

HIGH RATE OF MT. APO GEOTHERMAL POWER IN MINDANAO FROM UNLAWFUL AND DEFECTIVE PRIVATIZATION

OVERVIEW OF THE UNLAWFUL PRIVATIZATION OF MT. APO GEOTHERMAL POWER DISTRIBUTION

The Aquino administration’s privatization of the 108-MW Mt. Apo geothermal power distribution in **Mindanao**, done in 2014, is an incontrovertible proof of how EPIRA-dictated privatization of government assets/operation in the power industry raised—not reduced—electricity rates. This absurdity has to stop.

BEFORE PRIVATIZATION

Energy charge when the power complex was still with the National Power Corporation (Kristianne Fusilero, “Hike in Mt. Apo power rates a result of privatization: exec,” *Mindanao Times Online*, April 24, 2015) **₱ 3.00** per kWh

AFTER PRIVATIZATION

Energy charge **₱ 3.034** per kWh

Add: New charges under privatization scheme

Winning bidder’s administration fee: **₱105.17**
million per year **₱ 0.1377** per kWh

Winning bidder’s illegal recovery of highest premium bid: ₱128-million monthly or ₱1.5-billion annual payment to the government, passed on 100% to consumers; thus, nothing comes from bidder **₱ 2.011** per kWh

**Total power generation charge
as increased by evil privatization**

[as authorized by the Energy Regulatory Commission (ERC) under its order dated May 11, 2015, on ERC Case No. 2015-035 RC, posted to ERC’s website] **₱ 5.1827** per kWh

**COMPELLING GROUNDS FOR REVERSAL
OF PRIVATIZATION OF MT. APO GEOTHERMAL
POWER DISTRIBUTION IN MINDANAO IN 2014**

1. The public bidding for the privatization was illegal.

a. What should be done but was NOT done: public bidding on the lowest rate per kWh or lowest rate of return

Under the Procurement Law (RA 9184), the winning bid in public bidding for procurement of services should be the most advantageous bid, which equates to the lowest bid that entails the lowest expenditure. The privatization of Mt. Apo geothermal power distribution (wholesale marketing to retailer power cooperatives) constituted procurement of services covered by this law—which required public bidding competition on the lowest rate per kWh of power to be distributed. However, this kind of public bidding was not done, even if the privatization of Mt. Apo power distribution was a clear-cut case of procurement of services within the ambit of the Procurement Law.

b. What should NOT be done but was done: public bidding and award based on the highest premium to government

The winning bid in the innovative but questionable actual bidding scheme was the offered **highest premium** to be given to the government. In effect, the winning bid was the most disadvantageous offer, because it inescapably translated to the highest rate per kWh of power distributed. This came about because the offered winning **highest premium** is **not free**. To avoid financial loss, the winning bidder has to recover it by way of an increase in electricity rate to power consumers, which include power-consuming national and local government units in the area. The winning bidder's unwarranted rate increase will result in unreasonable power rates for consumers, a violation of the Supreme Court enunciated public policy on the entitlement of consumers to reasonable rates (p. 160).

2. The innovative public bidding scheme that chose the winning bidder based on offered HIGHEST PREMIUM or cash incentive to the government—not based on the traditional lowest bid by way of lowest power rate per kWh—gave rise to unlawful or unjust taxation, without any enabling law for it similar to that for the road users' tax.

To authorize the government to charge motor vehicle owners a certain fee as road users' tax, an enabling bill had to originate from the House of Representatives under the Constitution, then underwent the law-making process until eventually enacted into law, RA 8794, the Road Users' Tax Law.

In the privatization of Mt. Apo geothermal power distribution, ERC has authorized a power rate increase for the winning bidder's recovery of the highest premium payment to the government—at the rate of ₱2.011 per kWh, ₱128 million per month, or a staggering **₱1.54 billion** per year for the duration of the privatization contract. Under the situation, ERC appears to have exceeded its authority because while its jurisdiction covers energy matters, its approved rate increase is for the winning bidder's recovery of its highest premium bid. While in this case it is part of the winning bidder's operating expenditures, it is neither power generation cost nor power distribution expense. Therefore, its recovery is an unwarranted charge to power consumers. It is in substance a consumption tax, a continuing indirect tax to consumers. ***However, as such consumption tax, it has no enabling law like that of the road users' tax, therefore it is unlawful. In effect, ERC engaged in unauthorized legislation and usurped the taxing power of Congress under the Constitution.***

As ground for increase in privatized power rates, the recovery of the winning highest premium is not germane to the power industry. It is not for the recovery of any power generation and marketing costs. It is merely an ill-advised arbitrary fund-raising government imposition. Therefore, with or without an enabling law, it still equates to ***unjust taxation*** to the victimized and discriminated power consumers. They pay for it as a small part of the nation for the benefit of the whole nation.

Why the PREMIUM Payment to the Government is UNJUST TAXATION

The faulty public bidding scheme in the Mt. Apo geothermal power privatization entails indirect taxation in the form of consumption tax, which constitutes one of the worst kinds of ***unjust taxation***, in violation of the Constitution.

Under Section 28 (1), Article VI of the Constitution, taxation should be uniform and equitable. This means fair and consistent application of the taxation system, without favor or discrimination to any taxpayers.

In a broad sense, a tax is any levy or contribution imposed by the government on individual and/or corporate taxpayers' income, property, transaction, activity, etc. for public use or service, under whatever name or nomenclature, like toll, tribute, impost, excise, duty, and so on. In this sense, in the government's privatization of Mt. Apo geothermal power distribution, the required premium payment by the winning bidder to the government is in substance a government impost or tax, exacted from the winning highest bidder. However, while the winning bidder will pay the tax to the government, it will simply pass it on to consumers through increased power rate, in the process making it a consumption tax, an indirect tax quite burdensome to generally poor captive power consumers. It is based on the unavoidable consumption of a basic necessity regardless of paying capacity, not on income or ability to pay.

The highest premium exacted by the government from the winning bidder is highly discriminatory to captive consumers who will ultimately shoulder it as an increase in power rate. This premium imposition as a form of **taxation** is unsound finance and economics because **it has limited reach**. It will collect the tax over the years from captive consumers only, a very small fraction of the large universe of free-lunching taxpayers out of the now 108 million Filipinos—for whose benefit the collected tax will be spent by the national government. This then is a case of unfair mismatch of spenders and beneficiaries, or by the **few** who will ultimately pay for the premium as indirect tax, and the free-lunching **many** who will not pay but will also benefit from it. It is not the ideal kind of tax with a broad base of taxpayers so that the burden is spread out, light, and equitable. It is not the usual kind of users' tax either, where collection benefits the using taxpayers only, as in the case of road users' tax.

3. The privatization is in substance a wholesale subsidy scheme by victimized Mt. Apo geothermal power consumers in Mindanao to the rest of the entire population outside Mindanao, who do not pay premium built into the increased Mt. Apo geothermal power rate but similarly benefit from it.

The privatization of Mt. Apo geothermal power distribution, awarded to the winning bidder based on the highest premium offer to the government, also created a wholesale **subsidy scheme** by the relatively few **Mindanao** power consumers to the much larger population nationwide outside the Mt. Apo geothermal power distribution area. Under it, the government collects

monthly premium or indirect tax from the winning bidder—which passes it on 100% as rate increase to victimized Mindanao consumers—for deposit to the national government’s General Fund. The collected premium will be appropriated thereafter for the benefit of the now 108 million Filipinos, including the much larger free-lunching population outside Mindanao that similarly benefit from the premium but do not pay any part of it.

4. The privatization involved a cleverly disguised borrowing scheme that did not undergo public-bidding competition on lowest interest rate, therefore it is unlawful.

The public bidding conducted in 2014 by the Aquino administration in the privatization of Mt. Apo geothermal power distribution was patterned after the unlawful bidding scheme for the Cavite-Laguna Expressway (CALAX) (pp. 331-332). Among the latter’s many defects, it was a subtle borrowing scheme. The highest premium offer treated as winning bid in the privatization bidding is, in effect, not an income to the government or the public because it is not free. It has to be repaid to the winning bidder by power consumers (including government units and entities in the affected areas of Mindanao) through an electricity rate increase. Otherwise, the winning bidder will lose and the privatization public bidding will not attract any bidders.

Therefore, the public bidding scheme with highest cash-upfront premium as winning bid was, in reality, an unwitting subtly camouflaged and clever **borrowing scheme**, with the repayable highest premium earning a return of 12% per annum. This is the winning bidder’s claim to 12% allowable return on investment, based on the Supreme Court’s 12% reasonable return ruling on Meralco,⁸⁵ the power-distributor monopoly in Metro Manila and suburbs. Under the situation, the borrowing scheme is irregular because the 12% reasonable return to the winning bidder, as the effective interest rate to the government and other power consumers under the privatization scheme, is much higher than interest rates on regular government borrowing, such as low-yield Treasury bills or government bonds at interest rates below 6%.

However, the borrowing scheme under the privatization of Mt. Apo geothermal power distribution was a lot more ingenious. Power consumers—including government units and entities in the area—are required to “repay” the winning bidder even without it “lending” a single centavo. The bidder promised the moon as highest premium, then obtained power rate increase and that was it—its ₱1.5-billion annual obligation on premium payment is complied with.

⁸⁵ Energy Regulatory Board vs. Meralco, G.R. No. 141314, November 15, 2002, affirmed on April 9, 2003.

5. The Mt. Apo geothermal power privatization entailed avoidable but not avoided whopping power rate increase—because it is not absolutely necessary and could have been indefinitely postponed while its enabling law, EPIRA (RA 9136), is not yet subjected to crucially needed critical evaluation on why, after 20 years of its enactment, it raised rather than reduce power rates, and whether it can really lower it or not.

The privatization of Mt. Apo geothermal power distribution resulted in a substantial power rate increase to victimized Mindanao power consumers, from ₱3.00 per kWh to ₱5.1827 per kWh. It could have been avoided because the Mt. Apo geothermal power had been distributed by the government's National Power Corporation (Napocor) to relatively few retailer power cooperatives in Mindanao without any losses for years.

While the counter-productive EPIRA is not yet thoroughly reviewed for possible amendment, this set up could have been simply continued without any private investors taking over the function of Napocor, to avoid the staggering power rate increase that has taken place, equivalent to ₱1.6 billion per year (including winning bidder's ₱105.17 million annual administration fee), being sucked continuously from many struggling businesses and generally poor households in Mindanao. This is a clear case of intolerable **absurd privatization** resulting in a power rate increase, not decrease—a change for the worse, not for the better. This privatization and all other similar cases of privatization should be looked into and reversed.

**IMPERATIVE REVERSAL OF UNWARRANTED
POWER RATE INCREASE FROM FALLACIOUS
PRIVATIZATION OF MT. APO GEOTHERMAL
POWER DISTRIBUTION IN MINDANAO,
FROM ₱3.00 TO ₱5.1827 PER KWH**

To reverse the unwarranted rate increase from the privatization of Mt. Apo geothermal power distribution, what needs to be legally assailed is not the power rate increase improperly authorized by the Energy Regulatory Commission (ERC) because that approach is problematical, as follows:

1. ERC is a quasi-judicial body. It will take a lot of doing to overturn its decision as regularity is assumed in the performance of its function.
2. This approach will result in the private winning bidder incurring a monthly loss of ₱128 million—corresponding to its winning highest premium bid—if it cannot recover it from consumers once the ERC rate increase is reversed without abrogation of the concession contract, because the contract would then still require the winning bidder to pay the monthly premium.

The more logical approach is to attack the privatization—which produced the improper ERC rate increase—where it is vulnerable: in the illegal privatization public bidding that did not follow the existing Procurement Law (RA 9184). ***There was no bidding competition on the lowest service rate per kWh or most advantageous bid for the object of privatization—Mt. Apo geothermal power distribution.*** The Build-Operate-Transfer (BOT) Law (RA 6957 as amended by RA 7718), fallaciously invoked in the government's Cavite-Laguna Expressway (CALAX) public-private-partnership (PPP) project (Chapter 18), cannot be similarly fallaciously invoked here because the public bidding for Mt. Apo geothermal power distribution merely involved simple bidding on ***services*** to be rendered, not infrastructure construction. Thus, the BOT Law cannot be invoked and the lack of bidding competition on lowest service rate per kWh was in plain violation of the Procurement Law.

The point of legal attack then is the unlawful public bidding which produced the consequently illegal privatization concession contract, which in turn provoked the unwarranted ERC rate increase. As the privatization concession contract is ***contrary to law*** for having proceeded from unlawful public bidding, the Department of Justice (DOJ) should have the concession contract voided, rescinded, or canceled, with consequent automatic nullification of the ERC rate increase. Even if this is successfully done, the winning bidder will not incur an annual financial loss because its obligation for its winning highest premium bid—₱128-million monthly payment to the government—will be similarly extinguished if the concession contract is canceled.

Unlike in the cited CALAX PPP project where the winning bidder had to pay the government as cash upfront the winning highest premium bid, in the Mt. Apo geothermal power distribution privatization, the winning bidder did not shell out even a single centavo as cash upfront to the government—because the privatization scheme was cleverly disguised in favor of the private investor.

As unwarrantedly authorized by ERC, the winning bidder did nothing except to raise the old low power generation rate from ₱3.00 to ₱5.1827 per kWh. In the process, it fully passed on to hapless consumers its committed ₱128-million monthly premium payment to the government without any financial sacrifice whatsoever on its part. With the winning bidder's monthly obligation being wholly shouldered by power consumers, and without any actual premium payment coming from the resources of the winning bidder, if the concession contract is nullified, there will be no past cash upfront payment to the government that has to be refunded as a matter of equity or fairness. Therefore, the abrogation of the Mt. Apo geothermal power distribution privatization contract appears feasible and will not entail any government funding problem.

**WAS ANGAT DAM HYDROELECTRIC
POWER DISTRIBUTION SIMILARLY UNLAWFULLY
PRIVATIZED WITHOUT BIDDING COMPETITION
ON LOWEST RATE PER KWH?**

**The Department of Energy
and Congress Should Look into Past
Cases of Privatization of Other Power Plants Similar
to that of Mt. Apo Geothermal Power Distribution,
for Taking of Probably Needed Corrective Measures**

It is highly probable that the unlawful public bidding scheme undertaken in the privatization of Mt. Apo geothermal power distribution was also followed in the privatization of other government power plants, like that of the Angat Dam hydroelectric power plant in Angat, Bulacan. The Department of Energy and Congress, in their review of EPIRA, should also look into this angle, initiate reversal of any similar cases found, and legislate corrective measures.