

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 AURORA ELECTRIC COOPERATIVE, INC., WITH PRAYER FOR PROVISIONAL AUTHORITY

ERC CASE NO. 2009-173RC

AURORA ELECTRIC COOPERATIVE, INC. AND MASINLOC POWER PARTNERS CO. LTD.

Applicants.

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APPLICATION

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

I. THE APPLICANTS

1. Aurelco 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 Brgy. Reserva, Baler, Aurora. AURELCO has been granted a franchise or authority to distribute electric service in Baler, Casiguran, Dilasag, Dinalungan, Dipaculao, Maria Aurora, and San Luis, all in the province of Aurora, and Dinapigue in the province of Isabela (the "Franchise Area").

Copies of relevant documents proving the due incorporation, registration and permit to operate of AURELCO 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 Registration with the National Electrification Administration</i>	C
<i>Certificate of Franchise</i> issued by the National Electrification Commission	D

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

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

II. NATURE OF THE APPLICATION

5. Pursuant to Rule 20 (B) of the ERC Rules of Practice and Procedure, approved by the Honorable Commission on 22 June 2006 in Resolution No. 38, Series of 2006, this Application is submitted to the Honorable Commission for its review and approval of the Contract for the Supply of Electric Energy (“CSEE”), dated 30 September 2009, executed by AURELCO and MPPCL.

A copy of the CSEE, together with the Letter of Agreement amending Section 2.2.3, Annex III thereof dated 23 October 2009, are attached hereto as **Annexes “J”** and **“J-1”**. A summary of the relevant terms of the CSEE is likewise attached as **Annex “J-2”**.

Also attached herewith as **Annexes “K”** and **“K-1”** are the respective board and partner’s resolutions of AURELCO 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 Aurora 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 Aurora and Isabela, 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
<i>Sangguniang Bayan</i> of Baler	L
<i>Sangguniang Bayan</i> of Casiguran	L-1
<i>Sangguniang Bayan</i> of Dilasag	L-2
<i>Sangguniang Bayan</i> of Dinalongan	L-3
<i>Sangguniang Bayan</i> of Dipaculao	L-4
<i>Sangguniang Bayan</i> of Maria Aurora	L-5
<i>Sangguniang Bayan</i> of San Luis	L-6
<i>Sangguniang Panlalawigan</i> of Aurora	L-7
<i>Sangguniang Bayan</i> of Dinapigue	L-8
<i>Sangguniang Panlalawigan</i> of Isabela	L-9

7. Furthermore, Applicants have caused the publication of the present Application in its entirety in a newspaper of general circulation in AURELCO’s Franchise Area.

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

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

IV. STATEMENT OF FACTS

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

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

10. AURELCO, on the other hand, has an existing transition supply contract with NPC (“NPC TSC”) from whom it sources its electricity requirements. As the TSC between AURELCO and NPC is set to expire on 25 December 2009 and given the relatively small contract energy required by AURELCO of approximately 3.8 MW, no other NPC successor generating company or independent power producer has shown the same interest as MPPCL to enter into a supply agreement with AURELCO at a reasonable contract energy price. Considering that MPPCL offered the same terms and conditions as those in the CSEE for a larger electric cooperative (i.e., ZAMECO II which is about four (4) times larger than AURELCO), MPPCL’s offer is advantageous for AURELCO and its end-users.

11. As the privatization of NPC’s assets is accelerated pursuant to the EPIRA, AURELCO 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

12. As such, to ensure the security of power supply in AURELCO’s Franchise Area upon the expiry of the NPC TSC, and at the same time, further reduce the generation charge being paid by its customers, AURELCO entered into the CSEE with MPPCL for the supply of electric energy for reasons further discussed below.

¹ Section 23, EPIRA

Commercial advantage of MPPCL's generation rate

13. AURELCO concluded, after obtaining commitments for power supply to cover its load requirements from other possible suppliers, that it would be in the best interest of its consumers if it enters into a bilateral power supply contract with MPPCL, as its bilateral contract with MPPCL will not impose additional burden on AURELCO's customers, provide certainty of supply and assure AURELCO of a long-term competitive pricing.

13.1. A summary of the impact on AURELCO's generation charges of MPPCL's generation rate is shown below. By sourcing ninety percent (90%) of its power supply requirements from MPPCL, AURELCO will generate savings for its customers, as follows:

	Amount	Rate
MPPCL FSP at 55.3% LF		
Base Charge	74,682,211	4.3947
Performance Discount	(3,058,890)	(0.1800)
Security Discount	(1,699,383)	(0.1000)
Prompt Payment Discount	(2,097,718)	(0.1234)
Net Charges	67,826,220	3.9912
NPC TSC		
NPC TOU	74,673,273	4.3938
FBHC	416,381	0.0245
MRR	(3,059,129)	(0.1800)
PPD	(2,160,916)	(0.1271)
Net Charges	69,869,609	4.1111
Savings	2,038,404	0.1199

13.2. AURELCO did not consider NPC as a potential supplier, as the latter may no longer be in a position to supply AURELCO's required capacity 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. Even assuming that NPC is able to supply the power requirements of AURELCO, the same cannot be made consistently 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. 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 PhP 0.25/kWh of increase awaits

with the privatization of the Calaca Coal-Fired Plant and the Tiwi and Mak-Ban Geothermal Plants.

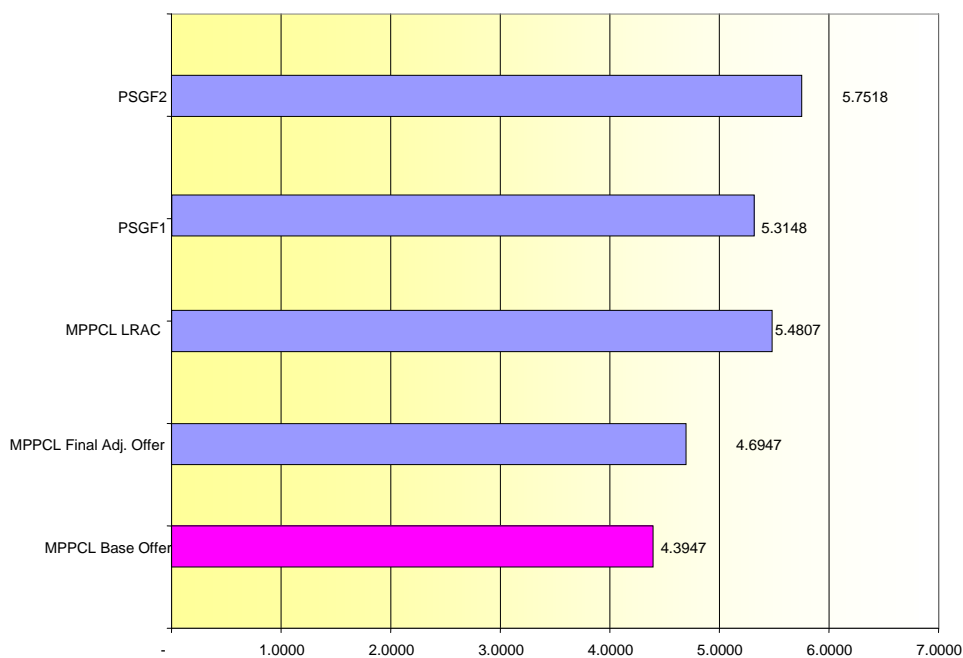
13.3. Moreover, by securing of its power supply from MPPCL, AURELCO reduces its risk for future positive deferred accounting adjustments (“DAA”) as the regime for positive adjustments in DAA is already imminent as gleaned from recent NPC applications.

13.4. PSALM confirmed by way of a certification dated 4 November 2009 that with the continuing privatization of the generation plants and considering the privatization schedule of PSALM aimed at one hundred percent (100%) of the total generating/operating capacity in Luzon and Visayas grids by the year 2010, it can no longer economically supply the electric power requirements of AURELCO beyond the expiration of the NPC TSC on 25 December 2009.

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

14. Moreover, AURELCO concluded that the commercial terms of the CSEE, particularly the generation rate being offered by MPPCL and MPPCL’s discount terms, is advantageous for AURELCO. MPPCL’s generation rate is more reasonable compared to other generating companies utilizing coal as fuel in the long run. In fact, it will generate savings for AURELCO and its customers. Thus, notwithstanding that a direct negotiation was undertaken by the parties, MPPCL’s generation rate offers a competitive and advantageous rate for AURELCO 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:



15. Considering the urgency of the situation, with the NPC TSC expiring on 25 December 2009 and a looming capacity shortfall in the Luzon grid, AURELCO 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, AURELCO will be able to significantly reduce the generation rate passed on to its customers.

16. It should likewise be noted 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, Applicants understand that the suspension has not been lifted.

17. The foregoing commercial advantages and legal grounds considered, on 30 September 2009, the parties entered into the CSEE, which is the subject of the instant Application.

V. ABSTRACT OF THE CSEE AND RELATED INFORMATION

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

18.1. **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 AURELCO 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.

18.2. **Volume.** Under the CSEE, MPPCL shall supply AURELCO a minimum 23,296,820 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, including the allowable decrease in the Contract Energy and AMD upon the synchronization and commercial operation of the Ditumabo Mini Hydro-electric Power Plant.

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

b. An Allowable Maximum Demand ("AMD") is made available which when dispatched is expected to meet AURELCO's peak power

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. Subject to Section 6.5 of the CSEE, receipt of and written approval by MPPCL of the Security Deposit required to be provided by AURELCO;
- c. Execution by AURELCO of an escrow agreement;
- d. Written confirmation from the Escrow Account Bank that AURELCO has established and funded an escrow account;
- e. Written confirmation from PEMC that AURELCO has completed its registration as an indirect trading member of WESM; and
- f. Receipt by MPPCL of AURELCO's list of customers belonging to the Contestable Market.

requirements. The AMD will be dispatched to satisfy the Bilateral Contract Quantities (“BCQ”) of AURELCO in a manner that would allow AURELCO 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 AURELCO 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 AURELCO shall pay as minimum charges.

d. The latest energy and demand forecast of AURELCO, 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 “O”**.

18.3. **Total Energy Charge Rate.** For electricity supplied by MPPCL, AURELCO 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 AURELCO), 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 "P"** 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, fuel cost, among other information.

Considering the confidential nature of **Annex "P,"** 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 "P"** 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 "P"** 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 August 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) MPPCL's average TOU tariff, taking into account its step increases are summarized in the table below:

	Base Offer	by 9/26/2010	by 9/26/2011	by 9/26/2012
GENERATION CHARGES				
Ave. Base TOU Rate, P/kWh	4.3947	4.4947	4.5947	4.6947

(vi) **Minimum Charges.** If AURELCO's Actual Energy is less than the Contract Energy in any Billing Period, AURELCO 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 4.3950/kWh

From 26 September 2010 to 25 September 2011	PhP 4.4950/kWh
From 26 September 2011 to 25 September 2012	PhP 4.5950/kWh
From 26 September 2012 onwards	PhP 4.6950/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 = 64%	B = 36%
From 26 September 2010 to 25 September 2011:	A = 65%	B = 35%
From 26 September 2011 to 25 September 2012:	A = 66%	B = 34%
From 26 September 2012 onwards:	A = 67%	B = 33%

FCPn	-	The average of the U.S. Consumer Price Index for Capital Equipment (line 63, International Financial Statistics) for the period of the calendar quarter immediately prior to the billing month.
FCPo	-	U.S. Consumer Price Index for Capital Equipment, line 63, International Financial Statistics as of December 2008.
FXRn	-	The average of the exchange rate of the Philippine Peso to the US Dollar as published by the <i>Bangko Sentral ng Pilipinas</i> for the period of the calendar quarter immediately prior to the billing month.
FXRo	-	PhP 48.00; provided, that when $FXR_n / FXR_o < 1$, 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 AURELCO 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:

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

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

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TOU - the interval where the Imbalance transpired
- 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 $\Sigma (AD - MBCQ) / CE > 5\%$, 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 RAI 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 AURELCO.

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

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

During the Term of the CSEE, AURELCO agrees to transact with the WESM exclusively through MPPCL to allow the latter to monitor AURELCO's compliance with Section 45(c) of the EPIRA. To implement this arrangement, MPPCL shall nominate the

BCQs of AURELCO at each WESM trading interval such that in a year’s period it would have nominated as its BCQs the equivalent to at least ten percent (10%) of AURELCO’s energy supply. The demand of AURELCO 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 arise the purchase of ten percent (10%) of AURELCO’s energy from the WESM.

19. 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 “Q”**.

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.

20. 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. AURELCO 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.

21. 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 AURELCO	R
Transmission Service Agreement between TRANSCO and MPPCL	R-1
Metering Services Agreement between TRANSCO and MPPCL	S
Connection Agreement between TRANSCO and MPPCL	T

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

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

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

VI. TREATMENT OF DISCOUNTS

24. 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 AURELCO under the CSEE. As earlier mentioned, these discounts include the Prompt Payment Discount, Performance Discount, and Payment Security Discount.

25. Allowing AURELCO to pass on to its customers fifty percent (50%) of the discounts granted by MPPCL follows the framework established by the Honorable Commission with respect to the treatment of prompt payment discount ("PPD") received by the distribution utilities from NPC under ERC Resolution No. 12, series of 2005⁴. In said Resolution, the distribution utilities were allowed by the Honorable Commission to pass on to their customers fifty percent (50%) of the PPD they received from the NPC.

26. The discounts which AURELCO would be allowed to keep constitute a substantial capital inflow for its operations. AURELCO'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

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

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

the repairs, upgrades, and expansion of electric power system of AURELCO. If AURELCO 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, AURELCO will have access to an assured capital source to enable it to maintain a sustainable operation by ensuring low systems loss and high productivity.

27. In using the balance of the discount for operating purpose, AURELCO may acquire maintenance and repair tools and equipment, as well as software, to further improve its efficiency, productivity, and reliability. Applicant AURELCO respectfully manifests that if the retention by AURELCO of the fifty percent (50%) of the discounts granted by MPPCL is allowed by this Honorable Commission, then it will only use the same to acquire maintenance and repair tools and equipment, as well as software, to further improve its efficiency, productivity and reliability and not for the remuneration of its officers and employees.

28. It must be emphasized that the prayer of the Applicants to be allowed to pass through fifty percent (50%) of the discounts they receive from MPPCL to their consumers is in consonance with the direction of the Honorable Commission towards efficiency benchmarking of Philippine electric cooperatives, which, among others, seek to introduce incentives to allow efficiency gains to be shared between the electric cooperative and the end-users.

29. To emphasize, the performance discounts (systems loss reduction and increased productivity) and security deposit discounts are offered by MPPCL to reward and encourage better performance of the distribution utility. Similar to the PPD, the performance discount and security deposit discount are in the same class of benefit as they should be first enjoyed by the party who caused it - the distribution utility, following the maxim of "benefit-causers enjoy."⁵

30. Thus, by this arrangement where AURELCO is allowed to retain fifty percent (50%) of the discounts granted by MPPCL, AURELCO will have access to an assured capital source to enable it to rehabilitate its distribution system, maintain a sustainable operation, and ensure low systems loss and high productivity without having to resort to requiring additional contribution from its member-consumers or from capital borrowings.

⁵ The maxim of "cost-causers pay" has a flip side which is "benefit-causers enjoy".

VII. CONFIDENTIAL TREATMENT OF ANNEX "P"

31. As earlier mentioned, **Annex "P"** 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 "P"** 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 "P"** 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 "P"** 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.*⁶, 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 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

⁶ 540 SCRA 215 [2007]

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."⁷ (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 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."⁸ (Emphasis supplied.)

⁷ 540 SCRA 215, 228-230

⁸ 540 SCRA 215, 237-239

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 stockholders⁹ or the constitutional right to information¹⁰.

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 "P" 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:**

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

⁹ Philpotts vs. Philippine Manufacturing Company, 40 Phil. 471 (1919).

¹⁰ Garcia vs. Board of Investments, G.R. 88637 (1989).

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 “P”** 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. Impending Expiration of the term of the TSC. As earlier discussed, considering the nearing expiration of the term of the NPC TSC between NPC and AURELCO on 25 December 2009, Applicants 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 AURELCO of incentives under the MPPCL CSEE. Pending final resolution of the pending application and without a provisional authority granted, AURELCO will be unable to avail of the commercial advantages granted to it under its CSEE with MPPCL, such as:

- a. savings for AURELCO and its customers, as MPPCL’s TOU Tariff 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 AURELCO and its customers; and

c. purchase in the WESM of ten percent (10%) of AURELCO's power supply requirements, in order for AURELCO to comply with the EPIRA requirement.

39.3. Provisional approval gives AURELCO a protection against price fluctuation in a volatile spot market. In the event that AURELCO 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, AURELCO and its customers will be exposed to the volatility of the rates in the WESM, to the detriment and prejudice of its consumers.

39.4. PSALM certified that it will no longer be able to economically supply the power requirements of AURELCO beyond the expiration of the NPC TSC. Likewise noteworthy is the certification issued by PSALM dated 4 November 2009, confirming that considering its privatization schedule, it can no longer economically supply the electric power requirements of AURELCO beyond the expiration of the NPC TSC on 25 December 2009.

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 AURELCO 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 “P”** 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 AURELCO to reflect as rate reduction to its end-users at least one-half of the discounts it will receive from MPPCL and authorizing AURELCO to keep the balance of the discounts for operating and capital expenditure purposes; and
4. approving the CSEE dated 30 September 2009, as amended, entered into between AURELCO and MPPCL.

Other reliefs just and equitable are likewise prayed for.

Makati City and Quezon City for Pasig City, 17 November 2009.

(Sgd)

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