

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

IN THE MATTER OF THE APPLICATION FOR THE APPROVAL OF THE CONTRACT FOR THE SUPPLY OF ELECTRIC ENERGY BETWEEN MASINLOC POWER PARTNERS CO. LTD. AND CAMARINES SUR II ELECTRIC COOPERATIVE, INC., WITH PRAYER FOR PROVISIONAL AUTHORITY

ERC CASE NO. 2010-121RC

**CAMARINES SUR II ELECTRIC COOPERATIVE, INC.
AND MASINLOC POWER PARTNERS CO. LTD.**

Applicants.

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APPLICATION

Applicants Camarines Sur II Electric Cooperative, Inc. ("CASURECO II") and Masinloc Power Partners Co. Ltd. ("MPPCL"), by undersigned counsels, respectfully state:

I. THE APPLICANTS

1. Camarines Sur II Electric Cooperative, Inc. is a non-stock non-profit electric cooperative which is registered under Presidential Decree No. 269, as amended, with office address at Del Rosario, Naga City. CASURECO II has been granted a franchise or authority to distribute electric service in the municipalities of Bombon, Calabanga, Canaman, Magarao, Milaor, Minalabac, Pili, Tinambac, Siruma, and the City of Naga, all in the province of Camarines Sur (collectively, the "Franchise Area").

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

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

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”).

Attached are copies of relevant documents proving the due registration and permit to operate of MPPCL as a generation company, as follows:

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

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 the Honorable Commission on 22 June 2006 in Resolution No. 38, Series of 2006, and Resolution No. 16, series of 2008, entitled “A Resolution Adopting Policies to Govern the Transition Supply Contracts which have been Assigned and Transferred to National Power Corporation Successor Generating Companies,” this Application is submitted to the Honorable

Commission for its review and approval of the Contract for the Supply of Electric Energy dated 1 June 2010 (“CSEE”), as later amended by the Letter of Agreement dated 15 June 2010 (“Letter of Agreement”) and the Supplemental Letter of Agreement dated 24 June 2010 (“Supplemental Letter”) executed by CASURECO II and MPPCL.

A copy of the CSEE, the Letter of Agreement, and the Supplemental Letter of Agreement are attached hereto as **Annexes “I,” “I-1,” and “I-2.”** A summary of the relevant terms of the CSEE is likewise attached as **Annex “I-3.”**

Also attached herewith as **Annexes “J” and “J-1”** are the respective board and partner’s resolutions of CASURECO II and MPPCL approving the execution of the CSEE 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 Camarines Sur, with a copy of the instant Application and its accompanying documents.

Certifications from the Presiding Officer or Secretary of the legislative bodies of the Franchise Area and of the *Sangguniang Panlalawigan* of Camarines Sur, 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
Bombon	K
Calabanga	K-1
Canaman	K-2
Magarao	K-3
Milaor	K-4
Minalabac	K-5
Pili	K-6
Tinambac	K-7
Siruma	K-8
Naga City	K-9
Province of Camarines Sur	K-10

7. Furthermore, Applicants have caused the publication of the present Application in its entirety in a newspaper of general circulation in CASURECO II’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	L
Copy of Newspaper	L-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. CASURECO II, on the other hand, entered into a transition supply contract with NPC (“TSC”) from whom it sourced its electricity requirements. Said TSC was later on assigned to AP Renewables, Inc. (“APRI”).

11. In view of the impending expiration of the term of the TSC on 25 December 2009, CASURECO II and APRI communicated their intention to enter into a bilateral power supply contract with one another. Copies of CASURECO II’s letter to APRI dated 17 September 2009 and APRI’s letter to CASURECO II dated 16 November 2009 are hereto attached as **Annexes “M”** and **“M-1,”** respectively.

12. On 4 November 2009, APRI submitted its offer to supply electricity to CASURECO II and the same was subject of several discussions between APRI and CASURECO II.

13. On 21 November 2009, acting on the aforementioned letter of APRI of its intention to enter into a bilateral power supply contract with CASURECO II and an extension of

the TSC during the period of negotiations for said bilateral contract, the Board of Directors of CASURECO II resolved to grant APRI's request to extend its power supply contract with CASURECO II from 26 December 2009 to 25 April 2010 under the same terms and conditions. A copy of said CASURECO II's Board Resolution is hereto attached as **Annex "N."** However, it should be noted that subsequently, APRI agreed to extend the said TSC up until March 25, 2010 or equivalent to three (3) billing months only.

14. On 9 December 2009, In2Power, Inc. ("In2Power") submitted its power supply offer to CASURECO II which was considered along with APRI's offer.

15. On 14 December 2009, CASURECO II wrote to this Honorable Commission requesting for an extension of the TSC for a period of three (3) months from 26 December 2009, or until 25 March 2010 pending the execution of a new bilateral supply contract with APRI through Therma Luzon, Inc. ("TLI"). A copy of said letter to this Honorable Commission is hereto attached as **Annex "O."**

16. After a careful review of the terms and conditions of the offers from APRI and In2Power, the Board of Directors of CASURECO II awarded the power supply contract to In2Power.

17. On 25 January 2010, CASURECO II entered into a Power Sales Contract ("PSC") with In2Power. Subsequently, on 12 March 2010, In2Power and CASURECO II filed an "Application for the Approval of Power Sales Contract with Motion for the Issuance of Provisional Authority" docketed as ERC Case No. 2010-018RC.

18. On 28 January 2010, the Honorable Commission issued a letter to CASURECO II which, among others, denied the latter's request to extend the term of the TSC.

A copy of the letter issued by the Honorable Commission is attached hereto as **Annex "O-1."**

19. As In2Power and CASURECO II have indicated in ERC Case No. 2010-018RC, the effective date of the PSC shall be on 26 March 2010. However, in a letter dated 18 March 2010, In2Power informed CASURECO II that it can no longer attain the target delivery for fully supply requirement of CASURECO II within the year. In2Power proposed that it can only obtain ten (10) megawatts of the total power requirements while CASURECO II shall purchase the rest of

its requirements from the Wholesale Electricity Spot Market (“WESM”). In2Power later verbally manifested that they are unable to comply even with its final offer of ten (10) megawatts.

A copy of In2Power’s letter to CASURECO II dated 18 March 2010 is attached hereto as **Annex “P.”**

20. On 29 March 2010, the Board of Directors of CASURECO II declared the PSC between CASURECO II and In2Power ineffective for failure of In2Power to satisfy the conditions precedent stipulated in said PSC.

A copy of the said board resolution is hereto attached as **Annex “Q.”**

21. Due to In2Power’s failure to provide power to CASURECO II, the latter started the process of obtaining commitments for power supply to cover its load requirements. Only MPPCL and TLI submitted their respective power supply proposals for the consideration of CASURECO II.

22. Further, to ensure supply of electricity to its consumers, CASURECO II was constrained to obtain its electric energy entirely from the WESM upon expiration of the TSC and in the meantime that it was negotiating for power supply agreements with power generators.

23. After a careful and thorough evaluation of the respective proposals, CASURECO II accordingly selected both MPPCL and TLI as its power suppliers, for reasons to be discussed below. A copy of CASURECO II’s Board Resolution awarding the power sales contract to MPPCL is hereto attached as **Annex “R.”**

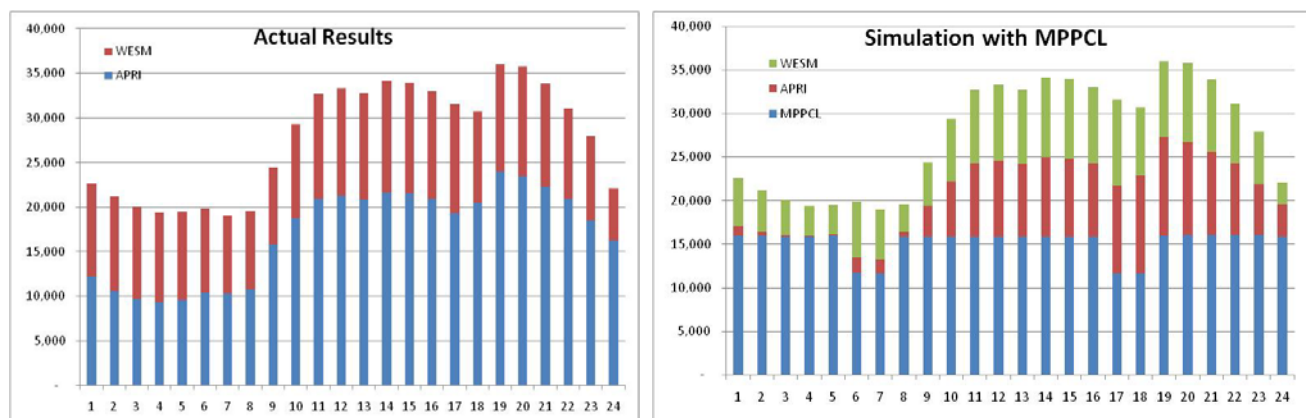
24. On 1 June 2010, MPPCL and CASURECO II entered into the CSEE which, as later amended by the Letter of Agreement and the Supplemental Letter, covers MPPCL’s commitment to supply at thirty-five to forty-five percent (35% - 45%) of the total power requirements of CASURECO II.

Commercial advantage of MPPCL’s generation rate and justification for negotiating with MPPCL

25. CASURECO II concluded, after a review of the power supply proposal submitted by MPPCL, that it would be in the best interest of its consumers if it enters into a bilateral power supply contract with MPPCL, as MPPCL's offer will lower the generation rates charged by

CASURECO II to its consumers, provide certainty of supply and assure CASURECO II of a long-term stable competitive price protected from the volatility of the spot market.

a. A comparison is made by showing the actual generation cost of CASURECO II vis-à-vis its simulated generation cost had MPPCL been supplying part of the requirements of CASURECO II for January to May 2010 under the terms of the CSEE. The charts showing the 24-hour supply profile based on actual results and the simulation are shown below:



The numerical results are summarized below:

ACTUAL RESULTS				
	kWh	% Share	Charge	Rate
APRI/TLI	61,854,612	62%	282,157,632	4.5616
WESM	38,361,086	38%	284,068,011	7.4051
Total	100,215,698	100%	566,225,643	5.6501

SIMULATION				
	kWh	% Share	Charge	Rate
MPPCL	55,080,688	55%	259,699,615	4.7149
APRI/TLI	20,907,594	21%	107,334,099	5.1337
WESM	24,227,417	24%	187,773,784	7.7505
Total	100,215,698	100%	554,807,497	5.5361

Savings	11,418,146	0.1139
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The above table shows that the combined supply of MPPCL, APRI and WESM would result in an overall savings of about P 0.1139/kWh.

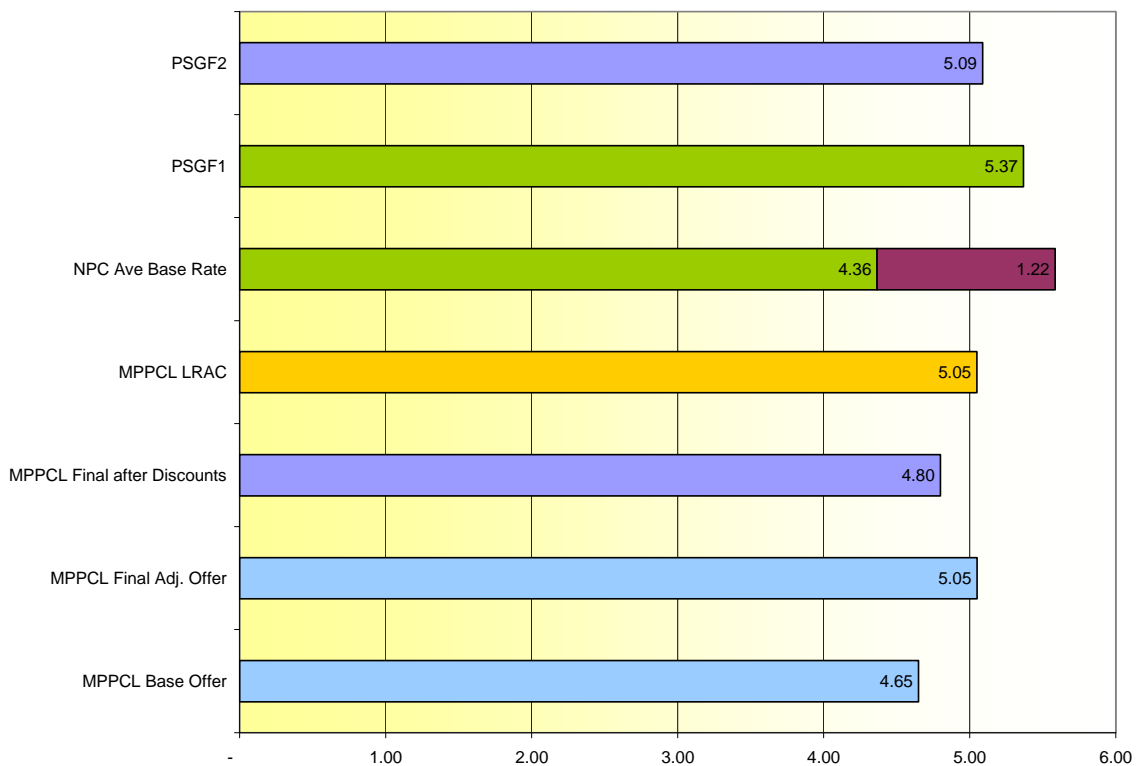
b. Furthermore, CASURECO II cannot rely on NPC or PSALM to continue supplying its power requirements after the expiration of the TSC and In2Power's inability to fulfill its obligations under the PSC.

c. PSALM confirmed by way of certification dated 20 July 2010 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 CASURECO II.

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

27. Further, MPPCL’s generation rate is more reasonable compared to other generating companies utilizing coal as fuel. In fact, it will generate savings for CASURECO II and its consumers. Thus, notwithstanding that a direct negotiation was undertaken by the parties, CASURECO II believes that MPPCL’s generation rate is competitive and advantageous.

An analysis of the power generation rate for the same load factor from MPPCL compared with the power rate of other generating facilities utilizing coal as fuel is presented in the chart below:



28. Considering the urgency of the situation, with the extended term of the TSC already expired and the rescission by In2Power of the PSC, CASURECO II decided to enter into a CSEE with MPPCL, rather than either risk having power supply shortfall or source its power supply from the volatile spot market.

29. The foregoing commercial advantages and legal grounds considered, on 1 June 2010, the parties entered into the CSEE, which is the subject of the instant Application.

V. ABSTRACT OF THE CSEE AND RELATED INFORMATION

30. The following are the salient features of the CSEE:

a. **Term.** The CSEE shall have a term of sixty (60) Billing Periods counted from the Operations Effectivity Date and shall be automatically renewed and shall continue until the lapse of another sixty (60) Billing Periods, unless earlier terminated or extended in accordance with the relevant provisions of the CSEE. Thereafter, MPPCL and CASURECO II may agree to renew the CSEE for two (2) successive durations of thirty-six (36) Billing Periods.

Under the CSEE, the Operations Effectivity Date occurs on the next immediate twenty-sixth (26th) day of the month after the conditions in Section 2.2¹ of the CSEE have been satisfied.

b. **Volume.** Under the CSEE, MPPCL shall supply CASURECO II energies in accordance with the Contract Energy and Allowable Maximum Demand on a monthly basis as provided for under Annex I of the CSEE.

(i) MPPCL shall commence with its obligation to supply power to CASURECO II starting on the Operations Effectivity Date.

(ii) An Allowable Maximum Demand ("AMD") is made available which, together with TLI's supply, CASURECO II will dispatch to meet CASURECO II's Bilateral Contract Quantities ("BCQ") in a manner that would allow

¹ The conditions are as follows:

- a. Approval by the Honorable Commission of the CSEE, provided that a provisional authority granted by the Honorable Commission shall be considered as a satisfaction of this condition;
- b. Receipt of and written approval by MPPCL of the Security Deposit required to be provided by CASURECO II;
- c. Execution by CASURECO II of an escrow agreement;
- d. Written confirmation from the Escrow Account Bank that CASURECO II has established and funded an escrow account;
- e. Written confirmation from PEMC that CASURECO II is a bona fide direct trading member of WESM; and
- f. Receipt by MPPCL of CASURECO II's list of customers belonging to the Contestable Market.

CASURECO II to be in a position to comply with the requirements of Section 45 (c) of EPIRA, i.e., securing ninety percent (90%) power supply from bilateral supply contracts and ten percent (10%) from the WESM.

(iii) The Contract Energy shall be used to determine the amount that CASURECO II shall pay as minimum charges.

(iv) The latest energy and demand forecast of CASURECO II, as embodied in its latest Distribution Development Plan and the variability of the forecast over the proposed contractual period, including the estimation of the potential for a reduction in load, is attached hereto as **Annex "T"**.

c. **Total Energy Charge Rate.** For electricity supplied by MPPCL, CASURECO II shall pay MPPCL a Monthly Power Bill which is composed of the Total 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 III of the CSEE. The Total Energy Charge is composed of the MPPCL Bilateral Energy Rate ("BER") which is **PhP 4.65/kWh** which may be adjusted from time to time in accordance with Section 3, Annex III of the CSEE, multiplied by the Actual Energy (based on the Daily BCQ Nominations of CASURECO II), and by a Rate Adjustment Index, plus the Allowable Contract Reimbursable.

Attached as **Annex "U"** is a summary of the methodology used by MPPCL to arrive at the MPPCL BER and the determination of the Total Energy Charge under the CSEE. It also contains information regarding the debt or equity ratio, capital costs, weighted average cost of capital, and fuel cost, among other information.

Considering the confidential nature of **Annex "U,"** 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 "U"** 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 "U"** in a sealed envelope, with each page of the document stamped with the word "Confidential."

a. **MPPCL Bilateral Energy Rate.** The MPPCL Bilateral Energy Rate may be adjusted in accordance with Section 3, Annex III of the CSEE, as follows:

(i) Should the Honorable Commission approve an increase in NPC's Basic Generation Rate as of 26 December 2009 (the "NPC Reference Rate"), MPPCL shall be allowed to adjust the BER in the same amount as NPC's rate increase ("BER Adjustment"), provided that the BER Adjustment shall not exceed a cumulative total of PhP 0.40/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 26 December 2010, the cumulative increases in NPC Basic Generation Rate reckoned from the NPC Reference Rate have not reached a total of PhP 0.20/kWh, the BER shall have a BER Adjustment of PhP 0.20/kWh.

(iii) If by 26 December 2011, the cumulative increases in NPC Basic Generation Rate reckoned from the NPC Reference Rate have not reached a total of PhP 0.40/kWh, the BER shall have a BER Adjustment of PhP 0.40/kWh.

(iv) **Minimum Charges.** If CASURECO II's Actual Energy is less than the Contract Energy in any Billing Period, CASURECO II shall pay an amount in accordance with Section I of Annex III of the CSEE plus an amount calculated by multiplying the Gross Average Rates below with the RAI corresponding to the Billing Period and the difference between Contract Energy and Actual Energy ("Minimum Charges"); provided that, if the difference is less than one percent (1%) of the Contract Energy, the Minimum Charges shall not apply. The Gross Average Rate shall also be adjusted by the same amount as the BER Adjustment.

Applicable Period	Gross Average Rate
Up to 25 December 2010	PhP 4.65/kWh
From 26 December 2010 to 25 December 2011	PhP 4.85/kWh
From 26 December 2011 onwards	PhP 5.05/kWh

b. **Rate Adjustment Index.** The Total 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 III of the CSEE:

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

Where:

Up to 25 December 2010:	A = 58%	B = 42%
From 26 December 2010 to 25 December 2011:	A = 60%	B = 40%
From 26 December 2011 onwards:	A = 61%	B = 39%

FCP _n	-	The average of the U.S. Consumer Price Index for Capital Equipment (line 63, International Financial Statistics) for the month immediately prior to the billing month.
FCP _o	-	U.S. Consumer Price Index for Capital Equipment, line 63, International Financial Statistics as of March 2010.
FXR _n	-	The average of the exchange rate of the Philippine Peso to the US Dollar as published by the <i>Bangko Sentral ng Pilipinas</i> for the month immediately prior to the billing month.
FXR _o	-	PhP 48.00; provided, that when FXR _n / FXR _o < 1, it shall be deemed to be 1.0000
FCI _n	-	Fuel Cost Index stated in US\$/ton as determined using the average of the Argus/McCloskey Coal Price Index Report for “API 6 (fob Newcastle)” for the month immediately prior to the billing month
FCI _o	-	US\$ 90.00 per ton

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

(i) MPPCL’s actual cost higher than ninety percent (90%) of the BER multiplied by the RAI for the Billing Period in any WESM trading interval when the Backup Power or Replacement Power is being supplied; and

(ii) Any charges for Line Rentals borne by MPPCL in supplying the BCQ of CASURECO II.

d. **Discounts.** Provided that CASURECO II has no overdue obligation to MPPCL, MPPCL shall grant CASURECO II the following discounts: (i) Prompt

Payment Discount, (ii) Performance Discount, and (iii) Payment Security Discount, all in accordance with Section 2, Annex III of the CSEE, as amended.

31. **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 “V”**.

As the Masinloc Power Plant is already an existing facility, it no longer attached a certification from the DOE that the generating capacity is consistent with DOE’s Philippine Development Plan. MPPCL understands that said DOE certification is required in cases of new and proposed generation capacities.

32. **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 TRANSCO. CASURECO II 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 ancillary services, MPPCL will charge CASURECO II its ancillary services costs on a pass-through basis.

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

Document	Annex
Transmission Service Agreement between TRANSCO and CASURECO II	W
Transmission Service Agreement between TRANSCO and MPPCL	W-1
Metering Services Agreement between TRANSCO and MPPCL	X
Connection Agreement between TRANSCO and MPPCL	Y

34. **Details of the procurement process of fuel.** As earlier stated, MPPCL’s Power Plant primarily runs on coal. Attached hereto as **Annex “Z”** 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.

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

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

VI. TREATMENT OF DISCOUNTS

36. 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 2005², Applicants respectfully request for the approval of a similar treatment for all discounts available to CASURECO II under the CSEE. As earlier mentioned, these discounts include the Prompt Payment Discount, Performance Discount, and Payment Security Discount.

37. In the event that CASURECO II meets the criteria set forth in Section 2, Annex III of the CSEE which entitles it to these discounts, CASURECO II should be allowed to reflect at least one-half of the discounts as rate reduction to its end-users and that it may use the balance for operating and capital expenditure purposes.

38. The discounts which CASURECO II would be allowed to keep constitute a substantial capital inflow for its operations. CASURECO II's only assured source of capital to finance the expansion, rehabilitation, and upgrading of its power distribution system is Members Contribution In Aid of Capital Expenditures ("MCIAC") allowed by the Honorable Commission under the RSEC-WR.³ It cannot be denied however that the MCIAC is not enough to sustain the repairs, upgrades, and expansion of electric power system of CASURECO II. If CASURECO II is not allowed to retain fifty percent (50%) of the discounts granted by MPPCL, it will have difficulty in raising additional funds for capital expenditures which at present comes

² A Resolution Approving a New Policy on the Treatment of the Prompt Payment Discount

³ Rules for Setting the Electric Cooperatives' Wheeling Rates

only from debt financing or from MCIAC. Thus, by this arrangement, CASURECO II will have additional source of funds that will enable it to maintain a sustainable operation by ensuring low systems loss and high productivity.

39. Additionally, in using fifty percent (50%) of the discounts for capital expenditures, CASURECO II may acquire maintenance and repair tools and equipment, as well as software, to further improve its efficiency, productivity, and reliability.

VII. CONFIDENTIAL TREATMENT OF ANNEX "U"

40. As earlier mentioned, **Annex "U"** contains numbers, methodology, and calculations which provide valuable information and insight on how MPPCL arrives at the BER and Total 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 "U"** 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.

41. 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 "U"** 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.

42. The data contained in **Annex "U"** 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 2007 case of *Air Philippines Corporation vs. Pennswell, Inc.*⁴, 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:

⁴ 540 SCRA 215 [2007]

“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 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.”⁵ (Emphasis supplied.)

43. 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

⁵ 540 SCRA 215, 228-230

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 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.”⁶ (Emphasis supplied.)

44. 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 stockholders⁷ or the constitutional right to information⁸.

45. 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.”

46. 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

⁶ 540 SCRA 215, 237-239

⁷ *Philpotts vs. Philippine Manufacturing Company*, 40 Phil. 471 (1919).

⁸ *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 BER and the Total 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 “U” 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:**

a. 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.

i. 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”

ii. 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.

b. 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.

c. Given the immense protection afforded to trade secrets in our jurisdiction, as enshrined in the Constitution, without such necessity of disclosure of **Annex “U”** 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 A PROVISIONAL AUTHORITY

47. **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.

48. **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 provisional authority or interim relief in the instant Application.

a. **Expiration of the term of the TSC compounded by the inability of In2Power to comply with its obligations under, and rescission of, the PSC.** As earlier

discussed, considering the expiration of the term of the TSC between CASURECO II and APRI, compounded by the failure of In2Power to comply with its obligations under, and rescission of, the PSC, CASURECO II 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.

b. **Provisional approval allows immediate availment by CASURECO II of incentives under the MPPCL CSEE.** Pending final resolution of the pending application and without a provisional authority granted, CASURECO II will be unable to avail of the commercial advantages granted to it under its CSEE with MPPCL, such as:

(i) savings for CASURECO II and its consumers, as the resulting combined generation charge with the entry of MPPCL as a power supplier under the CSEE compares favorably vis-à-vis the volatile prices in the WESM; and

(ii) unique discounts offered by MPPCL under the CSEE, which further makes MPPCL's offer under the CSEE more competitive and advantageous for CASURECO II and its consumers.

c. **Provisional approval gives CASURECO II a protection against price fluctuation in a volatile spot market.** In the event that CASURECO II sources its power supply directly from the WESM, CASURECO II and its consumers will be exposed to the volatility of the rates in the WESM, to the detriment and prejudice of its consumers.

d. **PSALM will no longer be able to economically supply the power requirements of CASURECO II.** Considering its privatization schedule, PSALM can no longer economically supply the electric power requirements of CASURECO II beyond the expiration of the extended term of the TSC on 25 March 2010.

49. **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."

a. 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.

b. 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.

c. 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.”

d. 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.

e. 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.

50. In view of all the foregoing, Applicants respectfully submit the instant Application for the approval of the Contract for the Supply of Electric Energy between MPPCL and CASURECO II 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 "U"** 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 CSEE pending the issuance of a final resolution in the instant Application;
3. allowing CASURECO II to reflect as rate reduction to its end-users at least one-half of the discounts it will receive from MPPCL and authorizing CASURECO II to keep the other half of the discounts for capital expenditure purposes; and
4. approving the CSEE dated 1 June 2010, as amended entered into between CASURECO II and MPPCL.

Other reliefs just and equitable are likewise prayed for.

Makati City and Naga City for Pasig City, 7 September 2010.

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