

REPUBLIC OF THE PHILIPPINES  
SUPREME COURT  
MANILA

SECOND DIVISION

NATIONAL ASSOCIATION OF  
ELECTRICITY CONSUMERS FOR  
REFORMS, INC. (NASECORE),  
represented by PETRONILO  
ILAGAN, et al.,

*Petitioners,*

- versus -

G.R. NO. 190795

MANILA ELECTRIC COMPANY  
INC., (MERALCO),

*Respondent.*

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**R E P L Y**  
**TO MERALCO'S COMMENT DATED JANUARY 26, 2010**  
**(Reiterating the Urgent Prayer for the Issuance**  
**of a TRO or a Status Quo Order)**

PETITIONERS, through counsel and unto this Honorable Supreme Court, by way of a reply, most respectfully state:

1. On March 15, 2010, petitioners received the instant Resolution dated February 02, 2010, requiring, among others, petitioners to file a reply to MERALCO's comment dated January 26, 2010, within ten (10) days from receipt of said Resolution, or until March 25, 2010.

2. On March 24, 2010, petitioners filed a motion for extension of fifteen (15) days to file the said reply, or until April 9, 2010 a legal holiday.

3. MERALCO, in its subject comment, interposes the following ARGUMENTS AGAINST THE PETITION, viz:

I.

IN FILING A PETITION FOR CERTIORARI UNDER RULE 65, PETITIONERS HAVE AVAILED OF AN IMPROPER REMEDY IN DEFIANCE OF THE MANDATORY PROVISIONS OF THE RULES OF COURT, AND THUS, THE PETITION MUST BE DISMISSED OUTRIGHT.

A. PETITIONERS HAVE NOT PREVIOUSLY FILED A MOTION FOR RECONSIDERATION OF THE ASSAILED DECISION.

B. THE REMEDY OF APPEAL UNDER RULE 43 OF THE RULES OF COURT IS A PLAIN, SPEEDY AND ADEQUATE REMEDY AVAILABLE TO THE PETITIONERS.

II.

IN FILING THE PETITION DIRECTLY BEFORE THIS HONORABLE COURT, PETITIONERS HAVE FAILED TO OBSERVE THE PROPER HIERARCHY OF COURTS, RENDERING THE PETITION DISMISSIBLE.

III.

PETITIONERS WERE AMPLY AFFORDED THE RIGHT TO PARTICIPATE IN THE PROCEEDINGS AND FILE THE PROPER PLEADINGS AND, THUS, HAVE BEEN AFFORDED SUFFICIENT OPPORTUNITY TO BE HEARD IN ACCORDANCE WITH ADMINISTRATIVE DUE PROCESS. PETITIONERS' FAILURE OR REFUSAL TO PARTICIPATE WITHIN THE REQUIRED PERIODS CANNOT BE TAKEN AS A DENIAL OF THEIR RIGHT TO DUE PROCEEDS.

IV.

A MOTION FOR RECONSIDERATION OF THE ASSAILED DECISION FILED BY ONE OF THE INTERVENORS, INTERVENOR MALLILLIN, IS PENDING BEFORE THE ERC. THE ERC HAS SET SAID MOTION FOR RECONSIDERATION FOR HEARING AND ORDERED THE PARTIES TO COMMENT THEREON. IN VIEW OF THE FILING OF, AND THE ACTION TAKEN BY THE ERC ON THE MOTION FOR RECONSIDERATION, MERALCO MANIFESTED TO ERC ON 26 JANUARY 2010 THAT IT IS VOLUNTARILY SUSPENDING THE IMPLEMENTATION OF THE ASSAILED DECISION EFFECTIVE IMMEDIATELY PENDING RESOLUTION OF SAID MOTION. CLEARLY, THESE HAVE RENDERED THE ISSUES RAISED IN THE PETITION MOOT, PARTICULARLY AS PETITIONERS HAVE BEEN AFFORDED ANOTHER OPPORTUNITY TO AIR THEIR POSITION BEFORE THE ERC.

4. Petitioners, for better appreciation of the present petition, state hereunder certain important backgrounder of this case, viz:

*MERALCO, the biggest electric distribution utility in the country, is operating an electric distribution utility by virtue of a mega-franchise granted under RA 9209. MERALCO's franchise cover 23 cities and 88 municipalities within Metro Manila, the entire provinces of Bulacan, Rizal and Cavite, parts of the provinces of Laguna, Quezon and Batangas and 17 Barangays in Pampanga with a total population of about 19 million, and it has 4.3 million customers.*

*In 2009, MERALCO sold to its customers an estimated total of 27 billion KWh. Also, during the said year, MERALCO was granted by the Energy Regulatory Commission (ERC) of two rate increases, one in May 2009 (P0.257/KWh) and another in December 2009 (P0.269/KWh). Prior to these two increases, the distribution rate of MERALCO was P0.9657/KWh, hence, the aforesaid two rate hikes combined is equivalent to FIFTY FOUR (54%) PERCENT.*

*These two increases granted to MERALCO are subjects of two separate cases filed by petitioners now pending before the different divisions of this Honorable Court, to wit:*

<u>Increase granted to MERALCO</u>	<u>ERC CASE NO.</u>	<u>SUPREME COURT CASE</u>
1) P0.257/KWH	2008-004RC and 2008-018RC	G.R. No. 191150
2) P0.269/KWH	2009-57RC	G.R. No. 190795

*The first increase (P0.257/KWH) was initially brought to the Court of Appeals under Rule 43. It was however dismissed by the appellate court, hence, same was brought to this Honorable Court via Rule 45. The second increase (P0.269/KWH) was brought directly to this Honorable Court via Rule 65 because, on its face the ERC Decision is a patent nullity for lack of substantive and procedural due process of law.*

*It should be noted that the aforesaid twin increases of MERALCO's rate which were granted by the ERC in just a span of eight (8) months (the first in may 2009 while the second in December 2009) would not only unduly but unlawfully burden 4.3 million customers of MERALCO. In fine, these customers numbering 4.3 million would be required to shell out from their pockets the amount of Php1.424 billion monthly (P0.257 + P0.269 x 27 ÷ 12 billion KWh + 12% VAT), in violation of the Constitution, the law and jurisprudence. Plainly, an unnecessary "price-shock", so to speak.*

*Worse, the twin rate increases granted to MERALCO are in utter disregard of the findings made by the Commission on Audit (COA) in its Audit Report submitted to ERC on November 12, 2010, pursuant to the directive of the Supreme Court contained in its Decision in the case of MERALCO vs. Lualhati, et al., 510 SCRA 455, wherein it was found by the COA Audit Team that: (1) certain operating expenses of MERALCO amounting to billions of pesos were considered not reasonable and necessary, hence, not recoverable; (2) certain property and equipments also amounting to billions of pesos were not considered as part of the rate based as those were not used and useful in the distribution operation; and (3) the rate of return granted to MERALCO in 2003 was 15.5% which is 3.5% higher than the 12% reasonable rate established in jurisprudence*

which was consistently adopted by the Supreme Court. A copy of the aforesaid COA Audit Report is hereto attached as ANNEX "A".

In the aforesaid COA Audit Report, COA disallowed certain properties and expenses of MERALCO for being not used or useful and unnecessary or unreasonable, some of which are:

1. Employer's pension and other benefits
  2. PCIB special account
  3. Fitness Center and sports related expenses
  4. Goodwill and unnecessary advertising expenses
  5. Fringe benefits to management/employees
  6. Funding allocation which benefited the entire Lopez Group
  7. Voluntary welfare assistance to employees and retirees, i.e., assistance due to death and calamities, oratory services, memorial plans, special retirement allowance, civic and charitable contributions, longevity bonus, etc.
  8. Depreciation expenses on fully depreciated assets and those excluded in the rate base
  9. Corporate Wellness Center formerly JFC Hospital used for affiliates, relatives and the public
  10. MERALCO Fitness Center/tennis court/Oval/open space on the north and east of MERALCO Fitness Center
  11. Shooting range
  12. Security/operation/BPO buildings
  13. Strip Mall
  14. Open space
  15. Ateneo Medical School
  16. Creek with open space to the north and east of Medical City
  17. Helipad and surrounding space and access road
  18. Parking space in front of Business Solutions Center which is almost a kilometer away from Meralco Offices
  19. Helicopter already retired
  20. Several not being used substation equipment, structures and improvements
  21. Meralco Museum
  22. Meralco Theater
  23. Communication equipment at the residence of Mr. Manolo Lopez
5. In view of the said COA Audit Report (Annex "A" hereof), the position of

the herein petitioners were validated, i.e., that MERALCO's rate increase of P0.0865/KWh granted in 2003 was not only unnecessary but also unreasonable hence, MERALCO should not only be ordered to roll back its rate but also to refund its excess revenues to the consumers.

6. An analysis of the audited financial statements of MERALCO reveals that the profits of MERALCO for the years 2003 to 2008 (during the implementation of the

rate increase of P0.0865 granted by the ERC in 2003) far exceeded the generally acceptable 12% rate of returns on actual capital or equity of public utilities, viz:

TABLE 1  
Manila Electric Company  
**Return on Actual Capital or Equity**  
For the Years 2003 to 2008  
(in Thousand Pesos, except the yearly return on capital)

	Capital	Adjusted Income Before Tax	Yearly Return on Capital (%)
<u>Year</u>	<u>A</u>	<u>B</u>	<u>C=B÷A</u>
2003	13,845,000	4,494,000	32.45%
2004	14,976,980	12,162,000	81.20%
2005	16,351,046	7,590,000	46.42%
2006	17,633,534	9,134,000	51.80%
2007	18,111,751	9,579,000	52.89%
2008	19,685,138	8,304,000	42.18%

7. In view thereof, MERALCO had therefore earned income in excess of what is generally considered just and reasonable during the said six year period in the aggregate sum of Thirty Nine Billion Two Hundred Eight Million Five Hundred Fifty Six Thousand (Php39,208,556,000) Pesos, the breakdown of which follows:

TABLE 2  
**Meralco's Excess Income**  
(In Thousand Pesos )

	Adjusted Income Before Tax	Allowable Income (12%)	Excess Income
<u>Year</u>	<u>A</u>	<u>B</u>	<u>C=A-B</u>
2003	4,494,000	1,661,400	2,832,600
2004	12,162,000	1,797,238	10,364,762
2005	7,590,000	1,962,126	5,621,874
2006	9,134,000	2,116,024	7,017,976
2007	9,597,000	2,173,410	7,423,590
2008	8,304,000	2,362,246	5,941,754
<b>TOTAL</b>	<b>EXCESS INCOME</b>		<b><u>39,208,556</u></b>

Schedules A, B, and B-1 showing the detailed computation of the above Table 2 are hereto attached as ANNEXES "B", "C" and "D", respectively.

8. Despite the validation by COA of the above computation which was based on MERALCO's own audited financial statements, ERC still ordered the increase of MERALCO's rate twice last year by P0.257/KWh and P0.269/KWh, or for a total increase of P0.526/KWh, which is equivalent to a whopping P54.46% increase.

9. Thus, when the assailed ERC Decision was received by petitioners covering the second increase of P0.269/KWh, petitioners decided to go straight to the Supreme Court via a Petition for Certiorari because the said ERC Decision is not only a patent nullity for having denied the right of the petitioners to due process of law but because of the number of consumers affected by the said Decision; because the amount involved in the controversy is so huge (P605.25 million [plus 12% VAT] additional billing per month); because it is violative of the provisions of the EPIRA; because it is contrary to the constitutional provisions on social justice, because it is in utter disregard of the COA Audit Report (Annex "A" hereof), which validated the analysis of petitioners (see paragraphs 5 to 7) and which was specifically ordered by the Supreme Court in order to determine the reasonableness of the rate of MERALCO; and because it is extremely urgent to stop the impending implementation of the assailed Decision last January 2010. Plainly, resort to the Honorable Court via Rule 65 was made in order to prevent a colossal miscarriage of justice.

10. It is humbly submitted that there is an appeal (under Rule 43) available to the petitioners but same is slow and inadequate. Had the petitioners availed of the remedy under Rule 43, the 'decision of the said court' would then be still appealable to the Supreme Court. Whereas, if is brought direct to the Supreme Court, any decision which may be promulgated by said Court is no longer appealable to any tribunal. Hence, the proceeding is short. Moreover, there is no assurance that the Court of Appeals would stay the execution of the assailed ERC Decision. And even if a TRO is granted by the Court of Appeals, same is valid only for sixty (60) days as provided

under Section 5, par. 4 of Rule 58. It should be noted that the assailed Decision of the ERC is immediately executory, hence, there is an extreme urgency to secure a temporary restraining order.

11. It is also submitted that petitioners did not file any motion for reconsideration with the ERC, because with due respect, it is the firm belief of petitioners that same would be futile considering that the ERC had blatantly disregarded the Supreme Court directive to consider the last increase of MERALCO (granted in 2003 in the amount of P0.0865/KWh as provisional until ERC has taken action on the COA Audit Report); because of ERC's adamant position that the PBR rate fixing methodology is the be-all-and-end-all of its rate fixing function (thus, offering as a sacrifice the interest of millions of consumers to the altar of an internationally accepted methodology); the blatant violation by the ERC of own rules; that the assailed ERC Decision is a patent nullity, hence, null and void for lack of jurisdiction on the part of the ERC; and the utter disregard by the ERC of the COA Audit Report which validated petitioners findings that the rate of MERALCO should be rolled back and the amount of P39.208 billion be refunded to the consumers. (See Table 2, page 6 above).

12. It should be noted that in the case of Republic vs. Sandiganbayan, 269 SCRA 316, the Supreme Court ruled that where the issue raised is one purely of law, when public interest is involved, and in case of urgency, certiorari is allowed notwithstanding the existence and availability of the remedy of appeal, viz:

***“Before proceeding to the resolution of the principal issues raised in the petition, we first dispose of the procedural question on the propriety of certiorari under Rule 65 of the Rules of Court as the remedy in assailing the subject Sandiganbayan Resolution.***

***We answer in the affirmative, and treat this case as an exception to the general rule governing petition for certiorari. Normally, Decisions of the Sandiganbayan are brought before this Court under Rule 45, not Rule 65. “However, where the issue raised is one purely of law, where public interest is involved, and in case of urgency, certiorari is allowed notwithstanding the***

***existence and availability of the remedy of appeal. Certiorari may also be availed of where an appeal would be slow, inadequate and insufficient.”***

13. Also, in the case of ABS-CBN Broadcasting Corp. vs. COMELEC, 323 SCRA 811, the Supreme Court held that the rule on exhaustion of administrative remedy may be glossed over for compelling reasons, viz:

***“This Court, however, has ruled in the past that this procedural requirement may be glossed over to prevent a miscarriage of justice, when the issue involves the principle of social justice or the protection of labor, when the decision or resolution sought to be set aside is a nullity or when the need for relief is extremely urgent and certiorari is the only adequate and speedy remedy.”***

14. As to the position of respondent MERALCO that the instant petition violates the rule on hierarchy of courts, same is not impressed with merit.

15. The doctrine of hierarchy of courts is not an *iron-clad* dictum. In several instances when the Supreme Court was confronted with cases of national interest and/or serious implications, it never hesitated to set aside the rule and proceed with the judicial determination of the cases. (*Chavez vs Romulo*, 431 SCRA 534, *Government of the United States of America vs. Purugunan*, 389 SCRA 623; *COMELEC vs. Quijano-Padilla*, 389 SCRA 353; *Buklod ng Kawaning EIIB vs. Zamora*, 360 SCRA 718; and *Fortich vs. Corona*, 289 SCRA 624.).

16. With due respect, it is humbly submitted that it would be pointless to file the instant petition with the Court of Appeals knowing fully well that the TRO that may be issued by the said court has a limited life, i.e., sixty (6) days. If a TRO is issued by the Supreme Court, same is indefinite, unless ordered otherwise by the Court.

17. Moreover, if the petition for certiorari is filed with the highest court of the land, the decision will be swift-immediately final and executory—no more appeal is available to the parties.

18. The nature of this case is undeniably endowed with public interest and immediate relief to the 4.3 million customers of MERALCO, 80% of whom are impoverished or marginalized is of great imperative. This involves their hard-earned money amounting to more than half a billion pesos every month to be handed to MERALCO which is undeniably not entitled to any rate increase considering that it has been generating excessive revenues according to COA and based on its financial statements has been amassing excessive profits beyond the 12% reasonable rate of return established in jurisprudence. Hence, MERALCO should be required instead to refund its excessive revenues to its customers and to roll back its rate. Plainly, there would be an unjust enrichment of the rich investors/owners of MERALCO at the expense of the lowly consumers whom MERALCO has vowed to serve.

19. Moreover, this case does not only involve purely a question of law but it involves a decision which is a patent nullity; and that the constitutional rights of the consumers have been grossly transgressed. Petitioners are therefore begging the highest court of the land to exercise its residual power under the doctrine of *parens patriae* over the affected millions of consumers who are being abused, oppressed and defrauded by businessmen whose goal is merely to accumulate the greatest wealth at the shortest time possible, instead of serving the public.

20. As to the claim of respondent MERALCO that the instant petition should be dismissed outright for being moot, same deserves scant consideration.

21. According to MERALCO, the present petition is now moot because a motion for reconsideration of the assailed Decision was filed by one of the intervenors in the case; that ERC has set the motion for hearing; and that MERALCO had

manifested to ERC that it is voluntarily suspending the implementation of the assailed Decision.

22. According, to the Supreme Court:

***“It is settled that an action is considered “moot” when it no longer presents a justiciable controversy because the issues involved have become academic or dead or when the matter in dispute has already been resolved and hence, one is not entitled to judicial intervention unless the issue is likely to be raised again between the parties. xxx. Simply stated, there is nothing for the respondent court to resolve as the determination thereof has been overtaken by subsequent events.” (Santiago vs. Court of Appeals, 285 SCRA 16).***

23. The mere filing of a motion for reconsideration of the assailed ERC Decision by another intervenor can not be considered to have already rendered the present petition moot. It should be noted that the issues raised by intervenor Mallilin in his subject motion for reconsideration are different from the issues raised in the present petition. Moreover, there is no resolution yet that was issued by the ERC on the said motion for reconsideration, hence, it is highly speculative on the part of MERALCO to claim that the assailed ERC Decision is now academic or dead.

24. Likewise, the voluntary suspension by MERALCO of the implementation of the increased rate granted under the assailed Decision does not render the present petition moot. As a matter of fact, such suspension which is to be construed as mere temporary, not permanent, is clearly a contrived subterfuge on the part of MERALCO, i.e., to merely show that the assailed Decision is already academic or dead, hence, the present petition is now moot. It is however feared that, once the Supreme Court falls on this deadly pretext of MERALCO and decides to dismiss the present petition, MERALCO can resume the implementation of the assailed Decision. This time with more dire consequence to the consumers because MERALCO could implement same retroactively and collect interest on past due billings or under-recoveries.

1. According to MERALCO, petitioners can not complain of the alleged lack of due process during the proceeding below because MERALCO was entitled to a prompt resolution of its application, viz:

*“Having failed to avail of the numerous opportunities to be heard accorded by the ERC, Petitioners can not now complain of the alleged lack of due process during the proceedings below.*

*“It should be noted by this Honorable Court that as the applicant in the proceedings before the ERC, MERALCO was entitled to a prompt resolution of its application. Petitioners, by moving to intervene and yet failing to attend the hearings or submit position papers or memoranda as directed by the ERC, were clearly acting in bad faith in attempting to delay the proceedings. The instant Petition is another attempt to delay the proceedings, which move should be countenanced by this Honorable Court.” (p. 16, MERALCO’s Comment).*

2. The aforequoted statement of MERALCO is far from the truth. It was ERC, with the prodding of MERALCO which was clearly acting in bad faith in this case.
3. Please note that in any proceeding after the submission by a party of its formal offer of evidence, the opposing party is given time to file its opposition or comment thereto, after which, the tribunal shall issue its order admitting or denying the evidence offered.
4. In this case, the ERC ordered the petitioners to file their comment/opposition to MERALCO’s formal offer of evidence within ten (10) days from receipt thereof. Petitioners received MERALCO’s formal offer of evidence dated December 01, 2009 on December 08, 2009. Thus, petitioners had originally until December 19, 2009 to file their comment/opposition. However, on December 14, 2009 four (4) days before the deadline ERC promulgated its assailed Decision.
5. This is not to mention the fact that NASECORE filed a motion asking for additional fifteen (15) days within which to file its comment/opposition to

the Formal Offer of Evidence from MERALCO;s compliance with ERC's Order dated December 7, 2009, (Annex "C", Petition). It was only on December 15, 2009 that NASECORE received said MERALCO compliance, hence, NASECORE had until December 30, 2009, within which to file its comment/opposition to the Formal Offer of Evidence. However, as stated earlier, ERC promulgated the assailed Decision on December 14, 2009, sixteen (16) days before the extended date requested by NASECORE to file its comment/opposition.

6. Worse, petitioners were not given a chance to submit its evidence nor its memorandum in support of its position that MERALCO has been amassing profits beyond the 12% reasonable rate of return established in jurisprudence which is being consistently adopted by the Supreme Court, hence, instead of granting a new rate increase, ERC should order the rollback of MERALCO's rate to P0.8792 and order MERALCO to refund the excess profit to the consumers in the amount of P39,208 billion.
7. Why the deliberate haste in promulgating the assailed ERC Decision? It is strongly believed by petitioners that such deliberate haste was done in order to prevent petitioners from using as part of its evidence the COA Audit Report (Annex "A" hereof) which confirmed the above findings of petitioners. (Please see paragraph 4, sub-paragraphs 6 and 7, above).
8. It should be noted that the aforesaid COA Audit Report (Annex "A" hereof) was transmitted to ERC on November 12, 2009. It was released to petitioners only on February 19, 2010.

9. Be that as it may, it should be noted that the right to speedy disposition of cases are accorded also to the consumers and not only to MERALCO, as provided under Section 16, Article 3 of the Constitution, viz:

*“Sec. 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.”*

10. Moreover, the fact that the present petition was filed immediately upon receipt of the assailed ERC Decision negated MERALCO’s claim that petitioners are delaying the proceedings.

11. Thus the Supreme Court has succinctly held that:

*“While the courts, in some instances, allow a relaxation in the application of the rules, it was never intended to forge a bastion for violation of due process.” (Rizal Security vs Maraan, 546 SCRA 23)*

12. Under Section 43 (f) of the Electric Power Industry Reform Act of 2001 (EPIRA), one of the functions given to the ERC under the law is to set the rates of electricity distribution utilities, viz:

*“43. Functions of the ERC. – The ERC shall promote competition, encourage market development, ensure customers 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. Toward this end, it shall be responsible for the following key functions in the restructured industry:*

xxx

xxx

xxx

*(f) In the public interest, establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably. The ERC may adopt alternative forms of internationally accepted rate-setting methodology as it may deem appropriate. The rate-setting methodology so adopted and applied must ensure reasonable price of electricity”. xxx (Underscoring ours).*

13. To further emphasize the obligation of the ERC to protect consumers from rates that are unjust and unreasonable, the said law emphatically provides that the ERC must ensure the affordability of electric power (Section 2[c]), ensure transparency and reasonableness of its price (Section 2 [d]), and at all times ensure consumer protection (Section 2 [f] and [j]).
14. It is crystal clear therefore, that the function of the ERC to fix rates involves a balancing of the investor and the consumer interests. However, considering that the business and operations of a public utility are imbued with public interests since it is engaged in public service, the question is: Should public interests prevail over private profits?
15. Elsewise stated, the rate fixed should guarantee the viability of the distribution utility and at the same time ensure that the rates are not only just and reasonable, but also AFFORDABLE to the public. In short, as pointed out by the Supreme Court, “rate regulation is the art of reaching a result that is GOOD for the public utility and is BEST for the public”. (*Republic vs. MERALCO, 301 SCRA 700*).
16. While the power to fix rates is a legislative function, whether exercised by the legislature itself or delegated through an administrative agency, a determination of whether the rates so fixed are reasonable and just is a purely judicial question and is subject to the review of the Courts. (*Republic vs. MERALCO, ibid*).
17. It is an established jurisprudence that both the government regulators and the courts have been consistently adopting 12% as reasonable rate of return for public utilities, viz:

*“The rate of return is a judgment percentage which, if multiplied with the rate base provides a fair return on the public utility for the use of its property for service to the public. The rate of return of a public utility is not prescribed by statute but by administrative and judicial pronouncements. This Court has consistently adopted a 12% rate of return for public utilities.”* (Republic vs MERALCO, 391 SCRA 700)

18. As a **matter** of fact, even at the height of electric power crisis in 1993, Section 3(d) of Power Crisis Act (R.A. 7648) authorized the President to increase temporarily the rate of return on rate base of NAPOCOR to not more than 12% of its rate base. This shows that 12% should be the maximum rate of return, whether during the normal time or when there is an electric power crisis. And this cap is applicable to all public utilities without exception.
  
19. Surprisingly, despite the fact that the audited financial statements of MERALCO have been reflecting years after years that it is amassing gargantuan profits (see paragraphs 6 and 7, above) hence, a clear indication that the consumers are being overcharged, the ERC has remained oblivious of its duty to protect the consumers and forgot its promise to revisit the assumptions it used in computing the Weighted Average Cost of Capital (WACC) which became the basis for fixing the Return On Rate Base (RORB) of 15.5% it gave to MERALCO under ERC Case Nos. 2001-900 and 2001-646, and which resulted in a rate increase which was implemented in June 2003.
  
20. Therefore, the grant of a new rate resulting to an increase under the assailed Decision in the amount of P1.4987 per kilowatt-hour to MERALCO further aggravates the negligence of the ERC causing immeasurable hardships especially to the multitude of marginalized consumers.
  
21. As the Supreme Court had said:

*“In third world countries like the Philippines, equal justice will have a synthetic ring unless the economic rights of the people, especially the poor, are protected with the same resoluteness as their right to liberty. The cases at bar are of utmost significance for they concern the right of our people to electricity and to be reasonably charged for their consumption. In configuring the contours of this economic right to a basic necessity of life, the Court shall define the limits of respondent MERALCO, a giant public utility and a monopoly, to charge our people for their electric consumption. The question is: should public interest prevail over private profits? (Republic vs. MERALCO, *ibid.*)*

22. It is also provided in Section 45 of the said EPIRA, that:

*“The ERC shall motu proprio monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior by any participant in the electric power industry. Upon finding that a market participant has engaged in such act or behavior, the ERC shall stop and redress the same. Such remedies shall, without limitation, include the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits and imposition of fines and penalties pursuant to this Act.” (underscoring supplied)*

23. On the part of the consumers, they merely accept the new rate as approved by the ERC since electricity is a very basic need of all people and that power distribution is a monopoly within its franchise area. They are the “captive market” so to speak. Moreover, the consumers are confident that the ERC has been conscientiously and scrupulously protecting their interests as enjoined by the EPIRA Law.

24. The U.S. Supreme Court has held that the result reached after implementing the rate set or fixed, and not the rate setting methodology employed, is the controlling factor in determining if the rates granted to a public utility is just and reasonable, viz:

*“The regulatory commission can employ any method so long as the result was reasonable to consumer and investor.” (National Power Commission vs. Hope Natural Gas*

*Co., 320 US 58 [194], cited in the Concurring Opinion, J. Castro, Republic vs. Medina, 41 SCRA 644, 695 [1971]).*

25. The doctrine established in said case has been termed the “END RESULT DOCTRINE.”
  
26. It is axiomatic that the excess profits of a public utility is a result of overcharging of customers through an unjust and unreasonable rate. There is no other way such excessive profits could be explained.
  
27. In fine, MERALCO succeeded in wangling from the ERC through an internationally accepted rate-setting methodology (i.e, Performance Based Rate [PBR]) a rate that will not only guarantee that its operations shall remain viable but a rate that will give it astronomical profits at the expense of the consuming public whom it is obligated to serve.
  
28. Ultimately, it must be stressed, that the focus should be on the undeniable fact that the bottom line issue here is the REASONABLENESS of the new rate which is an offshoot of the assailed ERC Decision granting MERALCO a new rate increase.
  
29. Therefore, first and foremost, whatever rate the Regulator sets, the end-goal is to protect public interest and the only way public interest can be best protected is through the setting of a distribution rate that is reasonable and just.

30. Thus, in a Motion for Reconsideration filed with the ERC in the Case No. 2008-004RC and 2008-018RC, petitioners had emphatically stated in the preliminary statement that,

***“When you tell your child, if you get good grades in school, I will increase your allowance.... that is performance-based!”***

***“When the regulator tells the public utility, if you increase your efficiency, improve the quality of your service, and lower your operating cost, I will reward you...that is performance based!”<sup>1</sup>***

***BUT, when nothing has been shown and proven yet and the regulator still tells you, I will nonetheless reward you... no doubt that it is a deception!***

***The Honorable Commission, as vanguard against abuses on electric consumers must be so reminded that rate regulation calls for a careful consideration and analysis of the totality of facts and circumstances material to each application before any upward rate revision is rendered. It does not depend solely on the need of the public utility but all the stakeholders’ interest must be weighed because rate regulators should strike a balance between the clashing interests of the public utility and the consuming public and the balance must assure a reasonable rate of return to public utilities without being unreasonable to the consuming public.***

***To a consumer, the reasonableness of a rate is very hard to determine especially without the benefit of a formal education in the subject of regulation. Statements such as balancing the conflicting interest between the utilities and consumers do not establish clear standards in setting just and reasonable rates that will be fair to the consuming public while ensuring that the quality and reliability of service the utility is mandated to provide is not sacrificed. That is why, the consumer is always faced with the question of whether the rates approved by the regulator are sufficient to allow recovery of just and reasonable cost and a reasonable return on their investments based on the accepted cap of not more than 12% or are excessive, as these are all passed on to the consumers.***

***What is reasonable or unreasonable then depends on a calculus of changing circumstances that ebb and flow with time. Yesterday cannot govern today, no more than today can determine tomorrow. In other words, since the present rate-setting methodology adopted by the Honorable Commission cannot guarantee that the rights of the consuming public will be protected as it caters solely to the purported need of the public utility to jack up its rates chargeable in the future as its rewards for improved efficiency and service in the past, the public will just sit idly in the sideline watching rates increasing incessantly and unabated since, the public utility had improved its services anyway.***

***Consider this. Based on the financial statements of MERALCO which are considered by law as public/commercial documents and are required for submission to this Honorable Commission, the Common Stockholders of***

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<sup>1</sup> SOURCE: [www.erc.gov.ph/pdf/TWRG%20Hearing%202010-05.ppt](http://www.erc.gov.ph/pdf/TWRG%20Hearing%202010-05.ppt) accessed on November 6, 2008.

***MERALCO for the last Twenty-One (21) years earned 8,896% on their actual investment of only P441.6-million, computed as follows:***

Year	Stock Dividends (in millions)	Cash Dividends (in millions)	Accumulated Undistributed Income (in millions)	Total Return on Investments (in millions)	Common Stockholders Paid Up Capital (in millions)	% Return on Investments
	(A)	(B)	(C)	(D=A+B+C)	(E)	(F=D/E)
1987					253.93	
1988	174.99					
1989					30.00	
1990	114.73					
1991	286.83					
1992	374.20	113.00			95.00	
1993	797.80	173.00			37.64	
1994	1,082.65	270.00			26.12	
1995	1,636.95	818.00				
1996	1,473.25	1,694.00			55.61	
1997	1,931.91	2,222.00				
1998		2,066.00				
1999		2,090.00			14.30	
2000	1,677.18	1,048.00				
2001						
2002					(70.00)	
2003						
2004						
2005					(4.00)	
2006					3.00	
2007	1,002.56	1,006.00	17,232.00			
<b>TOTAL</b>	<b>10,553.16</b>	<b>11,500.00</b>	<b>17,232.00</b>	<b>39,285.06</b>	<b>441.60</b>	<b>8,896%</b>

***The table above shows that for a period of twenty-one (21) years, the stockholders of MERALCO earned 8,896% from their actual investments which is equivalent to a staggering average yearly return of 424%.***

***In fact, in 2007, MERALCO declared a cash dividend of P1-billion and a stock dividend of P1-billion and it has a P17.2-billion in undistributed income also in the same year. These staggering profits negate any argument that MERALCO needs a rate increase under whatever rate methodology.***

31. Clearly, the consumers are not only being oppressed, but being abused and being defrauded of their hard-earned money.

32. Thus, while the ERC has the sole authority to adopt alternative forms of internationally-accepted rate –setting methodology as it may deem appropriate, it also has the responsibility and obligation to protect the interest

- of the consumers, *i.e.*, the rate-setting methodology so adopted and applied must ensure a reasonable price of electricity.
33. As of today, the COA audit of respondent MERALCO had already been submitted to ERC, but the latter has not yet taken the appropriate action thereon. Thus, the assailed ERC decision which granted MERALCO a rate increase under the PBR was a palpable disobedience of the ERC to the afore-quoted directive of the Supreme Court that: “ the provisional rate increases will continue to be subject to its being reasonable and just until after the ERC has taken the appropriate action on the COA Report.”
34. Unfortunately, ERC chose to ignore, to the detriment of the consumers, the above ruling of the Supreme Court and the audited financial statements of MERALCO which clearly show the excessive profits realized by respondent MERALCO thus, compelling petitioners to seek the intervention of the Court with respect to MERALCO’s excessive profits which are clear indicia that its rate is unreasonable and not affordable. There is another term used to describe such unreasonable rate – OVERCHARGING. This was the compelling reason for the prayer to refund excess profits. (G.R. No. 191150).
35. Considering that based on MERALCO’s audited financial statement that MERALCO had realized excessive profits for the last six (6) years, in the amount of P39.208 billion, the new increase in the respondent Meralco rates has further swelled the overcharges of MERALCO to the consumers.
36. It should be noted that there was no iota of evidence adduced by respondent MERALCO to the effect that its application to raise its rates is founded on a very urgent necessity, *i.e.* to ensure the viability of its operation. Particularly, there was no showing that respondent MERALCO’s financial condition is at

imminent danger; that the respondent MERALCO had resorted to cost-reduction measures; and most importantly that respondent MERALCO had attempted but failed to raise additional capital through stocks-rights offering to its stockholders or through sale of stocks to the outside investors in the stock market. In other words, respondent MERALCO failed to show that from the provisional rate increase of P0.0865/kWh implemented commencing in June 2003, it was unable lately to recover its just and reasonable costs and it was not earning a reasonable return on the actual capital it invested in the service, thus, the imperative need to hike its rate.

37. On the contrary, respondent MERALCO continuously donates valuable properties directly or through Meralco Foundation, keeps on increasing its investment on non-related businesses of subsidiaries and affiliates; maintains an unnecessary and extremely expensive pension plan for its employees and officers and advertises on inordinate and profligate fashion.

38. Moreover, respondent MERALCO's financial statements which are considered public/commercial documents and are being regularly submitted to ERC, show that respondent MERALCO is in a pink of health. The price of its shares of stocks in the stock market are hitting unprecedented heights. The struggle among three local giant conglomerates, Lopez Group of Companies, San Miguel Corporation and Philippine Long Distance Telephone Company, to acquire MERALCO shows that respondent MERALCO is considered a "crown jewel" by astute businessman.

39. Evidently, the PBR methodology or other rate setting methodology for that matter should not and cannot be considered as the "be-all" and the "end-all" of the application for a rate hike by MERALCO or by any electric utility.

40. It is worth stressing at this point that the “be-all” and “end-all” of the price setting function of the ERC is to ensure that the rate resulting from any price increase is just, necessary and reasonable. What matters solely is that the rate that has been determined is just and reasonable and not that the methodology that was employed by the ERC is being used in highly developed countries.
41. It is well conceded that by reason of the special knowledge and expertise of the ERC over matters falling under its jurisdiction, as in the assailed ERC Decision, they are in the best position to pass judgment thereon. Thus, their findings of fact in that regard are generally accorded great respect, if not finality by the courts.
42. It bears emphasis, however, that it is also well settled that even decisions of administrative agencies which are declared “final” by law are not exempt from judicial review when so warranted (*Cosep vs. NLRC*, 290 SCRA 704). Factual findings of administrative agencies are not infallible and will be set aside when they fail the test of arbitrariness (*PAL vs. NLRC*, 279 SCRA 445), or upon proof of gross abuse of discretion, fraud or error of law (*Itogon Suyoc Miners vs. Office of the President*, 270 SCRA 63).
43. The adoption by respondent ERC of an internationally-accepted rate-setting methodology called the PBR, which it used as the basis for approving MERALCO’s application for rate increase, grossly failed to consider the necessity, justness and reasonableness of the rate increase essential in protecting public interests.

44. In the light of the foregoing, the new rate (P1.4917/KWh) granted by ERC to MERALCO in the assailed Decision is not GOOD for the investors of MERALCO and BEST to the consuming public; but... FANTASTIC to the investors of MERALCO and CATASTROPHIC to the consuming public.

45. MERALCO also claims in its Comment dated January 26, 2010 that because of the pending motion for reconsideration filed by Intervenor Mallilin and the Manifestation and Motion filed by MERALCO for voluntary suspension of the implementation of the assailed Decision, there is no urgent and paramount necessity for the issuance of a TRO or a status quo order.

46. The above assertion is completely baseless and preposterous. The motion for reconsideration filed by Intervenor Mallilin which raised a different issue than the present petition was already resolved and the temporary suspension of the implementation of the assailed ERC Decision was also lifted as per ERC's Order dated March 10, 2010, the dispositive portion of which is quoted below:

***“WHEREFORE, the foregoing premises considered, the “Motion for Reconsideration” filed by Engr. Mallilin is hereby GRANTED WITH MODIFICAION. Accordingly, MERALCO is hereby directed to implement the revised distribution rates, excluding all rate distortions, as shown in the foregoing table. Consequently, the Order dated February 1, 2010 issued by the Commission granting the deferment of the implementation of the Decision dated December 14, 2009, pending final resolution of Engr. Mallilin’s motion is hereby LIFTED.” (A copy of said ERC Order dated March 10, 2010 [docketed on March 31, 2010] is hereto attached ANNEX “E”).***

47. Thus, considering that under the aforequoted Order a green signal has been given for the immediate implementation of the assailed Decision; the claim therefore of MERALCO that “there is a no urgent and paramount necessity”

for the issuance of a TRO or a status quo order has been totally debunked as a mere self-serving and baseless assertion.

48. It should be noted that MERALCO has even disclosed to the Philippine Stock Exchange that by virtue of the said ERC Order (Annex "E" hereof) MERALCO will increase its distribution rate to P1.4917 effective this month of April. (Attached is a clipping of the April 1, 2010 issue of the Philippine Star as ANNEX "F").

49. MERALCO also claims in its Comment dated January 26, 2010 that "petitioners have failed to show any right, much less a clear and unmistakable right to be protected."

50. Apparently, MERALCO is of the thinking that it has the supreme right to ask for a rate increase; and that the consumers has no right at all to complain. MERALCO should be reminded that its only right is to be assured that its operations remains viable, i.e., is recover just and reasonable its operating and maintenance costs plus a reasonable 12% profit on its investment. While the consumers have the right to demand for a reasonable and affordable price of electricity and that they should not be deprived of their property without the due process of law (Section 1, Article III, Constitution). These rights are clear under the declaration of policy (Sec. 2[c], [d], [f] and [j] of the EPIRA and the rate-setting function of the ERC (Section 43 (f), EPIRA) and the Constitution. In other words, the price of electricity must be GOOD for MERALCO and BEST for the consumers. Ineluctably, if the price is FANTASTIC for MERALCO and CATASTROPIC for the consumers, the consumers has the right, a clear and unmistakable right, under the Constitution, the law and jurisprudence to protect such right. Apparently,

MERALCO is of delusion that the financially marginalized consumers are also marginalized in the eyes of the law as well as the Constitution. It forgot the dictum that “those who have less in life must have more in law.”

51. Moreover, please consider the following:

52. Based on the track record of MERALCO in refunding its over-collections to its customers, it takes more than five (5) years before the full amount is given back to the consumers. Worse, no penalty, much less interest is being paid to the consumers. At present, MERALCO has yet to complete several refunds ordered by the Supreme Court and the ERC, to wit:

- a. On account of corporate income tax charged to the consumers resulting to excessive revenue as ordered by the Supreme Court in the case of *Republic vs. Meralco, 401 SCRA 130*, in the amount of Php30,200,000,000.00.
- b. Over recovery of currency adjustment by MERALCO as ordered by the ERC in ERC Case No. 2001-900 dated September 28, 2008 in the amount of Php3,924,922,762.58.
- c. Refund of the meter deposits to all customers as ordered by the ERC as provided in the Magna Carta for Residential Electricity Consumers of 2004 in the amount of Php2,879,000,000.00.

Hence, refund is not a viable option to the consumers.

53. Additional proof of the existence of the right of the consumers to ask for a TRO or a status quo order is MERALCO’s maintenance of unnecessary and extremely expensive non-contributory pension plan for all its regular and permanent officers and employees, on top of the legally mandated contributions to the Social Security System (SSS), to wit;

Year	Pension Cost
2000	1,100,000,000.00
2001	1,142,000,000.00

2002	1,142,000,000.00
2003	2,400,000,000.00
2004	2,586,000,000.00
2005	1,577,000,000.00
2006	1,784,000,000.00
2007	2,837,000,000.00
2008	1,869,000,000.00
TOTAL	16,437,000,000.00

54. Moreover, records show that MERALCO had been transferring its funds for the establishment of various subsidiaries, affiliates and joint venture, instead of using these funds to keep and maintain the rate in its current level if not to reduce the same. Below are the companies referred to:

**SUBSIDIARIES**

	<b>Ownership</b>
Corporate Information Solutions (CIS)	100%
Meralco Energy Inc, (MEI)	100%
e-Meralco Ventures, Inc. (eMVI)	100%
Asian Center for Energy Management (ACEM)	100%
Meralco Financial Services Corporation (Finserv)	100%
Republic Surety and Insurance Co. (RSIC)	100%
Lighthouse Overseas Insurance Company, Limited	100% (Bermuda)
MESCOR and Subsidiaries	97%
CEDC	65%
Rockwell Land Corporation (Rockwell)	51%

**AFFILIATES**

First Private Power Corporation and Subsidiary (FPPC)	40%
Batangas Cogeneration Corporation (Batangas Cogen)	38%(ceased operation)
General Electric Philippines and Meter Instrument Company, Inc (GEPMICI)	35%

**JOINT VENTURE**

Soluziona	50%
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55. MERALCO's income last year surged to 169% mainly because of the first rate increase based on the PBR scheme which was implemented last May of 2009 and for this it has just declared a cash dividend equivalent to staggering 31.5% of its outstanding capital, which is beyond the reasonable 12% rate of return established in jurisprudence. (Attached are clippings of February 24, 2010 issue of Business World and March 23, 2010 issue of Philippine Daily Inquirer as ANNEXES "G" and "H", respectively).

56. Thus, the consumers have a right to protect its interest in view of the excessive profits of respondent MERALCO in the amount of P39,208,556,000.00 in the last six years, despite the extremely expensive non-contributory pension plan for all its regular and permanent employees and officers; its investments in the above subsidiaries and affiliates which do not redound to the interests of the consumers; its inordinate advertising practice; it's extremely generous donations; and its recent declaration of staggering 31.5% cash dividends to its stock holders. Evidently, this circumstances also reflects MERALCO's callousness and insensitivity to the plight of the consumers, ninety percent of whom are marginalized and impoverished. Plainly, the rate that was granted to MERALCO is not GOOD for the investors and BEST for the consumers BUT it is FANTASTIC to the investors and CATASTROPHIC to the consumers.

57. This is not to mention the 12% VAT that would be charged to consumers equivalent to Php72.72 million monthly, Even if the Php.269/KWh increase is later on nullified and ordered refunded, the 12% VAT collected from the consumers would in all probability not be included in the refund. Ineluctably, the consumers have to do something to protect its interest and not just sit idly.

58. It should be further noted that in case this Honorable Court grants the urgent prayer of the petitioners for the issuance of a temporary restraining or status quo order, same would not affect the viability of MERALCO which the EPIRA guarantees since as discussed earlier its audited financial statements, show that MERALCO has been overcharging the consumers as evidenced by its excess profits for the period 2003 to 2008 in the amount of Php39,208,556,000.00 and the fact that its average return on investment during the same period is 51% which is way above the reasonable 12% return established in jurisprudence and which is consistently adopted by the Supreme Court.

Hence, there would be no clear prejudice or INJURY that may be caused on MERALCO if the instant prayer for issuance of a temporary restraining or status quo order is granted.

59. Finally, the temporary restraining or status quo order that may be issued by this Honorable Court will only restore the parties to the condition immediately prior to the issuance of the assailed ERC Decision which is patently void for lack of the substantive and procedural due process of law. It should be noted that MERALCO's return in 2008 (the year immediately prior to the grant of the rate increase in question) was 42.18% which is far beyond the reasonable 12% return, hence, there was really no need to grant MERALCO any rate increase in 2009. (please see paragraphs 6 and 7 above).

## **P R A Y E R**

**WHEREFORE**, premises considered, it is most respectfully prayed that upon receipt of the instant Reply to MERALCO's Comment dated January 26, 2010, an Order be issued by this Honorable Court restraining Respondent MERALCO from collecting starting this month the average distribution rate increase of P0.269/KWh granted by the ERC under its assailed Decision.

Petitioners also most respectfully pray that this Honorable Court declare the assailed Decision of the ERC dated December 14, 2009, NULL and VOID for lack of due process of law and to refund to MERALCO's customers all collections that might have been made based on the rate increase granted under the said assailed Decision immediately on the succeeding billing cycle, plus the legal interest thereon.

Other just and equitable reliefs are also prayed for.

Makati City for Manila, Philippines, 7 April 2010.

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**EXPLANATION**  
**(Pursuant to Section 11, Rule 13**  
**1997 Rules of Civil Procedure)**

The foregoing Reply was served upon the other parties thru registered mail with return card instead of personal service, due to the distance of their offices and lack of personnel to effect personal service.

**LEONARDO A. AURELIO**