

9 May 2018

**HON. AGNES VST. DEVANADERA**

Chairperson  
Office of the Chairman  
Energy Regulatory Commission  
Pacific Center Building, San Miguel Avenue  
Ortigas Center, Pasig City

**Comments on the 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 (ERC Case No. 2018-002 RM)**

**Dear Chairperson Devanadera,**

In compliance with the Honorable Commission's request, we are respectfully submitting in the attached matrix our comments, suggestions, and critical issues that the Honorable Commission must consider in its decision making process regarding the *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 under ERC Case No. 2018-002 RM*

Please allow us to summarize the key points that we have raised in our comments:

- 1. ERC review process for PSA approval shall be time bounded** – We understand that under Section 43 of the EPIRA, it is the mandate of the ERC to review and approve the retail rates for the captive customers. However, we request that such review must be time-bounded in order for the proponents to avoid costly delays which will ultimately affect the consumers. We suggest that the ERC streamline their review and approval process, taking into consideration that the PSA application has undergone transparent bidding process under the CSP. We respectfully suggest that a Final Approval be given by the Honorable Commission on the PSA application within one hundred eighty (180) days reckoned from the filing of the said PSA.
- 2. Unsolicited Proposals under Swiss Challenge** - We suggest that ERC adopt a template indicating the minimum requirement to guide the DU/EC in determining the completeness of a submitted unsolicited proposal. Using a “first in time approach” as basis of naming an “Original Proponent” would be unfair to another proponent who may have real project to begin with vis-à-vis an opportunist who had just the luck of submitting an early proposal however incomplete or ill-prepared to pursue a real offer. We suggest that in order to guide the DU in accepting an unsolicited proposal, a minimum documentary requirement and information must be contained in the proposal, among others, Contract Quantities, Price,

plant technology, contract duration and documentary requirements already obtained such as ECC, Site Control, DOE endorsement, GIS and Connectivity agreements in order for it to be considered as original proponent.

3. **Benchmark Rate** – We would like to be clarified if the benchmark rate that will be adopted by the Honorable Commission serve as a bid price cap. There are instances that generators put a higher risk premium in its price to take into account the credit worthiness of a particular EC which may be worse than the ERC used in determining the benchmark rate.
4. **PSA Pricing Structure**- We suggest to the Honorable Commission the adoption of the Discounted Cash Flow (DCF) methodology in determining the Capital Recovery Fee (CRF) and not the methodology using investment annuity at the founding WACC of the project. We suggest using a single methodology using the DCF methodology (or the Internal Rate of Return analysis). The DCF (or IRR analysis) obviates the limitations of the annuity method using the founding WACC (e.g., WACC varies as debt:equity structure changes over time, annuity cannot capture the nuances of cash flows such as income tax holidays, repayment of debt, trapped cash, etc).
5. **Invalidating Termination and “Walk-away” provisions in the PSA** - We are of the view that the prohibition against the termination or “walk-away” clauses impairs the parties inherent right to freely contract and establish such terms and conditions in the PSA as the parties may deem convenient. Termination or “walk-away” clauses are typically incorporated in PSA to provide an opportunity for both parties to withdraw from contractual obligation, where the outcome of external factors have made a particular undertaking different from what the parties have originally intended and agreed upon. Without termination or “walk-away” clauses, there can be a situation wherein generators would be force to supply electricity to the DU at a rate which is not commercially viable and sustainable. This makes the situation inequitable for the generator.

We thank you for the opportunity to provide our inputs to the Draft Rules and likewise express our appreciation to the Honorable Commission’s initiatives to continuously revisit and refine its existing rules and regulations to improve the energy industry.

Respectfully yours,



**Chrysogonus F. Herrera**  
Senior Vice President  
Commercial and Planning

Incl: Annex A- Matrix of Comments on ERC 2018-002 RM