

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
BETWEEN DAVAO LIGHT
AND POWER COMPANY,
INC. (DLPC) AND THERMA
MARINE, INC., (TMI) WITH
MOTION FOR
PROVISIONAL AUTHORITY
AND MOTION FOR
CONFIDENTIAL
TREATMENT OF
INFORMATION**

ERC CASE NO. 2018-121 RC

**DAVAO LIGHT AND POWER
COMPANY, INC., (DLPC), AND
THERMA MARINE, INC., (TMI),
*Applicants.***

Promulgated:
MAR 21 2019

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NOTICE OF PUBLIC HEARING

TO ALL INTERESTED PARTIES:

Notice is hereby given that on 27 December 2018, Davao Light and Power Company, Inc., (DLPC) and Therma Marine, Inc. (TMI) filed a Joint Application dated 12 December 2018, seeking the Commission's approval of Power Supply Agreement with prayer for provisional authority and motion for confidential treatment of information.

DLPC and TMI alleged the following in their *Joint Application*, the pertinent portions of which are hereunder quoted as follows:

THE APPLICANT

1. DLPC is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with office address at C. Bangoy Sr. St., Davao City. It is a grantee of a legislative franchise under Republic Act No.

It is a grantee of a legislative franchise under Republic Act No. 8960 to construct, operate and maintain an electric light, heat and power system in Davao City and Panabo City, and the Municipalities of Carmen, Sto. Tomas and Braulio Dujali, Province of Davao del Norte (the "Franchise Area").

2. TMI is a generation company duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal office address at Mobile 2 Lawis, Sta. Ana, Nasipit, Agusan del Norte 8602. TMI is the owner of the 100 MW power barge located in Barangay San Roque, Maco, Compostela Valley ("M1"), and the 100 MW power barge located in Barangay Sta. Ana, Nasipit, Agusan Del Norte ("M2"), (collectively referred to as the "Power Plant").

Statement of Facts

3. Among the declared State Policies of Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 ("EPIRA") as enumerated in Section 2 thereof, is ensuring the quality, reliability, security and affordability of the supply of electric power. DLPC shares in the realization of this State Policy.
4. In order to ensure the quality, reliability, security and affordability of the supply of electricity, DLPC must consider the economic activities in its franchise area that may require higher supply requirements from its customers.
 - 5.1 DLPC's annual demand growth for the past five years was at 5.86%.
 - 5.2 In 2016, the Gross Regional Domestic Product for Region XI (Davao Region) increased by 9.5%, which was further increased to 10.9% in 2017.¹
 - 5.3 The foregoing shows the robust economic growth in Davao Region, with Davao City being a critical area for these economic activities.
5. In the Power Supply Procurement Plan ("PSPP") submitted to the Department of Energy, DLPC computed that it will have a supply deficit in 2019 by about 106 MW, given the lower allocation from PSALM and expiration of DLPC's PSAs with two (2) peaking plants in 2018. Demand growth for the next three (3) years is expected at 6.3%. To address this supply deficit, and to procure a new supplier for 50MW of its peaking requirements, DLPC resolved to undergo Competitive Selection Process ("CSP").
6. In compliance with the Department of Energy's Department Circular No. DC2018-02-0003 adopting and prescribing the *Policy for the Competitive Selection Process in the Procurement*

¹ Growth Rate of the Gross Regional Domestic Product at constant 2000 prices. Available at: <https://psa.gov.ph/regional-accounts/grdp/data-and-charts> (Last Accessed: 20 November 2018)

by the Distribution Utilities of Power Supply Agreement for the Captive Market ("CSP Circular"), DLPC constituted a Third Party Bids and Awards Committee ("TPBAC"). The TPBAC decided on the Terms of Reference of the CSP.

7. The first round of competitive bidding failed due to non-compliance of the five generating companies, which submitted their intent to bid, to the pre-qualification requirements set by the TPBAC.
8. In the second round of bidding, only Southern Philippines Power Corporation ("SPPC") and TMI submitted bid proposals. SPPC's proposal did not meet some of the technical requirements set under the TOR, leaving TMI as the only qualified bidder. Thus, in accordance with the CSP Circular, and ERC Resolution No. 13, series of 2015, which was further explained in ERC Resolution No. 1, series of 2016, (collectively the "ERC CSP Resolutions") the TPBAC declared the second round of bidding as failed since there was only one qualified bidder.
9. Due to the failure of two rounds of competitive bidding, DLPC's Board of Directors resolved to undergo direct negotiation as allowed under the CSP Circular and the ERC CSP Resolutions. This resulted in the Power Supply Agreement subject of this *Joint Application*.
10. Section 45 (b) of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001, provides that distribution utilities may enter into bilateral power supply contracts subject to review by the Honorable Commission. In connection with this, ERC Resolution No. 2, Series of 2015 provides that the distribution utilities and generation companies jointly file with the Honorable Commission their respective power supply agreements.
11. Thus, this instant *Joint Application* for the approval of the Power Supply Agreement (PSA) between TMI and DLPC subject of this *Joint Application*.

Salient Terms of the PSA

12. **Contract Period.** The PSA shall take effect immediately on the date of its execution, and shall remain in force and effect for three (3) years after the Commencement Date but in no case beyond December 25, 2021, unless otherwise extended or earlier terminated in accordance with the provisions of the PSA.
13. **Contract Capacity.** The Contract Capacity refers to the capacity that TMI shall make available to DLPC per Interval. TMI shall make Contract Capacity of 50,000 kW available and deliver Associated Energy to DLPC from the Commencement Date until the end of the Contract Period, at the Delivery Point, and at the Contract Price specified.

14. **Temporary Delivery of Additional Energy.** DLPC may request for temporary delivery of Additional Energy in respect of a particular Billing Period by delivery of written notice thereof at least thirty (30) Days before the date on which such adjustment is proposed to take effect, which shall be without prejudice to the right of TMI to waive the thirty (30) Day notice period, setting out the reasons therefor and providing all documents necessary to support the request. Any such request shall be subject to approval by TMI in its sole discretion (which approval shall not be unreasonably withheld), which Additional Energy shall be paid for by DLPC at the Additional Energy Charge specified in Schedule 7.1 (*Rates Schedule*).
15. **Replacement Power.** If, at any time after the occurrence of the Commencement Date, TMI fails to make Contract Capacity and Associated Energy available or, if DLPC requires, to Deliver Replacement Power to DLPC, DLPC shall be entitled to directly procure its own Replacement Power and TMI shall be liable to pay DLPC an amount equal to the difference between: (i) the cost of such Replacement Power (including applicable VAT and incremental costs arising from procuring the Replacement Power from another source), and (ii) the amount the DLPC would have paid for the Replacement Power had it been paid at the Contract Price (the "Differential"). For the avoidance of doubt, if the Differential is a negative number, DLPC shall have no liability whatsoever to TMI.
16. **Outages.** TMI shall be allowed Scheduled Outages not to exceed five (5) Days or one hundred twenty (120) hours each Contract Year during the Contract Period, during which times reduced or no supply of Contract Capacity will be available to DLPC. TMI shall likewise be allowed Forced Outages not to exceed five (5) days or one hundred twenty (120) hours each Contract Year during the Contract Period, during which times reduced or no supply of Contract Capacity will be available to DLPC.
17. **Billing and Payment of Fees.** TMI shall deliver to DLPC an itemized Billing Statement setting out the Contract Price due on account of the Contract Capacity made available and the Associated Energy (or Replacement Power, as the case may be) Delivered during each Billing Period on or before the fifth (5th) Day of the Payment Month.
18. **Penalties.** If DLPC fails to pay the Contract Price or any other amounts payable by it under the PSA in full on the due date, it shall pay a penalty of two percent (2%) per month (a fraction of a month to be considered one (1) month) based on the amount due, from the date when such payment is due until the date such amount is received in full by TMI.
19. **Taxes, Fees and Costs.** DLPC shall be liable for payment of the Universal Charge upon the imposition thereof, it being understood that the imposition of the Universal Charge pursuant to the provisions of the EPIRA shall not be an event of

Force Majeure. Each Party shall be liable for its respective income taxes. Save as otherwise provided in the PSA, each Party shall be liable for such costs and expenses that each may incur on account of the performance of its obligations under the PSA.

20. **Contract Price.** Contract Price refers to the price to be paid by DLPC to TMI for the purchase of Contract Capacity and Associated Energy during a Billing Period as specified in **Schedule 7.1 (Rates Schedule)**, which is reproduced below. For purposes of the Contract Price tariff structure, “the Supplier” shall refer to TMI.

Schedule 7.1 – Rates Schedule

Tariff Formula

Contract Price = Fixed Charges + Variable Charges + Other Charges

Fixed Charges = $[CRF + (\text{Fixed Fee} * IF_f)] * CC$

Variable Charges = $[(EF * IF_v) + FLR] * ED_m$

Other Charges = all existing and future taxes, fees and imposts (and any increase or adjustments thereon), other charges that may be imposed on the procurement and purchase of oil, and other charges imposed on the Power Plant, including the charges indicated in Schedule 3 item 4 of the Agreement, in Philippine Pesos, as applicable.

Where:

CRF = Capital Recovery Fee of PhP110/kW/month

Fixed Fee = Fixed O&M fee of PhP314/kW/month

CC = Contract Capacity of 50,000 kW

EF = Energy Fee PhP0.15245/kWh

IF_f = Inflation factor for fixed O&M fee
 $= 0.21731 + 0.78269 \times (PCPI_m/PCPI_b)$

IF_v = Inflation factor for Energy Fee
 $= 0.06897 + 0.10982 \times (PCPI_m/PCPI_b) +$
 $0.13370 \times (PUX_m/PUX_b) \times (UCPI_m/UCPI_b) +$
 $0.22917 \times (PEX_m/PEX_b) \times (ECPI_m/ECPI_b) +$
 $0.45834 \times (PYX_m/PYX_b) \times (JCPI_m/JCPI_b)$

Where:

PCPI_m = Philippine CPI of the current billing month

PCPI_b = Philippine CPI of 97.20 as of June 2011 [2012=100]

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UCPI _m	=	US CPI of the current billing month
UCPI _b	=	US CPI of 225.722 as of June 2011
ECPI _m	=	EURO CPI of the current billing month
ECPI _b	=	EURO CPI of 96.050 as of June 2011 [2015=100]
JCPI _m	=	Japan CPI of the current billing month
JCPI _b	=	Japan CPI of 96.4 as of June 2011 [2015=100]
PUX _m	=	Peso to US Dollar exchange rate at the end of the current billing month
PUX _b	=	Peso to US Dollar exchange rate of 44.8210 PHP/USD as of 17 May 2010
PEX _m	=	Peso to EURO exchange rate at the end of the current billing month
PEX _b	=	Peso to EURO exchange rate of 55.4032 PHP/EUR as of 17 May 2010
PYX _m	=	Peso to Yen exchange rate at the end of the current billing month
PYX _b	=	Peso to Yen exchange rate of 0.4851 PHP/JPY as of 17 May 2010

Notes:

- a. If the CPI of current billing month is not published and available within two days from the end of the Billing Period, the most recent available published index shall be used.
- b. If the source of any the foregoing indices is no longer available or is not been published or available for a prolonged period, the replacement index shall be selected by Supplier.
- c. If any of the foregoing indices are re-based during the duration of this Agreement, Supplier has the option to apply a corresponding adjustment to the inflation formula to conform with the re-basing of the subject indices.

FLR = Fuel oil rate and other fuel related cost in Php/kWh
= HFR + related actual fuel cost

HFR = Heavy fuel oil rate in Php/kWh
= HFCR x P_{HFO}

HFCR = Heavy fuel oil consumption rate of 0.23580 liters/kWh

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P_{HFO} = the monthly actual cost per liter of heavy fuel oil (HFO), calculated based on “first in, first out” procedure using the data of actual monthly invoices of deliveries, inventories and consumption.

ED_m = the sum of the hourly volumes of Contract Energy delivered (not exceeding the energy quantities associated with the Contract Capacity) for the Billing Period primarily with calendar month m (for example December 26-January 25 is associated with January), (and adjusted for transmission losses, if any, imputed by the transmission service provider if measured at a meter other than the Generator Metering Point), in kWh

$$\text{Additional Energy Charge} = \left[\frac{CRF + (FOM * IF_f)}{BPH} + (EF * IF_v) + FLR \right] * AED_m$$

Where:

CRF = as defined above

FOM = as defined above

IF_f = as defined above

BPH = number of hours for the Billing Period when Additional Energy is delivered

EF = as defined above

IF_v = as defined above

FLR = as defined above

AED_m = the sum of the hourly volumes of Additional Energy delivered for the Billing Period primarily with calendar month m (for example December 26-January 25 is associated with January), (and adjusted for transmission losses, if any, imputed by the transmission service provider if measured at a meter other than the Generator Metering Point), in kWh

21. **Estimated Rate Impact.** The indicative rate impact on DLPC’s overall generation rate with and without supply from TMI under the PSA are as follows:

Estimated Generation Charge* (April 2019, PhP/kWh)		
Without TMI PSA	With TMI PSA	Impact
4.8909	5.1240	0.2331

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*Assumptions:

- (1) TMI will replace reduction in PSALM allocation
 - (2) TMI to run at 21% load factor
22. Copies of the foregoing documents and/or information are attached to this Joint Application as annexes hereof:

Annex	Documents/Information
A	DLPC's Articles of Incorporation (AOI)
B	DLPC's By-Laws
C	DLPC's General Information Sheet (GIS)
D	DLPC's Ownership Structure Map
E & series	TMI's AOI
	TMI's Certificate of Incorporation
F	TMI's By-Laws
G	TMI's GIS
H	TMI's Ownership Structure Map
I & series	TMI's Certificates of Registration with the BOI
J	Environmental Compliance Certificate issued by the DENR
K & series	Certificates of Compliance issued by the ERC
L	Demand Side Management (DSM) Programs of DLPC
M	PSALM Certification
N	DLPC's Supply and Demand Scenario and Average Daily Load Curves
O	DLPC's Power Supply Procurement Plan
P & series	Invitations to Submit Proposal
	Terms of Reference
	Letter proposals from bidders
	TPBAC Evaluation Reports
	DLPC's Board Resolution
	Matrix of Competitive Selection Process
	Certification (Conduct of Competitive Selection Process)
Q	Power Supply Agreement between TMI and DLPC
R & series	TMI's Transmission Service Agreement and Metering Service Agreement
S	DLPC's Transmission Service Agreement with NGCP
T	Executive Summary of the PSA
U	TMI's Sources of Funds/Financial Plans (Confidential)
V	TMI's Pricing Model (Confidential)
W	Estimated Rate Impact of Supply from TMI
X	TMI's Sample Bill reflecting power rates and other charges
Y & series	Fuel and Lube Procurement Process (Confidential)
	Fuel Supply Agreement (Confidential)
Z	TMI's latest Audited Financial Statements (AFS), Balance Sheet, Income Statement, and Statement of Cash Flows
AA	TMI's Plant Performance Test Report (Confidential)
BB	Write-up on Other Documentary Requirements
CC	Judicial Affidavit of Annie C. Magno

**MOTIONS FOR PROVISIONAL AUTHORITY
AND CONFIDENTIAL TREATMENT OF INFORMATION**

Allegations in Support of the Motion for Provisional Authority

23. In view of the lower allocation from PSALM and expiration of DLPC's PSAs with two (2) peaking plants in 2018, DLPC moves for the grant of a provisional authority to draw power under the instant PSA. As shown in its PSPP, DLPC anticipates a supply deficit of 106 MW for 2019. Thus, to ensure the continuous, reliable, efficient and affordable power supply to the customers in its Franchise Area, DLPC needs a firm contract to meet its peak load demand.
24. Attached as **Annex "CC"** hereof is the Judicial Affidavit of Annie C. Magno in support of the motion for provisional approval.

**Allegations in Support of the Motion for Confidential
Treatment of Information**

25. Section 1, Rule 4, of the ERC Rules of Practice and Procedure provides that a party to any proceeding before the Commission may request that information about that party in the Commission's possession not be disclosed.
26. In line with this, TMI prays for the confidential treatment of the information contained in the following annexes, and not disclose the same except to the officers and staff of the Honorable Commission:

Annex	Documents and/or Information
U	TMI's Sources of Funds/Financial Plans
V	TMI's Pricing Model
Y	Fuel and Lube Procurement Process
Y-1	Fuel Supply Agreement
AA	TMI's Plant Performance Test Report

27. The foregoing documents contain information and data involving TMI's operation, financial trade secrets, formula and pricing structures used in arriving at TMI's tariff. These information are not generally available to the public. As such, the information and data contained in these documents are privileged and confidential in nature. In the case of the *Air*

Philippines Corporation v. Pennswell, Inc.,² the Supreme Court explained that:

“[T]rade 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. 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. **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.** 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. 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.’” (Footnotes omitted, emphasis supplied.)

28. The foregoing documents constitute a compilation of information on the operations of TMI’s plant that have actual and valuable proprietary interest, which TMI must protect against competitors. If the information contained in the foregoing documents are disclosed to the public, especially TMI’s competitors, the data can be used by a competitor as an input or variable in the determination of the competitor’s tariff. Thus, a competitor knowing this information will gain a competitive leverage against TMI. As explained by this Honorable Commission’s Decision in the ERC Case No. 2015-111 RC:

“In the case of PNOC RC, the documents sought to be protected from disclosure contains formula and pricing structures used in arriving at their proposed tariff. The prices cited in the documents were components of the resulting proposed tariff. In fact, all three (3) documents were used by the Commission in evaluating the reasonableness of the proposed rate. **In electric power industry where prices is a major consideration in selecting one’s supplier, it is apparent that the assumption used in arriving at one’s proposed tariff is considered a competitive leverage by one player against its competitors.**

² 564 Phil. 774 (2007), G.R. No. 172835.

Thus, the Commission resolved to treat the said documents confidential and may not be publicly disclosed.”³ (Emphasis supplied.)

29. In view of the foregoing and pursuant to Rule 4 of the ERC Rules of Practice and Procedure, TMI respectfully requests that the foregoing documents attached as **Annexes “U”, “V”, “Y”, “Y-1” and “AA”**, and the information contained therein as confidential and privileged, and not be disclosed to persons other than the necessary officers and staff of this Honorable Commission.
30. TMI hereby submits one (1) copy each of **Annexes “U”, “V”, “Y”, “Y-1” and “AA”** in a sealed envelope with the envelope and each page of the document stamped with the word “Confidential.”

P R A Y E R

31. **WHEREFORE**, premises considered, Applicants respectfully pray that the Honorable Commission:
 - a. **ISSUE** an Order treating **Annexes “U”, “V”, “Y”, “Y-1” and “AA”**, and the information contained therein as confidential, directing their non-disclosure to persons other than officers and staff of the Honorable Commission, as necessary, pursuant to Rule 4 of the ERC Rules, and prescribing guidelines for the protections thereof;
 - b. Pending trial on the merits **PROVISIONALLY APPROVE**, the PSA, including all the rates, fees and charges set out therein; and
 - c. After trial on the merits, **APPROVE with FINALITY** the PSA, including all the rates, fees and charges set out therein.

Other relief just and equitable are likewise prayed for.

The Commission has set the *Joint Application* for determination of compliance with the jurisdictional requirements, expository presentation, pre-trial conference, and presentation of evidence on **25 April 2019 (Thursday) at ten o’clock in the morning (10:00 A.M.) at DLPC’s Principal’s Office at C. Bangoy Sr. St., Davao City.**

³ *In the Matter of the Application for the Approval of the Power Supply Agreement Between Nueva Ecija II Electric Cooperative, Inc. – Area 2 (NEECO II – Area 2) and PNOC Renewables Corporation (PNOC RC) with Prayer for Provisional Authority, ERC Case No. 2015-111 RC, Decision dated 30 May 2017, p. 26.*

All persons who have an interest in the subject matter of the instant case may become a party by filing with the Commission a verified Petition to Intervene at least five (5) days prior to the initial hearing and subject to the requirements under Rule 9 of the 2006 ERC Rules of Practice and Procedure, indicating therein the docket number and title of the case and stating the following:

- 1) The petitioner's name and address;
- 2) The nature of petitioner's interest in the subject matter of the proceeding and the way and manner in which such interest is affected by the issues involved in the proceeding; and
- 3) A statement of the relief desired.

All other persons who may want their views known to the Commission with respect to the subject matter of the case may file their opposition or comment thereon at any stage of the proceeding before Applicant rests its case, subject to the requirements under Rule 9 of the 2006 ERC Rules of Practice and Procedure. No particular form of opposition or comment is required, but the document, letter, or writing should contain the following:

- 1) The name and address of such person;
- 2) A concise statement of the opposition or comment; and
- 3) The grounds relied upon.

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All such persons who wish to have a copy of the *Joint Application* may request from DLPC and TMI that they be furnished with the same, prior to the date of the initial hearing. Applicants are hereby directed to furnish all those making such request with copies of the *Joint Application* and its attachments, subject to the reimbursement of reasonable photocopying costs. Any such person may likewise examine the *Joint Application* and other pertinent records filed with the Commission during the standard office hours.

WITNESS, the Honorable Chairperson and CEO **AGNES VST DEVANADERA**, and the Honorable Commissioners **ALEXIS M. LUMBATAN**, **CATHERINE P. MACEDA**, and **PAUL CHRISTIAN M. CERVANTES**, Energy Regulatory Commission, this 05th day of March 2019 in Pasig City.

FOR AND BY AUTHORITY
OF THE COMMISSION:


JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Oversight Commissioner for Legal Service


LS: [Signature] / MCC / [Signature] / GLO