

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 ZAMBALES II ELECTRIC COOPERATIVE, INC., WITH PRAYER FOR PROVISIONAL AUTHORITY

ERC CASE NO. 2009-141RC

ZAMBALES II ELECTRIC COOPERATIVE, INC. AND MASINLOC POWER PARTNERS CO. LTD.

Applicants.

X-----X

APPLICATION

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

I. THE APPLICANTS

1. Zambales 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 Magsaysay, Castillejos, Zambales. ZAMECO II has been granted a franchise or authority to distribute electric service in Cabangan, Castillejos, parts of Olongapo City, San Antonio, San Felipe, San Marcelino, San Narciso and Subic, all in the province of Zambales (collectively, the "Franchise Area").

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

Document	Annex
<i>Articles of Incorporation</i>	A
<i>Amended 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 recently 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 (“CSEE”), dated 21 August 2009, executed by ZAMECO II and MPPCL.

A copy of the CSEE dated 21 August 2009 is attached hereto as **Annex “I.”** A summary of the relevant terms of the CSEE is likewise attached as **Annex “I-1”**.

Also attached herewith as **Annexes “J”** and **“J-1”** are the respective board and partner’s resolutions of ZAMECO 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 Zambales, 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 Zambales, 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
Cabangan	K
Castillejos	K-1
Olongapo City	K-2
San Antonio	K-3
San Felipe	K-4
San Marcelino	K-5
San Narciso	K-6
Subic	K-7
<i>Sangguniang Panlalawigan</i> of Zambales	K-8

7. Furthermore, Applicants have caused the publication of the present Application in its entirety in a newspaper of general circulation in ZAMECO 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. Pursuant to the terms and conditions of the APA, MPPCL became the assignee of various Contracts for the Supply of Electric Energy or Transition Supply Contracts (“TSC”) between NPC and its customers, including ZAMECO II. The original term of the TSC between NPC and ZAMECO II that was assigned to MPPCL expired on 25 February 2009.

11. Prior to the expiry of the TSC, and as the Applicants were still finalizing the terms of their new bilateral power supply contract, which is the subject of the instant application, they entered into a Letter of Agreement where the parties agreed to extend the TSC for another six (6) billing periods or until 25 August 2009.

A copy of the Letter of Agreement is attached hereto as **Annex “M.”**

12. Subsequently, the Honorable Commission, through a letter approved the extension of the term of the TSC between the parties.

A copy of the Honorable Commission’s letter is attached as **Annex “M-1.”**

13. The Applicants subsequently entered into a Supplemental Letter of Agreement dated 25 August 2009 for the extension of the term of the TSC for another six (6) Billing Periods effective from 26 August 2009 or up to 25 February 2010.

The letter is attached hereto as **Annex "N"**.

14. As the privatization of NPC's assets is accelerated pursuant to the EPIRA, ZAMECO II has to ensure the security of power supply for 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

15. After the assignment of its TSC with NPC to MPPCL, ZAMECO II started the process of obtaining commitments for power supply to cover its load requirements. MPPCL and Trans-Asia Oil and Energy Development Corporation ("Trans-Asia") submitted their respective offers for consideration by ZAMECO II. After a careful and thorough evaluation of the respective offers, ZAMECO II has accordingly selected MPPCL as its power supplier, for reasons further discussed below.

Commercial advantage of MPPCL's generation rate

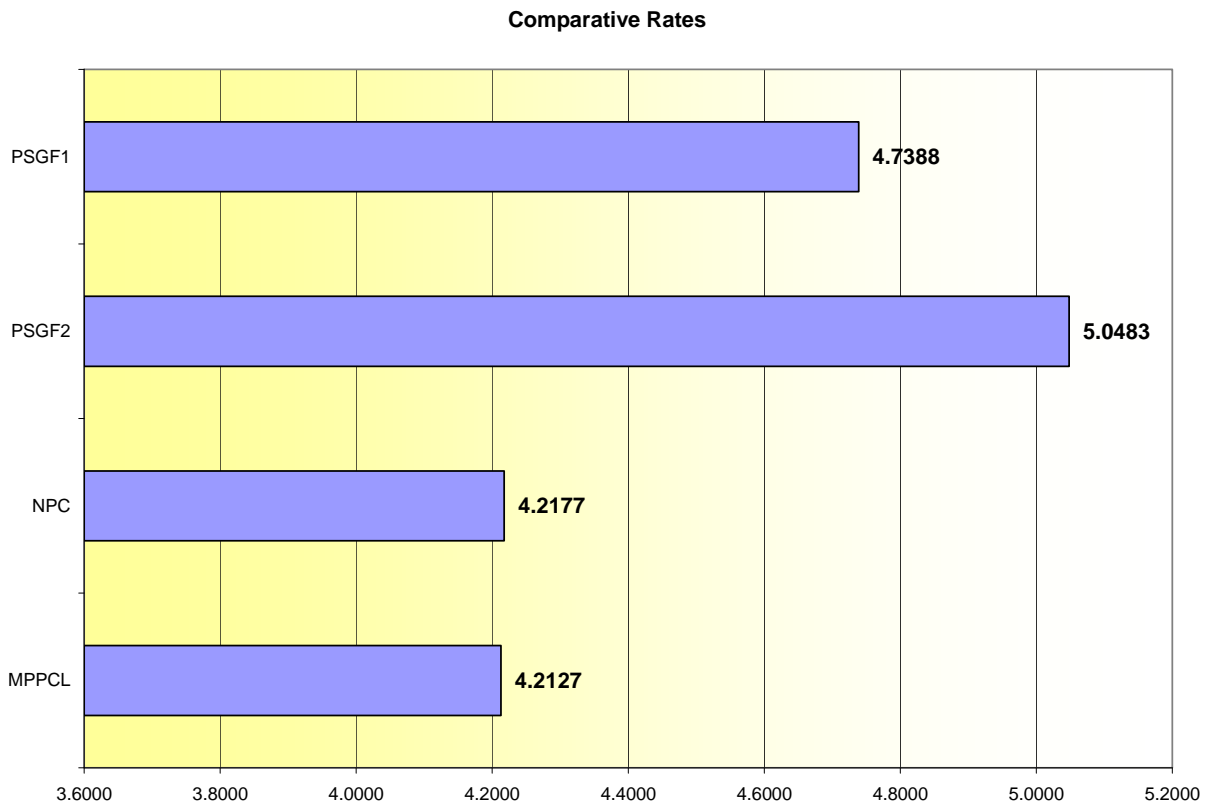
16. ZAMECO II concluded, after being satisfied with MPPCL's compliance and performance of its obligations under the assigned TSC, and after a comparison between MPPCL's offer and that of Trans-Asia, that it would be in the best interest of its consumers if it enters into a new bilateral power supply contract with MPPCL, as its bilateral contract with MPPCL will not impose additional burden on ZAMECO II's customers, provide certainty of supply and assure ZAMECO II of a long-term competitive pricing.

16.1. Moreover, ZAMECO II concluded that the commercial terms of the CSEE, particularly the generation rate being offered by MPPCL and MPPCL's discount terms, is advantageous for ZAMECO II. 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. In fact, it will generate savings for ZAMECO II and its customers. In addition, it should be noted that ZAMECO II

¹ Section 23, EPIRA

arrived at its decision to enter into negotiations with MPPCL after ZAMECO II had approached different generating companies and reviewed the various offers submitted to it. Thus, notwithstanding that a direct negotiation was undertaken by the parties, ZAMECO II believed that MPPCL's generation rate offers a competitive and advantageous rate for ZAMECO II and its customers.

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:



16.2. **Generation Rate for the Delivered Power.** A summary analysis of the rate impact of the power delivered power from MPPCL to ZAMECO II is presented in tabular form below. The figures below also show the step increases and its impact on the rate of ZAMECO II.

	Base Offer	by 9/26/2010	by 9/26/2011	by 9/26/2011
GENERATION CHARGES				
Ave. Base TOU Rate, P/kWh	4.2127	4.3127	4.4127	4.5127
Performance Discount	(0.1800)	(0.1800)	(0.1800)	(0.1800)

Security Discount	(0.1000)	(0.1000)	(0.1000)	(0.1000)
Prompt Payment Discount	(0.1180)	(0.1210)	(0.1240)	(0.1270)
Net Generation Rate	3.8147	3.9117	4.0087	4.1057
TRANSMISSION AND ANCILLARY SERVICES CHARGES				
Power Delivery Charges	0.6013	0.6013	0.6013	0.6013
Ancillary Services Charges	0.4596	0.4596	0.4596	0.4596
Total	1.0609	1.0609	1.0609	1.0609
DELIVERED POWER CHARGES, NET				
Power Delivery Charges	4.8757	4.9727	5.0697	5.1667

16.3. ZAMECO II cannot rely on NPC to continue supplying ZAMECO II's power requirements, as the latter may no longer be in the position to supply ZAMECO II's required capacity at rates lower than MPPCL 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 CSEE on 21 August 2009, NPC's basic rates for Luzon of PhP 4.3648/kWh was already higher compared to MPPCL's basic energy rate. Indeed, NPC's rates can only be higher because, in connection with its application for increase in its base generation charges under ERC Case No. 2009-004 RC, another P 0.25/kWh of increase awaits with the privatization of the Calaca Coal-Fired Plant and the Tiwi and Mak-Ban Geothermal Plants.

16.4. In addition, ZAMECO II cannot rely on NPC to continue supplying ZAMECO II's power requirements after the expiration of the NPC TSC, 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.

16.5. Despite several requests, NPC and/or PSALM have yet to issue a certification on whether or not it has available transition supply contract capacity to supply ZAMECO II the Contract Energy for the duration of the term of the CSEE. It should be noted, however, that NPC has issued certifications for other distribution utilities which have previously entered into bilateral power supply contracts with MPPCL confirming that NPC cannot commit to supply the electric power requirements of these distribution utilities for the whole term of the CSEE, as it would not be economical for NPC to serve its former customers given the privatization schedule of PSALM.

Attached hereto as **Annex "O"** is a certification attesting to the refusal of NPC and PSALM to issue such certification.

16.6. A summary of MPPCL's generation rate with the NPC TOU rate is shown in the table below. As earlier mentioned, by sourcing its power supply requirements from MPPCL, ZAMECO II would be able to generate savings for its customers:

ZAMECO II: MPPCL Supply	
Volume, kWh	96,264,601
TOU Tariff Rate, P/kWh	4.2127
Performance Discount	(0.1800)
Security Discount	(0.1000)
Prompt Payment Discount	(0.1180)
Net Selling Rate	3.8147
Total Generation Charge, PhP	367,221,826

NPC Supply	
TOU Tariff Rate, P/kWh	4.2177
FBHC	0.0245
MRR	(0.1800)
Prompt Payment Discount	(0.1219)
Net Selling Rate	3.9403
Total Generation Charge, PhP	379,310,452

Savings	
Rate, P/kWh	0.1256
Total Base Charge, PhP	12,088,626

16.7. Considering the urgency of the situation, with the extended term of the NPC TSC already expired, ZAMECO II decided to enter into a CSEE with MPPCL, rather than risk having power supply shortfall. More importantly, with the entry of MPPCL as a power supplier, ZAMECO II will be able to significantly reduce the generation rate passed on to its customers.

Legal basis for entering into direct negotiations

17. On 15 December 2008, prior to the expiration of the ZAMECO II TSC, and prior to the execution of the instant CSEE on 21 August 2009, the Honorable Commission issued Resolution No. 16, series of 2008. Significantly, Sections 2 and 5 of ERC Resolution No. 16 allow the parties to a TSC, prior to the expiration of the TSC which has been assigned and transferred,

to negotiate for and enter into new bilateral power supply contract that should govern the transactions between the parties. Section 2 specifically states:

“Prior to the expiration of the TSC which has been assigned and transferred, **the NPC successor generating companies and the DUs are not precluded from negotiating for and entering into new bilateral power supply contracts** that should govern the transactions between the parties.” (Emphasis supplied.)

18. After the issuance of ERC Resolution No. 16, the parties therefore commenced negotiations for the terms of a new bilateral power supply contract which would govern their relationship after the expiration of the TSC on 25 February 2009.

19. In this regard, the Applicants also wish to note that while the Honorable Commission issued an amendment to the ERC Guidelines on the Recovery of Costs for the Generation Component of the DU Rates in April 2004, requiring the conduct of public bidding in the contracting of power supply by distribution utilities, the implementation of this amendment has been suspended by the Honorable Commission in Resolution No. 21, Series of 2006 dated 10 May 2006 together with other resolutions which were not subjected to public hearing. Until now, the Applicants understand that the suspension has not been lifted.

20. The foregoing commercial advantages and legal grounds considered, on 21 August 2009, the parties entered into the CSEE, which is the subject of the instant Application.

V. ABSTRACT OF THE CSEE AND RELATED INFORMATION

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

21.1. **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 thirty-six (36) Billing Periods, unless MPPCL gives notice of its intention not to renew the CSEE or unless earlier terminated or extended in accordance with the relevant provisions of the CSEE. Thereafter, MPPCL and ZAMECO 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 2.2² of the CSEE have been satisfied.

21.2. **Volume.** Under the CSEE, MPPCL shall supply ZAMECO II a minimum 98,400,500 kWh of Contract Energy per year for the whole term of the CSEE. Details regarding the volume of Contract Energy and Allowable Maximum Demand on a monthly basis are provided for under Annex I of the CSEE.

a. MPPCL shall commence with its obligation to supply power to ZAMECO II starting on the Operations Effectivity Date.

b. An Allowable Maximum Demand (“AMD”) is made available which when dispatched is expected to meet ZAMECO II’s peak power requirements. The AMD will be dispatched to satisfy the Bilateral Contract Quantities (“BCQ”) of ZAMECO II in a manner that would allow ZAMECO II 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. Any amounts in excess of the AMD or the BCQ nominated for the load of ZAMECO II shall be deemed to have been sourced and purchased by MPPCL from the WESM.

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

d. The latest energy and demand forecast of ZAMECO II, as embodied in its latest Distribution Development Plan and the variability of the

² 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 ZAMECO II;
- c. Execution by ZAMECO II of an escrow agreement;
- d. Written confirmation from the Escrow Account Bank that ZAMECO II has established and funded an escrow account;
- e. Written confirmation from PEMC that ZAMECO II has completed its registration as an indirect trading member of WESM; and
- f. Receipt by MPPCL of ZAMECO II’s list of customers belonging to the Contestable Market.

forecast over the proposed contractual period, including the estimation of the potential for a reduction in load, is attached hereto as **Annex “P”**.

21.3. Total Energy Charge Rate. For electricity supplied by MPPCL, ZAMECO 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 Time-of-Use (“TOU”) Tariff, as indicated in the table below, and 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 ZAMECO II), and by a Rate Adjustment Index, plus the Imbalance Energy Charge and Allowable Contract Reimbursable.

Period	January – June		July - December	
	Monday - Saturday	Sunday & Holiday	Monday - Saturday	Sunday & Holiday
1:00:00 AM	2.3250	2.3250	2.3250	2.3250
2:00:00 AM	2.3250	2.3250	2.3250	2.3250
3:00:00 AM	2.3250	2.3250	2.3250	2.3250
4:00:00 AM	2.3250	2.3250	2.3250	2.3250
5:00:00 AM	2.3250	2.3250	2.3250	2.3250
6:00:00 AM	2.3250	2.3250	2.3250	2.3250
7:00:00 AM	2.3250	2.3250	2.3250	2.3250
8:00:00 AM	2.3250	2.3250	2.3250	2.3250
9:00:00 AM	6.5000	2.3250	2.3250	2.3250
10:00:00 AM	6.5000	2.3250	6.1500	2.3250
11:00:00 AM	6.5000	2.3250	6.1500	2.3250
12:00:00 PM	6.5000	2.3250	6.1500	2.3250
1:00:00 PM	6.5000	2.3250	6.1500	2.3250
2:00:00 PM	6.5000	2.3250	6.1500	2.3250
3:00:00 PM	6.5000	2.3250	6.1500	2.3250
4:00:00 PM	6.5000	2.3250	6.1500	2.3250
5:00:00 PM	6.5000	2.3250	6.1500	2.3250
6:00:00 PM	6.5000	2.3250	6.1500	2.3250
7:00:00 PM	6.5000	6.3500	6.1500	6.0000
8:00:00 PM	6.5000	6.3500	6.1500	6.0000
9:00:00 PM	6.5000	2.3250	6.1500	2.3250
10:00:00 PM	2.3250	2.3250	2.3250	2.3250
11:00:00 PM	2.3250	2.3250	2.3250	2.3250
12:00:00 AM	2.3250	2.3250	2.3250	2.3250

Attached as **Annex “Q”** is a summary of the methodology used by MPPCL to arrive at the MPPCL TOU Tariff 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 “Q,”** 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 “Q”** 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 “Q”** 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 III of the CSEE, as follows:

(i) Should the Honorable Commission approve an increase in NPC’s Basic Generation Rate as of 26 May 2009 (the “NPC Reference Rate”), MPPCL shall be allowed to adjust the TOU Tariff 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 PhP 0.30/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 September 2010, the cumulative increases in NPC Basic Generation Rate reckoned from the NPC Reference Rate have not reached a total of PhP 0.10/kWh, the TOU Tariff shall have a TOU Adjustment of PhP 0.10/kWh.

(iii) If by 26 September 2011, 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 TOU Tariff shall have a TOU Adjustment of PhP 0.20/kWh.

(iv) If by 26 September 2012, the cumulative increases in NPC Basic Generation Rate reckoned from the NPC Reference Rate have not reached a total of PhP 0.30/kWh, the TOU Tariff shall have a TOU Adjustment of PhP 0.30/kWh.

(v) **Minimum Charges.** If ZAMECO II's Actual Energy is less than the Contract Energy in any Billing Period, ZAMECO 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 TOU Adjustment.

Applicable Period	Gross Average Rate
Up to 25 September 2010	PhP 4.2127/kWh
From 26 September 2010 to 25 September 2011	PhP 4.3127/kWh
From 26 September 2011 to 25 September 2012	PhP 4.4127/kWh
From 26 September 2012 onwards	PhP 4.5127/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:

$$RAI = \{A \times (FCPI_n/FCPI_o) + B \times (FCI_n/FCI_o)\} \times (FXR_n/FXR_o)$$

Where:

Up to 25 September 2010:	A = 62%	B = 38%
From 26 September 2010 to 25 September 2011:	A = 63%	B = 37%
From 26 September 2011 to 25 September 2012:	A = 64%	B = 36%
From 26 September 2012 onwards:	A = 65%	B = 35%

FCP_n - 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

c. **Imbalance Energy Charge.** The Imbalance Energy Charge (“IEC”) shall only be paid by ZAMECO II for the positive values of the terms (AD - MBCQ) and (WEP – TOU x RAI) and no reduction of or refund in payment will be made when $MBCQ > AD$ or when $TOU \times RAI > WEP$. The formula for the IEC is further defined in Section 1, Annex III of the CSEE, as follows:

$$IEC = SC \times \sum \{ \text{MAX} ((AD - MBCQ), 0) \times \text{MAX} ((WEP - TOU \times RAI), 0) \}$$

Where:

- SC - 110%
- AD - Actual Demand which is the sum of the coincident energy demand in the interval where the Imbalance transpired
- MBCQ - Maximum Bilateral Contract Quantity
- WEP - WESM Ex-Post Nodal Energy Price actually paid by MPPCL for the interval where the Imbalance transpired
- TOU - TOU Tariff rate for the hour, day, and month in accordance with the above tariff schedule

Provided that in any WESM trading interval:

- if $MBCQ > AD$, then $IEC = 0$;
- if $WEP < TOU \times RAI$, then $IEC = 0$; and
- if, in any Billing Period, when $\sum (AD - MBCQ) / CE > 5\%$, then $SC = 120\%$; where CE is the Contract Energy for that Billing Period

d. **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 Backup Power or Replacement Power is being supplied;

(ii) MPPCL's actual line rental payments to WESM in excess of PHP 0.10/kWh in any WESM trading interval; and

(iii) any congestion charges borne by the MPPCL in supplying the BCQ of ZAMECO II.

e. **Discounts.** Provided that ZAMECO II has no overdue obligation to MPPCL, MPPCL shall grant ZAMECO 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.

21.4. Energy Purchase from the WESM. For the purpose of sourcing at least ten percent (10%) of ZAMECO II's energy requirements from the WESM, ZAMECO II shall transact with the WESM through MPPCL. MPPCL shall purchase ZAMECO II's energy requirements from the WESM at the applicable WESM rates. However, MPPCL shall charge ZAMECO II based on the stipulated TOU Tariff rate determined under Annex III of the CSEE.

During the Term of the CSEE, ZAMECO II agrees to transact with the WESM exclusively through MPPCL to allow the latter to monitor ZAMECO II's compliance with Section 45(c) of the EPIRA. To implement this arrangement, MPPCL shall nominate the BCQs of ZAMECO II at each WESM trading interval such that in a year's period it would have nominated as its BCQs the equivalent of ninety percent (90%) of ZAMECO II's energy supply. The demand of ZAMECO II in a WESM trading interval for which no BCQ is declared is an Imbalance - a delivery from WESM that satisfies Section 45 (c) of the EPIRA. In this manner arises the purchase of ten percent (10%) of ZAMECO II's energy from the WESM.

22. 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 "R"**.

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

23. **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. ZAMECO 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 ZAMECO II its ancillary services costs on a pass-through basis.

24. 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 ZAMECO II	S
Transmission Service Agreement between TRANSCO and MPPCL	S-1
Metering Services Agreement between TRANSCO and MPPCL	T
Connection Agreement between TRANSCO and MPPCL	U

25. **Details of the procurement process of fuel.** As earlier stated, MPPCL's Power Plant primarily runs on coal. Attached hereto as **Annex "V"** 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.

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

Document	Annex
Audited Financial Statements for 2008	W
Certification on the heat rate of generating units	X
Certification on long-term loans	Y

VI. TREATMENT OF DISCOUNTS

27. 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 2005³, Applicants respectfully request for the approval of a similar treatment for all discounts available to ZAMECO II under the CSEE. As earlier mentioned, these discounts include the Prompt Payment Discount, Performance Discount, and Payment Security Discount.

28. In the event that ZAMECO II meets the criteria set forth in Section 2, Annex III of the CSEE which entitles it to these discounts, ZAMECO 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.

29. The discounts which ZAMECO II would be allowed to keep constitute a substantial capital inflow for its operations. ZAMECO II's only assured source of capital to finance the expansion, rehabilitation, and upgrading of its power distribution system is the five percent (5%) Reinvestment Fund allowed by the Honorable Commission to be allocated from its gross revenues. It cannot be denied however that the Reinvestment Fund is not enough to sustain the repairs, upgrades, and expansion of electric power system of ZAMECO II. If ZAMECO II is not allowed to retain fifty percent (50%) of the discounts granted by MPPCL, it will have substantial difficulty to raise capital either from additional contributions from its members or from debt financing. Thus, by this arrangement, ZAMECO II will have access to an assured capital source to enable it to maintain a sustainable operation by ensuring low systems loss and high productivity.

30. Additionally, in using the balance of the discount for operating purpose, ZAMECO II may acquire maintenance and repair tools and equipment, as well as software, to further improve its efficiency, productivity, and reliability. ZAMECO II will likewise have funds for the remuneration of its officers and employees that is contingent upon and that rewards them for their achievement of efficiency and productivity.

³ A Resolution Approving a New Policy on the Treatment of the Prompt Payment Discount

VII. CONFIDENTIAL TREATMENT OF ANNEX “Q”

31. As earlier mentioned, **Annex “Q”** contains numbers, methodology, and calculations which provide valuable information and insight on how MPPCL arrives at the TOU Tariff Rate 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 “Q”** 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.

32. 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 “Q”** 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.

33. The data contained in **Annex “Q”** 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.*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:

“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**

⁴ 540 SCRA 215 [2007]

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.)

34. 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 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

⁵ 540 SCRA 215, 228-230

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.)

35. 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.

36. 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.”

37. 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 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 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 “Q” should therefore entitled to the protection**

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).

of confidential information provided under Rule 4 of the ERC Rules of Practice and Procedure, due to the following reasons:

37.1. 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.

37.2. 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.

37.3. Given the immense protection afforded to trade secrets in our jurisdiction, as enshrined in the Constitution, without such necessity of disclosure of **Annex "Q"** 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

38. **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.

39. **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.

39.1. **Expiration of the term of the TSC.** As earlier discussed, considering the expiration of the term of the TSC between MPPCL and ZAMECO II, ZAMECO 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.

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

- a. savings for ZAMECO II and its customers, as MPPCL's base offer generation rate under the CSEE compares favorably vis-à-vis the NPC TOU rate;
- b. unique discounts offered by MPPCL under the CSEE, which further makes MPPCL's offer under the CSEE more competitive and advantageous for ZAMECO II and its customers; and
- c. purchase in the WESM of ten percent (10%) of ZAMECO II's power supply requirements, in order for ZAMECO II to comply with the EPIRA requirement.

39.3. **Provisional approval gives ZAMECO II a protection against price fluctuation in a volatile spot market.** In the event that ZAMECO II sources its power supply or additional requirements from NPC, it may be required to pay NPC at the Default Wholesale Supplier rate which is ten percent (10%) higher than the NPC basic rate for Luzon or WESM Ex Post Nodal Energy Price, whichever is higher. In the alternative, should it resort to directly buy from the WESM or purchase power through a direct member, ZAMECO II and its customers will be exposed to the volatility of the rates in the WESM, to the detriment and prejudice of its consumers.

40. **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."

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

40.2. The authority of the Honorable Commission to grant a provisional authority has been clearly affirmed by the Supreme Court in the case of *Freedom from Debt Coalition vs. Energy Regulatory Commission* (432 SCRA 157) where the Supreme Court has stressed that the Honorable Commission is endowed with the statutory authority to approve provisional rate adjustments under the aegis of Sections 44 and 80

of the Electric Power Industry Reform Act, in relation to Section 16 (c) of the Public Service Act and Section 8 of E.O. No. 172.

40.3. 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.”

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

41. 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 ZAMECO 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 “Q”** 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 ZAMECO II to reflect as rate reduction to its end-users at least one-half of the discounts it will receive from MPPCL and authorizing ZAMECO II to keep the balance of the discounts for operating and capital expenditure purposes; and
4. approving the CSEE dated 21 August 2009 entered into between ZAMECO II and MPPCL.

Other reliefs just and equitable are likewise prayed for.

Makati City for Pasig City, 01 September 2009.

Atty. Randy B. Escolango

Counsel for Applicant ZAMECO II

Tel. No. (047) 224-6635

Roll No. 47293

IBP Lifetime No. 764508

PTR No. 4529368

MCLE Compliance No. II-0016261

- and -

PUYAT JACINTO & SANTOS

Counsel for Applicant MPPCL

12/F VGP Center (formerly Manilabank Building)

6772 Ayala Avenue

Makati City

Tel. No. 840-5025; Fax No. 810-0890

By:

Regina Jacinto-Barrientos

IBP Roll No. 40547

IBP No. LRN 02737; Negros Occidental

PTR No. 0008424/1-07-09; Makati City

MCLE Compliance No. II-0001297/10-25-07

Luther D. Ramos

IBP Roll No. 50919

IBP No. 773297/1-09-09; Cagayan

PTR No. 0020666/1-07-09/Makati

MCLE Compliance No. II-0003396/10-25-07

Fidel T. Valeros, Jr.

Roll No. 51029

PTR No. 0020867/1-07-09/Makati City

IBP No. 772667/1-09-09/Quezon City

MCLE II-0002318/14 July 2007

Marigel M. Baniqued

Roll No. 56784

PTR No. 3162273/5-04-09/San Carlos City (Pang.)

IBP No. 788251/4-17-09/Pangasinan

MCLE Exempt - Admitted 2009