

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

IN THE MATTER OF THE APPLICATION FOR THE APPROVAL OF THE SUPPLEMENTAL AGREEMENT TO THE CONTRACT FOR THE SUPPLY OF ELECTRIC ENERGY BETWEEN DAGUPAN ELECTRIC CORPORATION AND MASINLOC POWER PARTNERS CO. LTD., WITH PRAYER FOR ISSUANCE OF PROVISIONAL AUTHORITY

ERC CASE NO. 2010-092RC

DAGUPAN ELECTRIC CORPORATION AND MASINLOC POWER PARTNERS CO. LTD.

Applicants.

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APPLICATION

Applicants Dagupan Electric Corporation (“DECORP”) and Masinloc Power Partners Co. Ltd. (“MPPCL”), by undersigned counsels, respectfully state:

I. THE APPLICANTS

1. Dagupan Electric Corporation is a privately-owned electric distribution utility which is registered under the Securities and Exchange Commission (“SEC”), with principal office address at A.B. Fernandez West, Dagupan City, Province of Pangasinan. DECORP has been granted a franchise to distribute electric service in the City of Dagupan, Municipalities of Calasiao, Sta. Barbara, San Fabian, San Jacinto, Manaoag, and Barangays Cruz and Bolingit of San Carlos City, Pangasinan (the “Franchise Area”).

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

Document	Annex
<i>Amended Articles of Incorporation</i>	A
<i>Amended By-laws</i>	B
<i>Registration with the SEC</i>	C
<i>Republic Act No. 3221 granting DECORP franchise for an electric light, heat and power system in the Municipality of Calasiao and Dagupan City in</i>	D

<i>Pangasinan.</i>	
<i>Republic Act No. 4013 granting DECORP franchise for an electric light, heat and power system in the Municipalities of Sta. Barbara, San Jacinto, and San Fabian in Pangasinan.</i>	D-1
<i>Certificate of Franchise for San Fabian, San Jacinto, and Sta. Barbara issued by the National Electrification Commission</i>	D-2
<i>Certificate of Franchise for Manaoag issued by the National Electrification Commission</i>	D-3
<i>Certificate of Franchise for Barangays Bolingit and Cruz, San Carlos City issued by the National Electrification Commission</i>	D-4

2. MPPCL is a limited partnership established in the Philippines to invest in, acquire, finance, complete, construct, develop, improve, operate, maintain, and hold power production and electric generating facilities in the country, with principal office address at Barangay Bani, Masinloc, Zambales.

MPPCL is a subsidiary of The AES Corporation, a global power generation and power distribution company with assets in twenty eight (28) countries in Asia, North America, South America, Europe and Africa.

3. MPPCL acquired and took over the operations of the Masinloc Coal-Fired Thermal Power Plant (“Masinloc Power Plant”), a six hundred megawatt (600 MW) power plant located in Masinloc, Zambales, through a competitive bidding process managed by the Power Sector Assets and Liabilities Management Corporation (“PSALM”).

Copies of relevant documents proving the due registration and permit to operate of MPPCL as a generation company are attached herewith as follows:

Document	Annex
<i>Amended Articles of Limited Partnership</i>	E
<i>Board of Investments Certificate of Registration dated 3 March 2008</i>	F
<i>Environmental Compliance Certificate No. 9009-049-206C for the Masinloc Power Plant</i>	G
<i>Letter from the Department of Environment and Natural Resources dated 23 July 2008 approving transfer of ownership of the ECC to MPPCL</i>	H
<i>Certificate of Compliance</i>	I

4. The Applicants may be served orders and other processes through the undersigned counsels, at their addresses indicated herein below.

II. NATURE OF THE APPLICATION

5. Pursuant to Rule 20 (B) of the ERC Rules of Practice and Procedure, approved by this Honorable Commission on 22 June 2006 in Resolution No. 38, Series of 2006, this Application is submitted to the Honorable Commission for its review and approval of the Supplemental Agreement to the Contract for the Supply of Electric Energy (“SA”), dated 28 June 2010, executed by DECORP and MPPCL.

A copy of the SA is attached hereto as Annex “J.” The Contract for Supply of Electric Energy dated 7 December 2009 is attached as **Annex “J-1.”** Likewise attached as Annex “J-2” is a summary of the relevant terms of the SA.

Also attached herewith as Annexes “K” and “K-1” are the respective board and partner’s resolutions of DECORP and MPPCL approving the execution of the SA by the parties.

III. COMPLIANCE WITH PRE-FILING REQUIREMENTS

6. 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 Pangasinan, with a copy of the instant Application, and accompanying documents.

Certifications from the Presiding Officer or Secretary of the respective legislative bodies of the local government units within the Franchise Area, and the *Sangguniang Panlalawigan* of Pangasinan, or their duly authorized representatives, attesting to the fact of such service will be attached hereto as follows:

Certification of Presiding Officer/Duly Authorized Representative	Annex
Calasiao	L
Dagupan City	L-1
Manaoag	L-2
San Carlos City	L-3
San Fabian	L-4

San Jacinto	L-5
Sta. Barbara	L-6
<i>Sangguniang Panlalawigan Pangasinan</i>	L-7

7. Furthermore, Applicants have caused the publication of the present Application in its entirety in a newspaper of general and national circulation which includes DECORP's franchise area.

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

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

IV. STATEMENT OF FACTS

8. The provisions of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 ("EPIRA"), called for the privatization of the power generation assets of the National Power Corporation ("NPC") in order to promote competition in the power sector and to reduce the price of electricity in the Philippines. The Masinloc Power Plant was one of the power generation assets of the NPC that was already privatized.

9. MPPCL acquired the Masinloc Power Plant as it was the winning bidder in the competitive bidding process managed by PSALM. The acquisition was perfected through an Asset Purchase Agreement ("APA") dated 26 July 2007.

10. DECORP has an existing Transition Supply Contract with NPC ("NPC TSC") which is set to expire on July 2010. DECORP planned the reduction of its TSC off-take starting 2010 by about fifty percent (50%) in pursuance of its program to participate in the Wholesale Electricity Spot Market ("WESM") as well as in anticipation of the Retail Open Access.

11. DECORP previously entered into a Power Purchase and Sale Agreement dated 7 July 2006 ("PPSA") with GNPOWER Limited Company ("GNPOWER") whereby the latter is expected to deliver the power requirement of DECORP upon the expiration of the NPC TSC. Said PPSA was approved by the Honorable Commission under ERC Case No. 2007-088 RC.

12. As the applicants have indicated in ERC Case No. 2007-088 RC, GNPOWER will commence providing the power requirements of its customer distribution utilities, including DECORP, in late 2010 or 2011. The latest feedback of DECORP from GNPOWER, however, indicates that the commercial operation of GNPOWER'S power plant will be delayed and GNPOWER may only be able to commence operation by January 2013.

13. As such, to ensure the security of power supply in DECORP'S Franchise Area given its additional power supply requirements and in anticipation of the expiry of the NPC TSC, and at the same time, further reduce the generation charge being paid by its customers, DECORP undertook a competitive selection process by inviting interested entities to supply its power requirements in its Franchise Area. The said competitive selection was conducted as follows:

13.1. DECORP published the Invitation to Bid for its power requirements on 02 October 2009 in The Daily Tribune, a newspaper of general and national circulation in the Philippines. The invitation indicates the specific power supply requirements of DECORP starting January 2010 (the billing period to start on 26 December 2009 and to end on 25 January 2010) subject of the bid and the term of the power supply contract which shall be for a minimum of three years.

The corresponding Affidavit of Publication and newspaper issue containing the published invitation are attached hereto as follows:

Document	Annex
Affidavit of Publication	N
Copy of the Daily Tribune dated 2 October 2009	N-1

13.2. On 6 October 2009, MPPCL submitted its letter of intent to participate in the competitive selection process.

Attached herewith as **Annex "O"** is a copy of MPPCL'S letter of intent.

13.3. On 10 November 2009, DECORP awarded to MPPCL a contract to supply DECORP'S power supply requirements.

Attached herewith as **Annex "P"** is a copy of the Notice of Award to MPPCL.

13.4. Similarly, on the same date, DECORP awarded the balance of its energy requirements to SN Aboitiz Power (“SNAP”).

14. As such, the Applicants proceeded with the signing and execution of the CSEE on 7 December 2009.

15. On 7 January 2010, the Applicants filed an Application dated 16 December 2009 before this Honorable Commission for the review and approval of the CSEE. The same was docketed as ERC Case No. 2010-005 RC.

16. Thereafter, the Applicants received a copy of the Order dated 1 February 2010, provisionally approving the aforementioned Application and authorizing the implementation of the CSEE effective January 2010. The said CSEE covers partially DECORP’s energy requirements.

17. The Applicants likewise received a copy of the Notice of Public Hearing dated 1 February 2010 setting the Application for initial hearing, expository presentation, pre-trial conference and evidentiary hearings on 1 March 2010 and 2 March 2010 at DECORP’s main office in Dagupan City. The Applicants filed their Joint Formal Offer of Evidence on 22 March 2010.

18. As above stated, DECORP sought to source the remainder of its energy requirements for a three-year period ending 2012 from SNAP. However, SNAP could not guarantee to DECORP its supply throughout the year.

19. Hence, to ensure the security of power supply of its customers in compliance with its obligation under its franchise and the EPIRA “to supply electricity in the least cost manner to its captive market, subject to the collection of retail rate duly approved by the ERC”¹, on 28 June 2010, DECORP and MPPCL signed and executed the Supplemental Agreement to the CSEE covering the balance of the energy requirements of DECORP (the “Additional Capacity”) within said three-year period. With respect to the Additional Capacity, and unless otherwise amended, the SA incorporates therein the terms and conditions of the CSEE. It is noted however, that the terms of the SA does not apply to the contract energy as indicated in the CSEE.

¹ Section 23, EPIRA

Commercial advantage of obtaining the Additional Capacity from MPPCL, MPPCL's generation rate, and justification for negotiating with MPPCL

20. DECORP concluded that it would be to the best interest of its consumers if MPPCL will supply the remainder of the energy requirements of DECORP rather than secure the same from the Wholesale Electricity Spot Market ("WESM"), as MPPCL's offer will lower the generation rates charged by DECORP on its customers, grant flexibility by providing an option to re-declare DECORP's daily Bilateral Contract Quantity for the Additional Capacity ("Additional BCQ") within a given time, provide certainty of supply and assure DECORP of a long-term competitive pricing.

20.1. A simulation was made using the actual energy profile of DECORP during the Billing Period of January to May 2010 with its actual WESM dispatch and with a separate slice of load under the contract quantities² in the CSEE and in the SA. Using this simulation, a comparison between the resulting costs from the rates offered by MPPCL, the NPC TOU tariff and the WESM prices for the same energy are shown in the table below:

Comparative Charges with Additional Capacity								
	Power Charges by Source of Supply					Total Power Cost		
	MPPCL CSEE	Additional Capacity			WESM	MPPCL CSEE + MPPCL SA + WESM	MPPCL CSEE + NPC TOU on SA + WESM	MPPCL CSEE + WESM on SA + WESM
		MPPCL SA	NPC TOU on SA	WESM on SA				
Total Energy	85,973,987	14,029,924			12,689,415	112,693,326		
January	56,212,712	16,019,240	16,057,444	14,956,112	7,768,433	80,000,384	80,038,589	78,937,256
February	72,371,771	12,780,425	12,799,989	31,392,404	11,000,949	96,153,145	96,172,709	114,765,124
March	73,999,958	11,499,370	12,543,319	27,925,796	8,229,790	93,729,118	94,773,067	110,155,544
April	86,259,773	12,732,127	12,716,319	25,011,213	7,695,453	106,687,352	106,671,544	118,966,439
May	77,701,659	20,906,277	20,943,630	33,627,119	20,105,212	118,713,148	118,750,501	131,433,990
	366,545,872	73,937,438	75,060,701	132,912,644	54,799,836	495,283,147	496,406,410	554,258,353
	Savings with MPPCL		1,123,263	58,975,206		4.3950	4.4049	4.9183
						Savings	1,123,263	58,975,206
							0.0100	0.5233

It is noted that DECORP will obtain savings from buying the Additional Capacity from MPPCL amounting to PhP 1.123 Million compared to NPC and a PhP 58.975 Million compared to the WESM.

² Based AMD and Contract Energy for first semester of 2011 considering that AMDs for first semester of 2010 can only cover less than 40% of DECORP's requirements.

20.2. It is also noted that the SA potentially grants additional savings for DECORP as it is given the flexibility to re-declare its daily Additional BCQ Nominations. Considering the limited experience in the BCQ re-declaration by DECORP, no heuristic method has been developed to conduct further aleatory analysis to highlight the savings therefrom. Nonetheless, it is not unreasonable to assume that, given the ability to “cherry pick” with BCQ re-declaration, further savings may be realized by DECORP on top of the savings shown in the above table.

20.3. Moreover, the simulation confirms that MPPCL’s offer under the CSEE is advantageous to DECORP’s end-users as may be gleaned in the table below:

Comparative Charges on Slice of Supply under CSEE							
	Energy, kWh	Amounts in PhP			Rate in PhP/kWh		
		MPPCL Net	NPC Net	Savings	MPPCL Net	NPC Net	Savings
January	14,528,321	56,212,712	59,419,979	3,207,267	3.8692	4.0899	0.2208
February	17,204,676	72,371,771	75,795,167	3,423,396	4.2065	4.4055	0.1990
March	17,146,379	73,999,958	85,177,898	11,177,940	4.3158	4.9677	0.6519
April	19,675,863	86,259,773	90,138,286	3,878,513	4.3840	4.5812	0.1971
May	17,418,747	77,701,659	81,315,060	3,613,401	4.4608	4.6682	0.2074
	85,973,987	366,545,872	391,846,389	25,300,517	4.2635	4.5577	0.2943

20.4. DECORP cannot rely on NPC or PSALM to continue supplying its power requirements after the expiration of the NPC TSC and in the event of GNPOWER’s delay, due to the anticipated insufficient supply of power in 2010 as projected by the Department of Energy (“DOE”) and the privatization of NPC’s generating assets. Even assuming that NPC is able to supply the power requirements of DECORP, the same cannot be made consistently at rates lower than MPPCL’s considering that the power plants remaining with NPC, after the privatization of its assets, are plants which are less efficient and thus more expensive to run. At the time of the signing of the SA, NPC’s effective rates for Luzon of PhP 4.3431/kWh was already higher compared to MPPCL’s basic energy rate.

20.5. Moreover, by securing the Additional Capacity from MPPCL, DECORP reduces its risk for future positive deferred accounting adjustments (“DAA”) as the regime for positive adjustments in DAA are already imminent as gleaned from recent NPC and PSALM applications.

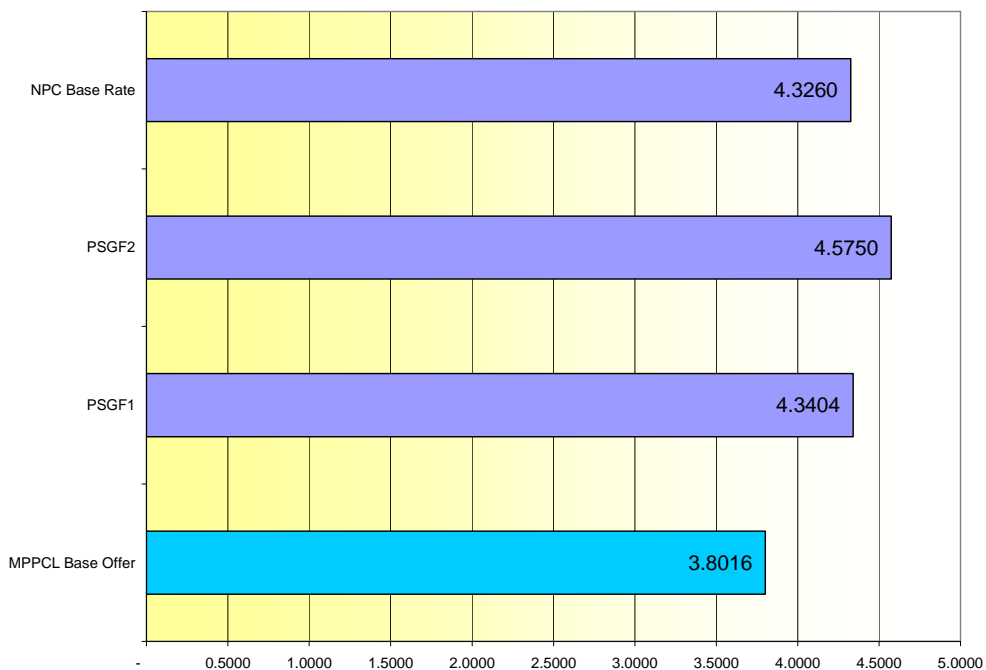
20.6. PSALM confirmed by way of certification dated 15 December 2009 that with the continuing privatization of the generation plants and considering the

privatization schedule of PSALM aimed at one hundred percent (100%) of the total generating/operating capacity in Luzon and Visayas grids by the year 2010, it can no longer economically supply the electric power requirements of DECORP.

Attached hereto as **Annex “Q”** is a copy of the PSALM Certification.

21. Moreover, MPPCL’s generation rate is more reasonable compared to other generating companies, such as NPC in the near term, and other generation companies utilizing coal as fuel in the long-run and will, in fact, generate savings for DECORP and its customers. Thus, MPPCL’s generation rate offers a competitive and advantageous rate for DECORP and its customers.

A summary analysis of the power generation rate from MPPCL compared with the power rate of other generating facilities (based on the same parameters, e.g., capacity factor, exchange rate, fuel cost), utilizing coal as fuel, is presented in tabular form below:



22. Considering the growing energy requirements of DECORP, the expiration of its NPC TSC, the projected delay in the commercial operations of GNPOWER, the inability of SNAP to guarantee energy supply to DECORP throughout the year, and the benefits granted to DECORP under the SA, in particular, the flexibility to re-declare its Additional BCQ Nominations *after* the Billing Period, DECORP decided to execute the Supplemental Agreement to the CSEE with MPPCL.

23. The foregoing commercial advantages and factual circumstances considered, on 28 June 2010, the parties entered into a Supplemental Agreement to the CSEE, which is the subject of the instant Application.

V. ABSTRACT OF THE SA AND RELATED INFORMATION

24. The following are the salient features of the SA:

24.1. **Effectivity and Term.** Subject to the approval of this Honorable Commission of the SA and its registration with the WESM as a bilateral power supply contract, MPPCL's obligation with respect to the supply of the Additional Capacity shall commence on 26 July 2010 (the "SA Operations Effectivity Date"). The SA shall automatically terminate upon the termination of the CSEE.³

24.2. **Volume.** Under the SA, MPPCL shall supply DECORP a minimum of 42,187,800 kWh Contract Energy per year for the whole term of the SA. Details regarding the volume of the Additional Allowable Maximum Demand ("AMD") and Additional Contract Energy on a monthly basis are provided for under Annex I of the SA.

a. MPPCL shall provide DECORP the Additional Allowable Maximum Demand (the "Additional AMD"), which together with the AMD under the CSEE, DECORP will dispatch in a manner that will allow it to comply with the requirements of Section 45(c) of the EPIRA, i.e. securing ninety percent (90%) power supply from bilateral supply contracts and ten percent (10%) from the WESM.

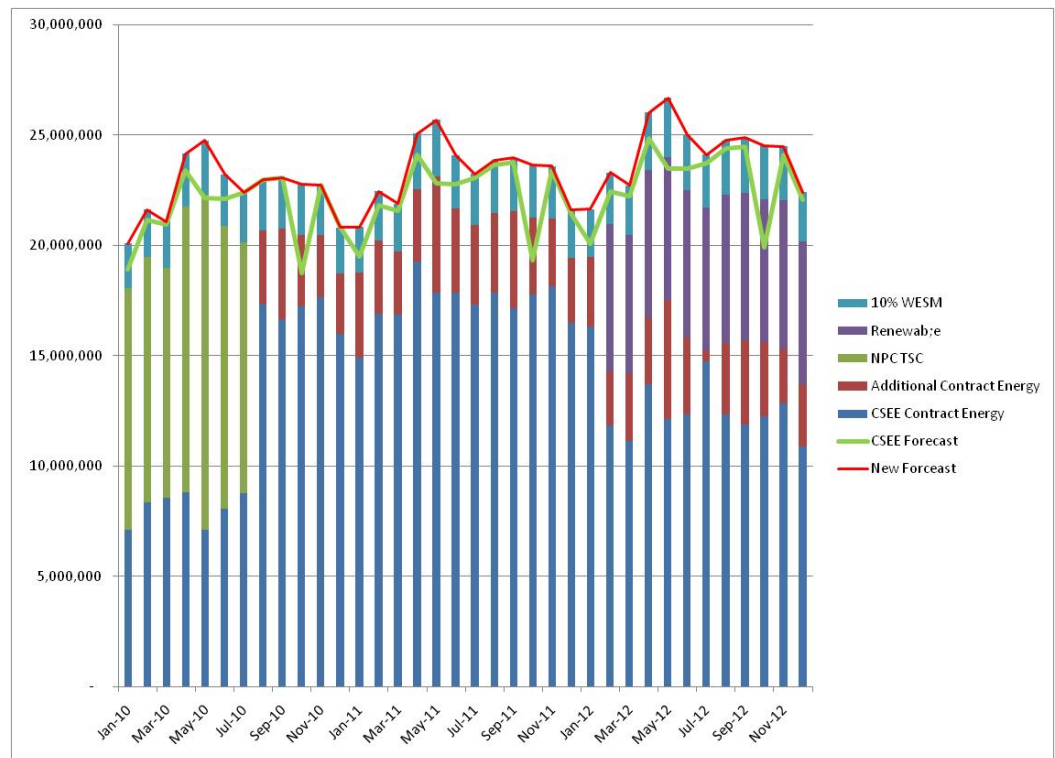
b. DECORP shall have the option to re-declare its Daily Additional BCQ Nominations for the Additional Capacity by not later than 5:00 PM of the fifth (5th) day after the Billing Period (the "Re-declaration Deadline"), provided that DECORP does not exceed the Additional AMD in any re-declaration of its Daily Additional BCQ Nominations.

³ The CSEE has a term of thirty six (36) Billing Periods counted from the Operations Effectivity Date and shall be automatically renewed and continue until the lapse of another twenty-four (24) Billing Periods or until the start of the supply of power from GNPOWER, whichever comes first, unless earlier terminated in accordance with the CSEE. Thereafter, the Parties may renew the Contract by mutual agreement in writing for two (2) successive durations of twenty-four (24) Billing Periods each.

c. The Additional Contract Energy shall be used to determine the amount that DECORP shall pay as minimum charges.

The energy and demand forecast of DECORP at the time of the signing of the CSEE, is attached hereto as **Annex “R.”** Likewise shown in **Annex “R”** is the energy forecast of DECORP at the time it entered into the SA, which shows the marked increase of DECORP’s requirements from 802 GWh forecast for 2010 – 2012.

d. Below is a chart showing the energy and demand forecast of DECORP from January 2010 to November 2012.



24.3. Charges for the Additional Capacity. For the Additional Capacity, DECORP shall pay MPPCL the monthly additional power bill (the “Monthly Additional Power Bill”), which is composed of the *Total Additional Energy Charge, TransCo Service Charge, Generation Service Charge, and Value Added Tax* applicable to the transaction, and calculated according to the methodology set out in Annex II of the SA. The Total Additional Energy Charge is composed of the MPPCL Time-of-Use (“MPPCL TOU”) Tariff, as indicated in the table below, and may be adjusted from time to time in accordance with Section 3, Annex II of the SA, multiplied by the Actual Additional Energy, and by a

Rate Adjustment Index, plus the Dispatch Flexibility Charge and the Allowable Contract Reimbursible.

Period	January - June		July - December	
	Monday - Saturday	Sunday & Holiday	Monday - Saturday	Sunday & Holiday
1:00:00 AM	1.9000	1.9000	1.9000	1.9000
2:00:00 AM	1.9000	1.9000	1.9000	1.9000
3:00:00 AM	1.9000	1.9000	1.9000	1.9000
4:00:00 AM	1.9000	1.9000	1.9000	1.9000
5:00:00 AM	1.9000	1.9000	1.9000	1.9000
6:00:00 AM	1.9000	1.9000	1.9000	1.9000
7:00:00 AM	1.9000	1.9000	1.9000	1.9000
8:00:00 AM	1.9000	1.9000	1.9000	1.9000
9:00:00 AM	5.9000	1.9000	1.9000	1.9000
10:00:00 AM	5.9000	1.9000	5.5500	1.9000
11:00:00 AM	5.9000	1.9000	5.5500	1.9000
12:00:00 PM	5.9000	1.9000	5.5500	1.9000
1:00:00 PM	5.9000	1.9000	5.5500	1.9000
2:00:00 PM	5.9000	1.9000	5.5500	1.9000
3:00:00 PM	5.9000	1.9000	5.5500	1.9000
4:00:00 PM	5.9000	1.9000	5.5500	1.9000
5:00:00 PM	5.9000	1.9000	5.5500	1.9000
6:00:00 PM	5.9000	1.9000	5.5500	1.9000
7:00:00 PM	5.9000	5.6500	5.5500	5.3000
8:00:00 PM	5.9000	5.6500	5.5500	5.3000
9:00:00 PM	5.9000	1.9000	5.5500	1.9000
10:00:00 PM	1.9000	1.9000	1.9000	1.9000
11:00:00 PM	1.9000	1.9000	1.9000	1.9000
12:00:00 AM	1.9000	1.9000	1.9000	1.9000

Attached as **Annex "S"** is a summary of the methodology used by MPPCL to arrive at the MPPCL TOU Tariff and the determination of the Total Additional Energy Charge under the SA. It also contains information regarding the capital costs, weighted average cost of capital, fuel cost, among other information.

Considering the confidential nature of **Annex "S"** as the numbers, methodology and calculations contained therein would provide valuable information reflecting the bidding strategy of MPPCL, not only for distribution utilities undertaking competitive process for their power supply requirements, but also for MPPCL's trading in the WESM, MPPCL respectfully requests that **Annex "S"** be treated as a confidential document. In accordance with Section 1(b), Rule 4 of the ERC Rules of Practice and Procedure, Applicant MPPCL hereby submits one (1) copy of **Annex "S"** in a sealed envelope, with each page of the document stamped with the word "Confidential."

a. **MPPCL Time-of-Use Tariff Rate.** The MPPCL TOU Tariff Rate may be adjusted in accordance with Section 3, Annex II of the SA, as follows:

(i) Should the Honorable Commission approve an increase in NPC Basic Generation Rate as of 25 October 2009 (the “NPC Reference Rate”), MPPCL shall be allowed to adjust the MPPCL TOU in the same amount as NPC’s rate increase. The adjustment shall be made by increasing all elements of the TOU Tariff above, by the same amount as NPC’s rate increase (the “TOU Adjustment”), provided that the TOU Adjustment shall not exceed a cumulative total of Php0.15/kWh. Only positive adjustments shall apply, except when the NPC Test Period(s) used by the ERC in its determination of a negative Basic Generation Rate adjustment cover periods after the date hereof.

(ii) If by 25 December 2011, the cumulative increases in NPC Basic Generation Rate reckoned from the NPC Reference Rate have not reached a total of Php0.15/kWh, the TOU Tariff shall have a TOU Adjustment of Php0.15/kWh.

(iii) **Minimum Charges.** If DECORP’s Actual Additional Energy is less than the Additional Contract Energy in any Billing Period, DECORP shall pay an amount in accordance with Section I of Annex II of the SA plus an amount calculated by multiplying the rate of Php5.50/kWh with the RAI corresponding to the Billing Period and the difference between Contract Energy and Actual Energy (the “Minimum Charges for Additional Contract Energy”). The rate of Php5.50/kWh shall be adjusted by the same amount as the TOU Adjustment.

b. **Rate Adjustment Index.** The Total Additional Energy Charge shall be subject to adjustments in the Rate Adjustment Index (“RAI”) to reflect changes in foreign exchange, consumer price, and fuel cost, calculated using the formula below as further defined in Section 1, Annex II of the SA:

$$\text{RAI} = \{A \times (\text{FCPI}_n/\text{FCPI}_0) + B \times (\text{FCI}_n/\text{FCI}_0)\} \times (\text{FXR}_n/\text{FXR}_0)$$

Where:

Up to 25 December 2011:	A = 63%	B = 37%
From 26 December 2011 onwards	A = 64%	B = 36%

- FCPn - The average of the U.S. Consumer Price Index for Capital Equipment (line 63, International Financial Statistics) for the period of the calendar quarter immediately prior to the billing month.
- FCPo - U.S. Consumer Price Index for Capital Equipment, line 63, International Financial Statistics as of December 2008.
- FXRn - The average of the exchange rate of the Philippine Peso to the US Dollar as published by the Bangko Sentral ng Pilipinas for the period of the calendar quarter immediately prior to the billing month.
- FXRo - PhP 48.00; provided, that when $FXRn / FXRo < 1$, it shall be deemed to be 1.0000
- FCIn - Fuel Cost Index stated in \$/Million Kcal as determined using the average of the Argus/McCloskey Coal Price Index Report for "API 6 (fob Newcastle)" for the period of the calendar quarter immediately prior to the billing month.
- FCIo - US\$ 9.70 per Million kcal
- DFC - Dispatch Flexibility Charge, which is the charge for the option of BCQ Re-declaration which shall be at the rate of PhP 0.10/kWh (the "Dispatch Flexibility Charge") applicable to the Actual Additional Energy. The Dispatch Flexibility Charge shall be increased to PhP0.15/kWh on July 26, 2011.

c. **The Allowable Contract Reimbursable.** This component includes the following:

(i) MPPCL's actual cost higher than ninety percent (90%) of the MPPCL TOU Tariff multiplied by the Rate Adjustment Index for the Billing Period in any WESM trading interval when the Replacement Power is being supplied; and

(ii) any congestion charges borne by the MPPCL in supplying the BCQ of DECORP.

d. **Discount.** Provided that DECORP has no overdue obligation to MPPCL, MPPCL shall grant DECORP the Prompt Payment Discount in accordance with Section 2, Annex II of the SA.

25. **Characteristics of the power capability and connection facility.** The Masinloc Power Plant is rated at 600-MW Gross and installed (as opposed to rated) capacity.

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

As the Masinloc Power Plant is already an existing facility, Applicants have no longer secured a certification from the DOE that the generating capacity is consistent or inconsistent with DOE’s Philippine Development Plan. Applicants understand that said DOE certification is required in cases of new and proposed generation capacities.

26. **Details of the Applicants’ transmission/connection facilities** - MPPCL is connected to the Luzon grid via a double circuit 230 KV line to the Kadampat EHV Substation of the National Transmission Corporation (“TRANSCO”). DECORP is likewise connected to the Luzon grid.

As such, Applicants will not incur costs in developing or constructing anew a transmission or grid connection project to complement Masinloc Power Plant’s capacity, as it is already connected to the grid. It should also be noted that MPPCL is currently not paying costs of ancillary services based on the OATS rules. If it were made to pay for ancillary services, MPPCL will charge DECORP its ancillary services costs on a pass-through basis.

27. Attached herewith are copies of the Transmission Service Agreement, Metering Services Agreement and Connection Agreement of the Applicants with TRANSCO, as follows:

Document	Annex
Transmission Service Agreement between TRANSCO and DECORP	U
Transmission Service Agreement between TRANSCO and MPPCL	U-1
Metering Service Agreement between TRANSCO and MPPCL	V
Connection Agreement between TRANSCO and MPPCL	W

28. **Details of the procurement process of fuel.** As earlier stated, MPPCL's Power Plant primarily runs on coal. Attached hereto as **Annex "X"** is a certification on the availability of coal supply for MPPCL, salient terms of its coal supply contracts, and the process conducted by MPPCL for its procurement.

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

Document	Annex
Audited Financial Statements for 2009	Y
Certification on long-term loans	Z
Certification on the heat rate of generating units	AA
Allocation of MPPCL's existing capacity	BB

VI. TREATMENT OF DISCOUNT

30. Pursuant to the policy of the Honorable Commission allowing the distribution utilities to pass on to their customers fifty percent (50%) of the prompt payment discount received from NPC in ERC Resolution No. 12, series of 2005⁴, Applicants respectfully request for the approval of a similar treatment for the Prompt Payment Discount ("PPD") available to DECORP under the SA.

31. In consonance with ERC Resolution No. 12, in the event that DECORP meets the criteria set forth in Section 2, Annex II of the SA which entitles it to this discount, DECORP should reflect at least one-half of the discount as rate reduction to its end-users and retain one-half for its operations.

32. It must be emphasized that the prayer of the Applicant DECORP to be allowed to pass through fifty percent (50%) of the PPD it will receive from MPPCL to its consumers is in further consonance with existing ERC rules.

⁴ A Resolution Approving a New Policy on the Treatment of the Prompt Payment Discount

VII. CONFIDENTIAL TREATMENT OF ANNEX "S"

33. As earlier mentioned, **Annex "S"** contains numbers, methodology, and calculations which provide valuable information and insight on how MPPCL arrives at the MPPCL TOU Tariff Rate and Total Additional Energy Charge and would accordingly reflect MPPCL's bidding strategy for distribution utilities undertaking competitive process for the selection of their power suppliers and MPPCL's trading in the WESM. It is submitted therefore that **Annex "S"** falls within the bounds of proprietary "trade secrets" which are entitled to protection under the Constitution, statutes, and rules and regulations of this Honorable Commission.

34. 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, Applicant MPPCL respectfully requests for the issuance of a protective order declaring **Annex "S"** as confidential information, as the Applicants intend to present it as evidence in the instant Application.

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.

35. The data contained in **Annex "S"** constitute "trade secrets" of Applicant MPPCL; thus, MPPCL 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.*⁵, had the opportunity to discuss the definition of "trade secrets" and the great extent to which the same are protected under our laws. The Supreme Court defined the term "trade secret" as follows:

"A trade secret is defined as a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. The definition also extends to a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value. **A trade secret may consist of any formula, pattern, device, or compilation of information that: (1) is used in one's business; and (2) gives the employer an opportunity to obtain an advantage over competitors who do not possess the information. Generally, a trade**

⁵ 540 SCRA 215 [2007]

secret is a process or device intended for continuous use in the operation of the business, for example, a machine or formula, but can be a price list or catalogue or specialized customer list. It is indubitable that trade secrets constitute proprietary rights. The inventor, discoverer, or possessor of a trade secret or similar innovation has rights therein which may be treated as property, and ordinarily an injunction will be granted to prevent the disclosure of the trade secret by one who obtained the information "in confidence" or through a "confidential relationship." American jurisprudence has utilized the following factors to determine if information is a trade secret, to wit:

- (1) the extent to which the information is known outside of the employer's business;
- (2) the extent to which the information is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and to competitors;
- (5) the amount of effort or money expended by the company in developing the information; and
- (6) the extent to which the information could be easily or readily obtained through an independent source.”⁶ (Emphasis supplied.)

36. 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 social and economic progress. Verily, the protection of industrial secrets is inextricably linked

⁶ 540 SCRA 215, 228-230

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.”⁷
(Emphasis supplied.)

37. In other instances, the Supreme Court has held that the confidential nature of trade secrets protects such from disclosure even in the face of the right of inspection given to stockholders⁸ or the constitutional right to information⁹.

38. In ERC Case No 2008-030, NPC’s application for revised basic generation rates, the Honorable Commission had an occasion to rule on the confidentiality of NPC’s results of operation per power plant for calendar years 2005 to 2007. The Honorable Commission declared such information as confidential, in this wise:

“Upon review of the documents submitted by NPC, the Commission found that the results of operation per plant of NPC for years 2005 to 2007 contain vital information necessary in the calculation of its production costs in P/kWh per plant and the corresponding revenues. This information will serve as initial inputs to NPC’s decision-making. As such, disclosure of this information will give the other parties, particularly the other generation companies (Gencos) and the distribution utilities (DUs) with Genco counterparts, undue advantage in the pricing of electricity in the market over NPC and other Gencos by using its production costs as benchmark. Thus, the Commission deems the information as confidential, which may not be made public, as it may affect adversely the competitive position of NPC and other generation companies.”

39. Information which falls within the definition of a trade secret as defined by jurisprudence is clearly information which merits the confidential treatment provided for under

⁷ 540 SCRA 215, 237-239

⁸ *Philpotts vs. Philippine Manufacturing Company*, 40 Phil. 471 (1919).

⁹ *Garcia vs. Board of Investments*, G.R. 88637 (1989).

Rule 4 of the ERC Rules of Practice and Procedure. **Applicant MPPCL respectfully submits that the numbers, methodology, and calculations which relate to how MPPCL arrives at the TOU Tariff Rate and the Total Additional Energy Charge which necessarily reflects its bidding strategy (“Sensitive Data”) qualify as trade secrets, as this will give other parties, particularly the other generation companies and distribution utilities with generation counterparts, who may get hold of this information, undue advantage in the pricing of electricity in the competitive selection process of distribution utilities and in the WESM by using these vital information as benchmark in bidding against MPPCL. Annex “S” should therefore entitled to the protection of confidential information provided under Rule 4 of the ERC Rules of Practice and Procedure, due to the following reasons:**

39.1. The Sensitive Data is the property of MPPCL. Such data were generated by Applicant MPPCL based on the operations of MPPCL and pursuant to the business of MPPCL and for use in the future endeavors of MPPCL alone. As the success of a party in any bidding depends largely on its ability to make a more attractive bid offer than any competitors, it is clear that MPPCL as a prospective bidder in competitive process undertaken by distribution utilities and trading in the WESM, derives economic value from such Sensitive Data being generally unknown and not readily ascertainable by the public.

a. The data, if divulged, would otherwise tend to affect adversely the competitive position of MPPCL. To use the language of the Supreme Court in the *Air Philippines* case, there is no doubt that the Sensitive Data is also valuable to other prospective bidders and as such to allow the disclosure of the same would be to cripple MPPCL’s business, and to place it at an undue disadvantage since it would lose the backbone and competitive edge on which its business is founded and which is essential to its success. Hence, the latter has an actual, valuable proprietary interest to protect with respect to the information sought to be treated as confidential. A failure to safeguard the confidential nature of such Sensitive Data would have a chilling effect on free and fair competition, contrary to the policy espoused in the EPIRA:

“SECTION 2. Declaration of Policy. — It is hereby declared the policy of the State:

x x x

(c) To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full

public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market;

x x x''

b. The information is likewise commercially sensitive and has actual commercial value. It relates to the numbers, methodology, and calculations which would allow competitors to determine the bidding strategy of MPPCL. Moreover, the data do not normally form part of the information which is disclosed or is required to be disclosed by MPPCL to other government agencies. As stated above, it is clear that MPPCL derives economic value from such Sensitive Data being generally unknown and not readily ascertainable by the public.

39.2. The information is not generally available to the public and is not yet available or in the possession of the Honorable Commission on a non-confidential basis from a source that, to MPPCL's knowledge, has lawfully acquired such information on a non-confidential basis.

39.3. Given the immense protection afforded to trade secrets in our jurisdiction, as enshrined in the Constitution, without such necessity of disclosure of **Annex "S"** to other parties, there can be no reason to make an exception to the protection to which MPPCL's trade secrets are entitled.

VIII. ISSUANCE OF PROVISIONAL AUTHORITY

40. **Provisional Authority under the Rules.** Under Rule 14 of the ERC Rules of Practice and Procedures, 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.

41. **Factual Grounds for issuance of Provisional Authority.** Applicants respectfully submit that the following facts and circumstances clearly warrant the issuance by the Honorable Commission of a provisional authority or interim relief in the instant Application.

41.1. Impending expiration of the term of the NPC TSC compounded by delay in the commencement of commercial operations of GNPOWER's plant, and the inability of SNAP to guarantee energy supply to DECORP throughout the year. As earlier discussed, considering the additional energy requirements of DECORP, the expiration of the term of the NPC TSC, compounded by the unforeseen delay in the commencement of the PPSA of DECORP with GNPOWER and the inability of SNAP to guarantee the supply of energy requirements of DECORP amidst efforts to secure power from SNAP, DECORP and MPPCL are constrained to ask the Honorable Commission for a provisional approval of the instant Application pending the issuance of a final order or decision in order to ensure reliable and steady power supply in DECORP's Franchise Area.

41.2. The terms of the SA are substantially similar to the terms of the CSEE. In ERC Case No. 2010-005RC, this Honorable Commission had the opportunity to review the CSEE and, after an initial evaluation thereof, found that the CSEE "will redound to the benefit of DECORP's customers in terms of continuous, reliable and efficient power supply as mandated by the EPIRA."¹⁰ Given that the terms and conditions of the SA, including the TOU Tariff, are substantially similar to those agreed by the parties in the CSEE, Co-applicants respectfully manifest that the SA likewise provides the end-users of DECORP, at the minimum, similar advantages.

41.3. Provisional approval allows immediate availment by DECORP of incentives under the MPPCL SA. A provisional authority granted in the instant Application will further enable DECORP to avail of the commercial advantages granted to it under its CSEE with MPPCL, such as:

- a. savings for DECORP and its customers;
- b. discount offered by MPPCL under the SA, which further makes MPPCL's offer under the SA more competitive and advantageous for DECORP and its customers; and
- c. flexibility provided by the SA as DECORP is given the option to re-declare Daily Additional BCQ Nominations for the Additional Capacity.

¹⁰ Page 16, Order dated 1 February 2010

41.4. **Provisional approval gives DECORP a protection against price fluctuation in a volatile spot market.** In the event that DECORP sources its power supply directly from the WESM, DECORP and its customers will be exposed to a bigger risk of the volatility of the rates in the WESM, to the detriment and prejudice of DECORP's consumers.

41.5. **PSALM will no longer be able to economically supply the power requirements of DECORP.** Considering its privatization schedule, PSALM can no longer economically supply the electric power requirements of DECORP beyond the expiration of the NPC TSC on 25 July 2010.

42. **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 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."

42.1. 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 evidence that the Applicants have submitted and the comments filed by any interested person, if there be any.

42.2. 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 EPIRA, in relation to Section 16 (c) of the Public Service Act and Section 8 of E.O. No. 172.

42.3. 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."

42.4. The Supreme Court only emphasized that, as a prerequisite to such issuance, the Honorable Commission should consider also the comments of the consumers and the LGUs concerned on the application which were filed within thirty (30) days from their receipt of a copy of the application or the publication thereof. In other words, the Honorable Commission must wait for 30 days from service of copies of the application on the interested parties or from the publication of such application before it can issue a provisional order.

42.5. 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.

43. In view of all the foregoing, Applicants respectfully submit the instant Application for the approval of the Supplemental Agreement to the Contract for the Supply of Electric Energy between MPPCL and DECORP for the Honorable Commission's urgent and utmost consideration.

PRAYER

WHEREFORE, premises considered, the Applicants most respectfully pray that this Honorable Commission issue an order:

1. treating **Annex "S"** 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;
2. granting provisional approval/authority for the parties to implement the provisions of the SA pending the issuance of a final resolution in the instant Application;
3. allowing DECORP to reflect as rate reduction to its end-users at least one-half of the discount it will receive from MPPCL and authorizing DECORP to keep the balance of the discounts for operating and capital expenditure purposes; and
4. approving the SA dated 28 June 2010 entered into between DECORP and MPPCL.

Other reliefs just and equitable are likewise prayed for.

Makati City and Dagupan City, Pangasinan for Pasig City, 15 July 2010.

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