

REPUBLIC OF THE PHILIPPINES
ENERGY REGULATORY COMMISSION
SAN MIGUEL AVENUE, PASIG CITY

**IN THE MATTER OF THE APPLICATION FOR
APPROVAL OF THE POWER SUPPLY AGREEMENT
BETWEEN MASBATE ELECTRIC COOPERATIVE, INC.
AND DMCI MASBATE POWER CORP., WITH
PRAYER FOR PROVISIONAL AUTHORITY**

ERC CASE NO. 2010-063RC

**MASBATE ELECTRIC COOPERATIVE, INC. AND
DMCI MASBATE POWER CORP.**

Applicants.

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**APPLICATION
(APPROVAL OF POWER SUPPLY AGREEMENT AND
NEW POWER PROVIDER'S TRUE COST GENERATION RATE)**

Applicants MASBATE ELECTRIC COOPERATIVE, INC. ("MASELCO") and DMCI MASBATE POWER CORP. ("DMPC"), by undersigned counsels, respectfully state:

I. THE APPLICANTS

1. MASELCO is a non-stock, non-profit electric cooperative organized and existing under and by virtue of Presidential Decree 269, as amended, with office address at Pinamarbuhan, Mobo, Masbate. MASELCO has been granted a franchise or authority by the National Electrification Administration ("NEA") to distribute electric service in the city of Masbate and the municipalities of Mobo, Uson, Dimasalang, Palanas, Cataingan, Pio V. Corpus, Cawayan, Esperanza, Placer, Aroroy, Baleno, Balud, Mandaon, and Milagros, all in the province of Masbate (the "Franchise Area").

Copies of relevant documents proving the due incorporation, registration and permit to operate of MASELCO as a distribution utility are attached herewith as follows:

Document	Annex
<i>Articles of Incorporation</i>	A
<i>By-laws</i>	A-1
<i>Certificate of Franchise</i> issued by the National Electrification Commission	B

2. DMCI Masbate Power Corp. is a corporation duly authorized and existing under and by virtue of the laws of the Republic of the Philippines, with principal address at Mobo, Masbate, Philippines. DMPC may be served orders and other processes through its undersigned counsel.

2.1. DMPC is a subsidiary of DMCI Holdings, Inc. (“DMCI Holdings”). It is the project company established by DMCI Holdings for the purpose of performing the obligations of the SUPPLIER in the Power Supply Agreement which is subject of approval in the instant Application.

2.2. DMCI Holdings is the original party to the Power Supply Agreement. Pursuant to Sec. 3.2.1 of the PSA, DMCI Holdings assigned all its rights in the PSA to DMPC through a Deed of Assignment dated 7 January 2008. A copy of the Deed of Assignment is attached hereto as **Annex C**.

2.3. Attached are copies of relevant documents proving the due registration, incorporation and permit to operate of DMPC and DMCI Holdings.

Document	Annex
<i>Amended Articles of Incorporation</i> of DMPC	D
<i>Amended By-laws</i> of DMPC	D-1
<i>Amended Articles of Incorporation</i> of DMCI Holdings	E
<i>By-laws</i> of DMCI Holdings	E-1
DMPC’s Environmental Compliance	F
DMPC’s Notice of Application for Board of Investments Certificate of Registration	G
Affidavit of Publication of the BOI Notice	G-1
Certificate of Compliance	H

II. NATURE OF THE APPLICATION

3. Pursuant to the *Guidelines for the Setting and Approval of Electricity Generation Rates and Subsidies for Missionary Electrification Areas* (“ERC Guidelines”) approved by the Honorable Commission in ERC Resolution No. 11, Series of 2005, this Application is submitted to the Honorable Commission for its review and approval of the Power Supply Agreement (“PSA”), as amended by the Reinstated and Amendment to the Power Supply Agreement (“Reinstated PSA), Transitory Agreement (“TA”) and Supplement to the Transitory Agreement (“TA Supplement”) (hereinafter, all shall be collectively referred to as the “PSA and its Supplements”) between MASELCO and DMPC, as well as the approval of the NPP-TCGR provided therein.

The PSA and its Supplements are attached hereto as **Annexes I, I-1, I-2 and I-3**.

III. COMPLIANCE WITH PRE-FILING REQUIREMENTS

4. In compliance with Rule 6 of the ERC Rules of Practice and Procedure, Applicants have furnished the respective legislative bodies of the Local Government Units within the Franchise Area, and the *Sangguniang Panlalawigan* of Masbate, with a copy of the instant Application together with its accompanying documents.

Copies of the certifications from the Presiding Officer or Secretary (or their duly authorized representatives) of the legislative bodies of the Franchise Area and the *Sangguniang Panlalawigan* of Masbate attesting to the fact of service will be attached hereto as follows:

Certification of Presiding Officer or Duly Authorized Representative	Annex	Certification of Presiding Officer or Duly Authorized Representative	Annex
<i>Sangguniang Bayan</i> of Aroroy	J	<i>Sangguniang Panlungsod</i> of	J-8

Certification of Presiding Officer or Duly Authorized Representative	Annex	Certification of Presiding Officer or Duly Authorized Representative	Annex
		Masbate City	
<i>Sangguniang Bayan</i> of Baleno	J-1	<i>Sangguniang Bayan</i> of Milagros	J-9
<i>Sangguniang Bayan</i> of Balud	J-2	<i>Sangguniang Bayan</i> of Mobo	J-10
<i>Sangguniang Bayan</i> of Cawayan	J-3	<i>Sangguniang Bayan</i> of Palanas	J-11
<i>Sangguniang Bayan</i> of Cataingan	J-4	<i>Sangguniang Bayan</i> of Placer	J-12
<i>Sangguniang Bayan</i> of Dimasalang	J-5	<i>Sangguniang Bayan</i> of Pio V. Corpus	J-13
<i>Sangguniang Bayan</i> of Esperanza	J-6	<i>Sangguniang Bayan</i> of Uson	J-14
<i>Sangguniang Bayan</i> of Mandaon	J-7	<i>Sangguniang Panlalawigan</i> of Masbate	J-15

5. Furthermore, Applicants have caused the publication of the instant Application in its entirety in a local newspaper of general circulation within the Franchise Area.

Copies of the corresponding Affidavit of Publication and the newspaper issue containing the published Application will be attached hereto as follows:

Document	Annex
Affidavit of Publication	K
Copy of Newspaper	K-1

IV. STATEMENT OF FACTS
ATTENDANT TO THE APPROVAL OF THE PSA

6. On 26 January 2004, the Department of Energy (“DOE”) issued Department Circular 2004-01-001 (the “DOE Circular”), entitled *“Prescribing the Rules and Procedures for Private Sector Participation in existing National Power Corporation-Small Power Utilities Group (“NPC-SPUG”) Areas to Engage in Missionary Electrification Pursuant to Rule 13 of the EPIRA’s Implementing Rules and Regulations.”*

6.1. The DOE Circular aims to encourage the involvement of New Power Providers (“NPPs”) in NPC-SPUG areas with the view of providing quality,

reliable and secure supply of electricity while simultaneously reducing the Missionary Electrification portion of the Universal Charge (“UC-ME”) borne by all end-users.

6.2. The DOE Circular provides, among others, that a covered electric cooperative (“EC”) should procure by way of a Competitive Selection Process (“CSP”) an NPP that can adequately and reliably supply its electricity requirements. The NPP will take over from NPC-SPUG’s role as the primary power supplier to the EC. The DOE Circular further provides that an EC may hire a Transaction Advisor to manage the CSP.

7. The island of Masbate is among the off-grid islands currently served by the NPC-SPUG opened for private sector participation.

8. On 17 February 2006, MASELCO signed a Memorandum of Agreement (“MOA”) with the DOE engaging the International Finance Corporation (“IFC”) as its Transaction Advisor in the conduct of the CSP.

9. Accordingly, IFC conducted its due diligence examination of MASELCO, including a review of its existing electricity supply and demand characteristics, and compiled all relevant information for potential investors in an Information Memorandum.

10. IFC proceeded with the publication of its Invitation for Expression of Interest for the CSP in the following newspapers: (a) Philippine Daily Inquirer, on 25 and 26 July 2006; (b) Business World, on 27 and 28 July 2006; and (c) Philippine Star, on 29 July 2006.

11. On 30 August 2006, IFC launched the CSP with the public release of the Bidding Procedures. Subsequent amendments to the Bidding Procedures were released on different dates through Supplemental Bid Bulletins.

A copy of the Bidding Procedures and the Supplemental Bid Bulletins are attached hereto as **Annexes L to L-6** respectively.

12. On 7 November 2006, the deadline for the submission of bids, three (3) investors (the “Bidders”) submitted their respective bids, each consisting of a First Bid Envelope (the “Technical Bid”) and a Second Bid Envelope (the “Financial Bid”), to the Bids and Awards Committee (“BAC”).

12.1. The Bidders were:

(i) DMCI Holdings, Inc.;

(ii) Masbate Progress Power Consortium (“MPPC”, a consortium of EEI Power Corporation, Islands Grid Network Philippines, Inc. and Power One Corporation); and

(iii) Vivant Consortium (a consortium of Vivant Corporation and Gigawatt Power Inc.).

12.2. The BAC was composed of the following: (a) the President of NPC as Chairman; with (b) the President of MASELCO, and (c) the General Manager of MASELCO, as members.

13. The Technical Bids were examined to ensure compliance with the Bidding Procedures and to verify the accuracy and completeness of the documents submitted therein. Thereafter, from 8 to 14 November 2006, the BAC evaluated the Technical Bids of the Bidders and all three (3) Technical Bids were rated "Passed."

14. On 15 November 2006, the BAC reviewed the Financial Bids and compared the bid prices of the Bidders. The bid prices are as follows: (i) MPPC (PhP 6.9900/kWh), (ii) DMCI (PhP 7.0700/kWh), and (iii) Vivant Consortium (PhP 10.9875 PhP/kWh).

15. As such, MPPC was declared the Winning Bidder after submitting the lowest bid price or NPP-TCGR. DMCI Holdings submitted the second lowest bid and was declared the Second Ranking Bidder.

16. MPPC, however, failed to comply with a condition precedent to the issuance of the Notice of Award within the period provided for in the Bidding Procedures. Consequently, the BAC disqualified MPPC as Winning Bidder pursuant to and by virtue of its authority under the Bidding Procedures.

Copies of the relevant communications between the BAC and MPPC are attached as **Annexes M to M-2**.

17. In accordance with the Bidding Procedures, the BAC declared DMCI Holdings as the qualified winning bidder and issued the Notice of Award dated 15 January 2007 in its favor.

A copy of the Notice of Award is attached as **Annex N**.

18. In a formal ceremony in Malacañang Palace on 4 May 2007, MASELCO and DMCI signed the PSA in the presence of Her Excellency President Gloria Macapagal Arroyo, then NPC President Cyril del Callar and then DOE Secretary Raphael Lotilla. Pictures taken during the signing ceremony are attached herewith as **Annex O**.

19. The following are the pertinent documents relating to the CSP as required under the ERC Guidelines:

Requirements	Annex
A sworn certification issued by MASELCO that the PSA was awarded in accordance with Article II Section 2 of the ERC Guidelines	P
Department of Energy (DOE) Certification on the conduct of the CSP	Q
Copy of the following contracts:	
a. PSA	I
b. Subsidy Agreement	R
c. Phase In Phase Out Agreement	S

V. ABSTRACT OF THE POWER SUPPLY AGREEMENT AND RELATED INFORMATION

20. **Executive Summary.** Under the PSA, DMPC shall deliver a Guaranteed Dependable Capacity (“GDC”) of 13,000 kW which MASELCO may dispatch for its load and ancillary services requirements.

21. Salient features of the PSA

21.1. **Term.** The PSA has a term commencing on the date of its execution and expiring on the last day of the fifteenth (15th) year of the Commercial Operations Period as provided therein, unless extended or earlier terminated. The Commercial Operations Period shall commence not later than eighteen (18) months from Effective Date.

21.2. **Volume.** Under the Bidding Documents and the PSA, DMPC is required to supply power to MASELCO with a GDC of 13,000 kW. The GDC is computed to ensure that DMPC meets MASELCO's projected peak demand requirements.

21.3. **Payment for Energy.** MASELCO shall only pay for actual energy delivered, and not on a take or pay basis, except in extraordinary circumstances as provided in the PSA. In exceptional circumstances, payments shall be based on a pre-defined Net Expected Energy ("NEE").

21.4. **True Cost Generation Rate and Subsidized Rate.** DMPC's True Cost Generation Rate (TCGR) is based on its bid price of PhP 7.0700/kWh (consisting of Capacity, Operations and Maintenance Rate and Energy Fee), subject to adjustments based on Philippine and US Consumer Price Index, the weighted average cost of fuel in the Philippines and foreign exchange rates. MASELCO's payments, pursuant to the ERC Resolution, shall still be at the ERC-approved Subsidized Approved Generation Rate ("SAGR") for Masbate which is currently at PhP 5.11/kWh, as approved by the Honorable Commission on 04 December 2004 through its Order in ERC Case No. 2004-449. The excess of DMPC's TCGR above the SAGR shall be recovered by DMPC through the UC-ME Subsidy.

VI. JUSTIFICATION FOR THE APPROVAL OF THE PSA AND NPP TCGR

- A. The NPP-TCGR (including any adjustment mechanism for variable costs and inflation) set in the PSA, with Reference to the BNE Rate is Fair and Reasonable**

22. The Total Fee represents the total amount billed to MASELCO for energy supplied by DMPC. The Total Fee is composed of (i) Capacity, Operations and Maintenance Fee, which is monthly adjusted to reflect changes in the consumer price index and foreign exchange, and (ii) Energy Fee, which is also monthly adjusted to reflect changes in fuel prices and consumer price index. The Total Fee is computed using the following formula:

$$TF_t = COMF_t + EF_t$$

Where:

- t = Billing Month t
- TF_t = Total Fee for Billing Month t expressed in PhP
- COMF_t = Capacity, Operations and Maintenance Fee for Billing Month t calculated using Formula 3 of Schedule G of the PSA and expressed in PhP
- EF_t = Energy Fee for Billing Month t calculated using Formula 4 of Schedule G of the PSA and expressed in PhP

22.1. *Capacity, Operations and Maintenance Fee (COMF)*. Under the tariff formula in Schedule G of the PSA, the COMF is computed as follows:

$$COMF_t = ED_t \times COMR_{COD} \times [0.4 \times (XR_t / XR_{COD}) + 0.3 \times (CPI_t / CPI_{COD}) + 0.3]$$

Where:

- ED_t = Energy Delivered by Supplier during Billing Month t as determined under Section 5 of the PSA, the Dispatch Protocols and Schedule F, and expressed in kWh
- COMR_{COD}¹ = Capacity, Operations and Maintenance Rate as defined in Financial Bid Form submitted by Supplier and expressed in PhP/kWh

¹ The COMR at commencement date of Commercial Operations Period (COMR_{COD}) shall be calculated as follows:

$$COMR_{COD} = COMR \times [0.9 \times (XR_{COD} / XR_0) + 0.1 \times (CPI_t / CPI_{COD})]$$

Where:

- COMR = Capacity, Operations and Maintenance Rate as defined in Financial Bid Form submitted by Supplier and expressed in PhP/kWh

- XR_t = Average USD to PhP exchange rate during the month immediately before the Billing Month t as reported by the Bangko Sentral ng Pilipinas
- XR_{COD} = Average USD to PhP exchange rate during the month immediately before the commencement date of Commercial Operations Period and reported by the Bangko Sentral ng Pilipinas
- CPI_t = Monthly Consumer Price Index for the Philippines for All Income Households (All Items) as reported by the National Statistics Office (NSO) during the month immediately before the Billing Month t
- CPI_{COD} = Monthly Consumer Price Index for the Philippines for All Income Households (All Items) as reported by the National Statistics Office (NSO) during the month immediately before the commencement date of Commercial Operations Period

22.2. **Energy Fee.** This represents the cost of fuel consumed in generating power supplied to MASELCO and is computed as follows:

$$EF_t = \sum_i ED_t \times (ER \times ED_{t(i)} / ED_t \times I_{(i)})$$

Where:

- ED_t = Energy Delivered from all generation sources during Billing Month t, expressed in kWh
- ER = Energy Rate as defined in Financial Bid Form submitted by Supplier and expressed in PhP/kWh
- $ED_{t(i)}$ = Energy Delivered from generation source (i) during Billing Month t, expressed in kWh
- $I_{(i)}$ = Index for fuel type (i)

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- XR_{COD} = Average USD to PhP exchange rate during the month immediately before the commencement date of Commercial Operations Period and reported by the Bangko Sentral ng Pilipinas
- XR_0 = Average USD to PhP exchange rate during the month immediately before the Bidding Date as reported by the Bangko Sentral ng Pilipinas
- CPI_{COD} = Monthly Consumer Price Index for the Philippines for All Income Households (All Items) as reported by National Statistics Office (NSO) during the month immediately before the commencement date of Commercial Operations Period
- CPI_0 = Monthly Consumer Price Index for the Philippines for All Income Households (All Items) as reported by the National Statistics Office (NSO) during the month immediately before the Bid Date

If (i) = renewable generation source $I_{(i)} = 1$

If (i) = oil-based consuming generation source $I_{(i)} = (MOPS_t/MOPS_o)$

Where:

$MOPS_t$ = Average of the daily Mean Oil Platts Singapore (MOPS) for Fuel Oil reported in US Dollars per barrel during the month immediately before the Billing Month t and converted to PhP at the USD to PhP average exchange rate during the month immediately before the Billing Month t reported by the Bangko Sentral ng Pilipinas

$MOPS_o$ = 44.2917 USD/bbl

If (i) = coal-consuming generation source $I_{(i)} = (CPI_t/CPI_o)$

Where:

CPI_t = Monthly Consumer Price Index for the Philippines for All Income Households (All Items) as reported by National Statistics Office (NSO) during the month immediately before the Billing Month t

CPI_o = Monthly Consumer Price Index for the Philippines for All Income Households (All Items) as reported by the National Statistics Office (NSO) during the month immediately before the Bid Date

23. The NPP-TCGR for Billing Month t shall then be calculated using the formula below:

$$TCGR_t = TFt/EDt$$

Attached as **Annex T** is a summary of the methodology used by DMPC to arrive at the determination of the TCGR under the PSA and TA. It also contains information regarding the debt or equity ratio, capital costs, weighted average cost of capital, and fuel cost, among other information.

24. Pursuant to the ERC Guidelines, MASELCO shall pay to DMPC only the Subsidized Approved Generation Rate (“SAGR”). The SAGR for Billing Month t is computed as follows:

$$SAGR_t = SAGR_{t-1} \times (1 + T)^{\left(\frac{m}{12}\right)}$$

Where:

$t-1$ = Previous Billing Month

m = Number of months in between $t-1$ and t

$SAGR_{t-1}$ = SAGR for Billing Month $t-1$ expressed in PhP/kWh. If the Energy Regulatory Commission (ERC) has approved a new SAGR during Billing Month $t-1$, then $SAGR_{t-1}$ shall be equal to the SAGR approved by the ERC during Billing Month $t-1$

$SAGR_t$ = SAGR for Billing Month t expressed in PhP/kWh

T = Transition Index, if applicable, as defined by the Energy Regulatory Commission. If the Energy Regulatory Commission has defined a Transition Index then T would be equal to 0 (zero)

25. After the TCGR and SAGR for the applicable month are determined, the OFFTAKER’s Fee and Subsidy Fee under the PSA are then calculated as follows:

25.1. If $TCGR_t > SAGR_t$ then –

OFFTAKER shall pay SUPPLIER an OFFTAKER Fee (OF) for Billing Month t expressed in PhP and determined as:

$$OF_t = SAGR_t \times ED_t$$

Where:

OF_t = OFFTAKER Fee for Billing Month t

$SAGR_t$ = Subsidized Approved Generation Rate for Billing Month t as determined by Formula 6 in Schedule G

ED_t = Energy Delivered by SUPPLIER during Billing Month t as determined by Section 5, the Dispatch Protocols and Schedule F

NPC-SPUG shall pay SUPPLIER a Subsidy Fee (SF) for Billing Month t expressed in PhP and determined as:

$$SF_t = TF_t - OF_t$$

Where:

SF_t = Subsidy Fee for Billing Month t

TF_t = Total Fee as determined by Formula 1 in Schedule G of the PSA

25.2. In all other cases –

OFFTAKER shall pay SUPPLIER an OFFTAKER Fee (OF) for Billing Month t expressed in PhP and determined as:

$$OF_t = TF_t$$

B. UC-ME Subsidy is reduced with the entry of DMPC as MASELCO's NPP; hence, resulting in savings for end-users

26. With DMPC as the NPP of MASELCO, there will be a substantial reduction in the missionary electrification subsidy, as compared with NPC continuing to provide power supply to MASELCO. This results in savings for each end-user as there is a proportionate decrease in the missionary electrification portion of the Universal Charge being shouldered by all end-users.

27. The comparison below shows the subsidy requirement of DMPC versus NPC and the resulting savings in the UC-ME subsidy as a result of the entry of DMPC as MASELCO's NPP:

Area	SAGR (a)	NPC Cost of Generation based on ERC Case No. 2006-004 (PhP/kWh) (b)	NPC's estimated Subsidy Requirement (PhP/kWh) (c)	DMCI TCGR (PhP/kWh) (d)	DMCI Estimated Subsidy Requirement (PhP/kWh) (e)	Savings in the UC-ME Subsidy (PhP/kWh) (f)
			$c = b - a$		$e = d - a$	$f = c - e$
Masbate	5.1167	10.7878	5.6711	7.0700	1.9533	3.7178
						PhP 178,454,400²

² Estimated annual savings based on estimated 2008 NPC sales to MASELCO of 48,000,000 kWh.

C. The Risks Associated with the Supply of Electricity such as Those Pertaining to the Economic Conditions of the Country, Foreign Exchange Fluctuations, Changes in World Crude Prices, and the Like are Efficiently Allocated Between the EC and the NPP

28. The risks associated with the supply of electricity are efficiently allocated between the EC and the NPP and the same is sufficiently addressed in the PSA and its Supplements. The risks identified in the PSA and the appropriate remedies are summarized in the table below. The table shows that the risks are met with appropriate remedies which also give the parties some latitude to renegotiate the terms of the PSA.

Risk	Allocation & Remedy
Non-political force majeure < 90 days	<ul style="list-style-type: none"> ➤ SAGR & Subsidy payment made on actual energy delivered ➤ PSA term extended kWh for kWh
Non-political force majeure > 90 days	<ul style="list-style-type: none"> ➤ 30 day consultation period ➤ SAGR & Subsidy payment made on actual energy delivered ➤ Either party may terminate if events of Force Majeure subsist beyond 30 day consultation period. EC can opt to purchase NPP assets (credit enhancement being considered)
Political force majeure (including subsidy shortfall)	<ul style="list-style-type: none"> ➤ SAGR & Subsidy paid based on take or pay arrangement ➤ Contract opener ➤ Either party may terminate, Government/NPC/EC buy-out (credit enhancement being considered) and/or NPP can remove assets
Supplier default	<ul style="list-style-type: none"> ➤ 90 day cure period ➤ SAGR & Subsidy payment on actual energy delivered ➤ Draw on Supplier's performance bond ➤ EC step-in rights (for 90 days) ➤ EC can terminate and can opt to purchase NPP assets (credit enhancement being considered) ➤ Supplier pays termination fee in the amount of outstanding performance bond
Off-taker default except payment security default	<ul style="list-style-type: none"> ➤ 90 day cure period ➤ SAGR & Subsidy paid based on take or pay arrangement ➤ Supplier to provide technical assistance ➤ Supplier may terminate, Government/NPC/EC buy-out (credit enhancement being considered) and/or NPP can re-deploy assets

Off-taker (EC) payment security default	<ul style="list-style-type: none"> ➤ Draw on EC Payment Security (Standby Letter of Credit with the National Electrification Authority) ➤ Cure period up to 12 months depending on amount of payment security ➤ Supplier may terminate, management strengthening program / Government/NPC/EC buyout (credit enhancement being considered) and/or NPP can re-deploy assets
Change in relevant laws (regulatory framework, etc) and extraordinary increase in insurance premium	<ul style="list-style-type: none"> ➤ EC and Subsidy pay Fees on energy delivered ➤ Contract cost opener to preserve NPP's return
Market Downturn (EC dispatch < [90%] of Net Expected Energy for 6 consecutive months)	<ul style="list-style-type: none"> ➤ EC and Subsidy pay Fees on energy delivered ➤ [Considering backing payment for a specific range of guaranteed off-take by LGUGC] ➤ Contract opener ➤ Supplier may terminate, EC buy-out (credit enhancement being considered) and/or NPP can re-deploy assets

VII. STATEMENT OF FACTS
ATTENDANT TO THE APPROVAL OF THE TRANSITORY AGREEMENT

29. Under the PSA, DMPC is responsible to initially install a coal-fired power plant (and later bunker-fuel/diesel-fired power plant) to supply the electricity requirements of MASELCO. The construction of a coal-fired power plant, however, was met with strong opposition from the City Government of Masbate City and the Provincial Government of Masbate.

30. On 15 September 2008, the *Sangguniang Panlungsod* of the City of Masbate passed Resolution No. 079-08 opposing the construction of a coal-fired power plant within the city. This was followed by the passage of *Sangguniang Panlalawigan* Resolution No. 078-2008 dated 13 October 2008 which likewise expressed opposition to the construction and operation of a coal-fired power plant within the province.

A copy of Resolution No. 079-08 and Resolution Number 078-2008 are attached hereto as **Annex U** and **Annex U-1**, respectively.

31. The unexpected delay in the PSA's implementation arising from the local opposition to the proposed coal-fired power plant caused the lapse of the period to comply with the conditions precedent for Effective Date under the PSA without all the conditions precedent being complied with.

32. Despite this setback, DMPC and MASELCO remained committed in pursuing the project and implementing the PSA. Given the local opposition to the construction and operation of a coal-fired power plant, DMPC and MASELCO agreed for DMPC to construct instead a bunker-fired/diesel-fired power plant to meet the power supply requirements of Masbate under the PSA. As of today, DMPC's bunker-fired power plant is virtually complete and is almost ready to commercially operate.

Attached as **Annexes V and V-1** are pictures of the bunker-fired/diesel-fired power plant.

33. Due to other issues which caused a standstill in the PSA's implementation, the relevant government agencies intervened and a meeting was held on 29 July 2009 between DMPC, MASELCO, the DOE, NPC and NEA. In said meeting, the

parties committed to take measures that will pave the way for the smooth implementation of the PSA.

A copy of the minutes of the meeting held between DMPC, MASELCO, the DOE, NPC and NEA is attached as **Annex W**.

34. Pursuant to the foregoing meeting, DMPC and MASELCO entered into a Reinstated and Amendment to the Power Supply Agreement dated 19 October 2009 ("Reinstated PSA"). The Reinstated PSA provides, among others, for (i) the reinstatement of the PSA, (ii) the extension of time to comply with the conditions precedent to Effective Date, (iii) the waiver of certain conditions precedent under the PSA, and (iv) the change in power generation technology from a coal-fired to a bunker-fired/diesel-fired power plant.

A copy of the Reinstated PSA is hereto attached as **Annex I-1**.

35. In order to clarify their intention in entering into the Reinstated PSA and to further define their respective rights and obligations under the PSA, DMPC and MASELCO entered into a Transitory Agreement (“TA”) dated 3 March 2010. The TA was entered into by DMPC and MASELCO as a temporary measure to ensure the reliability and security of power supply in MASELCO’s Franchise Area while DMPC cannot yet construct the coal-fired power plant contemplated under the PSA due to opposition from concerned local government units. Thus, the term of the TA is for a short period of five (5) years. During this period, DMPC will operate its bunker-fired/diesel-fired power plant to provide power supply to MASELCO until the opposition on the construction of its coal-fired power plant is resolved.

36. The parties thereafter entered into a Supplement to the TA dated 26 March 2010 which provides for the generation rate that will apply during the implementation of the TA.

A copy of the TA and Supplement to the TA are attached hereto as **Annexes I-2** and **I-3** respectively.

37. Subsequent to the execution of the Reinstated PSA, the TA, and Supplement to the TA, the DOE, through the Secretary of Energy, confirmed that the TA has basis under the original PSA and issued a confirmation letter to DMPC stating that there is no need for the DOE to issue another certification on the CSP, as the DOE had previously issued such certification to MASELCO when it underwent the CSP to determine DMPC as its new private provider.

A copy of the DOE confirmation letter is attached as **Annex X**.

38. **Salient features of the TA**

38.1. **Term.** The TA has a term of five (5) years commencing on the date of its execution. At anytime during the Term of the TA, DMPC and MASELCO shall reevaluate the political and social situation in Masbate to determine if the circumstances then prevailing will permit DMPC to proceed with the installation of the coal-fired power plant under the original PSA. If it is determined that the coal-fired power plant cannot be completed prior to the lapse of the term of the TA, the parties may extend the term of the Transitory Agreement, amend the existing PSA or terminate the TA.

Except as otherwise expressly indicated in the TA, the terms and conditions of the PSA shall similarly apply during the Term of the TA.

38.2. **Volume.** During the Term of the TA, DMPC is still required to provide MASELCO with a GDC of 13,000 kW. The GDC is computed to ensure that DMPC meets MASELCO's projected peak demand requirements.

38.3. **True Cost Generation Rate and Subsidized Rate.** During the Term of the TA, MASELCO agreed to avail of the generating capacity of DMPC's bunker-fired/diesel-fired power plant. The power generation rate shall be in accordance with the rate specified under the Supplement to the TA dated 26 March 2010, as discussed further below, which as of the date of the Application, is at PhP 8.4417.

For purposes of computing the generation rate during the Term of the TA, the following formula shall be applied which is consistent with the formula

structure in the PSA, except for changes in reference indexes due to change in the fuel:

$$\text{TGC} = \{[(\text{COMR}_t \times (1 + \text{VAT})) + \text{BHC}] \times \text{BD}\} + \text{Fuel}$$

Where:

TGC = Total Generation Fee to be billed to Offtaker for the Subsidized Approved Generation Rate and to the National Power Corporation for the amount of Subsidy

COMR_t = Capacity and O&M Rate to be adjusted on a monthly basis using the formula provided below

BHC = Benefits to Host Communities or ER-194 equivalent to P0.01/kWh, or as adjusted

BD = Billing Determinant or the total kWh sold to Offtaker for any billing month, as measured at the entry point of NPC Primary Voltage of 69 kV 10MVA Receiving Substation or any other entry point as agreed upon by the parties.

Fuel = Actual Fuel Cost, inclusive of freight, insurance and duties, charged on a pass through basis subject to a gross fuel consumption rate equivalent to 0.26li/kWh for bunker and 0.28li/kWh for diesel

The Monthly Capacity and O&M Rate is computed as follows:

$$\text{COMR}_t = \text{COMR}_b \times [(40\% \times (\text{XR}_t/\text{XR}_b)) + (30\% \times (\text{CPI}_t/\text{CPI}_b)) + 30\%]$$

Where:

COMR_b = Base Capacity and Operating & Maintenance Rate as of February 2010 equivalent to PhP 3.6507/kWh for the 2 x 6.2 MW Bunker-fired Power Plant and 6 x 2 MW Back-up generators;

XR_t = Average United States Dollars (USD) to PhP exchange rate for the month immediately before the Billing Month *t* as reported by the Bangko Sentral ng Pilipinas

XR_b = Base Average United States Dollars (USD) to PhP exchange rate equivalent to PhP 46.3116, which is the average USD to PhP exchange rate for the month of February 2010

CPI_t = Monthly Consumer Price Index for the Philippines for all Income Households (All Items) as reported by the National Statistics Office (NSO) during the month immediately before Billing Month *t*; and

CPIb = Base Monthly Consumer Price Index for the Philippines for all Income Households (All Items) as reported by the National Statistics Office (NSO) equivalent to 164.6, which is the CPI for the month of February 2010

38.4. Pursuant to the ERC Guidelines, MASELCO shall pay to DMPC only the SAGR during the Term of the TA, using the formula as discussed in paragraph 24 and 25 hereof.

39. **Characteristics of the power capability and connection facility.** DMPC's power plant during the TA is rated at 24.4 MW installed capacity and 20.6 MW dependable capacity.

The relevant technical specifications of the transmission and delivery facilities are likewise specifically described in **Annex Y**.

40. **Details of the Applicants' Transmission/Connection Facilities.** DMPC's power plant will be connected to MASELCO's distribution system via 13.2kV line from the plant to MASELCO's feeder line.

Based on the 29 July 2009 meeting between DMPC, MASELCO, DOE, NEA and NPC, among NPC's obligations is to install a 69 kV sub-transmission line within seven (7) months to one (1) year to connect DMPC's power plant to MASELCO's substations. On the other hand, MASELCO is responsible for constructing said substations together with NPC's construction of the 69 kV sub-transmission line to ensure that the line will immediately be utilized once it has been installed.

41. **Details of the procurement process of fuel.** As earlier stated, DMPC's power plant runs on bunker and diesel fuel. DMCI is still in the process of negotiation with various suppliers for fuel that it intends to utilize for its power plant. Attached hereto as **Annex Z** is a certification that DMPC is committed to procure and enter into fuel supply agreements at the least possible cost.

42. In compliance with the ERC Rules of Practice and Procedure, the following documents are likewise submitted:

Document	Annex
Audited Financial Statement of DMPC	AA
Certification on the heat rate of generating units	BB
Certification on long-term loans	CC
General Information Sheet of DMPC	DD

VIII. CONFIDENTIAL TREATMENT OF ANNEX T

43. Considering the confidential nature of **Annex T**, as the numbers, methodology, and calculations contained therein would provide valuable information reflecting DMPC's investment strategy, DMPC respectfully requests that **Annex T** be treated as a confidential document. In accordance with Section 1(b), Rule 4 of the ERC Rules of Practice and Procedure, Applicant DMPC hereby submits one (1) copy of **Annex T** in a compact disc, stamped with the word "Confidential."

44. Under Rule 4 of the ERC Rules of Practice and Procedure, the Honorable Commission may, upon request of a party and determination of the existence of conditions which would warrant such remedy, treat certain information submitted to it as confidential. Pursuant to such provision, DMPC respectfully requests for the issuance

of a protective order declaring **Annex T** as confidential information, as the Applicants intend to present it as evidence in the instant Application.

45. Even though it will be treated as a confidential document and a protective order will be issued, the rules do not preclude the parties of record or their lawyers access to such confidential information after agreeing to be bound by the terms of the protective order.

46. The data contained in **Annex T** constitute “trade secrets” of Applicant DMPC; thus, DMPC has actual and valuable proprietary interest to protect with respect to such information. The Supreme Court, in the recent case of *Air Philippines Corporation vs. Pennswell, Inc.*³, had the opportunity to discuss the definition of “trade secrets” and the great extent to which the same are protected under our laws.

47. In the *Air Philippines* case, the Supreme Court emphasized the status of trade secrets as protected information, shielded from disclosure except for the most pressing of reasons. The Supreme Court stated unequivocally that trade secrets are of a privileged nature, as is evident from the protection that is afforded them in our laws, including the Revised Penal Code, the Securities Regulation Code, the National Internal Revenue Code of 1997, and the Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990. The Supreme Court went on to state:

“Clearly, in accordance with our statutory laws, this Court has declared that intellectual and industrial property rights cases are not simple property cases. Without limiting such industrial property rights to trademarks and trade names, this Court has ruled that all agreements concerning intellectual property are intimately connected with economic development. The protection of industrial property encourages investments in new ideas and inventions and stimulates creative efforts for the satisfaction of human needs. It speeds up transfer of technology and industrialization, and thereby bring about

³ 540 SCRA 215 [2007]

social and economic progress. Verily, the protection of industrial secrets is inextricably linked to the advancement of our economy and fosters healthy competition in trade.

Jurisprudence has consistently acknowledged the private character of trade secrets. There is a privilege not to disclose one's trade secrets. Foremost, this Court has declared that trade secrets and banking transactions are among the recognized restrictions to the right of the people to information as embodied in the Constitution. We said that the drafters of the Constitution also unequivocally affirmed that, aside from national security matters and intelligence information, trade or industrial secrets (pursuant to the Intellectual Property Code and other related laws) as well as banking transactions (pursuant to the Secrecy of Bank Deposits Act), are also exempted from compulsory disclosure.”⁴ (Emphasis supplied.)

IX. ISSUANCE OF A PROVISIONAL AUTHORITY

48. **Provisional Authority under the Rules.** Under Rule 14 of the ERC Rules of Practice and Procedure, the Honorable Commission is authorized to issue a provisional authority or interim relief prior to a final decision in the instant Application, provided that the facts and circumstances alleged warrant such remedy.

49. **Factual Grounds for issuance of Provisional Authority.** As mentioned above, DMPC and MASELCO entered into the TA to immediately ensure the security and reliability of power supply in MASELCO’s Franchise Area considering the passage of the resolutions opposing the construction of a coal-fired power plant in Masbate. The issuance of a provisional approval will redound to the following benefits:

49.1. **Reduction in the UC-ME Subsidy.** There will be a substantial reduction in the missionary electrification subsidy, as compared with NPC continuing to provide power supply to MASELCO, during the term of the TA and during the term of the PSA. During the TA, this results in savings for each end-user as there is a proportionate decrease in the missionary electrification portion

⁴ 540 SCRA 215, 237-239

of the Universal Charge being shouldered by all end-users, as shown in the table below:

Area	SAGR (a)	NPC Cost of Generation based on ERC Case No. 2006-004 (PhP/kWh) (b)	NPC's estimated Subsidy Requirement (PhP/kWh) (c) c = b - a	DMCI TCGR (PhP/kWh) (d)	DMCI Estimated Subsidy Requirement (PhP/kWh) (e) e = d - a	Savings (PhP/kWh) (f) f = c - e
Masbate	5.1167	10.7878	5.6711	8.4417	3.3250	2.3461
						PhP 112,612,800⁵

49.2. **Reliable and Steady Power Supply during the May 2010**

Elections. The issuance of a provisional approval in the instant Application will ensure a reliable and steady power supply in MASELCO's Franchise Area during the May 2010 elections. Areas under the Franchise Area have already experienced frequent brownouts and power interruptions due to load shedding caused by shortage in power supply. The granting of a provisional authority in the instant Application would definitely provide the needed supply of power to at least minimize power interruptions in MASELCO's Franchise Area. Given that Masbate has always been an election hotspot, the reliability of power supply leading to, during and after the May 10, 2010 elections will serve to minimize election-related incidences that may occur should there be power interruptions.

50. **Legal Basis for the Grant of Provisional Authority.** Applicants likewise respectfully submit that Section 3, Rule 14 of the Honorable Commission's Rules of Practice and Procedure clearly provides legal basis for the grant of provisional authority, as it expressly states that "motions for provisional authority or interim relief may be acted upon with or without hearing."

⁵ Estimated annual savings based on estimated 2008 NPC sales to MASELCO of 48,000,000 kWh.

50.1. The aforesaid rule further provides that the Honorable Commission shall act on the motion on the basis of the allegations of the application or petition and other pieces of evidence that the Applicants have submitted and the comments filed by any interested person, if there be any.

50.2. The authority of the Honorable Commission to grant a provisional authority has been clearly affirmed by the Supreme Court in the case of *Freedom from Debt Coalition vs. Energy Regulatory Commission* (432 SCRA 157) where the Supreme Court has stressed that the Honorable Commission is endowed with the statutory authority to approve provisional rate adjustments under the aegis of Sections 44 and 80 of the Electric Power Industry Reform Act, in relation to Section 16 (c) of the Public Service Act and Section 8 of E.O. No. 172.

50.3. Verily, in the *Freedom from Debt Coalition* case, when confronted with the issue of whether the Honorable Commission exercised grave abuse of discretion in granting provisional rate adjustment, the Supreme Court emphasized that “like Section 16 (c), C.A. No. 146 and Section 8, E.O. No. 172, Section 4 (e), Rule 3 of the IRR does not require the conduct of a hearing prior to the issuance of a provisional order.”

50.4. Considering the foregoing, there is clear and sufficient basis that the issuance of a provisional authority or interim relief pending the issuance of a final order or decision in the instant Application is imperative.

51. In view of all the foregoing, Applicants respectfully submit the instant Application for the Honorable Commission’s urgent and utmost consideration.

PRAYER

WHEREFORE, in view of all the foregoing, it is most respectfully prayed that this Honorable Commission issue an order:

1. granting provisional approval/authority for the parties to implement the provisions of the Transitory Agreement pending the issuance of a final resolution in the instant Application;

2. approving the Transitory Agreement between DMPC and MASELCO;

3. approving the Power Supply Agreement between DMPC and MASELCO dated 4 May 2007, as amended, to commence upon the lapse of the Term of the Transitory Agreement;

4. approving the NPP-TCGR provided for in the PSA and the TA;

5. directing NPC to grant and disburse the appropriate subsidy requirement to DMPC for the difference between DMPC TCGR and SAGR for MASELCO; and

6. treating **Annex T** as confidential information pursuant to Rule 4, Section 1 of the ERC Rules of Practice and Procedure and prescribing the guidelines for the protection thereof.

Other reliefs just and equitable are likewise prayed for.

Makati City and Masbate for Pasig City 7 May 2010.

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