

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



IN THE MATTER OF THE APPLICATION FOR THE APPROVAL OF THE AMENDMENT/SUPPLEMENT TO THE AGREEMENT FOR THE SALE OF ELECTRIC ENERGY (ASEE), TRANSMISSION SERVICE AGREEMENT (TSA) AND SUPPLEMENTAL MEMORANDUM OF AGREEMENT (MOA) TO THE NPC-MERALCO POWER SUPPLY CONTRACT (PSC) FOR THE POWER REQUIREMENTS OF SUNPOWER AND THE SUPPLEMENTAL AGREEMENT (SA) BETWEEN SUNPOWER AND MERALCO, WITH PRAYER FOR PROVISIONAL AUTHORITY

ERC CASE NO. 2009-011 RC

MANILA ELECTRIC COMPANY
(MERALCO),
Applicant.
x-----x

DOCKETED
Date: JAN 29 2010
By: *[Signature]*

DECISION

Before the Commission for resolution is the application filed on February 20, 2009 by the Manila Electric Company (MERALCO) for the approval of the following contracts:

- a. The Amendment/Supplement to the Agreement for the Sale of Electric Energy (ASEE), Transmission Service Agreement (TSA) and Supplemental Memorandum of Agreement (MOA) to the National Power Corporation (NPC)-MERALCO Power Supply Contract (PSC) for the power requirements of Sunpower Philippines Manufacturing Limited

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(SUNPOWER) and the Supplemental Agreement (SA) between SUNPOWER and MERALCO, with prayer for provisional authority.

In the said application, MERALCO alleged, among others, the following:

1. On September 1, 2004, it filed an application with the Commission for the approval of its MOA with SUNPOWER, National Transmission Corporation (TRANSCO), NPC, and Mirant Energy Corporation (MIRANT); its ASEE with SUNPOWER; its Electric Power Purchase Agreement (PPA) with MIRANT; Amendment/Supplement to NPC-MERALCO Contract for the Supply of Electricity (CSE); its TSA with TRANSCO; and the Protocol on NPC and MIRANT generation dispatch for the electricity requirements of SUNPOWER (PROTOCOL);
2. On March 1, 2006, the Commission rendered a Decision approving the ASEE, PPA and Amendment/Supplement to NPC-MERALCO CSE, TSA and the PROTOCOL;
3. On September 26, 2008, it executed an "Amendment/Supplement to the ASEE, TSA and Supplemental MOA to the NPC-MERALCO Power Supply Contract for the Power Requirements of Sunpower (AMENDMENT/SUPPLEMENT)" with NPC, TRANSCO and SUNPOWER. The main objective of the AMENDMENT/SUPPLEMENT is to extend the ASEE terms to SUNPOWER's plant located at First Philippine Industrial Park, Sta. Anastacia, Sto. Tomas, Batangas;
4. Said AMENDMENT/SUPPLEMENT also provided for the schedule of rates for SUNPOWER'S First Philippine Industrial Park (FPIP) plant located at Sta. Anastacia, Sto. Tomas, Batangas. These rates are subject to change upon approval by the Commission. Shown below is the schedule of rates for the said FPIP plant:

Year	NPC Rates		Average Generation Charge	Transmission Charge	Distribution Charge	Metering Charge	Supply Charge	CERA	Local Franchise Tax	Universal Charges	Rate
	40%	60%									
2007	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.0645
2008	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.0645
2009	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.0645
2010	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.0645
2011-2005	0.04539	0.05500	0.0512	0.0182	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.0744
20016-2019	0.04539	0.05500	0.0512	0.0200	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.0762

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5. Simultaneous with the signing of the AMENDMENT/SUPPLEMENT, it entered into a Supplemental Agreement with SUNPOWER clarifying the rights and obligations of the parties in the AMENDMENT/SUPPLEMENT. The salient features of the said Supplemental Agreement are as follows:

I. Removal of Section 3.7 of ASEE –

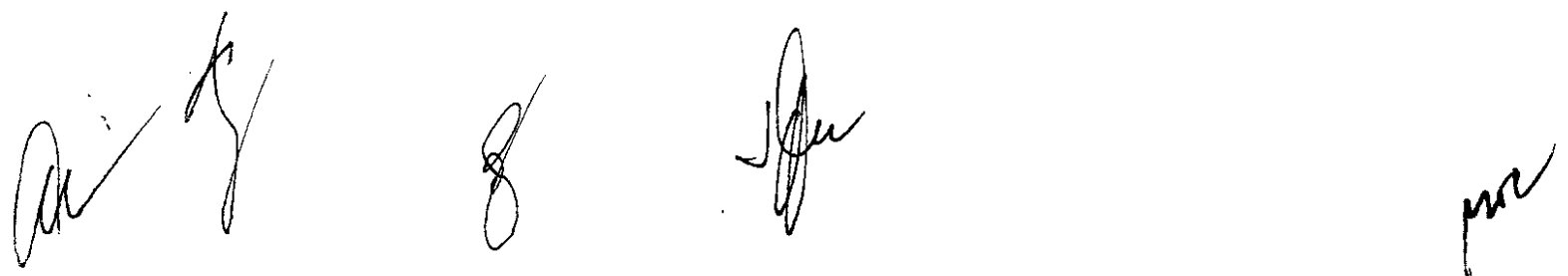
- 1) In relation to item 4, paragraph 2 of the Amendment/Supplement, if the actual consumption for the month exceeds the monthly forecast, SUNPOWER shall pay the excess energy at a rate equivalent to the contract rate in the Amendment/Supplement. Conformably with the monthly take or pay obligation of SUNPOWER under this agreement, all previous stipulations of clauses relating to the Annual Energy Offtake, including Section 3.7 of the ASEE and item 4, paragraph 3 of the Amendment/Supplement, providing for the liability of SUNPOWER in case its actual consumption falls below 70% of the revised Minimum Annual Energy Offtake, are hereby repealed and superseded, and shall no longer apply to the party.

II. Changes in System Loss Rate Charges –

- 3) The system loss rate charges for SUNPOWER plant located at First Philippine Industrial Park, Sta. Anastacia, Sto. Tomas, Batangas, shall be in accordance with ERC's approved standard system loss rate charges according to service voltage.

III. Limitation of its Application of Preferential Rates

- 4) The terms and conditions of this Supplemental Agreement and the Amendment/Supplement shall only apply to SUNPOWER's plants located at Laguna Technopark Inc., Biñan, Laguna and at the First Philippine Industrial Park, Sta. Anastacia, Sto. Tomas, Batangas. With respect to future sites, and in the event of an ERC-approved adjustment in the distribution rates of MERALCO for its captive customers, other than SUNPOWER, the latter agrees to negotiate with MERALCO within fifteen (15) days from effectivity of said adjustment, for the corresponding amendment to the ASEE, the Amendment/Supplement and this Agreement to reflect such adjustment as may be agreed upon by the parties, subject to the approval of the ERC. xxx"

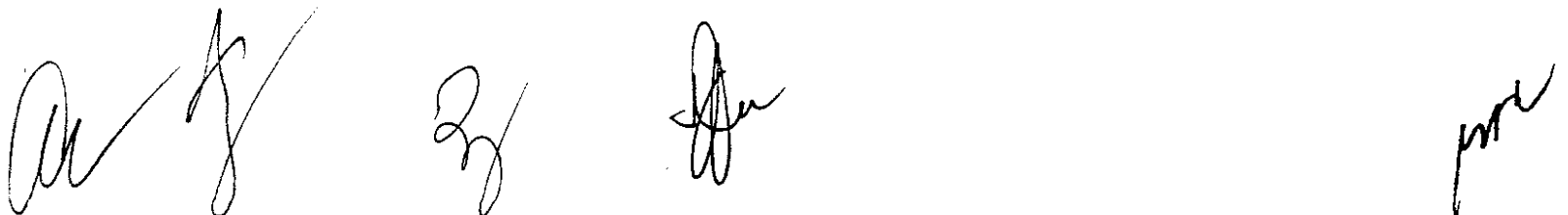
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6. The additional investments being put up by SUNPOWER support the goal of the Government in having an alternative source of power in the Philippines to ease up dependence in non-renewable sources of energy. Accordingly, in order to stimulate the development of solar energy in the country and attract investments in photo-voltaic industry, there is an urgent need for these contracts and corresponding rates thereon to be immediately implemented without delay through the issuance of a provisional authority; and
7. It prays that upon filing of the instant application, and pending hearing thereon, a provisional authority be immediately issued authorizing the implementation of the "Amendment/Supplement to the ASEE, TSA and Supplemental MOA to the NPC-MERALCO Power Supply Contract for the Power Requirements of SUNPOWER" and the "Supplemental Agreement" and after hearing on the merits, a Decision be rendered approving the said agreements.

Having found the said application sufficient in form and in substance with the required fees having been paid, an Order and a Notice of Public Hearing, both dated March 16, 2009, were issued setting the application for initial hearing on April 13, 2009.

MERALCO was directed to cause the publication of the attached Notice of Public Hearing, at its own expense, twice (2x) for two (2) successive weeks in two (2) newspapers of general circulation in the Philippines, with the date of the last publication to be made not later than ten (10) days before the date of the scheduled initial hearing. It was also directed to inform the consumers, by any other means available and appropriate, of the filing of the instant application, their reasons therefor and of the scheduled hearing thereon.

The Office of the Solicitor General (OSG), the Commission on Audit (COA) and the Committees on Energy of both Houses of Congress were furnished with copies of the Order and the Notice of Public Hearing and were



requested to have their respective duly authorized representatives present at the aforesaid initial hearing.

Likewise, the Offices of the Mayors of Pasig, the Municipality of Sto. Tomas, Batangas and the Provincial Governor of the Province of Batangas were furnished with copies of the Order and Notice of Public Hearing for the appropriate posting thereof on their respective bulletin boards.

During the April 13, 2009 initial hearing, only MERALCO appeared. No oppositor/intervenor appeared nor was there any intervention/opposition registered.

At the said hearing, MERALCO moved that an Order of general default be issued against those interested parties who failed to appear at the said hearing. Said motion was granted.

Thereafter, MERALCO presented its lone witness, Mr. Cesar J. Dawana, its Senior and Account Officer, who testified in support of the instant application. In the course of his direct examination, several documents were presented and marked as Exhibits "A" to "X-X-1", inclusive.

The direct examination having been terminated, the Commission directed MERALCO to submit its formal offer of evidence. In compliance therewith, MERALCO filed its "Formal Offer of Evidence" on May 8, 2009. The same is hereby admitted for being relevant and material in the resolution of this case.

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DISCUSSION

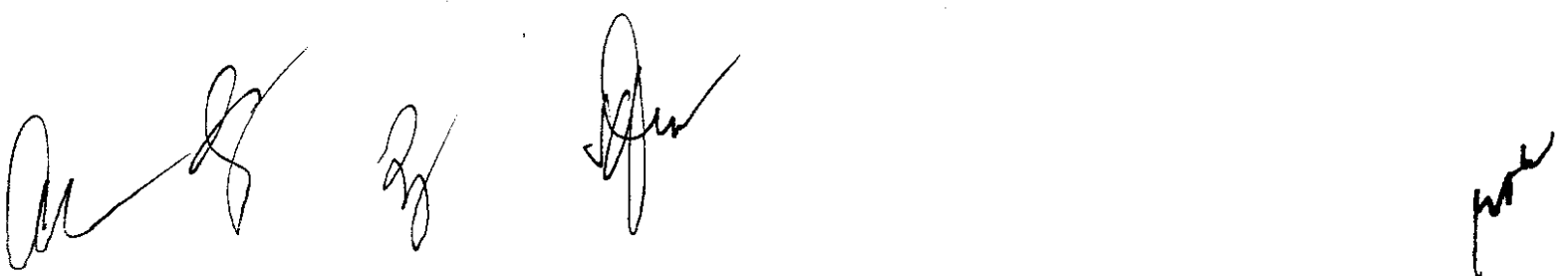
Original Contracts

SUNPOWER is engaged in the manufacturing of high-efficiency photovoltaic cells, located in Laguna Technopark Inc. (LTI), Binan, Laguna. The Philippine Government, through the Department of Energy (DOE), considers SUNPOWER's investment to be strategically important and supportive of the mandate to develop renewable sources of energy.

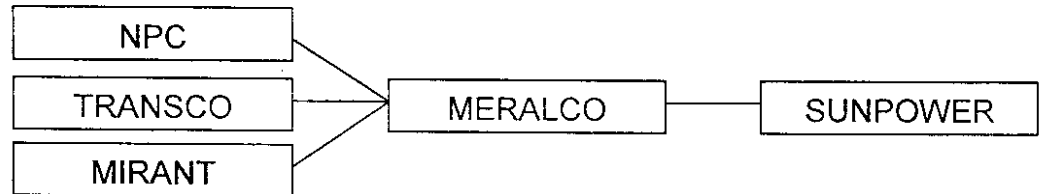
On March 18, 2004, MERALCO and SUNPOWER entered into an ASEE for the delivery of electricity to SUNPOWER's Solar Wafer Fabrication Plant and other related activities at the Laguna Technopark, Inc., Binan, Laguna.

Relative thereto, MERALCO and TRANSCO entered into a TSA pertaining to the transmission service of the power generated from NPC and MIRANT and purchased by MERALCO for the supply to SUNPOWER. Likewise, MERALCO and MIRANT entered into a Power Purchased Agreement (PPA) for the supply of electricity to SUNPOWER sourced from the 198 MW excess capacity of the Sual Power Plant in Pangasinan.

MERALCO and NPC also entered into a "Supplemental Memorandum of Agreement" to the NPC-MERALCO PSC for the power requirements of SUNPOWER.

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The following illustration shows the schematic contractual arrangement of the parties, to wit:



Based on the foregoing arrangements, MERALCO shall source the power requirements of SUNPOWER from the NPC (40%) and MIRANT (60%).

Under the said contracts, SUNPOWER was granted preferential rates for the generation cost through NPC and MIRANT, transmission cost through TRANSCO and distribution charge through MERALCO.

It must be noted that the preferential rates extended to SUNPOWER are exclusively applicable to its operation within its facilities located at the Laguna Technopark, Inc., Biñan, Laguna. Any future activities outside the said facilities are not covered by the above contracts.

On March 1, 2006, the Commission issued its Decision approving the aforesaid contracts taking into consideration the economic benefits from SUNPOWER's investment in the Philippines.

Amendments/Supplements to the Original Contracts

Consistent with its goal of providing more investments in the Philippines, SUNPOWER decided to expand its operations and other related activities to

other sites outside the Laguna Technopark to maximize its manufacturing activities and minimize risks associated with a limited site. As such, SUNPOWER expected to be accorded the same privilege of lower electricity rates which it has been enjoying for operating its LTI facilities.

However, considering that the approved original contracts do not extend to SUNPOWER's operations outside the LTI facilities, it entered into amendments/supplemental agreements on its MOA with MERALCO, NPC, and TRANSCO to include operations outside its facilities in LTI. Shown below are the salient provisions of the amended/supplemental contracts:

For locations or delivery points other than SUNPOWER's LTI facilities, the following applies:

- a) The power shall be solely generated and supplied by NPC;
- b) The power rate per kilowatt-hour in US\$ shall be in accordance with the following:

Year	NPC Rates (US\$)		Average Generation Charge	TransCo Charge	Distribution Charge	Metering	Supply Charge	CERA	Local Franchise Tax	Universal Charge	Rate
	40%	60%									
2007	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.064
2008	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.064
2009	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.064
2010	0.04539	0.05500	0.0512	0.0083	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.064
2011-2015	0.04539	0.05500	0.0512	0.0182	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.074
2016-2019	0.04539	0.05500	0.0512	0.0220	0.003679	0.000002	0.000004	0.000437	0.000258	0.000683	0.076

- c) The system loss rate of 1.5% shall be adjusted for the difference between the standard system loss rate of the respective locations and the LTI standard system loss rate. The system loss shall be for the account of SUNPOWER and payable in addition to the generation rate in the above schedule.

The Commission considers the above amendments as a grant of preferential rates by NPC, TRANSCO and MERALCO to their customers..

It is significant to note that subsequent to the approval of the aforesaid original contracts but prior to the execution of the subject amended/supplemental contracts, the Commission issued Resolution No. 23, Series of 2007, entitled "Resolution Adopting the Policy that the Grant of Preferential Rate to Qualified Customers Shall be Considered as Management Prerogative."

As enunciated in the said Resolution, the grant of discounts by the distribution utilities, NPC and TRANSCO to their respective customers is a management prerogative, subject to the following conditions:

1. Any reduction to revenues on the part of the DUs, NPC and TRANSCO must not be recovered from or passed on to their other customers:
2. Any losses that may be incurred by the DUs, NPC and TRANSCO should not give rise to any form of cross-subsidy; and
3. All similarly-situated customers shall be treated alike and be accorded the same privilege.

The implementation of the contracts subject of the instant application shall provide benefits to SUNPOWER by way of reduced operating costs. This will encourage more investments in the Philippines. Without relief to various investors in the Philippines, their business closure or relocation to other countries will be inevitable. Such scenario will have a negative effect on the national economy through the loss of both foreign exchange revenues and employment.

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The Commission recognizes the need for continued growth in the economic zone and strong impetus for competitive power rates in order to attract investments in the region. It is also aware of the rights of MERALCO, NPC and TRANSCO to exercise their inherent management decisions and best judgment whether they should enter into contracts with their respective customers subject only to the conditions previously stated.

Moreover, the Commission finds the instant application consistent with Section 2 of Republic Act No. 9136, which provides that:

"Section 2. Declaration of Policy – It is hereby declared the policy of the State:

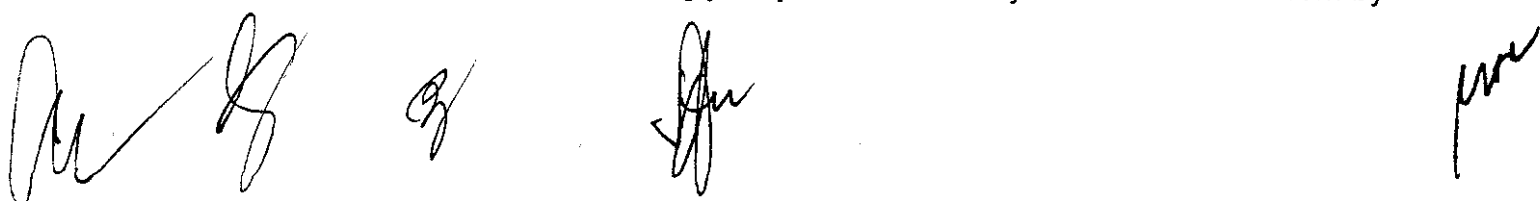
x x x

(b) To ensure the quality, reliability, security and affordability of the supply of electric power;

x x x

(f) To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power; x x x"

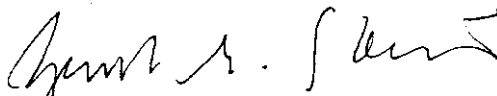
WHEREFORE, the foregoing premises considered, the application for the approval of the Amendment/Supplement to the Agreement for the Sale of Electric Energy (ASEE), Transmission Service Agreement (TSA) and Supplemental Memorandum of Agreement (MOA) to the National Power Corporation (NPC)-Manila Electric Corporation (MERALCO) Power Supply Contract (PSC) for the power requirements of Sunpower Philippines Manufacturing Limited (SUNPOWER) and the Supplemental Agreement (SA) filed by MERALCO are hereby **APPROVED**. Accordingly, any losses that may be incurred therefrom by



MERALCO, NPC and TRANSCO should not give rise to any form of cross subsidy and that any under-recoveries as a result thereof should not form part of their respective allowable revenues.


SO ORDERED.

Pasig City, December 14, 2009.

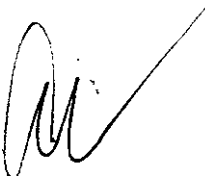

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Chairperson *gucut*


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