

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



**IN THE MATTER OF THE  
APPLICATION FOR  
AUTHORITY TO DEVELOP,  
OWN AND/OR OPERATE  
DEDICATED POINT-TO-  
POINT LIMITED  
TRANSMISSION FACILITIES  
TO CONNECT THE ENERGY  
STORAGE FACILITY TO THE  
VISAYAS GRID THROUGH  
THE NATIONAL GRID  
CORPORATION OF THE  
PHILIPPINES KABANKALAN  
SUBSTATION**

**ERC CASE NO. 2019-024 MC**

**SMCGP PHILIPPINES  
ENERGY STORAGE CO. LTD.  
(SMCGP Storage),**

*Applicant.*

X ----- X

**Promulgated:**  
September 1, 2020

**ORDER**

Before this Commission for resolution is the motion for confidential treatment of information filed by SMCGP Philippines Energy Storage Co. Ltd. (SMCGP Storage) pursuant to Rule 4 of the Commission's Rules of Practice and Procedure (RPP).

On 04 October 2019, SMCGP Storage filed an *Application* for authority to develop, own, and/or operate dedicated point-to-point limited transmission facilities.

In the said application, SMCGP Storage moved, among others, that the following documents/information be declared confidential in accordance with Rule 4 of the Commission's RPP:

	<b>Markings</b>	<b>Documents</b>
1	Annex “A” of the <i>Compliance</i> dated 29 November 2019	A detailed breakdown of the bill of quantities in relation to the project cost estimates presented during the expository presentation
2	Annex “D” of the <i>Compliance</i> dated 29 November 2019	Facilities Study Review Report issued by NGCP
3	Annex “F” of the <i>Compliance</i> dated 29 November 2019	Write-up indicating the proof of necessity of the Kabankalan BESS <sup>1</sup> as Ancillary Service Provider

The Applicant alleged that the documents provide valuable information in connection with the plant design and technology of the Kabankalan BESS using a new and innovative type of technology. Thus, it is to SMCGP Storage’s best interest to keep the information confidential and inaccessible to its competitors.<sup>2</sup>

The Applicant further alleged that the design, financial, and operational information contained in the documents that relate to the Kabankalan BESS’s plant design and technology qualify as trade secrets. The Applicant also alleged that the documents will give other parties, particularly other companies seeking to develop similar generation facilities, information relating to the design and technology that SMCGP Storage painstakingly researched and developed for its Generation Facility.<sup>3</sup>

### **Discussion**

Sections 1 and 2, Rule 4 of the Commission’s RPP 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.

---

<sup>1</sup> Kabankalan BESS refers to the 20 MW Battery Energy Storage Plant located in Barangay Binicuil, Kabankalan City, Negros Occidental;

<sup>2</sup> Allegation No. 6 of the *Compliance* dated 29 November 2019;

<sup>3</sup> Allegation No. 10 of the *Compliance* dated 29 November 2019;

- (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”.

X X X

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.

X X X

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 not be disclosed. To determine whether or not to approve the 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>4</sup>, the Supreme Court affirmed Pennswell’s “right to guard its trade

---

<sup>4</sup> G.R. No. 172835, 13 December 2007;

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>5</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>6</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>7</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>8</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 granted to prevent the disclosure of the trade secret by one who obtained the information “in confidence” or through a “confidential relationship.”<sup>9</sup> American jurisprudence has utilized the following factors<sup>10</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;

---

<sup>5</sup> *Ibid.*, citing BLACKS LAW DICTIONARY 1494 (1991), 6<sup>TH</sup> ed.;

<sup>6</sup> *Ibid.*, citing *Id.*, citing *Palin Mfg. Co., Inc. v. Water Technology, Inc.*, 103 Ill.App.3d 926, 59 Ill. Dec. 553, 431;

<sup>7</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 trade secret., citing *Air Products and Chemicals, Inc. v. Johnson*, 296 Pa. Super. 405, 442 A.2d 1114 (1982);

<sup>8</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);

<sup>9</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>10</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.;

- (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>11</sup>

In *Cocoland Development Corporation vs. NLRC*<sup>12</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>13</sup> (EO No. 02) on the *People's Constitutional Right to Information* was considered in the evaluation of the motion. The Commission determined that Section 4 of 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 data and information sought to be declared confidential by the Applicant, the Commission rules that the following information with proprietary value be treated confidential:

	<b>Markings</b>	<b>Documents</b>
1	Annex "A" of the <i>Compliance</i> dated 29 November 2019	A detailed breakdown of the bill of quantities* in relation to the project cost estimates presented during the expository presentation
2	Annex "D" of the <i>Compliance</i> dated 29 November 2019	Facilities Study Review Report issued by NGCP

\* *The total cost, however, is not confidential.*

---

<sup>11</sup> *Ibid.*, citing *Id.*;

<sup>12</sup> G.R. No. 98458, 17 July 1996;

<sup>13</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; and

The confidential treatment of the information as stated in the table above shall be until the end or termination of the Connection Agreement<sup>14</sup> between SMCGP Storage and the National Grid Corporation of the Philippines (NGCP) because the information contains valuable and sensitive commercial and financial matters regarding the business operations of SMCGP Storage, thus, constitute trade secrets. The information relates to a new and innovative type of technology developed by SMCGP Storage and the disclosure thereof to its competitors would enable the latter to gain undue commercial and financial advantage over SMCGP Storage.

On the other hand, the Commission rules that Annex “F” (Write-up indicating the proof of necessity of the Kabankalan BESS as Ancillary Service Provider) cannot be declared confidential because it does not have any valuable proprietary interest that warrants protection.

Relative to the foregoing, the Commission’s personnel who have custody of the documents declared confidential are 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 their 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 documents containing the confidential information/data, separate and apart from the records of the case for the duration of the non-disclosure period; and
4. The Commission’s personnel in charge of the case shall execute an Affidavit of Non-Disclosure containing the foregoing undertaking.

---

<sup>14</sup> Paragraph 4 of the unsigned Connection Agreement; The Connection Agreement shall be for a period of ten (10) years and shall take effect on the 26<sup>th</sup> day of February 2020 until the 25<sup>th</sup> day of February 2030.

**WHEREFORE**, the foregoing premises considered, the Commission hereby **PARTIALLY GRANTS** the motion for confidential treatment of information of SMCGP Philippines Energy Storage Co. Ltd. (SMCGP Storage).

**ACCORDINGLY**, the following data and information are hereby **GRANTED** confidential treatment until the end or termination of the Connection Agreement between SMCGP and the National Grid Corporation of the Philippines (NGCP):

	<b>Markings</b>	<b>Documents</b>
1	Annex "A" of the <i>Compliance</i> dated 29 November 2019	A detailed breakdown of the bill of quantities (except the total cost) in relation to the project cost estimates presented during the expository presentation
2	Annex "D" of the <i>Compliance</i> dated 29 November 2019	Facilities Study Review Report issued by NGCP

However, Annex "F" (Write-up indicating the proof of necessity of the Kabankalan BESS as Ancillary Service Provider) is hereby **DENIED** treatment of confidentiality.

*(This space was intentionally left blank.)*

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

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

**SO ORDERED.**

Pasig City, 12 August 2020.

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

  
**ALEXIS M. LUMBATAN**  
*Commissioner*

  
**CATHERINE P. MACEDA**  
*Commissioner*

  
**FLORESINDA G. BALDO-DIGAL**  
*Commissioner*

  
**MARKO ROMEO L. FUENTES**  
*Commissioner*

  
LS: IHH/ARG/MCCG

Copy Furnished:

1. SMCGP Philippines Energy Storage Co. Ltd. (SMCGP)  
15F San Miguel Properties Centre  
No. 7 St. Francis Street, Mandaluyong City
2. Puyat Jacinto & Santos  
*Counsel for SMCGP Storage*  
10F 8 Rockwell  
Hidalgo corner Plaza Drive  
Rockwell Center, Makati City
3. Regulatory Operations Service  
17<sup>th</sup> Floor, Pacific Center Building, San Miguel Avenue, Pasig City