

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



IN THE MATTER OF THE APPLICATION FOR APPROVAL OF THE POWER SUPPLY AGREEMENT, AS AMENDED BY AMENDMENT NO. 1, ENTERED INTO BY AND BETWEEN CLARK ELECTRIC DISTRIBUTION CORPORATION (CEDC) AND SAN MIGUEL ENERGY CORPORATION (SMEC), WITH PRAYER FOR THE ISSUANCE OF PROVISIONAL AUTHORITY

ERC CASE NO. 2015-141 RC

CLARK ELECTRIC DISTRIBUTION CORPORATION (CEDC) AND SAN MIGUEL ENERGY CORPORATION (SMEC),

Applicants.

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D O C K E T E D
Date: **AUG 27 2015**
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ORDER

On July 28, 2015, Clark Electric Distribution Corporation (CEDC) and San Miguel Energy Corporation (SMEC) filed a joint application for the approval of their Power Supply Agreement (PSA), as amended by Amendment No. 1, with prayer for the issuance of provisional authority.

In the said application, CEDC and SMEC alleged, among others, the following:

1. CEDC is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at Bldg. N2830, Bayanihan Street, Clark Freeport Zone, Pampanga;

2. SMEC is a corporation duly organized and existing under the laws of the Republic of the Philippines with office address at the 2nd Floor 808 Building, Meralco Avenue corner Gen. Lim Street, San Antonio Village, Pasig City. It is the Independent Power Producer (IPP) Administrator of the 1,000 MW Net Contracted Capacity of the Sual Coal-fired Thermal Power Plant (Sual Power Plant) under the IPPA Agreement executed between SMEC and the Power Sector Assets and Liabilities Management Corporation (PSALM);

CEDC's Power Situation

3. The customers of CEDC are mostly industrial locators of the Clark Special Economic Zone whose operations are heavily dependent on sufficient and steady supply of electricity at stable rates;
4. To ensure continuous supply and security of electricity within its franchise area, on March 20, 2013, CEDC signed a PSA with SMEC for a Contract Capacity of 70,000 kW from March 20, 2013 to December 25, 2019, at the price approved by the Commission in ERC Case No. 2012-087 RC. The power requirements for CEDC shall be sourced from the Sual Power Plant Output administered by SMEC;
5. It should be noted, however, that the modifications in the Decision of the Commission dated December 17, 2012 in ERC Case No. 2012-087 RC are pending resolution due to the "Petition for Intervention with Motion for Reconsideration" dated June 5, 2014 filed by SMEC;
6. CEDC has no alternate supplier other than SMEC. Without SMEC, CEDC would be constrained to source all its electricity requirements from the Wholesale Electricity Spot Market (WESM), at constantly fluctuating prices which are generally higher than prices fixed in contracts with power suppliers. For this reason, and for the benefit of its customers, CEDC was constrained to immediately implement its PSA with SMEC;
7. CEDC has forecasted and simulated the effect of the inclusion of the power supplied by SMEC, thus:

With SMEC ¹	PhP 4.6045/kWh
Without SMEC ²	PhP 4.6678/kWh
Rate Impact (decrease)	PhP(0.0633)/kWh

Note: 1. Estimated Average Rate under the PSA

2. Average WESM Rate based on WESM Hourly Prices

THE POWER SUPPLY AGREEMENT AND AMENDMENT NO. 1

8. Under the PSA, SMEC shall supply power to CEDC for a term covering the period March 20, 2013 to December 25, 2019. The Contract Capacity is fixed on a monthly basis. The extension of the PSA, if desired by both contracting parties, shall be subject to a written agreement;
9. The Sual Power Plant shall be scheduled for outage for the period August 8, 2015 to September 6, 2015;
10. Considering that CEDC's primary source of its electricity requirements is SMEC and to ensure that the electrical output committed under the PSA will be supplied, on July 9, 2015, SMEC and CEDC executed Amendment No. 1 and agreed upon an amendment of Article 7.2.1 on Replacement Power to read as follows:

"7.2 Replacement Electrical Output During Outages

7.2.1 During (i) Outages within the Annual Outage Allowance Days and, (ii) when applicable, Outages and Major Maintenance Outages within the Full Load Equivalent Outage Allowance Days, Clark Electric shall procure replacement Contract Capacity and replacement Associated Energy from the WESM. However, Power Supplier may offer replacement Contract Capacity and replacement Associated Energy from other sources and Clark Electric shall have the option to accept said offer, provided, it shall be lower than Clark Electric's forecast replacement power cost from the WESM. If Clark Electric accepts the offer, the cost of such replacement power shall be a pass-through cost."

11. The PSA contains the following salient terms and conditions:

"1.1 xxx

Contract Capacity or CC means 55,000 kW from the Plant, which may be increased up to 70,000 kW xxx

xxx

2.2 Term of Agreement

2.2.1 Subject to Article 3, this Agreement shall become effective on the Effective Date.

2.2.2 The term of this Agreement (the "Term") shall commence on the Effective Date and shall expire on December 25, 2019, unless terminated earlier in accordance with the terms of this Agreement or extended by the application of Section 2.2.3 or Section 14.3.2.

2.2.3 After the fifth (5th) anniversary, but no later than the sixth (6th) anniversary date of the Effective Date, the Parties shall enter into good faith negotiations to decide on whether to extend the Term; provided that any extension of the Term may be up to the expiration of the IPPA Agreement; provided further that, except for the Term, the same terms and conditions of this Agreement shall govern the extension. The duration of the negotiations for extension shall not exceed ninety (90) Days from the start thereof. If the Parties fail to agree to an extension within the ninety (90) Day period, this Agreement will be non-extendible and expire on December 25, 2019.

x x x

4.1 Supply of Power

Subject to the terms and conditions of this Agreement:

4.1.1 From the Effective Date until the expiration or earlier termination of this Agreement, Power Supplier shall:

(a) make available to Clark Electric, and Clark Electric shall purchase from Power Supplier, at the Price determined in accordance with Appendix D, the Contract Capacity of the Plant; and

(b) sell to Clark Electric, and Clark Electric shall purchase from Power Supplier, at the Price determined in accordance with Appendix D, the Associated Energy of the Plant, to the extent of Clark Electric's relevant day-ahead nominations.

4.1.2 The Contract Capacity and Associated Energy shall be dedicated exclusively to Clark Electric for so long as this Agreement is in force and effect. Notwithstanding this, Clark Electric acknowledges that the Power Supplier is required to offer any portion of the Plant's capacity not nominated by Clark Electric pursuant to the "must offer rule" under the WESM Rules.

4.1.3 Unless otherwise expressly permitted by this Agreement, Power Supplier shall provide Clark Electric with capacity and/or electrical energy exclusively from the Plant.

x x x

7.1 Outage Allowances

7.1.1 Power Supplier is allowed Outages not to exceed sixty (60) Days for each Contract Year ("Annual Outage Allowance Days") of the Term, during which times reduced or no supply of Contract Capacity or Associated Energy will be available to Clark Electric; provided that Power Supplier shall be allowed an outage of thirty (30) days for Major Maintenance ("Major Maintenance Outage

Allowance Days”), in addition to the Annual Outage Allowance Days, once every five (5) year interval reckoned from the last Major Maintenance in 2011. Unutilized Annual Outage Allowance Days or Major Maintenance Outage Allowance Days, as the case may be, shall not be carried forward to any subsequent Contract Year.

7.1.2 Any reduction in capacity from the Plant, whether due to an Outage, Major Maintenance Outage, Events of Force Majeure or otherwise, shall be allocated pro rata among Clark Electric and its assignees, based on their Contract Capacity at the time of such reduction.

7.2 Replacement Electrical Output During Outages

7.2.1 During (i) Outages within the Annual Outage Allowance Days and, (ii) when applicable, Outages and Major Maintenance Outages within the Full Load Equivalent Outage Allowance Days, **Clark Electric shall procure replacement Contract Capacity and replacement Associated Energy from the WESM. However, Power Supplier may offer replacement Contract Capacity and replacement Associated Energy from other sources and Clark Electric shall have the option to accept said offer, provided, it shall be lower than Clark Electric’s forecast replacement power cost from the WESM. If Clark Electric accepts the offer, the cost of such replacement power shall be a pass-through cost. (Emphasis supplied)**

7.2.2 If during any Contract Year, (i) the actual Outages exceed the Annual Outage Allowance Days and, (ii) when applicable, the actual Outages and actual Major Maintenance Outages exceed the Full Load Equivalent Outage Allowance Days, the Power Supplier shall procure, at its own cost, such quantities

of electrical energy from third parties (including the WESM) to satisfy the relevant day-ahead nominations of Clark Electric. Power Supplier shall indemnify and hold Clark Electric harmless from any loss, cost, expense or penalty incurred or paid by Clark Electric as a result of Power Supplier's failure to so procure such quantities of electrical energy for Clark Electric.

x x x

8.1 Commencement of Open Access and Retail Competition

The Parties acknowledge that Open Access and Retail Competition shall be implemented in phases in accordance with the guidelines to be issued by the ERC, and upon implementation, the amount of Contract Capacity and Associated Energy may be adjusted for each phase in accordance with the terms hereof.

x x x

8.3 Assignment or Transfer of Contract Capacity Due to Open Access and Retail Competition

Upon the implementation by the ERC of Open Access and Retail Competition, Clark Electric shall also be entitled to assign, transfer, designate, delegate or allocate (as determined by Clark Electric) to any of its Affiliates, or to any of its business segments, to the extent allowed by Law, or to any third party acceptable to Power Supplier (which express written consent shall not be unreasonably withheld), its right to purchase such portion of Contract Capacity and Associated Energy reduced as a result of Open Access and Retail Competition.

For the avoidance of doubt, in no case shall the reduction contemplated in Section 8.2 or

the assignment or transfer contemplated in Section 8.3 relieve or otherwise excuse Clark Electric from payment for the full Contract Capacity and Associated Energy except as otherwise assumed by the assignee or transferee. Clark Electric shall then be relieved from paying for, and from any liability pertaining to, such portion of the Contract Capacity and Associated Energy assigned, transferred, designated, delegated or allocated.

- 8.4 Any capacity that the Power Supplier reacquires from any Affiliate or business segment of Clark Electric shall be taken by Clark Electric under the same terms and conditions (including the Price) as contained in this Agreement for the unexpired portion of the Term. This portion of capacity that Clark Electric takes shall be added to, and treated as "Contract Capacity" for the purposes of this Agreement.

x x x

9.2 Payments

- 9.2.1 Clark Electric shall pay the entire amount indicated in the Final Invoice (subject to Section 6 of Appendix G) when due and payable, provided that Clark Electric shall not be required to make payment on any Invoice that is manifestly in error or apparently invalid.
- 9.2.2 If Clark Electric disputes all or any portion of a Final Invoice for a reason other than a manifest error in, or the apparent invalidity of, such Final Invoice, Clark Electric shall nonetheless pay the full amount of such Invoice (subject to Section 6 of Appendix G). Any payment by Clark Electric under this Section 9.2.2 is without prejudice to Clark Electric's right at a later date to dispute, protest or question any amount so paid. If applicable, Clark Electric shall dispute, protest or question a Final Invoice within fifteen (15)

Days from the date of its receipt. In such a case, the dispute, protest or question shall be resolved within thirty (30) Days from the date of filing of the dispute or protest with Power Supplier. If the dispute, protest or question is not resolved, Clark Electric may at any time refer such dispute, protest or question for resolution in accordance with Article 17.

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12.2 ERC Approval

12.2.1 Clark Electric shall use reasonable best efforts to secure ERC Final Approval in form and substance satisfactory to the Parties.

12.2.2 If the ERC's Final Approval requires an amendment of any provision herein, including provisions on amounts payable under this Agreement, or subjects such approval to any material term or condition that is not acceptable to either Party, acting reasonably ("ERC Conditional Approval"), the Parties shall cooperate in good faith to resolve the required ERC amendment(s) or to address the material term or condition. The Parties may:

(a) Within fifteen (15) Days after the receipt by the Parties of the ERC Conditional Approval, seek a reconsideration of the ERC Conditional Approval; or

(b) Within sixty (60) Days after receipt by the Parties of the ERC Conditional Approval, revise and file an amended Agreement for approval by the ERC, or if the Parties fail to agree on the amendment of this Agreement within the period prescribed in this Section 12.2.2, terminate this Agreement;

Provided that if the motion for reconsideration is denied by the ERC, or the amended Agreement is disapproved by

the ERC, or approved by the ERC but still with any material term or condition that is not acceptable to either Party, acting reasonably, either Party may terminate this Agreement upon thirty (30) Days prior written notice to the other Party.”

Under the PSA (Appendix D), the estimated Contract Price (for May 2015) would be PHP4.6045 per kWh. A sample computation of the foregoing Contract Price has been attached hereto as Annex I. “1.1 xxx

12. In further support of the instant application, they submitted the following documents as part of the application:

Annex	Nature of Documents
A	Power Supply Agreement between CEDC and SMEC dated 20 March 2013
B	Amendment No. 1 dated 9 July 2015
C	SMEC Certificate of Incorporation
D	SMEC General Information Sheet
E	SMEC latest Audited Financial Statements
F	CEDC Actual and Forecasted Load Data
G	CEDC Rate Impact Analysis
H	CEDC Procurement
I	Sample Computation - Rates
J	Other Documents - Supporting
K	Affidavit of Fortunato C. Leynes

**ALLEGATIONS IN SUPPORT OF THE PRAYER FOR
ISSUANCE OF PROVISIONAL AUTHORITY**

13. Considering the scheduled outage of the Sual Power Plant for the period August 8, 2015 to September 6, 2015, the immediate issuance of provisional authority to implement the PSA, as amended by Amendment No. 1, will shield CEDC from sourcing all the electricity requirements of its customers from the WESM, at constantly fluctuating prices

which are generally higher than prices fixed in contracts with power suppliers;

14. The interim relief sought by them that may be granted by the Commission shall be subject to adjustments and other conditions that the Commission may impose after hearing and final determination; and
15. They pray that: a) the Commission approves the PSA, as amended by Amendment No. 1; and b) pending hearing, a provisional authority be granted to implement the PSA, as amended by Amendment No. 1.

Finding the said application to be sufficient in form and substance with the required fees having been paid, the same is hereby set for jurisdictional hearing, expository presentation, pre-trial conference and evidentiary hearing on **September 22, 2015 (Tuesday) at nine o'clock in the morning (9:00 A.M.) at the CEDC's Multi-Purpose Hall, Bldg. N2830, Bayanihan Street, Clark Freeport Zone, Pampanga.**

CEDC and SMEC are hereby directed to cause the publication of the attached Notice of Public Hearing, at their own expense, twice (2x) for two (2) successive weeks in two (2) newspapers of general circulation in the Philippines, with the date of the last publication to be made not later than ten (10) days before the date of the scheduled initial hearing. They are also directed to inform the consumers within CEDC's franchise area, by any other means available and appropriate, of the filing of the instant application, their reasons therefor, and of the scheduled hearing thereon.

Let copies of the application, this Order, and the attached Notice of Public Hearing be furnished the Office of the Solicitor General (OSG), the Commission on Audit (COA) and the Committees on Energy of both Houses of Congress. They are hereby requested, if they so desire, to send their duly authorized representatives at the scheduled hearings.

Likewise, let copies of this Order and the attached Notice of Public Hearing be furnished the Office of the Administrator/Responsible Officer of the Clark Freeport Zone Authority (CFZA) for the appropriate posting thereof on its bulletin board.

CEDC and SMEC are hereby directed to furnish all those making requests therefor with copies of the application and its attachments, subject to reimbursement of reasonable photocopying costs.

On the date of the initial hearing and pre-trial conference, CEDC and SMEC must submit to the Commission their written Compliance with the jurisdictional requirements attaching therewith, methodically arranged and duly marked, the evidences on the actual posting and publication of the Notice of Public Hearing consisting of certification issued to that effect, signed by the afore-mentioned Administrator/Responsible Officer or his duly authorized representative, bearing the seal of his office, and the affidavits of the Editors or Business Managers of the newspapers where the said Notice of Public Hearing were published together with the complete issues of the said newspapers, and such other proofs of compliance with the requirements of the Commission.

CEDC, SMEC and all interested parties are directed to submit, at least five (5) days before the date of initial hearing and pre-trial conference, their respective Pre-Trial Briefs containing, among others:

- (a) A summary of admitted facts and proposed stipulation of facts;
- (b) The issues to be tried or resolved;
- (c) The documents or exhibits to be presented, stating the purposes thereof and proposed markings therefore; and
- (d) The number and names of the witnesses, with their written testimonies in an individual affidavit form, to be attached to the Pre-Trial Brief.

Failure of CEDC and SMEC to submit the required Pre-Trial Brief and Judicial Affidavits of its witnesses within the prescribed period shall be a ground for cancellation of the scheduled hearing, and the resetting of which shall be six (6) months from said date of cancellation.

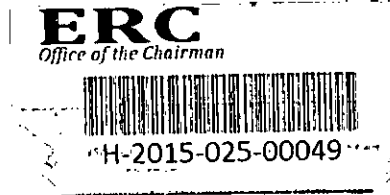
As part of the pre-trial conference, CEDC and SMEC must also be prepared to make an expository presentation of their application, aided by whatever communication medium that they may deem appropriate for the purpose, in order to put in plain words and explain, for the benefit of the consumers and other concerned parties, what the application is all about and the reasons and justifications being cited in support thereof.

SO ORDERED.

Pasig City, August 17, 2015.

FOR AND BY AUTHORITY
OF THE COMMISSION:


JOSE VICENTE B. SALAZAR
Chairman



Copy Furnished:

1. Quiason Makalintal Barot Torres Ibarra and Sison Law Offices

Attention: ATTYS. MANUEL M. TORRES and MIGUEL K. MATHAY
Counsels for Applicant CEDC
21st Floor, Robinsons-Equitable Tower,
4 ADB Avenue corner Poveda Street,
1605 Ortigas Center, Pasig City

2. Atty. Julieta B. Estamo

Counsel for SMEC
23rd Floor, San Miguel Properties Centre
No. 7 St. Francis Avenue
Mandaluyong City

3. The General Manager

Clark Electric Distribution Corporation (CEDC)

Attention: MR. RADITO P. TUAZON
Chief Operating Officer
Building N2830 Bayanihan Street
Clark Freeport Zone, Pampanga

4. Commission on Audit

Commonwealth Avenue
Quezon City

5. Senate Committee on Energy

GSIS Building, Roxas Boulevard
Pasay City

6. House Committee on Energy

Batasan Hills, Quezon City

7. Office of the President of PCCI

Philippine Chamber of Commerce and Industry (PCCI)
3rd Floor, ECC Building, Sen. Gil Puyat Avenue
Makati City

8. Office of the Administrator/Responsible Officers

Clark Freeport Zone
Province of Pampanga