

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



**TEAM (PHILIPPINES) ENERGY
CORPORATION (TPEC),**
Complainant,

- versus -

ERC CASE NO. 2015-032 MC

**BENGUET ELECTRIC
COOPERATIVE, INCORPORATED
(BENECO),**
Respondent.

X ----- X

DOCKETED
Date: AUG 03 2015
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ORDER

On June 8, 2015, Team (Philippines) Energy Corporation (TPEC) filed a "Complaint" against Benguet Electric Cooperative, Incorporated (BENECO) for the latter's alleged non-payment of Generation Rate Adjustment Mechanism (GRAM) and Incremental Currency Exchange Rate Adjustment (ICERA) (copy hereto attached).

In the said complaint, TPEC alleged, among others, that:

The Parties

1. Complainant TPEC is a corporation duly organized and existing under the Philippine law, with principal office address at 25/F W Fifth Avenue Building, Fifth Avenue, Bonifacio Global City, Taguig City 1634. A copy of its Articles of Incorporation is attached to the complaint as Annex "A";

2. Respondent BENEKO is a cooperative duly organized and existing under the Philippine law, with principal office address at Alapang, La Trinidad, Benguet;
3. TPEC and BENEKO are both participants in the Philippine energy sector;
4. TPEC and BENEKO have previously manifested their consent to the Commission's assumption of jurisdiction over the dispute described herein;¹

The Material Facts

A. The Electric Power purchase Agreement (EPPA) and the Commission's approval thereof

5. On May 29, 2003, TPEC [then known as Mirant (Philippines) Energy Corporation] and BENEKO entered into an EPPA for the supply and delivery of electric energy, a copy of which is attached as Annex "C";
6. Under the EPPA, TPEC agreed to supply and deliver to BENEKO 81,468,000 kWh of electricity every year (or 81,691,200 kWh every leap year) for twenty (20) years on a take-or-pay basis.² TPEC would source such electricity from the 200 MW uncontracted capacity of the Sual Coal-Fired Thermal Power Plant located in Sual, Pangasinan (the Sual Plant) owned by Team Sual Corporation;³
7. In turn, BENEKO agreed to pay fees for the supply of electricity (the Electricity Fee). The parties agreed that the Electricity Fee will be based on or will reference the rates charged by the National Power Corporation (NPC) (such rates are referred to as the NPC Rate). The EPPA provides:

¹ See Transcript of Stenographic Notes (TSN) of the May 11, 2015 hearing, a copy of which is attached as Annex "B"

² See EPPA, Articles 3.1 and 3.3

³ See EPPA, Articles 3.4

4.1 Electricity Fees. In respect of each Billing Month within the Cooperation Period, **[BENECO] shall pay Electricity Fees to [TPEC] in accordance with Schedule 7.**

Schedule 7. Payment for Electricity Formula

- II. At all times **[BENECO] shall pay Electricity Fees to [TPEC]** computed for each Billing Month (or part thereof, as the case may be) after the Capital Recovery Period of Five (5) Years of the Cooperation Period as set forth below:

$$\text{Electricity Fee} = E \times (\text{NPC RATE} - \text{DISCOUNT} \times \text{ESC})^4$$

8. The EPPA defines the "NPC RATE" as follows:

Effective NPC Cost applicable for the month as billed by National Power Corporation (NPC) and National Transmission Corporation (TRANSCO) as approved by ERC. Includes Generation Charges (composed of Generation Cost, Franchise & Benefits to Host Communities Taxes and Foreign Exchange Rate Adjustment (FOREX) due to Generation Company (GENCO)), Transmission Delivery Charges (composed of Transmission and Sub-transmission Power Delivery Service Charges), Cross-Subsidy Charges (composed of Intra-Regional Grid Cross Subsidy Demand and Energy Charges), Ancillary Services Charges (composed of Load Following & Frequency Regulation, Spinning Reserve and Back-up Power Service Charges), System Operation Charge, and Supply and Metering Charge and other

⁴ *Emphasis supplied*

adjustments that may be charged by NPC and Transco. Expressed in PhP/kWh;⁵

9. On June 30, 2008, in ERC Case No. 2005-051 RC⁶, the Commission promulgated a Decision (the June 30 Decision) approving the EPPA, albeit with modification. The June 30 Decision mainly modified the discount to be used. It restated the formula for computing Electricity Fee, which formula included a reference to the NPC Rate. The June 30 Decision approved the referencing of the Electricity Fee to the NPC Rate and the definition of the NPC Rate in the EPPA. The June 30 Decision states in part:

The Commission made an evaluation of the pricing structures of the EPPA and found that the proposed electricity price of MIRANT to BENECON during the Capital Recovery Period or the first five (5) years of the cooperation period is equal to and never greater than the rates chargeable by NPC plus TransCo. **NPC rate includes Basic Generation Charge (Average NPC TOU Rates to BENECON), Franchise & Benefits to Host Communities Taxes, Power Act Reduction (PAR), Generation Rate Adjustment Mechanism (GRAM), and Incremental Currency Exchange Rate Adjustment (ICERA) excluding Value Added Tax (VAT).**⁷

A copy of the said June 30 Decision is attached as Annex "D";

10. The Commission thus recognized and approved that the NPC Rate referenced in the EPPA includes (among other components) the GRAM and ICERA;

⁵ EPPA, Schedule 7. *Emphasis supplied*

⁶ *Entitled "In the Matter of the Application for Approval of the Electric Power Purchase Agreement (EPPA) between Benguet Electric Cooperative, Inc. (BENECON) and Mirant (Philippines) Energy Corporation with Prayer for Provisional Authority"*

⁷ June 30 Decision, p. 12; *emphasis supplied*

11. None of the parties appealed or sought a reconsideration of the June 30 Decision and which decision has become final;
12. On January 17, 2005, TPEC and BENECON entered into an Amendment to Electric Power Purchase Agreement (Amended EPPA). It primarily increased the capacity of electricity to be delivered to BENECON and provided a revised formula for computing Electricity Fee. The revised formula, however, maintained a reference to the NPC Rate. The revised Schedule 7 of the Amended EPPA states:

Schedule 7. Electricity Fee

- I. At all times, [BENECON] shall pay Electricity Fees to [TPEC] computed for each Billing Month (or part thereof, as the case may be) during the Cooperation Period, as set forth below:

$$\text{Electricity Fee} = E \times [\text{NPC_GENCO} - (\text{DISCOUNT} \times \text{ESC}) + \text{TRANSCO}]^8$$

The Amended EPPA is attached as Annex "E";

13. The Amended EPPA defines "NPC_GENCO" as essentially the "NPC RATE" in the EPPA less the National Transmission Corporation (TransCo) charges or simply, the NPC generation charges. The Amended EPPA defines "NPC_GENCO" as follows:

Effective NPC Generation rate applicable for the Billing Month as billed by National Power Corporation (NPC) which shall include **NPC's ERC approved total generation tariff rates and charges for the Luzon grid (presently composed of Generation Charges, a Franchise and Benefits to Host Communities Component and Other Taxes and any fuel cost adjustment charges, foreign exchange adjustment charges and**

⁸ *Emphasis supplied*

such other charges as may be allowed or approved by the ERC from time to time) and such other adjustments as may be charged by NPC. Expressed in PhP/kWh;⁹

14. On December 1, 2009, the Commission issued an Order approving the Amended EPPA (the December 1 Order; the June 30 Decision and the December 1 Order are collectively referred to as the EPPA Decisions);

A copy of the said December 1 Order is attached as Annex "F";

15. The December 1 Order did not modify or affect the previous Commission's recognition and approval of the parties' reference to the NPC Rate. Under the December 1 Order, the NPC Rate still includes the GRAM and ICERA;
16. None of the parties appealed or sought a reconsideration of the December 1 Order and which order has become final;

**B. The GRAM and ICERA:
Initial payments and
subsequent non-payment**

17. Pursuant to the EPPA and the Amended EPPA, as approved by the EPPA Decisions, TPEC has billed BENEKO the Electricity Fee pegged at the NPC Rate, which includes (among other components) the GRAM and ICERA, starting from the billing period of March 2004;¹⁰
18. BENEKO began paying the GRAM component of the Electricity Fee for the period September 26 to October 25, 2004.¹¹ It continued paying the GRAM until the billing period of August 26 to September 25, 2014;

⁹ Amended EPPA, Schedule 7; *emphasis supplied*

¹⁰ From March until September 2004, the GRAM was embedded together with the other components of the NPC Rate

¹¹ The GRAM was unbundled from the NPC Rate starting October 2004

19. BENEKO began paying ICERA component to TPEC beginning March 2004 covering the period March 13 to March 25, 2004. It continued paying the ICERA to TPEC until the billing period October 26 to November 25, 2013;
20. BENEKO has enjoyed the benefits of negative GRAM and ICERA adjustments, specifically, during the period of October 2007 to March 2011 billings for the GRAM, and the December 2007 billing; February and March 2008 billings; and June 2008 to March 2011 billings for the ICERA. Those billings are based on the same formula for the Electricity Fee contained in the EPPA. BENEKO did not question those billings;
21. BENEKO suddenly stopped paying TPEC the GRAM and ICERA components of the NPC Rate, despite TPEC's billings of those items:
 - a) BENEKO did not pay GRAM starting from the billing period of September 26 to October 25, 2014; and
 - b) BENEKO did not pay the ICERA starting from the billing period of November 26 to December 25, 2013;
22. TPEC thus demanded that BENEKO pay its unsettled bills, particularly, for the GRAM and ICERA. TPEC has sent at least six (6) letters demanding for the payment of GRAM and ICERA at the rates approved by the Commission. Copies of the said six (6) demand letters are attached as Annexes "G-1" to "G-6";
23. In letters dated August 19, 2013, January 28, 2014, May 19, 2014, July 28, 2014, September 16, 2014 and October 2, 2014 (the BENEKO 2013-2014 Letters), BENEKO initially requested that the ICERA component be excluded in the next billing and that any over-recovery be offset from their GRAM payables. BENEKO has been of the position that the "ICERA should have already been excluded *** since February 2013 because the equivalent peso value of the ICERA using the applicable test period July 2009 to April 2010 was [supposedly] already fully

recovered.”¹² The BENEKO 2013-2014 Letters are attached as Annexes “H-1” to “H-6”;

24. In addition, BENEKO also argued that they excluded GRAM and ICERA from their payments because (a) the GRAM and ICERA Decisions (*infra*) provided that the recovery of GRAM and ICERA “will either be ninety-six (96) months or until such time that the full amount shall have been recovered whichever comes earlier”¹³, and (b) BENEKO has supposedly “calculated that the under-recovered amount shall have been fully recovered by then;”¹⁴
25. BENEKO also reiterated its refusal to pay the GRAM and ICERA components of the Electricity Fee in its letters dated January 7, 2015, January 15, 2015, February 24, 2015 and February 25, 2015, copies of which are attached as Annexes “H-7” to “H-10”;
26. The parties have been unsuccessful in their attempts to reach an amicable solution to their disputes relating to the payment of GRAM and ICERA:
 - a) On January 26, 2015, Mr. Noel Aboboto, Senior Manager of TPEC’s Energy Supply Business, attended a BENEKO board meeting to get further clarification of BENEKO’s refusal to pay the GRAM and ICERA components of the Electricity Fee and to explain TPEC’s position. The ultimate result of that meeting was Resolution No. 03-15, which authorized “the General Manager of BENEKO to file a petition before the Energy Regulatory Commission (ERC) to clarify the legality of the continuous collection of ICERA and GRAM.” Resolution No. 03-15 is attached to BENEKO’s letter dated February 24, 2015 (Annex “H-9”); and
 - b) Similarly, upon TPEC’s invitation, on March 9, 2015, TPEC’s President, Mr. Suguru Tsuzaki, met with BENEKO’s General Manager, Mr. Gerardo Verzosa for the purpose of further exploring the possibility of

¹² BENEKO’s letter dated October 2, 2014 (Annex “H-6”)

¹³ *Id.*

¹⁴ *Id.*

finding a mutually acceptable solution.¹⁵ Unfortunately, no amicable solution has been reached;

C. TPEC's entitlement to the GRAM and ICERA

27. TPEC is entitled to claim GRAM and ICERA from BENEKO. Conversely, BENEKO has the obligation to pay the full GRAM and ICERA to TPEC under the EPPA;
28. The GRAM and ICERA are part of the NPC Rate under the EPPA, and the Electricity Fee under the EPPA is pegged at the NPC Rate. Therefore, the GRAM and ICERA are essential components of the Electricity Fee under the EPPA;
29. The ERC authorized TPEC to collect and claim the GRAM and ICERA when it approved the EPPA, including the Electricity Fee's reference to the NPC Rate;
30. The EPPA Decision has long become final and executory and no party has questioned it;
31. As mentioned, BENEKO initially paid the GRAM and ICERA billed by TPEC starting 2004 but stopped only in 2014 and 2013, respectively;
32. NPC has charged GRAM at the rate of PhP0.3267/kWh since January 2013 up to March 2015 pursuant to the Commission's Decision dated March 26, 2012 in ERC Case Nos. 2008-042 RC, 2008-053 RC, 2008-63 RC, 2009-032 RC, 2009-056 RC, 2010-003 RC, 2010-068 RC and 2010-074 RC (the "GRAM Decision");¹⁶
33. ICERA at the rate of PhP0.3637/kWh has been charged by NPC since January 2013 up to March 2015 pursuant to the Commission's Decision dated March 26, 2012 in

¹⁵ See TPEC's letters dated February 23, 2015 and February 26, 2015 (Annexes "G-5" and "G-6")

¹⁶ See also NPC's Unbundled Rates for Luzon Grid, P/kWh January 2013 – January 2015 which is available at <http://www.napocor.gov.ph/index.php/luzon-effective-rates> (last accessed on June 3, 2015)

ERC Case Nos. 2010-067 RC and 2010-073 RC (the ICERA Decision);¹⁷

34. Pursuant to the GRAM and ICERA Decisions, the EPPA/Amended EPPA, and EPPA Decisions, the GRAM rate of PhP0.3267/kWh and ICERA rate of PhP0.3637/kWh have been incorporated in the NPC Rate which TPEC billed to BENEKO beginning January 2013;
35. Under the EPPA Decisions, the GRAM and ICERA are essential components of the Electricity Fee so long as these were being charged by NPC;
36. Inasmuch as NPC charged (as it continues to charge) ICERA at the rate of PhP0.3637/kWh since November 26, 2013, then this rate is also part of and payable by BENEKO to TPEC as a component of the Electricity Fee under the EPPA starting from that period;
37. For the same reason, because the NPC charged (as it continues to charge) GRAM at the rate of PhP0.3267/kWh since September 25, 2014, then this rate is also part of and payable by BENEKO to TPEC as a component of the Electricity Fee under the EPPA starting from that period;
38. Worse, BENEKO has also been unduly reducing from its monthly payments to TPEC an amount equivalent to three percent (3%) of the Electricity Fee for supposedly paying its bills promptly (the Prompt Payment Discount or PPD) starting from the billing period of November 26 to December 25, 2013. While TPEC and BENEKO agreed in the implementation of the Amended EPPA that BENEKO may be entitled to a three percent (3%) discount whenever it makes payment of the Electricity Fee within ten (10) days after it receives the monthly billing¹⁸, BENEKO should not have reduced its payments to TPEC because it is not entitled to the PPD;
39. The PPD is only allowed if BENEKO is able to make **full** payment of the Electricity Fee within the prescribed

¹⁷ *Id.*

¹⁸ See Amended EPPA, Schedule 7

period. BENEKO's partial payments are not full payments which completely discharge its obligations to TPEC.¹⁹ Consequently, BENEKO is not entitled to the PPD;

40. In light of the foregoing, as of May 26, 2015, BENEKO is obligated to pay TPEC the total amount of **Three Hundred Five Million Eight Hundred Seventy-Two Thousand Five Hundred Fifty-Three Pesos and Two Centavos (PhP305,872,553.02)** to TPEC, inclusive of interest and value-added taxes (VAT). This amount is broken down as follows:

- a) **Fifty-Three Million Seven Hundred Eighty-Four Thousand Forty-Four Pesos (PhP53,784,044.00)**, equivalent to the unpaid GRAM for the billing periods beginning September 26, 2014 until March 25, 2015;
- b) **One Hundred Seventy-Five Million Four Hundred Sixty-Seven Thousand Fifteen Pesos and Forty-Six Centavos (PhP175,467,015.46)**, equivalent to the unpaid ICERA starting from the billing period November 26, 2013 to March 25, 2015; and
- c) **Seventy-Six Million Six Hundred Twenty-One Thousand Four Hundred Ninety-Three Pesos and Fifty-Seven Centavos (PhP76,621,493.57)**, equivalent to the BENEKO's improper application of the Prompt Payment Discount starting from the billing period of November 26, 2013 until March 25, 2015;

Summaries of BENEKO's total unpaid obligations to TPEC are attached as Annexes "I-1" and "I-2";

41. It bears emphasis that TPEC and BENEKO agreed that TPEC may terminate the EPPA (and the Amended EPPA) in the event that BENEKO fails to pay any amount due from it. Section 15.2 of the EPPA states:

¹⁹ In *G&M (Phil.), Inc. v. Batomalaque* (G.R. No. 151849, June 23, 2005), the Court declared that partial payment is not payment, that is, it not payment that will discharge an obligation

15.2. Without prejudice to the right of [TPEC] to suspend the supply of electricity for non-payment by [BENECO], **[TPEC] may terminate this Agreement** on 45 days' prior Termination Notice to [BENECO] if any of the following events of default (each a "BUYER Default") has occurred, unless such BUYER Default is cured within the 45-day period from receipt of the Termination Notice:

c. [BENECO] defaults in payment when due of any amount payable under this Agreement and such failure continues for a period of not less than fifteen (15) days[.]²⁰

42. Thus, should BENECO continuously refuse to pay Electricity Fee, TPEC is entitled to enforce its rights under the EPPA and under the law;

D. The Commission's jurisdiction

43. The parties consent to the Commission's assumption of jurisdiction in this dispute relating to the GRAM and ICERA;²¹

44. As mentioned, the BENECO board issued Resolution No. 03-15, which authorized "the General Manager [of BENECO] to file a petition before the Energy Regulatory Commission (ERC) to clarify the legality of the continuous collection of ICERA and GRAM". Resolution No. 03-15 is attached to BENECO's letter dated February 24, 2015 (Annex "H-9");

²⁰ *Emphasis supplied*

²¹ *Supra*, note 1. See also Resolution No. 03-15 which is attached to BENECO's letter dated February 24, 2015 (Annex "H-9")

45. TPEC itself has requested the assistance of the Commission to resolve this matter. In a letter dated March 26, 2015, TPEC requested the Commission to direct BENEKO to: (a) faithfully comply with the EPPA Decisions; (b) pay TPEC the unpaid GRAM and ICERA indicated in TPEC's Electricity Fee billings; and (c) to reconcile and collect from its customers the outstanding GRAM and ICERA. This TPEC letter dated March 26, 2015 is attached (without its attachments) as Annex "J";
46. Finally, the Commission called for a conference on May 11, 2015 in respect of TPEC's March 26, 2015 letter. The proceedings have been reflected in the transcript of stenographic notes prepared after the conference:²²
- a) At the May 11, 2015 conference, present were Atty. Noel J. Salvanera from the Commission as presiding officer, the clerk, stenographer, Atty. Delmar O. Carino (counsel for and representing BENEKO), Attys. Norma Margarita B. Patacsil and Vladi Miguel S. Lazaro (counsel for TPEC), and other officials-representatives of TPEC; and
 - b) BENEKO and TPEC's representatives, together with Atty. Noel J. Salvanera, discussed and confirmed/agreed at the conference that (i) it is the intention of both BENEKO and TPEC to bring their present dispute before the Commission; (ii) either party could file a petition before the Commission; (iii) the case before the Commission will be a Miscellaneous Case, and not a rate case, and the issue will be limited to the effectivity of the GRAM and ICERA; (iv) neither the EPPA nor the Commission's jurisdiction will be an issue in the proceedings;
47. Accordingly, TPEC invokes the Commission's jurisdiction here, inasmuch as (among others) TPEC and BENEKO are participants in the Philippine energy sector and the dispute here relating to the GRAM and ICERA involves contracts approved by the Commission (i.e., the EPPA and Amended EPPA) and decisions rendered by it (i.e.,

²² *Supra*, note 1

the EPPA Decisions and the GRAM and ICERA Decisions); and

Prayer

48. Thus, TPEC prays that the Commission:

48.1 Direct BENEKO to fully comply with the EPPA Decision and the terms of the EPPA and Amended EPPA; and

48.2 Direct BENEKO to pay TPEC, pursuant to the EPPA Decision and the GRAM and ICERA Decisions, the GRAM and ICERA specified in TPEC's billings, amounting to:

a. **Fifty-Three Million Seven Hundred Eighty-Four Thousand Forty-Four Pesos (PhP53,784,044.00)** corresponding to the GRAM owed by BENEKO to TPEC beginning September 26, 2014 until March 25, 2015, inclusive of interest and VAT, and computed as of May 26, 2015;

b. **One Hundred Seventy-Five Million Four Hundred Sixty-Seven Thousand Fifteen Pesos and Forty-Six Centavos (PhP175,467,015.46)** corresponding to the ICERA owed by BENEKO to TPEC beginning November 26, 2013 to March 25, 2015, inclusive of interest and VAT, and computed as of May 26, 2015; and

c. Future GRAM and ICERA to be collected;

48.3 Direct BENEKO to pay TPEC the PPD which was improperly applied beginning November 26, 2013 until March 25, 2015 **Seventy-Six Million Six Hundred Twenty-One Thousand Four Hundred Ninety-Three Pesos and Fifty-Seven Centavos (PhP76,621,493.57)**, inclusive of interest and VAT, and computed as of May 26, 2015; and

48.4 As necessary, direct BENEKO to reconcile and collect from its member-consumers the outstanding GRAM and ICERA.

Finding the said complaint to be sufficient in form and in substance with the required fees having been paid, the same is hereby set for initial hearing, expository presentation, pre-trial conference and evidentiary hearing on **August 24, 2015 (Monday) at two o'clock in the afternoon (2:00 P.M.) at the ERC Hearing Room, 15th Floor, Pacific Center Building, San Miguel Avenue, Pasig City.**

TPEC is hereby directed to cause the publication of the attached Notice of Public Hearing, at its own expense, once (1x) in a newspaper of general circulation in the Philippines, at least ten (10) days before the scheduled date of initial hearing.

BENEKO is hereby directed to submit its answer to the complaint within ten (10) days from receipt hereof.

The parties are directed to submit, at least five (5) days before the date of initial hearing and pre-trial conference, their respective Pre-trial Briefs containing, among others:

- (a) a summary of admitted facts and proposed stipulation of facts;
- (b) the issues to be tried or resolved;
- (c) the documents or exhibits to be presented, stating the purposes and proposed markings thereof; and
- (d) the number and names of the witnesses, with their written testimonies in an individual affidavit form, to be attached to the Pre-trial Brief.

Failure of BENEKO to submit the required Pre-trial Brief and Judicial Affidavits of its witnesses within the prescribed period shall be a ground for cancellation of the scheduled hearing, and the resetting of which shall be six (6) months from said date of cancellation.

SO ORDERED.


Pasig City, July 20, 2015.

FOR AND BY AUTHORITY
OF THE COMMISSION:



ALFREDO J. NON
Officer-In-Charge and Commissioner

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n/n/tpec vs. beneco/2015-032 MC/initial order

Copy Furnished:

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