

**Trade Union Congress Party (TUCP Party-List)
And
Associated Labor Unions-TUCP**

**Position Paper on the Electric Power Industry Reform Act
(EPIRA)**

29 January 2013

It has almost been thirteen years since the Electric Power Industry Reform Act (EPIRA) or RA 9136 was passed by the Congress and its implementation began in 2001. Among the major reasons for the passage of EPIRA were to stop the financial haemorrhage of the National Power Corporation and the financial burden to the national government, address the high cost of electricity which at that time was already one of the highest in Asia and in the world and the uncertainties in the sufficiency and reliability of supply of electricity vis-a-vis the projected high electricity demand at that time.

The following provisions under the Declaration of Policy of EPIRA reflect some of the major objectives of the law:

- To ensure the quality, reliability, security and affordability of the supply of electric power;
- 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;
- To enhance the inflow of private capital and broaden the ownership base of the power generation, transmission and distribution sectors in order to minimize the financial risk exposure of the national government;
- To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power;
- To establish a strong and purely independent regulatory body and system to ensure consumer protection and enhance the competitive operation of the electricity market; and

However, in the 13 years of the implementation of the law, these policies are still far from being realized. In fact, EPIRA is deemed a failure. Instead of getting relief from skyrocketing electricity rates, the electricity consumers in the country have been continuously and heavily burdened by bearing almost all the costs in the supply of electricity while power companies have been assured of generous

profits as a result of new rates determination methodology that was adopted by the Energy Regulatory Commission under EPIRA.

Power rates have increased at least ten times. Residential customers have been shelling out between ten percent (10%) to fifteen percent (15%), at least, of their monthly income for electricity. And doing business in the country has become less encouraging to foreign investors because of high cost of electricity. Some have even already moved out to neighboring countries where electricity and other production costs are cheaper. Meanwhile, power interruptions are still regularly experienced especially in Mindanao and Visayas.

It is high time therefore to start the process of overhauling EPIRA in order to realize its promise of quality, reliable, secure and affordable supply of electricity. We can start by changing the following sections of EPIRA:

1. GENERATION as well as SUPPLY OF ELECTRICITY SHOULD BE TREATED AS PUBLIC UTILITY OPERATIONS

(Sec.6 (GENERATION SECTOR) defines power generation as NOT a public utility operation. As a result of this categorization, the generation company does not have to secure franchise to operate. Another interpretation is that prices charged by a generation company for supply of electricity is not subject to regulation by the ERC, thus exempting and excluding generation sector from the 12% cap on profits and net income of a public utility)

A public utility is defined as a business or service engaged in regularly supplying the public with some commodity or service of public consequence, or essential to the general public such as water, electricity, transportation and media services. Public utility operations are subject to a 12% cap on return of investment proceeding from the Public Service Law of 1936.

Power generation is not just like any other commodity. It, just like the provision of water and transportation, is imbued with public interest. Power generation is key to the building of nations, to facilitating growth and progress, enhancing the quality of life and increasing the choices available to all Filipinos. It is analogous to being the milk run, the hospital run and the bank run. It is by its very nature a public utility and therefore must be subject to regulation by the ERC.

Placing it outside the jurisdiction of the ERC is fraught with dangers. Power generation, transmission, supply and distribution are natural monopolies, with electricity flowing seamlessly through the lines to the individual customer. Unlike other commodities, the laws of physics and the current state of technology do not allow enormous amounts of electricity to be stored. Power must be used once it is generated.

Artificially withdrawing power generations or man-made induced shortages of electricity will unduly bring the economy to a standstill and return domestic comforts back to the level of the primitive. They will also unduly bring up the cost of power. As we saw, the combined effects of the scheduled Malampaya outage and the effects of the presumably force majeure simultaneous shutdowns of other plants supposedly placed MERALCO at the mercy of the merchant generation plants selling their power at the spot market. The flaw in competition theory arises in a situation when no cap on return of investments is set and, the players just go thru the motions of pretending to compete or operate as a cartel wherein their unregulated generation costs will just be treated as a “pass-through” charge by the distribution utilities.

2. **BROADEN OWNERSHIP BASE IN THE POWER INDUSTRY TO ALSO INCLUDE CONSUMERS AND WORKERS. ENSURE DE-MONOPOLIZATION AND DISPERSAL OF OWNERSHIP IN THE POWER INDUSTRY**

Section 28 - *De-monopolization and Shareholding Dispersal* – only mandates shareholding limits of persons (including directors, officers, stockholders and related interests) in a generation company, distribution utility and their respective holding companies to a maximum of fifteen (15%) percent of the voting shares of stock to those not listed in the Philippine Stock Exchange. This therefore implies that for those listed, the percentage in the voting shares can be much higher.

This section exempts utilities or companies like MERALCO, VECO, and other big and established power companies that are controlled by few families. This runs counter to the policy of the State as described in EPIRA's Declaration of Policy to “enhance the inflow of private capital and **broaden the ownership base of the power generation, transmission and distribution sectors** in order to minimize the financial risk exposure of the national government.”

The 15% shareholding limit must apply to all power companies. Allowing broader ownership base shall prevent the perpetuation of cartel in the power industry.

3. ADD TWO SEATS IN THE ERC TO INCLUDE REPRESENTATION FROM CONSUMERS AND LABOR SECTOR

Section 38 – *Creation of the Energy Regulatory Commission – only provides for 5 members of the Commission. These are the Chairman and four other members to be appointed by the President.*

Two members from consumers and labor organizations must be included in the Energy Regulatory Commission to ensure true representation in the decision-making in the Commission and overall protection of interests and welfare of consumers in the power industry. These two new members shall be selected and endorsed by consumers and labor organizations respectively.

4. REPLACE THE CURRENT UN-TRANSPARENT AND COMPLEX PERFORMANCE-BASED RATE-SETTING METHODOLOGY (PBR) WITH SIMPLIFIED AND TRANSPARENT FORMULA LIKE THE RETURN-ON-RATE-BASE (RORB) THAT PUTS 12% ceiling on profits and net income

Sec.43 (Functions of ERC), provides that “In the public interest, (ERC) 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 rate-setting methodology so adopted and applied must ensure a reasonable price of electricity. The rates prescribed shall be non-discriminatory....”

The ERC must revert to the old formula that it is using – the RORB. The Performance-Based Rate Methodology that it has been using since 2006, replacing RORB, has proven to be much beneficial only to the power companies like MERALCO and to great disadvantage of their customers. Under RORB, the power companies pay for the ACTUAL costs of their operation and apply before the ERC for recovery of their costs and their profit margin. Under PBR, the companies present to ERC their PROJECTED costs including their profit, and based on this their charges from their customers will be determined and collected. After two years, their costs will be reviewed and their over or under-recoveries will be determined. In case of overrecoveries, their customers have already advanced these costs to them. In effect, under PBR, the customers are advancing or paying for all the PROJECTED COSTS declared by the companies in their

application to ERC. Again, this is contrary to EPIRA's Declaration of Principle to ensure transparent and reasonable prices of electricity.

5. PROHIBIT CROSS-OWNERSHIP BETWEEN THE GENERATION, DISTRIBUTION, SUPPLY, AND TRANSMISSION SECTORS.

Section 45 – *Cross Ownership, Market Power Abuse And Anti-Competitive Behavior* – states that “ No participant in the electricity industry may engage in any anti-competitive behavior including, but not limited to, cross-subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.”

However, the succeeding paragraph under this Section renders the intention weak or this Section in general, ineffective, as cross-ownership is only prohibited between the transmission company and any company in the other sectors (generation and distribution).

This would encourage sweetheart deals, and even more so under the current legal regime where the EPIRA does not prohibit cross-ownership between and among the power generation and distribution sectors. To truly prevent market power abuse and anti-competitive behaviour, prohibition on cross-ownership should apply between all sectors. A company and its shareholders should only stick to one business operation – either generation, distribution, supply, or transmission – and should no longer have any interest (either through its subsidiary, affiliate) in another business operation in the power sector to avoid collusion and other anti-competitive behaviour.

We should already learn our lesson from the case of MERALCO and its independent power producers (Sta. Rita, San Lorenzo). There is cross-ownership in MERALCO and the First Gas group with the former being held 5% by the Lopez group which also owns the latter. We also have the example of the Davao Light and Power distribution company owned by the Aboitiz group which provides the power generation therein. This cross-ownership gives them undue advantage over other players, and give

them control over pricing and market behaviour to the detriment of the consumers.

From the NAPOCOR monopoly, we have moved to a monopsony within each major island grid. 60% of the power generation in each grid are owned by three families providing them with market dominance in the supply sector. In the distribution side, we have a ridiculously large MERALCO franchise which constitutes 70% of the power sales and is the dominant buyer in the Luzon grid. Without ERC regulation, the generation sector could cherry-pick its customers (providing disguised subsidies to preferred customers) or engage in price gouging under the cover of competition. Indeed, while the unbundling of the horizontally structured monopoly of the government-owned National Power Corporation was intended to generate competition and lower the prices, the exact opposite has happened. What was horizontally broken up, is now being vertically reassembled with the generation, transmission, supply and distribution sectors being put together (with cross-ownership being very much the norm) under the smaller franchise areas of MERALCO, Visayan Electric Corporation, and Davao Light and Power. This same model is now being replicated as the 119 electric cooperatives are being gobbled up by the major power players. The EPIRA may have rid us of a supposedly corrupt NAPOCOR, but in its place is a socially unaccountable and financially avaricious private power sector.