

**REPUBLIC OF THE PHILIPPINES
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City**

**IN THE MATTER OF THE APPLICATION
FOR THE REFUND OF THE DIFFERENCES
(EXCESSES) BETWEEN MERALCO
AVERAGE MONTHLY GENERATION
CHARGE AND THE ERC APPROVED NPC
GENERATION CHARGE FROM JUNE
2003 TO JUNE 2006 MULTIPLIED BY
THE KILOWATT-HOUR SALES OF
MERALCO FOR THE CORRESPONDING
MONTHLY PERIOD.**

**NATIONAL ASSOCIATION OF
ELECTRICITY CONSUMERS FOR
REFORMS, INC. (NASECORE), represented
by its President, PETRONILO ILAGAN,
SIEGFRIEDO VELOSO, BONIFACIO DAZO,
WILLIAM P. ESPIRITU and LEONARDO A.
AURELIO,**

Petitioners,

-versus-

ERC CASE NO. _____

**MANILA ELECTRIC COMPANY (MERALCO),
Respondent.**

X-----X

PETITION

PETITIONERS, by counsel, unto this Honorable Commission,
respectfully state:

I.

PREFATORY STATEMENT

1. Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA), was enacted into law in 2001. It was crafted precisely to ensure the quality, reliability and affordability of the supply of electricity by allowing open access to various players in the power industry. Among the intended benefits for the captive market is lower electric costs as it mandates distribution facility to supply electricity to its customers in a least cost manner, to wit:

"A distribution utility shall have the obligation to supply electricity **in the least cost manner** to its captive market, subject to the collection of retail rate duly approved by the ERC."¹

2. On June 9, 2003, Republic Act No. 9209 was signed into law, granting MERALCO a twenty-five (25) year consolidated franchise to operate and maintain a distribution system in some of the cities/municipalities of Metro Manila, Bulacan, Cavite and Rizal and certain cities/municipalities/barangays in Batangas, Laguna, Quezon and Pampanga.

3. Section 4 of Republic Act No. 9209 otherwise known as the "Meralco Franchise" provides for the responsibility of Meralco to the public, to quote:

"SEC. 4. Responsibility to the Public. - The grantee shall supply electricity to its captive market in the least cost manner. In the interest of

¹ Section 23, R.A. No. 9136

the public good and as far as feasible and whenever required by the ERC, the grantee shall modify, improve or change its facilities, poles, lines, systems and equipment for the purpose of providing efficient and reliable service and **reduced electricity costs**. The grantee shall charge reasonable, just and competitive power rates for its services to all types of consumers within its franchised area in order that business and industries shall be able to compete. The grantee shall have the obligation to provide open and nondiscriminatory access to its distribution system and services for any end-user within its franchise area consistent with Republic Act No. 9136, otherwise known as the “Electric Power Industry Reform Act of 2001.” **The grantee shall not engage in any activity that will constitute an abuse of market power such as but not limited to, unfair trade practices, monopolistic schemes and any other activities that will hinder competitiveness on business and industries.**” (Emphasis Ours)

4. Thus, Meralco, as a distribution utility, has under the above-said two (2) laws, is duty bound, among others, to supply electricity to its captive market in the least cost manner, reduced electricity costs and to avoid abuse of market power such as but not limited to, unfair trade practices and monopolistic schemes.

5. However, these objectives of Republic Act No. 9136 and Republic Act No. 9209 were blatantly disregarded when MERALCO started to charge from June 2003 to June 2006 its captive market higher electricity costs than that mandated by law.

6. MERALCO misused in bad faith (with intention to enrich itself at the expense of its consumers) by applying charging electricity costs in

complete violation of the abovesaid two (2) laws. ERC unjustifiably approved the application, including the assailed generation charge based on Meralco's formula which led to the application of the weighted average generation cost derived from the rate of NPC and Meralco-IPPs which is clear violation of the above-mentioned laws, to the damage and prejudice of the consuming public.

~~(REPHRASE)~~

7. Despite the passage of these two (2) laws, MERALCO has failed to comply with its responsibilities to the public of supplying electricity at the least cost manner. Six years have passed, the objectives of the EPIRA Law are far from being realized, despite the provisions meant to protect consumers from unfair, unjust, and unreasonable electricity rate. Meralco's prevailing electric rates now are considered as the highest in Asia.

8. Hence, pursuant to the objectives of Republic Act Nos. 9136 and 9209, petitioners are constrained to file the instant petition seeking relief against Meralco and to give this Honorable Commission the opportunity to rectify the erroneous and void applications of the law by its predecessors.

II.

THE PARTIES

9. Petitioner NATIONAL ASSOCIATION OF ELECTRICITY CONSUMERS FOR REFORMS² (NASECORE, for brevity) is a non-stock and non-profit organization registered under Philippine laws and engaged in consumer advocacy in the electricity industry, which judicial notice should be taken by this Honorable Commission. NASECORE is represented by its President, Petronilo L. Ilagan, who is of legal age, married, Filipino and filing the instant case as the President of NASECORE and in his personal capacity as one of the customers of Meralco. It may be served with notices thru its President at No. 10 Bayside Court Compound, 680 Quirino Avenue, Tambo, Paranaque City. A copy of the Secretary's Certificate is hereto attached as **Annex "A"**.

NASECORE is an organization whose objective is to promote, advance, and protect the interest of ordinary consumers. A substantial number of its members are customers of MERALCO because they reside within MERALCO's franchise.

10. Petitioners Siegfriedo Veloso with postal address at 10 Tagaytay Road, Alabang Hills Village, Muntinlupa City and Bonifacio Dazo with postal address at 50 C.V. Starr Avenue, Philamlife Village, Las Pinas City, are both of legal age, Filipinos, and married.

² Also an Intervenor in ERC Case Nos. 2001-900RC and 2001-646RC

They are filing this case as member of NASECORE and in their personal capacity as customers of MERALCO because they reside within the MERALCO's franchise areas, copy of their Meralco Billing is hereto attached as **Annexes "B" and "B-1"**, respectively.

11. Petitioners William R. Espiritu with postal address at 214 Jupiter Street, Aero Park Subdivision, Paranaque City and Leonardo A. Aurelio with postal address at 7266 Marcelo Avenue, Paranaque City, both of legal age, Filipinos, and married.

They are likewise filing this case as member of NASECORE and in their personal capacity as customers of MERALCO because they reside within the MERALCO's franchise areas, copy of their Meralco Billing is hereto attached as **Annexes "C" and "C-1"**, respectively.

12. Respondent MANILA ELECTRIC COMPANY (MERALCO, for brevity) is a domestic corporation existing under the laws of the Republic of the Philippines, with principal office address at Lopez Building, Meralco Center, Ortigas Avenue, Pasig City where it may be served with notices and other processes of this Honorable Commission.

It has a franchise to operate and maintain a distribution system in some of the cities/municipalities of Metro Manila, Bulacan, Cavite and Rizal and certain cities/municipalities/barangays in Batangas, Laguna, Quezon and Pampanga, pursuant to Republic Act No. 9209.

III.

FACTS CONSTITUTING CAUSES OF ACTION

A.

MERALCO HAS CHARGED ITS CAPTIVE MARKET IN THE SUPPLY OF THE ELECTRICITY NOT IN THE LEAST COST MANNER IN VIOLATION OF SECTION 23 OF R.A. NO. 9136 AND SECTION 4 OF R.A. NO. 9209.

13. On August 12, 1994, MERALCO entered into a Power Purchase Agreement (PPA) with Ogden Quezon Power, Inc. (now Quezon Power Philippines Ltd. which is hereinafter known as “QPPL” for brevity) wherein MERALCO agreed to purchase from QPPL its entire electrical capacity from its 433.4 megawatts coal-fired power plant for a period of twenty-five (25) years.

14. On October 20, 1994, an application was filed by MERALCO before the ~~Honorable Commission~~ (formerly known as Energy Regulatory Board, hereinafter known as the “ERB”) which was docketed as ERB Case No. 94-217, for the approval of the Power Supply Agreement/Power Purchase Agreement (PPA) for the purchase of electric power and energy entered by it with Ogden Quezon Power, Inc. (QPPL). This application was approved on July 6, 1995 at the basic rate of P 1.7846/kWh for its first year of operation; P1.8690/kWh on the second year; P1.9398 on the 3rd year; and, P2.0135/kWh on the 4th year of its operation.

15. The condition for the ~~ERB's Honorable Commission's~~ approval is contained in the dispositive portion of the ERB Decision dated July 6, 1995, which reads:

“WHEREFORE, the foregoing premises considered, the Board hereby APPROVES the Power Purchase Agreement entered into by and among Ogden Quezon Power, Inc., Pacific Manufacturing Resources and MERALCO **subject to the condition that the rate of applicant per kWh should not exceed NPC's grid rate or the rate of all existing or future similar plant.**”³
[emphasis supplied]

16. The above-said Decision dated July 6, 1995, which took into consideration the National Power Corporation's (“NPC” for short) grid rate as the benchmark in the determination of the least cost to MERALCO's consumers, became final and executory as MERALCO did not file any appeal or certiorari thereto contesting the same. At the time of the above Decision dated July 6, 1995, the then ERB made a comparison between the rate of Ogden (QPPL) and that of NPC, to wit:

“Based on the Board's evaluation, it would be noted that Ogden's power rate is still way below that of NPC rate, to wit:

<u>YEAR</u>	<u>OGDEN</u>	<u>NPC</u>
1	1.7846	1.8643
2	1.8690	1.9433
3	1.9398	1.9965
4	2.0135	2.0682”

~~(Can we add, “Obviously, the NPC rate was used by the former ERB as the benchmark for determining the least cost supply of electricity”.)~~

17. On March 14, 1995, MERALCO entered into another Power

³ Decision dated July 6, 1995, p. 9 in ERB Case No. 94-217

Purchase Agreement (PPA) with its First Gas Power Corporation - Sta. Rita (hereinafter known as “**FGPC-Sta. Rita**” for brevity), an IPP owned/controlled by First Philippine Holdings Corporation (FPHC) which also controls Meralco. This PPA was later replaced with the Amended and Restated Power Purchase Agreement on January 9, 1997. Under the said agreement, MERALCO undertook to purchase from FGPC - Sta. Rita the full capacity and energy to be produced by gas-fired power generating facility. The said agreement is under a long-term power off-take arrangement for a period of twenty-five (25) years beginning from the commencement of the commercial operations of the power plant in year 2000.

18. On February 28, 1997, an amended application was filed by MERALCO before the former ERB for the approval of the Power Supply Agreement/Power Purchase Agreement (PPA) for the purchase of electric power from FGPC - Sta. Rita which was docketed as ERB Case No. 97-03. The said application was approved by the then ERB in its Decision dated June 11, 1997 with an approved basic rate of P1.4597/kWh, to quote:

"After a thorough evaluation it is clear that FGPC's rate to applicant is comparable with the rates of other IPPs selling power to NPC utilities in the Luzon Grid. Since the purchase cost of MERALCO from FGPC is lower than the effective rate of NPC, the rates charged to applicant are just and reasonable."

(Here, it is also very clear that NPC's grid (Luzon) rate was used as the benchmark for determining the least cost supply of electricity which led to the approval of the proposed rate of P1.4597/kWh as being the least cost supply of electricity by the former. The coming in of FGPC will not only encourage efficiency in power.

*generation aside from the foreign exchange and budgetary savings of the government but will also promote public interest in a suitable and adequate manner. Furthermore, the Project meets the criteria laid down under Executive Order No. 215 for a pioneer status project owing to its having an attractive power tariff and utilizing high efficiency technology and environmentally friendly fuel never before utilized in the country. The project will also serve as a preinvestment to build an entirely new industry in natural gas. It will also provide energy diversification that is critical to the continued progress and security of the nation."*⁴[Emphasis supplied]

19. The above-said ERB Decision dated June 11, 1997 which again took into consideration the NPC's grid rate as the benchmark in the determination of the least cost generation charge to Meralco's consumers became final and executory as MERALCO did not file any appeal or certiorari thereto contesting the same.

20. At the time of the above-said Decision dated June 11, 1997, the then ERB also made a comparison between the rate of FGPC-Sta. Rita and that of NPC, as follows:

*"FGPC's rate of 1.4597/kWh is lower than NPC's current effective price which is P2.1908/kWh. FGPC has a lower average rate per kWh of P1.4427 assuming a higher load factor of 90% as against NPC's 2.1545 per kWh."*⁵

21. On April 29, 1998, MERALCO and First Gas Power Corporation - San Lorenzo (hereinafter known as **"FGPC-San Lorenzo"** for short), another IPP owned/controlled by FPHC which also controls Meralco, executed a Memorandum of Understanding (MOU) wherein both parties agreed to negotiate and enter into a Power Purchase Agreement (PPA) for the

⁴ Decision dated June 11, 1997, pp. 6-7 in ERB Case No. 97-03

⁵ Decision dated June 11, 1997, p. 6 in ERB Case No. 97-03

sale and purchase of capacity and energy from FGPC-San Lorenzo. This MOU was subsequently replaced when MERALCO and FGPC-San Lorenzo executed a Power Purchase Agreement (PPA) on July 22, 1999 wherein the former shall purchase from the latter the capacity and energy to be produced by the San Lorenzo power plant. The said agreement shall be under a long-term ~~poweroff-take~~ “take or pay” arrangement for a period of twenty-five (25) years beginning from the commencement of its commercial operation in 2002.

22. On September 9, 1999, an application was filed by MERALCO docketed as ERB Case No. 99-62 before the former ERB for the approval of the Power Supply Agreement/Power Purchase Agreement for the purchase of electric power and energy entered by it with FGPC-San Lorenzo. The said application was approved in ERB Decision dated January 24, 2000, and the basic rate approved was P2.17/kWh at 83% load factor. The pertinent portion of the ERB decision containing the rationale for the approval reads as follows:

*"This Board believes that FGP Corp.'s rate to applicant MERALCO is comparable with the rates of other Independent Power Producers (IPPs) selling power to NPC/ utilities in the Luzon grid. The Board also takes cognizance of the fact that the computed rates of FGP Corp. to Meralco at minimum off-take is lower than the effective rate of NPC to MERALCO and that FGP Corp.'s rate to herein applicant appears to be just and reasonable."*⁶ [Emphasis supplied]

23. The above-said ERB Decision dated January 24, 2000 which

⁶ Decision dated January 24, 2000, p. 20 in ERB Case No. 99-62

consistently took into consideration NPC's grid rate as the benchmark in the determination of the least cost generation charge to MERALCO's consumers became final and executory as MERALCO did not file any appeal or certiorari thereto contesting the same.

24. At the time of the above-said ERB Decision dated January 24, 2000, ERB made a comparison between the rate of FGPC-San Lorenzo and that of NPC, to wit:

"The resultant figures show that at 83% load factor, FGP's rate using condensate gas is P2.6413/kWh and 2.9160/kWh using natural gas. Likewise, at 90% load factor, the total charge at delivery point is P2.5832/kWh using condensate gas and P2.8486/kWh using natural gas. It is worthy to note that at 83% load factor a shift from using condensate gas to natural gas shows a difference of P0.2747/kWh while at 90% load factor, such shift shows a difference of P0.2654/kWh.

The projected NPC rate to Meralco at simulated 83% load factor in year 2002 is as follows:

<i>NPC rate at delivery point</i>	<i>P3.7573</i>
<i>Less: Wheeling Charge</i>	<i>0.1669</i>
<i>Ancillary Service</i>	<i><u>0.1669</u></i>
<i>Total (P /KWh)</i>	<i><u>P3.4224</u></i>

From the above projection of NPC rates to applicant Meralco, it is evident that the rate of FGP Corp. would still be lower than the rate of NPC. It must be emphasized, however, that the pipeline charge is payable only once the San Lorenzo plant has been converted into natural gas operation."⁷

25. It is clear from the foregoing ERB decisions that the rates approved for MERALCO's individual IPPs⁸, under its applications on the

⁷ Decision dated January 24, 2000, p. 14 in ERB Case No. 99-62

⁸ As defined by Section 4 of R.A. 9136

above mentioned Power Purchase Agreements with its three (3) IPPs, namely: Ogden Quezon Power, Inc.(QPPL), First Gas Power Corporation - Sta. Rita (FGPC-Sta. Rita) and First Gas Power Corporation - San Lorenzo (FGPC-San Lorenzo), hereinafter collectively known as “**MERALCO IPPs**”, were all lower than the rates of NPC.

26. The three (3) decisions of the Honorable Commissions from 1995 to 2000 in approving the applications of the above mentioned Power Purchase Agreements with MERALCO IPPs have recognized, acknowledged, used, and treated with finality the NPC rate as the benchmark in approving the individual rates of MERALCO IPPs in accordance with the intent and spirit of Executive Order No. 215 (“E.O. 215” for short) to determine the “*least cost*” of generation charge to be used by MERALCO for its consumers which was later carried on under Section 23 of the R.A. No. 9136 and Section 4 of R.A. No. 9209.

27. The passage of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA Law) in June of 2001 paved the way again of ensuring that the distribution utilities like MERALCO shall supply its captive market of lower electric costs as it mandates under Section 23 thereof that the distribution utility shall supply electricity to its customers in a least cost manner, to wit:

"A distribution utility shall have the obligation to supply electricity **in the least cost manner** to its captive market, subject to the collection of retail rate duly approved by the ERC."

28. Under the same EPIRA Law, it mandated all distribution utilities,

such as MERALCO, to file its revised rates for the approval of this Honorable Commission within six months from its effectivity in keeping with its policies of transparency and full accountability and to determine if the distribution utilities are charging their consumers in the least cost basis as mandated by the EPIRA Law.⁹

29. MERALCO filed its revised rates on December 26, 2001 before the Honorable Commission and the same was reviewed by the Honorable Commission.

30. In its Decision dated March 20, 2003, the ERC determined that the average costs of electric power bought by MERALCO for the period August 2002 to January 2003 were PhP2.4664/kWh from NPC and an average rate of PhP4.2173/kWh from MERALCO IPPs. The MERALCO average generation rate arrived at the time of the ERC decision promulgated in March of 2003 was P3.1665, as shown in Table 1 below:

TABLE 1

GENERATION COSTS FOR NPC and MERALCO IPPs in P/kWh			
	Sales Mix	Php/kWh	Wt.Ave. Rate
NPC	60%	2.4664	1.4802
Combined IPPs supply Month August 2002 to January 2003	40%	4.2173	1.6863
Weighted Average Cost			3.1665

⁹ Section 36, Republic Act No. 9136

31. The above Table 1 clearly shows that the least cost is the NPC rate of P2.4664/kWh pursuant to the doctrine enunciated by the former ERB using the NPC rate as the benchmark in arriving at the least cost and the generation costs. On the other hand, the combined generation cost of MERALCO IPP's from August 2002 to January 2003 in Table I is not in the least cost basis.

32. The weighted average generation rate as shown in Table I is not sanctioned by R.A. No. 9136 and R.A. No. 9209. In fact, such weighted average generation rate is a distortion of the least cost provision under the said laws, and therefore, null and void.

33. The Table I above shows that ERC itself, it is respectfully submitted, has abandoned the correct application in determining the least cost in the supply of electricity and ignored the consistent doctrine enunciated in the Decisions of the former ERB using the NPC rate as the benchmark for determining the least cost.

34. But that is not all. The ERC Decision failed to explain why it has adopted the weighted average generation cost and how it will benefit the hapless consumers. Not only that. The ERC Decision is now perceived by the suffering consumers to be the instrument of Meralco's abuses and geometric increase in the generation charge.

35. On the basis of a Motion for Reconsideration by MERALCO, this weighted average generation cost was modified in the Decision dated May 30, 2003 of the Honorable Commission using the most current data

available. Thus, the amount of P3.1665 was adjusted to P3.3027/kWh upon which the deferred Power Purchase Agreement (PPA) of P0.1002/kWh pursuant to ERC Order dated 29 May 2003, in ERC Case No. 2001-383 was added to arrive at the generation cost of **P3.4029**, the amount reflected then from June 2003 to June 2006 of the MERALCO bill, copies of which are hereto attached as **Annexes "D" to "D-35"**.

36. MERALCO is mandated under Section 23 of EPIRA Law to charge its consumers of electricity generation charge in a least cost manner but the use of weighted average cost using the two rates coming from NPC and MERALCO owned-IPPs is clearly not in the least cost manner because **it is very clear that rates of MERALCO IPPs are way higher than NPC's rates.**

37. Moreover, Section 4 of Republic Act No. 9209 otherwise known as the "Meralco Franchise" provides for the responsibility of Meralco to the public to supply its captive market in the least cost manner, to quote:

*"SEC. 4. Responsibility to the Public. - **The grantee shall supply electricity to its captive market in the least cost manner.** In the interest of the public good and as far as feasible and whenever required by the ERC, the grantee shall modify, improve or change its facilities, poles, lines, systems and equipment for the purpose of providing efficient and reliable service and reduced electricity costs. The grantee shall charge reasonable, just and competitive power rates for its services to all types of consumers within its franchised area in order that business and industries shall be able to compete. The grantee shall have the obligation to provide open and nondiscriminatory access to its distribution system and services for any end-user within its franchise area consistent with Republic Act No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001. x x*

x”

38. On the other hand, the then ERC, who is mandated by law to implement the above-said laws and with the bounden duty to protect the public from predatory pricing of electricity, abuse of market power, unfair trade practices, monopolistic schemes and other activities detrimental to competitiveness or business and industries has been remissed of its duty because despite clear and unequivocal violation of the said laws committed by MERALCO in the application of its rate, it approved the said MERALCO’S scheme of using weighted average cost from the two rates coming from NPC and MERALCO owned-IPPs which is not in the least cost manner.

39. The clear violation of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 renders the said decision of the then ERC as void judgment. A void judgment is in legal effect, no judgment by which no rights are divested from which no rights can be obtained, which neither binds nor bars anyone, and under which all acts performed and all claims flowing out are void and considering further that the decision, for want of jurisdiction of the court, is not a decision in contemplation of law, and hence cannot become executory, it follows that such a void judgment cannot constitute a bar to another case by reason of *res judicata*¹⁰ and may be attacked directly or collaterally.¹¹ ***It cannot become final.***¹²

40. Even assuming that the then ERC approved the said

¹⁰ Municipality of Antipolo v. IAC, 133 SCRA 320

¹¹ David v. Aguilizan 94 SCRA 707

¹² MWSS v. Sison, 124 SCRA 394.

MERALCO'S scheme of using weighted average cost from the two rates coming from NPC and MERALCO owned-IPPs in charging the consumers of generation charge, the said ERC's approval was null and void as the same was committed in blatant violation of the law.

41. The Table 2 below which forms part of MERALCO's Compliance dated August 19, 2005 under ERC Case No. 2004-74 entitled, *"In the Matter of the Application for Approval of the Amendments to the Power Purchase Agreements Between (A) First Gas Power Corporation (Sta. Rita) and Manila Electric Company and (B) FGP Corporation (San Lorenzo) and Manila Electric Company) with Prayer for Provisional Authority"*, will show the rates of MERALCO IPPs charged against petitioners and its captive market are higher than NPC rate and, in using NPC rates as the benchmark as it was consistently used by the then ERB, the rates of MERALCO IPPs are not considered in the least cost.

TABLE 2

SUPPLY MONTH	AVERAGE RATE P/KWH			
	NPC	QPPL	FGPC- Sta. Rita	FGPC- San Lorenzo
Dec. 26 2003 to Jan. 25, 2004	3.36	5.03	1.53	4.2

Jan 26, 2004 to Feb. 25, 2004	3.69	4.19	4.25	3.89
Feb. 26, 2004 to Mar. 25, 2004	2.94	8.45	4.07	4.4
Mar. 26, 2004 to Apr. 25, 2004	3.08	6.05	4.03	3.91
April 26, 2004 to May 25, 2004	3.28	4.47	4.46	3.92
May 26, 2004 to June 26, 2004	3.47	4.66	4.03	4.75
June 26, 2004 to July 25, 2004	3.35	5.27	4.24	4.95
July 26, 2004 to Aug. 25, 2004	3.2	4.95	4.38	5.59
Aug. 26, 2004 to Sep.. 25, 2004	3.07	5.06	4.65	5.65
Sep. 26, 2004 to Oct. 25, 2004	4.89	5.27	4.64	5.39
Oct.. 26, 2004 to Nov. 25, 2004	5.01	4.93	4.81	4.84
Nov. 25, 2004 to Dec. 25, 2004	4.34	6.21	6.09	5.93

42. Except for the periods Dec. 26 2003 to Jan. 25, 2004 and September 26-October 25, 2004, where only FGPC-Sta.Rita's rate were lower than the NPC rate, from December 26, 2003-December 25, 2004, the NPC rates, which are the least cost, were lower than the above-said rates of MERALCO IPPs.

43. From June of 2003 to June 2006, except for the period of Oct. 26, 2004 to Nov. 25, 2004, the above table clearly shows that MERALCO blatantly violated its legal obligation to its captive market under Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 to supply electricity in the least cost manner when it purchased and/or sourced its power from MERALCO IPPs despite the fact that the NPC offers a generation rate which is less than MERALCO IPPs and therefore, at the least cost to petitioners and/or consumers of MERALCO.

44. Despite the fact that there is an available supply from NPC at a least cost to consumers, MERALCO, in violation of the EPIRA Law and its

franchise, unjustifiably and in bad faith, bought electricity from MERALCO IPP'S at a much higher rate than NPC's effective selling rates. This aggravated the already heavy burden suffered by its consumers from the unreasonably high cost of power. Such blatant violation demonstrates MERALCO's utter lack of concern for the welfare of its customers.

45. MERALCO's violations of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 arising from its acts of not supplying electricity to its customers in the least cost manner has resulted in excess or over payments to MERALCO in the total amount of **Forty Nine Billion Five Hundred Sixty Three Million Ninety Six Thousand One Hundred Fifty Two Pesos and Twenty Centavos (P49,563,096,152.20)** covering the period June 2003 to June 2006.

46. From June 2003 to April 2005, ERC did not perform its duty of ensuring that the electricity cost being charged by MERALCO against its captive market/customers are in the least cost basis. It turned a blind eye in the perpetration of MERALCO's violations of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209.

47. From June 2003 to April 2005, MERALCO unjustly accumulated from its consumers the total amount of **Thirty Seven Billion Two Hundred Million Pesos (P37,200,000,000.00)** excess or over payments arising from its acts of not supplying electricity to its customers in the least cost manner.

48. From the Table 3 below using the attached copies of the

MERALCO billings (known as Annexes D to D-35) from June 2003 to April 2005 containing therein its average generation rates in the same period shows the excess or over payments of its customers based on the monthly computation of the differences (excesses) between the average generation rate of MERALCO and the NPC selling rate as the least cost basis, multiplied by the total monthly kilowatt-hour sales to its consumers, to wit:

TABLE 3

MONTH AND YEAR	Meralco Average General Rate	NPC Selling Rate	Diff.	KWH SALES	REFUNDABLE AMOUNT
2003					
June	3.4029	2.4009	1.0020	2,014,593.05	2,018,622,244.12
July	3.4029	2.4009	1.0020	2,060,887.30	2,065,009,078.61
August	3.4029	2.0065	1.3964	2,076,089.97	2,899,052,039.69
September	3.4029	2.0065	1.3964	2,020,023.24	2,820,760,452.34
October	3.4029	2.4962	0.9067	1,986,205.60	1,800,892,619.33
November	3.4029	2.4962	0.9067	2,079,547.85	1,885,526,040.13
December	3.4029	2.4897	0.9132	2,024,901.93	1,849,140,443.39
2004					
January	3.4029	2.4897	0.9132	1,699,933.58	1,552,379,351.65
February	3.1886	2.3887	0.7999	1,962,302.23	1,569,645,560.18
March	3.1886	2.3887	0.7999	1,957,340.86	1,565,676,957.11
April	3.1886	2.3887	0.7999	2,106,403.49	1,684,912,154.05
May	3.1886	2.4614	0.7272	2,178,984.67	1,584,557,658.57
June	3.3213	2.5981	0.7232	2,151,596.18	1,556,034,361.72
July	3.3213	2.5981	0.7232	2,120,314.31	1,533,411,313.33
August	3.3213	2.5981	0.7232	2,137,511.76	1,545,848,507.72
September	3.4950	2.5981	0.8969	2,134,125.49	1,914,097,160.05
October	3.4950	3.9662	(0.471)	2,145,267.08	
November	4.5700	3.9384	0.6316	2,075,286.50	1,310,750,956.56
December	4.5313	3.9384	0.5929	2,021,253.95	1,198,401,472.29
2005					
January	4.7762	3.9834	0.7928	1,789,377.11	1,418,618,175.19
February	4.7753	3.9834	0.7919	1,913,662.73	1,515,429,516.68
March	4.4007	3.9834	0.4173	1,885,077.62	786,642,892.91
April	4.5259	3.9834	0.5425	2,072,538.89	1,124,352,348.91
SUB-TOTAL					37,200,000,000.00

49. The figures shown in the above Table 3 clearly show that MERALCO IPP rates are not considered as the least cost and violative of

Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 and that NPC rate is the least cost, and therefore should be the basis of MERALCO's generation charge and not the weighted average rate.

50. Starting May of 2005, NPC began billing MERALCO based on a TIME OF USE (TOU) Billing Rates. However, MERALCO still supply its customers not in the least cost manner in violation of its mandate under Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 because MERALCO's TOU scheme still unjustly and in bad faith, bought electricity from MERALCO IPP'S at a much higher rate than NPC's effective selling rates, despite the fact that there is an available supply from NPC at a least cost to consumers.

51. From the Table 4 below, it is clearly shown that even in the TOU scheme of MERALCO, it unjustly enriched itself in amassing excess or over payments from its captive market in the total amount of Nine Billion Seven Hundred Sixty Four Million Eight Hundred Forty One Thousand Six Hundred Eighty Nine Pesos and Forty Seven Centavos (P9,764,841,689.47) to the damage and prejudice of petitioners and consumers.

52. Using the copies of the MERALCO billings from June 2003 to June 2006 containing therein its average generation rates and the ERC-approved generation/selling rates, hereto attached as Annexes "D" to "D-35", the figures below in Table 4 will clearly show that rates of MERALCO IPP's were not in the least cost and were not fair to MERALCO's captive market,

to wit:

TABLE 4

MAY 2005- JUNE 2006 BASED ON TIME OF USE					REFUNDABLE AMOUNT
2005	IPP's	NPC	Diff.	kWh	
May	4.5348	4.9486	(0.4138)	2,192,407,442	
June	4.8970	4.9996	(0.1026)	2,263,-00,149	
July	4.9119	4.3392	0.5727	2,154,533,244	1,233,874,641.79
August	4.9380	4.3700	0.5680	2,169,788,448	1,232,460,674.48
September	4.7437	4.3347	0.4090	2,135,470,235	873,442,804.36
October	4.7982	4.3927	0.4055	2,078,582,773	842,845,170.33
November	4.8294	4.3126	0.5168	2,048,875,524	1,058,958,366.28
December	4.7564	4.3180	0.4384	2,102,085,785	921,582,919.79
2006		-			
January	4.8437	4.6719	0.1718	1,808,043,181	310,662,800.89
February	5.0469	4.7348	0.3121	2,001,329,245	624,675,841.15
March	4.9915	4.7454	0.2461	2,014,339,348	495,820,072.56
April	4.9419	4.6018'	0.3401	2,095,655,115	712,787,606.63
May	4.9690	4.7669	0.2021	2,187,540,858	442,124,578.56
June	5.2177	4.7597	0.4580	2,217,447,449	1,015,606,212.66
SUB-TOTAL					9,764,841,689.47
REFUND					

53. Thus, from July 2005 to June 2006, MERALCO's violations of Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 arising from its acts of not supplying electricity to its customers in the least cost manner has resulted in amassing excess or over payments to MERALCO in the total amount of Nine Billion Seven Hundred Sixty Four Million Eight Hundred Forty One Thousand Six Hundred Eighty Nine Pesos and Forty Seven Centavos (P9,764,841,689.47).

54. In the data provided by the National Electrification Administration (except the data inserted in the column of Meralco), the violation of the law by MERALCO is further shown in the comparative table of generation rates on the subject periods charged by electric cooperatives to

its respective consumers in neighboring provincial franchise areas as against MERALCO's charge in the same period.

ELECTRIC COOPERATIVES	Generation Charge P/kWh				
	Per Approved Unbundled Rate		Dec. 2006	Dec. 2007	Sept. 2008
	20 03	20 04			
MERALCO	3.4029'	3.7515'	5.001'	nds	Nds
PANELCO I	2.0696		4.443 8	3.696 1	3.4359**
CENPELCO	2.1897		4.354 8	3.641 7	2.5129
PANELCO III	2.1962		4.415 2	nds	Nds
PELCO I	2.0696		4.301 3 ***	3.561 0	3.5210
PELCO II		2.0887	4.460 8	3.727 0	2.5269
PELCO III		2.1897	4.610 0	3.588 1	2.5081
PENELCO	2.1664		4.341 7	3.613 6	2.4577
TARELCO I	2.1897		4.333 7	3.591 6	2.6412
TARELCO II		2.0887	4.452 5	3.609 0	2.4760

ZAMECO I	2.1009		4.330 5	3.574 2	3.5316
ZAMECO II		2.0047 **	Nds	3.628 4	3.5438
BATELEC I	2.1664		4.293 3	3.769 4	2.4726
BATELEC II		2.0887	4.503 0	3.743 0	2.7815

Legend:

Nds- no data submitted

* Includes the following:

Franchise & Benefits to Host Communities (FBHC)

Incremental Currency Exchange Rate Adj. (ICERA/FOREX)

Pre. Yrs. Adj. on Power Cost (PPA)

Power Act Rate Reduction

‘Meralco weighted average generation cost

**2005

***November

55. It should be observed that for the years 2003 to 2004, the highest generation rate that the other electric cooperative was charging for the neighboring provinces, is only P2.1897/kWh. This is the rate charged by TARELCO I as against the P3.4029/kWh rate that MERALCO was collecting from March 2003 to January 2004. In fact, for November 2004, MERALCO was collecting P4.5700/kWh, a rate which is double the rate being charged by TARELCO I to its consumers.

56. In sum, the average generation rates billed by MERALCO and paid by its customers from June 2003 to June 2006, except for October 2004, were not the rates supplied *"in the least cost manner"* to its captive customers which is a blatant violation of the mandatory provisions under

Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209 and the same has resulted to unwarranted excess or over payments by its captive consumers to MERALCO in the total amount of **Forty Nine Billion Five Hundred Sixty Three Million Ninety Six Thousand One Hundred Fifty Two Pesos and Twenty Centavos (P49,563,096,152.20)**

57. Hence, petitioners seek the immediate lump-sum cash refund by MERALCO of the differences (OVER PAYMENTS) between its average monthly generation charge and the ERC-approved generation charge of NPC multiplied by the monthly kilowatt-hour sales of MERALCO from June 2003 to June 2006 pursuant to the general law that no one should unjustly enriched himself at the expense of others.¹³

¹³ Article 19 and 22 of New Civil Code

B.**MERALCO IS ENGAGED IN ACTS
CONSTITUTING ABUSE OF MARKET
POWER AND MONOPOLISTIC SCHEME IN
VIOLATION OF SECTION 23 OF R.A. NO.
9136 AND SECTION 4 OF R.A. NO. 9209.**

58. As mentioned earlier, MERALCO entered into Power Purchase Agreements with its three (3) IPPs, namely: Ogden Quezon Power, Inc.(QPPL), First Gas Power Corporation - Sta. Rita (FGPC-Sta. Rita) and First Gas Power Corporation - San Lorenzo (FGPC-San Lorenzo).

59. Despite the available NPC rate which is lesser than the cost of supply of electricity from the above-said MERALCO IPPs higher rate, MERALCO still obtained its supply of electricity from the said IPPs.

60. The obvious purpose of MERALCO of its acts of not supplying electricity to its customers in the least cost manner and continue sourcing its electricity supply from MERALCO IPPs instead from NPC's lesser rate is to unjustly benefit its own IPPs with whom it has a majority and controlling interests.

61. Clearly, it appears that MERALCO has engaged in acts constituting abuse of market power and monopolistic schemes which resulted in over charging its captive market in the generation charge for the benefit of its two (2) IPPs, namely, First Gas Power Corporation (FGPC), Sta. Rita and San Lorenzo.

62. The majority and controlling interest of MERALCO are the family of Chief Executive Officer, Manuel Lopez ("Lopez Family" for short)

of which judicial notice should be taken by this Honorable Commission.

63. The two (2) major stockholder and controlling interests of FGPC, when combined, are Lopez, Inc. and First Gas Holdings Corporation, both are domestic corporations duly organized and existing under and by virtue of Philippine laws.

64. The single major stockholder of First Gas Holdings Corporation is Benpress Holdings Corporation which holds 43% of the stockholdings, in addition to several Lopezes holding some stockholdings therein. The majority and controlling interest of Benpress Holdings Corporation are the Lopez Family of which judicial notice should be taken by this Honorable Commission.

65. Likewise, Lopez, Inc. is the proprietary corporation of the same Lopez Family who holds control of MERALCO.

66. Thus, the act of MERALCO in obtaining the supply electricity from FGPC despite of its higher rate than that of NPC, thereby violating the “least cost” provision of the EPIRA Law, is purposely not to benefit the consumers to which it serves but to unfairly benefit its own two (2) IPPs [First Gas Power Corporation - Sta. Rita (FGPC-Sta. Rita) and First Gas Power Corporation - San Lorenzo (FGPC-San Lorenzo)] with whom MERALCO has an interest to protect.

67. In abusing market power and monopolistic scheme, MERALCO has violated its franchise as mandated by Section 4 of Republic Act No. 9209 that provides for the responsibility of Meralco to the public, to quote:

“SEC. 4. Responsibility to the Public. - The grantee shall not engage in any activity that will constitute an abuse of market power such as but not limited to, unfair trade practices, monopolistic schemes and any other activities that will hinder competitiveness on business and industries.”

68. The blatant violation of the said two (2) laws by MERALCO necessitates the piercing of corporate veil between MERALCO and MERALCO IPP’s because it is justified in the case because “the concept of separate legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime.”¹⁴

C.

COMMON ALLEGATIONS TO BOTH CAUSES OF ACTION

69. Since the blatant violations of the above-said laws are so gross and brazen, the instant action also seeks the imposition of the maximum penalty of Fifty Million Pesos (P50,000,000.00) each month of violation from June 2003 to June 2006 by this Honorable Commission against herein MERALCO pursuant to Section 46 of EPIRA, which provides:

“SEC. 46. Fines and Penalties. - The fines and penalties that shall be imposed by the ERC for any violation of or non-compliance with this Act or the IRR shall range from a minimum of Fifty thousand pesos (P50,000.00) to a maximum of Fifty million pesos (P50,000,000.00).”

¹⁴ De Leon vs. National Labor Relations Commission, 358 SCRA 275 [2001]

70. By reason of the willful and deliberate failure of MERALCO to comply with the mandatory provisions under Section 23 of Republic Act No. 9136 and Section 4 of Republic Act No. 9209, petitioners were compelled to litigate and incur litigation expenses in the amount not less than Five Hundred Thousand Pesos (P500,000.00). The undersigned lawyers, for and in behalf of the Petitioners and captive market having direct interests in the outcome of the instant case have exerted and continue to exert painstaking man hours to study, research, investigation, litigation other related services in prosecuting this case which should be compensated on the basis of the principle of *quantum meruit* taking into consideration the nature of the case and amount claimed.

IV.

PRAYER

WHEREFORE, it is respectfully prayed of the Honorable Commission that it issue an Order giving due course to this Petition and after due notice and hearing issue a Decision:

1. Ordering MERALCO to immediately implement a lump sum cash refund in the amount of **Forty Nine Billion Five Hundred Sixty Three Million Ninety Six Thousand One Hundred Fifty Two Pesos and Twenty Centavos (P49,563,096,152.20)** representing the differences (excesses) between the MERALCO monthly generation charge and the ERC approved NPC Generation Rate from June 2003 - June

2006, multiplied by the kilowatt-hour monthly sales of MERALCO for the same period, with legal interest of 12% per annum commencing from the time of violation on June of 2003;

2. Ordering MERALCO to comply with its obligation under the law to source the least cost of electricity for its customers;

3. Ordering MERALCO to refrain from committing acts tantamount to abuse of market power and monopolistic scheme

4. Ordering MERALCO to pay the maximum penalty of Fifty Million Pesos (P50,000,000.00) each month from June 2003 to June 2006 for the violation of EPIRA Law;

5. Ordering MERALCO to pay the cost of suit and attorney's fees and professional fees for the under named legal counsels based on the principle of *quantum meruit*.

Petitioners further pray for other reliefs and remedies which may be deemed proper and equitable under the premises.

May 18, 2009.

Quezon City for Pasig City.

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6 August 2008

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