



DECISION

CASE NUMBER 001-021-022/PUU-I/2003

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon the first and last level has passed the following decision, with respect to the petition for judicial review of Law Number 20 Year 2002 concerning Electrical Power against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

I. Petitioners in Case 001/PUU-I/2003:

1. APHI (Indonesian Legal and Human Rights Consultant Association);
2. PBHI (Indonesian Legal Aid and Human Rights Association);
3. 324 Foundation;

In this matter, authorizing the following persons:

1. Hotma Timbul Hutapea, S.H.;
2. Johnson Panjaitan, S.H.;
3. Saor Siagian, S.H.;

4. Ecoline Situmorang, S.H.;
5. Mangapul Silalahi, S.H.;
6. Basir Bahuga, S.H.;
7. Lamria, S.H.;
8. Sonny W. Warsito, S.H.;
9. Reinhard Parapat, S.H.;
10. Niko Adrian, S.H.;
11. Muhammad A. Fauzan, S.H.;
12. Sholeh Ali, S.H.;
13. John. B. Sipayung, S.H.;
14. Sunem Fery Membaya, S.H.;
15. Vony Reyneta, S.H.;
16. Dorma H. Sinaga. S.H.;
17. Yuli Husnifah, S.H.;
18. David Oliver Sitorus, S.H.;
19. Leonard Sitompul, S.H.;
20. Yohanes D. Tukan, S.H.;
21. Lambok Gultom, S.H.;

Advocates and general defense attorneys joined together in the Indonesian Legal and Human Rights Consultants' Association (APHI) and Indonesian Legal Aid and Human Rights Association (PBHI) selecting their legal domicile at APHI's office, Jalan Raya Pasar Minggu, Km. 17,7 Number 1B, 3rd Floor, Pasar Minggu, South Jakarta 12740, by virtue of a

Special Power of Attorney dated December 24, 2003 hereinafter referred to as **PETITIONER I**;

II. Petitioners in Case 021/PUU-I/2003:

1. Ir. Ahmad Daryoko, 2. M. Yunan Lubis, SH, respectively as the General Chairperson and Secretary General of the Central Executive Board of PT PLN (Persero) Workers' Union, in this matter acting for and on behalf of PT PLN (Persero) Workers' Union, having its address at PT PLN (Persero) Head Office, Jalan Trunojoyo Block M I/135, Kebayoran Baru, South Jakarta, hereinafter in this petition referred to as **PETITIONER II.**

III. Petitioners in Case 022/PUU-I/2003:

Ir. JANUAR MUIN and Ir. DAVID TOMBENG respectively as the General Chairperson and General Secretary of the State Electricity Pensioners Family Association and in this matter acting as a Private Person and an Individual Indonesian Citizen for and on behalf of the State Electricity Pensioners Family Association (IKPLN) domiciled at PT. PLN (Persero) Head Office, Tower I, 4th Floor, Jl Trunojoyo Block M I/35 Kebayoran Baru,

South Jakarta, hereinafter referred to as
PETITIONER III.

Having read the petition of the Petitioners;

Having heard the statement of the attorneys in fact of the Petitioners;

Having heard the statement of the Government and the People's
Legislative Assembly;

Having read the written statement of the Government and the People's
legislative Assembly;

Having examined the evidence;

Having heard the statement of the Experts presented by the Petitioners
and the Experts presented by the Government;

Having read the written statement and heard the oral statement of the
Coordinating Minister for the Economy;

Having read the written statement and heard the oral statement of the
Minister of Energy and Mineral Resources;

Having read the written statement and heard the oral statement of the
Minister of State Owned Enterprises;

Having read the Study of the Working Group on Power Sector Restructuring (WG PSR) on the Electrical Power Law;

Having read the additional statement of the Government on the petition for Judicial Review of Law Number 20 Year 2002 concerning Electrical Power;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the Petitioners are as mentioned above;

Considering whereas prior to considering the principal case issue of the, the Constitutional Court (hereinafter referred to as the Court) needs to first determine the Court's authority and the legal standing of the Petitioners in the *a quo* petition as follows;

1. Authority of the Court

Considering whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) *juncto* Article 10 Paragraph (1) of Law No. 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law), one of the authorities of the Court is to review laws against the Constitution. Whereas laws that can be reviewed are the laws enacted following the First Amendment to the 1945 Constitution dated October

19, 1999 (please refer to Article 50 of the Constitutional Court Law and its Elucidation);

Considering whereas the *a quo* petition is concerned with the judicial review of Law No. 20 Year 2002 concerning Electrical Power (hereinafter referred to as the Electrical Power Law) enacted on September 23, 2002 with the State Gazette of the Republic of Indonesia Year 2003 Number 94, Supplement to the State Gazette of the Republic of Indonesia Number 4226;

Considering whereas therefore, the Court has the authority to examine, hear, and decide upon the *a quo* petition;

2. Legal Standing of the Petitioners

Considering whereas petitioners in a judicial review of law against the Constitution, pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, must have one of these qualifications: a) individuals (including groups of people having a common interest); or b) units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in law; or c) public or private legal entities; or d) state institutions; claiming that their constitutional rights and/or authorities have been impaired by the coming into effect of a law petitioned for review. Whereas the above mentioned constitutional rights are the rights regulated in the 1945 Constitution [please refer to the Elucidation of Article 51 Paragraph (1) of

the Constitutional Court Law], including in this matter, particularly the Human Rights (HAM) as included in Article 28A through Article 28J and other constitutional rights set forth in Article 27 through Article 34 of the 1945 Constitution, as well as in general, Indonesian Citizen Rights as a consequence of the Unitary State of the Republic of Indonesia as a constitutional state;

Considering whereas the Petitioners in the *a quo* petition can be qualified as follows:

- The Petitioners in Case No. 001/PUU-I/2003 are APHI, PBHI, and the 324 Foundation, which can be qualified as private legal entities or at least as individual Indonesian citizens, hereinafter referred to as Petitioner I, arguing that their constitutional rights included in Article 1 Paragraph (3), Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28H Paragraph (1), and Article 33 Paragraphs (2) and (3) of the 1945 Constitution are deemed to have been impaired by the coming into effect of the Electrical Power Law;
- The Petitioner in Case No. 021/PUU-I/2003 is PT.PLN's Workers Union which can be qualified as a legal entity or at least an individual Indonesian citizen, hereinafter referred to as Petitioner II, which argues that their constitutional rights guaranteed by Article 27 Paragraph (2), Article 28D Paragraph (2), Article 28H Paragraph (1) and (3), Article 33 Paragraph (3), and Article 54 Paragraph (3) of the 1945 Constitution have been impaired by the coming into effect of the Electrical Power Law;

- The Petitioners in Case No. 022/PUU-I/2003 are Ir. Januar Muin and Ir. David Tombeg which can be qualified as individual Indonesian citizens, hereinafter referred to as Petitioner II who deem that the Electrical Power Law has impaired their constitutional rights included in Article 28A, Article 28C Paragraph (1), and article 28H Paragraph (1) of the 1945 Constitution;

Considering whereas the Petitioners either as consumers of electric power (Petitioner I, Petitioner II, and Petitioner III), or even as a group of people with emotional connections to the PLN (State-Owned Electricity Company) have an interest in the management of electrical power with orientation towards the greatest prosperity of the people and claim that their constitutional rights will be extremely impaired if the electrical power as an important productive branch that affects the livelihood of many people is not controlled by the State and not oriented towards the public interests;

Considering whereas pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, the impairment of constitutional rights shall sufficiently be argued as an assumption that remains to be proven with the principal case. The impairment of the constitutional rights does not always have to be actual, but can also be potential in nature. In fact, every tax-paying citizen has the constitutional right to question every law that relates to the economic field that affects his or her welfare;

Considering whereas therefore, the Court is of opinion that the Petitioners, namely Petitioner I, Petitioner II, as well as Petitioner III, have the legal standing to file the *a quo* petition;

Considering whereas since the Court has the authority and the Petitioners have the legal standing, the Court shall therefore consider the principal issue of the case;

3. Principal Issue of the Case

Considering whereas in the principal case, Petitioner I filed a petition for a formal review (*formele toetsing*) and a substantive review (*materiele toetsing*) of the Electrical power Law, whereas Petitioner II and Petitioner III only filed the *a quo* petition for a substantive review;

a. Petition Formal review of the Petitioners in Case No. 001/PUU-I/2003:

Considering whereas in the petition for formal review, the Petitioners in Case No. 001/PUU-I/2003 have argued about the procedures for the formulation of the *a quo* Law which are not in accordance with the provision of Article 20 Paragraph (1) of the 1945 Constitution namely the principle that the People's Legislative Assembly is the one that has the authority to establish laws, which is then implemented in Article 33 Paragraph (2) Sub-Paragraph a and Paragraph (5) of Law No. 4 Year 1999 concerning the Organizational Structure and Status of the People's Consultative Assembly (MPR), the People's Legislative Assembly (DPR) and the Regional Legislative Assembly (DPRD) (hereinafter referred to as

the Structure and Status Law) *juncto* Article 189 and 192 of the DPR Rules of Procedure, for the following the reasons:

- Whereas the procedures for the ratification of the Electrical Power Law in the DPR Plenary Session did not meet the quorum, since it was not attended by more than half of the total members as required by Article 189 of the DPR Rules of Procedure;
- Whereas the decision-making conducted by the DPR through a deliberation to reach a consensus is contradictory to Article 192 of the DPR Rules of Procedure, because there were still differences of opinion among the members and the factions of the DPR;

Considering with respect to the aforementioned arguments of the Petitioners in Case No. 001/PUU-I/2003, the Court is of opinion that when the Electrical Power Law was enacted in 2002, the law concerning the procedure for the formulation of laws which was mandated by Article 22A of the 1945 Constitution had not existed, so that there was no clear standard concerning the procedures for the formulation of laws in accordance with the Constitution. Therefore, the 1999 Structure and Status Law which was the mandate of Article 19 Paragraph (1) of the 1945 Constitution *jo.* DPR Rules of Procedure mandated by the aforementioned 1999 Structure and Status Law shall be made as the criteria for evaluating the procedures for formulating laws;

Considering whereas the arguments presented by the Petitioners in the aforementioned Case No. 001/PUU-I/2003 has been denied by DPR in an written statement presented in a Court hearing attached with the Minutes of the DPR Plenary Session dated September 4, 2002 with respect to which Petitioners in Case No. 001/PUU-I/2003 evidently could not provide any evidence to prove to the contrary, so that according to the Court the petition for a formal review of the Electrical Power Law filed by Petitioners in Case No. 001/PUU-I/2003 is groundless and must therefore be rejected;

b. The Petitioners' Petition for substantive review

Considering whereas to conduct a judicial review against Article 33 Paragraph (2) of the 1945 Constitution, the Court considers it necessary to first provide a definition or meaning of "controlled by the state" as indicated in Article 33 Paragraph (2) of the 1945 Constitution. Article 33 Paragraph (2) of the 1945 Constitution has a normative effective force as follows:

1. The Constitution gives authority to the state to control production branches vital to the state and which control the livelihood of the public;
2. The aforementioned authority is directed to both those who will manage and those who have managed the production branches which are important for the state and which affect the livelihood of the public. In the production branches where the production types of livelihood have not yet existed or is just endeavored, which are vital to the state and which affect the livelihood of

the public shall be prioritized where the state itself shall manage and control the aforementioned production branches and at the same time prohibits individuals or private entities from working on such production branches;

3. With respect to the production branches that have been managed by individuals or private entities while evidently the production branches are important for the state and control the livelihood of the public, the state can, with the authority granted by Article 33 Paragraph (2) of the 1945 Constitution, take over the aforementioned production branches through appropriate means in accordance with just rules of law;

Considering whereas the state's authority granted by the 1945 Constitution can be exercised at any time if the required elements which are vital to the state and/or which affect the livelihood of the public as set forth in article 33 Paragraph (2) are fulfilled;

Considering whereas the provision of the 1945 Constitution that gives authority to the state to control production branches which are important for the state and which affect the livelihood of the public is not intended merely for the sake of the state's authority alone, but is intended for the state to be able fulfill its obligations as mentioned in the Preamble to the 1945 Constitution, *".... to protect the entire Indonesian nation and the entire Indonesian motherland, and in order to promote general welfare..."* and also *"...creating social justice for all the people of Indonesia"*. The mission set forth in the aforementioned state authority is intended so that the state shall exercise the control over the production

branches in such a way that such production branches must fulfill the three aspects of the public interests, namely: (1) adequate availability, (2) even distribution, and (3) affordable prices for the public. The relationship between the state's control over production branches which are important for the state and for the livelihood of the public, as well as the mission contained in the state's control constitutes an integral paradigm followed by the 1945 Constitution, and it can even be said to be the law ideal (*rechtsidee*) of the 1945 Constitution. Thus, it is clear that the 1945 Constitution has made its choice. The question as to whether the aforementioned three aspects above can be fulfilled by the market economy system, and whether such aspects should therefore be just surrendered to market mechanism must surely be answered in a normative manner namely that the 1945 Constitution does not choose such a system as reflected in Article 33 Paragraph (4). The basis of the aforementioned choice is not without reason at all. The assumption that the market mechanism can automatically fulfill the abovementioned three aspects is a logical simplification which is far from reality, which is the existence of a perfect market mechanism (system). The reality that such a perfect market mechanism does not exist can be observed in this statement by Joseph E. Stiglitz: "... *presumption that markets, by themselves, lead to efficient outcomes, failed to allow for desirable government interventions in the market and make everyone better off*". (Globalization and its Discontents, Joseph E. Stiglitz, page. XII);

Considering whereas based on historical interpretation, as included in the Elucidation of the 1945 Constitution before the amendment, the meaning of the

provision concerned is *“The economy is based on a economic democracy, prosperity for all the people. Therefore production branches which are important to the state and which affect the livelihood public must be controlled by the state. Otherwise, the control over production falls in the hands of a few powerful people and many people will be oppressed by them. Only companies that do not affect the livelihood of the public may be left in the hands of individuals”* The above explanation still leaves questions, as to what are included in the **production branches that are vital to the state**, and which **control the livelihood of the public**, as well as what is meant by **managed by the state**;

Considering whereas Mohammad Hatta as one of the founding fathers describes that the definition of control by the state as follows: ‘The aspiration embedded in Article 33 of the 1945 Constitution is that massive productions whenever possible are conducted by the Government with the assistance of foreign capital loan. If this scheme does not succeed, it is also necessary to give opportunities to foreign businesses to invest in Indonesia with the requirements determined by the Government...Such is the way that we thought of how to carry out economic development on the basis of Article 33 of the 1945 Constitution...If national manpower and national capital are insufficient, then borrow foreign manpower and foreign capital to make production go smoothly. If other nations are unwilling to lend their capital then opportunities are given to them for investing in our motherland with the requirements determined by the Government of Indonesia itself. (Mohammad Hatta, A Collection of Speeches II Page. 231. Compiled by I. Wangsa Widjaja, Mutia F. Swasono, PT. Toko Gunung Agung

Tbk. Jakarta 2002). Dr. Mohammad Hatta's aforementioned interpretation was adopted by a Seminar on the Explanation of Article 33 of the 1945 Constitution in 1977 in Jakarta which stated that the state enterprise sector is intended to manage Paragraphs (2) and (3) of Article 33 of the 1945 Constitution and in the fields of funding, state-owned companies are financed by the Government, and should the Government not have sufficient funds to finance them, they can borrow domestically or from overseas, and if it is still insufficient then they can be conducted together with foreign investments on the basis of production sharing;

Considering whereas the Minister of State Owned Enterprises (BUMN) in his written statement at the hearing forum of the Court interpreted "controlled by the state" which means that the state shall be the regulator, facilitator, and operator which dynamically leads to the state being merely as the regulator and facilitator, whereas Prof. Dr. Harun Alrasid, S.H. interpreted "controlled by the state" as being "owned by the state";

Considering whereas the Court also considers the opinions of the experts who declare that in reality, there is no economic system that is fully liberal in an extreme way, neither is there an economic system of a full command or planned economy nature. Therefore, Article 33 of the 1945 Constitution must still serve as a reference, because Article 33 is not in anyway interpreted as anti market economy, and that the market economy does not fully put aside the role of the state to interfere when there is a distortion and injustice either, because the dynamic interpretation of Article 33 of the 1945 Constitution by the Court is

carried out with the optimum observance of the strategic changes in national and global environment;

Considering whereas by viewing the 1945 Constitution as the system concerned, thus the interpretation of “controlled by the state” in Article 33 of the 1945 Constitution contains a higher or broader interpretation than ownership in the civil law conception. The conception of control by the state is a public legal conception which is related to the principle of the sovereignty of the people in the 1945 Constitution, in the field of politics (political democracy) and economy (economic democracy). In the people’s sovereignty principle, the people are the ones recognized as the source, owner and the holder of the highest power in living as a state, in accordance with the doctrine of *“from the people, by the people and for the people”*. In the interpretation of the highest power, the interpretation of public ownership by the people collectively is also included;

Considering whereas if the phrase “controlled by the state” is just interpreted as ownership in the civil (private) sense, it will not suffice to use the control to achieve the “greatest prosperity of the people”. Therefore the mandate to “promote public welfare” and to “implement social justice for all the people” stated in the Preamble of the 1945 Constitution will be impossible to realize. However, the civil ownership conception itself must be recognised as one of the logical consequences of the control by the state which also includes the interpretation of the collective public ownership by the people of the resources concerned. The expression “controlled by the state” can not be interpreted simply

as the right to *regulate*, because it is automatically inherent in the functions of the state without having to be specifically mentioned in the constitution. Even if supposedly Article 33 is not included in the 1945 Constitution, as common in many countries which adopt the liberal economy principle which do not regulate basic economic norms in their constitutions, the state automatically has the authority to perform the regulatory function. Therefore, it is impossible to reduce the meaning of the phrase “controlled by the state” as merely concerning the authority of the state to regulate the economy. Therefore, the view which interpretes “controlled by the state” as ownership in the civil conception sense and the view that interpretes “controlled by the state” simply as the authority of the state to regulate, are both rejected by the Court;

Considering whereas based on the above descriptions and opinions, therefore the phrase “controlled by the state” must be interpreted to include the interpretation of control by the state in the broad sense which is based on the conception of the sovereignty of the Indonesian people over all of the resources consisting of the “*land and water and natural resources contained therein*”. Included in it is the interpretation of the collective public ownership by the people of the resources concerned. The people collectively are constructed by the 1945 Constitution as giving the mandate to the state to make policy (*beleid*) and perform the administration (*bestuursdad*), regulation (*regelendaad*), management (*beheersdaad*) and oversight (*toezichthoudensdaad*) with the purpose of the greatest prosperity of the people. The function of administration (*bestuursdaad*) by the state is carried out by the government with its authority to issue and

revoke permit facilities (*vergunning*), licensing (*licentie*), and concession (*concessie*). The state's regulatory function (*regelendaad*) is performed through the legislative authority of the People's Legislative Assembly together with the government, and regulation by the government (*eksekutif*). The management function (*beheersdaad*) is performed through share holding mechanism and/or through direct involvement in the management of the State Enterprises as instruments through which the state *c.q.* the government will exercise its control over the natural resources for the greatest prosperity of the people. The function of oversight by the state (*toezichthoudensdaad*) is carried out by the state *cq* the government in the context of supervising and controlling so that the exercise of control by the state upon vital branches of production which affect the livelihood of many people will be performed for the greatest prosperity of the people;

Considering whereas in such interpretation framework, control in the sense of civil ownership (private), which originates from the conception of public ownership related to the branches of production which are vital to the state and/or which affect the livelihood of many people which according to the provision of Article 33 Paragraph 2 shall be controlled by the state, depends upon the dynamics of the condition development of each branch of production. Those that have to be controlled by the state are branches of production which are considered important to the state and/or which affect the livelihood of many people, namely: (i) a branch of production which is important for the state and affects the livelihood of many people, (ii) important to the state but does not control the livelihood of many people, or (iii) not important for the state but affects

the livelihood of many people. The three have to be controlled by the state and used for the prosperity of the people. However, it is up to the government and together with the people's representative institution to assess whether and when a branch of production is important to the state and/or affects the livelihood of many people. A branch of production which at a certain time is important for the state and controls the livelihood of many people, may at other point in time become no longer important for the state and does not affect the livelihood of many people. However, the Court also has the authority to assess by reviewing it against the 1945 Constitution if in fact there are parties who claim to have been impaired constitutionally by such assessment of the legislators;

Considering whereas based on the above description, if the electricity production branch is seriously considered by the government and the People's Legislative Assembly as being no longer important for the government or no longer affects the livelihood of many people, the administration, regulation, management, and oversight may be transferred to the market. However, if the electrical power production branch concerned is still important to the government and/or still affects the livelihood of many people, the state *c.q.* the government is still required to take control of the concerned production branch by regulating, administering, managing and supervising to ensure that it is being used truly for the greatest prosperity of the people. Such interpretation of taking control also includes the interpretation of of civil ownership as an instrument to maintain the level of control by the state *c.q.* the government in managing the concerned electricity production branch. Therefore, the conception of the state's private

share holding in enterprises which concern production branches which are important for the government and which affect the livelihood of many people must not be dichotomised or substituted with conception of regulation by the state. Both are included in the interpretation of control by the state. Therefore, the state does not have the authority to regulate or determine rules which prohibit itself from owning shares in an enterprise which is important for the government and which affects livelihood of many people as instruments or means for the state to maintain its control over resources which are to be used for the purpose of the greatest prosperity of the people;

Considering in addition, to guarantee the efficiency with justice principle as referred to in Article 33 Paragraph 4 of the 1945 Constitution which states, “ *the national economy shall be organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by keeping the balance between the progress and the unity of the national economy*”, control in terms of private ownership must also be understood as being relative in nature in the sense that it does not have to be absolutely 100% at all times, provided that the control by the state *c.q.* the government on the management of the resources is still properly maintained. Even though the government only own relative majority shares, divestment or privatization of the Government’s ownership of shares in the related state-owned enterprises can not be considered contradictory to Article 33 of the 1945 Constitution provided that it still determines the policy making process in the enterprise concerned. Therefore, the Court is of the opinion that the provision of

Article 33 of the 1945 Constitution does not refuse privatisation, as long as it does not abolish the control by the state *c.q.* the government to be the main factor in determining the policy of the enterprise in the production branches which are important to the state and/or which affect the livelihood of many people. Article 33 of the 1945 Constitution does not reject the idea of competition among business actors, as long as it does not abolish control by the state including the authority to regulate, administer, manage and supervise production branches which are important for the state and/or which affect the livelihood of many people for the greatest prosperity of the people;

Considering whereas in reviewing the *a quo* law, the court also considers the statement of the government which contains driving factor, scope, philosophy and the conception of Law Number 20 Year 2002, briefly as follows:

1. Limited government funding in developing the electrical power sector;
2. The supply of electricity in a more transparent, efficient, and fair manner with private participation to be carried out through competition mechanism so that it ensures equal treatment for all business actors;
3. The need to anticipate change at the national, regional and global level and observing legal reform or development in the related sectors;
4. The state's control in electrical power sector is implemented with the authority of the state *c.q.* the government in setting policies, regulation and supervision of business implementation;

5. The effort to provide electrical power is intended to ensure the availability of electrical power in sufficient quantity, with good quality and reasonable price to justly and evenly improve the welfare and prosperity of the people and to drive the continuous improvement of the economy, with the efficient supply of the electrical power through strong regulation, business competition and transparency in a healthy business climate, for the creation of efficiency;
6. The electrical power industry structure can be formed in a vertically integrated manner or separated based on the functions. In areas which technically and economically allow competition, the generation, transmission, distribution and retail are separate businesses, with the exception of business area which naturally has to be performed by monopoly, namely transmission and distribution. For areas in which competition can not/can not yet be applied, the supply of electrical power is carried out through monopoly;
7. The establishment of the electric rate is directed at *cost based/cost recovery* approach and the monitoring of the implementation of the tariff establishment by the market. The retail price of electrical power for competitive areas is established through market mechanism. The rental price for transmission and distribution is established by the Electrical Power Market Supervisory Board;

8. The state administration system as regulated in Article 33 of the 1945 Constitution regulates that the government has the function as a regulator, which is performed by technical ministers, and the function as an operator, which is carried out by the office of the state minister who supervises and guides the running of businesses such as State Owned Enterprises (BUMN). In time, the government must focus more as the regulator and gradually releases its function as an operator, in accordance with the principle: “*Government function is to Govern*”;
9. Controlled by the state has the interpretation that the (1) Ownership (2) Regulation, development, and supervision and (3) the administration of the business activities are performed by the Government itself;
10. The philosophy of “state control” is the creation of national resilience in the field of energy (oil and gas, electricity etc) in the Unitary State of the Republic of Indonesia with the main aim of supplying and distributing energy domestically;
11. Deregulation is efficiency through competition, efficiency which maximizes total surplus of the users added by supply surplus, which can be said as user value subtracted by production cost. Competition does not guarantee the lowest price at a certain time, competition will drive that the users will recover production cost in the long run including reasonable capital return. Competition will also minimize the average cost for production and the average cost for the users;

Considering whereas the expert witnesses presented by the Government have provided their statement as completely quoted in the principal issue of the case, which principally describes the following:

1. The electricity market will stand under one authority, which is called the Bapetal, based on certain rules which are called the market rules. There are successful and unsuccessful markets, the problem is the market rules, namely how the rules of the game must be performed. By studying the market rules we can suit the rules to our interests, as mandated by the constitution that the national economy is to be conducted based on the principle of efficiency with justice. The interpretation of efficiency with justice in the electrical power world has a special meaning. Efficiency is the achievement of economic equilibrium that is a competition balance where the price is determined on the basis of supply and demand. The efficiency with justice is achieved in one competition system if the average price used by the supplier is the best which is eventually affordable in terms of the users, and the supplier and consumer surplus meet;

2. The parameters which are used to assess whether the law being reviewed is favorable or unfavorable are as follows:

a. **The first parameter, efficiency;**

The economic theory efficiency shows that only competitions will enable the achievement of efficiency. However, electricity has a

unique characteristic, a natural monopoly so that it can not be fully released into the market. Unbundling is a means of efficiency. Even though later there is a lawsuit on the competition in electricity, no state has returned to the single integrated monopoly, and only market rules are changed.

b. **The second parameter, tax contribution;**

The tax contribution from the State Owned Electricity Company (PLN), has suffered losses for three consecutive years, only this year it acquired a profit which is relatively small compared to its large assets;-

c. **The third parameter, unfavorable to the public or not;**

There are two indicators namely public accessibility and price. It is very difficult to achieve 100% electrification ratio by simply relying on the State Owned Electricity Company (PLN), thus opportunities have to be provided to anyone to increase the accessibility, as low access does not benefit the public. Those who do not have access to electricity have to pay 4 or 5 times more expensive than those with access. Those who do not have access are people who are poor;

3. The role of Electricity as a commodity can be viewed in three large groups, namely electricity as public service, as infrastructure, and as part of the state

revenue. In the public service context, electricity is only second in importance to the need for food, which means that citizens' rights will be violated without electricity. Therefore, easily accessible electricity with reasonable price has become the need of a state. It is not adequate to simply rely on the State Owned Electricity Company (PLN) to fulfill the rights for electricity. Therefore the supply of electricity has become a priority. The new Law on Electrical Power has encouraged the effort, without having to solely rely on the State Owned Electricity Company (PLN) but also relying on private investors, cooperatives or Region Owned Enterprise (BUMD) with due observance of the regulations issued by the supervisory board. Electricity as infrastructure is a driving source of the state economy, which can not only rely on the State Owned Electricity Company (PLN) but also has to involve Region Owned Enterprises (BUMD), cooperatives etc;

Considering whereas on the other hand the expert witness presented by the Petitioners have explained as follows:

1. Electricity as public utility can not be surrendered to the free market mechanism, because in free market, the parties make decisions based on the supply and demand, whereas the market in essence is based on the purchasing power and supplying power. If that happens, the real measurement on each transaction that takes place is the profit of certain parties based on the supply and demand, the process of which is based

- more on less supply and more demand which eventually yields profit to the or electrical power procedures or generators;
2. In the free market mechanism, those who benefit are the capital owners, in economic terms, *individual welfare game* and not *social welfare game*, and what take place are social welfare losses. In the principle of competition, the real cost based recovery is never as can never question honestly how much cost is spent by the contractors which have to be borne by the government. The government is very weak in knowing the cost components of each investor. Therefore it is not logical if the government is directed to establish tariff calculation, because the cost recovery is not open, in terms of how much the fixed cost, variable cost and general cost are, which can then be calculated as production cost. Article 8 Paragraph 2 and Article 17 Paragraph 1 are the foundation and reference for the restructuring of the electrical power sector, the electric power competition, which rely on the power of free market. Efficiency and competition are not characteristics of the free market, because a free market is a *free fight liberalism* whereby the strong wins. Efficiency with justice at the micro and macro level is based on the government administration effectiveness for the sake of social welfare and not for the efficiency of investors';
 3. If the electricity system is put into competition, the capital will go into the *Jamali* system (Java, Madura and Bali) whose market has been formed for

90 years, and not to outside of Java, while we have to give gross subsidy for regions outside *Jamali*, which can only be done if it is performed by a State Owned Enterprise /BUMN (the State Owned Electricity Company/PLN). The electrical power business is capital and technology intensive. If it is given to the private sector, the mindset will be to maximize profit and then to return the capital quickly, which is different from a State Owned Enterprise/BUMN (the State Electricity Company/BUMN);

4. Meanwhile, according to the statement of the expert, David Hall, Director of Public Services International Research Unit, Business School, University of Greenwich, Park Row, London from England, the restructuring in England which started in 1990, has three basic elements namely, firstly, privatization, secondly, liberalization, and thirdly, creating an electrical power market which consists of house markets. The electricity producer sells to the distribution company and then to the retail market whereby the distribution company sells to the customers. The restructuring in England, in terms of electricity price compared to other countries in fact did not bring down the electricity price. It is true that in the short term, efficiency and productivity improved, but it was mainly caused by the reduction in manpower. The labors as the stakeholders suffered the greatest loss as a consequence of termination of employment, whereas the capital owners with a bigger capital received higher profit. The current fact in England is that private companies tend to **reintegrate** those which were previously unbundled by the English government through

restructuring program. This resulted in only five electricity companies which are vertically integrated and those previously unbundled were then reintegrated. Study indicates that electricity contracts with the private electricity companies were based on long term contracts and were very expensive. They were guaranteed by the government and often as a consequence, the government and the state enterprise had to shoulder very expensive cost and this created heavy financial burden. The study concluded that it is not wise to restructure the electricity sector, as it will create many problems and obviate other more flexible policies in terms of long term development of the electric sector. Recently, there were four countries which postponed or cancelled to restructure its electrical power sector *i.e.* Thailand, South Korea, Brazil and Mexico;

Considering whereas in the petition for substantive review, Petitioner I (Case No. 001/PUU-I/2003) argued that the Electrical Power Law is not in accordance with or contradictory to Article 33 of the 1945 Constitution, because it has encouraged privatization of the electrical power supply, an important production branch that affects the livelihood of many people which should be controlled by the state. This will impair the constitutional rights of the Indonesian citizens, including Petitioner I, which are guaranteed by the 1945 Constitution. Therefore, in the petition Petitioner I requested for the Electric Power Law to be declared contradictory to the 1945 Constitution and not having binding legal affect;

Considering whereas in the petition for substantive review of Petitioner II (Case number 021/PUU-I/2003), it is argued that Article 8 Paragraph 2, Article 16, Article 17 Paragraph 3 and Article 30 Paragraph 1 of the Electrical Power Law are contradictory to Article 33 of the 1945 Constitution. The argument is that the policy of separating electrical power supply business through unbundling system indicated in Article 8 Paragraph 2 covering businesses of generation, transmission, distribution, sales, sales agents, market manager, and electric power system manager which are to be managed by different business entities (*vide* Article 16), especially the provision that only the transmission and distribution are managed by for the State Owned Enterprise (BUMN), thus not put for competition [*vide* Article 17 Paragraph 1], putting the rest for competitions by all business entities (including private entities), have reduced the meaning of **“ controlled by the state for important branches of production which affect the livelihood of many people”** as intended in Article 33 Paragraph 2 of the 1945 Constitution. As a consequence of the above policy, unavoidably there will be an effort to privatize the electrical power business and make the electrical power as a market commodity. This means that there will no longer be protection for the majority of the people who have not been able to afford electricity;

Considering whereas Petitioner III (Case No. 022/PUU-I/2003) in the petition for substantive review argued several aspects in the Electrical Power Law which are not in accordance with article 33 of the 1945 Constitution as follows:

- The aspect of free competition indicated in Article 17 Paragraph 1 and Article 21 Paragraph 3 will in fact escalate electrical power crisis In Indonesia which at present has occurred outside Java. Therefore, according to Petitioner III, the policy is not appropriate and will in fact burden the electricity consumers even more;

- The “*unbundling*” aspect indicated in Article 16, namely that various electric power supply businesses [*vide* Article 8 Paragraph 2 of the *a quo* law] are to be conducted separately by different business entities and Article 29 Paragraphs 1 and 2 which provide that business permit holders in the Electrical Power Supply are prohibited from combining businesses which can cause market control and unfair business competitions with the exception of those that drive efficiency but do not disrupt competition. The above policies result in the State Owned Electricity Company (PLN) having to be unbundled into several types of businesses, while thus far the State Owned Electricity Company (PLN) already has a permit which is integrated vertically And that besides, the business area which is put into competition (for example generation) may not interest the private businesses;

- The aspect of establishing selling prices which is left to reasonable and fair competitions [*vide* Article 38 Paragraph 1] is not in line with the meaning of Article 33 of the 1945 Constitution which is oriented to the welfare of the people;

Considering whereas the principal issue of the Petitioners' petition concerning competition in the electrical power business which according to Law Number 20 Year 2002 is to be conducted separately (unbundled) by different business entities, will be assessed as to whether it contradicts the 1945 Constitution by considering two issues, as follows:

1. Whether the electrical power production branch is important to the state and affects the livelihood of many people, such that it must be controlled by the state;
2. If the state control in Article 33 of the 1945 Constitution is not anti competition and not anti market, how the state exercises such control by the state according to Article 33 of the 1945 Constitution;

Considering whereas with respect to the first problem whether the electrical power is an important branch for the state and affects the livelihood of many people, it is evident from the following:

1. During the hearings, in their written and oral statements, the government and the People's Legislative Assembly did not deny the argument of the Petitioners that electricity is a production branch which is important for the state and which affects the livelihood of many people;
2. Whereas electricity's being an important production branch is also admitted by the legislators. This can be concluded from the

"Considering" section Sub-Article a of Law Number 20 Year 2002 on Electrical Power which states," *whereas the electrical power is very useful in promoting public welfare, improving the intellectual life of the nation, and improving the economy in the context of realizing a just and prosperous society in both material and spiritual terms evenly based on Pancasila and the 1945 Constitution*";

3. Whereas the Experts presented by the government also admitted that electricity is very important for the state, whether as a commodity which is a source of revenue or as infrastructure which is necessary in implementing the tasks of development as needed by the people and which affects the livelihood of many people. As public service, the electricity is only second in importance to the need for food;

Considering whereas with the above facts, it has been proven that electricity is a production branch which is important for the state and affects the livelihood of many people. Therefore, in accordance with Article 33 Paragraph 2, the electrical power production branch must be controlled by the state;

Considering whereas since it is clear that the electric power production branch must be controlled by the state, the Court has to consider, the two issues (the principal problems) in the *a quo* petition namely whether the electric power business activities being conducted competitively by treating the business players equally and by separate business entities (unbundled), is contradictory to the 1945 Constitution ;

Considering whereas the interpretation of the Court on control by the government as described above must be assessed based on Article 33 of the 1945 Constitution, including the administration of national economy based on economic democracy, the principle of togetherness, efficiency with justice, and environmental insight which is interpreted that control by the state also means private ownership, which does not always have to be 100%. This means, the government is ownership of shares in a business related to a production branch which is important for the state and/or which affects the livelihood of many people, can be of absolute majority nature (above 50 %) or of relative majority nature (under 50%), insofar as the government as the relative majority shareholder, still legally hold a key position in the decision making of the enterprise;

It must be understood that even though the government only owns relative majority shares in the State Owned Enterprise (BUMN), the state's key position must be maintained in the decision making for policy setting in the enterprise concerned. This illustrates the control of the state which includes regulation, administration, management and supervision;

Considering whereas the argument of the Petitioners states that the electrical power product can not yet be interpreted, equated or applied as an economic commodity. It must also be interpreted as infrastructure which needs to be subsidized. Hence, the interpretation of competition and the similar treatment to all business players as indicated in the "Considering" section Sub-Articles b

and c and Article 16, 17 Paragraph 1 and Article 21 Paragraph 3 of Law Number 20 Year 2002 is unacceptable. The interpretation of controlled by the state as described above will cause confusion as the meaning of control by the state which includes regulation, administration, management and supervision will be reduced if it is treated equally with private and foreign enterprises in the competition system;

Considering whereas the experts are of the opinion that competition and unbundling will only take place at JAMALI area (Java, Madura and Bali) as a market which has already been formed. Competition will be won by businesses which are financially and technologically solid. Whereas areas outside Java, Madura and Bali whose market has not been formed will become the responsibility of the government to supply electricity in an integrated manner. This can not be accomplished without cross subsidy from the profitable market at JAMALI. Therefore, the obligation to implement the greatest prosperity and welfare for all of the Indonesian people will not be achieved because private business players will be oriented to earn profit from market which has already been established;

Considering whereas based on the above consideration, the Court is of the opinion that to save, protect and further develop a more sound State-Owned Enterprise (BUMN) as an asset of the state and nation which has been providing commercial and non-commercial electricity services to the Indonesian public, nation and state as a form of control by the state, the provision of Article 16 of

Law Number 20 year 2002 which orders the separation/split of the electric power business system (unbundling system) with different business actors will aggravate the State Owned Enterprise (BUMN) leading to the absence of guaranteed commercial and non commercial electricity supply for all elements of the public. Therefore, it will be unfavorable for the public, nation, and state. The statements of experts presented by the Petitioner have explained empirical experience in Europe, Latin America, Korea and Mexico where electricity sector restructuring in fact was not beneficial and became a heavy burden for the state. Therefore, the Court is of the opinion that it is contradictory to Article 33 of the 1945 Constitution;

Considering whereas the Court is of the opinion that the legislators also asses that the electricity sector up to now is still a production branch important to the state and affects the livelihood of many people. Therefore, according to Article 33 Paragraph 2 of the 1945 Constitution, it must remain to be controlled by the state through a state enterprise financed by the government or in partnership with foreign or national private companies with foreign and domestic loan. Another alternative is by involving national/foreign private capital in a good and mutual partnership system. This means that only a State Owned Enterprise (BUMN) can manage the electricity sector, whereas national or foreign private companies may only participate upon invitation from the State Enterprise (BUMN), through partnership, shareholding, capital loan etc. The problem is whether the task to manage the electricity sector solely belongs to the State Owned Enterprise (BUMN), in this case the State Owned Electricity Company

(PLN), or whether it can be shared with other state enterprise, or even with Region Owned Enterprise (BUMD), in line with the regional autonomy spirit. The Court is of the opinion that, if the State Owned Electricity Company (PLN) is still capable and can be more efficient, the task should still be assigned to the State Owned Electricity Company (PLN), otherwise, it is possible to share the tasks with other State Owned Enterprise (BUMN) or Region Owned Enterprise (BUMD) with State Owned Electricity Company (PLN) as the holding company;

Considering whereas furthermore by referring to the views of Hatta and the experts as described above on the description of Article 33 of the 1945 Constitution, it can be briefly concluded that the interpretation of control by the state is that the state has to strengthen the production branch that it owns, so that gradually it will be able to independently provide for the needs which concern the livelihood of many people and replace the positions of the national and foreign private companies;

Considering whereas the inefficiency of the State Owned Enterprise (BUMN) which arises due to mismanagement factors and corruption, collusion and nepotism (KKN) must not be made as an excuse to ignore Article 33 of the 1945 Constitution, as the Indonesian idiom says “**buruk muka cermin dibelah**” (*equivalent to the English idiom “an ill bird fouls its own nest”*). Improvements made must reinforce the state control to be able to perform its constitutional obligations as stated in Article 33 of the 1945 Constitution;

Considering whereas with the considerations described above, the petition of the petitioners must be partly granted by declaring Articles 16, 17 paragraph 3 and Article 68 of Law Number 20 Year 2002 on Electrical Power contradictory to the 1945 Constitution and must therefore be declared as not having binding legal effect;

Considering whereas although the provisions viewed as being contradictory to the constitution basically are Articles 16, 17 Paragraphs 3 and Article 68, particularly which concern unbundling and competition, such articles are in fact the *heart* of Law Number 20 Year 2002 whereas all of the paradigms underlying the Electrical Power Law are based on competition in the management with unbundling system as reflected in the “Considering” section Sub-Articles b and c of the Electrical Power Law. That matter is not in accordance with the soul and spirit of Article 33 Paragraph 2 of the 1945 Constitution which is the basic norm of the Indonesian national economy;

Considering whereas the Court is of the opinion that the production branch in Article 33 Paragraph 2 of the 1945 Constitution on the electrical sector must be interpreted as one unity of the generation, transmission and distribution. Therefore, even though only certain articles, paragraphs or part of a paragraph of the *a quo* law are declared as not legally binding, Law Number 20 Year 2002 can not be maintained as a whole, as it will create confusion which will cause legal uncertainty in its application;

Considering whereas Articles 16 and 17 are declared as being contradictory to the 1945 Constitution with the result that the entire Law Number 20 Year 2002 is declared as not having any binding legal effect because its underlying paradigm is contradictory to the 1945 Constitution. Therefore, to prevent misunderstanding and uncertainty which may cause the impression that there is no legal certainty in the electrical power sector in Indonesia, it needs to be stressed that in accordance with Article 58 of Law Number 24 year 2003 concerning the Constitutional Court, the decision of the Constitutional Court shall have a legal effect since its pronouncement and will be applicable prospectively and not retroactively. Therefore, all agreements, contracts and permits in the electricity sector which have been signed and issued based on Law Number 20 Year 2002 shall remain valid until they are expired or no longer valid;

Considering whereas to avoid legal vacuum (*rechtsvacuum*), the old electrical power law, namely Law Number 15 Year 1985 regarding Electrical Power (State Gazette of the Republic of Indonesia Number 74, Supplement to the State Gazette Number 3317) shall be reinstated because Article 70 of Law Number 20 Year 2002 which declares the invalidity of Law Number 15 Year 1985 no longer has binding legal effect;

Considering whereas with Law Number 20 Year 2002 being declared not having binding legal effect in its entirety, it is recommended that the legislators prepare a new draft law on electrical power in accordance with Article 33 of the 1945 Constitution;

In view of Article 56 Paragraphs 2 and 3, and Article 57 Paragraph 3 of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

To reject the petition of Petitioner I for formal review;

To grant the petition of Petitioner I, Petitioner II and Petitioner III for substantive review in its entirety;

To declare Law Number 20 Year 2002 on Electrical Power (State Gazette of the Republic of Indonesia Year 2002 Number 94, Supplement to the State Gazette of the Republic of Indonesia Number 4226) contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

To declare Law Number 20 Year 2002 on Electric Power (State Gazette of the Republic of Indonesia Year 2002 Number 94, Supplement to the Gazette of the Republic of Indonesia Number 4226) as not having binding legal effect;

To order the publication of this decision in the State Gazette at the latest 30 working days as from the pronouncement of this decision;

Hence the decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices on: Wednesday, December 1, 2004, and was pronounced on this day Wednesday, December 15, 2004 by us: Prof.Dr. Jimlly Asshiddiqie, S.H., as the Chairperson and concurrent Member accompanied by

Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., Prof. H.A. Mukthie Fadjar, S.H., MS., Soedarsono, S.H., Dr. Harjono, S.H., MCL., H. Achmad Roestandi, S.H., I Dewa Gede Palguna, S.H., M.H., and Maruarar Siahaan, S.H., respectively as members and assisted by Kasianur Sidauruk, S.H. and Widi Astuti. S.H. as Substitute Registrar, in the presence of the Petitioners/their Attorneys-In-Facts.

CHIEF JUSTICE,

signed

PROF. DR. JIMLY ASSHIDDIQIE, S.H.

JUSTICES,

signed

signed

PROF. DR. H.M. LAICA MARZUKI, S.H. PROF. H.A.S. NATABAYA, S.H., LL.M.

signed

signed

H. ACHMAD ROESTANDI, S.H. PROF. H. A. MUKTHIE FADJAR, S.H., MS.

signed

signed

DR. HARJONO, S.H., MCL.

I DEWA GEDE PALGUNA, S.H., M.H.

signed

signed

MARUARAR SIAHAAN, S.H.

SOEDARSONO, S.H.

SUB REGISTRAR,

signed

signed

KASIANUR SIDAURUK, S.H.

WIDI ASTUTI, S.H.