

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements  
Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

Article / Section No.	Section Title / Subject Matter of Concern	Discussion of Comments and/or Questions for Clarification	Recommendations / Suggestions / Proposed Changes
Article II	New Definition	It is observed that while "Emergency Supply Procurement" is a capitalized term, the same is not defined in the draft Rules. It is proposed that a definition be provided for "Emergency Supply Procurement".	Proposed definition:  <b><u>"Emergency Supply Procurement is defined as procurement by DUs of energy supply under the circumstances contemplated in Section 5."</u></b>
Article II, (k)	“(k) “Force Majeure” or “Fortuitous Event” refers to an extraordinary event which is not foreseen, or which, though foreseen, is inevitable, such event may be produced by two general causes: (1) by nature, such as but not limited to a typhoon, storm, tropical depression, flood, drought, volcanic eruptions, earthquake, <b><u>tidal, wave,</u></b> or landslide, and (2) by the act of man, such as but not limited to an act of war, sabotage, blockage, revolution, riot, insurrection, civil commotion, or any violent, or threatening actions.”	1) “Tidal, wave” if taken separately appears to be not descriptive of an extraordinary event. It is thus proposed that the same be revised as “tidal wave” to describe an exceptionally large ocean wave.  2) Should include any system emergency or Transmission Failure that may affect the delivery of power by the GenCo.	Proposed revision:  “(k) “Force Majeure” or “Fortuitous Event” refers to an extraordinary event which is not foreseen, or which, though foreseen, is inevitable, such event may be produced by two general causes: (1) by nature, such as but not limited to a typhoon, storm, tropical depression, flood, drought, volcanic eruptions, earthquake, <b><u>tidal, wave,</u></b> or landslide, and (2) by the act of man, such as but not limited to an act of war, sabotage, blockage, revolution, riot, insurrection, civil commotion, or any violent, or threatening actions, <b><u>or any system emergency or Transmission Failure that may affect the delivery of power by the GenCo.</u></b> ”
Article IV, Section 2	<b>“Section 2. Competitive Selection Process. –</b> xxx	For clarity, Meralco respectfully recommends that DUs and ECs are allowed a fresh period of 6 months within which to undertake the 2 <sup>nd</sup> round of CSP, in case of failure of CSP under	Proposed Revision:

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements  
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	<p>The entire CSP process including the award of contract should be completed within six (6) months from the publication of the invitation to bid. Failure to complete the process within this period shall invalidate the CSP."</p>	<p>the circumstances mentioned in Article IV, Section 3.1 of the draft Rules.</p>	<p><b>"Section 2. Competitive Selection Process.</b> – "xxx The entire CSP process including the award of contract should be completed within six (6) months from the publication of the invitation to bid. Failure to complete the process within this period shall invalidate the CSP. <b><u>Provided that, in case of failure of CSP under the circumstances mentioned in Article IV, Section 3.1 of the draft Rules, DUs and ECs are given a fresh period of 6 months from the publication of the 2<sup>nd</sup> invitation to bid within which to conclude the 2<sup>nd</sup> round of CSP.</u></b>"</p>
<p>Article IV, Section 3</p>	<p><b>"Section 3. Competitive Public Bidding.</b> The primary mode of procurement under competitive selection process which consists of the following procedures:</p> <p>(a) <b><u>Advertisement or publication</u></b> in a newspaper of general circulation, <b><u>once weekly for two (2) consecutive weeks;</u></b></p> <p>(b) <b><u>Pre-bid conference</u></b> shall be held <b><u>twelve (12) days prior to the deadline of the submission of receipt</u></b></p>	<p>1) One-time publication of the Invitation to Bid in a newspaper of general circulation may already be sufficient, considering the costs attendant to publication and the fact that the Invitation will also be posted on the DOE E-based portal (and when available, the DU's website) at least for the duration of the CSP.</p> <p>2) While posting in the website of the concerned DU and the DOE E-Portal is included in Section 13 (Publication and Posting), they are not mentioned in this Section. For consistency, it is recommended that posting in the websites of the concerned DU and the DOE be included in Section 3.</p> <p>3) The purpose of the pre-bid conference is to clarify the concerns, if any, of participating GenCos with respect to the details of DU's requirements, documents for submission, etc., even before they decide whether or not to participate in the bidding process by submitting their qualification documents. As such, it is posited that the nearest (to the invitation</p>	<p>Proposed revision:</p> <p><b>"Section 3. Competitive Public Bidding.</b> The primary mode of procurement under competitive selection process which consists of the following procedures:</p> <p>(a) Advertisement or publication <b><u>of the Invitation to Bid once</u></b> in a newspaper of general circulation and <b><u>posting thereof in the respective websites of the concerned DU and DOE;</u></b></p> <p>(b) Pre-bid conference shall be held <del>twelve (12) days prior to the deadline of the submission of receipt of bids but not earlier</del> <b><u>no later than ten (10) days from publication of the Invitation to Bid;</u></b></p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements  
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	<p><b><u>of bids but not earlier than seven (7) days from publication;</u></b></p> <p>(c) <b><u>Pre-qualifications</u></b> shall be <b><u>completed within seven (7) days from deadline for submission of bids;</u></b> xxx</p> <p>(e) <b><u>Bid evaluation</u></b> shall be <b><u>completed within seven (7) days from the opening of bids;</u></b> xxx</p>	<p>publication date) that the pre-bid conference is held, the earlier the concerns/issues of participating bidders will be addressed. Hence, it is proposed that the same be held no later than ten (10) days from publication of the Invitation to Bid (i.e., not when the deadline for submission of financial bids is already approaching).</p> <p>4) The pre-qualification stage or the screening of potential counter-party GenCos involves a tedious process. GenCos will be evaluated based on their technical and financial capability etc. as contained in the pre-qualification documents. In this regard, it is more reasonable to reckon the pre-qualification state from the submission of the pre-qualification documents.</p> <p>5) The 7-day period within which to evaluate the bids submitted may be too long a time, considering that at this point, the bidders have already been pre-qualified. A 5-day period may already suffice for this (especially considering the comment below with respect to Article IV, Section 3f), while allotting more time for evaluation for purposes of pre-qualification.</p>	<p>(c) Pre-qualifications shall be completed within seven (7) days from deadline for submission of <b><u>bids qualification documents;</u></b> xxx</p> <p>(e) Bid evaluation shall be completed within <del>seven (7)</del> <b>five (5)</b> days from the opening of bids; xxx"</p>
<p>Article IV, Section 3(f), in relation to Appendix "A" (Item 9 in 1-03 and, 1-17)</p>	<p>"(f) Post-qualification, if any must be completed within five (5) days from the receipt of the bidder of the BAC notice that it has the lowest calculated bid; xxx"</p>	<p>A two-step process of bidding is proposed so as to (a) ensure at the outset that the participants in the bid who submit their financial proposals are qualified, (b) avoid spending unnecessary time and resources on evaluation of bids from unqualified bidders, and (c) limit access to the Power Supply Agreement (PSA) to those pre-determined as qualified bidders.</p> <p>The two-step process would entail that interested GenCos first submit qualification documents (legal, technical and financial) for evaluation of the BAC of their eligibility, as contemplated in Section3(c) ("Pre-qualifications"), and then only qualified</p>	<p>A two-step process of bidding is proposed consisting of pre-qualification of bidders' legal, technical and financial qualifications, and thereafter, submission and evaluation of their bids.</p> <p><i>Meralco's detailed proposal is included in its comments on Appendix "A" of the draft Rules.</i></p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

		bidders may submit bids for evaluation of the BAC under Section 3(e) ("Bid Evaluation").	
Article IV, Section 3.1	<p><b>"Section 3.1. Direct Negotiation.</b> – Direct negotiation with interested party for the supply of electricity may be made by the DU after at least two (2) failed CSPs. A CSP is considered to have failed when during its conduct, any of the circumstances exist:</p> <p>(a) No proposal was received by the DU;</p> <p>(b) Offers of prospective suppliers failed to meet the requirements prescribed under the Terms of Reference xxx;</p> <p>(c) No successful negotiation was completed by the DU with the selected bidder."</p>	It is observed that the Section does not include the situation wherein the DU has determined, after the pre-qualification stage, that no GenCo has qualified. It is thus recommended that this situation be included in the enumerated instances of a failed CSP.	<p>Proposed revision:</p> <p><b>"Section 3.1. Direct Negotiation.</b> – Direct negotiation with interested party for the supply of electricity may be made by the DU after at least two (2) failed CSPs. A CSP is considered to have failed when during its conduct, any of the circumstances exist:</p> <p>(a) No proposal was received by the DU;</p> <p>(b) Offers of prospective suppliers failed to meet the requirements prescribed under the Terms of Reference xxx;</p> <p>(c) No successful negotiation was completed by the DU with the selected bidder; and</p> <p>(d) <b><u>There are no prospective suppliers that qualified.</u></b>"</p>
Article IV, Section 4.1	<p><b>"Section 4.1 Swiss Challenge Process.</b> Once an unsolicited proposal is accepted, the Swiss Challenge is engaged to</p>	1) One-time publication of the Invitation to Bid in a newspaper of general circulation may already be sufficient (to avoid additional publication costs and considering that there will also be posting in the websites of the concerned DU and the DOE).	<p>1) Proposed revision:</p> <p><b>"Section 4.1 Swiss Challenge Process.</b> Once an unsolicited proposal is accepted, the Swiss Challenge is engaged to facilitate</p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<p>facilitate a competitive process adopting the following process: xxx</p> <p>(b) The <b><u>bid offer is then published in a newspaper of general circulation, once weekly for two (2) consecutive weeks</u></b> and opened for counter-offer from third parties under the traditional tendering process, which is outlined in the tender documents.</p> <p>(c) During this period, the original unsolicited proposal proponent must also submit a <b><u>bid bond</u></b> equivalent to that required in the tender documents for a potential challenger; <b><u>this bid bond is intended to confirm that the unsolicited proposal proponent has adequate means to execute the project if granted;</u></b> xxx</p>	<p>2) Under the Section, the purpose of a bid bond is to "confirm that the <i>unsolicited proposal proponent has adequate means to execute the project if granted</i>".</p> <p>(a) May we request clarification if this provision means that the bid bond is equivalent to entire cost of the project or may this be equivalent to a percentage of the entire project cost?</p> <p>(b) Considering the purpose for the bid bond, Meralco proposes that all potential challengers, not just the original unsolicited proposal proponent, must be required to submit a bond.</p> <p>3) The 30-day period within which the original proponent may match the price submitted by a challenger is observed to be too long, especially considering the limit of 6 months for the entire CSP under Section 2 of the draft Rules. In addition, the selected bidder is presumed to know its acceptable rate of return and the corresponding price it can offer. Based on the experience of Meralco, a five (5)- day working period may already be sufficient.</p>	<p>a competitive process adopting the following process: xxx</p> <p>(b) The bid offer is then published <b><u>once</u></b> in a newspaper of general circulation, <b><u>posted in the website of the concerned DU and the DOE</u></b> <del>once weekly for two (2) consecutive weeks</del> and opened for counter-offer from third parties under the traditional tendering process, which is outlined in the tender documents.</p> <p>(c) During this period, the original unsolicited proposal proponent <b><u>and potential challengers</u></b> must also submit a bid bond equivalent to that required in the tender documents for a potential challenger; xxx xxx</p> <p>(e) When a lower price proposal is submitted and approved, the original unsolicited proposal proponent will have <del>thirty (30)</del> <b><u>five (5)</u></b> working days to match the price. xxx</p> <p>2) The amount of the "Bid bond" is for clarification.</p>
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MERALCO’s Comments on the ERC’s Draft “Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market”

	<p>(e) When a lower price proposal is submitted and approved, <b><u>the original unsolicited proposal proponent will have thirty (30) working days to match the price.</u></b> xxx”</p>		
<p>Article IV, Section 5</p>	<p><b>“Section 5. Emergency Supply Procurement. <u>Emergency Procurement</u></b> of power supply may be undertaken by the affected DUs due to the occurrence of Force Majeure, Fortuitous Event or other analogous circumstances not specifically enumerated under the definition of a force majeure or fortuitous event, <b><u>in order to maintain safe, reliable, secure and efficient operation of the power system.</u></b></p> <p>The issuance of a Fortuitous Event or Force Majeure notice by the affected DU shall exempt the DU from complying with Section 2 of these</p>	<p>1) It is observed that the term “Emergency Procurement” while capitalized is not defined. On the other hand, “Emergency Supply Procurement” and “Emergency Procurement of power supply” appear to denote the same thing. For simplicity and consistency, we recommend to just use “Emergency Supply Procurement”.</p> <p>2) As a qualification for the Emergency Supply Procurement, it’s mentioned in the Section that <i>“the rate shall not be higher than the latest ERC-approved generation tariff for same or similar technology in the area”</i>.</p> <p>a) Meralco observes that the lowest ERC-approved generation tariff and “latest ERC-approved generation tariff” may not necessarily be the same rate. Meralco respectfully proposes that the rate be at least comparable to the latest ERC-approved generation tariff, as verified from the ERC website.</p> <p>b) For clarification if the term ERC-approved generation tariff can either mean provisional or otherwise, whichever is applicable at the time of Emergency Supply Procurement.</p>	<p>Proposed revision:</p> <p><b>“Section 5. Emergency Supply Procurement. <u>Emergency Supply Procurement</u></b> of power supply may be undertaken by the affected DUs due to the occurrence of Force Majeure, Fortuitous Event or other analogous circumstances not specifically enumerated under the definition of a force majeure or fortuitous event, in order to maintain safe, reliable, secure and efficient operation of the power system. <b><u>Provided, that the cooperation period of the corresponding PSA shall not exceed one (1) year; Provided further, that the rate shall be comparable to the latest ERC approved generation tariff for same or similar technology in the area. For purposes of this Section 5, an affected DU may undertake Emergency Supply Procurement by reason of an outage of the Malampaya facility or upon reliance</u></b></p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<p>Rules, subject to evaluation and final decision of the relevant application, which shall be filed with the ERC within ninety (90) days upon its implementation.</p> <p>Provided, that the cooperation period of the corresponding PSA shall not exceed one (1) year; Provided further, that the rate shall not be higher than the latest ERC approved generation tariff for same or similar technology in the area.</p> <p>The DU shall provide Notice to the ERC, the Department of Energy (DOE), the National Electrification Administration (NEA), in the case of ECs and the National Power Corporation (NPC), in case of Off-grid areas, of the exemption within thirty (30) days upon the implementation of the <b><u>Emergency Supply Procurement.</u></b>"</p>	<p>c) Minor revision of the Section is proposed to better clarify the process that will be undertaken in case of emergency supply procurement by the affected DU.</p>	<p><b><u>on a Force Majeure claim by its contracted Generation Company.</u></b></p> <p><b><u>The DU shall provide Notice to the ERC, the Department of Energy (DOE), the National Electrification Administration (NEA), in the case of ECs and the National Power Corporation (NPC), in case of Off-grid areas, of the exemption within thirty (30) days upon the implementation of the emergency supply procurement.</u></b></p> <p>The issuance of a Fortuitous Event or Force Majeure notice by the affected DU shall exempt the DU from complying with Section 2 of these Rules, subject to evaluation and final decision of the relevant application, which shall be filed with the ERC within ninety (90) days upon its implementation.</p> <p><del>Provided, that the cooperation period of the corresponding PSA shall not exceed one (1) year; Provided further, that the rate shall not be higher than the latest ERC approved generation tariff for same or similar technology in the area.</del></p> <p><del>The DU shall provide Notice to the ERC, the Department of Energy (DOE), the National Electrification Administration (NEA), in the case of ECs and the National Power Corporation (NPC), in case of Off-grid areas, of the exemption within thirty (30)</del></p>
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MERALCO’s Comments on the ERC’s Draft “Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market”

			<p><del>days upon the implementation of the Emergency Supply Procurement.”</del></p>
<p>Article IV, Section 6</p>	<p><b>“Section 6. Benchmark Rate.</b> – The ERC shall establish a benchmark rate that serve as a reference price that may be used to assess the prudence and reasonableness of the PSA price.</p> <p>The ERC will utilize financial model in calculating the Benchmark Rate. The model inputs, such as capital and operating costs, rates of return and technical parameters will be determined and reviewed on an annual basis by the ERC through a full consultation process.</p> <p>The model will take into account relevant factors such as but not limited to the type of contract (financial or physical), the load factor, load shape and location or reference node to calculate the benchmark price for a portfolio of</p>	<p>It is noted that while the draft Rules provides for the general standards within which the Benchmark Rate shall be established and annually reviewed by the ERC, the details of the procedure for calculating and determining such Rate are not yet included in the draft Rules. In this regard, Meralco respectfully requests that it be mentioned that a separate resolution thereon will be promulgated by the ERC.</p>	<p>Proposed revision:</p> <p><b>“Section 6. Benchmark Rate.</b> – The ERC shall establish a benchmark rate that serve as a reference price that may be used to assess the prudence and reasonableness of the PSA price.</p> <p>The ERC will utilize financial model in calculating the Benchmark Rate. The model inputs, such as capital and operating costs, rates of return and technical parameters will be determined and reviewed on an annual basis by the ERC through a full consultation process.</p> <p>The model will take into account relevant factors such as but not limited to the type of contract (financial or physical), the load factor, load shape and location or reference node to calculate the benchmark price for a portfolio of efficient new entrant plants to match the terms of the PSA being assessed.</p> <p><b><u>The procedure for calculating and determining the Benchmark Rate shall be subject of a separate resolution to be promulgated by the ERC.”</u></b></p>



MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	efficient new entrant plants to match the terms of the PSA being assessed."		
Article IV, Section 7	<p><b>"Section 7. Bids and Awards Committee (BAC).</b> xxx</p> <p>The DU shall provide, prior to the performance of their duties and responsibilities as members of the BAC, a <b><u>seminar or training on R.A. 9184, otherwise known as the "Government Procurement Reform Act."</u></b> xxx</p> <p>A quorum of the BAC shall be composed of a simple majority of all voting members of the BAC.</p> <p>A decision of the BAC shall be composed of a <b><u>simple majority of all voting members of the BAC.</u></b></p>	<p>1) It is observed that there may be no need for a seminar or training on R.A. 9184 or the Government Procurement Reform Act (GPRA) considering that the contracts to be bidded out under the CSP process are not government contracts. In addition, there may be items under the GPRA that are not applicable in the CSP process. Hence, it is proposed that this be deleted.</p> <p>2) It is mentioned in the Section that a quorum is composed of a simple majority of all voting members of the BAC. It is noted, however, that the Chairman is a non-voting member and votes only in case of a tie. As currently worded, there will be no quorum in an instance wherein there are only two voting members of the BAC and the Chairman present. To address this concern, it is respectfully proposed that for purposes of determining a quorum, no distinction be made between voting and non-voting members.</p> <p>On the other hand, in case of arriving at a decision, the current language suggests that a unanimous vote is necessary if only 3 members of the BAC are present. It is proposed that in such a case, the vote of a simple majority of the members of the BAC that are present will be sufficient.</p>	<p>Proposed revision:</p> <p><b>"Section 7. Bids and Awards Committee (BAC).</b> xxx</p> <p><del>The DU shall provide, prior to the performance of their duties and responsibilities as members of the BAC, a seminar or training on R.A. 9184, otherwise known as the "Government Procurement Reform Act."</del> xxx</p> <p>A quorum of the BAC shall be composed of a simple majority of all <b>voting</b> members of the BAC.</p> <p>A decision of the BAC shall be composed of a simple majority of all <b>voting present</b> members of the BAC."</p>
Article IV, Section 8	<p><b>"Section 8. BAC Technical Working Group (TWG) and Secretariat. – xxx</b> xxx</p> <p><b><u>The BAC-TWG shall submit a report to the ERC</u></b></p>	<p>Under Section 7 of the draft Rules, the BAC shall spearhead and manage the CSP. However, under this Section, it is mentioned that it is the BAC-TWG that submits a report to the ERC regarding its "findings and recommendations as part of the pre-filing requirements".</p>	<p>Proposed revision:</p> <p><b>"Section 8. BAC Technical Working Group (TWG) and Secretariat. – xxx</b> xxx</p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements  
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	<p><b><u>regarding their findings and recommendations as part of the pre-filing requirements.</u></b> xxx”</p>	<p>In light of Section 7, Article IV which provides, among other things, that “[t]he BAC shall be accountable to its decision in the conduct of CSP”, the “findings and recommendations” should come from the BAC and not the BAC-TWG.</p>	<p>The BAC-<del>TWG</del> shall submit a report to the ERC regarding their findings and recommendations as part of the pre-filing requirements. xxx”</p>
<p>Article IV, Section 11</p>	<p><b>“Section 11. Third Party Auctioneer.</b> – In lieu of the BAC or the Joint BAC, the DU may opt to engage a Third-Party Auctioneer (TPA) to conduct and manage its CSP in accordance with these Rules. <b><u>The TPA shall be subject to accreditation by the ERC.</u></b> xxx ”</p>	<p>It is noted that the accreditation procedure for the TPA is not yet included in the draft Rules. For clarity, it is suggested to be mentioned that TPA accreditation shall be covered by a separate resolution from the ERC.</p>	<p>Proposed revision:  <b>“Section 11. Third Party Auctioneer.</b> – In lieu of the BAC or the Joint BAC, the DU may opt to engage a Third-Party Auctioneer (TPA) to conduct and manage its CSP in accordance with these Rules. <b><u>The TPA shall be subject to accreditation by the ERC. The accreditation procedure shall be subject of a separate resolution to be promulgated by the ERC.</u></b>”</p>
<p>Article IV, Section 12</p>	<p><b>“Section 12. CSP Observers.</b> – xxx For <b><u>Grid Areas</u></b>, an invitation to become Observers shall be extended to the DOE, NEA, in the case of ECs, and <b><u>Non-Government Organizations (NGOs) and members of the local Chamber of Commerce.</u></b> For <b><u>Off-Grid Areas</u></b>, an invitation shall also be extended to NPC and Private DUs to act as Observers in all of the bidding activities provided in these Rules.</p>	<p>1) The terms “Grid Areas” and “Off-Grid Areas”, while capitalized, are not defined terms. Suggest that a definition be provided in the draft Rules.</p> <p>2) It is respectfully observed that presence of Observers may not be necessary in the following stages of the CSP:</p> <ul style="list-style-type: none"> <li>a) <b><u>Post-qualification</u></b> – considering that this involves mere submission of documents;</li> <li>b) <b><u>Announcement of Winning Bidder/Sending of Notice Award</u></b> – It may already be sufficient to just post the results of the bidding at the concerned DU’s website and the website of the DOE. On the other hand, sending of the notice of award to the winning bidder would only involve such winning bidder. Presence of Observers under Section 12, Article IV of the draft Rules may therefore be dispensed with.</li> </ul>	<p>Proposed revision:</p> <p>CSP Observers shall be allowed to be present in the proceedings but shall not participate, <u>nor</u> have the right to vote, <u>or act in any way that may delay the conduct of CSP.</u> Observers shall be given written and e-mail invitations at least five (5) working days before the date of the procurement stages.</p> <p>An invitation in writing and e-mail to Observers shall be extended at each of the following stages of the CSP:</p> <ul style="list-style-type: none"> <li>(a) Pre-bid conference;</li> <li>(b) Pre-qualification, if any;</li> </ul>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<p>CSP Observers shall be allowed to be present in the proceedings but shall not participate nor have the right to vote. Observers shall be given written and e-mail invitations at least five (5) working days before the date of the procurement stages.</p> <p>An invitation in writing and e-mail to Observers shall be extended at each of the following stages of the CSP:</p> <p>(a) Pre-bid conference;          (b) Pre-qualification, if any;          (c) Submission and Opening of Bids;          (d) Bid Evaluation;          (e) Negotiations;          (f) Post-qualifications, if any;          (g) Awarding; and          (h) Contract Signing.</p> <p><b><u>Observers shall be allowed access to the following documents upon their</u></b></p>	<p>c) <b><u>Negotiation of PSA</u></b> – Considering that there may be commercial terms or proprietary items under discussion during negotiations, it is respectfully submitted that this should be between the parties only.</p> <p>d) <b><u>Signing of PSA</u></b> – Presence of Observers may no longer be necessary as this involves merely the execution of the PSA.</p> <p>3) Considering that the Abstract of Bids and Proposals typically involve information which are commercial in nature, there is a concern in allowing Observers to gain access to such documents.</p> <p>In addition, the Bid Documents and other related documents also contain information proprietary in nature for the DU, or the TPA, as the case may be, and the bidders. In the alternative, Observers may be provided with the Terms of Reference which contains a summary of the terms of DU's requirement.</p> <p>With respect to the "Post-qualification summary report", and in view of the earlier discussed proposal to have a 2-step bidding process where bidders are pre-qualified, it is our understanding that any such report would simply contain a checklist as to the compliance by the bidders with the submission of pre-qualification documents. As such, in lieu of the report, the BAC may just submit the list of the bidders that have pre-qualified.</p> <p>On the other hand, the purpose for the "Video recording of CSP proceedings", i.e., to keep a record of what transpired during the CSP proceedings, may already be served by a simple audio-recording of the same.</p>	<p>(c) Submission and Opening of Bids; <b><u>and</u></b>          (d) Bid Evaluation;  <del>(e) Negotiations;</del>  <del>(f) Post-qualifications, if any;</del>  <del>(g) Awarding; and</del>          (h) <b><u>Contract Signing.</u></b></p> <p><b><u>Subject to reimbursement/payment of reasonable photocopying/reproduction costs</u></b>, Observers shall be allowed access to the following documents upon their request, subject to any confidentiality undertaking:</p> <p>(a) Minutes of BAC, Joint BAC or TPA meetings;  <del>(b) Abstract of Bids;</del>          (c) Post-qualification summary report; <b><u>and</u></b>  <del>(d) Video</del> <b><u>Audio</u></b> recording of CSP proceedings;  <del>(e) Proposals; and</del>  <del>(f) Bid Documents and other related documents.</del></p> <p>xxx"</p>
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MERALCO’s Comments on the ERC’s Draft “Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements  
Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market”

	<p><b>request</b>, subject to any confidentiality undertaking:</p> <p>(a) Minutes of BAC, Joint BAC or TPA meetings;</p> <p>(b) <b><u>Abstract of Bids</u></b>;</p> <p>(c) <b><u>Post-qualification summary report</u></b>;</p> <p>(d) <b><u>Video recording of CSP proceedings</u></b>;</p> <p>(e) <b><u>Proposals</u></b>; and</p> <p>(f) <b><u>Bid Documents and other related documents</u></b>.</p> <p style="text-align: center;">xxx”</p>	<p>Moreover, access by Observers to the other documents in this Section, i.e., Minutes of BAC, Joint BAC or TPA meetings, Post-qualification summary report, [Audio] recording of CSP proceedings should be subject to reimbursement/payment of reasonable photocopying/reproduction costs.</p> <p>4) Further, to facilitate the timely conclusion of the CSP proceedings and deter the filing of nuisance/frivolous suits/actions, Meralco respectfully recommends that it be clarified in the draft Rules that no suit or action can be filed by NGOs or members of the local Chamber of Commerce while the CSP proceedings are underway. At any rate, such entities may intervene and submit their concerns/issues for disposition of the ERC when the corresponding application for approval of the PSA is filed with it.</p>	
<p>Article IV, Section 13</p>	<p><b>“Section 13. Publication and Posting. – xxx</b></p> <p><b><u>The BAC, Joint BAC or TPA shall post the Invitation to bid in its website, if there is any, in the DOE E-based portal, and in the NEA website in the case of ECs. The BAC, Joint BAC or TPA shall continuously update the DOE and NEA on the status thereof through their respective E-based portals.</u></b></p> <p>The BAC, Joint BAC, or TPA shall likewise ensure that</p>	<p>1) For clarity, the concerned DU shall only <i>cause</i> the posting of the Invitation to Bid in the DOE website considering that it does not have direct access to the website of DOE.</p> <p>Further, since DUs cannot ensure posting on the DOE E-based Portal, DUs should be deemed to have complied with this requirement once posting requests or materials for posting are transmitted to the DOE.</p> <p>2) For clarification of what this sentence means: “The BAC, Joint BAC or TPA shall continuously update the DOE and NEA on the status thereof through their respective E-based portals.” It should be noted, however, that in the 3<sup>rd</sup> paragraph of the same Section, it is provided that “[t]he BAC, Joint BAC, or TPA shall likewise ensure that all bid bulletins and related announcements shall be posted at the DOE E-based portal and NEA website, in the case of ECs”. In which case, such</p>	<p>Proposed revision:</p> <p><b>“Section 13. Publication and Posting. – xxx</b></p> <p>The BAC, Joint BAC or TPA shall <b><u>cause the posting of</u></b> the Invitation to bid in its website, if there is any, <b><u>in the DOE E-based portal, and in the NEA website in the case of ECs.</u></b> xxx</p> <p style="text-align: center;">xxx</p> <p>The BAC, Joint BAC or TPA may also opt to, publish the invitation to bid <b><u>once</u></b> in one (1) newspaper of local circulation in the region, province, city or municipality indicating the CSP schedules, among other necessary information for the bidders,</p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<p>all bid bulletins and related announcements <b><u>shall be posted at the DOE E-based portal and NEA website, in the case of ECs.</u></b></p> <p>xxx</p> <p>The BAC, Joint BAC or TPA may also opt to, publish the invitation to bid in one (1) newspaper of local circulation in the region, province, city or municipality indicating the CSP schedules, among other necessary information for the bidders, <b><u>once weekly for two (2) consecutive weeks.</u></b></p> <p>In addition to the publication, <b><u>the BAC, Joint BAC or TPA shall exert its best effort to disseminate its Invitation to Bid to all GenCos.</u></b></p>	<p>posting should already be deemed as the update to the DOE or NEA, as applicable.</p> <p>3) One-time publication of the Invitation to Bid in a newspaper of general circulation may already be sufficient plus posting in the respective websites of the concerned DU and the DOE.</p> <p>4) To minimize on costs that will ultimately be borne by consumers, it is suggested that instead of requiring DUs to disseminate information to all GenCos, it be made incumbent upon GenCos to monitor the DOE E-portal for Invitations to Bid.</p>	<p><del>once weekly for two (2) consecutive weeks.</del></p> <p><b><u>It shall be incumbent upon GenCos to monitor the DOE E-portal for Invitations to Bid released by DUs' BAC or TPA."</u></b></p> <p>Other items are for clarification.</p>
<p>Article IV, Section 14.</p>	<p><b>"Section 14. Protest Mechanism and Dispute Resolution.</b> – xxx Protests shall be resolved within ten (10) working days from receipt thereof. Decision of the governing board of the DU, the governing board of</p>	<p>1) It is observed that there may be matters or issues in the CSP that is within the jurisdiction of the ERC (i.e., disputes between and among industry participants or players in the energy sector under Section 43(u) of the EPIRA) and not the regular courts. In this regard, it is proposed that parties' first recourse should be with the Energy Regulatory Commission (ERC).</p>	<p>Proposed revision:</p> <p><b>"Section 14. Protest Mechanism and Dispute Resolution.</b> – xxx Protests shall be resolved within ten (10) working days from receipt thereof. Decision of the governing board of the DU, the governing board of the aggregated DUs or the duly authorized</p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<p>the aggregated DUs or the duly authorized officer/s of the TPA shall be final. <b><u>Court action may be resorted to after protests have been resolved with finality.</u></b></p> <p><b><u>Any conflict or dispute of any kind between the parties in connection with the implementation of the contract xxx shall be submitted to arbitration in the Philippines xxx or by mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution."</u></b></p>	<p>We recognize, however, that the filing of the action before the ERC will likely result in the suspension of the CSP which will effectively hold the entire CSP, especially the DU seeking immediate supply, hostage in the meantime. In this regard, Meralco recommends that the aggrieved party should be required to furnish a bond to the ERC, as a condition for filing the action, to protect the DU and the entire bidding process from nuisance/frivolous suits.</p> <p>2) The portion of the provision that states that "<i>[a]ny conflict or dispute of any kind between the parties in connection with the implementation of the contract xxx shall be submitted to arbitration in the Philippines xxx or by mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution</i>" may no longer be necessary to be included in the rules considering that the same is already provided for in the PSA.</p>	<p>officer/s of the TPA shall be final. <del>Court action may be resorted to a</del>After protests have been resolved with finality, <b><u>any aggrieved party may file an action with the ERC.</u></b></p> <p><del>Any conflict or dispute of any kind between the parties in connection with the implementation of the contract xxx shall be submitted to arbitration in the Philippines xxx or by mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution."</del></p>
<p>Article IV, Section 15</p>	<p><b>"Section 15. Exemptions.</b> – all PSAs shall be procured through CSP; Provided however, that the following instances shall warrant an exemption from the conduct of CSP:</p> <p>(a) <b><u>Any generation project owned by the DU funded by grants or donations. xxx"</u></b></p>	<p>We propose that DUs be given the opportunity to undertake generation projects if it is intended for electrification of micro-grid or non-viable/off-grid areas.</p>	<p>Proposed revision:</p> <p><b>"Section 15. Exemptions.</b> – all PSAs shall be procured through CSP; Provided however, that the following instances shall warrant an exemption from the conduct of CSP:</p> <p>Any generation project owned by the DU, <b><u>or</u></b> funded by grants or donations for electrification of remote or off-grid areas. xxx"</p>

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

<p>Article V, Section 3</p>	<p><b>"Section 3. Review of the ERC.</b> – ERC's evaluation of the PSA and the generation rate will be based on its satisfaction of the following:</p> <p>(a) That the PSA was awarded in accordance with the prescribed procurement process xxx;</p> <p>(b) That the PSA guarantees suppliers' compliance with the xxx standards set out in the bid documents; and</p> <p>(c) That the PSA have substantially complied with the PSA Framework under Appendix "B" <u>that accords the parties with equitable rights and that the risks associated with the supply of electricity such as those pertaining to the tariff structure, economic indices, foreign exchange fluctuations, volatility of fuel prices and the like are</u></p>	<p>1) May we be clarified whether the evaluation by the ERC of the tariff structure be market-based or cost-based?</p> <p>2) Generation charges are mere pass-through charges and DUs can neither earn any revenue nor incur any loss therefrom. The phrase "<i>that <u>accords the parties with equitable rights</u> and that the <u>risks associated with the supply of electricity</u> such as those pertaining to the tariff structure, economic indices, foreign exchange fluctuations, volatility of fuel prices and the like are <u>efficiently allocated between the parties</u>", however, effectively shifts the exposure/risk to the DUs thereby defeating the pass-through nature of generation charges. In this regard, Meralco respectfully proposes that the same be deleted in this this Section.</i></p>	<p>Proposed revision:</p> <p><b>"Section 3. Review of the ERC.</b> – ERC's evaluation of the PSA and the generation rate will be based on its satisfaction of the following:</p> <p>(a) That the PSA was awarded in accordance with the prescribed procurement process xxx;</p> <p>(b) That the PSA guarantees suppliers' compliance with the xxx standards set out in the bid documents; and</p> <p>(c) That the PSA have substantially complied with the PSA Framework under Appendix "B", <del>that accords the parties with equitable rights and that the risks associated with the supply of electricity such as those pertaining to the tariff structure, economic indices, foreign exchange fluctuations, volatility of fuel prices and the like are efficiently allocated between the parties."</del></p>
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MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements  
Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<b><u>efficiently allocated between the parties."</u></b>		
Article V, Section 7	<b>"Section 7. ERC Action on the Application</b> – Any PSA submitted to the ERC shall be reviewed as to its "reasonableness in terms of costs, risk allocation, and other contractual terms. xx"	To facilitate energy sourcing and planning activities of DUs, and allow parties to a PSA visibility on when the same may be implemented, it is recommended that the provision specify that a decision shall be reached within a period of 180 days from when the PSA is submitted to the ERC for review.	Proposed revision:  <b>"Section 7. ERC Action on the Application</b> – Any PSA submitted to the ERC shall be reviewed as to its reasonableness in terms of costs, risk allocation, and other contractual terms. <b><u>The relevant PSA application shall be resolved within one hundred-eighty (180) days from the time the case is submitted for decision.</u></b> "
Article V, Section 7	<b>"Section 7. ERC Action on the Application</b> – xxx The ERC's decision and judgement shall bind both parties and shall not be rendered ineffective or nugatory by any termination or "walk-away" clause incorporated."	While it may be beneficial for the customers of the DU in the short-term that the approved rate is lower than what was applied, in the long-run if the approved rate causes the performance of the GenCo to deteriorate and affects its viability, then end-users would have to pay the price for forced outages and unreliable supply.	For consideration.
Additional Comments	New Section	To ensure that participation of GenCos in the CSP is carefully thought out and DUs are not left hanging by a winning GenCo after the completion of a CSP, to the ultimate prejudice of its customers), it is respectfully proposed that a penalty of disqualification for [at least] five (5) years in event of failure to deliver under an awarded PSA be expressly provided.	It is respectfully recommended that a penalty of disqualification for the winning GenCo that backs out from the awarded PSA be included in the Invitation to Bid:  [NEW] <b><i>"Penalty of disqualification from CSPs of the DU for at least the next five (5) years, in the event of failure by the</i></b>



MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

			<b>winning GenCo to deliver under an awarded PSA."</b>
<b>Comments on Appendix "A", Procedures of the Competitive Public Bidding for Distribution Utility's (DUs) Power Supply Contracting</b>			
	<b>General Comment</b>	Considering that many DUs have been conducting CSP for several years and have established bidding processes by now, it is respectfully proposed that similar to Appendix "B" regarding PSA Framework, which is explicitly stated to "serve [only] as a guide], it also be expressly stated that the Procedures of the Competitive Bidding ("Procedures") outlined in Appendix "A" of the draft Rules will serve as a guide only. This notwithstanding, the Competitive Bidding process must comply with the minimum standards laid down in the rules (e.g., timelines indicated in Article IV, Section 3).	Suggest to include an express statement at the beginning of Appendix "B".
Appendix "A", 1-03	Timetable for Competitive Selection Process	Similar to Meralco's previous comment on the draft Rules: (a) a one-time publication may already be reasonable; and (b) posting in the websites of the concerned DU and the DOE should be included in the requirement.	For consideration.
	1. Publication of Invitation to <u>submit Pre-qualification requirements</u>		
	5. Pre-bid Conference/Start of due diligence	As proposed by Meralco in the draft Rules, the Pre-bid conference should be held no later than 10 days from publication of the Invitation to Bid.	Meralco proposal: Pre-bid conference should be held no later than 10 days from publication of the Invitation to Bid.
	9. Post-qualification	It is stated in 1-17 of Appendix "A" that post-qualification entails the submission of certain documentary requirements to the BAC which covers technical, legal and financial requirements.  It is observed, however, that these requirements should already be included as part of the pre-qualification requirements to: (a)	For consideration.

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

		ensure at the outset that the participants in the bid who submit their financial proposals are qualified, (b) avoid spending unnecessary time and resources on evaluation of bids from unqualified bidders, and (d) limit access to the Power Supply Agreement (PSA) to those pre-determined as qualified bidders. The post-qualification process under Appendix "A" and the draft Rules may involve only the submission of documents that are required for ERC filing.	
	11. Announcement of winning bidder/sending notice of award	of of  Meralco observes that it may already be sufficient to just post the results of the bidding at the concerned DU's website and the website of the DOE.  On the other hand, sending of the notice of award to the winning bidder would only involve such winning bidder. Presence of Observers under Section 12, Article IV of the draft Rules may therefore be dispensed with.	It is respectfully submitted that the presence of Observers may be dispensed with when sending the notice of award.
Appendix "A", 1-10	<b>"1-10 Contents of Bid</b>  Each bid shall compose of two (2) separate envelopes containing the First Bid Envelope (Technical Component) and Second Bid Envelope (Financial Bid Component) as follows:  1.xxx "Technical Component" xxx:  a) The Project; b) A certification under oath xxx that:	Meralco respectfully observes that:  1) Save for "The Project", the items under the "Technical Component" may more aptly be included in the Legal Requirements and not the Technical Component/Requirements; 2) The Technical Component/Requirements should demonstrate that the Plant/Project of the bidder is capable of supplying the capacity required by the DU etc.	For consideration.

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	<p>i. Each of the documents submitted xxx is an original copy or a true and faithful reproduction or copy of the original;</p> <p>ii. The Bidder shall advise the BAC xxx of any change in the information contained in any portion of his Bid or in previous submissions;</p> <p>iii. The Bidder undertakes all the responsibilities set forth in Section 1-06 xxx</p> <p>c) Two (2) copies of the Undertaking to Post a Performance Bond xxx which shall be under oath;</p> <p>Full compliance with the above requirements shall be the basis of the BAC in evaluating the First Bid Envelope (Technical Component).</p>		
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MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

Comments on Appendix "B", Power Supply Agreement Framework			
Appendix "B", 2 Term of Contract Period	"2. xxx The term of the PSA should <b>not exceed ten (10) years</b> "	<ol style="list-style-type: none"> <li>1) It is suggested that no limit on the term be specified as the price tends to decrease as the term is prolonged, since the recovery of costs is spread over a longer period.</li> <li>2) It is understood that the concern may be with respect to possible Stranded Contract Costs with the lowering of thresholds for contestability by virtue of Retail Competition and Open Access (RCOA). However, this may be addressed by assignment and/or reduced capacity provisions in the PSA as specified in item 13 of ERC's PSA Framework (Appendix "B"), as specified in item 13 of ERC's PSA Framework (Appendix "B").</li> </ol>	Consistent with the concept that the PSA Framework shall merely serve as a guide, it is suggested that no limit on the term be specified.
Appendix "B", 13 Reduction of Contract Capacity on account of RCOA	"The provisions sets (sic) out the agreement of the parties for any reduction of Contract Capacity on account of retail competition and open access within thresholds allowed by law (contestability) and with proper notice periods. The parties may agree on a protocol on the foregoing."	Meralco respectfully suggests to include reduction of contract capacity due to implementation of Renewable Energy (RE) Law.	For consideration.
Appendix "B", 19 Billing and Payment	<ul style="list-style-type: none"> <li>• No offsetting</li> <li>• xxx</li> <li>• If an invoice is not disputed within 90 days after payment, it is deemed to be accepted,</li> </ul>	Consistent with the concept that the PSA Framework shall merely serve as a guide, it is suggested that these prescriptions be dispensed with and parties be allowed the freedom to agree on billing and payment provisions.	For consideration.

MERALCO's Comments on the ERC's Draft "Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market"

	final and binding to the Buyer and Seller		
<i>Comments on Appendix "C", General Information and Requirements for the Pre-filing of Applications for Approval of Power Supply Agreement (PSA)</i>			
Appendix "C"	Annex F, F-1, F-2	We understand that the purpose of this requirement is for validation that the DU does not breach the contracting limitation under Section 45 of the EPIRA. It is respectfully submitted that a submission of the list of, and relationships with, DUs, Subsidiaries and Affiliates is sufficient to address such purpose, without need of providing information on the Board of Directors/Board Members of each.	For consideration.
Appendix "C"	Annex U	Annex U pertains to the certification to be issued by PSALM/NPC whether the Transition Supply Contract (TSC) capacity and energy is expected to be available during the contractual period. However, this may be inapplicable to some DUs or ECs that no longer have any TSCs with NPC.	It is recommended that the submission of such certification be required only if applicable.
Appendix "C"	Annex V-3	It is not clear what is meant by "optimization of remaining WESM exposure." In any case, Annex V-2 would already include a discussion/indication of the consideration of WESM as alternative source of supply.	It is suggested that by reason of redundancy, Annex V-3 be deleted and the remaining documents be re-marked.
	Annex V-7 and v-8	Annex V-7 pertains to the "average daily load curve, supply and demand scenario of the DU" while Annex V-8 pertains to the DU's "supply-demand scenario (daily load curve)". It appears that information required in Annex V-8 are a duplication of those enumerated in Annex V-7.	It is suggested that by reason of redundancy, Annex V-8 be deleted and the sample template attached be re-marked as Annex V-7.
Appendix "C"	Annexes Z and AA	Meralco observes that most of the enumerated documents may not be applicable or available yet for greenfield projects depending on Project Timelines mentioned in Annex AJ of Appendix C.	For consideration.

MERALCO’s Comments on the ERC’s Draft *“Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market”*

Appendix “C”	Annex AB2, item 6	Meralco observes that this is similar to Annex W, which pertains to the rate impact simulation on the overall rates of the DU once the contract is approved (including an explanation on assumptions and input parameters used in the derivation thereof).	It is suggested that by reason of redundancy, Annex AB2, item 6 be deleted and the remaining documents be re-marked.
Appendix “C”	Annex AI, item d	Meralco observes that Annex AI, item d is similar to Annex V-4, which mentions the submission of “details regarding the load forecast projects in accordance with the latest Distribution Development Plan of the Distribution Utility and the variability of those projections over the proposed contract period”.	It is suggested that by reason of redundancy, Annex AI, item d be deleted and the remaining documents be re-marked.