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DEVELOPMENT ROUNDTABLE SERIES

TOWARDS SHARED UNDERSTANDING and COMMON ACTION



EPIRA at 10: Failed Assumptions and Unfulfilled Promises

Rep. Lorenzo R. Tañada III
and Atty. Nepomuceno Malaluan



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About the Development Roundtable Series (DRTS) Integrative Papers
The DRTS Integrative Papers contain the results of the consultations, roundtables, field experiences and research of the six thematic working groups. The papers' highlights are the recommendations that can now be used by advocates, policy makers, NGOs and peoples' organizations in their campaigns and initiatives for policy reforms.



On June 2011, the Electric Power Industry Reform Act or EPIRA reached its 10th year since it was approved into law. EPIRA was a landmark measure, mandating the radical restructuring of the electricity industry from one dominated by the government sector (in generation and transmission) to a fully privatized industry.

In brief, EPIRA required the government-owned National Power Corporation to privatize its generation and transmission assets, Independent Power Producer (IPP) contracts, and all other disposable assets, excepting only those associated with missionary electrification in off-grid areas (called Small Power Utilities Group or SPUG). The privatization was to be done through a liquidating corporation, the Power Sector Assets and Liabilities Management Corporation (PSALM). Outside of a transition role in the privatization process, EPIRA left government with only the planning and regulatory functions through the Department of Energy (DOE) and the Energy Regulatory Commission (ERC).

EPIRA was intended to be the solution to the country's electricity problems. At the core of these problems had been the government's inability to finance the sector's investment requirements, setting off a crippling power crisis in the early 1990s.

How government had envisioned EPIRA to solve the electricity problems can be gleaned, for instance, from the government's policy statement submitted to the Asian Development Bank in November 1998, in support of its loan application. In restructuring and privatizing the power sector, the government believed that competition would happen, generating greater operational and economic efficiency. It would at the same time facilitate the inflow of private capital, thereby minimizing government's financial and risk exposure. The projected overall result of EPIRA is a reliable, secure, high quality and affordable power supply. These perspectives are reiterated in EPIRA's declaration of policy.

EPIRA had been a leap of faith. The belief was that technology, the growing demand for electricity and a large pool of foreign investors in the sector, would combine to make feasible a competitive market in power generation.

Ten years into its implementation, we raise grave issues with EPIRA's outcomes, and argue that a continued framework of minor tweaking just won't do.

Supply Insecurity

Section 2 (b) of EPIRA declares it the policy of the state to ensure the quality, reliability, security and affordability of the supply of electric power.

Electricity security has short term, medium term and long term aspects. In the short term, electricity security involves responding to power interruptions, stabilizing frequency and voltage variations, and matching demand and supply on a daily basis. In the medium term, electricity security involves the proper maintenance of generation and transmission/distribution assets two years into the future to maintain appreciable levels of dependable capacity.

Beyond two years, there needs to be long term planning for investments in generation capacity and network expansion to meet projected demand growth and to replace plants and assets at the end of their life cycle. In generation, power plants require between two to five years construction lead time and massive capitalization from US\$1 million to as high as US\$4 million per MW of installed capacity.

It is now apparent that EPIRA is not able to provide an adequate framework to ensure long term supply security.

On the one hand, the market has been proved seriously inadequate in promptly responding to the sale of existing NPC/PSALM assets, much less to commit and put up new capacity.

The first signs of market failure came with the grossly missed privatization targets. Under EPIRA, the NPC plants and/or IPP contracts were to be grouped in a manner that promoted viability, efficiency and competition. Also, at least 70 percent of capacity of all generating assets and IPP contracts located in Luzon and Visayas should have been privatized within three years from the effectivity of the law, or by June 2004. Such privatization level is a requirement for the implementation of retail competition within the same deadline.

However, legal impediments (such as creditor consent) and lack of investor interest plus their need for contractual market guarantees have combined to seriously delay the sale of assets. The sale of the bigger plants started to come on stream only in the latter part of 2006.

As a result, the declaration of retail competition/open access has overshot deadline by seven years, with the ERC declaring retail competition and open access for Luzon and Visayas to commence on 26 December 2011 yet (based on a finding that plants representing 79.5 percent of installed generating capacity and IPP contracts representing 76.8 percent of installed capacity have been privatized).

But the more serious threat to long term security in supply is the market's failure to provide new capacity requirements. The Department of Energy's capacity addition requirement in its power development planning has not been adequately met by corresponding private sector commitments to put up new capacity. Thus, despite the substantial lead time afforded by the oversupply of power after the Asian crisis, reserve power has been reduced to less than adequate. In fact, Visayas experienced tightening of power supply and Mindanao experienced actual power shortages in 2010. Luzon is already experiencing diminishing reserves and forecasted to experience critical supply levels in the next two years.

Based on the DOE's 2009 to 2030 Power Development Plan, Luzon has capacity addition requirement of 1,050 MW between 2009 and 2014, but only 815 MW is expected to come on stream during the period. For Mindanao, 500 MW is required but only 100 MW will come on stream. It is only the Visayas that is foreseen to resolve its power supply outlook for this period.

More strategically, in addition to the backlog for Luzon in Mindanao, capacity addition requirement is forecasted at 10,850MW for Luzon, 2,000MW for Visayas, and 2,000MW for Mindanao between 2015 and 2030. There is as yet no committed capacity for these. But even as market failure to provide adequate investment is apparent, government has immobilized itself with the EPIRA prohibition on NPC to contract or build new capacity.

PSALM Hemorrhage

Section 2 (i) declares it a policy under EPIRA to facilitate an orderly and transparent privatization of the assets and liabilities of the National Power Corporation.

At the time EPIRA was enacted, total financial obligations of NPC stood at US\$16.39 billion. After selling 91.73 percent of NPC/PSALM assets for US\$10.65 billion as of 31 Dec 2010, total financial obligations of PSALM still stood at US\$15.82 billion as of December 2010. If we factor in the PhP200 billion of NPC debt that was transferred to the national government in 2004 as part of EPIRA, government indebtedness in the power sector has even increased.

In other words, what EPIRA achieved in 10 years was only to facilitate the privatization of assets, while the liabilities have remained with PSALM at almost the same levels as when it started, with a huge national government absorption of liabilities to boot.

The PSALM financial hemorrhage is not about to stop. The conversion of NPC's long term debts in the past into shorter term commercial loans and bonds meant higher carrying costs than that of the original debt profile of NPC. With assets depleted and projected receivables (such as Transco concession fees) generally falling below maturing obligations on a yearly basis, PSALM is stuck with continued refinancing and ever-ballooning liabilities. In mid-June 2011, PSALM announced that it secured "a PhP75 billion syndicated term loan facility" for its 2011 financial shortfall.

While the country is confronted with this financial outcome, PSALM has paid excessive amounts in professional fees to legal advisors/consultants or contractors, and in incentives to employees regardless of status.

In its comments and observations on the 2009 audit of PSALM, the Commission on Audit observed that PSALM's hiring of legal advisors/consultants or contractors was in violation of COA Circular No. 95-011. This circular prohibits employment by government agencies of private lawyers unless justified under extraordinary circumstances, in which case written conformity by the Solicitor

General or the Office of the Government Corporate Counsel (OGCC) and of the Commission on Audit are required. While PSALM secured conformity from the OGCC, COA denied its concurrence as such should have been secured *prior* to hiring. COA also found the consultancy fees and reimbursable expenses to be excessive. (While we do not have information on how much was exactly involved and how this was booked in PSALM's financial statements, we note that an entry under "Professional Services" ballooned to PhP1.16 billion in 2009 from PhP118 million in 2008 in PSALM's statement of expenses.)

In the same audit report, among the notice of disallowances given by COA was the payment to employees of corporate performance-based incentives for 2008 and 2009, amounting to PhP106 million. Each employee, regardless of status, received incentive pay equivalent to 5.5 months of basic salary.

Consumers to Face even Higher Rates

EPIRA declares it among its policies to ensure affordable and reasonable electricity rates in a regime of free and fair competition, and to protect the public interest, as it is affected by electricity rates.

The latest report is that we now have the highest electricity rates in Asia. Our national average rate of PhP8.14 per kWh is considerably more expensive than the rates of our neighbors of around P5 per kWh.

But consumers will have to brace for even higher electricity rates.

With all assets sold, and remaining receivables inadequate, PSALM can only look to consumers to cover its US\$16 billion black hole and continuing operational losses. The only mechanism available under EPIRA for this purpose is the universal charge for stranded debt and stranded contract costs.

Also in June 2011, PSALM already filed its petitions for the recovery of stranded debt and stranded contract cost. For stranded debts, PSALM seeks to recover from consumers PhP65 billion. For

stranded contract costs, just for the years 2007 to 2010, PSALM seeks to recover PhP74.3 billion.

This is not the end of the causes of future rate increases. There are certain IPP contracts that are not eligible for stranded contract cost recoveries. But there are existing mechanisms for recoveries of contract losses for this, such as the Incremental Currency Exchange Rate Adjustment (ICERA) and Automatic Recovery of Monthly Fuel and Purchased Power Costs. In addition, there is the impending charging of Feed-In Tariff (FIT) as subsidy for new capacity using renewable energy.

Another price-related concern has to do with the emerging ownership structure of the industry. It has become a field dominated by a few big players, where anti-competitive behavior such as exclusive dealing, dividing territories, vertical and horizontal integration, and price leading could hurt the consumers and public interest at large.

Today, San Miguel Energy Corporation has emerged as the biggest player in generation, owning 22 percent of generating capacity. The Lopez group owns 18 percent and Aboitiz, 14 percent. In the 17th Status Report on EPIRA Implementation, the ERC finds that no generation company violated the market share limitations per grid and national grid for the year 2010. However, no data is presented on cross ownership and bilateral contracting where EPIRA also imposes certain limitations.

Finally, as to the impact of open access and retail competition, we note that the opportunity for consumers to participate in retail competition is again limited to big players. There are only about 700 entities that would qualify under the consumption threshold.

Critical Adjustments Now


For years, the approach of our government agencies has been to try to get EPIRA on track through its key components. But clearly, we are faced with very serious problems that require critical and major adjustments now.

First, we cannot wait for the electricity insecurity to mature into another severe power supply crisis as witnessed in the early 1990s. It was a big mistake for EPIRA to completely remove government's role in power generation. Even as we allow private provision of electricity, reintroducing government in the generation sector will provide the much needed mechanism to address market failures in putting up adequate new capacity and to counter-balance any anti-competitive behavior of the big private players.

We also need to support the electric cooperatives in the context of the emerging dominance by big players. There have been overtures for big business to buy out the cooperatives. The cooperatives represent the only remaining sector with dispersed and small-hold ownership, and they need to be protected.

Second, the PSALM debts and losses should be recognized as a key policy issue that cannot be left to PSALM's failing management. We urge the Executive and Congress to convene an inter-agency, inter-branch and multi-stakeholder process to discuss and decide whether consumers can afford a full pass-on of the PSALM debts and losses, and what other approaches are available for retiring the obligations of PSALM?

Third, we need to evaluate the performance of the Energy Regulatory Commission in the discharge of its regulatory functions. We believe that the political appointments in the commission have compromised its independence, and it has become a tool for the Executive to postpone unpopular price increases at the expense of the worsening financial conditions of PSALM. We believe that the ERC's capacity must be upgraded to enable it to adequately monitor the ongoing concentration of ownership in the power sector, and to effectively analyze its impact on power rates and electricity security. ERC also needs to be proactive in the disclosure of key information necessary for citizens to meaningfully participate in its regulatory process.

The government approach of only making minor tweaks on EPIRA cannot continue. We need bold and strategic action now to truly ensure secure and affordable electricity for Filipinos. 

Acronyms

COA	Commission on Audit
DOE	Department of Energy
EPIRA	Electric Power Industry Reform Act
ERC	Energy Regulatory Commission
GOCC	Government Owned and Controlled Corporations
IPPs	Independent Power Producers
MW	Megawatt
NPC	National Power Corporation
OGCC	Office of the Government Corporate Counsel
PSALM	Power Sector Assets and Liabilities Management Corporation

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ABOUT THE AUTHORS

Rep. Lorenzo Tañada III, or Erin as he is known to close friends, is the Representative of the Fourth District of Quezon in the Philippine Congress, of which he is currently Deputy Speaker and a member of the Joint Power Commission.

Atty. Nepomuceno (Nepo) Malaluan is Trustee at the Action for Economic Reforms, an independent policy organization working on macroeconomic, privatization and utility regulation, and governance issues. Nepo has done research and published work on electricity and water sectors, particularly on utility privatization and regulation. In governance, he works extensively on the issue of Freedom of Information. Nepo has degrees in Economics and Law from the University of the Philippines.

About the DRTS

Why we are here

Inspired by the successes of the World Social Forum in 2001, where civil society organizations, academics and activists with varying political advocacies gathered, and of the Stop the New Round! Coalition's campaign against the Doha Round of the World Trade Organization in 2003, Focus on the Global South-Philippines initiated a process where stakeholders can consult and dialogue on issues, and work towards achieving unities. Thus was born the Development Roundtable Series or DRTS in 2004.

From 2004 hence, the DRTS experience has shown this: Where there is a way to come together and discuss social-political and development issues, there is will to resolve differing views and find common ground in platforms for policy changes.

What we aim for

The DRTS identifies issues and determines courses of action, recognizes competing interests and addresses pitfalls, but eventually works out policy alternatives. The process uses research, roundtable discussions, forums, campaigns as means to achieve the following objectives:

- That the public's interest is always reflected in government policies as well as in policy-making;
- That the policy agenda adheres to universally recognized rights;
- That interested sectors are able to dialogue and address common questions, and work towards creating shared agenda;
- That this common agenda is promoted and popularized.

How we do things

DRTS processes begin with inception roundtables, where interested organizations discuss and debate issues, and become birthing ground for thematic working groups (TWGs). Originally, there were five (5) thematic

working groups and one (1) regional process that were formed: the Food and Agriculture, Trade and Industrial Policy, Agrarian Reform and Rural Development, Water Resources and Services, and Foreign Policy TWGs, plus a regional process called the Mindanao TWG. The Mindanao TWG recognizes the specific context of advocacies in Mindanao and urgent issues they confront.

Each TWG has an anchor organization/s responsible for keeping the process going. The anchor organizations are then convened in a group called Convenors core group, which steers the DRTS processes. Focus is the over-all coordinator of all the TWGs and oversees the implementation of the consolidated plans of the DRTS Convenors core group. At present, there are four (4) thematic working groups and two (2) regional processes that tackle broad issues related to the following themes:

- Trade, Industrial Policy and Privatization
- Agrarian Reform and Rural Development
- Water Resources and Services
- Peace, Security and Foreign Policy
- Development issues in Visayas
- Development issues in Mindanao

TWGs are the core groups in the process but other organizations and individuals have also been active, such as in the yearly SONA activity.

Who can participate

and how to get involved

Everyone-individuals and organizations- is encouraged and welcome to participate in the DRTS. There are several ways to get involved:

- Basic participation
 - Attend public education activities
 - Attend consultations
 - Join special and mass activities
- High-level participation
 - Join a thematic working group
 - Join a lead group for on-the- ground activities

DRTS THEMATIC WORKING GROUPS

TWG on Trade, Industrial Policy and Privatization

- Action for Economic Reforms (AER)
- Alliance of Progressive Labor (APL)
- Center for Labor Justice (CLJ)
- Centro Saka Inc. (CSI)
- Fair Trade Alliance (FTA)
- Focus on the Global South (Focus)
- Freedom from Debt Coalition (FDC)
- National Economic Protectionist Association (NEPA)
- Partido Manggawa (PM)
- Philippine Rural Reconstruction Movement (PRRM)
- Tambuyog Development Center (Tambuyog)

TWG on Agrarian Reform and Rural Development

- Philippine Network of Rural Development Institutes (Philnet-RDI)
- Katipunan ng Bagong Pilipina (KABAPA)
- Makabayang Alyansa ng mga Magsasaka sa Pilipinas (MAKABAYAN-Pilipinas)
- Pambansang Kilusan ng mga Samahang Magsasaka (PAKISAMA)
- Pagkakaisa para sa Tunay na Repormang Agraryo (PARAGOS-Pilipinas)
- Pambansang Katipunan ng mga Samahan sa Kanayunan (PKSK)
- Samahang Magsasaka ng Macabud
- Center for Agrarian Reform Empowerment and Transformation (CARET)
- Center for Agrarian Reform and Rural Development (CARRD)
- Centro Saka Incorporated (CSI)
- Focus on the Global South (Focus)
- Kaisahan Tungo sa Kaunlaran ng Kanayunan at Repormang Pansakahan (KAISAHAN)
- Management and Organizational Development for Empowerment (MODE)
- Project Development Institute (PDI)
- Philippine Ecumenical Action for Community Empowerment (PEACE Foundation)
- Philippine Legislators' Committee on Population and Development (PLCPD)
- Sentro ng Alternatibong Lingap Panligal (SALIGAN)
- Peoples' Campaign for Agrarian Reform Network (AR Now!)
- Partnership for Agrarian Reform and Rural Development Services (PARRDS)
- Pambansang Koalisyon ng Kababaihan sa Kanayunan (PKKK)
- John Carroll Institute for Church and Social Issues (JJCSI)

TWG on Water Resources and Services

- Bantay Tubig
- Freedom from Debt Coalition (FDC)
- Focus on the Global South

- Institute for Popular Democracy (IPD)
- Pambansang Koalisyon ng Kababaihan sa Kanayunan (PKKK)
- Women's Legal Bureau (WLB)
- Philippine Center for Water and Sanitation (PCWS)
- Alliance of Government Workers in the Water Sector (AGWWAS)
- Visayas State University-Institute for Strategic Research and Developmental Studies (VSU-ISRDS)

TWG on Visayas

- Alliance of Government Workers in the Water Sector (AGWWAS)
- Alter Trade Foundation
- Eastern Visayas Sustainable Agriculture Network (EVSQANET)
- Environmental Legal Assistance Center (ELAC)
- Kabuhayan Micro Credit
- Negros Organic Agriculture Movement (NOAM)
- PROCESS Foundation-Antique
- Pagtinabangay Foundation
- Philnet-RDI- Leyte
- KAISAMPALAD
- Visayas Association of Water Districts (VAWAD)
- Visayas State University-Institute for Strategic Research and Developmental Studies (VSU-ISRDS)

TWG on Mindanao

- Alternative Forum for Research in Mindanao (AFRIM)
- Philippine Network of Rural Development Institutes (Philnet-RDI)-Mindanao
- Task Force on Food Sovereignty (TFFS)-Mindanao
- Kinaiyahan Foundation Inc.
- Freedom from Debt Coalition (FDC)-Mindanao
- Philippine Rural Reconstruction Movement (PRRM)-Mindanao
- Rural Development Institute for Sultan Kudarat (RDISK)
- Tri-People Concern for Peace, Progress and Development (TRICOM)
- Katipunan ng Samahan ng Maralita sa Kanayunan (KASAMA KA)
- Davao Provinces Rural Development Institutes (DPRDI)

TWG on Peace and Foreign Policy

- Alliance of Progressive Labor
- Focus on the Global South (Focus)
- Partido Manggawa (PM)
- Kilusan tungo sa Pambansang Demokrasya (KPD)
- Center for Migrant Advocacy(CMA)
- Institute for Popular Democracy
- JPICC-AMRSP
- Initiatives for International Dialogue (IID)
- Akbayan
- Stop the War Coalition (STWC)-Philippines
- UP Alyansa
- Resource Center for People's Development
- Sanlakas
- Kanlungan

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