



Republic of the Philippines
National Electrification Administration

NEA MEMORANDUM No.-2004-020

FOR : ALL MEMBERS OF THE BOARD OF DIRECTORS
AND ALL GENERAL MANAGERS OF
ELECTRIC COOPERATIVES

FROM : ATTY. JOHN JOSEPH M. MAGTULOY, CPA
Deputy Administrator
Legal Sector

DATE : September 23, 2004

SUBJECT : ERC's Clarification on Direct Connection

Attached for your reference is the legal and policy consideration the ERC developed on the subject.

More power and warm regards.

ATTY. JOHN JOSEPH M. MAGTULOY, CPA



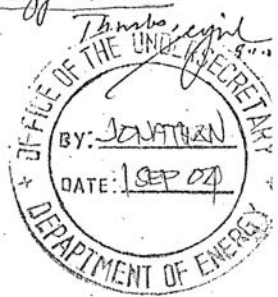
Republic of the Philippines
**ENERGY
REGULATORY
COMMISSION**

*For consideration for further instructions
FC: [unclear] CC: [unclear] [unclear] all*

August 24, 2004

HON. VINCENT PEREZ
Secretary, Department of Energy (DOE)
PNOC Complex, Fort Bonifacio
Taguig, Metro Manila

CSH: Please disseminate ACTD to Engrg Execon.



**SUBJECT: DIRECT CONNECTION WITH
NPC AND TRANSCO ISSUES**

DEAR HONORABLE SECRETARY PEREZ:

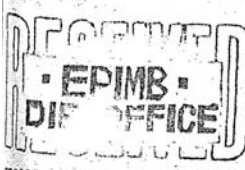
We wish to inform you of the following legal and policy considerations that the Commission developed regarding the issue of whether or not industrial enterprises can buy electric power in bulk directly from the National Power Corporation (NPC) and National Transmission Corporation (TRANSCO). These address the issues that were brought to the Commission through letter queries from three (3) *private distribution utilities* such as Visayan Electric Company (VECO), San Fernando Electric Light and Power Company, Inc. (SFELAPCO) and Panay Electric Company, Inc. (PECO) and two (2) *rural electric cooperatives* like Central Negros Electric Cooperative, Inc. (CENECO) and Surigao del Sur I Electric Cooperative, Inc. (SURSECO I).

A. Legal Considerations (underscoring provided for emphasis)

1. Section 3 (g) of Republic Act No. 6395, as amended, otherwise known as "An Act Revising the Charter of the National Power Corporation":

"Sec. 3. Powers and General Functions of the Corporation. - The powers, functions, rights and activities of the Corporation shall be the following:

(g) xxx xxx xxx; to sell electric power in bulk to (1) industrial enterprises, (2) city, municipal or provincial system and other government institutions, (3) electric cooperatives, (4) franchise holders, and (5) real estate subdivisions; Provided, That the sale of power in bulk to industrial enterprises and real estate subdivisions may be undertaken by the Corporation when the power requirement of such enterprises or real estate subdivisions is not less than 100 kilowatts, Provided, further, that no restriction shall apply to sale of power in bulk to enterprises registered with the Board of Investments; Provided, finally, That the Corporation shall continue to sell electricity to industrial enterprises under existing contracts, and provide for the collection of charges for any service rendered."



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2. Section 2 of Presidential Decree No. 269, as amended (or the National Electrification Administration [NEA] Decree):

“Section 2 - (Declaration of National Policy). xxx xxx xxx Because of their non-profit nature, cooperative character and the heavy financial burdens that they must sustain to become effectively established and operationally viable, electric cooperatives, particularly, shall be given every tenable support and assistance by the National Government holding the franchise in the area.”

3. Section 39 of Presidential Decree No. 269, as amended:

“Section 39 - (Assistance to Cooperatives; Exemption from Taxes, Imposts, Duties, Fees; Assistance from the National Power Corporation.) xxx xxx xxx Pursuant to the national policy declared in Section 2, the Congress hereby finds and declares that the following assistance to cooperative is necessary and appropriate: xxx (b) The National Power Corporation shall, except with respect to the National Government, give preference in the sale of its power and energy to cooperatives, and shall otherwise provide the maximum support of and assistance to cooperatives of which it is capable, including assistance in developing dependable and reliable arrangements for their supplies of bulk power, either from itself, or from other sources. In pursuance of the foregoing policy, the National Power Corporation shall not, except upon prior written agreement approved by the cooperative's board, compete in the sale of power and energy which without regard to the location of the point of delivery thereof, will be utilized and consumed within any area franchised to a cooperative.”

4. Section 9 (b) of Republic Act No. 9136 (the Electric Power Industry Reform Act of 2001 [EPIRA]):

“Section 9. Functions and Responsibilities. – Upon the effectivity of this Act, the TRANSCO shall have the following functions and responsibilities:

xxx xxx xxx

(b) Provide open and non-discriminatory access to its transmission system to all electricity users.”

5. Rule 7, Section 4 (a) of the Implementing Rules and Regulations (IRR) of Republic Act No. 9136 (EPIRA)

“Section 4. Obligations of a Distribution Utility.

(a) A Distribution Utility shall provide distribution services and connections to its systems for any End-user within its Franchise Area consistent with the Distribution Code. Any existing End-user within the Franchise Area of a

Distribution Utility that is connected to TRANSCO facilities shall be served by the franchised Distribution Utility upon acquisition of the sub-transmission facilities: *Provided, however,* That the Distribution Utility which acquired the subtransmission facilities shall be paid by the End-user the corresponding subtransmission rates or wheeling charge imposed by NPC in accordance with its contract to the End-user as approved by ERC.”

A reading of the above provisions reveals that there is *no explicit pronouncement* to repeal the power of NPC, through TRANSCO, to directly sell electric power in bulk to industrial enterprises. However, in the case of the *Electric Cooperatives (EC)*, there is a need of a prior *written agreement approved by its board* before a direct connection is authorized. Further, the concerned distribution utility (DU) can only require the direct-connection customer to fall within its service when it has acquired the sub-transmission facilities of TRANSCO. The law is silent on those sub-transmission facilities that are owned by the direct-connection customers themselves.

B. JURISDICTION AND THE PARTICULAR ROLE OF THE ERC (*underscoring provided for emphasis*)

5. Section 43, paragraph (u) of Republic Act No. 9136, (or the Electric Power Industry Reform Act of 2001 [the EPIRA]):

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

- u. *The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.*”

It is worthy to note that the Department of Energy (DOE) pursuant to the above provision, through Undersecretary Cyril C. Del Callar, in a letter dated March 27, 2003, endorsed to the Commission the case of Visayan Electric Company, Inc. (VECO) versus NPC and Grand Cement Manufacturing Corporation (GCMC) for determination as to who between VECO or the NPC has the right to supply power to GCMC. This case is now docketed as ERC Case No. 2003-150 entitled “*Visayan Electric Company, Inc. vs. National Power Corporation, Taiheyo Cement Philippines, Inc. (formerly Grand Cement Manufacturing Corporation)*”.

6. The Supreme Court Decision in the case of the PHILIPPINE SINTER CORPORATION and PHIVIDEC INDUSTRIAL AUTHORITY, petitioners, vs. CAGAYAN ELECTRIC POWER and LIGHT CO., INC., respondent. [G.R. No. 127371. April 25, 2002]:

The Supreme Court commented on the role of the regulatory body to determine the appropriateness of direct connections. It stated "On January 21, 1987, President Corason C. Aquino and her Cabinet approved a Cabinet Reform Policy for the power sector and issued a Cabinet Memorandum, Item No. 2 of which provides: "Continue direct connection for industries authorized under the BOI-NPC Memorandum of Understanding of 12 January 1981, until such time as the appropriate regulatory board determines that direct connection of industry to NPC is no longer necessary in the franchise area of the specific utility or cooperative. Determination shall be based in the utility or cooperatives meeting the standards of financial and technical capability with satisfactory guarantees of non-prejudice to industry to be set in consultation with NPC and relevant government agencies and reviewed periodically by the regulatory board."

C. POLICY CONSIDERATIONS REGARDING "SATISFACTORY GUARANTEES OF NON-PREJUDICE TO INDUSTRY" (underscoring provided for emphasis)

7. Section 2, paragraphs (a), (b), (c) and (f) of Republic Act No. 9136, (or the Electric Power Industry Reform Act of 2001 [the EPIRA]):

"SEC. 2. Declaration of Policy. – It is hereby declared the policy of the State:

- a. To ensure and accelerate the total electrification of the country;
- b. To ensure the quality, reliability, security and affordability of the supply of electric power;
- c. To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market;

xxx

- f. To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power;

In the event that the quasi-judicial intervention of the Commission may be required, the affected distribution utility may file a case taking the nature of an application for the Implementation of Cabinet Reform Policy in the Power Sector in relation to Section 43 (u) of the EPIRA.

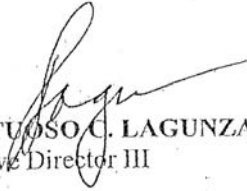
The local economy's welfare would be a major factor in the success or failure of an application. Given the very poor condition of the national economy, an applicant must establish that the additional imposition of charges for electric power will not unduly burden the large load customer directly connected to the NPC. It must be noted that these enterprises enjoy preferential

(low) rates from the NPC as part of the investment incentives in the name of economic growth. The economic multiplier effect is also a major factor in an application's approval. The imposition of an additional charge, in all likelihood, will be passed on to the consuming public. An applicant must also establish that the cost of living, employment levels, and the general economic welfare of the area in a distribution utility's franchise area will not be affected negatively.

For your information.

Very truly yours,

FOR AND BY THE AUTHORITY OF THE COMMISSION:


FRUCTUOSO C. LAGUNZAD, JR.
Executive Director III