

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 LA UNION ELECTRIC COOPERATIVE, INC., WITH PRAYER FOR PROVISIONAL AUTHORITY

ERC CASE NO. 2009-176RC

LA UNION ELECTRIC COOPERATIVE, INC. AND MASINLOC POWER PARTNERS CO., LTD.

*Applicants.*

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**APPLICATION**

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

**I. THE APPLICANTS**

1. La Union 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 Sta. Rita East, Aringay, La Union. LUELCO has been granted a franchise or authority to distribute electric service in the municipalities of Agoo, Aringay, Bacnotan, Bagulin, Balaoan, Bangar, Bauang, Burgos, Caba, Luna, Naguilian, Pugo, Rosario, San Fernando, San Gabriel, San Juan, Santol, Sto. Tomas, Sudipen, Tubao, all in the province of La Union and in the municipalities of Sison, San Jacinto, San Fabian and Pozorrubio, all in the province of Pangasinan (the "Franchise Area").

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

<b>Document</b>	<b>Annex</b>
<i>Articles of Incorporation</i>	A
<i>Amended By-laws</i>	B
<i>Certificate of Registration with the National Electrification Administration</i>	C
<i>Certificate of Franchise issued by the National Electrification Commission</i>	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:

<b>Document</b>	<b>Annex</b>
<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”)</i> No. 9009-049-206C for the Masinloc Power Plant	G
<i>Letter</i> from the Department of Environment and Natural Resources 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 dated 30 September 2009 (“CSEE”), the two Supplemental Agreement to the Contract for the Sale of Electric Energy dated 30 September

2009 (“SA”), and the Letter of Agreement dated 23 October 2009, executed by LUELCO and MPPCL.

A copy of the CSEE is attached hereto as **Annex “J”** and copies of the two SAs are attached as **Annexes “J-1” and “J-2”**. The Letter of Agreement dated 23 October 2009 is likewise attached as **Annex “J-3”** and the summary of the relevant terms of the CSEE is attached as **Annex “J-4”**.

Also attached herewith as **Annexes “K” and “K-1”** are the respective board and partner’s resolutions of LUELCO 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 La Union and Pangasinan, with a copy of the instant Application and accompanying documents.

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

<b>Certification of Presiding Officer/Duly Authorized Representative</b>	<b>Annex</b>	<b>Certification of Presiding Officer/Duly Authorized Representative</b>	<b>Annex</b>
Agoo	L	San Gabriel	L-14
Aringay	L-1	San Juan	L-15
Bacnotan	L-2	Santol	L-16
Bagulin	L-3	Sto. Tomas	L-17
Balaoan	L-4	Sudipen	L-18
Bangar	L-5	Tubao	L-19
Bauang	L-6	Sangguniang Panlalawigan of La Union	L-20
Burgos	L-7	Sison	L-21
Caba	L-8	San Jacinto	L-22
Luna	L-9	San Fabian	L-23
Naguilian	L-10	Pozorrubio	L-24
Pugo	L-11	Sangguniang Panlalawigan of Pangasinan	L-25
Rosario	L-12		
San Fernando	L-13		

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

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

<b>Document</b>	<b>Annex</b>
Affidavit of Publication	M and M-1
Copy of Newspaper	M-2 and M-3

#### **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. LUELCO, 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 NPC and LUELCO is set to expire on 25 December 2009, LUELCO previously entered into a Power Purchase and Sale Agreement dated 25 April 2007 ("PPSA") with GNPOWER Limited Company ("GNPOWER") whereby the latter is expected to deliver the power requirements of LUELCO upon the expiration of the NPC TSC. Said PPSA was approved by the Honorable Commission under ERC Case No. 2007-121 RC.

11. In ERC Case No. 2007-121 RC, the applicants therein indicated that GNPOWER will commence providing the power requirements of its customer distribution utilities, including LUELCO, in late 2010 or 2011. The latest feedback of LUELCO from GNPOWER, however, indicates that the commercial operation of GNPOWER's power plant will be delayed and GNPOWER may only be able to commence operation in the middle of 2012, or after the expiry of the NPC TSC.

12. As such, to ensure the security of power supply in LUELCO’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, LUELCO entered into the CSEE with MPPCL for the supply of electric energy to commence from the approval by the Honorable Commission of the CSEE, or issuance of a provisional authority thereof.

**Commercial advantage of MPPCL’s generation rate**

13. To minimize the adverse consequences of a projected delay in the commencement of the commercial operation of GNPOWER’s power plant, and to further lower the generation charge passed on to its customers, LUELCO entered into discussions with MPPCL for the latter to supply LUELCO’s power requirements for thirty-six (36) Billing Periods at a price which provides additional savings vis-à-vis Luelco’s current strategy of procuring ninety percent (90%) of its energy from NPC and ten percent (10%) from the WESM. Such supply is intended to commence from the approval of the CSEE or issuance of provisional approval thereof and shall be automatically renewed until the lapse of another twenty-four (24) Billing Periods or until the commencement of GNPOWER plant’s commercial operations, whichever comes first. Thereafter, the parties may renew the CSEE by mutual agreement for two successive durations of thirty six (36) Billing Periods.

14. LUELCO concluded that entering into the CSEE with MPPCL will redound to the best interest of its consumers. Hence, LUELCO executed the CSEE, the SAs and Letter Agreement not only as risk mitigation measure and provide certainty of supply in the event of GNPOWER delay but, more importantly, as this will further increase savings for its consumers.

14.1. A summary of the impact on LUELCO’s generation charges of MPPCL’s generation rate is shown below. By sourcing 90% of its power supply requirements from MPPCL, LUELCO will generate additional savings for its customers, as follows:

MPPCL CSEE	Volume, kWh	Share, %	Rate, PhP/kWh
MPPCL BCQs	117,148,767	90%	4.2749
WESM	12,973,427	10%	2.9668
Total	130,122,194	100%	4.1445
NPC TSC	Volume, kWh	Share, %	Rate, PhP/kWh
NPC BCQs	117,148,767	90%	4.3440
WESM	12,973,427	10%	2.9668
Total	130,122,194	100%	4.2067

Savings in Rate, PhP/kWh	<b>0.0622</b>
Savings in Amount, PhP Million	<b>8.09</b>

14.2. LUELCO cannot rely on NPC to continue supplying LUELCO's power requirements in the event of GNPOWER's delay, 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 LUELCO, the same cannot be made consistently at rates lower than MPPCL's considering that the power plants remaining with NPC, after the privatization of its assets, are plants which are less efficient and thus more expensive to run. At the time of the signing of the CSEE on 30 September 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.

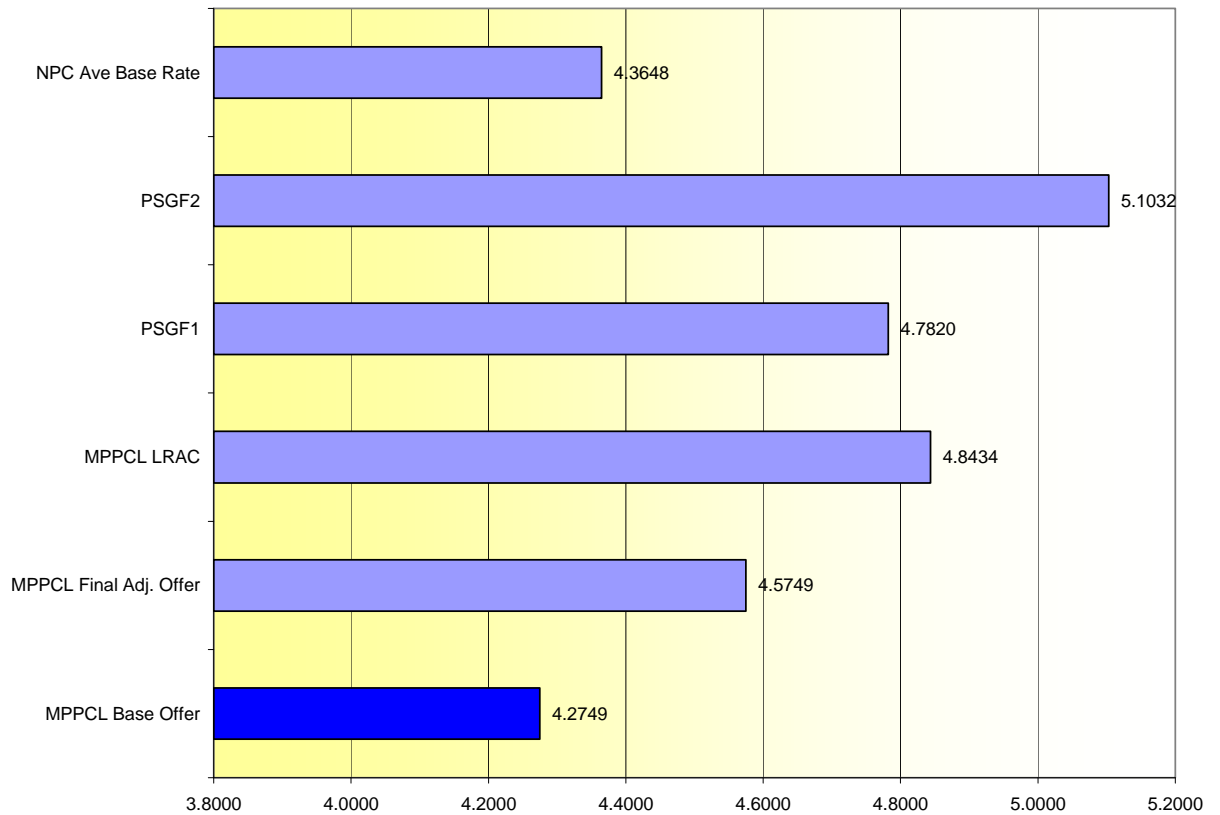
14.3. Moreover, by securing of its power supply from MPPCL, LUELCO reduces its risk for future positive deferred accounting adjustments ("DAA") as the regime for positive adjustments in DAA is already imminent as gleaned from recent NPC applications.

14.4. PSALM further confirmed by way of a certification dated 3 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 LUELCO beyond the expiration of the NPC TSC on 25 December 2009.

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

15. Moreover, LUELCO concluded that the commercial terms of the CSEE, particularly the generation rate being offered by MPPCL and MPPCL's discount terms, are advantageous for LUELCO as MPPCL's generation rate is more reasonable compared to other generating companies utilizing coal as fuel in the long run. Thus, notwithstanding that a direct negotiation was undertaken by the parties, MPPCL's generation rate offers a competitive and advantageous rate for LUELCO and its customers.

A summary of MPPCL's basic generation rate vis-à-vis the rate of other generation companies are provided in the table below:



16. Considering the urgency of the situation, with the NPC TSC expiring on 25 December 2009, a looming capacity shortfall in the Luzon grid, and further aggravated by the projected delay in the commercial operation of GNPOWER to supply LUELCO's energy requirements, LUELCO 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, LUELCO will be able to significantly reduce the generation rate passed on to its customers.

17. 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.

18. The foregoing commercial advantages 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**

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

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

Under the CSEE, the Operations Effectivity Date occurs on the next immediate twenty-sixth (26<sup>th</sup>) day of the month after the conditions in Section 2.2<sup>1</sup> of the CSEE have been satisfied.

19.2. **Volume.** Under the CSEE, MPPCL shall supply LUELCO a minimum 120,939,700kWh 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 LUELCO starting on the Operations Effectivity Date.

b. An Allowable Maximum Demand ("AMD") is made available which LUELCO will dispatch to meet its Bilateral Contract Quantities ("BCQ") in a manner that would allow LUELCO 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.

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<sup>1</sup> 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 LUELCO;
- c. Execution by LUELCO of an escrow agreement;
- d. Written confirmation from the Escrow Account Bank that LUELCO has established and funded an escrow account;
- e. Written confirmation from PEMC that LUELCO is a direct trading member of WESM; and
- f. Receipt by MPPCL of LUELCO's list of customers belonging to the Contestable Market.

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

d. The latest energy and demand forecast of LUELCO, 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”**.

19.3. **Total Energy Charge Rate.** For electricity supplied by MPPCL, LUELCO 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 LUELCO), and by a Rate Adjustment Index, plus the 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	6.4000	2.3250	2.3250	2.3250
10:00:00 AM	6.4000	2.3250	6.0500	2.3250
11:00:00 AM	6.4000	2.3250	6.0500	2.3250
12:00:00 PM	6.4000	2.3250	6.0500	2.3250
1:00:00 PM	6.4000	2.3250	6.0500	2.3250
2:00:00 PM	6.4000	2.3250	6.0500	2.3250
3:00:00 PM	6.4000	2.3250	6.0500	2.3250
4:00:00 PM	6.4000	2.3250	6.0500	2.3250
5:00:00 PM	6.4000	2.3250	6.0500	2.3250
6:00:00 PM	6.4000	2.3250	6.0500	2.3250
7:00:00 PM	6.4000	6.2500	6.0500	5.9000
8:00:00 PM	6.4000	6.2500	6.0500	5.9000
9:00:00 PM	6.4000	2.3250	6.0500	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, and 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
<b>GENERATION CHARGES</b>				
Ave. Base TOU Rate, P/kWh	4.2749	4.3749	4.4749	4.5749

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

<b>Applicable Period</b>	<b>Gross Average Rate</b>
Up to 25 September 2010	PhP 4.2750/kWh
From 26 September 2010 to 25 September 2011	PhP 4.3750/kWh
From 26 September 2011 to 25 September 2012	PhP 4.4750/kWh
From 26 September 2012 onwards	PhP 4.5750/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 = 63%	B = 37%
From 26 September 2010 to 25 September 2011:	A = 64%	B = 36%
From 26 September 2011 to 25 September 2012:	A = 65%	B = 35%
From 26 September 2012 onwards	A = 66%	B = 34%

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 $FXRn / FXRo < 1$ , 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. **The Allowable Contract Reimbursable.** This component is the sum of 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; and

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

d. **Discounts.** Provided that LUELCO has no overdue obligation to MPPCL, MPPCL shall grant LUELCO 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. Additionally, a Price Discount Mechanism has been included pursuant to the Supplemental Agreement hereto attached as Annex J-2.

20. **Supplemental Agreement on the Balance of Requirements.** As LUELCO is in the process of preparing its organizational and financial resources for its registration as a direct

trading participant in the WESM, LUELCO and MPPCL entered in a supplemental agreement (the “SA”) on 30 September 2009 for the supply of the quantity of electricity required by LUELCO not covered by the Contract Energy (the “Balance of Requirements”). LUELCO foresees that it can complete all the requirements to become a direct trading participant in the WESM only by mid-2010.

20.1. **Term.** The SA shall have a term of six (6) Billing Periods counted from the Operations Effectivity Date or until 25 June 2010, whichever comes earlier, and shall be automatically renewed and shall continue until the lapse of another six (6) Billing Periods unless earlier terminated in accordance with the SA. However, the SA shall be coterminous with the CSEE under its Initial Term, Extension, or Renewal Term, as applicable.

20.2. **Purchases from the WESM.** During the term of the SA, MPPCL shall purchase in the WESM, on behalf of LUELCO, the quantity of electricity required by the latter not covered by the Contract Energy (the “Balance of Requirements”). Any WESM purchases made by MPPCL for LUELCO will be made in accordance with the terms of the SA.

20.3. **Monthly WESM Power Bill.** For purchases made by MPPCL under the SA, LUELCO shall pay a monthly power bill (“Monthly WESM Power Bill”) which is the sum of: (i) the invoice served by PEMC to MPPCL for the purchase of the Balance of Requirements and the charges for the line rentals and net settlement surplus and other WESM related charges, and (ii) a service fee calculated by multiplying the Balance of Requirements by the WESM Service Fee Rate below less any amounts indicated in a credit memorandum granted by MPPCL to LUELCO, which the latter chooses to avail of, plus any amounts indicated in a debit memorandum as due to MPPCL from billing adjustments that MPPCL may have against LUELCO.

Period Covered	WESM Service Fee Rate
Up to 25 June 2010	PhP 0.10/kWh
From 26 June 2010 to 25 December 2010	PhP 0.15/kWh
From 26 December 2010 to 25 June 2011	PhP 0.20/kWh

21. **Supplemental Agreement on the Price Discount Mechanism.** To mitigate the rate impact of the loss of the mandatory rate reduction (MRR), LUELCO determined that it needs to allocate fifty percent (50%) of the discounts in reducing the generation charges of

residential end-users only. In any event, all other users will experience a rate reduction because MPPCL's base rate is lower than NPC.

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 "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.

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. LUELCO 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.

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:

<b>Document</b>	<b>Annex</b>
Transmission Service Agreement between TRANSCO and LUELCO	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

25. **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.

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

<b>Document</b>	<b>Annex</b>
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**

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 2005<sup>2</sup>, Applicants respectfully request for the approval of a similar treatment for all discounts available to LUELCO under the CSEE. As earlier mentioned, these discounts include the Prompt Payment Discount, Performance Discount, and Payment Security Discount.

28. Allowing LUELCO 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 2005<sup>3</sup>. 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.

29. Adopting the foregoing framework of reflecting 50% of the discounts as rate reduction to all end-users results in equal savings for all. The amount of savings, however, is not sufficient to offset the loss of the MRR of PhP 0.30/kWh for the residential end-users. To mitigate the impact of such loss of MRR, LUELCO proposes:

(a) to reflect fifty percent (50%) of the prompt payment discount as rate reduction in MPPCL’s generation charge which is consistent with existing practice;

(b) to reflect fifty percent (50%) of the proceeds of the performance discount, payment security discount and price discount mechanism (i.e., the non-PPD

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<sup>2</sup> A Resolution Approving a New Policy on the Treatment of the Prompt Payment Discount

<sup>3</sup> A Resolution Approving a New Policy on the Treatment of the Prompt Payment Discount

discounts) as rate adjustment in MPPCL’s generation charges for residential end-users only to offset the loss of the MRR.

(c) to permit LUELCO to use the balance of the proceeds of the discounts after its use in Section 28 (b), above, for operating and capital expenditures.

30. Based on the above framework of the utilization and distribution of the discounts, the specific impact to residential end-users is a further reduction in rate while all other end-users will experience rate reduction anyway because of the lower base charges of MPPCL. This is shown in the chart below:

	In Rate, PhP/kWh purchased power		
	MPPCL	NPC	Savings
<b>Net Generation Charges</b>	<b>3.6971</b>	<b>3.9273</b>	<b>0.2302</b>
add: 50% PPD retained by EC	0.0526	0.0562	0.0036
add: 50% PD & PSD retained by EC	0.1260	-	(0.1260)
add: 50% PDM retained by EC	0.0450	-	-
add: 50% PD & PSD given to Residential	0.1260	-	(0.1260)
add: 50% PDM given to Residential	0.0450	-	-
add: MRR given to residential users	-	0.1891	0.1891
<b>Pass-thru generation charges</b>	<b>4.0919</b>	<b>4.1726</b>	<b>0.0807</b>
System Loss Charge	0.5319	0.5424	0.0105
VAT on pass-thru generation charges	0.4377	0.4207	(0.0171)
VAT on System Loss Charge	0.0569	0.0547	(0.0022)
<b>Billed Generation Charges</b>	<b>5.1185</b>	<b>5.1903</b>	<b>0.0719</b>

<b>NPC &amp; WESM</b>	<b>Residential</b>	<b>Others</b>
Billed Generation Charges	5.1903	5.1903
Less: MRR	(0.3000)	
<b>Net Charges</b>	<b>4.8903</b>	<b>5.1903</b>
<b>MPPCL &amp; WESM</b>	<b>Residential</b>	<b>Others</b>
Billed Generation Charges	5.1185	5.1185
Less: Share in PD, PSD & PDM	(0.2444)	
<b>Net Charges</b>	<b>4.8741</b>	<b>5.1185</b>
<b>Savings</b>	<b>0.0163</b>	<b>0.0719</b>

Notes: PPD – Prompt Payment Discounts  
 PD – Performance Discount  
 PSD – Payment Security Discount  
 PDM - Price Discount Mechanism

31. The discounts which LUELCO would be allowed to keep constitute a substantial capital inflow for its operations. LUELCO’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 LUELCO. If LUELCO 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, LUELCO will have access to an assured capital source to enable it to maintain a sustainable operation by ensuring low systems loss and high productivity.

32. In using the balance of the discount for operating purpose, LUELCO may acquire maintenance and repair tools and equipment, as well as software, to further improve its efficiency, productivity, and reliability. Applicant LUELCO respectfully manifests that if the retention by LUELCO 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.

33. It must be emphasized that the prayer of the Applicant LUELCO to be allowed to pass through fifty percent (50%) of the discounts it receive from MPPCL to its 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.

34. To emphasize, the performance discounts (systems loss reduction and increased productivity) and payment 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."<sup>4</sup>

35. Thus, by this arrangement where LUELCO is allowed to retain fifty (50%) of the discounts granted by MPPCL, LUELCO 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.

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<sup>4</sup> The maxim of "cost-causers pay" has a flip side which is "benefit-causers enjoy".

## VII. CONFIDENTIAL TREATMENT OF ANNEX "P"

36. 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.

37. 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.

38. 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.*<sup>5</sup>, 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**

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<sup>5</sup> 540 SCRA 215 [2007]

**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.”<sup>6</sup> (Emphasis supplied.)

39. 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**

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<sup>6</sup> 540 SCRA 215, 228-230

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.”<sup>7</sup> (Emphasis supplied.)

40. 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 stockholders<sup>8</sup> or the constitutional right to information<sup>9</sup>.

41. 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.”

42. 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:**

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<sup>7</sup> 540 SCRA 215, 237-239

<sup>8</sup> Philpotts vs. Philippine Manufacturing Company, 40 Phil. 471 (1919).

<sup>9</sup> Garcia vs. Board of Investments, G.R. 88637 (1989).

42.1. 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.

42.2. 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.

42.3. 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**

43. **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.

44. **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.

44.1. **Impending expiration of the term of the NPC TSC compounded by delay in the commencement of commercial operations of GNPOWER's plant.** As earlier discussed, considering the nearing expiration of the term of the NPC TSC between NPC and LUELCO, compounded by the unforeseen delay in the commencement of the PPSA of LUELCO with GNPOWER, LUELCO and MPPCL are constrained to ask the Honorable Commission for a provisional approval of the instant Application pending the issuance of a final order or decision in order to ensure reliable and steady power supply in LUELCO's Franchise Area.

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

a. savings for LUELCO and its customers, as the resulting combined generation charge with the entry of MPPCL as a power supplier under the CSEE compares favorably vis-à-vis the existing power supply arrangements of LUELCO with NPC and WESM; and

b. discounts offered by MPPCL under the CSEE, which further makes MPPCL's offer under the CSEE more competitive and advantageous for LUELCO and its customers.

c. unique structure of discounts which enables offsetting the loss of the MRR and mitigate the impact thereof to the residential end-users

44.3. **Provisional approval gives LUELCO a protection against price fluctuation in a volatile spot market.** If, as a result of the NPC TSC expiration and delay in the commercial operations of GNPOWER, LUELCO will be constrained to source 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 its entire energy requirements, LUELCO and its customers will be exposed to a bigger risk of the volatility of the rates in the WESM, to the detriment and prejudice of LUELCO's consumers.

44.4. **PSALM certified that it will no longer be able to economically supply the power requirements of LUELCO.** Likewise noteworthy is the certification issued by PSALM dated 3 November 2009 that considering its privatization schedule, it can no longer economically supply the electric power requirements of LUELCO beyond the expiration of the NPC TSC on 25 December 2009.

45. **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."

45.1. 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.

45.2. 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.

45.3. 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.”

45.4. 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.

46. 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 LUELCO 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 LUELCO to continue reflecting 50% of its prompt payment discounts to reduce its generation charges to all its end-users;

4. allowing LUELCO to reflect as rate reduction to its residential end-users only at least fifty percent (50%) of MPPCL's other discounts (such as the performance discount, payment security discount and price discount mechanism) it will receive from MPPCL;

5. authorizing LUELCO to keep the balance of the all discounts for operating and capital expenditure purposes;

6. approving the CSEE dated 30 September 2009 entered into between LUELCO and MPPCL.

Other reliefs just and equitable are likewise prayed for.

Makati City for Pasig City, 23 November 2009.

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