



PHILIPPINE INDEPENDENT POWER PRODUCERS ASSOCIATION, INC.

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11 November 2013

ENERGY REGULATORY COMMISSION

Pacific Center Building,
San Miguel Avenue,
Ortigas Center 1600, Pasig City,
Metro Manila,
Philippines



Attention: **Atty. Zenaida G. Cruz-Ducut**
Chairperson and CEO

Re: **Comments on the Proposed Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to Their Captive Market ("Proposed Rules")**

Dear Hon. Chairperson Ducut,

The Philippine Independent Power Producers Association ("PIPPA") extends its appreciation to the Honorable Commission for this opportunity to comment on the Proposed Rules.

PIPPA supports the initiative of the Honorable Commission to establish standards and methodologies that will ensure transparent and reasonable prices of electricity for the distribution utility's ("DU") captive market in terms of the generation component of their retail rates in their various power supply agreements ("PSA").

We note that the Honorable Commission has considered some of the comments/suggestions of PIPPA and has incorporated the same in the current draft propose rules. However, we would like to respectfully reiterate our position on the following items:

Joint filing of the PSA.

We believe that Article IV Section I, which requires the "joint" filing by the DU and the generator of the PSA application, unduly expands regulatory control over the generation sector. We respectfully submit that the ERC cannot compel the generator to be a joint applicant, with the DU, in applying for approval of the PSA.

We recognize and respect the ERC's jurisdiction over the regulated sectors of the power industry. However, the generation sector is expressly declared under the EPIRA as not subject to regulation. Specifically, Section 6 of the EPIRA clearly provides that the generation sector shall be **competitive** and **open**. Upon implementation of retail competition and open access, the prices charged by a generator for the supply of electricity shall **not** be subject to regulation by the ERC.



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Sections 25 and 45 (b) of the EPIRA likewise provide that while the DU may freely enter into bilateral power supply contracts, it is the **retail rate charged by the DU** to its captive market which is subject to ERC regulation.

Also, under Rule 11 Section 5 of the Implementing Rules and Regulations of the EPIRA, the review of such bilateral power supply contracts entered into by the DUs shall be required only for DUs whose level of Open Access has not reached household demand level.

Hence, to require the generator to file an application for the approval of its generation rates in the PSA, even if made jointly with the DU, runs contrary to the mandate of the EPIRA.

Prohibition of walk away provision in the PSA

We believe that the prohibition against termination or “walk-away” clauses incorporated in the PSA impairs the respective parties’ inherent right to freely contract and establish such terms and conditions as they may deem convenient¹.

Termination or “walk-away” clauses are typically incorporated in PSAs to provide an opportunity for both parties to withdraw from a contractual obligation, where the outcome of external factors have made a particular undertaking (i.e., for the sale and purchase of electricity at a fixed price) different from what the parties have originally intended and agreed upon.

Without the termination or walk-away clauses, generators would be forced to supply electricity to the DU at a rate which is not commercially viable and sustainable. This will create distortions in the market rates since it is no longer the price at which generators are willing to supply and the price at which DUs are willing to purchase.

We wish to reiterate that the absence of such clauses may create a situation where DUs could be seen as less attractive power supply customers. This is in view of the additional risk levied upon supply contracts between generators and DUs brought about by the possibility of being compelled to comply with a rate inconsistent with what the parties have originally agreed. On one hand, low-cost generators would find greater favor in contracting with contestable customers, as they remain unregulated by the ERC. On the other hand, DUs may be left to contract with high-cost generators, where the cost-based methodology would be made to apply, and the absence of a “walk-away” clause would be a non-issue.

This situation defeats the objective of the EPIRA to promote competition in the power industry as this would discourage private entities – developers and lenders alike – from investing in the generation sector.

Moreover, the modification of contractual stipulations (including the nullification of termination and walk-away clauses and thus effectively compelling the generator and the DU

¹ Article 1306 New Civil Code: “The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy. (1255a)”



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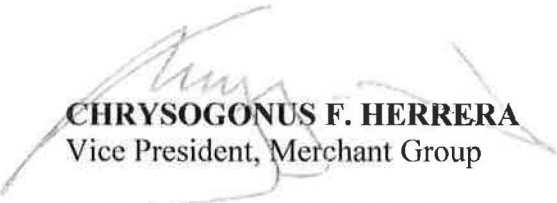
to remain bound to a contract against their will) is no longer be within the scope of judicial or regulatory authority and may not be a valid exercise of police power.

In addition to the above comments, we would like to respectfully suggest that the Honorable Commission adopt a consistent methodology in the evaluation of all the pending PSAs, which did not go through a Competitive Selection Process prescribed in this Rule. The evaluation methodology for those still pending the Honorable Commission's approval should only follow one consistent principle. We believe that adopting a different approach in evaluation of the PSAs, on other generator will lead to distortion in the competition among the generators.

We have attached the other comments/suggestions of PIPPA in the prescribe Matrix for the Honorable Commission's reference.

Once again, we wish to thank the Honorable Commission for allowing PIPPA to participate in the consultation process for the proposed rules. PIPPA is hopeful that its comments on the Proposed Rules would be taken by the Honorable Commission into consideration

Very truly yours,



CHRYSOGONUS F. HERRERA
Vice President, Merchant Group

Encl: Comments Matrix for PSA Rules

Rules Governing the Execution, Review and Evaluation of Power Supply Agreement Entered Into by Distribution Utilities for the Supply of Electricity to their Captive Market
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<i>Page/ Section Number</i>	<i>Discussion of Comment/s and/or Questions for Clarification</i>	<i>Suggestions / Proposed Change(s) to the Draft Rules</i>
General-Evaluation of Existing PSA	<p>We note that there is no mention of how the Honorable Commission will evaluate the pending PSAs given Provisional Approvals.</p> <p>We would like to respectfully suggest that the Honorable Commission adopt a consistent methodology in the evaluation of all the pending PSAs, which did not go through a Competitive Selection Process prescribed in this Rule.</p> <p>The evaluation methodology for those still pending the Honorable Commission's approval should only follow one consistent principle. We believe that adopting a different approach in evaluation of the PSAs, on the other hand, will lead to distortion in the competition among the generators.</p>	We respectfully suggest that for the pending PSA, the Honorable Commission adopt a consistent, objective and transparent methodology in evaluating said PSAs.
General - Aggregation	<p>Several Electric Cooperatives have formed an aggregation company to contract power supply for their members. No rules have been promulgated by the Honorable Commission on the said demand aggregation of ECs. We respectfully suggest that rules for aggregation be included in this guidelines. Among the issues that need to be resolved are the following:</p> <ol style="list-style-type: none"> 1) Who is the contracting party? (The aggregator company does not have assets) 2) Can the aggregation be used to just to solicit the least cost through CSP and contracts will be entered individually? 3) What happens if one of the member defaults? 4) Can the other members collect from their 	



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	<p>customers to cover the obligations of the defaulting member?</p> <p>5) How will be the security deposit divided among the member ECs?</p> <p>6) Is the aggregator a regulated entity? If so what return is it permitted to make?</p>	
<p>Article IV- Requirements and Review</p> <p>Section 1. Filing of the PSA</p>	<p>We recognize and respect the ERC's jurisdiction over the regulated sectors of the power industry. However, we respectfully submit that the Honorable Commission cannot compel the generator to be a joint applicant, with the DU, in applying for the approval of the PSA</p> <p>Sections 25 and 45(b) of the EPIRA provide that the subject of ERC regulation is only the DU's retail rate to its captive customers.</p> <p>Also, section 6 of the EPIRA provides that the generation sector shall be competitive and open. Upon implementation of RCOA, the prices charged by a generator for the supply of electricity shall not be subject to regulation of the ERC.</p>	<p>Section 1. Filing of the PSA – The PSA shall be the a joint responsibility by the generation company and the of the DU. Following the execution of the PSA, the parties thereto DU shall file with the ERC, within thirty (30) days therefrom, an joint application for the approval of said PSA and for the determination of the reasonable generation costs that the DU can recover from its captive market as part of its retail rate.</p>
<p>Section 2. Review of the ERC</p>	<p>We reiterate our position as per our comments submitted to the Honorable Commision in the first draft of this Rules, that the review of the Honorable Commission should be limited to the procedural aspect of the Competitive Selection Process. As long as the EC or DU has faithfully complied on the rules of CSP, then ERC should approve the PSA within a given time frame.</p>	<p>Section 2. Review of the ERC – ERC's evaluation of the PSA and the generation rate will be based on its satisfaction of the following:</p> <p>a. That the PSA was awarded in accordance with the prescribed procurement process prescribed under Appendix A of the rules, as applicable.</p>
<p>Section 3. PSA Pricing Structure</p>	<p>We are of the position that the review of the Honorable Commission should be limited to the procedural aspect of the Competitive Selection Process. As long as the EC or DU has faithfully complied on the rules of CSP, then ERC should approve the PSA within a given time frame.</p>	<p>Delete Section 3</p>



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Section 4. Other Documentary Requirements	We are of the position that the review of the Honorable Commission should be limited to the procedural aspect of the Competitive Selection Process. In addition, these documentary requirements are already captured in the Terms of Reference by the ECs/DUs	Delete Section 4
Section 5. Procedural Requirements	Same as Article IV Section 1 discussion.	Section 5. <i>Procedural Requirements</i> – Prior to the filing with the ERC of the application referred to in the preceding section, the DU parties shall comply with Section 4 (e), Rule 3 of the IRR of the Act and Rule 6 of the ERC Rules of Practice and Procedure. Any application that fails to comply with the above requirements shall not be accepted. The application shall be treated as a rate case and the procedure applicable to rate cases shall be observed.
Section 6. ERC Action on the Application.	<p>We believe that the prohibition against termination or "walk-away" clauses incorporated in the PSA impairs the respective parties' inherent right to freely contract and establish such terms and conditions as they may deem convenient.</p> <p>Termination or "walk-away" clauses are typically incorporated in the PSAs to provide an opportunity for both parties to withdraw from a contractual obligation, where the outcome of external factors have made a particular undertaking different from what the parties have originally intended and agreed upon.</p> <p>There are civil rights that may have been violated by this provision. With all due respect to the Honorable Commission, said provision may be overextending the regulatory powers of the ERC to a non regulated entity</p>	<p>Section 6. <i>ERC Action on the Application</i> – Any PSA submitted to the ERC shall be reviewed for faithful compliance the CSP process and approved thereof. and approved and not as to its "reasonableness" in terms of costs, risk allocation, and other contractual terms.</p> <p>In the exercise of its discretion and on the basis of all the submissions made, the ERC shall determine whether or not to approve the full pass through or prohibit some or all energy costs from being passed on to the DU's captive market and whether or not to disapprove or modify certain contractual stipulations of the parties.</p> <p>The ERC's decision and judgment shall bind both parties and shall not be rendered ineffective or nugatory by any termination or "walk-away" clause incorporated in the PSA.</p>



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<p>Appendix A – Bid Terms and Conditions</p>	<p>We note that the template follows the procurement process of a government owned or controlled corporation and follows the government procurement act. May we be clarified if the Honorable Commission will issue a template for privately owned companies. We would also like to know the treatment on procurement process that has a provision for "Swiss Challenge".</p> <p>In the same manner, we would like to clarify with the Honorable Commission whether the template adopted in the said rules are mandatory.</p> <p>If so, it is suggested that a much more thorough review be conducted since such may not be applicable or has not considered/captured the aspects that are particular to the nature of the qualified suppliers (e.g., IPPA/IPP, type of technology, type of fuel, type of operation, etc.).</p> <p>Conversely, the DU may include changes on the CSP process and TOR, to suit their particular needs and have more flexibility to source suppliers. The Honorable Commission should clarify if such changes will be reviewed by ERC prior to the tender process or after the tender process has been conducted and the PSA agreed by the DU and the generator is submitted to ERC for evaluation and approval. In the latter case, there is a risk that the tender process may be disallowed or nullified by the ERC due to technicalities.</p>	
<p>Appendix A- 11-02</p>	<p>Typographical error.</p>	<p>WARRANTY AGAINST OFFERING OR PAYING COMMISSION OR CONSIDERATION TO ANY GOVERNMENT OFFICER OR ANY DIRECTOR, OFFICIAL OR EMPLOYEE OF PSALM DUs/ECs, MEMBERS OF THE COMMITTEE AND DISCLOSURE OR COMMISSION PAID TO</p>



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		PRIVATE PERSON
Appendix A-1 Timelines for CSP	We note that the timelines given has not indicated the period for the review process and approval of the ERC.	Include ERC timeline approval for PSA.
Appendix PSA Template General	<p>May we be clarified if the PSA template can be edited by the DUs/ECs to suit their particular needs. Each DU/EC has a specific contractual requirement. A capacity-based contract may not be the most suited pricing scheme for each of the DU/ECs.</p> <p>In the same manner, we would like to clarify with the Honorable Commision whether the template adopted in the said rules are mandatory.</p> <p>If so, it is suggested that a much more thorough review be conducted since such may not be applicable or has not considered/captured the aspects that are particular to the nature of the qualified suppliers (e.g., IPPA/IPP, type of technology, type of fuel, type of operation, etc.).</p> <p>Conversely, the DU may include changes on the PSA template, to suit their particular needs and have more flexibility to source suppliers. The Honorable Commission should clarify if such changes will be reviewed by ERC prior to the tender process or after the tender process has been conducted and the PSA agreed by the DU and the generator is submitted to ERC for evaluation and approval. In the latter case, there is a risk that the tender process may be disallowed or nullified by the ERC due to technicalities.</p>	We propose that the Honorable Commission give flexibility to the DU/EC to construct their own PSAs. However, the Honorable Commission should also specify if there are provisions they would require to be added in the PSAs.