the foregoing material allegations.
14. From the foregoing, it is both clear and undeniable that the herein respondents have neither legal nor factual basis to impose and/or collect such Distribution Utility Wheeling Charges from the herein complainant considering, among others, that respondent Meralco - - to whom the same are supposedly due, is **NOT** the legitimate and bonafide owner of the subtransmission lines to which the complainant is connected, and, further, because there is as yet no Distribution Wheeling Service Agreement between the complainant and respondent Meralco.
15. Perforce, the complainant is under no legal and/or contractual obligation to continue paying such Distribution Utility Wheeling Charges to respondent Meralco, or to any of the respondents for that matter.
16. Accordingly, the herein respondents should immediately, and without delay, cease and desist, or should be required to forthwith cease and desist, from assessing and/or collecting such Distribution Utility Wheeling Charges from the complainant, as well as from including the same in any and all future billing statements to be issued to the herein complainant.
17. Complainant is entitled to the reliefs prayed for, and the whole or part of such reliefs consists of preventing respondent GNPowr from including such Distribution Utility Wheeling Charges in all of its future Billing Statements to the complainant, and, necessarily as well, of altogether preventing and/or enjoining respondent Meralco from actually charging and/or collecting the same Distribution Utility Wheeling Charges from the complainant.
18. Complainant is able and willing to post the requisite bond, if necessary, in such amount as may be fixed or determined by this Honorable Commission to answer for any and all damages, which the respondents may suffer as a result of the issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction, should this Honorable Commission subsequently and finally decide that complainant was not otherwise entitled thereto.

PRAYER

WHEREFORE, the complainant respectfully prays, as follows:

1. Immediately upon the filing of this complaint, a Temporary Restraining Order (TRO) and/or Writ of Preliminary Injunction be issued preventing and enjoining the respondents from collecting such Distribution Utility Wheeling Charges from the complainant,

and/or from including such Distribution Utility Wheeling Charges in all of the respondents' future Billing Statements to the complainant.

2. After trial on the merits, and compliance with the mandatory hearings as set forth in the Rules of Practice and Procedure of this Honorable Commission, judgment be rendered in favor of the complainant and against the respondents, as follows:

- a) Permanently preventing and enjoining either or both respondents Meralco and GNPowder from charging and collecting such Distribution Utility Wheeling Charges from the complainant; and
- b) Ordering respondent Meralco to return and/or refund to the complainant the sum total of TWELVE MILLION ONE HUNDRED SEVENTY ONE THOUSAND SEVEN HUNDRED SIXTY FOUR & 50/100 (₱12,171,764.50), plus legal interest, representing such unauthorized and illegal assessment and collection of Distribution Utility Wheeling Charges from the complainant beginning 26 March 2017, as well as any and all future payments therefor that complainant may be forced to effect prior to the actual issuance of a TRO and/or a Writ of Preliminary Injunction in this case.

The complainant also prays for such other or further reliefs as may be deemed just and equitable under the premises.

Proceedings Conducted by the Commission

Acting on the said *Complaint*, on 31 January 2018, the Commission issued an *Order* setting the case for pre-hearing conference on 23 February 2018 and directing GNPowder and MERALCO to file their respective *Answers/Comments* on the said complaint.

On 20 February 2018, respondents GNPowder and MERALCO filed their respective "*Motions for Extension of Time*" to file their answers.

On 23 February 2018, the Commission conducted a pre-hearing conference to afford the parties the opportunity to settle the case amicably. However, the parties failed to enter into a compromise agreement and the case was set for pre-trial hearing. On even date, GNPowder filed its "*Answer*". Thus, on 27 February 2018, the Commission issued an *Order* setting the case for pre-trial hearing on 13 April 2018.

On 21 March 2018 and 2 and 6 April 2018, respondent MERALCO filed its "*Motion for Extension of Time*", "*Answer*", and "*Motion for Extension of Time To File Pre-Trial Brief*", respectively.

On 10 April 2018, respondents GNPowder and MERALCO filed their respective “*Pre-Trial Briefs*” while BPC filed its “*Pre-Trial Brief Ad Cautelam*” on 12 April 2018.

During the 13 April 2018 continuation of hearing, MERALCO and GNPowder moved to reset the pre-trial hearing since they needed more time to study the submissions of the parties. The said motion was granted by the Commission. Thus, the pre-trial hearing of this case was reset on 20 April 2018.

At the 20 April 2018 hearing, BPC, MERALCO and GNPowder appeared. At the said hearing, the Commission conducted the pre-trial hearing where the parties stipulated on facts and issues relative to this case.

On 4 June 2018, the Commission issued a *Pre-Trial Order*. In the same *Order*, the Commission set the presentation of BPC’s evidence-in-chief on 16 July 2018. In addition, BPC was directed to submit the judicial affidavits of its witnesses at least five (5) days before the scheduled hearing, copy furnished the respondents.

At the 16 July 2018 evidentiary hearing, the Commission directed the parties to submit their respective position papers on whether or not MERALCO is authorized to collect the “Distribution Utility Wheeling Charges” (DUWC). Likewise, the Commission directed GNPowder to submit the details of MERALCO’s monthly billings for BPC starting 26 March 2017.

On 15 August 2018, BPC, MERALCO and GNPowder filed their respective *Position Papers*.

On 22 August 2018, GNPowder filed its *Notice of Compliance*.

DISCUSSION

While the title of BPC’s pleading states that it is an application for a TRO and/or preliminary injunction, BPC is primarily seeking in its complaint a provisional injunctive relief from this Commission in order for MERALCO and GNPowder to cease and desist from collecting DUWC. A discussion of the substance of the complaint may reveal that it is in fact a relief for the issuance of a cease and desist order by preventing and/or enjoining respondents MERALCO and GNPowder from charging and/or collecting the DUWC from BPC.



In the case of Spouses *Munsalud v. NHA*¹, the Supreme Court held that:

The trial court is reminded that the caption of the complaint is not determinative of the nature of the action. The caption of the pleading should not be the governing factor, but rather the allegations in it should determine the nature of the action, because even without the prayer for a specific remedy, the courts may nevertheless grant the proper relief as may be warranted by the facts alleged in the complaint and the evidence introduced.

Moreover, it is to be noted that, a status quo order and cease and desist order, which is akin to a writ of preliminary injunction, may be issued to restrain or prevent even mere threats or attempts to violate a right.²

Authority of the Commission To Grant Provisional Relief

It is settled that this Commission has the power to grant provisional remedy, such as the relief being prayed for by BPC. In *BF Homes, Inc. et. al, vs. Manila Electric Company*³, the Supreme Court affirmed the Commission's authority to grant provisional relief. The Supreme Court ruled that:

Incidentally, BF Homes and PWCC seemed to have lost sight of Section 8 of Executive Order No 172 which explicitly vested on the ERB, as an incident of its principal function, the authority to grant provisional relief, thus:

Section 8. Authority to Grant Provisional Relief – The Board may, upon filing of an application, petition or complaint or at any stage thereafter and without prior hearing, on the basis of supporting papers duly verified and authenticated, grant provisional relief on motion of a party in the case or on its own initiative, without prejudice to a final that the pleadings, together with such affidavits, documents and other evidence which may be submitted in support of the motion, substantially support the provisional order. Provided, That the Board shall immediately schedule and conduct a hearing thereon within thirty (30) days thereafter, upon publication and notice to all affected parties.

The aforequoted provision is still applicable to the ERC as it succeeded the ERB, by virtue of Section 80 of the EPIRA. A writ of preliminary injunction is one such provisional relief which a party in a case before the ERC may move for.

¹ G.R. No. 167181, Citing *Bokingo vs. The Honorable Court of Appeals*, G.R. No. 161739; and *Evangelista vs. Santiago*, GR. No. 157447

² *Los Baños Rural Bank, Inc. vs. Africa, et.al.*, G.R. No. 143994

³ G.R. No. 171624, 6 December 2010



Notably, the above-mentioned provision of EO 172 continues to be applicable to the ERC as the successor of the ERB, by virtue of Section 80 of Republic Act No. 9136, otherwise known as the *Electric Power Industry Reform Act of 2001 or EPIRA*, viz:

“Section 80. Applicability and Repealing Clause. - The applicability provisions of Commonwealth Act No. 146, as amended, otherwise known as the “Public Services Act”; Republic Act 6395, as amended, revising the charter of NPC; Presidential Decree 269, as amended, referred to as the National Electrification Decree; Republic Act 7638, otherwise known as the “Department of Energy Act of 1992”; **Executive Order 172, as amended, creating the ERB; Republic Act 7832 otherwise known as the “Anti-Electricity and Electric Transmission Lines/Materials Pilferage Act of 1994”, shall continue to have full force and effect except insofar as they are inconsistent with this Act.” (Underscoring supplied)**

As can be gleaned from Section 80 of the EPIRA, EO 172, as amended, shall continue to have full force and effect only to those provisions that are inconsistent with the EPIRA.

The issuance by the Commission of a provisional relief in the form of a Cease and Desist Order is in accordance with Section 43 of the EPIRA, which provides:

Section 43. Functions of the ERC - The ERC shall promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry.

Thus, in the *National Power Corporation vs. East Asia Utilities Corporation and Cebu Private Power Corporation*⁴, the Supreme Court affirmed the Commission’s authority to issue a cease and desist order, to wit:

We find no reason to modify or reverse the above findings of the ERB and ERC.

Under the decision in ERB Case No. 96-118, which approved the allowable rates for the charges on services provided by NPC to its customers, it is undisputed that there is no provision which allows NPC to charge PDS charges on AS separately from AS charges. On the contrary, the AS charges already cover all costs necessary to provide the same.

⁴ G.R. No. 170934, July 23, 2008

In the said case, NPC assailed the Decision of the Court of Appeals which affirmed the Decision of then ERB and Order of the Commission directing NPC to cease and desist from charging therein respondents of Power Delivery Service (PDS) charges corresponding to Ancillary Services (AS). The Supreme Court ruled that based on its *Decision in ERB Case No. 96-118*, there is no provision which allows NPC to charge PDS charges on AS separately from AS charges.

With the authority of this Commission to grant provisional relief, the issue to be resolved is whether or not BPC has the right to seek and be granted a cease and desist order.

There is Substantial Evidence For the Issuance of a Cease and Desist Order

Section 5, Rule 133 of the Rules of Evidence provides that:

Section 5. Substantial evidence. – In cases before administrative or quasi-judicial bodies, a fact may be deemed established if it is supported by substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.

In *NPC vs. PEPOA, Inc.*⁵, the Supreme Court had the occasion to discuss the authority of the ERB (now ERC) to issue a cease and desist order and the evidence required in support thereof, viz:

Petitioner further challenges the ERB's December 20, 1995 Order, which directed it to cease and desist from collecting the penalties, ending resolution of the case. The NPC contends that the provisional relief required notice and hearing prior to being granted, similar to the requirement of the rule on preliminary injunction under Rule 58 of the Rules of Court. Petitioner adds that PEPOA did not submit any supporting documents or affidavits to show the great or irreparable injury that would justify the provisional relief.

Authority to Grant Provisional Relief

The authority to grant provisional relief was conferred on the ERB, not under the Rules of Court but under Executive Order 172, whose pertinent provision reads:

Section 8. Authority to Grant Provisional Relief – The Board may, upon filing of an application, petition or complaint or at any stage thereafter and without prior hearing, on the basis of supporting papers duly verified and authenticated, grant provisional relief on

⁵ G.R. No. 159457, 7 April 2006

motion of a party in the case or on its own initiative, without prejudice to a final that the pleadings, together with such affidavits, documents and other evidence which may be submitted in support of the motion, substantially support the provisional order. Provided, That the Board shall immediately schedule and conduct a hearing thereon within thirty (30) days thereafter, upon publication and notice to all affected parties.

This Court explained the cited provision in Citizen's Alliance for Consumer Protection vs. Energy Regulatory Board, as follows:

"x x x (ERB) is authorized in appropriate cases to grant provisional relief, whether on its own initiative or on motion of a party, either (1) upon filing of an application, petition or complaint; or (2) at any state thereafter and without need of prior hearing, subject, however, to conducting hearing thereon within (30) days thereafter. Issuance on an order granting such provisional relief must rest upon substantial evidence and is without prejudice, however, to rendition of a final decision after hearing."

Plainly, the ERB has the authority to issue provisional relief 1) upon motion or on its own initiative; 2) without notice and hearing; and 3) after the filing of an application, a petition or a complaint.

Need to Substantiate Provisional Relief

The ERB has the discretion to grant provisional relief. **Section 8 of the Executive Order No. 172 simply requires that its exercise of this discretion be supported by substantial evidence in the form of authenticated or verified documents. The reason can easily be discerned from the fact that the order is, by its nature, temporary and subject to adjustment after final hearing.**

The silence of the law cannot be construed as granting limitless discretion to the ERB. The standard for granting provisional relief may be found in the laws creating or relating to the ERB. **After all, statutes should be construed as a whole and in relation to their amendments. Thus, the ERB should exercise its discretion in consideration of its mandate to ensure the quality, reliability, security and affordability of the supply of electric power.** Provisional relief cannot be ordered in a whimsical, arbitrary or oppressive manner.

If supported by substantial evidence, the factual finding of the ERB – and administrative body charged with a specific field of expertise – is conclusive and should not be disturbed. Administrative bodies are given wide latitude in the evaluation of evidence, including the authority to take judicial notice of facts within their special competence. Absent any proof to the contrary, the presumption is that official duty has been regularly performed. Hence, the ERB is presumed to have performed its duty of studying the available evidence, prior to the issuance of the provisional relief.

The ERB issued the Cease and Desist Order in recognition of the fact that end consumers would ultimately pay for the penalties imposed by the NPC. It is clear that the latter did not even rebut this justification. (Underscoring supplied)

It is clear from the foregoing disquisition that the Commission is given wide latitude of discretion in determining the propriety of the issuance of a provisional relief such as a cease and desist order. In fact, only substantial evidence in the form of verified or authenticated documents are needed to support an application for a cease and desist order.

Furthermore, the Supreme Court in the above case emphasized that the Commission should exercise its discretion in issuing cease and desist orders in consideration of its mandate to ensure the quality, reliability, security and affordability of the supply of electric power and in recognition of the fact that it would be the end consumers who would ultimately pay and be unduly burdened by any act or attempt to violate its rules and regulations.

In one instance in *ERC Case No. 2011-052 MC*⁶, the Commission issued a *Cease and Desist Order* to avert the deleterious effects if a distribution utility, Angeles Electric Company (AEC), and its consumers will be disconnected from the transmission grid. The pertinent provisions of the said *Order* are hereunder quoted, as follows:

The Commission is empowered by law and jurisprudence to order remedial relief in the exercise of its jurisdiction, considering the anticipated deleterious effects to AEC and its consumers if it will be disconnected from the grid due to non-payment of the contested DWSA charges and the penalty for the unused contracted energy.

It is worthy to mention that in the case of *Manila Electric Company vs. Energy Regulatory Board, and Edgar L. Ti*, the Supreme Court ruled that the Commission has the authority to grant provisional relief, to wit:

X X X

To prevent the imposition of additional line loss charges to AEC and its consumers and so as not to render nugatory whatever action the Commission shall take thereon, NGCP is hereby directed to refrain from using a gross-up mechanism in the line loss meter readings on AEC's energy off-take.

WHEREFORE, the foregoing premises considered, the National Grid Corporation of the Philippines (NGCP) is hereby directed to CEASE and DESIST from grossing-up the line losses of

⁶ In the Matter of the Petition for Dispute Resolution to Direct the National Grid Corporation of the Philippines to Cease and Desist from Grossing Up Results of Meter Readings with Prayer for Cease and Desist Order; Angeles Electric Corporation, Petitioner v. National Grid Corporation of the Philippines; 22 August 2011



Angeles Electric Corporation's (AE) meter readings at the delivery point in Petersville Power Station at Barangay Pulung Maragul, Angeles City until such time that the Commission has finally resolved this case.

SO ORDERED.

In the instant *Complaint*, it is significant to note that GNPOWER as RES, is responsible for all contractual, service, and billing matters related to their contestable customers including those pertaining to the Distribution Wheeling Services (DWS) that will be provided by the DU operating within the location of the contestable customer in accordance with Section 4.4 of *ERC Resolution No. 02, Series of 2010 (A Resolution Adopting the Amendments to Distribution Services and Open Access Rules)*, to wit:

RELATIONSHIP WITH RES' END-USE CUSTOMERS

A RES is responsible for all contractual, service, and billing matters related to their End-use customers including those pertaining to the Distribution Wheeling Services (DWS), and the DU shall not be responsible for monitoring, reviewing or enforcing such contracts or arrangements. This does not, however, prohibit End-users from contracting and contracting directly with the DU for Connection Assets and Services pursuant to Article II of the DSOAR.

Subject to the adoption by the ERC of the dual billing policy for contestable customers, a RES may opt to have one or more of their end-use contestable customers contract directly with the DU for DWS.

Section 4.2 of the same *Resolution* provides that an entity may qualify for the DWS if said RES has a DWSA with the relevant DU operating within the location of the contestable customer. Accordingly, under the DWSA, the RES shall be fully responsible for determining the billing methods for their customers and payment of all obligations to other market participants.

For the charges relating to the distribution utility, all of its pass-through charges will be billed by the RES to the contestable customers, in accordance with Section 11.3 of *Resolution No. 16, Series of 2012, entitled "Transitory Rules for the Initial Implementation of Open Access and Retail Competition (RCOA)"*.

Meanwhile, Section 3 of *ERC Resolution No. 14, Series of 2013, entitled "A Resolution Adopting a Pro-Forma Distribution Wheeling Services Agreement 'DWSA' Between a Retail Electricity Supplier 'RES' and a Distribution Utility 'DU' Upon Retail Competition and Open Access"*, provides the DWS charges to be billed by the DU to the RES, as follows:

- a. Distribution Charge;
- b. Standard Connection Charge (SCC) or Guaranteed Minimum Billing Demand (GMBD)
- c. Supply Charge;
- d. Metering Charge;
- e. System Loss Charge;
- f. Transmission Charge;
- g. Local Franchise Tax;
- h. Senior Citizen Discount, if applicable;
- i. Lifeline Subsidy;
- j. Universal Charge; and
- k. Other Charges and Adjustments, which shall include, but not limited to, over/under-recoveries and other pass-through charges approved by the ERC.

In compliance with the aforesaid Rules, on 14 October 2014, GNPOWER and MERALCO signed a *Distribution Wheeling Services Agreement (DWSA)* in order for GNPOWER to avail of the Distribution Wheeling Services for its contestable customers within MERALCO's franchise area.

As soon as BPC was able to successfully switch as an indirect member in the Wholesale Electricity Spot Market (WESM) in accordance with *ERC Resolution No. 26, Series of 2007*, GNPOWER started delivering power supply to BPC on March 26, 2017.

Since BPC's switching date, GNPOWER periodically remits to MERALCO the amount collected from BPC for the charges stated below, in compliance with the DWSA:

- a. Transmission Charges
- b. Distribution Wheeling Charges which include System Loss Charges, Distribution Charge, Subsidies, Local Franchise Taxes, and Universal Charges;
- c. ILP Recovery
- d. Generation Charge Over/Under Recovery (GOUR)
- e. MERALCO 2nd Generation Rate Adjustment Mechanism; and
- f. Applicable Value-added Taxes

It is BPC's fundamental contention, however, that respondent MERALCO, not being the owner of the sub-transmission line, has no authority under the law to assess and collect the "*Distribution Utility Wheeling Charge*" in question from BPC.

Based on the record of this Commission, it was disclosed that the BPC is directly connected to the 9.72 kilometer segment of the 38.72 kilometer sub-transmission line which is presently owned, operated

and managed by the National Grid Corporation of the Philippines (NGCP). The almost entire length of this sub-transmission line is located within the franchise areas of both the MERALCO and the Batangas II Electric Cooperative, Inc. (BATELEC II).

Records of the Commission also show that MERALCO has a pending application with the Commission for the approval of the sale of the subject sub-transmission line where BPC is currently connected.

In order that these sub-transmission assets may be acquired by the distribution utility under the mandate of EPIRA, MERALCO and BATELEC II had to file an application/petition to the Commission for the approval of the sale and transfer of the sub-transmission assets pursuant to Section 8 of the EPIRA, to wit:

Section 8. Creation of the National Transmission Company - xxx.

The subtransmission functions and assets shall be segregated from the transmission functions, assets and liabilities for transparency and disposal: Provided, That the subtransmission assets shall be operated and maintained by TRANSCO until their disposal to qualified distribution utilities which are in a position to take over the responsibility for operating, maintaining, upgrading, and expanding said assets. All transmission and subtransmission related liabilities of NPC shall be transferred to and assumed by the PSALM Corp.

TRANSCO shall negotiate with and thereafter transfer such functions, assets, and associated liabilities to the qualified distribution utility or utilities connected to such subtransmission facilities not later than two (2) years from the effectivity of this Act or the start of open access, whichever comes earlier: Provided, That in the case of electric cooperatives, the TRANSCO shall grant concessional financing over a period of twenty (20) years. Provided, however, That the installment payments to TRANSCO for the acquisition of subtransmission facilities shall be given first priority by the electric cooperatives out of the net income derived from such facilities. The TRANSCO shall determine the disposal value of the subtransmission assets based on the revenue potential of such assets.

In case of disagreement in valuation, procedures, ownership participation and other issues, the ERC shall resolve such issues.

The filing of the application for the approval of the sale and transfer of the sub-transmission assets is also in accordance with the Commission's "*Guidelines to the Sale and Transfer of the TRANSCO's Subtransmission Assets and the Franchising of Qualified Consortiums*". These *Guidelines* established, among others, the approval process of the final sale and transfer of the subtransmission



assets to the qualified distribution utilities. Subsequently, several resolutions were issued amending the said Guidelines, to wit:

1. *Resolution No. 03, Series of 2005, entitled “In the Matter of Amending the Guidelines for the Sale and Transfer of the TRANSCO’s Subtransmission Assets and the Franchising of Qualified Consortiums”;*
2. *Resolution No. 01, Series of 2009, entitled “A Resolution Adopting the Amendments to the Guidelines to the Sale and Transfer of TRANSCO’s Subtransmission Assets and the Franchising of Qualified Consortiums”;*
3. *Resolution No. 27, Series of 2010 amending pertinent provisions of ERC Resolution No. 48, Series of 2006, entitled “A Resolution Summarizing the Applicable Legal Principles and Policies of the ERC on End-Uer Connections” which addressed the concerns of directly connected end-users; and*
4. *Resolution No. 15, Series of 2011, entitled “A Resolution Adopting the Amended Rules for the Approval of the Sale and Transfer of TRANSCO’s Subtransmission Assets and the Acquisition by Qualified Consortiums”.*

Records of the Commission also disclosed that on 27 December 2012, MERALCO and BATELEC II filed an “*Application*” before the Commission docketed as *ERC Case No. 2012-085 MC*.⁷ This application is for the approval of the consortium of MERALCO and BATELEC II and the issuance by the Commission of a franchise and Certificate of Public Convenience and Necessity (CPCN) to the Consortium for the sale and transfer of the subtransmission assets.

To date, the Commission has not yet issued its resolution on the application filed by MERALCO and BATELEC II. Without the said resolution approving the Consortium and the corresponding issuance of a franchise and CPCN, MERALCO and BATELEC II are in no position to acquire and operate the 38.72 kilometer sub-transmission line subject of this application.

Almost simultaneous to the filing of the said “*Application*” in *ERC Case No. 2012-085 MC*, the consortium of MERALCO and BATELEC II and the National Transmission Corporation (TRANSCO) also jointly filed on 28 December 2012 another “*Application*”,

⁷ “*In the Matter of the Application of the Consortium Agreement Between Batangas II Electric Cooperative, Inc. (BATELEC II) and Manila Electric Company (MERALCO) and the Issuance of a Franchise and a Certificate of Public Convenience and Necessity to Own, Operate and Maintain Subtransmission Assets in Favor of the Consortium of BATELEC II and MERALCO, with Prayer for Provisional Authority.*”


docketed as *ERC Case No. 2012-139 MC*⁸, for the approval of the sale of the sub-transmission line. Similar with *ERC Case No. 2012-085 MC*, the Commission has yet to issue its resolution on the “*Application*” for the approval of the sale of the sub-transmission line to the consortium. The Commission’s evaluation of the subject *Application* will establish whether the consortium has the technical and financial capabilities to acquire the sub-transmission line and that said asset meets the qualifications standards and technical criteria of a sub-transmission asset. This action on the part of the Commission ultimately serves consumer interests with respect to assuring them of regulated entities’ compliance with duly established technical and financial standards.

MERALCO took much to elaborate of the fact that Saint Thomas Paper Corporation (STPC), the predecessor of BPC, has a Transmission Service Agreement (TSA) with NGCP; STPC requested MERALCO to be considered as its customer and said request was accommodated culminating in the transition of STPC to the contestable market; there was a transfer of MERALCO’s service from STPC to BPC whereby a Connection Agreement was executed by and between the STPC and BPC; and BPC is a contestable customer being directly supplied by the RES—GNPower while, MERALCO, because of its connection requirement, has an existing DWSA with the RES-GNPower.

Nonetheless, all of these allegations by MERALCO lost sight of the fact that BATELEC II and/or MERALCO, or both, can only legally impose the “*Distribution Utility Wheeling Charge*” upon BPC as a contestable customer if and only if it has assumed ownership of the sub-transmission assets which are subject of its *Applications* per ERC Case No. 2012-139 RC. Such ownership, on the other hand, can only materialize when the following conditions are met: (1) the Commission has issued a favorable resolution approving the “*Application*” for the approval of the sale of the sub-transmission assets pursuant to Resolution No. 15, Series of 2011; and (2) Payment has been made by MERALCO and transfer of rights and ownership is carried out between the distribution utility and TRANSCO. It is clear, however, that under the instant case, those conditions are not present.

It is evident that an invasion of a right, which is material and substantial, is being continually inflicted upon the business interest of BPC. It warrants for an urgent and paramount necessity for the Commission to issue a relief to prevent serious damage against BPC. The necessity to put a halt to MERALCO’s distribution wheeling charges from BPC is therefore paramount.

⁸ “In the Matter of the Application for the Approval of the Sale of Various Sub-transmission Line/Assets of the National Transmission Corporation (TRANSCO) to the Consortium of the Manila Electric Company (MERALCO) and Batangas II Electric Cooperative, Inc. (BATELEC II), as Covered by a Contract To Sell, As Amended, With Prayer for Provisional Authority, National Transmission Corporation (TRANSCO), Manila Electric Company (MERALCO), and Batangas II Electric Cooperative, Inc. (BATELEC II) – Applicants”



WHEREFORE, the foregoing premises considered, the Manila Electric Company (MERALCO) and GN Power Limited Company (GNPower) are hereby directed to cease and desist from assessing, billing and collecting from Batangas Paper Corporation (BPC) the distribution wheeling charges until the final resolution of this case.

SO ORDERED.

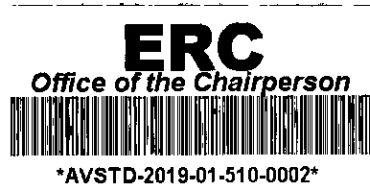
Pasig City, 05 December 2018.


AGNES VST DEVANADERA
Chairperson and CEO

(On Official Business)
JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Commissioner


ALEXIS M. LUMBATAN
Commissioner


CATHERINE P. MACEDA
Commissioner



Copy Furnished:

1. **MR. JOSE DENNIS C. LAKAMPUENGA**
Vice-President for Operations
BATANGAS PAPER CORPORATION (BPC)
Ionian Compound near LIIP
Malampasan Exit, South Luzon Expressway (SLEX)
Biñan, Laguna

2. **ATTYS. LOURDY D. TORRES, FRANCESCA T. OVALLES and ANA CHARISA DIAZ**
Counsels for respondent GNPowder
28th Floor, The Orient Square Building, Don Francisco Ortigas, Jr. Road,
Ortigas Center, Pasig City

3. **ATTYS. HORATIO ENRICO M. BONA and KARL WILLIAM SORIANO**
Assistant Vice President (AVP)
Legal Services
MANILA ELECTRIC COMPANY (MERALCO)
Ortigas Center, Pasig City

4. **ATTYS. MARLON ALEXANDRE C. CRUZ and PATRICK J.R. E. CARPIO**
CRUZ NERIA AND CARPIO LAW OFFICES
Counsel for the Complainant Batangas Paper
Unit 303 Pacific Center Building
No. 33 San Miguel Avenue, Ortigas Center, Pasig City