

Republic of the Philippines  
ENERGY REGULATORY COMMISSION  
San Miguel Avenue, Pasig City



IN THE MATTER OF THE  
APPLICATION FOR  
APPROVAL OF THE  
CONTRACT FOR THE  
SUPPLY OF ELECTRIC  
ENERGY BETWEEN  
MASINLOC POWER  
PARTNERS CO., LTD.  
(MPPCL) AND PAMPANGA  
RURAL ELECTRIC SERVICE  
COOPERATIVE, INC.  
(PRESCO), WITH PRAYER  
FOR PROVISIONAL  
AUTHORITY

ERC CASE NO. 2009-105 RC

MASINLOC POWER  
PARTNERS CO., LTD.  
(MPPCL) AND PAMPANGA  
RURAL ELECTRIC SERVICE  
COOPERATIVE, INC.  
(PRESCO),

Applicants.

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DOCKETED  
Date: OCT 25 2010  
By: *W*

**ORDER**

Before this Commission for resolution is the motion for confidential treatment of information filed by Applicants Masinloc Power Partners Co., Ltd. (MPPCL) and Pampanga Rural Electric Service Cooperative, Inc. (PRESCO) pursuant to Rule 4 of the Commission's Rules of Practice and Procedure (RPP).

On 06 November 2009, MPPCL and PRESCO filed an *Application* for the approval of their Contract for the Supply of Electric Energy (CSEE) with prayer for provisional authority.

In the said *Application*, MPPCL and PRESCO moved, among others, that the following documents/information be considered as confidential in accordance with Rule 4 of the Commission's RPP:

<b>Exhibits</b>	<b>Documents</b>
P	Methodology and Calculations of MPPCL
NN	MPPCL's WACC and Calculation of the IRR
OO	Notes on the Computations for the WACC and IRR
PP	Details and Derivation of Savings
QQ	Electronic Copy of MPPCL's WACC and Calculation of the IRR, and Details and Derivation of Savings

Applicant MPPCL contended that the aforesaid information are the numbers, methodology, and calculations reflecting its bidding strategy, not only for distribution utilities undertaking competitive process for their power supply requirements, but also for trading in the Wholesale Electricity Spot Market (WESM). Thus, these documents and information fall within the bounds of proprietary "trade secrets" which are entitled to protection under the Constitution, and the rules and regulations of the Commission.

### **Discussion**

Sections 1 and 2, Rule 4 of the Commission's Rules of Practice and Procedure provide that:

**"Section 1. Request for Confidential Treatment of Information.** A party to any proceeding before the Commission may request that information about that party in the Commission's possession not be disclosed. To do so, said party shall:

- (a) Submit a request that information not be disclosed describing therein with particularity the information to be treated as confidential; specifying the grounds for the claim of confidential treatment of the information and, if applicable, specifying the period during which the information must not be disclosed.
- (b) Submit to the Commission one copy of the document that contains the information sought to be treated as confidential, placed in a sealed envelope, with the envelope and each page of the document stamped with the word "Confidential".

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The party seeking to have the information protected from disclosure has the burden of proof to demonstrate that the information sought to be disclosed is entitled to that protection.”

**“Section 2. Action by the Commission on the Request.** – For the purpose of determining whether or not to accord confidential treatment to information, the Commission may review the information claimed to be confidential.

The Commission may deny the request for confidential treatment of information on grounds such as, but not limited to the following:

- (a) The party requesting confidential treatment of information has no actual, valuable proprietary interest to protect with respect to the information sought to be treated as confidential.
- (b) The information is, at the time of the request, generally available to the public by means other than through a breach of any confidentiality obligation with respect to such information.
- (c) The information is, at the time of the request, available to or already in the possession of the Commission on a non-confidential basis from a source that, to the knowledge of the Commission, has lawfully acquired such information on a non-confidential basis.

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Under the aforesaid Rules, a party to any proceeding before the Commission may request the same not to disclose certain information and treat such information confidential, specifying the grounds for the claim of confidential treatment of the information and, if applicable, specifying the period during which the information must be disclosed. To determine whether or not to approve said request, the Commission may review the information claimed to be confidential pursuant to Section 2 of the same Rules.

In the case of *Air Philippines Corporation vs. Pennswell, Inc.*<sup>1</sup>, the Supreme Court affirmed Pennswell's "right to guard its trade secrets, manufacturing formulas, marketing strategies, and other confidential programs and information against public disclosure on the ground that such information can be illegally and unfairly utilized by business competitors who, through their access to Pennswell's business secrets, may use the same for their own private gain, to the irreparable prejudice of the latter."

In the same case, *trade secret* was defined, 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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

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<sup>1</sup> G.R. No. 172835, 13 December 2007.

<sup>2</sup> *Ibid.*, citing BLACKS LAW DICTIONARY 1494 (1991), 6<sup>TH</sup> ed.

<sup>3</sup> *Ibid.*, citing *Id.*, citing *Palin Mfg. Co., Inc. v. Water Technology, Inc.*, 103 Ill.App.3d 926, 59 Ill.Dec. 553, 431.

<sup>4</sup> *Ibid.*, citing AMJUR EMPLOYMENT 178, citing *Saunders v. Florence Enameling Co., Inc.*, 540 So. 2d 651 (Ala. 1988); *Air Products and Chemicals, Inc. v. Johnson*, 296 Pa. Super. 405, 442 A.2d 1114 (1982). The foregoing citation also expounded that trade secrets need not be technical in nature. Market-related information such as information on current and future projects, as well as potential future opportunities for a firm, may constitute a trade secret., citing *Air Products and Chemicals, Inc. v. Johnson*, 296 Pa. Super. 405, 442 A.2d 1114 (1982).

<sup>5</sup> *Ibid.*, citing *Id.*, citing *Saunders v. Florence Enameling Co., Inc.*, 540 So. 2d 651 (Ala. 1988); *Air Products and Chemicals, Inc. v. Johnson*, 296 Pa. Super. 405, 442 A.2d 1114 (1982). A former employee of an insurance company, who routinely received information regarding the company's customer list and policy termination dates while serving as vice-president, was barred from disclosing that information, even though the company had partially disclosed the customer list in attempts to secure new clients. *Alexander & Alexander, Inc. v. Drayton*, 378 F. Supp. 824 (E.D. Pa. 1974), *aff'd*, 505 F.2d 729 (3d Cir. 1974).

granted to prevent the disclosure of the trade secret by one who obtained the information “in confidence” or through a “confidential relationship.”<sup>6</sup> American jurisprudence has utilized the following factors<sup>7</sup> 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.”<sup>8</sup>

In ***Cocoland Development Corporation vs. NLRC***<sup>9</sup>, the Supreme Court held that trade secrets must have substantial factual basis which can pass judicial scrutiny.

Executive Order No. 02, Series of 2016<sup>10</sup> (EO No. 02) on the People's Constitutional Right to Information was considered in the evaluation of this motion. The Commission determined that Section 4

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<sup>6</sup> *Ibid.*, citing 9 A.L.R.3d 665, citing Am Jur, Injunctions (Rev ed 72). The Restatement of the Law of Torts 757, emphasizes that liability for the disclosure of a trade secret learned under conditions giving no privilege of disclosure or use is not based on the mere copying or use but on the improper means by which the information was procured.

<sup>7</sup> *Ibid.*, citing *Id.*, as adopted from the Uniform Trade Secrets Act which is intended to provide states with a legal framework for improved trade-secret protection.

<sup>8</sup> *Ibid.*, citing *Id.*

<sup>9</sup> G.R. No. 98458, 17 July 1996.

<sup>10</sup> Operationalizing in the Executive Branch the People's Constitutional Right to Information and the State Policies of Full Public Disclosure and Transparency in the Public Service and Providing Guidelines Therefor

of the subject EO No. 02, in relation to the Memorandum from the Executive Secretary dated 24 November 2016, allowed for exceptions under which the instant case is covered.

After reviewing the information sought to be declared confidential by Applicants, the Commission rules that the following documents with proprietary value be treated confidential:

1. *Methodology and Calculations of MPPCL* (Exhibit P);
2. *MPPCL's WACC, except Capital Structure, Cost of Debt and Equity, Resulting WACC and Plant Capacity Details, and Calculation of the IRR* (Exhibit NN);
3. *Notes on the Computations for the WACC and IRR* (Exhibit OO), except the Gross Plant Output, Total Project Cost, Capital Structure with resulting WACC, and Energy Sales; and
4. *Electronic Copy of MPPCL's WACC and Calculation of the IRR, including the Details and Derivation of Savings* (Exhibit QQ) with corresponding numbers, methodology, and calculations.

The aforesaid documents contain valuable and sensitive commercial and financial information regarding the competitive strategy of Applicant MPPCL, thus, constitutes trade secrets. These data and calculations reflect the company's business strategy in assuming risks vis-à-vis its potential gain to arrive at a more attractive rate. If these information will be shared, it will alter the chances of the company to achieve competitive advantage.

The information in these documents are being used by Applicant MPPCL in its business which gives it an opportunity to obtain an advantage over its competitors in the electric industry. Furthermore, such information, if not treated confidential, can be unfairly utilized by its business competitors to gain advantage and to the prejudice of MPPCL. Being trade secrets of Applicant MPPCL, the data and information enumerated above must be accorded confidential treatment.

On the other hand, the summary of the *Details and Derivation of Savings* (Exhibit PP), by itself, without the corresponding numbers, methodology, and calculations cannot be the subject of confidential treatment. The data and information contained therein

do not have any valuable proprietary interest to warrant them confidential treatment.

Relative to the foregoing findings, the Commission's personnel who have custody of the documents declared confidential are hereby directed to abide by the following rules and conditions:

1. The Commission's personnel in charge of the case shall use the confidentially treated information only for the purpose of evaluating the Application and/or such other purpose/s as may have been agreed upon by the parties in its Protective Agreement;
2. The Commission's personnel in charge of the case shall refer to the confidentially treated information based only on its caption and/or description, as enumerated above, without divulging the salient portions thereof to unauthorized persons/entities;
3. The Commission's personnel in charge of the case shall continue to protect the information from public disclosure by maintaining the document containing the confidential information/data separate and apart from the records of the case for the duration of the non-disclosure period;
4. The Commission's personnel in charge of the case shall keep the confidentially treated information in its original envelope/packaging, locked in a repository, with the key to be kept by the Commission's duly authorized personnel, only to be taken out during the proceedings should the same be ordered by the Commission; and
5. The Commission's personnel in charge of the case shall execute an Affidavit of Non-Disclosure containing the foregoing undertaking.

**WHEREFORE**, the foregoing premises considered, the Commission hereby **PARTIALLY GRANTS** the motion for confidential treatment of information of Applicants Masinloc Power Partners Co., Ltd. (MPPCL) and Pampanga Rural Electric Service Cooperative, Inc. (PRESCO).

**ACCORDINGLY**, the following documents, subject to exceptions, are hereby **GRANTED** confidential treatment:

1. *Methodology and Calculations of MPPCL* (Exhibit P);
2. *MPPCL's WACC*, except Capital Structure, Cost of Debt and Equity, Resulting WACC and Plant Capacity Details, *and Calculation of the IRR* (Exhibit NN);
3. *Notes on the Computations for the WACC and IRR* (Exhibit OO), except the Gross Plant Output, Total Project Cost, Capital Structure with resulting WACC, and Energy Sales; and
4. *Electronic Copy of MPPCL's WACC and Calculation of the IRR, and Details and Derivation of Savings* (Exhibit QQ) with corresponding numbers, methodology, and calculations.

However, the summary of the *Details and Derivation of Savings* (Exhibit PP) is hereby **DENIED** treatment of confidentiality.

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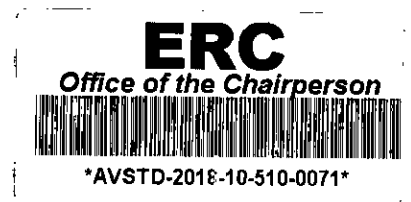
**RELATIVE THERETO**, the Commission hereby **DIRECTS** its personnel in charge of this case to:

1. Comply with the rules and conditions specified herein;
2. Maintain the confidentiality of the information/data declared confidential until the Commission directs otherwise; and
3. Ensure that the said documents are separate and kept apart from the case record for the said duration.

**SO ORDERED.**

Pasig City, 20 September 2018.

  
**AGNES VST DEVANADERA**  
*Chairperson and CEO*



**JOSEFINA PATRICIA A. MAGPALE-ASIRIT\***  
*Commissioner*

  
**ALEXIS M. LUMBATAN**  
*Commissioner*

**GERONIMO D. STA. ANA\***  
*Commissioner*

  
**CATHERINE P. MACEDA**  
*Commissioner*

LS: /ARG/IHH/GBO

ROS: TCC/AJMO/FGBD

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Copy Furnished:

1. Atty. Zenon S. Suarez  
*Counsel for PRESCO*  
Room 313 Web-Jet Building  
64 Quezon Avenue corner BMA Street, Quezon City
2. Pampanga Rural Electric Service Cooperative, Inc. (PRESCO)  
Anao, Mexico, Pampanga
3. Puyat Jacinto & Santos Law  
*Counsel for MPPCL*  
10F, 8 Rockwell Hidalgo corner Plaza Drive  
Rockwell Center, Makati City
4. Masinloc Power Partners Company, Limited (MPPCL)  
Barangay Bani, Masinloc, Zambales
5. Regulatory Operations Service (ROS)  
Energy Regulatory Commission  
17<sup>th</sup> Floor, Pacific Center Building, San Miguel Avenue, Pasig City