

Republic of the Philippines
ENERGY REGULATORY COMMISSION
Pasig City

IN THE MATTER OF THE
JOINT APPLICATION FOR
APPROVAL OF THE
EMERGENCY POWER
SUPPLY AGREEMENT
ENTERED INTO BY AND
BETWEEN ZAMBALES I
ELECTRIC COOPERATIVE,
INC. AND MASINLOC
POWER PARTNERS CO.
LTD., WITH PRAYER FOR
PROVISIONAL AUTHORITY
AND CONFIDENTIAL
TREATMENT OF
INFORMATION

ERC CASE NO. 2024-011 RC

ZAMBALES I ELECTRIC
COOPERATIVE, INC. AND
MASINLOC POWER
PARTNERS CO. LTD.,
Joint Applicants.

Promulgated:
January 24, 2024

NOTICE OF VIRTUAL HEARING

TO ALL INTERESTED PARTIES:

Notice is hereby given that on 19 January 2024, Zambales I Electric Cooperative, Inc. (ZAMECO I) and Masinloc Power Partners Co. LTD. (MPPCL) filed a Joint Application dated 15 December 2023, seeking the Commission's approval of their Emergency Power Supply Agreement (EPSA), with prayer for provisional authority and confidential treatment of information.

The pertinent allegations of the Joint Application are hereunder quoted as follows:

THE JOINT APPLICANTS

- 1. ZAMECO I is an electric cooperative duly organized by virtue of Presidential Decree No. 269, as amended, with principal office address at San Vicente, Palauig, Zambales, Philippines. ZAMECO I serves the power requirements of the Municipalities of Sta. Cruz, Candelaria, Masinloc, Palauig, Iba and Botolan all in the Province of Zambales (collectively, the "Franchise Area"). For purposes of this Joint Application, ZAMECO I is represented herein by its Board President, Merlina T. Ranoco and Project Supervisor/ Acting General Manager, Engr. Alvin M. Farrales, duly authorized by the ZAMECO I Board of Directors.1
2. MPPCL is a limited partnership duly organized and existing under and by the laws of the Republic of the Philippines, with principal office address at the Masinloc Coal-Fired Thermal Power Plant, Barangay Bani, Masinloc, Zambales. For purposes of this Joint Application, MPPCL is represented by its Managing Partner and CEO, Elenita D. Go, and Chief Finance Officer, Paul Bernard D. Causon, duly authorized for the purpose by virtue of the Secretary's Certificate dated 25 October 2023.2
3. The Joint Applicants may be served with the orders, notices, and other processes of the Honorable Commission through their respective undersigned counsels at the addresses indicated herein.

NATURE OF THE APPLICATION

- 4. The instant Joint Application for approval of the Emergency Power Supply Agreement ("EPSA") entered into by and between ZAMECO I and MPPCL dated 25 October 2023 (the "ZAMECO I-MPPCL EPSA") is being submitted to the Honorable Commission for its review and approval pursuant to Sections 253 and 45(b) of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (the "EPIRA"), Rule 20(B) of the Honorable Commission's Resolution No. 01, Series of 2023 (the "ERC Revised Rules of Practice and Procedure") and Resolution No. 16, Series of 20236 (the "ERC Implementing Guidelines for the Procurement, Execution, and Evaluation of Power Supply Agreements"), and the Department of Energy's ("DOE") Department Circular No. 2023-06-0021 (the "DOE 2023 CSP Policy").7

STATEMENT OF MATERIAL DATES

- 5. As will be further discussed below, the Force Majeure event which prompted ZAMECO I and MPPCL to enter into the EPSA subject of this instant Application occurred on 25 October 2023.

STATEMENT OF FACTS

- 6. Necessity for Power Supply: ZAMECO I, together with eleven (11) other electric cooperatives ("Ecs"), is a member of the Central Luzon Electric Cooperative Association First Luzon Aggregation Group, Inc. ("CLECAFLAG"). CLECAFLAG was organized for the purpose of aggregating its member-Ecs' power requirements, in order to take advantage of economies of scale, which was expected to bring about lower prices for the supply of electricity, and necessarily lower rates for the covered member-consumer-owners ("MCOs"). Thus, the members of CLECAFLAG conducted a joint Competitive Selection Process ("CSP") for the supply of 300 MW of aggregated baseload capacity requirements of its members, from a new generating power plant for twenty (20) years.
7. On 10 March 2014, CLECAFLAG declared GNPower Ltd. Co. ("GNPower") as the winning bidder, and thus CLECAFLAG's member Ecs, which includes ZAMECO I, executed their individual Power Purchase and Sale Agreement ("PPSA") with GNPower.
8. ZAMECO I's PPSA with GNPower was for an original contracted capacity of 5 MW with annual increments onwards for the duration of twenty (20) years (the "ZAMECO I-GNPower PPSA"). More importantly, the ZAMECO I-GNPower PPSA was meant to eventually replace ZAMECO I's Contract for the Supply of Electricity with MPPCL (the "ZAMECO I-MPPCL CSEE"), which was set to expire on 25 October 2022.
9. Subsequently, on 22 June 2018, ZAMECO I and GNPower jointly filed an application with the Honorable Commission for the approval of the ZAMECO I-GNPower PPSA docketed as ERC Case No. 2018-064 RC (the "1st ERC Case").
10. To date, and for reasons beyond the control of ZAMECO I and GNPower, the 1st ERC Case remains unresolved by the Honorable Commission. Without the Honorable Commission's action or approval of the ZAMECO I-GNPower PPSA, ZAMECO I could not draw power from GNPower.
11. With the impending expiration of the ZAMECO I-GNPower PPSA, among other circumstances, on 17 May 2022, ZAMECO I wrote to the Department of Energy ("DOE"), requesting for a Certificate of Exemption ("COE") from the conduct of a CSP ("COE-CSP") to allow ZAMECO I to enter into an EPSA to urgently provide for the power supply for its MCOs.
12. On 16 August 2022, ZAMECO I received the COE-CSP from the DOE valid for a one (1) year period. Thereafter, on 05 October 2022, ZAMECO I and MPPCL entered into an EPSA valid for a one (1) year period expiring on 25 October 2023 (the "1st ZAMECO I-MPPCL EPSA").
13. Foreseeing that the Honorable Commission might not be able to timely resolve the 1st ERC Case, ZAMECO I thought it proper to terminate the ZAMECO I-GNPower PPSA, to allow ZAMECO I to include its 5 MW capacity in its planned CSP. Thus, on 17 August 2023, ZAMECO I's Board of Directors approved the termination of the ZAMECO I-GNPower PPSA on the ground of force majeure. ZAMECO I's termination was concurred by GNPower, with both agreeing to jointly file the necessary motion to withdraw the application filed in the 1st ERC Case.8

Complications arising from the pendency of the 1st ERC Case

- 14. Prior to the mutual termination of the ZAMECO I-GNPower PPSA, ZAMECO I had already intended to conduct another CSP to account for the 5 MW shortage in its capacity due to the pendency of the 1st ERC Case.

- 15. In preparation thereof, ZAMECO I in its latest Power Supply Procurement Plan ("PSP") at the time removed the 5 MW contracted capacity since this power requirement was supposed to be contracted through the ZAMECO I-GNPower PPSA. However, since the ZAMECO I-GNPower PPSA was terminated by the parties, ZAMECO I must now secure a bilateral contract for 5 MW capacity.
16. ZAMECO I informed the DOE of its intention to conduct a CSP for ZAMECO I's full capacity requirements. However, the DOE advised ZAMECO I that it cannot subject the 5 MW capacity under the ZAMECO I-GNPower PPSA to a CSP without the Honorable Commission finally resolving the 1st ERC Case. On account thereof, ZAMECO I's intended CSP for its entire power requirement is held in abeyance.
17. To date, ZAMECO I has no other active and existing power supply contracts apart from the 1st ZAMECO I-MPPCL EPSA, which expired on 25 October 2023. Thus, upon the expiration of the 1st ZAMECO I-MPPCL EPSA, ZAMECO I will have to rely entirely on the Wholesale Electricity Spot Market ("WESM") to meet its total demand requirements. Moreover, ZAMECO I is currently registered as an indirect WESM Member; as such, it has to rely on its direct WESM member counterparty to transact on its behalf.
18. While ZAMECO I is in the process of registering as a direct WESM Member and is taking necessary steps to prepare for its CSP, the CSP process will take time thereby subjecting ZAMECO I and its MCOs to prevailing and volatile WESM market prices in the interim period.
19. On October 25, 2023, after soliciting offers,9 conducting thorough evaluations and scrutinizing price proposals and terms received, ZAMECO I entered into an EPSA with MPPCL, the generation company with the lowest and most responsive proposal.

The pendency of the 1st ERC Case, taken together with the expiration of the 1st ZAMECO I-MPPCL EPSA and inability of ZAMECO I to subject its 5 MW requirements to CSP, constitutes force majeure allowing ZAMECO I and MPPCL to execute the EPSA subject of this Joint Application

- 20. Section 3.8 of the DOE 2023 CSP Policy defines force majeure as "any extraordinary event not foreseeable or avoidable, or to an event that could not be foreseen, or which, though foreseen, is inevitable and independent of human will or the DU's participation, whether by active intervention, neglect or failure to act." The Supreme Court as early as the case of Murillo vs. Mendoza, G.R. No. L-46020, 8 December 1938, in resolving events which would constitute as force majeure likened it to addressing the question of whether unforeseen acts arose wherein no fault or negligence from those involved intervened.
21. Applying the afore-cited rule and jurisprudence, the antecedents presented herein clearly constitute force majeure, justifying the execution of the subject EPSA.
22. It bears reiterating that ZAMECO I, even four (4) years prior to the expiration of the then subsisting ZAMECO I-MPPCL CSEE, had already properly conducted the CSP resulting in the execution of the ZAMECO I-GNPower PPSA and timely filed the 1st ERC Case. In fact, ZAMECO I continuously and consistently made the necessary motions and representations to resolve the 1st ERC Case. However, due to events outside of ZAMECO I's control and independent of any participation therefrom which would delay the resolution thereof.
23. It likewise bears stressing that ZAMECO I took immediate action to address the impending shortage in its power supply: First, by entering into the 1st ZAMECO I-MPPCL EPSA; and Second, by taking the necessary action to conduct another CSP to cover its power requirements. Unfortunately, the DOE advised ZAMECO I that it cannot subject the 5 MW capacity under the ZAMECO I-GNPower PPSA to a CSP without the Honorable Commission finally resolving the 1st ERC Case.

ABSTRACT OF THE EMERGENCY POWER SALES AGREEMENT AND RELATED INFORMATION

- 24. ZAMECO I's Power Situation. ZAMECO I's average peak demand for its Franchise Area is 28.56 MW for 2023 to 2024 as provided in its Supply - Demand Scenario.10
25. Generation Facility. The power to be provided to ZAMECO I will be sourced from MPPCL's 1 x 315 MW (Unit 1), 1 x 344 MW (Unit 2), and 1 x 335 (Unit 3) coal fired power plant, comprising the Masinloc Coal-Fired Power Plant located in Barangay Bani, Masinloc, Zambales, with an installed capacity of 1,039.7 MW and net dependable capacity of 949.9 MW11 (the "Power Station"). MPPCL shall supply power to ZAMECO I under the terms stipulated in the ZAMECO I-MPPCL EPSA.
26. Salient Features of the EPSA.

Contract Term. The EPSA shall take effect between the Parties on the date of signing ("Execution Date") and the supply duration shall be up to maximum period of one (1) year or twelve (12) Billing Periods from Supply Effective Date ("SED") as defined below until the end of the Agreement Term.

The SED shall be whichever comes later of: a) 26 October 2023; or b) 26th Day of the calendar month when the copies of the resolutions approved by the Buyer's Board of Directors authorizing the execution, delivery and performance of the Buyer of this Agreement, duly certified by the Buyer's Board Secretary, have been received by the Seller from the Buyer.

Contract Capacity. The Contracted Capacity for the duration of the EPSA shall be at a minimum capacity of 22,530 kW up to a maximum of 28,540 kW.

Beginning SED, the Seller shall make available to the Buyer, and the Buyer shall purchase from the Seller the Contract Capacity as stated in Annex I of the EPSA, as follows:

Table with 2 columns: Billing Period and Contract Capacity, kW. Rows include periods from October 2023 to September 2024 with varying capacities.

Contract Price. The Contract Price under Annex II of the EPSA are as follows:

Table with 3 columns: Price Component, Unit, Rate. Components include Capacity Fee (PhP/kWh), Fuel Fee (USD/kWh).

Monthly Power Bill and Total Energy Charge. Under the EPSA, ZAMECO I shall pay the following monthly power bill and total energy charge to MPPCL: [see Annex III of the EPSA]

Capacity Fee

MCP = CF * CC * (BPD - FMT) * 24

Where:

- MCP = The Monthly Capacity Payment in PhP, for the Contract Capacity and Associated Energy for the Billing Period
CF = The Capacity Fee, in PhP/kWh, as set forth in Annex II
CC = The Contract Capacity, in kW, as set forth in Annex I
BPD = Billing Period Days, the number of days in the relevant Billing Period
FMT = The Full Load Equivalent Force Majeure Days Taken for the relevant Billing Period

Fuel Fee

MFP = [FFC = FFB * (CIFC / CIFB)] * FXc * AE

Where:

- MFP = The Monthly Fuel Payment, in PhP, for the Contract and Associated Energy for the Billing Period
FFC = Adjusted Fuel Fee for the current Billing Period, in USD/kWh approximated to nearest four (4) decimals
FFB = Base Fuel Fee set at USD0.0320/kWh, as set forth in Annex II
CIFC = Current CIF shall be the actual landed Fuel Cost for the Billing Period, in USD/Million kcal
CIFB = Base CIF set at USD10.20/Million kcal
FXc = Average of the daily Foreign Exchange ("FX") rate of the Philippine Peso to the US Dollar as posted by the Bangko Sentral ng Pilipinas for the calendar month prior to the current Billing Month
AE = Associated Energy during the current billing period

Outages. During the term of the EPSA, MPPCL shall guarantee the supply of the Contract Capacity to ZAMECO I, even during Scheduled and Unscheduled Outages of the Power Station. For the avoidance of doubt, an Event of Force Majeure as defined in Article 11 of the EPSA shall not be considered an Outage.

Adjustments in Contract Capacity.

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The Buyer may be allowed to reduce its Contract Capacity without the payment of the corresponding Buy-Out Fee if the reduction of the Contract Capacity is: (i) the result of Retail Competition and Open Access ("RCOA"), (ii) compliance with Renewable Portfolio Standards ("RPS") requirements, and/or (iii) availability of Green Energy Option Program (GEOP) (collectively known as "Buy-Out Fee Exemptions"), provided that a corresponding reduction of BCO is made proportionately among all of the Buyer's power suppliers.

- 27. Estimated Rate Impact. The indicative rate impact on ZAMECO I's overall generation rate with and without the additional supply from MPPCL is as follows:12

Table with 5 columns: Contract Period, MPPCL, WESM, Price/kWh, P/BP. Rows show monthly data from Nov-2023 to Oct-2024 with price and bill per bill period.

12 Wholesale Electricity Spot Market (WESM) Rate is used in this analysis due to exposure to price of electricity in the market should Zameco I fail to enter into the EPSA with MPPCL. WESM Peak Prices for the month of September 2023 is used.

- 28. Copies of the following documents and/or information are attached to this Joint Application as annexes and made as integral parts hereof:

Table with 2 columns: Annex and Documents/Information. Lists various documents like Board Resolutions, CSP Policy, etc.

The conduct of a CSP is not required and the ZAMECO I-MPPCL EPSA is immediately implementable

- 29. ZAMECO I need not undergo a CSP prior to execution of the ZAMECO I-MPPCL EPSA. Moreover, ZAMECO I and MPPCL may request that information may not be disclosed. Pursuant to this, Applicant MPPCL prays for the confidential treatment of the information contained in the following annexes:
30. Under Sections 2.3 and 2.3.5 of the DOE 2023 CSP Policy, the conduct of a CSP is not required for the negotiated procurement of emergency power supply, and the filing of an emergency power supply agreement with the Honorable Commission does not need any prior clearance or certification from the DOE.

ALLEGATIONS RELATIVE TO THE PRAYER FOR CONFIDENTIAL TREATMENT OF INFORMATION

- 31. Rule 4 of the Honorable Commission's Rules of Practice and Procedure provides that ZAMECO I and MPPCL may request that information may not be disclosed. Pursuant to this, Applicant MPPCL prays for the confidential treatment of the information contained in the following annexes:

Table with 2 columns: Annex and Documents and/or Information. Lists Annex 'I' and series.

- 32. MPPCL prays for the confidential treatment of the information contained in the Annexes "I" and series, and not disclosed except to the officers and staff of the Honorable Commission and its staff.
33. Annexes "I" and series contain the details of MPPCL's power rate calculations, financial model, as well as the manner by which these were derived. This information are proprietary in nature and should be protected as trade secrets as contemplated by law and jurisprudence. In the case of Air Philippines Corporation vs. Pennswell, Inc.,14 the Supreme Court defined a trade secret, as follows:

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

- 34. The interest of the consuming public is sufficiently protected by the review and evaluation of the rates under the PSA by the Honorable Commission, without the need to disclose the contents of Annexes "I" and series. The reasonableness and transparency of the prices of electricity is to be assured by the Honorable Commission through its own review and verification of MPPCL's operating costs and expenses;
35. More importantly, MPPCL's competitors, should they obtain the information contained in Annexes "I" and series, will gain undue advantage thereon and have the opportunity to use the same in their operations. The negotiating power of MPPCL with parties it plans to contract with or who it is currently doing business with, will clearly be thwarted if it is compelled to disclose such information;
36. Accordingly, MPPCL submits one (1) copy of Annexes "I" and series, in a sealed envelope, with the said envelope and each page of the documents and/or information stamped with the word "Confidential".
37. Lastly and corollary to the foregoing, MPPCL would like to implore the discerning wisdom of the Honorable Commission to include in its issuance for this purpose the "procedures for the handling or returning the confidential information, as appropriate, upon the close of the proceedings or at the end of the period for which the information is to be treated as confidential";
38. This is guided by the fact that MPPCL will seek for the return of these sought to be declared confidential annexes after its utilization as evidence in this case and/or at the close of the proceedings hereof, so as to relieve the Honorable Commission of the burden of safekeeping the trade secrets of MPPCL enclosed in the subject annexes.

ALLEGATIONS IN SUPPORT FOR THE ISSUANCE OF PROVISIONAL AUTHORITY

- 39. While ZAMECO I intends to account for the deficit supply, this process will take time and ZAMECO I's consumers will need the assurance of seamless, stable, and reliable power while ZAMECO I prepares for the CSP.
40. Consequently, ZAMECO I was compelled to enter into the ZAMECO I-MPPCL EPSA to ensure an adequate power supply at a rate advantageous to its consumers. In compliance with Section 6 of the ERC Implementing Guidelines for the Procurement, Execution, and Evaluation of Power Supply Agreements, ZAMECO I shall bill its consumers with the applicable interim rate under prevailing policies/guidelines of the Honorable Commission.
41. In order to ensure the sustainability of their operations, ZAMECO I should be permitted to collect the rates, fees, and charges provided in the ZAMECO I-MPPCL EPSA from its customers, and for MPPCL to charge ZAMECO I accordingly.

1 See Annex "B" of the Joint Application.
2 See Annex "O" of the Joint Application.
3 SEC-25, Retail Rate. - The retail rates charged by distribution utilities for the supply of electricity in their captive market shall be subject to regulation by the ERC based on the principle of full recovery of prudent and reasonable economic costs incurred, or such other principles that will promote efficiency as may be determined by the ERC.
4 Distribution utilities may enter into bilateral power supply contracts subject to review by the ERC.
5 A Resolution Adopting the Revised Rules of Practice and Procedure of the Energy Regulatory Commission.
6 Entitled, "Implementing Guidelines for the Procurement, Execution, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to Their Captive Market."
7 Entitled, "Prescribing the policy for the mandatory conduct of the Competitive Selection Process by the Distribution Utilities for the procurement of power supply for their captive market".
8 See Annex "H" of the Joint Application.
9 See Annex "F" and series of the Joint Application.
10 See Annex "C" of the Joint Application.
11 Based on the latest MPPCL COC Application pre-filed before the ERC on 27 October 2023.
12 Id., at Annex I of the EPSA, Annex "A" hereof.

13 See Annex "G" of the Joint Application.
14 G.R. No. 172835, December 13, 2007.
15 Letter (d), Section 4, of the ERC Rules and Practice and Procedure.