

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



**IN THE MATTER OF THE
APPLICATION FOR THE
APPROVAL OF THE POWER
SUPPLY AGREEMENT (PSA)
BETWEEN CLARK ELECTRIC
DISTRIBUTION
CORPORATION (CEDC) AND
STRATEGIC POWER DEVT.
CORP. (SPDC) WITH PRAYER
FOR CONFIDENTIAL
TREATMENT OF
INFORMATION,**

ERC CASE NO. 2017-045 RC

**CLARK ELECTRIC
DISTRIBUTION
CORPORATION (CEDC) AND
STRATEGIC POWER DEVT.
CORP. (SPDC),**

Applicants.

X-----X

D O C K E T E D
Date: SEP 18 2017
By: W

NOTICE OF PUBLIC HEARING

TO ALL INTERESTED PARTIES:

Notice is hereby given that on 19 May 2017, the applicants Clark Electric Distribution Corporation (CEDC) and Strategic Power Devt. Corp. (SPDC) filed a *Joint Application* dated 31 March 2017 for the approval of their Power Supply Agreement (PSA), with prayer for confidential treatment of information.

Applicants CEDC and SPDC alleged the following in their *Joint Application*:

Joint Applicants **CLARK ELECTRIC DISTRIBUTION CORPORATION** ("CEDC") and **STRATEGIC POWER DEVT. CORP.** ("SPDC"), through their respective undersigned counsel, respectfully state that:

ERC CASE NO. 2017-045 RC
NOTICE OF PUBLIC HEARING/ 13 September 2017
PAGE 2 OF 13

1. CEDC is a private corporation duly organized and existing under the laws of the Republic of the Philippines, with its office address at Bldg. N2830, Bayanihan Street, Clark Freeport Zone, Pampanga, Philippines. It may be served with notices and other processes of this Honorable Commission through its counsel at the address indicated herein;
2. CEDC is a registered private distribution utility granted by Clark Development Corporation a franchise to own, operate and maintain a power distribution system and to distribute power exclusively within the Clark Special Economic Zone;
3. SPDC is a corporation duly organized and existing under the laws of the Republic of the Philippines, with its office address at 2/F, 808 Bldg, Meralco Ave. cor. Gen. Lim St., San Antonio Village, Pasig City. It may be served with notices and other processes of this Honorable Commission through its counsel at the address indicated herein;
4. SPDC is the Independent Power Producer Administrator (“**IPPA**”) of the 345 MW San Roque Hydroelectric Power Plant in Barangay San Roque, San Miguel, Pangasinan (the “**Plant**”) by virtue of an IPP Administration Agreement it executed with the Power Sector Assets and Liabilities Management Corporation (“**PSALM**”);
5. There is a need for CEDC to diversify its source of capacity through bilateral supply agreements with generation companies having hydroelectric power plants to satisfy the requirements of its environmentally conscious customers within its franchise area and also to mitigate its exposure to the volatile prices of the Wholesale Electricity Spot Market (“**WESM**”) during the outages, whether forced or scheduled, of its current lone power supplier, San Miguel Energy Corporation;
6. Under Section 45(b) of Republic Act No. 9136, otherwise known as the “Electric Power Industry Reform Act of 2001” (“**EPIRA**”), it is provided that “*Distribution utilities may enter into bilateral power supply contracts, subject to review by the ERC xxx*”;
7. Thus, in accordance with ERC Resolution No. 13, Series of 2015, CEDC conducted a competitive selection process, the details of which are shown below:
 - 7.1 On January 6, 2017, CEDC published an Invitation for Price Challenge in Manila Times with a deadline on January 23, 2017 at five in the afternoon (5PM);
 - 7.2 On January 24, 2017, CEDC published a second Invitation for Price Challenge in Manila Times with a deadline on February 8, 2017 at five in the afternoon (5PM);

ERC CASE NO. 2017-045 RC
NOTICE OF PUBLIC HEARING/ 13 September 2017
PAGE 3 OF 13

7.3 That on the above-mentioned publications for Invitation for Price Challenge, no party signified its intention to challenge the offer of SPDC.

8. Thereafter, on February 21, 2017, CEDC executed a Power Supply Agreement (“PSA”) with SPDC for the supply of Contract Electric Energy, as follows:

CAPACITY	DAYS	TRADING INTERVAL	TIME
20 MW per hour (firm)	Mondays to Saturdays, excluding national holidays	10h to 21h	0901h to 2100h
5 MW per hour (non-firm)	Mondays to Saturdays	01h to 24h	0001h to 2400h

9. The PSA between CEDC and SPDC, a copy of which is attached as **ANNEX “A”** and made an integral part hereof, contains the following salient features:

“Article 1 Term and Effectivity

1.1 Term of Agreement

1.1.1 This Agreement shall become effective upon approval, whether provisional (“**Provisional Approval**”) or final (“**Final Approval**”), of the Energy Regulatory Commission (“**ERC**”) (“**Commencement Date**”) and shall expire on December 25, 2019, unless terminated earlier in accordance with Article 9 (Termination) or Section 1.2.2 of this Agreement, or extended by the Parties (“**Term**”).

1.2 ERC Approval

1.2.1 The Parties shall file a joint application with the ERC for the approval of this Agreement, including the Generation Charge defined in Section 4.1 and as detailed in **Appendix “A”** (“**ERC Application**”).

1.2.2 If in connection with the ERC Application, the ERC requires any portion of the Generation Charge to be adjusted, the Parties may agree to renegotiate the terms of this Agreement. If upon renegotiation, the Parties fail to arrive at mutually acceptable terms and conditions of the Agreement within a period of fifteen (15) days, the Power Supplier may, at its option, terminate this Agreement immediately.

Article 2 Sale and Purchase of Contract Energy

2.1 Supply of Power

Subject to the terms and conditions of this Agreement:

2.1.1 Immediately upon the Commencement Date, Power Supplier shall make available, sell and deliver to CEDC, and CEDC shall purchase from Power Supplier the Contract Electric Energy from the Plant and/or other sources at the Generation Charge defined in Section 4.1.

2.1.2 In the event of Power Supplier's failure to deliver the firm Contract Electric Energy due to a circumstance not falling under Article 6 (Force Majeure), CEDC shall source the Contract Electric Energy from the WESM. Power Supplier shall reimburse CEDC for the difference in price in excess of the Generation Charge.

2.1.3 Power Supplier shall not be entitled to any planned/scheduled or forced outage allowances.

Article 4 Billing and Payment

4.1 Generation Charge

The Generation Charge is detailed in Appendix A, and is exclusive of VAT, line rentals, replacement power and other charges applicable to CEDC.

4.2 Billing

4.2.1 The billing period shall commence on the twenty-sixth (26th) day of the current month and shall end on the twenty-fifth (25th) day of the succeeding month, taking into consideration the Commencement Date and termination of this Agreement ("Billing Period")

4.2.2 Power Supplier shall render to CEDC an itemized Invoice on the basis of CEDC's day-ahead binding twelve (12)-hour energy nominations for each day of a Billing Period. Each Invoice for a Billing Period shall show the Contract Electric Energy made available by Power Supplier to CEDC during each hour of such Billing Period.

4.3 Payments

4.3.1 Provided that CEDC receives the Final Invoice within the time set forth in Section 4.2.5, each Final Invoice shall be due and payable not later than the twenty fifth (25th) day of the calendar month following the month in which the end of the Billing Period for such Final Invoice relates; provided that if such day is not a business day, then the Final Invoice shall be due and payable on the next succeeding business day ("**Payment Date**"); provided further that CEDC shall not be required to make payment on any Final Invoice that is manifestly in error, apparently invalid or not in the form or substance contemplated by this Agreement.

4.3.2 If CEDC disputes all or any portion of a Final Invoice for a reason other than a manifest error in, or the patent invalidity or incorrect form or substance of, such Final Invoice, CEDC shall, nonetheless, pay the full amount of such Invoice. Any payment by CEDC under this Section is without prejudice to CEDC's right at a later date to dispute, protest or question any amount so paid.

xxx

Article 5 Taxes, Fees and Costs

5.1 Power Supplier shall be responsible for and shall make timely payment of the following amounts:

- (a) WESM costs attributable to Power Supplier;
- (b) WESM line rental charges associated with the bilateral contract quantities arising from this Agreement for the transmission of Contract Electric Energy from the Plant to the delivery point;
- (c) Benefits to Host Communities Charges; and
- (d) VAT on the foregoing amounts, if any.

Power Supplier shall also be liable for the payment of all other existing taxes, fees, charges and costs, including penalties, arising from this Agreement that properly pertain to the business of Power Supplier.

5.2 The following amounts that CEDC is responsible to third parties, in connection with the purchase of Contract Electric Energy, shall form part of the price that CEDC will charge to its customers:

- (a) WESM Costs attributable to CEDC except line rental mentioned in Section 5.1 (b);

- (b) VAT on Contract Electric Energy in accordance with Bureau of Internal Revenue (“**BIR**”) Revenue Memorandum Circular No. 61-2005 and ERC Resolution No. 20-2005, except in respect of any portion thereof that applies to VAT zero-rated and VAT-exempt customers of CEDC; and
- (c) National Grid Corporation of the Philippines (“**NGCP**”) Charges.

Notwithstanding this Section, CEDC shall, at all times, be liable for payment of all other existing taxes, fees, charges and costs, including penalties, arising from this Agreement that properly pertain to the business of CEDC.

xxx

Article 9 Termination

- 9.1 If for any reason, except as provided in Article 6, there is an actual failure on the part of Power Supplier to deliver to CEDC the Contract Energy for a period of ten (10) days, CEDC shall send written notice to Power Supplier stating that such a breach has occurred.
- 9.2 If, within thirty (30) days after receipt from CEDC of such written notice (**the “Curing Period”**), the actual failure on the part of Power Supplier to make available the Contract Capacity and deliver to CEDC the Contract Energy has not been remedied by Power Supplier, CEDC may terminate this Agreement and pursue any remedy available to it under this Agreement, at law or in equity.
- 9.3 CEDC shall, from and after the occurrence of a breach under Section 9.1 and even during the Curing Period, be entitled to source energy from the WESM or other parties and Power Supplier shall be liable to pay CEDC the difference between the amount CEDC actually paid for such energy and the Contract Price. For this purpose, CEDC has the right to immediately draw on the Performance Security for the settlement of any amounts owing to it under this Section 9.3.
- 9.4 Upon the early termination of this Agreement due to: (i) an actual failure on the part of Power Supplier to deliver to CEDC the Contract Energy, or (ii) the failure of CEDC to pay for the Contract Price under the terms and conditions of this Agreement, and without prejudice to any other provisions of this Agreement prior to such early termination, the Party in breach shall pay liquidated damages in an amount equivalent to the present value of the Contract Price for the remaining Term discounted at twelve percent (12%).

xxx”

ERC CASE NO. 2017-045 RC
NOTICE OF PUBLIC HEARING/ 13 September 2017
PAGE 7 OF 13

10. The Contract Price is a straight energy fee of PhP4.30 per kWh, exclusive of Value-Added Tax (“VAT”) and other charges as provided in Article 4.1;
11. Based on simulations, the effective delivered price under the PSA for the period March 26, 2017 – December 25, 2018 is PhP4.70 per kWh, as shown in the table calculation below:

Rate Impact

2017 Generation Rate Impact Without SPDC

	Energy (kWh)	Generation Charge (PhP)	Average Weighted Cost (PhP/kWh)
SMEC	261,420,150	1,350,600,371	5.17
WESM	35,126,442	161,012,765	4.58
SMEC Line Rental		22,011,577	
Total Energy	296,546,592	1,533,624,713	5.17

2018 Generation Rate Impact Without SPDC

	Energy (kWh)	Generation Charge (PhP)	Average Weighted Cost (PhP/kWh)
SMEC	232,121,557	1,350,173,703	5.82
WESM	26,227,456	96,141,828	3.67
SMEC Line Rental		19,544,635	
Total Energy	258,349,014	1,465,860,167	5.67

Percent Share

Sual	88.15%
WESM Peak	8.11%
WESM Off-Peak	3.74%

Percent Share

Sual	91.44%
WESM Peak	5.02%
WESM Off-Peak	3.52%

2017 Generation Rate Impact With SPDC

	Energy (kWh)	Generation Charge (PhP)	Average Weighted Cost (PhP/kWh)
SUAL 30MW	179,743,467	854,534,105	4.75
SPDC 20MW	63,960,000	275,028,000	4.30
SPDC 5MW	4,218,309	18,138,728	4.30
WESM	48,698,683	162,720,744	3.34
SMEC Line Rental		15,134,400	
Total	296,620,459	1,325,555,978	4.47

2018 Generation Rate Impact With SPDC

	Energy (kWh)	Generation Charge (PhP)	Average Weighted Cost (PhP/kWh)
SUAL 30MW	161,678,025	854,680,303	5.29
SPDC 20MW	63,960,000	275,028,000	4.30
SPDC 5MW	2,026,939	8,715,838	4.30
WESM	30,684,050	85,554,186	2.79
SMEC Line Rental		13,613,290	
Total	258,349,014	1,237,591,617	4.79

ERC CASE NO. 2017-045 RC
NOTICE OF PUBLIC HEARING/ 13 September 2017
PAGE 8 OF 13

Percent Share	
SUAL 30MW	56.30%
SPDC 20MW	25.86%
SPDC 5MW	1.42%
WESM Peak	5.11%
WESM Off-Peak	11.31%

Percent Share	
SUAL 30MW	63.86%
SPDC 20MW	24.97%
SPDC 5MW	0.66%
WESM Peak	3.17%
WESM Off-Peak	7.34%

2017 Generation Rate Savings (PhP/kWh)	0.70
---	------

2018 Generation Rate Savings (PhP/kWh)	0.88
---	------

12. As can be gleaned from the foregoing rate impact simulation, the simulated delivered price will result in an overall savings of PhP0.70 per kWh for Mar. 26 2017 – Dec. 25, 2017 and PhP0.88 per kWh for the year 2018;
13. Likewise, in support of this Joint Application, CEDC and SPDC provide this Honorable Commission with the following documents, which underwent the pre-filing conference of this Honorable Commission, to wit:

ANNEX	NAME OF DOCUMENT
"B"	Articles of Incorporation of CEDC
"C"	By-Laws of CEDC
"D"	General Information Sheet of CEDC
"E"	Demand Side Management Plan of CEDC
"F"	Distribution Development Plan of CEDC
"G"	CEDC's Certification of the Conduct of Competitive Selection Process ("CSP")
"H"	Secretary's Certificate of CEDC
"I"	Articles of Incorporation of SPDC
"J"	Securities and Exchange Commission ("SEC") Certificate of Incorporation of the said Articles of Incorporation and By-Laws of SPDC
"K"	General Information Sheet of SPDC
"L"	Write-up on SPDC's Shareholders' Agreement
"M"	Document showing information related to SPDC's Ultimate Parent Company, its Subsidiaries and all its affiliates
"N"	Board of Investment ("BOI") Certificate of Registration with attached Terms and Conditions
"O"	Environmental Compliance Certificate ("ECC") issued by the Department of Environment and Natural Resources ("DENR")
"P"	Certificate of Compliance ("COC") issued by the ERC pursuant to the Guidelines for the Issuance of COC for Generation Companies/Facilities
"Q"	Write-up on SPDC's Certification from Department of Energy ("DOE") regarding Philippine Development Plan ("PDP") or Certificate of Endorsement ("CoE")
"R"	Write-up on SPDC's Renewable Energy Service/Operating Contract from the Department of

ERC CASE NO. 2017-045 RC
NOTICE OF PUBLIC HEARING/ 13 September 2017
PAGE 9 OF 13

	Energy (“DOE”)
“S”	Write-up on SPDC’s Certificate of Registration or Certificate of Confirmation of Commerciality by an RE Developer and after due confirmation by the DOE
“T”	SPDC’s Transmission Service Agreement
“U”	Acknowledgement receipts by the Offices of the Administration of the Clark Freeport Zone and the Sangguniang Panlungsod of Pasig, of Copies of the Joint Application
“V”	Affidavit of Publication and complete issue of the newspaper where the Joint Application was published
“W”	Write-up on SPDC’s IPPA Agreement
“X”	Executive Summary of the PSA
“Y”	Cost-based calculation of SPDC’s True Cost Generation Rate (“TCGR”) including all cost analysis related to the pricing provisions in the contract such as the operating expenses (CONFIDENTIAL)
“Z”	Write-up on SPDC’s Fuel Procurement Process
“AA”	Technical Description of the San Roque Multi-Purpose Hydroelectric Power Plant
“BB”	Latest and Complete Set of Audited Financial Statement of SPDC
“CC”	Secretary’s Certificate of SPDC
“DD”	Rate Impact Analysis of CEDC

15. Furthermore, the Joint Application is consistent and in accordance with the first (1st) and fifth (5th) “Whereas clauses” of the DOE Circular No. 2003-12-11 which are quoted hereunder:

“WHEREAS, Section 2 of Republic Act No. 9136, also known as the Electric Power Industry Reform Act of 2001 or EPIRA, declared as a policy of the State, among others, [to ensure the quality, reliability, security and affordability of the supply of electric power;] (first “whereas clause”, Department of Energy Circular No. 2003-12-11. Underscoring supplied.)

“WHEREAS, pursuant to Section 23 of EPIRA, all distribution utilities, as defined in the law, SHALL HAVE THE OBLIGATION TO SUPPLY ELECTRICITY IN THE LEAST COST MANNER TO ITS CAPTIVE MARKET subject to the collection of retail rate duly approved by the Energy Regulatory Commission;” (fifth “whereas clause”, *ibid.* Underscoring supplied.)

16. The Joint Application is, likewise, consistent with Section 1 of the same Department Circular which declares as State policy, that:

“All distribution utilities must henceforth take cognizance and assume full responsibility to forecast, assure and contract for the supply of electric power in the respective franchise areas to meet their obligations as a distribution utility.” (Underscoring supplied.)

17. By way of emphasis, Resolution No. 21, Series of 2005 of the Honorable Commission dated 19 October 2005 had directed all Distribution Utilities (DUs) “to enter into future bilateral power supply contract with power producers to be subjected to a review by the Commission.” (Underscoring supplied.)
18. The PSC with SPDC was made to ensure the continuous supply of power to CEDC and due to the former’s competitive pricing structure and other favorable terms of its contract, which will redound to the benefit of the latter and its end-consumers in terms of reliable and affordable power supply;

Allegations in Support of the Confidential Treatment of Annex “Y”

19. Section 1, Rule 4 of the Honorable Commission’s Rules of Practice and Procedure provides that a “party to any proceeding before the Commission may request that information may not be disclosed”;
20. Pursuant thereto, SPDC prays for the confidential treatment of the information contained in Annex “Y”² of the Application, and not disclosed except to the Honorable Commission, its officers, and staff:
21. **Annex “Y”** contains the details of SPDC’s power rate calculations and financial model as well as the manner by which these were derived. This information is proprietary in nature and should be protected as trade secrets contemplated by law and jurisprudence. In the case of *Air Philippines Corporation vs. Pennswell, Inc.*¹, the Supreme Court defined a trade secret, as follows:

“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

¹ G.R. No. 172835, December 13, 2007

² Cost-based Calculation of SPDC’s True Cost Generation Rate (“TCGR”) including all cost analysis related to the pricing provisions in the contract such as the operating expenses

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". American jurisprudence has utilized the following factors 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."(*citations omitted, emphasis supplied*)
22. The interest of the consuming public is sufficiently protected by the review and evaluation of the rates under the PSC by the Honorable Commission, without the need to disclose the contents of **Annex "Y"**. The reasonableness and transparency of the prices of electricity is to be assured by the Honorable Commission through its own review and verification of SPDC's operating costs and expenses;
23. More importantly, SPDC's competitors, should they obtain the information in **Annex "Y"**, will gain undue advantage thereon and have the opportunity to use the same in their operations. The negotiating power of SPDC with parties it plans to contract with or who it is currently doing business with, will clearly be thwarted if it is compelled to disclose such information;
24. Accordingly, CEDC and SPDC respectfully submit one (1) copy of **Annex "Y"**, in a sealed envelope, with the said envelope and each page of the documents therein and/or information stamped with the word "*Confidential*".

PRAYER

WHEREFORE, the foregoing premises considered, the Joint Applicants Clark Electric Distribution Corporation ("CEDC") and Strategic Power Devt. Corp. ("SPDC") most respectfully pray that after due notice and hearing, the Honorable Commission shall:

1. **ISSUE** an Order treating **Annex “Y”**, and all the information contained therein as **CONFIDENTIAL**, and in this regard, a) direct their non-disclosure to persons other than the Honorable Commission, its officers and staff; b) continuously protect the said information from public disclosure by maintaining the same separate and apart from the records of the case, and c) ensure that **Annex “Y”** and all the information contained therein are not divulged to unauthorized persons pursuant to Rule 4 of its Rules of Practice and Procedure; and
2. **ISSUE** a Decision approving the Joint Application and the PSA between CEDC and SPDC, and authorizing CEDC to charge and collect the fees therein from its member-consumers.

Other reliefs just and equitable under the premises 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 **18 October 2017 at two o'clock in the afternoon (2:00 P.M.)**, at **CEDC's Main Office, Bldg. N2830, Bayanihan Street, Clark Freeport Zone, Pampanga, Philippines.**

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 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 Applicants rest their case, subject to the requirements under Rule 9 of the 2006 Rules of Practice and Procedure. No particular

ERC CASE NO. 2017-045 RC
NOTICE OF PUBLIC HEARING/ 13 September 2017
PAGE 13 OF 13

form of Opposition or Comment is required, but the document, letter, or writing should contain the following:

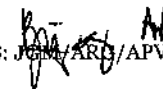
- 1) The name and address of such person;
- 2) A concise statement of the Opposition or Comment; and
- 3) The grounds relied upon.

All such persons who wish to have a copy of the *Joint Application* may request from Applicants 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 OIC Chairman and CEO, **ALFREDO J. NON**, and the Honorable Commissioners, **GLORIA VICTORIA C. YAP-TARUC** and **GERONIMO D. STA. ANA**, Energy Regulatory Commission, this 13th day of September 2017 in Pasig City.

FOR AND BY AUTHORITY
OF THE COMMISSION:


JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Oversight Commissioner for Legal

LS: /APV