

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



**IN THE MATTER OF THE  
APPLICATION FOR  
APPROVAL OF THE POWER  
PURCHASE AND SALE  
AGREEMENT BETWEEN  
ILOILO III ELECTRIC  
COOPERATIVE, INC. AND  
GNPOWER MARIVELES COAL  
PLANT LTD. CO. WITH  
MOTIONS FOR  
CONFIDENTIAL TREATMENT  
OF INFORMATION AND THE  
ISSUANCE OF PROVISIONAL  
AUTHORITY**

**ERC CASE NO. 2019-038 RC**

**ILOILO III ELECTRIC  
COOPERATIVE, INC. (ILECO  
III) AND GNPOWER  
MARIVELES COAL PLANT  
LTD. CO. (GMCP),**

**Promulgated:**  
September 02, 2020

***Applicants.***

**X ----- X**

**ORDER**

Before this Commission for resolution is the motion for confidential treatment of information filed by Iloilo III Electric Cooperative, Inc. (ILECO III) and GNPower Mariveles Coal Plant Ltd. Co. (GMCP) pursuant to Rule 4 of the Commission's Rules of Practice and Procedure (RPP).

On 24 May 2019, ILECO III and GMCP filed an *Application* for the approval of their Power Purchase and Sale Agreement (PPSA).

In the said *Application*, ILECO III and GMCP 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 “H”	Certification on Partnership Agreement
2	Annex “M-22”	Final Instructions to Bidders dated 09 December 2016
3	Annex “M-24”	Supplemental Bid Bulletin No. 1 dated 24 January 2017
4	Annex “M-26”	Supplemental Bid Bulletin No. 3 dated 10 February 2017
5	Annex “M-28”	Minutes of the PGPSC Opening of Bids dated 16 February 2017
6	Annex “M-29”	PGPSC TWG Letter dated 28 July 2017 regarding the results of the evaluation
7	Annex “M-30”	PGPSC BAC Resolution No. 13 Series of 2017 dated 05 September 2017
8	Annex “M-33”	Notice of Award dated 26 October 2017
9	Annex “S”	GMCP’s Financial Model as of October 2018 contained in a compact disk
10	Annex “S-1”	Notes on the Financial Model as of October 2018 and its Assumptions
11	Annex “S-2”	Write-up on the Finance-Related Pre-Filing Requirements of the ERC
12	Annex “T”	Certification on Financing Arrangements dated 10 December 2018 issued by GMCP and BDO Unibank, Inc. – Trust and Investment Group

Applicants alleged that Annexes “M-22”, “M-24”, “M-26”, “M-28”, “M-29”, “M-30”, and “M-33” show the individual offers of the bidders which participated in the Joint Competitive Power Supply Procurement (JCPSP). They further alleged that the Panay electric cooperatives (ECs), which include ILECO III, are bound by their undertaking that the offers and the proposed terms of supply are secure and are kept in confidence in order not to prejudice or pre-empt any future CSPs in which these bidders will participate. Otherwise, ILECO III, and the rest of the Panay ECs, may be held liable for damages for breach of confidentiality, and eventually, risk their good relations with the suppliers concerned.<sup>1</sup>

The Applicants likewise alleged that Annexes “H”, “S”, “S-1”, “S-2” and “T” contain documents that are exclusively owned by GMCP and are considered part of its business and trade secrets. As such, GMCP

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<sup>1</sup> Allegation No. 25 of the *Application*;

has the sole proprietary interest and will be unduly prejudiced should they be disclosed to the public.<sup>2</sup>

Furthermore, Applicants alleged that these annexes contain numbers, data, formula, methodology, and calculations involving valuable and sensitive commercial, financial and technological information reflecting GMCP's business operations and financial trade secrets, thus should be protected from public dissemination. Otherwise, such information can be illegally and unfairly utilized by business competitors who may use the same for their own private gain and to the irreparable prejudice of GMCP. In addition, negotiations with prospective customers may also be affected.<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.
- (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.

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<sup>2</sup> Allegation No. 26 of the *Application*;

<sup>3</sup> Allegation No. 27 of the *Application*;

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 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 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

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

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

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;
- (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>

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<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.;

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

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 Applicants, the Commission rules that the following information with proprietary value be treated confidential:

	<b>Markings</b>	<b>Documents</b>
1	Annex "S"	GMCP's Financial Model as of October 2018 contained in a compact disk
2	Annex "T"	Certification on Financing Arrangements dated 10 December 2018 issued by GMCP and BDO Unibank, Inc. – Trust and Investment Group

The confidential treatment of information as stated in the above table is recommended until the end or termination of the term of the PPSA<sup>14</sup> because the information contains valuable and sensitive commercial and financial matters regarding the business operations of GMCP, thus, constitute trade secrets. The information directly bears on the prices of GMCP and the disclosure thereof to its competitors would enable the latter to gain undue commercial advantage over GMCP.

On the other hand, the following data and information do not have any valuable proprietary interest to warrant them confidential treatment:

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<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

<sup>14</sup> Allegation No. 15 A of the *Application*; The PPSA shall be effective on the date of its execution and shall terminate after two hundred sixteen (216) billing periods from the date specified in the Commencement Date Notice pursuant to Section 1.3, Schedule 1 of the PPSA.

	<b>Markings</b>	<b>Documents</b>
1	Annex "H"	Certification on Partnership Agreement
2	Annex "M-22"	Final Instructions to Bidders dated 09 December 2016
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7	Annex "M-30"	PGPSC BAC Resolution No. 13 Series of 2017 dated 05 September 2017
8	Annex "M-33"	Notice of Award dated 26 October 2017
9	Annex "S-1"	Notes on the Financial Model as of October 2018 and its Assumptions
10	Annex "S-2"	Write-up on the Finance-Related Pre-Filing Requirements of the ERC

Relative to the foregoing, the Commission's personnel who have custody of the documents declared confidential are to be 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.

**WHEREFORE**, the foregoing premises considered, the Commission hereby **PARTIALLY GRANTS** the motion for confidential treatment of information of Iloilo III Electric Cooperative, Inc. (ILECO III) and GNPowder Mariveles Coal Plant Ltd. Co. (GMCP).

**ACCORDINGLY**, the following data and information are hereby **GRANTED** confidential treatment until the end or termination of the term of the Power Purchase and Sale Agreement (PPSA):

	<b>Markings</b>	<b>Documents</b>
1	Annex “S”	GMCP’s Financial Model as of October 2018 contained in a compact disk
2	Annex “T”	Certification on Financing Arrangements dated 10 December 2018 issued by GMCP and BDO Unibank, Inc. – Trust and Investment Group

However, the following data and information are hereby **DENIED** treatment of confidentiality:

	<b>Markings</b>	<b>Documents</b>
1	Annex “H”	Certification on Partnership Agreement
2	Annex “M-22”	Final Instructions to Bidders dated 09 December 2016
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	<b>Markings</b>	<b>Documents</b>
10	Annex "S-2"	Write-up on the Finance-Related Pre-Filing Requirements of the ERC

**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, 04 August 2020.

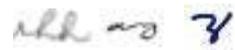
  
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*Commissioner*

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

  
LS: IHH/ARG/MCCG

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