THE CENTRE
Center for Empowerment, Innovation, and Training on Renewable Energy

RENEWABLE ENERGY POLICY DISCUSSION PAPER 1

COMPETITIVE SELECTION PROCESS

CARLA GREPO AND CEZAR ESTRADA

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Introduction

The restructuring of the entire power industry after the enactment of Republic Act No. 9136 or the "Electric Power Industry Reform Act of 2001" (EPIRA) had the objective of encouraging free and fair competition, enhance the woflniof private capital, and broaden the ownership base of the power generation, transmission, distribution, and supply sectors.

Overall, the EPIRA helped usher in a new era of competition in the Philippine power market. While supply has generally been secure at the generation level, demand growth has outpaced capacity additions, which remain primarily based on imported coal. In Luzon and the Visayas, supply has generally been secure in recent years, barring events like typhoons and earthquakes. Mindanao has also recently entered a period of supply adequacy with the xuflniof new generating capacities in the region.

However, generation and supply adequacy risks persist especially during peak- power demand months in the summer, experiencing tight supply conditions and spiking spot power prices. Several widespread blackouts which placed the power grids on red and yellow alert, have occurred over the past five years. These were mostly due to unplanned or forced outages of power plants due to technical issues like boiler tube leaks and boiler slagging, low generation availability, and maintenance of major power plants (e.g. Malampaya gas- to- power plant).

A World Bank policy paper confirmed that competition has increased significantly in the Philippine power market over the past decade. It stated that the market concentration dropped from being highly concentrated to moderately concentrated. However, the dominance of few major players across the power supply chain and the possibility of market power abuse remain troubling.[1]

[1] Barroso, Luiz A. and Luiz T.A. Maurer, "Electricity Auctions: An Overview of Efficient Practices," The World Bank, 2011, http://documents.worldbank.org/curated/en/114141468265789259/pdf/638750PUB0Exto00Box0361531B0PUBLIC0.pdf

Four major players account for 64% of total registered generation capacity. New competitors have entered the market, albeit slowly, perhaps due to regulatory uncertainty, complicated and lengthy processes for permits and licenses, high capital requirements, and restrictions on foreign ownership.[2]

The Philippines needs to continue to expand its power generation capacity to meet fast growing electricity demand needs which the Department of Energy (DOE) is projecting to increase from 14,782MW in 2018 to 49,287MW in 2040. The bulk of expected capacity additions in the mid-term are in coal-based power plants. It is therefore important for the Philippines to continue to diversify its power generation mix and harness the potential for renewable generation, to improve both security of supply and sustainability. To achieve these, increasing competition in the power generation segment is crucial.

Securing supply by strengthening competition can be achieved by developing a power procurement design that attracts new players to the market, minimizes transaction costs, promotes transparency, and discovers the real cost of electricity in order to get the lowest price for the benefit of the consumers.

A sound power procurement system should achieve the following:

- a fair, open, timely, transparent, objective, and non-discriminatory process;
- an efficient price discovery mechanism, minimizing information and transaction costs;
- an outcome in which the winning bidder can provide supply that is not only the lowest cost but also the most stable and sustainable; and

[2] Ibid.

- a design that is cohesive with the overall energy and procurement policies of reforming the power sector, introducing new participants, and harnessing indigenous and renewable sources of energy.

Overview of the Competitive Selection Process

Section 23 of the EPIRA provides that distribution utilities (DUs) shall have the obligation to supply electricity in the least-cost manner to their captive market. In June 2015, the DOE issued Circular No. DC2015- 06-0008, "Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)" after several groups of small electric cooperatives successfully bid out their aggregated demand (150 to 300 MW) resulting in a reduction in generation contract prices. The 2015 CSP circular provides that the conduct of CSP shall observe the following:

- Aggregation of DUs' uncontracted demand requirements;
- Annual conduct of the CSP; and
- Use of a uniform PSA template

Subsequent issuances were made by the Energy Regulatory Commission (ERC) to implement the DOE 2015 Circular, including the following:

- Joint ERC and DOE Resolution No. 1 "A Resolution Enjoining All Distribution Utilities to Conduct Competitive Selection Process (CSP) in the Procurement of Supply for their Captive Market"
- ERC Resolution No.13, Series of 2015 "A Resolution Directing All Distribution Utilities (DUs) to Conduct a Competitive Selection Process (CSP) in the Procurement of their Supply to the Captive Market"

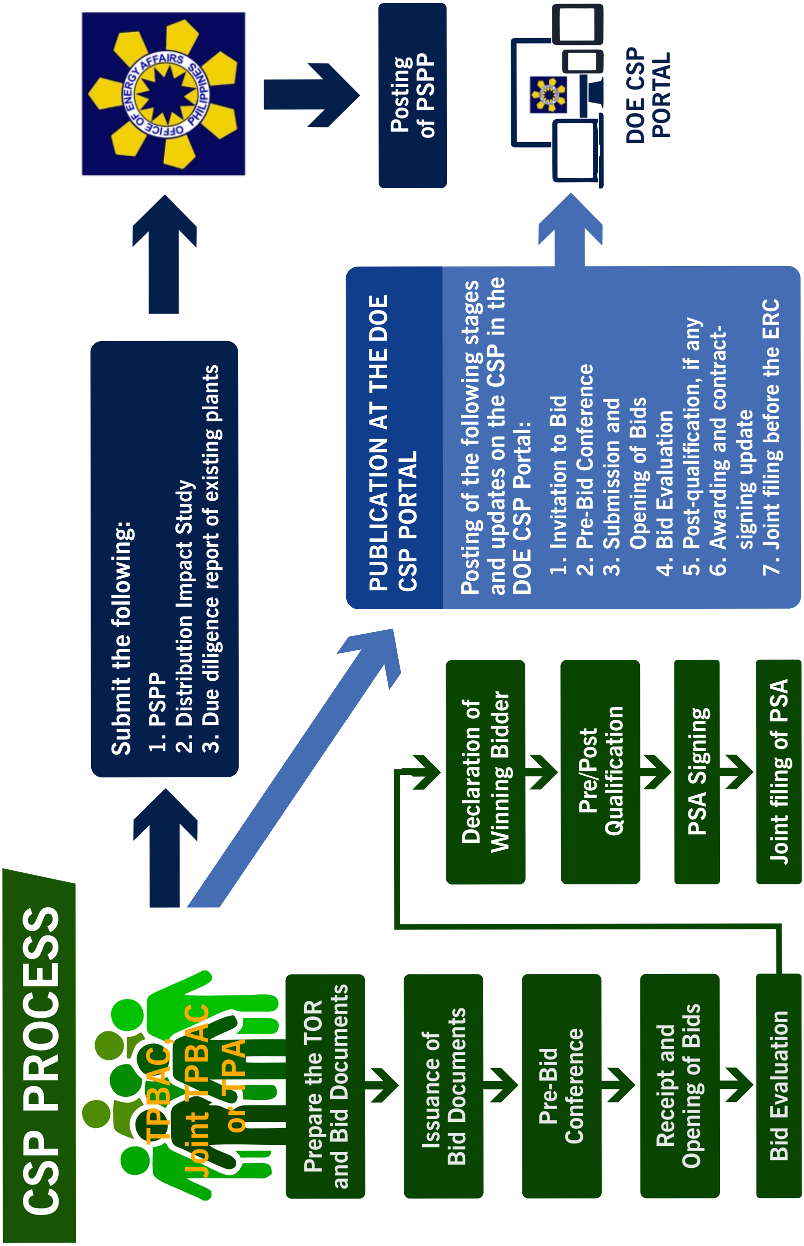

Figure 1 – The CSP Process (source: doe.gov.ph)

- ERC Resolution No. 1, series of 2016 "A Resolution Clarifying the Effectivity of ERC Resolution No.13, series of 2015"

The DOE also issued Department Circular No. DC2018-02-0003, entitled "Adopting and Prescribing the Policy for the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreements for the Captive Market in February 2018," ("2018 CSP Circular"), which basically mandates the DUs to award contracts by conducting a CSP through an independent, five-person third-party bids and awards committee (TPBAC), or in the absence of a TPBAC, through an accredited third-party auctioneer. However, much needs to be done to reconcile issuances by the DOE and the ERC.

The DUs are mandated to conduct a CSP to secure supply for their captive markets through bilateral contracts or PSAs. As of 2017, about 80% of the demand requirement was supplied through a PSA in Luzon and Visayas, while the 20% was supplied through trading in the Wholesale Electricity Spot Market (WESM). In Mindanao, the entire demand is procured through CSP given that the WESM has yet to commercially operate in the region.

Although the objective for issuing the circulars and other issuances on CSP is to provide a clear and streamlined process and to optimize procurement, key challenges remain which will be further discussed in the following sections.

Current and Potential Issues

1. **Bidding evaluations do not fully capture the nonprice benefits of renewables, or recognize some of their operational limitations, which result in the non-selection of renewables.**

Price is the primary consideration in most competitive selection methods, including those employed in the Philippines. Other considerations include operational factors where reliability needs to be demonstrated and dispatchable plants provide greatest value, and project finance and viability where higher marks are given to developers with a proven track record in project development.[3]

The challenge facing the renewables industry under competitive bidding is to ensure that the selection framework not only fully accounts for all of the costs and benefits of generation options but also recognizes the special characteristics and operational limitations of renewable projects.

To date, competitive selection in the Philippines has focused on price and operational considerations over other project attributes such as environmental, fuel diversity, and fuel price stability values. Bidding evaluations do not fully capture many of the nonprice benefits of renewables, or recognize some of their operational limitations, which in turn results in the non-selection of renewables.[4]

2. The stringent framework that applies to large capacities also apply to smaller capacity sizes.

Existing issuances on CSP provide a uniform framework regardless of the capacity sought to be procured by the DU. The stringent rules that apply to large capacities also apply to smaller capacity sizes. This framework tends to favor large players that are able to afford the associated administrative and transaction costs.[5]

In some instances, the benefits that may be derived from competition do not fully offset transaction costs that the bidding may entail. Investors may not readily take on the typically high development costs associated with preparing competitive bids for projects in smaller or riskier markets without any assurance that

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[3] Swezey, Blair, "The Impact of Competitive Bidding on the Market Prospects for Renewable Electric Technologies," National Renewable Energy Laboratory (NREL), September 1993, https://www.nrel.gov/docs/legosti/old/5479.pdf

[4] Swezey, 1993.

[5] Lucas, Hugo, Rabia Ferroukhi and Diala Hawila, "Renewable Energy Auctions in Developing Countries," International Renewable Energy Agency (IRENA), 2013, https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/IRENA%20Renewable%20Energy%20Auctions%20in%20Developing%20Countries.pdf

they would recover the expenses through the award of the contract.[6]

Competitive bidding also requires resources that small-scale or new project developers may not have. The risk that bidders will not ultimately receive a contract for their projects is relatively high. In some instances, participation in the bidding requires presenting feasibility studies and land use permits, adding layers of transaction costs with little assurance that this risk will be rewarded with an actual contract.[7]

3. The tariff determination procedure is tedious and poses a roadblock in the quick deployment of renewables.

The third draft of the CSP rules circulated by the ERC in 2019 ("Draft CSP Rules") provides that the "ERC shall establish a benchmark rate that shall serve as reference price that may be used to assess the prudency and reasonableness of the PSA price." It provides that the procedure for calculating and determining the benchmark rate shall be covered by a separate resolution to be promulgated by the ERC, but also states that the ERC shall utilize a financial model in calculating the benchmark rate, which considers model inputs such as capital and operating costs, rates of return, and technical parameters. It will also take into account relevant factors, including the type of contract (financial or physical), the load factor, load shape and location, or reference node.

In the current framework without the benchmarking method, there are cases when the rate in the winning bid is different from the actual rate subsequently approved by the ERC. Moreover, there are too many rate-setting applications than the ERC staff could handle. This tedious process of tariff determination by the ERC causes backlog and delay in project development.

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[6] Barroso, Luiz A. and Luiz T.A. Maurer, "Electricity Auctions: An Overview of Efficient Practices," The World Bank, 2011, http://documents.worldbank.org/curated/en/114141468265789259/pdf/638750PUB0Exto00Box0361531B0PUBLIC0.pdf

[7] Ferroukhi, Rabia, Diala Hawila, Salvaore Vinci and Diyyam Nagpal, "Renewable Energy Auctions:A Guideto Design,â€International Renewable Energy Agency (RENA)and Clean Energy Ministerial (CEM), 2015, https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2015/Jun/IRENA_Renewable_Energy_Auctions_A_Guide_to_Design_2015.pdf

4. Allowing aggregation of more than two DUs tends to limit the bidding process to generation companies with high capacities and create a barrier to smaller players.

A National Renewable Energy Laboratory (NREL) study on the impact of competitive bidding on the market prospects for renewable technologies stated that solicitation size is another factor in the success of renewables against nonrenewable fuel types. That is, renewables tend to exhibit more favorable economics at smaller sizes than fuel-based technologies, which are more subject to scale economies.

The study states that in Massachusetts, renewables represent 32% of winning capacity in solicitations of 100 MW or less, while renewable energy technologies represent only 5% of the winning in solicitations that ranged from 132 to 200 MW. In large capacity solicitations, the economies of larger fossil-based plants tend to dominate.[8]

While all-source bidding in principle offers the best price to the consumer, new RE projects are fundamentally disadvantaged in the marketplace. This is because it's challenging for them to have DUs acquire their supply or have their full resource value to be recognized.

Under these circumstances, having only all-source auctions may weaken competition instead of increase it.[9]

The Draft CSP Rules authorizes two or more DUs to aggregate their demand or energy requirements solely for the purpose of procuring their supply of electricity through competitive bidding. While the objective to achieve the best price for the consumer is laudable, allowing aggregation of more than two DUs may be anti-competitive since it might effectively limit the bidding process to generating companies with high capacities and become a barrier to smaller players.

[8] Swezey, 1993
[9] Ibid.

The same is true for not imposing a limit on the number of PSAs that one generation company or its affiliates could have with the same DU, which is the current situation. Allowing one GenCo or its affiliate to have an unlimited number of PSAs with a DU may have anti-competitive effects. For instance, since the Draft CSP Rules intend to exempt RE-based facilities with a maximum capacity of 1MW, a GenCo with two or more qualified generating facilities can be exempted from the CSP for every facility, even though owned by the same GenCo.

5. **Attracting investments in remote and unviable areas remains challenging.**

In infrastructure financing, private equity investors and lenders are driven by return on investment. Encouraging the inflow of private capital in rural electrification requires removing uncertainty of the reward to investors, which will give any set of investors pause during due diligence.

In the Draft CSP Rules, a prescribed contract template, where the cooperation/contract period is limited to ten (10) years, is annexed. The CSP policy, however, should consider that the longevity of the PSA constitutes another element of security for investors.

Many studies reveal that low potential for investment returns was a major disincentive to private sector investments. Placing a limit on the return on capital discourages firms that invest efficiently while it encourages those willing to accept a lower rate of return.

While long-term exclusive supply contracts the potential to restrict or distort competition because they restrict for a long period the freedom of buyers and sellers to transact with third parties, a fixed 10-year limitation on the contract period, on the other hand, might result in higher generation rates for renewable energy generators compared to other technologies.

6. There is a need to properly forecast demand and to adhere to the procurement plan.

The EPIRA mandates the DU to prepare and submit to the DOE (or the National Electrification Administration (NEA) in the case of electric cooperatives) an annual five-year distribution development plan (DDP). The Philippine Distribution Code also provides that the DU shall collate and process the planning data submitted by entities that use its distribution system into a cohesive forecast to be used in preparing the data for the DDP. The DDP shall include:

- Energy and demand forecasts;
- Sub-transmission capacity expansion;
- Distribution substation siting and sizing;
- Distribution feeder routing and sizing;
- Distribution reactive power compensation plan;
- Other distribution reinforcement plans; and
- A summary of the technical and economic analyses performed to justify the DDP

The Power Supply Procurement Plan (PSPP), on the other hand, refers to the DU's plan for the acquisition of a variety of demand-side and supply-side resources to cost-effectively meet the needs of its customers. The PSPP is an integral part of the DDP and must be submitted to the DOE or NEA, whichever is applicable, supported with a board resolution and/or a notarized Secretary's Certificate.

However, not all DUs have demonstrated the capacity or commitment to plan their power supply procurement. Submitted DDPs and PSPPs sometimes reveal that these documents are not meticulously prepared using reliable data and are merely being submitted for minimum compliance to the rules. For instance, sometimes data in the DDP and the individual PSPPs cannot be harmonized or completely conflict with each other. Some DUs do not submit them at all. In 2018, the DOE website showed only 26 submitted PSPPs, considering that there are about 150 DUs based on the 2016-2025 Distribution Development Plan. In 2019, even though the deadline for PSPP submission has already lapsed, only seven DUs have submitted their PSPPs so far. This only shows the blatant non-compliance of DUs with the PSPP requirement and the lack of enforcement on the regulator's part.

Most power supply deals have "take-or-pay provisions," which means that with or without actually sourcing power from the contracted generation company, the DU shall pay a cost which will be passed on to the consumers. Thus, if a DU engages so many power suppliers unnecessarily, it will cause an upward adjustment on the blended generation rate being charged by the DU.

Poor power supply procurement planning may also potentially lead to electricity generation deficit, which may lead to needing to procure emergency power from relatively expensive generators.

7. **There is no provision for the reduction of supply in cases other than the transfer of contestable customers to a Retail Electricity Supplier.**

Current issuances and existing PSAs only allow the reduction of contract capacity in cases when a contestable customer opts to source its supply from a Retail Electricity Supplier (RES). However, given the entry of disruptive technologies and the increase of distributed energy resources, DUs may face another supply issue. Without a provision for the reduction of supply in cases other than the transfer of contestable customers to a RES, the DU may incur stranded supply or may have to sell their excess supply to the WESM where prices are very volatile and may result in losses.

8. Regulatory uncertainty and perception of non-transparency or inconsistent application of rules compromise investor confidence.

Regulatory uncertainty remains a major challenge in attracting investors and in ensuring RE deployment. While occasional changes to improve the process are part of the learning process and usually welcomed by all stakeholders, frequent and unexpected changes dampen investor interest.

In the current rules, there is uncertainty over which government requirement will come first—the conduct of the CSP or securing a Service Contract for the specified area. This has resulted in some industry confusion and hesitation among investors to develop projects, especially in off-grid areas.

Another example concerns unsolicited proposals, which the current regulatory framework allows through direct negotiation in some circumstances. This method includes a requirement that comparative bids be solicited, and if a comparative bid is received at a lower price, the original proponent has the option to match the price of the comparative bid and win the contract (Swiss challenge). Moreover, in the Draft CSP Rules, unsolicited proposals are allowed if the proponent introduces a new concept or technology or uses an innovative design, formula, method, process, or system of generating electricity. However, it remains unclear and confusing how selection will be made, especially when there is more than one proponent offering same innovation or technology.

9. Some of the rules are prone to bias or corruption.

With regard to curbing the potential for bias or corruption, the current policy framework establishes a Third Party Bids and Awards Committee (TPBAC), which is meant to be an independent body that will spearhead and manage the CSP. However, in reality, the TPBAC only endorses the winning bidder to the DUâ€™s board of directors (BOD) for approval and the signing of a PSA. This means that the TPBAC is not completely independent since the chosen bidder is still subject to the approval of the DU-BOD. As a result, the purpose of creating a third-party committee is defeated if the DU-BOD retains final authority to approve the winning bidder.

The Draft CSP Rules does not remedy this, since the DU-BOD retains the power to disapprove the recommendation of the BAC. The process not only defeats the CSP process but is also prone to corruption and bias. Furthermore, it remains unclear in both the existing policy and the Draft CSP Rules which body is tasked to finalize the Terms of Reference — whether it is the DU-BOD or the BAC/TPBAC.

Proposed Changes in the CSP Model

1. **Technology choice and other non-price factors should be considered in the bidding evaluation system.**

To foster greater selection of renewables, a bid evaluation system that considers other non-price factors in project evaluation and scoring should be adopted. These factors should include specific nonmarket-related attributes of renewables, including environmental and economic impacts.

In a regulatory framework that recognizes the value of renewables, project attributes of renewables are considered while retaining the competitive benefits of traditional bidding schemes. In this setup, cost-effective renewable energy projects have better chances of being selected.

For instance, in some US states, a method called renewable energy set-asides is implemented. A set-aside establishes a specific amount of allowances for renewable generators, offering certainty for existing generators about the number of allowances allocated to them.

It might be worth considering establishing dedicated auctions that target one or more types of technologies. This mode of procurement can still provide the best results for a given set of technologies driven by policy decisions and preferences. Moreover, the terms of reference should also consider the optimal supply mix in the area, especially in off-grid areas where Renewable Portfolio Standard (RPS) requirements need to be considered.

Finally, there is also a need to ensure that the winner not only provides the lowest responsive bid but also the most reliable and secure supply of power. Without a defined list of technical requirements or benchmark for the operations of generating plants, there may be cases where the winner bidder may have the lowest bid, but will supply unreliable power.

2. **Rules should be adjusted to relieve smaller projects of stringent requirements and transaction costs.**

Highly competitive bidding processes are best suited to larger-scale and more established developers that can afford these high, upfront transaction costs. Thus, to encourage investments, especially in small and isolated areas, the rules may be adjusted to relieve smaller projects, for instance 1 MW, from going through the same stringent rules and lengthy processes that apply to large-scale projects.

Another option is to limit the prequalified bidders to a small number to increase each candidate's chance of winning, making them more willing to incur preparatory costs. Finally, an announced policy of reimbursing all or part of the development costs incurred in the preparation of the best non-qualified bid(s) could help attract bidders, including small players.

Other models may also be explored, especially in off-grid areas where incentives and guidelines in are not enough to attract the private sector. For instance, the rules may allow the electric cooperative to form a joint venture with a private sector partner without the need to go through a lengthy competitive selection process. As expected, tariff resulting from the joint venture project will still have to comply with the benchmark rate set by the ERC.

3. **Tariff determination procedure needs to be simplified and streamlined, and the pricing structure modified to be more responsive to different technologies.**

At the minimum, two categories should be set for the benchmarking of rates — one for fossil - based fuels and another for renewable energy. With government support for renewable energy and subsequent policies by the DOE and the ERC, it is only appropriate to have a different benchmarking rate for renewable energy

The most ideal would be the benchmarking of tariffs based on technology, system capacity, and location. The benchmark tariff should have cost adjustments for site geography, size and technology, and technologies should also be allocated a differentiated tariff.

The ERC should also establish its guidelines for making adjustments of the benchmark in certain off-grid projects. With the advent of renewable energy hybrid application, there is now a need to formulate tariffs for hybrid. A simplified tariff calculation should be developed and should also consider the use of storage batteries.[10]

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[10] Yaneza, Grace, Chitra Narayanswamy and Liam Fox, "Accelerating Renewable Mini-Grid Deployment: A Study on the Philippines," IRENA, October 2017, https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2017/Oct/IRENA_Philippines_Renewable_Mini-Grids_2017.pdf

Moreover, a streamlined process for determining tariffs would reduce processing time and offer greater certainty to potential developers and investors. If the benchmarking method proposed in the latest Draft CSP Rules are to be adopted, the ERC's lengthy rate approval process due to the volume of applications becomes superfluous. Compliance with the benchmark rate should already dispense with the need for the ERC to approve the rate to implemented by the DU.

4. **Fair competition should be considered in formulating the policy on aggregation, as well as entering into PSAs with the same generation company.**

As discussed above, renewables tend to compete more effectively against fossil fuel projects in smaller-sized solicitations. Imposing rules that protect fair competition and market access is necessary to truly strengthen competition by increasing the participants. This can be achieved by limiting the aggregation of demand or energy to two DUs only, or a reasonable number as the DOE may determine. Another possible solution is to require DUs that meet certain criteria as determined by the regulator to hold RE-only solicitations or solicitations of below a certain capacity size.

It might also be worth considering to impose a limit on the number of PSAs one generation company can enter into with the same DU to avoid anti-competitive behavior, especially since the latest Draft CSP Rules exempts small-scale RE-based facilities not exceeding 1MW from CSP.

As discussed above, a generation company with two or more qualified generating facilities can be exempted from the CSP for every facility, even though owned by the same generation company if the rules are not modified.

5. **The CSP policy should recognize that the PSA's contract period constitutes another element of security for investors.**

From a project finance standpoint, the contract period of the power purchase agreement should ideally be long enough to extend beyond the entire amortization period of the credit facilities to make it viable.[11]

The ERC should review the delicate balance between providing a regulatory environment that lowers the cost of financing and deploying RE projects and protecting the utilities from market risks. They should therefore further study the move to set a maximum contract term for the PSAs.

6. **The DOE should invest in ensuring the planning and forecasting capacity of procuring utilities.**

The government should provide technical assistance and capacity-building to electric cooperatives because many of them do not have technical skills to develop a procurement strategy that captures the demand forecast. The CSP policy should also ensure that DUs exert every effort to properly forecast their demand, precisely determine how much supply to procure in the future, and to adhere to such projections when procuring supply and conducting the CSP. The rules should also require DUs to procure only contracts that are necessary to fulfill the demand and to avoid stranded costs that will be passed on to the consumers. In other words, the rules should prohibit "over-contracting."

Thus, the rules should strictly provide that the volume of demand being procured and the frequency of the CSP should match the demand indicated in the DU's PSPP as

[11] Swezey, 1993.

submitted to the DOE. This would drive the DUs to develop a procurement supply plan more seriously and accurately. To strengthen enforcement, the rules should impose credible and enforceable penalties on the failure to submit the PSPP within the deadline and the failure to adhere to the submitted PSPP in procuring supply and conducting a CSP, unless otherwise allowed by the ERC in exceptional cases.

7. The prescribed PSA template should contain a provision allowing supply reduction in cases other than the application of RCOA.

As discussed above, current issuances and existing PSAs only allow the reduction of contract capacity in cases when a contestable customer opts to source its supply from a RES. However, given the entry of disruptive technologies and the increase of distributed energy resources, DUs may face another issue on their supply. It would thus be wise for the new CSP framework to consider not only the reduction of contract capacity on account of the RCOA and contestability, but also those unforeseen changes in the DU's operational landscape.

8. There should be clarity, stability, and transparency in the regulatory framework

Clarity, stability, and transparency in the CSP policy and actual implementation are key in creating an enabling regulatory framework. Rules must be harmonized and ambiguous or conflicting provisions reconciled. For instance, the different rules on acquiring RE service and/or operating contracts and CSP should clarify which government requirement will come first—the conduct of the CSP or securing a Service Contracts for the specified area.

As for unsolicited proposals, the DOE or ERC should thus propose some guidelines or set of criteria to be followed in the selection process. This may follow the “beauty contest” mechanism (or administrative allocation), wherein a set of guidelines and some measurable criteria are presented, leaving some room for subjective evaluation. Unsolicited proponents present their best case on why they should be awarded the contract, covering a variety of aspects (e.g. business plan, technical capacity, financial health, etc.). Since this is potentially a subjective, non-transparent selection process, there should also be mechanisms to assess the credibility of the claims made by participants, and to guard against corruption.

It is also important to consider how competitive bidding can lead to discontinuous market development (or stop-and-go cycles). Unless competitive bidding is conducted at a fixed schedule at regular intervals (e.g. more than once per year), this may lead to a stop-and-go pattern of deployment. These conditions restrict the flow of capital and the development of a robust supply chain.[12]

Finally, since the objective of CSP is to conduct a public, open, transparent, and non-discriminatory selection, dissemination of information among participants before, during, and after the auction is crucial. Currently, there are many issues with the posting and publication of critical information related to CSP. To remedy this and to successfully attract investors, the auctioneer must define fair and transparent rules and obligations for all the stakeholders. All relevant information must be clearly communicated to all competitors equally. Bidding objectives and operations should be explained, through seminars and workshops made available to stakeholders and market participants, as well as providing periodic informative training sessions.

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[12] Lucas, Hugo “Renewable Energy Auctions in Developing Countries,” International Renewable Energy Agency, 2013

9. There should be mechanisms to curb bias or corruption.

Regulatory oversight should be strengthened, including establishing a good monitoring system to detect abnormal bidding behavior. Investors' perceptions about the fairness of the process is a necessary condition for the success of the selection process. In addition, strong guarantees and penalties —and their strict implementation—are essential to the success of auction schemes, preventing underbidding and minimizing the risk of delays and completion failure. Regarding the DU-BOD's power over the BAC/TPBAC, we recommend dispensing with the need to secure the BOD approval of the winning bidder as selected by the TPBAC to truly make the TPBAC an independent body. By giving the DU-BOD the power to veto the TPBAC's selection, the entire process becomes vulnerable to corruption or bias. It is also the TPBAC who should have the authority to finalize the TOR, with only recommendations from the BOD.

Summary of Recommendations

Numerous lessons can be drawn from the Philippine experience with competitive bidding and other power procurement methods. Below are some administrative, regulatory, and infrastructural aspects that must be considered in designing the revised CSP framework:

Technology Choice and Other Non-Price Factors

- The CSP framework should consider specific nonmarket-related attributes of renewables, including environmental impact such as emissions and waste, and economic development impact such as job creation in the communities, among others.

- The terms of reference should consider the optimal supply mix in the area, especially in off-grid areas where there is a need to consider RPS requirements.

- The rules should ensure that the winner not only provides the lowest responsive bid but also the most reliable and secure supply of power.

Capacity Sizes

- To encourage investments, especially in small and isolated areas, the rules may be adjusted to relieve smaller projects below 1MW of the same stringent rules and lengthy processes that apply to large-scale projects.

- Another option is to limit the prequalified bidders to a small number to increase each candidate's chance of winning and thus make them more willing to incur preparatory costs.

- An announced policy of reimbursing all or part of the development costs incurred in the preparation of the best non-qualified bid(s) could help attract bidders, including small players.

Solicitation Size and Fair Competition Standards

- Impose a limit on the aggregation of demand or energy to two DUs only, or a reasonable number as determined by the regulator, since allowing aggregation of more than two DUs may be anti-competitive by being a barrier to small players and effectively limiting the auction to generation companies with high capacities.

- Impose a limit on the number of PSAs a generation company can enter into with the same DU. Refusing to impose a limit on the number of PSAs that one generation company or its affiliate can have with a DU may result in anti-competitive behavior.

Contract Period, Benchmark Rate, and Pricing Structure

- The contract period should be long enough to extend beyond the entire amortization period of the credit facilities to make it viable.

- The contract period should be carefully harmonized with the benchmark rate and PSA pricing structure, which in turn should consider type of technology that the proponent is offering.

- Different benchmark rates should be set based on technology, system capacity, and location. The benchmark tariff should have cost adjustments for site geography, size and technology, and technologies should also be allocated a differentiated tariff.

- Compliance with the benchmark rate set by the ERC should be updated on a regular basis, and compliance with such rate should dispense with the need to secure ERC's approval.

Power Supply Procurement Planning

- The volume of demand being procured and the frequency of the CSP shall match the demand indicated in the DU's PSPP as submitted to the DOE. To strengthen enforcement, credible and enforceable penalties should be imposed on the failure to submit the PSPP within the prescribed deadline and the failure to adhere to the submitted PSPP in procuring supply and conducting a CSP.

Quasi-Competitive Procurement Methods

- In unsolicited proposals, the DOE and/or ERC should propose a set of guidelines to be followed in the selection process, which shall include mechanisms to validate the proponents' claims and to minimize corruption.

Reduction of Contract Capacity

- The new CSP framework should consider not only the reduction of contract capacity on account of RCOA and contestability, but also those unforeseen changes in the DU's operational landscape and emerging technologies like distributed energy resources.

Transparency and Stability

- The TPBAC should be completely independent and their selection of the PSA no longer subject to the approval of the DU's BOD.

- CSP should be conducted at a fixed schedule at regular intervals (e.g. more than once per year); otherwise this may lead to a stop-and-go pattern of deployment and restrict the flow of capital.

- The DOE should adequately disseminate information on the bidding objectives and operations, through periodic seminars and workshops available to all stakeholders and market participants.

Competitive bidding processes do not operate in a vacuum and must always be an integral part of a country's overall energy and procurement policies of reforming the power sector, introducing new market participants, harnessing indigenous sources of energy, and creating competitive pressure to push prices down to benefit consumers.

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ANNEXES

ERC Rules on Competitive Selection Process
DOE Circular
Senate Bill by Win Gatchalian

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

RESOLUTION NO. 13, SERIES OF 2015

A RESOLUTION DIRECTING ALL DISTRIBUTION UTILITIES (DUs) TO CONDUCT A COMPETITIVE SELECTION PROCESS (CSP) IN THE PROCUREMENT OF THEIR SUPPLY TO THE CAPTIVE MARKET

WHEREAS, under Section 45 (b) of Republic Act No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA) and Rule 11, Section 5 of its Implementing Rules and Regulations (IRR) the Energy Regulatory Commission (ERC) is mandated to review the bilateral power supply contracts entered into by distribution utilities (DUs) whose markets have not reached household demand level;

WHEREAS, under Section 25 of the EPIRA and Rule 5, Section 4 (e) of its IRR, the ERC is mandated to regulate the retail rates charged by DUs for the supply of electricity to their captive market based on the principle of full recovery of prudent and reasonable economic costs incurred, or such other principles that will promote efficiency as may be determined by the ERC;

WHEREAS, on February 19, 2013, the ERC issued a Notice in ERC Case No. 2013-005 RM, entitled *"In the Matter of the Promulgation of the 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"* (PSA Rules), which was posted on the ERC's website, directing all interested parties to submit their respective comments on the first draft of the PSA Rules, not later than March 22, 2013;

WHEREAS, on various dates, the ERC received comments on the first draft of the PSA Rules from interested parties, namely: a) Cagayan Electric Power and Light Co., Inc. (CEPALCO); b) Visayan Electric Company, Inc. (VECO); c) Quezon Power (Philippines) Ltd. Co., (QPL); d) Power Source Philippines, Inc. (PSPI); e) National Grid Corporation of the Philippines (NGCP); f) Philippine Independent Power Producers Association, Inc. (PIPPA); g) Next Power Consortium, Inc.; h) SN Aboitiz Power Group (SNAP); i) Aboitiz Power Corporation (APC); j) Philippine

Electricity Market Corporation (PEMC); k) Manila Electric Company (MERALCO); l) Department of Energy (DOE); m) Philippine Rural Electric Cooperatives Associations, Inc. (PHILRECA); and n) National Rural Electric Cooperative Association (NRECA);

WHEREAS, on October 16, 2013, the ERC issued a Notice of Posting and Publication in the aforementioned case, which was posted on the ERC's website, directing all interested parties to submit their respective comments on the second draft of the PSA Rules and setting the same for public consultations on December 2, 2013 in Pasig City for the Luzon stakeholders and on December 5, 2013 in Cebu City for the Visayas and Mindanao stakeholders;

WHEREAS, on various dates, the ERC received comments on the second draft of the PSA Rules from interested parties, namely: a) PHILRECA; b) CEPALCO; c) VECO; d) QPL; e) PSPI; f) NGCP; g) PIPPA; h) Next Power Consortium, Inc.; i) SNAP; j) APC; k) PEMC; l) MERALCO; m) DOE; and n) NRECA;

WHEREAS, on January 27, 2014, the ERC issued a Notice of Posting and Public Consultation setting the second draft of the PSA Rules for public consultations on February 18, 20 and 24, 2014 in Davao City, Cebu City and Pasig City for the Mindanao, Visayas and Luzon stakeholders, respectively;

WHEREAS, on February 18, 20 and 24, 2014, the ERC conducted public consultations wherein the comments of the interested parties were discussed;

WHEREAS, the ERC, likewise, conducted Focus Group Discussions (FGDs) with the stakeholders on April 22 to 24, 2014 in Pasig City, May 6 to 8, 2014 in Cebu City, May 13 to 14, 2014 in Cagayan De Oro City and May 20 to 22, 2014 in Pasig City, to thoroughly discuss major issues in relation to the draft PSA Rules, such as: a) the requirement of Competitive Selection Process (CSP); b) the proposed PSA template; c) the joint filing of PSA applications by the DUs and generation companies (GenCos); and d) the "walk-away" provision in the PSA, and the ERC likewise set the deadline for the submission of additional comments or position papers on May 30, 2014;

WHEREAS, on various dates, the ERC received position papers/additional comments from interested parties, namely: a) PIPPA; b)

APC; c) Mindanao Coalition of Power Consumers; and d) Association of Mindanao Rural Electric Cooperatives, Inc. (AMRECO);

WHEREAS, Article III of the draft PSA Rules requires the DU to undertake a transparent and competitive selection process before contracting for the supply of electricity to its captive market;

WHEREAS, in October 2014, the DOE issued for comments its draft Circular on the proposed Demand Aggregation and Supply Auctioning Policy (DASAP);

WHEREAS, in the proposed DASAP, all DUs will be mandated to comply with the auction requirement prescribed therein and other rules and guidelines as may be prescribed in the implementation of the DASAP;

WHEREAS, by reason of the issuance of the DASAP and pending the finalization thereof, the ERC held in abeyance its action on ERC Case No. 2013-005 RM and final approval of the draft PSA Rules;

WHEREAS, on June 11, 2015, the Department of Energy (DOE) issued Department Circular No. DC2015-06-008, *Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)*;

WHEREAS, on October 20, 2015, the DOE and the ERC approved the issuance of a Joint Resolution embodying their agreement on the CSP, particularly, that the ERC shall issue the appropriate regulations requiring the DUs to undertake a CSP for the PSAs they will enter into for the supply to their captive markets;

WHEREAS, the ERC and the DOE are convinced that there is an advantage to be gained by having a CSP in place, in terms of ensuring transparency in the DUs' supply procurement and providing opportunities to elicit the best price offers and other PSA terms and conditions from suppliers;

NOW, THEREFORE, pursuant to its mandate under Republic Act No. 9136, the ERC **RESOLVES**, as it is hereby **RESOLVED**, to adopt the following:

Section 1. ***Award of PSA to Generation Company.*** – A PSA shall be awarded to the winning Generation Company following a successful transparent and competitive selection process or by Direct Negotiation as

3

provided in Section 3 below. A CSP is successful if the DU receives at least two (2) qualified bids from entities with which the DU is not prohibited from entering into a contract for power supply, in accordance with Rule 11, Section 5 (b) of the EPIRA IRR.

Section 2. *Competitive Selection Process.* - Pending the issuance by the ERC of a prescribed CSP, a DU may adopt any accepted form of CSP. At a minimum, the terms of reference to be used by the DU shall include the following:

(a) Required/Contracted Capacity and/or Energy Volumes.

(b) Generation sources (Hydro, Coal, Natural Gas, Diesel and others).

(c) Method of procurement for fuel, if applicable.

(d) Cooperation/Contract Period.

(e) Tariff Structure unbundled to Capacity Fees, Variable and Fixed Operating and Maintenance (O&M) Fee, Fuel Fee and others, including the derivation of each component. Base Fee adjustment formula, if any.

(f) Form of Payment (Pesos or Foreign Currency Denominated).

(g) Penalties (if applicable).

(h) If applicable, details regarding any transmission projects or Grid connection projects necessary to complement the proposed generation capacity, including identification of the parties that will develop and/or own such facilities, any costs related to such projects and specification of the parties responsible for recovery of any cost related to such projects; and

(i) Other key parameters.

Section 3. *Direct Negotiation.* – Direct negotiation with interested party for the supply of electricity may be made by the DU after at least two (2) failed CSPs. A CSP is considered failed when during its conduct, any of the following circumstances exists:

a. No proposal was received by the DU;
b. Only one supplier submitted an offer; and
c. Competitive offers of prospective suppliers failed to meet the requirements prescribed under the Terms of Reference, as determined by the DU Bids and Awards Committee.

Section 4. *Applicability.* – The CSP requirement herein mandated shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution. For PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.

This Resolution shall take effect immediately following its publication in a newspaper of general circulation in the Philippines.

Let copies of this Resolution be furnished the University of the Philippines Law Center-Office of the National Administrative Register (UPLC-ONAR), Department of Energy (DOE), Philippine Electric Power Operators Association, Inc. (PEPOA), Philippine Rural Electric Cooperatives Association, Inc. (PHILRECA) and all DUs and GenCos.

Pasig City, 20 October 2015.

ERC
Office of the Chairman
K-2015-004-01226

JOSE VICENTE B. SALAZAR
Chairman

ALFREDO J. NON
Commissioner

(On Official Travel)
GLORIA VICTORIA C. YAP-TARUC
Commissioner

JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Commissioner

GERONIMO D. STA. ANA
Commissioner

pjs/fgbd/fscj

BAC	Bids and Awards Committee
BMCEC	Barangay-Member Consumer Electrification Committee
BOD	Board of Directors
BOI	Board of Investments
BSP	Bangko Sentral ng Pilipinas
CDA	Cooperative Development Authority
COC	Certificate of Compliance
CPB	Competitive Public Bidding
CRF	Capital Recovery Fee
CSP	Competitive Selection Process
DDP	Distribution Development Plan
DOE	Department of Energy
DOJ	Department of Justice
DTI	Department of Trade and Industry
DU	Distribution Utility
EPIRA	Republic Act No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001"
ERC	Energy Regulatory Commission
Genco/s	Generation Company/ies
GIS	General Information Sheet
ICP	Invitation for Comparative Proposals
IPPA	Independent Power Producer Administrator
IRR	EPIRA Implementing Rules and Regulations
ITB	Invitation to Bid
LCB	Lowest Calculated Bid
LCRB	Lowest Calculated Responsive Bid
MSEAC	Multi-sector Electrification Advisory Council
NEA	National Electrification Administration
NPC	National Power Corporation
NPP	New Power Provider
NSBO	Notice to Submit Better Offer
O&M	Operating and Maintenance
PSA	Power Supply Agreement
PSALM	Power Sector Assets and Liabilities Management
PSPP	Power Supply Procurement Plan
SAGR	Subsidized Approved Generation Rate
SEC	Securities and Exchange Commission
TOR	Terms of Reference
TWG	Technical Working Group
USP	Unsolicited Proposal

"DRAFT"

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

RULES GOVERNING THE PROCUREMENT, EXECUTION, AND EVALUATION OF POWER SUPPLY AGREEMENTS ENTERED INTO BY DISTRIBUTION UTILITIES FOR THE SUPPLY OF ELECTRICITY TO THEIR CAPTIVE MARKET

Pursuant to Sections 23, 25 and 45 (b) of Republic Act No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA), and Rule 5, Section 4 (e), (h) and Rule 11, Section 5 of the Implementing Rules and Regulations (IRR) of the EPIRA, the Energy Regulatory Commission (ERC) hereby adopts and promulgates these Rules:

ARTICLE I
OBJECTIVES

Section 1. These Rules seek:

(a) To prescribe guidelines on default contractual provisions and minimum standard format for power supply contracting;
(b) To provide clear and efficient process in contracting power supply;
(c) To streamline the review and approval process of Power Supply Agreements (PSAs);
(d) To promote transparency in the selection and contracting of Distribution Utilities (DUs), and provide for accountability measures among DUs' officials in-charge of contracting power supply; and
(e) To promote competition among Generation Companies (GenCos) in providing the best offer of power supply which will ensure reliability of supply of electricity at the least cost for the DUs' captive market in terms of the generation component of their retail rates.

ARTICLE II
GOVERNING PRINCIPLES

Section 2. The implementation of these Rules shall be governed by the following principles:

(a) Efficiency in the manner of procurement and process of evaluation and approval of power supply agreements;
(b) Transparency in the procurement of electric power supply for the captive market;
(c) Fair competition by providing equal opportunity to all eligible GenCos to participate in the electric power supply procurement process;
(d) Adoption of simple procurement process that is adaptable to the advances in modern technology and in accordance with best utility practice;
(e) Accountability of directors, officers, employees and any other persons involved directly or indirectly in the procurement process; and
(f) Reasonable and competitive pricing of generation rate charged to captive consumers.

ARTICLE III
SCOPE AND APPLICATION

Section 3. These Rules shall apply to all DUs whether on-grid or off-grid, GenCos, Independent Power Producer Administrators (IPPAs), and such other entities that may be authorized by the ERC to supply power to the DUs, except those which are expressly excluded under these Rules.

ARTICLE IV
DEFINITION OF TERMS

Section 4. As used in these Rules, the terms enumerated hereunder shall have the following respective meanings:

(a) ***"Aggregated Demand"*** refers to the consolidated level in MW or volume in MWh of electric power requirement of two (2) or more DUs.

(b) ***"Associate"*** refers to any person which, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person.

(c) ***"Bids and Awards Committee"*** refers to the committee established in accordance with these Rules to spearhead and manage a DU's Competitive Selection Process (CSP).

(d) ***"Captive Market"*** shall refer to electricity end-users who do not have the choice of a supplier of electricity, as may be determined by the ERC in accordance with the EPIRA.

(e) ***"Certificate of Compliance"*** shall refer to a license issued by the ERC in favor of a person or entity to operate a power plant or other facilities used in the generation of electricity pursuant to Section 6 of the EPIRA and Section 4 of its IRR.

(f) ***"Comparative Public Bidding"*** refers to the method of competitive selection process for unsolicited proposals as provided for in Article IX.

(g) ***"Competitive Public Bidding"*** refers to a method of procurement which is open to participation by any interested party and consists of the following processes in accordance with Article VIII: a) advertisement or publication of invitation to bid; c) pre-bid conference; c) bid evaluation; d) post-qualification; and e) award of contract.

(h) ***"Competitive Selection Process*** refers to a process wherein DUs, on their own or acting as a group, undertake a transparent and competitive procurement to secure supply of electricity based on the evaluation criteria adopted by the DUs in accordance with the requirements of these Rules.

(i) ***"Control"*** shall mean the power to direct or cause the direction of the management policies of a person by contract, agency or otherwise.

(j) ***"Distribution Development Plan"*** is the program for expansion, reinforcement and rehabilitation of the distribution system which is prepared by the DU and submitted to the DOE for integration with the Power Development Plan (PDP) and Philippine Energy Plan (PEP). In the case of electric cooperatives, such plans shall be submitted through the National Electrification Administration (NEA) for review and consolidation.

(k) ***"Distribution Utility"*** shall refer to any electric cooperative, private corporation, government-owned utility or existing local government unit which has an exclusive franchise to operate a distribution system in accordance with its franchise and the EPIRA.

(l) ***"Energy Regulatory Commission"*** shall refer to the regulatory agency created under Section 38 of the EPIRA.

(m) ***"Emergency Supply Procurement"*** shall refer to the procurement by DUs of energy supply under the circumstances contemplated in Article XI, Section 41 hereof.

(n) ***"Force Majeure" or "Fortuitous Event"*** refers to an extraordinary event which is not foreseen, or which, though foreseen, is inevitable to happen, such event may be produced by two general causes: (1) by nature, such as but not limited to a typhoon, storm, tropical depression, flood, drought, volcanic eruptions, earthquake, tidal wave, or landslide; and (2) by the act of man, such as but not limited to war, conflagration, inundation, sabotage, blockade, revolution, riot, insurrection, civil unrest, or any violent, or threatening actions; or any system emergency that may affect the delivery of power by the GenCo.

(o) ***"Generation Company"*** shall refer to any person or entity authorized by the ERC to operate facilities used in the generation of electricity.

(p) ***"Grid"*** refers to the high voltage backbone system of interconnected transmission lines, substations and related facilities.

(q) ***"Independent Power Producer Administrator"*** refers to qualified independent entities appointed by the Power Sector Assets and Liabilities Management (PSALM) Corporation who shall administer, conserve and manage the contracted energy output of National Power Corporation (NPC) Independent Power Producer (IPP) contracts.

(r) ***"National Electrification Administration"*** refers to the government agency created under Presidential Decree 269, as amended by RA 10531.

(s) ***"National Power Corporation – Small Power Utilities Group"*** refers to the functional unit of NPC created to pursue missionary electrification function and responsible for providing power generation and its associated power delivery systems in areas that are not connected to the transmission system.

(t) ***"Off-Grid"*** refers to areas that are not connected to the main high voltage backbone system.

(u) ***"Power Supply Agreement"*** refers to the agreement, regardless of nomenclature, between a DU and a GenCo for the supply of capacity and/or energy intended for the DU's captive market.

(v) ***"Power Supply Procurement Plan"*** refers to the DU's plan for the acquisition of a variety of demand-side and supply-side resources to cost-effectively meet the electricity needs of its captive customers.

(w) ***"Project Cost"*** refers to the total funds needed to complete the project or work that consists of a Direct Cost and Indirect Cost. The Project Costs are any expenditures made or estimated to be made, or monetary obligations incurred or estimated to be incurred to complete the project.

(x) ***"Retail Rate"*** shall refer to the total price paid by end-users consisting of the charges for generation, transmission, and related ancillary services, distribution, supply and other related charges from electric services.

(y) ***"Solicited Proposals"*** refer to project proposals sought for by the DUs, wherein the DU selects a partner/s through competitive public bidding and bids are solicited through a published Invitation to Bid.

(z) ***"Subsidized Approved Generation Rate"*** refers to the generation rate expressed in peso per kilowatt-hour, which the ERC has approved for an Electric Cooperative (EC) to charge its consumers for electricity generation services in the off-grid area.

(aa) ***"Unsolicited Proposal"*** refers to project proposals submitted by GenCos or any entity authorized by ERC to supply electricity to the captive market, not in response to a formal solicitation or request issued by a DU to provide electric power supply to the DU.

ARTICLE V
POWER SUPPLY PROCUREMENT PLANNING

Section 5. ***Power Supply Procurement Planning.*** – Each DU shall annually develop and submit its Power Supply Procurement Plan (PSPP) as part of its Distribution Development Plan (DDP) to the Department of Energy (DOE).

Section 5.1 The PSPP shall contain the following:

(a) 10-year historical data on peak demand, energy sales and energy purchase;
(b) List of existing power supply agreements with corresponding status, expiration period, and actual utilization rate;
(c) 10-year monthly peak demand forecast and energy sales;
(d) Indicative energy and demand for Competitive Selection Process (CSP);
(e) Current Subsidized Approved Generation Rate (SAGR) for off-grid DUs to be passed-on to consumers;
(f) Current power demand and supply status of the DU;
(g) Indicative schedule for CSP taking into consideration the required construction period in the case of new generation plants and existing power plants whose contracts with DUs are expiring; and
(h) Current power supply mix and projected 10-year power supply mix to satisfy legal requirements and to meet the projected demand, taking into consideration local development scenarios, plans, and market conditions.

Section 5.2. The facts and projections as declared in the PSPP shall be attested to by the DU's Board of Directors (BOD) through a Board Resolution and/or notarized Secretary's Certificate and shall be submitted to the DOE not later than the 15th day of March of each year. The PSPP submitted to the DOE shall be published not later than the 30th day of May of each year through electronic publication including via the e-portals of DOE, NEA, and the website of the DU.

ARTICLE VI
PROCUREMENT PROCESS

Section 6. ***Competitive Selection Process (CSP).*** – A DU shall undertake a transparent and competitive procurement process for the supply of electricity to its captive market.

Section 7. ***Modes of Awarding PSA to a Generation Company.*** – All DUs shall procure their power supply requirement for their captive market through competitive public bidding in accordance with Article VIII hereof, except as provided in the following instances:

(a) When the DU receives an unsolicited proposal in accordance with Article IX;
(b) In case of two (2) failed biddings, the DU may procure supply through direct negotiation in accordance with Article X;
(c) Emergency supply procurement in accordance with Article XI; and
(d) Circumstances falling under Article XII.

ARTICLE VII
BIDS AND AWARDS COMMITTEE

Section 8. ***Bids and Awards Committee (BAC).*** – The DU, through its BOD, shall establish a BAC to spearhead and manage the CSP. The BAC shall comply with the policy and procedures in the conduct of CSP, as provided in these Rules. The BAC shall be accountable for its decision in the conduct of the CSP; Provided however, that the DU shall be responsible for any dispute or litigation arising from the CSP.

The DU, through its BOD, shall designate five (5) members of the BAC and their respective qualifications:

1) An officer or employee of the DU knowledgeable and/or experienced in the technical operations of the DU;
2) An officer or employee of the DU with knowledge and/or experience in any local or international competitive bidding procedures;
3) An officer or employee of the DU with accounting or finance background who has knowledge and/or experience on electricity pricing;

4) A registered captive customer preferably with knowledge/experience in the fields of accounting, economics, finance, law, and engineering; and
5) A registered captive customer preferably with knowledge/experience in competitive public bidding.

For the first three members, such DU-BAC member must be of managerial or supervisory in rank and shall have experience or knowledge of at least two (2) years in his or her field of expertise.

The representatives of the captive customer shall not be directly or indirectly employed by the DUs.

Prior to the performance of their duties and responsibilities, the members of the BAC shall attend the seminar or training on procurement and execution of PSA to be provided by the ERC.

The Chairperson and Vice Chairperson shall be selected by the DUs' BOD. The Chairman shall only vote in case of a tie.

The BAC shall notify the ERC of the conduct of the CSP five (5) calendar days before the first publication of the Invitation to Bid (ITB) or Invitation for Comparative Proposals (ICP).

The BAC shall be responsible for all aspects of the pre-bidding, and bidding process for solicited and unsolicited proposals. A quorum of the BAC shall be composed of a simple majority of all its members.

A decision of the BAC shall always require three (3) votes of all members present during the deliberation.

The BAC shall submit its report to the ERC regarding its findings and recommendations as part of the pre-filing requirements.

Section 9. ***BAC Technical Working Group (TWG) and Secretariat.*** – The DU-BOD shall designate the BAC Secretariat and the BAC shall designate the BAC-TWG. Both the BAC Secretariat and the BAC-TWG shall be headed by a regular or permanent employee of the DU, preferably an officer of managerial or supervisory in rank, to assist the BAC in the performance of its functions.

The BAC-TWG shall be composed of officials and personnel of the DU having knowledge, experience and/or expertise in the technical, legal and financial aspects of the subject procurement.

The BAC-TWG shall assist the BAC in the technical components of the CSP, such as the development of the Terms of Reference (TOR), evaluation of bids and post-qualification.

The BAC Secretariat shall provide administrative support to the BAC for this purpose and serve as the keeper and custodian of all records and documents relating to all CSPs conducted by the DU.

The BAC Secretariat shall fully document each step of the CSP and prepare and keep written minutes of all the BAC meetings and proceedings.

Section 10. ***Qualification and Restriction on Members of BAC, BAC-TWG and Secretariat.*** – Any member of the BAC, BAC-TWG and BAC Secretariat shall not be related within the fourth civil degree of consanguinity or affinity to any officer / authorized representative of any Authorized Suppliers or Generation Company including the latter's beneficial owners, Provided further, that the BAC, BAC-TWG members and BAC Secretariat must not have been employed with a GenCo or any authorized suppliers for the past two (2) years prior to the conduct of the CSP.

Any member of the BAC, BAC-TWG, BAC Secretariat, and their relatives by affinity or consanguinity within the fourth civil degree are prohibited from: (1) entering any contract with the winning bidder within three (3) years from the award of the PSA; and (2) being employed by the winning bidder for the same period.

All members of the BAC, BAC-TWG, and BAC Secretariat must sign confidentiality agreements to be valid and subsisting for the duration of the procurement process. In the event that the information obtained during the procurement process was granted confidential treatment by the ERC, the confidentiality agreement shall be deemed valid and subsisting for the duration of the term of the granted confidential treatment.

Section 11. ***Joint BAC, TWG and Secretariat of Aggregated DUs.*** – DUs may choose to aggregate their demand or energy requirements, solely for the purpose of procuring their supply of electricity through a competitive public bidding, Provided, however, that individual PSAs shall be entered into between the winning bidder and the individual member DU.

In the case of aggregated DUs, its Joint BAC, BAC-TWG, and BAC Secretariat shall be established through a Memorandum of Agreement between the Aggregated DUs. The qualifications, responsibilities, and restrictions provided in Sections 8, 9 and 10 shall apply to the members of the Joint BAC, BAC-TWG, and BAC Secretariat.

Section 12. ***CSP Observers.*** – To assure all parties that the CSP is conducted in an open, transparent, efficient, and equitable manner, the BAC or Joint BAC shall invite Observers to witness procurement proceedings in accordance with these Rules.

The following shall be part of the CSP Observers:

(1) A representative from DOE;
(2) A representative from NEA, in case of electric cooperatives;
(3) A representative from NPC-Small Power Utilities Group (NPC-SPUG), in case of off-grid ECs;
(4) Consumer representatives from the Department of Trade and Industry (DTI) – accredited consumer groups, local chamber of commerce, or for ECs, representatives from Multi-sector Electrification Advisory Council (MSEAC) and Barangay-Member Consumer Electrification Committee (BMCEC).

The consumer groups to be invited by the concerned DU/s to serve as Observers shall not be more than three (3) groups. The selected consumer groups shall only be allowed to send not more than two (2) representatives each.

CSP Observers shall be allowed to be present in the proceedings but shall not participate and have no voting rights, or act in any way that may delay the conduct of the CSP. Observers shall be given written and e-mail invitations at least five (5) calendar days before each of the scheduled procurement stages. The invitation shall include a copy of the terms of reference as published by the BAC or Joint BAC.

An invitation, in writing and by e-mail, to Observers shall be extended at each of the following stages of the CSP:

(a) Pre-bid conference;
(b) Submission and Opening of Bids;
(c) Bid Evaluation;
(d) Post-qualifications;
(e) Awarding; and
(f) Contract Signing.

Observers shall be allowed access to the following documents upon their request, and upon execution of a confidentiality undertaking:

(a) Minutes of BAC or Joint BAC meetings;
(b) Abstract of Bids;
(c) Post-qualification summary report;
(d) Video recording of CSP proceedings;
(e) Proposals; and
(f) Bid Documents and other related documents.

The Observers shall have the following responsibilities:

a. To immediately inhibit and notify in writing the procuring entity concerned of any actual or potential interest in the contract to be bid;
b. To prepare a report, either jointly or separately, indicating their observations made on the procurement activities conducted by the BAC or Joint BAC. The report shall assess the extent of the BAC or Joint BAC's compliance with these Rules and areas of improvement in the BAC's proceedings; and
c. To submit the report in accordance with Appendix "D" hereof to the DU-BOD and furnish a copy to the ERC. If no report is submitted by the Observer within seven (7) calendar days after each procurement activity, it is presumed that the bidding activity conducted by the BAC or Joint BAC followed the correct procedure.

The DU is required to make and keep, as part of the BAC or Joint BAC records, a complete and unedited video record of the proceedings in cases where no Observer is present.

The absence of Observers will not nullify the CSP proceedings; Provided, that Observers have been duly invited in writing and e-mail within the prescribed period.

ARTICLE VIII
COMPETITIVE PUBLIC BIDDING (CPB)

Section 13. ***Bidding Documents.*** - The Bidding Documents shall consist of the following:

(a) Invitation to Bid;
(b) Instruction to Bidders;
(c) Terms of Reference and other specifications;
(d) Eligibility Requirements;
(e) Form of Acceptance of Bidding Procedures;
(f) Form and Amount of Bid Security;
(g) Form and Amount of Performance Security and Warranty;
(h) Certification or undertaking that the Bidder or his duly authorized representative shall:

    i. Attest to the responsibilities of the Bidder; and
    ii. Authorize the BAC or its duly authorized representative(s) to verify any or all of the documents submitted for the eligibility check/post qualification;

(i) Technical and Financial Bid Forms; and
(j) Draft Contract, and General and Special Conditions of the Contract.

Section 13.1. ***Instruction to Bidders.*** – Instruction to Bidders, which establishes the procedures of the bidding, shall be clear, comprehensive and fair to all bidders.

Section 13.2. ***Terms of Reference (TOR).*** – The terms of reference shall include the following, but not limited to:

(a) Required/Contracted Capacity and/or Energy Volumes;
(b) Demand Requirement (baseload, mid-merit or peaking);
(c) Method of procurement for fuel, if applicable;
(d) Cooperation/Contract Period which shall not exceed ten (10) years;
(e) Fixed Bid Price in Philippine Peso per kilowatt-hour (PhP/kWh) inclusive of fuel cost but excluding any penalties and/or discounts to be implemented for the duration of the contract period;
(f) Fuel Source and projected fuel cost over the lifetime of the contract;
(g) Form of Payment;
(h) Penalties;
(i) Date of Commencement of supply; and
(j) Other key parameters.

The TOR, once published, can no longer be amended except for the Date of Commencement of Supply. The Date of Commencement of Supply may not be extended by the DU unless such extension is beneficial to its consumers, subject to the following conditions: (1) prior written notice to the ERC one (1) month before the original Date of Commencement of Supply; and (2) prior approval of the ERC.

The TOR shall form part of the PSA entered into by the parties as a result of a CSP. In case of conflict between the TOR and the PSA, the former shall prevail. Any violation of the duly published TOR and approved PSA shall result to the forfeiture of the performance bond and termination of the PSA.

In case supply was not provided on the Date of Commencement of Supply and the PSA has already been provisionally approved or approved with finality, the winning bidder shall be obliged to pay for the difference between the cost of the replacement power incurred by the DU and the provisionally or finally approved generation rate. Likewise, the winning bidder shall be subjected to penalties as provided for under Article XVII.

Section 13.3. ***Draft Contract.*** – The Draft Contract should clearly define the basic and legal relationship of the parties, their rights and responsibilities. The Draft Contract shall comply with the minimum terms and conditions provided for under Appendix "A" hereof.

Section 13.4. ***Access to Information.*** – In all stages of the preparation of the Bidding Documents, the DU shall ensure equal access to information. Prior to their official release, no aspect of the Bidding Documents shall be divulged or released to any prospective bidder or any person who has direct or indirect interest in the supply requirement to be procured.

No official or employee of the DU, nor shall any Bidder be entitled to any information regarding the Bidding Process, other than what is contained in the Bidding Documents, the Bidding Procedure, in Supplemental Bid Bulletins, and in the official announcement of the Bid results.

Section 14. ***Publication and Posting.*** – The BAC or Joint BAC shall cause the publication and posting of the Invitation to Bid (ITB) for the procurement opportunity in accordance with these Rules for the period specified herein.

The BAC or Joint BAC shall publish the ITB at least once (1x) every week for two (2) consecutive weeks in at least one (1) newspaper of general circulation. The weekly publications must not be less than seven (7) calendar days apart. The publication shall contain the TOR, procurement activity schedule, and deadline for the submission of bids.

The BAC or Joint BAC shall post the ITB on its website, if there is any, in the DOE E-based portal, and in the NEA website in the case of ECs. The BAC or Joint BAC shall continuously update the DOE and NEA on the status of the procurement activity through their respective E-based portals.

The BAC or Joint BAC shall likewise ensure that all bid bulletins and related announcements shall be posted at the DOE E-based portal and NEA website, in the case of ECs.

In cases where the DUs encounter problems in posting the necessary information in their respective E-based portals, the DUs shall inform the DOE and NEA for assistance in the required posting.

The BAC or Joint BAC may also opt to publish the ITB in one (1) local newspaper of local circulation in the region, province, city or municipality indicating the CSP schedules, among other necessary information for the bidders, once (1x) weekly for two (2) consecutive weeks. The weekly publications must not be less than seven (7) calendar days apart.

Section 15. ***Pre-Bid Conference.*** – A pre-bid conference shall also be conducted by the concerned DU at least thirty (30) calendar days before the deadline for the submission of bids to clarify any provisions, requirements and/or terms and conditions of the bidding documents and/or any other matter that the prospective bidders may raise.

Nothing stated at the pre-bid conference shall modify any provisions or terms and conditions of the bidding documents unless such is made as a written amendment thereto by the concerned DU. Any amendments shall be issued by the DU concerned to all bidders not later than fifteen (15) calendar days before the deadline of submission of bids to allow the participants to consider the same in the preparation of their bids. The notice of amendment in the form of a bid bulletin shall be duly acknowledged by each bidder prior to the submission of its bid and shall be so indicated in the bid. A summary of the pre-bid conference proceedings shall also be issued to all prospective bidders by the DU concerned. Attendance to the pre-bid conference by prospective bidders shall not be mandatory.

Section 16. ***Eligibility Requirements.*** – Included in its bid submission, prospective bidders shall submit the following eligibility requirements, if applicable:

(a) Executive Summary - Brief description of the Bidder's company history and structure, including relevant capabilities in the construction, operation and maintenance of a power plant;

(b) Organization Structure - Basic information of the Bidder's legal status and organizational chart; and

(c) Legal Documents - The Bidder shall submit the following:

(i) Registration Certificate issued by the Securities and Exchange Commission (SEC), DTI for sole proprietorship, or Cooperative Development Authority (CDA) for cooperatives;

(ii) Latest General Information Sheet (GIS), if available; and

(iii) Power of Attorney and other documents - Each Bidder must submit the following documents:

i. Original or Certified true copies of all corporate/legal documents (e.g. Board Resolution, Powers of Attorney) evidencing grant of authority to the individual submitting the Bid and making representation on behalf of the Bidder.

ii. Certification by the Bidder to the effect that it is not prohibited or restricted in any manner under applicable law or any agreement or license from participating in the Bidding Process of the Transaction.

iii. Sworn Undertaking that the Bidder, if applicable, as well as their affiliates, assigns and successors-in-interest, shall abide by the decisions of the DU-BAC, shall hold the DU, its Board Members, Officers and Management, and BAC free and harmless from any claim or cause of action arising from the conduct and award of the Project;

(iv) Attestation against Corruption

(v) Attestation of No Conflict of Interest – The Bidder must disclose detailed information regarding any existing, potential or future conflict of interest that a Bidder may have with the BAC or Joint BAC.

(d) Technical Capability Information - The Bidder shall submit the following to demonstrate compliance with the technical criteria established in the Terms of Reference:

(i) List of projects undertaken over the last ten (10) years;

(ii) List of electricity generation plants that the Bidder has operated for the last five (5) years;

(iii) Track records for the last five (5) years in operating the power plant;

(iv) Key Personnel Experience – curriculum vitae of key personnel of the prospective bidder showing they have sufficient experience in the electric power industry particularly in the generation sector; and

(v) Other relevant information showing proof of the technical capabilities of the Bidder that would be helpful to the BAC or Joint BAC.

(e) Financial Information - The Bidder shall submit the following:

(i) Audited Financial Statement, showing, among others, the prospective bidder's total and current assets and liabilities, stamped "received" by the BIR for the preceding calendar year from the date of bid submission;

(ii) Details of financial and operating background for the two (2) recent full financial years demonstrating the Bidder's financial viability;

(iii) Details of equity and financing plan indicating the capital structure and source of funds with supporting documents;

(iv) Letter of Credit, Bank Guaranty or Committed Line of Credit; and

(v) Any other relevant information regarding financial track record and capabilities of the Bidder that it believes would be helpful to the BAC or Joint BAC.

Section 17. ***Submission of Bids.*** – Bidders shall be required to submit their bids on or before the deadline stipulated in the Instructions to Bidders, as well as in the published ITB.

In no case shall the deadline for submission of bids be less than sixty (60) calendar days following the last publication of the Invitation to Pre-Qualify and Bid (Bid Submission Deadline).

Bids shall be submitted in two (2) separate sealed envelopes. The first main envelope shall contain the technical component of the bid, including the eligibility requirements under Section 16 of these Rules. The technical bid proposal and eligibility requirements shall be in separate sealed envelopes inside the first main envelope. The second main envelope shall contain the financial component of the bid.

In case of a financial bid submission, the bidder shall submit, as its technical proposal, the sources of electricity that it is proposing to supply to the DU, as well as the mechanism or protocol on how the manner of supply will be implemented.

All envelopes shall bear the name of the Bidder in capital letters and addressed to the BAC or Joint BAC of the concerned DU. They shall be marked "Do Not Open Before (date and time of opening of bids)". The envelopes shall be appropriately labeled as “Eligibility Requirements and Technical Proposal” and “Financial Proposal”.

Bids submitted after the Bid Submission Deadline shall be rejected and returned unopened to the Bidder. The BAC shall ensure that this circumstance is recorded in the minutes of the bid opening.

Section 18. ***Validity of the Bid.*** – A Bid must be valid for a period of not less than one hundred eighty (180) calendar days from the deadline for submission and opening of bids (Bid Validity Period). Bid with a shorter Bid Validity Period shall be rejected outright. The BAC or Joint BAC may request for extension of the Bid Validity Period should it become clear that the award of contract cannot be made on time.

Section 19. ***Bid Security.*** – Each bidder shall submit, as part of its bid submission, a Bid Security in accordance with the following terms and conditions:

(a) It is an amount expressed in Philippine Pesos in the form of:

i. Cash or cashier's/manager's check issued by a Universal or Commercial Bank or any other banks certified by the Bangko Sentral ng Pilipinas (BSP) as authorized to issue such financial instrument;

ii. Bank draft/guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank: Provided, however, that it shall be confirmed or authenticated by a local Universal or Commercial Bank, if issued by a foreign bank; and

iii. In case the Bid Security is issued by an international bank, said security has to be confirmed and validated by its local branch in the Philippines or by a bank that is duly registered and authorized by the BSP. The Bid Security shall be expressed in or converted to Philippine Peso at the exchange rate prevailing on the date of its issuance.

(b) The amount must be equivalent to one-month contract cost of the proposed power supply agreement computed using the bid price offered by the bidder;

(c) The Bid Security shall be issued in favor of the DU;

(d) The Bid Security shall guarantee that each bidder complies with its obligation under the bidding procedures during the Bid Validity Period, or any extension thereof. Refusal of the Winning Bidder to accept the award shall cause the forfeiture of his Bid Security; however, the Bid Security shall not be forfeited should the failure of the winning bidder to accept the award and enter into a contract be caused by force majeure or through no fault of its own;

(e) The Bid Security shall be governed by Philippine Laws; and

(f) The Bid Security shall provide for a contact person and address, telephone number and facsimile of the issuing bank for notification and demand.

The Bid Security shall guarantee that each bidder complies with its obligations under the bidding procedures during the Bid Validity Period, or any extension thereof.

A Bid submitted either (i) without the required Bid Security, (ii) in an amount less than the required amount, (iii) whose effectivity will expire prior to the Bid Validity Period, or (iv) which is materially defective, shall be rejected outright and returned to the Bidder.

The required bid security shall be valid for a reasonable period but in no case beyond one hundred eighty (180) calendar days from the deadline for submission and opening of bids. The execution of the ensuing contract shall be made within the Bid Validity Period and Bid Security Validity Period. Bid securities shall be returned to all unsuccessful bidders as soon as the Notice of Award is issued by the DU.

Section 20. ***Evaluation of Bids.*** – The evaluation of bids shall be undertaken in three (3) stages in accordance with the procedures described below:

a) Stage 1 – evaluation of bidders' eligibility in accordance with the requirements set forth in Section 16.

Only those bids that have been determined to have positively passed the first stage of evaluation shall be considered for the second stage of evaluation.

The sealed envelopes containing the Technical and Financial Proposals of Bidders determined to be ineligible pursuant to Section 16 shall be returned unopened; and

b) Stage 2 – evaluation and assessment of the technical and operational capability of the proposal vis-à-vis the prescribed requirements and minimum standards prescribed in the bidding documents. For purposes of this evaluation stage, the minimum technical and operational capability shall be as provided in Appendix "C" hereof.

Only those bids that have been determined to have positively passed the first and second stages of evaluation shall be considered for the third stage of evaluation.

In case the eligible bidder fails to pass the second stage of evaluation, the sealed envelope containing its financial proposal shall be returned to it unopened.

c) Stage 3 – evaluation of the financial proposal shall involve the assessment and comparison of the financial proposals of the bidders.

The eligible bidder with the Lowest Calculated Bid (LCB), who passed both the technical and financial requirements of the DU, shall advance to the post-qualification stage, followed by the next Lowest Calculated Bidder in case it fails post-qualification.

Section 21. ***Post-Qualification.*** – The LCB shall undergo post-qualification in order to determine whether the Bidder concerned complies with and is responsive to all the requirements and conditions as specified in the Bidding documents.

Within five (5) calendar days after the opening and evaluation of the bids, the BAC shall approve the Abstract of Bids, and the Bidder with the LCB shall be notified through electronic mail, or in writing, that it shall undergo post-qualification and submit the post-qualification requirements within five (5) calendar days from receipt of the notice.

If the BAC or Joint BAC determines that the bidder with the LCB passes all the criteria for post-qualification, it shall declare the said bid as the Lowest Calculated Responsive Bid (LCRB), and recommend to the DU-BOD the award of contract to the said bidder.

If, however, the BAC or Joint BAC determines that the bidder with the LCB fails the criteria for post-qualification, it shall immediately notify the said bidder electronically or in writing of its post-disqualification and the grounds for post-disqualification. The BAC or Joint BAC shall then proceed with the post-qualification of the bidder with the next LCB.

Each post-qualification process shall be completed in not more than fifteen (15) calendar days from determination of the LCB. In exceptional cases, the post-qualification period may be extended by the DU-BOD, but in no case shall the aggregate period exceed thirty (30) calendar days.

Section 22. ***Award of Contract.*** – The BAC shall recommend to the DU-BOD the award of contract to the bidder with the LCRB.

To facilitate the approval of the award, the BAC or Joint BAC shall submit the following supporting documents to the DU-BOD:

a) Resolution of the BAC or Joint BAC recommending the award;

b) Abstract of Bids; and
c) Other pertinent documents required by existing laws, rules and/or the DU.

Within ten (10) calendar days from receipt of the recommendation of the BAC or Joint BAC, the DU-BOD shall approve/disapprove the said recommendation. Within the same period provided herein, the BAC or Joint BAC shall notify, in writing, including via electronic mail, the losing bidders of its decision.

In the event the DU-BOD shall disapprove such recommendation, such disapproval shall be based only on valid, reasonable, and justifiable grounds to be expressed in writing, copy furnished the BAC or Joint BAC. The BAC or Joint BAC shall then proceed with the post-qualification of the Bidder with the next LCB.

Section 23. ***Notice of Award.*** – In case of approval by the DU-BOD, the BAC or Joint BAC shall immediately issue the Notice of Award to the Winning Bidder with the LCRB. The "Notice of Award", which is issued by the DU, shall indicate, among others, that the winning Bidder must submit within twenty (20) calendar days from official receipt of the "Notice of Award" the following:

(a) prescribed Performance Security;
(b) proof of commitment of the required equity contribution, as specified by the DU:
    i. in the case where the winning bidder is a corporation - e.g., treasurer's affidavit attesting to actual paid-up capital, subscription agreement(s) between a shareholder(s) of the Winning Bidder and the Winning Bidder itself covering said equity contribution, or shareholders agreement between and amongst two (2) or more shareholders of the Winning Bidder undertaking to contribute/subscribe the required equity contribution; or
    ii. in the case of a consortium - an undertaking of the members thereof to infuse the required equity contribution to the consortium.
(c) proof of firm commitments from reputable financial institution to provide sufficient credit lines to cover the total estimated cost of the project for prospective generation facilities;
(d) in the case of a consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the Project Proponent under the contract;

(e) in case a special purpose company is formed for purposes of undertaking the project, proof of registration in accordance with Philippine laws; and

(f) such other conditions imposed by the DU.

Failure to submit the above-listed requirements within the prescribed twenty (20)-day period will result to the forfeiture of the bid security. Within five (5) calendar days upon receipt of the foregoing requirements for award, the DU-BOD shall determine and notify the winning bidder of its compliance of all the conditions stated in the said notice.

A Notice of Award shall be made within the Bid Validity Period as herein provided.

Section 24. ***Notice to Proceed.*** – Upon determining the compliance of the Winning Bidder to the conditions set forth in the Notice of Award, the DU shall issue a Notice to Proceed stating therein that all conditions stated in the Notice of Award have been complied with.

Section 25. ***Execution/Approval of the Contract*** – The authorized signatory/ies of the Winning Bidder and the DU shall execute and sign the power supply agreement, as approved, in accordance with minimum terms and conditions set forth in Appendix "A", within ten (10) calendar days from receipt by the winning bidder of the Notice to Proceed from the DU that all conditions stated in the Notice of Award have been complied with.

In the event of refusal, inability or failure of the Winning Bidder to enter into a contract with the DU within the time provided therefor, the DU concerned shall forfeit its Performance Security.

In case the refusal, inability or failure to enter into a contract is caused by the DU, such failure shall be considered a violation of the instant Rules. Accordingly, a show cause order shall be issued against the DU. If the refusal, inability or failure to enter into a contract by the DU is found to be unjustifiable, the concerned DU's BOD and officers shall be penalized in accordance with Article XVII hereof.

The DU may consider awarding the contract to the Bidder with the next LCRB in the event that the Winning Bidder refuses, is unable, or fails to enter into a contract with a DU or fails to submit the requirements for post-qualification/Notice of Award.

Section 26. ***Lock-down provision.*** – The Winning Bidder shall not be allowed to sell and/or assign the executed power supply agreement resulting from a successful CSP to any other entity, except on the following instances: (1) assignment to the Winning Bidder's subsidiary project company, provided that the Deed of Assignment shall state that the

Winning Bidder and its stockholders shall be jointly and severally liable for any violation of the PSA terms and these Rules committed by its Assignee project company; and (2) upon ERC's approval and determination of the assignee or buyer's legal, technical and financial eligibility as provided for under Section 48 hereof.

Section 27. ***Duration of Competitive Public Bidding.*** The entire process of CPB, including the award of contract, should be completed within six (6) months from the first publication of the invitation to pre-qualify and to bid.

In the event of failed bidding under the circumstances mentioned in Article X, DUs are given a fresh period of six (6) months from the publication of the second (2^{nd}) invitation to bid within which to conclude the second (2^{nd}) round of competitive public bidding. A certification shall be submitted by the DU as part of the documentary requirement attesting to the completion of the CSP process within the prescribed period.

ARTICLE IX
UNSOLICITED PROPOSAL

Section 28. ***Requisites for Unsolicited Proposal (USP).*** – A DU may accept a USP for the supply of electricity, provided the following conditions are present:

(a) The project subject of the USP must involve: (i) a new concept or technology, or (ii) that which uses an innovative design, formula, method, process, or system of generating electricity which is new (within one year from its introduction), or untried in the Philippines;
(b) The project subject of the USP shall have an added value or direct benefit to the local community where the project will be built or to the national economy;
(c) The proposed rates under USP shall be benchmarked against the rates from previously approved PSAs;
(d) The proposed rate in the USP will result to a rate, 5% lower than the DU's current blended generation rate;
(e) Conforms with the capacity cap, wherein the contracted capacity subject of the USP shall not exceed 10MW or 3% of the DU's annual peak demand, whichever is higher;
(f) The USP must involve a project that have a superior efficiency level with resulting lower operations cost when matched to comparable projects;
(g) The USP does not result to stranded PSA capacity and energy quantities on the part of the DU; and

(h) The USP involves no direct government guarantee, subsidy or equity, and will not result to any form of subsidy between different customer classes of the DU.

For purposes of determining compliance to the first condition, the person who submits a USP must secure the following: (1) certification from the Board of Investment (BOI) endorsing it as a pioneer enterprise; and (2) Certification from DOE that the said project is new and untried in the Philippines.

Acceptance of the USP shall not result to a valid PSA, unless the process provided under this Article has been complied with.

Section 29. ***Persons Ineligible to Submit a USP.*** – A person associated with the DU shall not be allowed to submit an unsolicited proposal to the said DU. An "associate" means any person which, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. As used herein, "control" shall mean the power to direct or cause the direction of the management policies of a person by contract, agency or otherwise.

Section 30. ***Submission of a Complete USP.*** – For a USP to be considered by the DU, the proponent has to submit a complete proposal, which shall include a cover letter, feasibility study or business proposal which should indicate relevant assumptions, company profile, draft contract which adheres to the minimum terms provided in Appendix "A" of these Rules, and other documents that are needed, even if proprietary in nature. The cover letter shall indicate the basic information in the USP, such as its offered capacity and implementation period, and source of supply, among others, and shall include the company profile of the unsolicited proponent. The feasibility study or business proposal, draft contract, and other documents that are needed, if proprietary in nature, shall be submitted in a sealed envelope.

The DU shall acknowledge receipt of the proposal within ten (10) calendar days from receipt of the submitted USP. The DU shall advise the proponent whether the proposal is complete or incomplete within fifteen (15) calendar days from submission thereof.

If incomplete, the DU shall return to the proponent its submission indicating what information is lacking or necessary and give the proponent ten (10) calendar days from receipt thereof to complete the proposal. If the proponent fails to complete its submission within ten (10) calendar days, the USP is deemed rejected.

Section 31. ***Evaluation and Acceptance of USP.*** – The DU shall endorse the complete proposal to its BAC or Joint BAC. The BAC or Joint

BAC shall verify and evaluate the USP vis-à-vis the pre-conditions set forth in Section 28.

If the USP is found to be compliant with the criteria in Section 28, the BAC-TWG or Joint BAC-TWG shall prepare the draft contract. Thereafter, the BAC or Joint BAC shall endorse the USP and the Draft Contract to the DU-BOD for its acceptance.

The DU shall notify in writing the proponent whether it accepts or rejects the USP within thirty (30) calendar days from the date the proponent was notified that its USP is complete. If it accepts the USP, the DU shall send a Letter of Acceptance to the USP proponent. The Letter of Acceptance shall include the copy of the Draft Contract as prepared by the BAC-TWG or Joint BAC-TWG and approved by the DU-BOD.

If it accepts the Draft Contract, the proponent shall submit its written conformity with the Draft Contract. The DU shall now designate the proponent as the "Original Proponent" and endorse the Draft Contract to the BAC or Joint BAC for the conduct of the Comparative Bidding Process.

If the proponent does not accept the terms in the Draft Contract, then it is deemed to have withdrawn its USP.

Sections 16, 19, 21, 22, 23, 24 and 25 of Article VIII shall also apply to USPs.

Section 32. ***Tender Documents.*** – The BAC or Joint BAC, through its TWG shall prepare the Tender Documents which shall include the approved Draft Contract. The eligibility and tender documents shall be prepared along the lines specified under Article VIII. The Draft Contract as approved by the BAC or Joint BAC shall be considered final and non-negotiable by the comparative proponents. Proprietary information shall, however, be respected, protected, and treated with utmost confidentiality. As such, it shall not form part of the bidding/tender and related documents.

Section 33. ***Comparative Public Bidding.*** – The BAC or Joint BAC shall publish the "Invitation for Comparative Proposals" (ICP) after receipt of the notification from the Original Proponent that the latter accepts all the terms and conditions in the Letter of Acceptance and Draft Contract attached thereto. The ICP should be published at least once (1x) every week for two (2) consecutive weeks in at least one (1) newspaper of general circulation. The weekly publications must not be less than seven (7) calendar days apart. Said invitation should also be posted continuously in the website of the DU concerned, if available, and the DOE e-based portal and NEA website, in the case of ECs, during the period stated above.

A pre-bid conference shall be conducted by the concerned DU within thirty (30) calendar days following the last date of publication of the ICP.

The deadline for submission of comparative proposals shall not be less than ninety (90) calendar days after the date of the last publication of the ICP. After the set deadline, no comparative proposals shall be accepted.

Section 34. ***Posting of Bid Security by Original Proponent.*** – On the first day of the publication of the ICP, the Original Proponent shall be required to submit a Bid Security in the form and in the amount required under Section 19.

Section 35. ***Submission of Proposal.*** – The bidders are required to submit their proposals in two (2) sealed main envelopes at the time and place specified in the Tender Documents.

The first main envelope shall contain the technical component of the bid, including the eligibility requirements under Section 16 of these Rules. The technical bid proposal and eligibility requirements shall be in separate sealed envelopes inside the first main envelope. The second main envelope shall contain the financial component of the bid.

If proposals are not submitted by the deadline, the PSA shall be awarded to the Original Proponent.

Section 36. ***Evaluation of Comparative Proposals.*** – Proposals shall be evaluated in three (3) stages:

a) Stage 1 – evaluation of eligibility requirements;
b) Stage 2 – evaluation of the technical bid proposal; and
c) Stage 3 – evaluation of the financial bid proposal.

Only those bids which pass the first stage will be considered for the second stage. The DU shall return to the disqualified bidders the remaining envelopes unopened, together with a letter, stating the reasons for their disqualification The criteria for evaluation will follow Section 16 for the eligibility of comparative proponents.

Section 37. ***Ceiling Bid Price for the Comparative Proponent/s.*** – The Original Proponent shall be declared as the winning bidder unless the Comparative Proponent/s submit a bid price that is lower by at least 1% than the original bid price. The Comparative Proponent may submit a bid price lower than the said threshold.

Section 38. ***Floor Bid Price for the Comparative Proponent/s.*** – To prevent anti-competitive behavior, particularly predatory pricing, in no case shall the Comparative Proponent's bid price be lower by 40% of the Original Proponent's bid price.

Illustration:

If the bid price of the original proponent is PhP3.50/kWh, then the ceiling bid price for comparative proponents is PhP3.465/kWh.

On the other hand, the floor price shall be PhP2.1/kWh. The said amount is 40% lower than the original bid price. The said amount shall be the lowest bid price allowed for the comparative proponent.

Section 39. ***Right to submit better offer.*** – If, during the evaluation of the proposals, the BAC determines that the lowest bid price came from one of the comparative proponents, the BAC or Joint BAC shall, within ten (10) calendar days, issue a *"Notice to Submit Better Offer"* (NSBO) informing the Original Proponent of such fact. The Original Proponent shall be given a period of fifteen (15) calendar days from receipt of the BAC's or Joint BAC's *NSBO* to submit its better offer.

The Comparative Proponent with lowest bid price shall be declared the winning bidder unless the Original Proponent submits a bid price lower by no less than 1% than the bid price of the former.

ARTICLE X
DIRECT NEGOTIATION

Section 40. ***Direct Negotiation.*** – Direct negotiation with an interested party for the supply of electricity may be made by the DU after at least two (2) failed CPB or during an emergency supply situation in accordance with Section 41 hereof.

A CPB is considered to have failed when, during its conduct, any of the circumstances exists:

(a) No prospective supplier has qualified;
(b) No proposal was received by the DU;
(c) Offers of bidders failed to meet the requirements prescribed under the TOR, as determined by the BAC or Joint BAC; or
(d) In the event of refusal, inability or failure of all bidders to enter into a PSA with the DU within the time provided.

Section 40.1. The entire process of direct negotiation should be completed within three (3) months from the time it was determined that there was failure of bidding.

Section 40.2. In the event that any CSP is not completed within the prescribed period, the DU shall submit an explanation, under oath, to ERC, copy furnished all involved parties, stating the circumstances or reasons for the delay and unsuccessful CSP.

All fees paid by the prospective bidders shall be returned, without any deduction, within ten (10) calendar days from the failed CSP, without need of any demand.

ARTICLE XI
EMERGENCY SUPPLY PROCUREMENT

Section 41. ***Emergency Supply Procurement***. – Emergency Supply Procurement may be undertaken by the affected DUs due to the occurrence of *force majeure, fortuitous event or* other analogous circumstances not specifically enumerated under the definition of a *force majeure* or fortuitous event, in order to maintain safe, reliable, secure and efficient operation of the power system, or events or situations, the happening of which could not have been previously determined with certainty, necessitating the urgent and immediate procurement of supply.

The DU may also undertake emergency supply procurement in case of failure to deliver by the winning bidder of the electricity supply requirement of the DU on the date of commencement of supply.

The DU may immediately execute and implement the said emergency PSA provided the following conditions are present:

(1) the cooperation period of such emergency PSA shall not exceed one (1) year;
(2) the proposed rate shall not be higher than the latest ERC approved generation tariff for the same plant or similar technology in the area or the Benchmark rate as established by ERC under Section 43 hereof;
(3) the DU shall, within thirty (30) calendar days from the occurrence of the *Force Majeure, Fortuitous Event or* other analogous circumstances provided under this Article, notify in writing the ERC, the DOE, the NEA in the case of ECs and the NPC, in case of off-grid areas, of such Emergency Supply Procurement; and
(4) The DU shall file with the ERC the application for approval of the said emergency PSA within ninety (90) calendar days upon its implementation.

ARTICLE XII
CIRCUMSTANCES EXEMPT FROM THE CONDUCT OF CSP

Section 42. ***Exemptions.*** – All PSAs shall be procured through CSP; Provided, however, that the following instances shall warrant an exemption from the conduct of CSP:

(a) Any generation project owned by the DU funded by grants or donations. The DU may be allowed to infuse internally generated funds; Provided, that the amount shared by the DU shall not exceed thirty percent (30%) of the total project cost;

(b) Provision of power supply by PSALM Corporation from undisposed NPC generating assets and IPP contracts, and NPC-SPUG prior to, and until the entry of New Power Providers (NPP) in an area; and

(c) **Small-scale Renewable Energy**-based generating facilities, with a maximum capacity of 1MW.

ARTICLE XIII
BENCHMARK RATE

Section 43. ***Benchmark Rate.*** – The ERC shall establish a Benchmark Rate that shall serve as reference price that may be used to assess the prudency and reasonableness of the PSA price.

The ERC shall utilize a financial model in calculating the Benchmark Rate. The model inputs, such as capital and operating costs, rates of return and technical parameters, shall be determined and reviewed on a regular basis by the ERC through a full consultation process.

The model will take into account relevant factors such as, but not limited to, the type of contract (financial or physical), the load factor, load shape and location or reference node to calculate the benchmark price for a portfolio of efficient new entrant plants to match the terms of the PSA being assessed.

The procedure for calculating and determining the Benchmark Rate shall be subject of a separate resolution to be promulgated by the ERC.

Pending the promulgation of the official benchmark rates, the ERC shall publish, every January of each year, its approved PSA rates to serve as initial benchmark rate for the DUs.

ARTICLE XIV
PROTEST MECHANISM

Section 44. ***Protest on Decisions of BAC or Joint BAC.*** – Decision of the BAC or Joint BAC regarding CSP may be questioned by filing a written request for reconsideration within ten (10) calendar days upon receipt of written notice. The BAC or Joint BAC shall decide on the request for reconsideration within ten (10) calendar days from receipt thereof.

In the event that the request for reconsideration is denied, decisions of the BAC or Joint BAC may be protested, in writing, to the governing board of the DU or the governing boards of the aggregated DUs in accordance with the dispute resolution procedure as provided in the MOA.

A protest shall be made by filing a verified position paper with the governing board of the DU or the governing board of the aggregated DUs, accompanied by the payment of a non-refundable protest fee which shall be determined by the concerned BAC or Joint BAC.

The verified position paper shall contain the following information: name of bidder, address, name of project, brief statement of facts, issue to be resolved and such other matters and information pertinent and relevant to the proper resolution of the protest.

The protest must be filed within ten (10) calendar days from receipt of the resolution denying its request for reconsideration.

The position paper is verified by an affidavit that the affiant has read and understood the contents thereof and that all allegations therein are true and correct of his personal knowledge or based on authentic records. An unverified position paper shall be considered unsigned and produces no legal effect, while non-payment of protest fee will result to the outright dismissal of the protest.

Protests shall be resolved within ten (10) calendar days from receipt thereof. Decision of the governing board of the DU or the aggregated DUs shall be final. After protests have been resolved with finality, any aggrieved party may file an action with the ERC.

For clarity, no suit or action can be filed by the CSP Observers while the CSP is underway.

ARTICLE XV
DISPUTE RESOLUTION

Section 45. ***Arbitration.*** – In case of disputes arising out of or in connection with the PSA duly executed pursuant to a successful CSP, the parties to the PSA shall exert every effort to first resolve the said dispute amicably by mutual consultation.

In the event that parties failed to amicably settle the dispute, the dispute shall be finally settled through arbitration in accordance with the arbitration clause in the PSA, provided the venue in the said arbitration clause is in the Philippines and in accordance with the provisions of Republic Act No. 876 (Arbitration Law) and Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004).

If the dispute arises during the pendency of the parties' application for approval of their PSA with the ERC, the dispute shall be submitted to the ERC for resolution.

ARTICLE XVI
FILING AND REVIEW PROCEDURES

Section 46. ***Regulatory Power.*** – The ERC, in the exercise of its power and functions under the EPIRA, may establish additional guidelines and impose existing fines and/or penalties for non-compliance of electric power industry participants to these Rules.

Section 47. ***Filing of the PSA*** – The PSA shall be a joint responsibility of the generation company and the DU. Following the execution of the PSA, the parties thereto shall file with the ERC, within sixty (60) calendar days from execution, a joint application for the approval of said PSA. Failure to file with the ERC, within the period provided, the executed PSA resulting from a CSP, without justifiable reason, will be considered an event of default and will entitle the non-defaulting party to liquidated damages as stated in the PSA.

The application for approval of the PSA shall be accompanied by the following supporting documents:

(a) The duly signed PSA;
(b) All details on the procurement process used by the DU leading to the selection of the GenCo, including the terms of reference used by the DU and the proposals received by the DU;

(c) A sworn certification by the DU that a CSP was conducted within the prescribed period; and
(d) Other information that ERC shall require during the approval process.

Section 48. ***ERC Evaluation of the Application.*** – Any PSA submitted to the ERC for approval shall be reviewed on two (2) levels. The first level is to determine whether the bidding process is in accordance with these Rules and to ensure that there are no indications of any form of anti-competitive behavior. The second level is to determine the PSA's reasonableness in terms of costs, risk allocation, and other contractual terms.

In the event that the bidding process that resulted to the execution of the PSA submitted is found to be non-compliant with these Rules, the said PSA shall be dismissed outright and will no longer be evaluated as to its reasonableness.

In the exercise of its discretion and based on all the submissions made, the ERC shall determine whether to approve the full pass through or prohibit some or all costs from being passed on to the DU's captive market and whether or not to disapprove certain contractual stipulations of the parties.

The ERC's decision and judgment shall be binding on both parties and shall not be rendered ineffective or nugatory by any termination or "walk-away" clause incorporated in the PSA.

Section 49. ***Review of the ERC.*** – ERC's evaluation of the PSA will be based on its satisfaction of the following:

(a) That the PSA guarantees suppliers' compliance with the required legal, technical, environmental and financial standards set out in the bid documents;
(b) That the PSA have complied with the minimum terms and conditions embodied in the PSA Framework under Appendix "A";
(c) That the PSA accords the parties with equitable rights; and
(d) That the risks associated with the supply of electricity, such as those pertaining to the tariff structure, economic indices, foreign exchange fluctuations, volatility of fuel prices and the like are efficiently allocated between the parties.

Section 50. ***PSA Pricing Structure.*** – The ERC shall determine the reasonable generation cost under the said PSA, taking into account the following fees:

(a) **Capital Recovery Fee (CRF)** - a capital-related component to recover the cost of investment over the economic life of the plant together with a reasonable rate of return.

(b) **Operating and Maintenance (O&M) Fee** - a component to recover operating and maintenance cost which may be broken down into local and foreign components, where the local O&M cost represents locally-denominated plant operating cost, while foreign O&M cost represents maintenance of spare parts, supplies, and all other associated costs that are usually imported.

(c) **Fuel Fee** - if applicable.

Section 51. ***Other Documentary Requirements*** – In addition to the requirements under Section 47 hereof, the documents listed in Appendix "B" must also be attached to the application.

Section 52. ***Procedural Requirements*** – Prior to the filing with the ERC of the application referred to in the preceding section, the parties shall comply with Section 4 (e), Rule 3 of the IRR of the EPIRA 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.

ARTICLE XVII
PROHIBITED ACTS, FINES AND PENALTIES

Section 53. ***Prohibited Acts and Agreements.*** –

Section 53.1. The members of the BAC, BAC Secretariat, BAC-TWG and the members of the DU-BOD, shall refrain from doing any of the following acts:

(1) Conducting bid-opening stage in a non-public manner;

(2) Failing to read out or show the bid prices and terms at bid opening;

(3) Changing or discarding parts of bids or deliberately "losing" all or parts of bids;

(4) Changing the announced evaluation criteria during the evaluation process;

(5) Arbitrarily assigning or changing bid scores, or making deliberate "errors" in scoring;

(6) Voiding all bids for alleged errors in specifications and re-bidding the work;
(7) Extending the bid due date to permit late, changed or altered bids;
(8) Allowing unauthorized persons to participate in and influence the bid evaluation;
(9) Failing to record important information in the bid evaluation report, such as the ranking of bidders or bid prices;
(10) Any act which tends to undermine the objectives of the conduct of the CSP; or
(11) Any act or omission thereof that tends to undermine the objectives of these Rules.

Section 53.2. ***Failure to Deliver.*** – The winning bidder is obliged to deliver the entire electricity supply requirement of the DU on the date of commencement of supply as provided for under a duly executed PSA that is provisionally or finally approved by the ERC.

If the winning bidder failed, without justifiable reason, to perform the above-mentioned obligation, such failure shall constitute a failure to deliver.

Section 53.2.1. ***Obligation to Provide Replacement Power.*** – In any of the following cases, the winning bidder shall source and provide replacement power:

(1) If the PSA provides that the supply requirement shall be originating from a specific plant type with a provisional or final generation rate granted specifically to such plant, and the winning bidder was not able to provide supply from such plant type, the winning bidder shall be responsible for the provision of replacement power at the generation rate equivalent or less than the provisional or final approved generation rate;

(2) If the winning bidder was only able to provide partial electricity supply requirement of the DU on the date of commencement of supply, as provided for under a duly executed PSA, the winning bidder shall be responsible for the provision of replacement power for the deficient capacity at the generation rate equivalent or less than the provisional or final approved generation rate; and

(3) If the winning bidder failed to provide the entire electricity supply requirement of the DU on the date of commencement of supply, as provided for under a duly executed PSA, the winning bidder shall be responsible for

the provision of replacement power for the entire capacity at the generation rate equivalent or less than the provisionally or finally approved generation rate.

Section 53.2.2. ***Reportorial Requirement.*** – All DUs shall submit a sworn certification executed by its President or General Manager, notifying the ERC of the status of the implementation of the duly executed PSA, within five (5) calendar days from date of commencement of supply as provided for under the duly executed PSA.

Section 53.3. ***Bid Manipulation.*** – The following agreements between or among bidders are considered as bid manipulation and are prohibited under these Rules:

(1) ***Cover bidding*** or when individuals or firms agree to submit bids that involve at least one of the following: (i) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (ii) a competitor submits a bid that is known to be too high to be accepted, or (iii) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition;

(2) ***Bid suppression.*** Bid-suppression schemes involve agreements among competitors, in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid, so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration;

(3) ***Bid rotation.*** In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company;

(4) ***Market allocation.*** Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific

customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement;

(5) Any other analogous practices of bid manipulation; and

(6) Any other agreement in relation to the conduct or participation in a CSP which tends to substantially prevent, restrict or lessen competition.

Section 53.4. ***Fifty Percent (50%) Limit Rule.*** – No DU shall be allowed to enter into a PSA for a contracted capacity that is more than **fifty percent (50%) of its average total annual demand from an associated firm engaged in generation.**

The DU's average total annual demand shall be the average total annual demand for the year immediately preceding the conduct of the CSP as certified by the System Operator.

An associated firm with respect to another entity refers to any person which, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such entity.

"Control" shall mean the power to direct or cause the direction of the management policies of a person by contract, agency or otherwise.

Section 54. ***Penalties.*** – In case of violation of any of the provisions of these Rules, the ERC may, after due notice and hearing, impose any of the following:

Section 54.1. A penalty not lower than **PhP 100,000.00** but not exceeding **Php 500,000.00** at the discretion of ERC, shall be imposed upon such erring member of the BAC, BAC Secretariat, BAC-TWG and DU-BOD for violation of Section 53.1.

If the violation amounted to bid manipulation and violation of the fifty percent (50%) limit rule, the erring member of the DU-BOD or officer shall be liable to pay an administrative fine amounting to PhP 5,000,000.00.

In case the violation is committed by an officer or BOD member of an electric cooperative, the ERC shall recommend to NEA for his/her removal from office in accordance with Republic Act No. 10531, otherwise known as "National Electrification Administration Reform Act of 2013".

In addition to the foregoing, if the evidence so warrants, the ERC may file, before the Department of Justice (DOJ), criminal complaints for violations of the Act or other relevant laws for preliminary investigation and prosecution before the proper court.

Section 54.2. A penalty, amounting to 10% of the one (1) month value of the PSA, computed using the winning bidder's bid price, shall be imposed upon the winning bidder, in case of its failure to deliver as defined under Section 53.2, for every month that it is unable to provide the contracted supply without justifiable reason.

Section 54.3. ***Blacklisting.*** – In case of failure of the winning bidder to deliver the DU's electricity supply requirement for more than one (1) year from the date of commencement of supply, as provided for under the duly executed PSA, that is provisionally or finally approved by the ERC, the winning bidder shall be blacklisted and prohibited from participating in any CSP conducted by any DU and from entering any kind of PSA with any DU.

Section. 54.3.1. ***Duration and Scope of Blacklisting.*** – The prohibition to participate in any CSP and to enter into any PSA with any DU shall be for a period of three (3) years from the receipt by the erring winning bidder of the ERC's Decision imposing such penalty.

The penalty of Blacklisting shall attach:

i. to the power project of the winning bidder which is the subject of its bid offer in the CSP on which it was declared as winning bidder;

ii. In case a joint venture or consortium is blacklisted, or which has blacklisted member/s and/or partner/s, as well as a person/entity who is a member of a blacklisted joint venture or consortium, are likewise not allowed to participate in any CSP or enter into any PSA during the period of disqualification.

iii. In the case of corporations, a single stockholder, together with his/her relatives up to the third civil degree of consanguinity or affinity, and their assignees, holding at least twenty percent (20%) of the shares therein, its chairman and president, shall be blacklisted after they have been determined to hold the same controlling interest in a previously blacklisted corporation or in two corporations which have been blacklisted; the corporations of which they are part shall also be blacklisted.

Any PSA entered into by a DU after a successful CSP may not source its supply from a blacklisted power project for the duration of the blacklisting penalty.

In addition to the penalty of blacklisting, an administrative penalty amounting to two (2) months value of the PSA computed using the winning bidder's bid price shall be imposed on the erring winning bidder.

Section 54.3.2. ***Effect of Blacklisted Status to PSAs entered into prior to receipt of Blacklisted Status.*** – The PSAs, duly executed pursuant to a successful CSP prior to the decision of the ERC Blacklisting the winning bidder, shall not be affected by the Blacklisted Status of the winning bidder.

Section 54.3.3. The following winning bidder shall also be blacklisted:

(1) The winning bidder who refuses to enter into a PSA;
(2) The winning bidder who refuses to comply with the conditions set forth in the Notice of Award (e.g. posting of performance bond); and
(3) The winning bidder who charges the DU a rate higher than the ERC approved generation rate.

Section 54.4 ***Effect of Failure to submit the required reportorial requirement under Section 53.2.2.*** – A penalty amounting to PhP 500,000.00 shall be imposed upon the President or General Manager of the DU who fails to submit the sworn certification as required under Section 53.2.2.

Section 54.5. ***Administrative Penalty for Bid Manipulation***. – Any bidder found to have committed any acts considered as bid manipulation shall also be blacklisted from participating in any CSP and from entering in any kind of PSA with any DU. In addition to blacklisting, such bidder shall pay the fine of PhP 50,000,000.00.

If the evidence so warrants, the ERC may file before the Department of Justice (DOJ), criminal complaints for violations of the EPIRA or other relevant laws for preliminary investigation and prosecution before the proper court.

Section 54.6. ***Violation of the Fifty Percent (50%) Limit Rule.*** – In case of violation of Section 53.4, the erring DU and its affiliate shall pay an administrative fine in the amount of PhP 50,000,000.00 each. In addition to the payment of fine, the PSA entered into by them and filed before the ERC shall be disapproved outright.

Section 55. ***Violation of these Rules by the DU.*** – In case the violation of any other provisions of these Rules is committed by any member of the DU-BOD or its officers, each shall pay an administrative fine ranging from PhP 500,000.00 to PhP 1,000,000.00.

If the violation involves bid manipulation and violation of the fifty percent (50%) limit rule, the erring member of the DU-BOD or officer shall be liable to pay an administrative fine amounting to PhP 5,000,000.00.

ARTICLE XVIII
ENFORCEMENT

Section 56. ***Issuance of Show Cause Order.*** – The ERC, *motu proprio*, or upon the filing of a verified complaint by an interested party, shall issue a show cause order for any violation of these Rules.

Upon receipt of the show cause order, the person charged shall be given five (5) calendar days within which to explain and respond, in writing and under oath, to the charges cited in the show cause order.

In ascertaining the veracity of the explanation of the person charged of violating these Rules, the ERC may:

(1) Conduct an ocular inspection; or

(2) Obtain information from any person other than the person charged, or from any office or officer of the national and local governments, government agencies and instrumentalities, and government-owned or -controlled corporations, any information relevant to the charges in

the show cause order and the explanation provided by the person charged;

The penalties in the preceding Article shall be imposed only after the offender has been duly informed in writing of said violation and has been given an opportunity to present an explanation and has been duly warned of the consequences of said violation.

The imposition of any administrative sanction is without prejudice to any criminal action that may be filed, if warranted, under existing law, rules and regulations.

Within sixty (60) calendar days from the issuance of the show cause order, the ERC, after considering the statements made, or documents or articles produced in the course of the investigation, shall terminate the same by:

i. Issuing a resolution ordering its closure if no violation or infringement of this Act is found; or

ii. Issuing a resolution finding that a violation has been committed and imposing fines and penalties to the person charged.

If the evidence so warrants, the ERC may file, before the DOJ, criminal complaints for violations of this Act or relevant laws for preliminary investigation and prosecution before the proper court.

ARTICLE XIX
ANNUAL REPORTORIAL REQUIREMENTS

Section 57. ***Reportorial Requirements for DUs***. – On the 30th day following the effectivity of these Rules, all distribution utilities are required to submit the following documents:

1. SEC certified true copy of its Articles of Incorporation;
2. SEC certified true copy of its By-Laws;
3. SEC certified true copy of its Certificate of Registration;
4. SEC certified true copy of its latest General Information Sheet (GIS);
5. SEC certified true copy of the Certificate of Registration, Articles of Incorporation, By-Laws, and latest GIS of all its corporate stockholders;
6. SEC certified true copy of the Certificate of Registration, Articles of Incorporation, By-Laws, and latest GIS of its parent corporation;

7. SEC certified true copy of the Certificate of Registration, Articles of Incorporation, By-Laws, and latest GIS of all its affiliate or subsidiary; and
8. For Electric Cooperatives, latest list of Board Members and Officers duly certified by NEA.

Section 57.1 ***Amendments to the Reportorial Requirements.*** In case of amendments to the foregoing documents, the DU shall submit an updated certified true copy of such amendment within thirty (30) calendar days from the approval by the appropriate government agency.

If there are no amendments, the DU shall submit a certification, under oath, that no amendments were made for the year on the said documents. The said certification shall be submitted every year, on or before the 15th day of January.

ARTICLE XX
FINAL PROVISIONS

Section 58. ***Interpretation.*** – For clarity, if anything in these Rules is found to be inconsistent with its Appendices, the provision in these Rules shall prevail.

Section 59. ***Exception Clause.*** – Where good cause appears, the ERC may allow an exception from any provisions of these Rules if such exception is found to be in the public interest and is not contrary to law or any other related rules and regulations.

Section 60. ***Separability Clause.*** – If for any reason, any part or section of these Rules is declared unconstitutional or invalid, the other parts or sections hereof which are not affected thereby shall continue to be in full force and effect.

Section 61. ***Repealing Clause.*** – The pertinent provisions of other ERC rules or guidelines inconsistent herewith are hereby repealed or modified accordingly.

Section 62. ***Effectivity*** – These Rules shall take effect on the 90th day following its publication in a newspaper of general circulation or in the Official Gazette, whichever comes earlier.

All parties who have already begun the conduct of their CSP before the effectivity of these Rules, but have yet to file an application before the ERC, must file its application for the approval of the executed PSA before the said effectivity.

As proof that such parties have already begun their CSP, they shall submit, as part of their pre-filing requirements, an actual copy of their "Invitation to Bid," published in a newspaper of general circulation, the date of publication thereof should be prior to the date of issuance of these Rules.

Pasig City, ____________________ 2019.

Republic of the Philippines
DEPARTMENT OF ENERGY

DEPARTMENT CIRCULAR NO. DC2018-02-0003

ADOPTING AND PRESCRIBING THE POLICY FOR THE COMPETITIVE SELECTION PROCESS IN THE PROCUREMENT BY THE DISTRIBUTION UTILITIES OF POWER SUPPLY AGREEMENT FOR THE CAPTIVE MARKET

WHEREAS, Section 5 (d) of Republic Act No. 7638 or the "Department of Energy Act of 1992" declares, among others, that the Department of Energy (DOE) has the powers and functions to supervise and control over all the government activities relative to energy projects in order to attain the goals embodied in this Act;

WHEREAS, Section 2 of the "Electric Power Industry Reform Act of 2001" or "EPIRA" declares, among others, that it is policy of the State to: (i) ensure the quality, reliability, security and affordability of the supply of electric power; (ii) ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability; (iii) enhance the inflow of private capital and broaden the ownership base of the power generation, transmission and distribution sectors; (iv) protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power; and (v) encourage the efficient use of energy and other modalities of demand-side management;

WHEREAS, Section 37(i) of the EPIRA mandates the DOE, in addition to its powers and functions under Republic Act No.7638 to supervise the restructuring of the electricity industry and to develop policies and procedures and, as appropriate, promote a system of energy development incentives to enable and encourage electric power industry participants to provide adequate capacity to meet demand including, among others, reserve requirements;

WHEREAS, Section 2 of Republic Act No. 9513 or the "Renewable Energy Act of 2008" states the policy of the State to increase the utilization of renewable energy (RE) resources by institutionalizing the development of national and local capabilities in the use of renewable energy systems, and promoting its efficient and cost-effective commercial application by providing fiscal and non-fiscal incentives, among others;

WHEREAS, consistent with Section 23 of the EPIRA, all distribution utilities (DUs) must supply electricity in the least-cost manner to their respective Captive Market;

WHEREAS, Section 43 of the EPIRA mandates the Energy Regulatory Commission (ERC) to promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electric industry;

WHEREAS, on 26 January 2004, DOE issued Department Circular No. DC2004-01-001 entitled "Prescribing the Rules and Procedures for Private Sector

Participation in Existing NPC-SPUG Areas Pursuant to Rule 13 of the Implementing Rules and Regulations of the Electric Power Industry Reform Act of 2001 (EPIRA-IRR)" requiring the conduct of Competitive Selection Process (CSP) as the basis of the DUs in off-grid areas for selecting New Power Providers (NPPs) and entering into corresponding Power Supply Agreement (PSA), among others;

WHEREAS, on 11 June 2015, the DOE issued Department Circular No. DC2015-06-0008, entitled "Mandating All Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)", which required all DUs to conduct CSP, through a Third Party, in the procurement of PSAs for their captive market;

WHEREAS, there is a need to formulate a specific CSP Policy for all DUs in the country defining a clear, transparent and fair supply procurement process that will promote competition and greater private sector participation in the provision of adequate generation capacity to meet the demand in the captive market, and full accountability of the DUs in the provision of affordable electricity prices to their captive market;

NOW, THEREFORE, premises considered, and pursuant to its authority under EPIRA and its Implementing Rules and Regulations, the DOE hereby adopts and prescribes the "**Policy for the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreement for the Captive Market**" in both grid and off-grid areas, herein attached as **Annex "A"** and is an integral part of this Circular.

This Circular shall take in effect immediately after its publication in two (2) Newspapers of general circulation and shall remain in effect until otherwise revoked.

Issued on ____________________ at Energy Center, Bonifacio Global City, Taguig City.

ALFONSO G. CUSI
Secretary

Republic of the Philippines
DEPARTMENT OF ENERGY
IN REPLYING PLS. CITE:
DOE-AGC-18006584

FEB 01 2018

ANNEX "A"

POLICY FOR THE COMPETITIVE SELECTION PROCESS IN THE PROCUREMENT BY THE DISTRIBUTION UTILITIES OF POWER SUPPLY AGREEMENT FOR THE CAPTIVE MARKET

SECTION 1. GOVERNING PRINCIPLES

The procurement of power supply for the Captive Market shall be governed by the following principles:

1.1. Transparency in the conduct of Competitive Selection Process (CSP) through wide dissemination of bid opportunities and participation of all Generation Companies (GenCos);

1.2. Competitiveness by extending equal opportunity to eligible and qualified GenCos to participate in the CSP;

1.3. Least cost manner in ensuring that each distribution utility (DU) is able to meet the demand for its Captive Market at any given time;

1.4. Simple, streamlined and efficient procurement process applicable to the specific requirements of each DU in accordance with its Distribution Development Plan (DDP). These requirements shall specify, the following technical, economic and other parameters: (i) baseload, mid-merit and/or peaking capacities; (ii) the amount of energy to be delivered; (iii) type of fuel or resource, whether conventional fossil fuel (such as oil, coal, or natural gas) or renewable energy resources (such as biomass, geothermal, solar, hydro, ocean and wind); (iv) choice of other emerging systems and technology;(v) environmental standards; (vi) timing and delivery of supply; and (vii) other considerations of the DU, as may be applicable; and

1.5. Accountability involved in the procurement process and implementation of the Power Supply Agreements (PSAs) awarded under the CSP.

SECTION 2. COVERAGE

2.1. This Policy shall govern all DUs, grid and off-grid.

2.2. All PSAs shall be procured through CSP; Provided however, that the following instances shall warrant a Certificate of Exemption from the Department of Energy (DOE) on the conduct of CSP:

2.2.1. Any generation project owned by the DU funded by grants or donations. The DU may be allowed to infuse internally generated funds; Provided, that the amount shared by the DU shall not exceed 30% of the total project cost; Provided further, that taxes to be paid by the DU shall not be included in the total project cost;

2.2.2. Negotiated procurement of emergency power supply; Provided, that the cooperation period of the corresponding PSA shall not exceed one (1) year; Provided further, that the rate shall not be higher than the latest ERC approved generation tariff for same or similar technology in the area;

2.2.3. Provision of power supply by any mandated Government Owned and Controlled Corporation (GOCC) for off-grid areas prior to, and until the entry of New Power Providers (NPP) in an area; and

2.2.4. Provision of power supply by the Power Sector Assets and Liabilities Management (PSALM) Corporation through bilateral contracts for the power produced from the undisposed generating assets and Independent Power Producer (IPP) contracts duly sanctioned by the "Electric Power Industry Reform Act of 2001" or EPIRA as deemed by the DUs, subject to a periodic review by the DOE.

2.3. The Certificate of Exemption shall be issued by the DOE within ten (10) working days from receipt of the application.

2.4. For PSAs contemplated under Section 2.2.2, the grant of a Certificate of Exemption shall authorize the DU to immediately implement such PSAs, without prejudice to the evaluation and final decision of the ERC within sixty (60) working days from filing of the relevant application for approval thereof.

2.5. The DU shall be required to inform the Energy Regulatory Commission (ERC), National Power Corporation (NPC) and National Electrification Administration (NEA) of the exemption.

SECTION 3. DEFINITION OF TERMS

3.1. ***"Aggregation"*** refers to the joint action of DUs to aggregate their demand and energy requirements to jointly contract for their power supply to achieve economies of scale.

3.2. ***"Aggregated Demand"*** refers to the consolidated level in MW and volume in MWh of electric power of the DUs hourly, daily, monthly or annually.

3.3. ***"Base-load"*** refers to the minimum amount of electric power delivered or required over a given period of time.

3.4. ***"Bidding Documents"*** refers to the complete set of documents given to interested bidders, including at the minimum the Terms of Reference (TOR) for technical, legal and financial requirements sufficient to allow such bidders to submit a qualified bid.

3.5. ***"Captive Market"*** refers to the electricity end-users who do not have the choice of a supplier of electricity, as may be determined by the ERC in accordance with EPIRA.

3.6. *"**Certificate of Exemption**"* refers to Certificate issued by the DOE under Section 2.2 of this Policy.

3.7. ***"Competitive Bidding"*** refers to a method of procurement which is open to participation by any interested party and consists of the following processes: a) advertisement or publication; b) pre-bid conference; c) pre-qualifications d) bid evaluation; e) post-qualification, if any and h) award of contract.

3.8. ***"Competitive Selection Process"*** or ***"CSP"*** refers to the process wherein a Generation Company or, in the case of off-grid areas, New Power Provider, is awarded to supply electric power requirements of a DU through transparent and competitive bidding undertaken by a DU or by Aggregated DUs to secure supply of electricity based on the evaluation criteria adopted by the DUs in accordance with the requirements of this Policy. For purposes of, and throughout the Policy, the terms *"Competitive Bidding"* and *"CSP"* shall have the same meaning and shall be used interchangeably.

3.9. ***"Distribution Development Plan"*** *or* ***"DDP"*** is the program for expansion, reinforcement and rehabilitation of the distribution system which is prepared by the DU and submitted to the DOE for integration with the Power Development Plan and Philippine Energy Plan. In the case of electric cooperatives (ECs), such plans shall be submitted through the NEA for review and consolidation.

3.10. ***"Distribution Utility"*** *or* ***"DU"*** refers to any electric cooperative, private corporation, government-owned utility or existing local government unit which has an exclusive franchise or is authorized by law to distribute electricity to end-users.

3.11. ***"E-based Power Procurement Information Portal"*** or ***"DOE E-based Portal"*** refers to a portal, to be developed and managed by the DOE that shall be used as the primary and centralized source of information regarding all CSP activities of all DUs.

3.12. ***"EPIRA"*** refers to Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001.

3.13. ***"Emergency Power"*** refers to the power required by the DU in the event that a DU's actual power supply falls below its load demand due to Force Majeure and Fortuitous Events or other analogous circumstances that are beyond the control of the DU and such shortfall cannot be addressed through any reasonable means within a month, subject to the final determination by the DOE.

3.14. ***"Energy Regulatory Commission"*** *or* ***"ERC"*** refers to the regulatory agency created under EPIRA.

3.15. ***"Generation Company"*** *or* ***"GenCo"*** refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity.

3.16. ***"Grid"*** refers to the high voltage backbone system of interconnected transmission lines, substations and related facilities, located in each of the island groups of Luzon, Visayas and Mindanao, or as may otherwise be determined by the ERC in accordance with Section 45 of the EPIRA, together with the sub-transmission systems that are connected to or part of that system and are owned and operated by the Regulated Entity.

3.17. ***"Joint Third Party Bids and Awards Committee"*** *or* ***"Joint TPBAC"*** refers to Aggregated DUs whose composition where established through a Memorandum of Agreement of the participating DUs in accordance with Section 5 of this Policy.

3.18. ***"National Electrification Administration"*** or ***"NEA"*** refers to the government agency created under the Presidential Decree 269, as amended by RA 10531.

3.19. ***"Off-grid"*** areas that are not connected to the main high voltage backbone system.

3.20. ***"Power Supply Procurement Plan"*** or **"PSPP"** refers to a DU's plan for the acquisition of a variety of demand-side and supply-side resources to cost-effectively meet the electricity needs of its customers. The "PSPP" is an integral part of the DU's DDP.

3.21. ***"Renewable Portfolio Standards"*** *or* ***"RPS"*** refers to a market-based policy that requires electricity suppliers to source an agreed portion of their energy supply from eligible renewable energy (RE) resources.

3.22. ***"Replacement Power"*** refers to the electricity to be delivered by a winning generation company to the DU when its power plant is on forced or unscheduled outage.

3.23. ***"Subsidized Approved Generation Rate"*** *or* ***"SAGR"*** refers to the generation rate expressed in peso per kilowatt hour, which the ERC has approved for an EC to charge its consumers for electricity generation services.

3.24. ***"Third Party Auctioneer"*** *or* ***"TPA"*** refers to a team of private individuals or a private corporation duly recognized in the Philippines with experience in competitive bidding and with sufficient knowledge in the electric power industry.

3.25. ***"Third Party Bids and Awards Committee"*** *or* ***"TPBAC"*** refers to the third party committee established in accordance with Section 5 of this Policy to spearhead and manage a DU's CSP.

SECTION 4. DISTRIBUTION DEVELOPMENT PLAN (DDP) AND THE POWER SUPPLY PROCUREMENT PLAN (PSPP)

4.1. Each DU shall annually develop and submit to the DOE its DDP, which contains the PSPP. The DU shall undertake a cost-benefit analysis of the power supply requirements for the Captive Market, taking into consideration, among others, the following factors: a) prevailing cost or price in the market; b) energy demand forecasting; c) power system; d) load matrix; e) energy mix; and other requirements under the policy for DDP.

4.2. The PSPP shall contain, the following:

4.2.1. Historical data on peak demand, supply contract, energy sales and energy purchase;

4.2.2. 10-year monthly peak demand forecast; energy sales; existing contracts (expiration);

4.2.3. Committed energy and demand for CSP;

4.2.4. Currently approved SAGR for Off-grid DUs to be passed-on to consumers;

4.2.5. Current supply and demand status of the DU; and

4.2.6. Indicative schedule for CSP taking into consideration the required construction period in the case of new generation plants.

4.3. Pursuant to the EPIRA and its Implementing Rules and Regulation, the final annual ten-year DDP must be submitted to the DOE not later than 15th of March of each year and must be supported with a Board Resolution and/or notarized Secretary's Certificate.

SECTION 5. THIRD PARTY BIDS AND AWARDS COMMITTEE

5.1. Third Party Bids and Awards Committee (TPBAC)

5.1.1. The DU, through its Board of Directors (BOD), shall establish an independent TPBAC to spearhead and manage the CSP. The TPBAC shall comply with the policy and procedures in the conduct of CSP, as provided for in this Policy. The TPBAC shall be accountable to its decision in the conduct of the CSP; Provided however, that the DU shall bear the expenses for any dispute or litigation arising from the CSP.

5.1.2. The DU, through its Board of Directors (BOD), shall designate five (5) members of the TPBAC where three (3) members will come from the DU and the two (2) members will come from the captive customers that are not directly or indirectly related/affiliated to the DU. As such, the TPBAC shall be composed of the following:

5.1.2.1. One DU officer or employee knowledgeable in the technical operations of the DU;

5.1.2.2. One DU officer or employee with knowledge and/or experience with any local or international competitive bidding procedures;

5.1.2.3. One lawyer;

5.1.2.4. One finance officer or accountant that has knowledge on electricity pricing; and

5.1.2.5. One Technical person, or a person with knowledge and/or experience with any local or international competitive bidding procedures.

One of the last three (3) representatives shall represent the DU.

For all DUs, the selection process of the representatives of the captive customers to the TPBAC shall be submitted to the DOE for approval. For ECs, member-consumers who are not directly or indirectly employed by the EC shall qualify as members of the TPBAC.

5.1.3. The BOD of the DU shall only serve as an observer and not as a member of the TPBAC.

5.1.4. The Chair and Vice Chair shall be selected by the members of the TPBAC. The Chairman shall only vote in case of a tie.

5.1.5. A quorum of the TPBAC shall be composed of a simple majority of all voting members of the TPBAC.

5.1.6. A decision on all questions of the TPBAC shall require the majority of all the voting members of the TPBAC.

5.2. TPBAC Technical Working Group (TWG) and Secretariat

5.2.1. The BOD of the DU shall designate the TPBAC TWG and TPBAC Secretariat, to be headed by a regular or permanent employee of the DU, preferably an officer, to assist the TPBAC in the performance of its functions.

5.2.2. The TPBAC TWG shall be composed of the technical, legal and financial personnel of the DU.

5.2.3. The TPBAC TWG shall assist the TPBAC in the technical components of the CSP, such as development of the PSPP, TOR, eligibility screening, evaluation of bids, and post-qualification.

5.2.4. The TPBAC Secretariat shall provide administrative support to the TPBAC for this purpose and serve as the keeper of all records and documents relating to all CSPs conducted by the DU.

5.2.5. The TPBAC Secretariat shall fully document each step of the CSP and prepare and keep a written minutes of all the TPBAC meetings and proceedings.

5.3. Joint TPBAC of Aggregated DUs

5.3.1. In the case of Aggregated DUs, a Joint TPBAC and its composition including its corresponding TPBAC TWG and TPBAC Secretariat shall be established through a Memorandum of Agreement (MOA). The Joint TPBAC shall have five (5) members, where three (3) members will come from any of the participating DUs and the two (2) members will come from the captive customers of any of the participating DUs that are not directly or indirectly related/affiliated to the DUs. As such, the Joint TPBAC shall be composed of the following:

5.3.1.1. One DU officer or employee of any participating DU who is knowledgeable in the technical operations of DUs;

5.3.1.2. One DU officer or employee of any participating DU with knowledge and/or experience with any local or international competitive bidding procedures;

5.3.1.3. One lawyer;

5.3.1.4. One finance officer or accountant that has knowledge on electricity pricing; and

5.3.1.5. One Technical person, or a person with knowledge and/or experience with any local or international competitive bidding procedures.

One of the last three (3) representatives shall represent any of the participating DUs.

For all DUs, the selection process of the captive customers' representatives to the Joint TPBAC shall be submitted to the DOE for approval. For ECs, member-consumers who are not directly or indirectly employed by the EC shall qualify as members of the Joint TPBAC.

5.3.2. The BOD of any of the participating DUs shall only serve as an observer and not as a member of the Joint TPBAC.

5.3.3. The Chair and Vice Chair shall be selected by the members of the Joint TPBAC. The Chairman shall only vote in case of a tie.

5.3.4. A quorum of the Joint TPBAC shall be composed of a simple majority of all voting members of the Joint TPBAC.

5.3.5. A decision on all questions of the Joint TPBAC shall require the majority of all the voting members of the Joint TPBAC.

5.4. Joint TPBAC Technical Working Group (TWG) and Secretariat

5.4.1. The BOD of the participating DUs shall designate the Joint TPBAC TWG and Joint TPBAC Secretariat, to be headed by a regular or permanent employee of any of the participating DUs, preferably an officer, to assist the Joint TPBAC in the performance of its functions.

5.4.2. The Joint TPBAC TWG shall be composed of the technical, legal and financial personnel of the participating DUs.

5.4.3. The Joint TPBAC TWG shall assist the Joint TPBAC in the technical components of the CSP, such as development of the PSPP, TOR, eligibility screening, evaluation of bids, and post-qualification.

5.4.4. The Joint TPBAC Secretariat shall provide administrative support to the Joint TPBAC for this purpose and serve as the keeper of all records and documents relating to all CSPs conducted by the participating DUs.

5.4.5. The Joint TPBAC Secretariat shall fully document each step of the CSP and prepare and keep a written minutes of all the Joint TPBAC meetings and proceedings.

SECTION 6. THIRD PARTY AUCTIONEER

6.1. In lieu of the TPBAC or the Joint TPBAC, the DU may opt to engage a Third Party Auctioneer (TPA) to conduct and manage its CSP in accordance with this Policy.

6.2. The TPA shall be a team of private individuals or a private corporation duly recognized in the Philippines with experience in competitive bidding and with sufficient knowledge in the electric power industry: Provided, that the TPA is not in any way connected to any electric power industry players: Provided further, that the TPA shall have representation from the consumers as provided for in this Policy.

6.3. The ERC shall provide the guidelines for the accreditation of TPAs within 60 days upon the effectivity of this Policy.

SECTION 7. CSP OBSERVERS

7.1. To assure all parties to the CSP for power supply that the process employed is conducted in an open, transparent, effective, efficient, and equitable manner, the TPBAC, Joint TPBAC or TPA shall invite Observers in accordance with this Policy.

7.2. For Grid Areas, Observers shall be extended to the DOE, ERC and NEA, in the case of ECs. For Off-Grid Areas, an invitation in writing and e-mail shall also be extended to NPC to act as an Observer in all of the bidding activities provided in this Policy.

7.3. CSP Observers shall not participate in the proceedings and have no right to vote. Observers shall be given written and e-mail invitations at least five (5) working days before the date of the procurement stages.

7.4. An invitation in writing and e-mail to Observers shall be extended at each of the following stages of the CSP:

7.4.1. Pre-bid Conference;

7.4.2. Pre-qualification, if any;

7.4.3. Submission and Opening of Bids;

7.4.4. Bid Evaluation;

7.4.5. Negotiations;

7.4.6. Post-qualification, if any;

7.4.7. Awarding; and

7.4.8. Contract Signing.

7.5. Observers shall be allowed access to the following documents upon their request: (a) minutes of TPBAC, Joint TPBAC or TPA meetings; (b) abstract of Bids; (c) post-qualification summary report; (d) video recording of CSP proceedings; (e) opened proposals; (f) Bid Documents and other related documents.

7.6. The DU is required to make and keep, as part of the TPBAC, Joint TPBAC or TPA records, a complete and unedited video record of the proceedings in cases where no Observer is present.

7.7. The absence of Observers will not nullify the CSP proceedings; Provided, that Observers have been duly invited in writing and e-mail within the prescribed period.

SECTION 8. COMPETITIVE SELECTION PROCESS

8.1. The DUs shall comply with the standard procurement procedures, documents and forms in the procurement of power supply for their Captive Market under this Policy.

8.2. The TPBAC, Joint TPBAC or TPA shall submit to the DOE, and, in the case of the ECs, through the NEA, the following:

8.2.1. PSPP as incorporated in the current year DDP;

8.2.2. Distribution Impact Study (DIS)/ Load Flow Analysis conducted that serves as the basis of the TOR; and

8.2.3. Due diligence report on the existing generation plants.

8.3. The NEA shall review the submitted PSPP within ten (10) working days upon receipt prior to its submission to the DOE.

8.4. Preparation of Bid Documents

The TWG of the TPBAC, Joint TPBAC or TPA shall prepare the Bid Documents, which shall be composed of the following:

8.4.1. The TOR based on the recent PSPP submission shall which, at the minimum, contains the following information:

8.4.1.1. Cooperation Period with the Generation Company or the NPP;

8.4.1.2. Demand and Energy for CSP;

8.4.1.3. Preferred technology, if any, and justification for such preference;

8.4.1.4. Target Commercial Operation Date (COD), in the case of new generating capacities and the target date of delivery;

8.4.1.5. Replacement Power Requirement;

8.4.1.6. Enumeration of cost items to be passed-on to the captive customers;

8.4.1.7. Penalty provisions in cases of delay in construction and commercial operations for new generating capacities; and

8.4.1.8. Grounds for termination of the PSA during the cooperation period.

8.4.2. The Invitation to Bid shall, at the minimum, indicate the following:

8.4.2.1. Cooperation Period/ Contract Year;

8.4.2.2. Demand and Energy for CSP;

8.4.2.3. Eligibility requirements;

8.4.2.4. Information Memorandum;

8.4.2.5. Instruction to Bidders; and

8.4.2.6. Schedule and Deadlines up to the Notice to Proceed

8.4.3. Corporate Profile of the bidders;

8.4.4. Technical Proposal's requirements;

8.4.5. Financial Proposal's requirements;

8.4.6. Method and Criteria for evaluation;

8.4.7. Bidding Procedure;

8.4.8. Awarding, Signing of Contract, and Notice of Implementation;

8.4.9. Acceptable Form of Bid and Performance Securities;

8.4.10. Proposed Timelines or Milestones;

8.4.11. Power Supply Agreement Template;

8.4.12. Notarized Statement attesting to the information submitted for the bid;

8.4.13. Protest Mechanism; and

8.4.14. Other documents required and mandated by any government agencies.

8.5. Publication and Posting

The TPBAC, Joint TPBAC or TPA shall cause the publication and posting of the Invitation to Bid for the procurement opportunity in accordance with this Policy for the period specified therein.

8.5.1. The TPBAC, Joint TPBAC or TPA shall post the Invitation to bid in its website, if there is any, and in the DOE E-based portal and in the NEA website, in the case of ECs. The TPBAC, Joint TPBAC or TPA shall continuously update the DOE and NEA on the status thereof through their respective E-based portals.

The TPBAC, Joint TPBAC or TPA shall likewise ensure that all bid bulletins and related announcements shall be posted at the DOE E-based portal and NEA website, in the case of ECs.

In cases where the DUs encounter problems in the posting of the necessary pieces of information in the respective E-based portal, the DUs shall inform the DOE and NEA for assistance in the required posting.

8.5.2. The TPBAC, Joint TPBAC or TPA shall also cause the publication of the Invitation to Bid in a newspaper of general circulation once weekly for two (2) consecutive weeks.

8.5.3. The TPBAC, Joint TPBAC or TPA may opt to, in addition to Section 8.5.2, published the invitation to bid in one (1) local newspaper of local circulation in the region, province, city or municipality indicating the CSP schedules, among other necessary information for the bidders, once weekly for two (2) consecutive weeks.

8.5.4. In addition to publication, the TPBAC, Joint TPBAC or TPA shall exert its best effort to disseminate its Invitation to Bid to all GenCos.

8.5.5. For transparency, all stages and updates on the CSP that coincides with its CSP schedule must be provided to the DOE and NEA in case of ECs, for posting on the DOE E-based portal and NEA website, respectively, including but not limited to the Bid Bulletins relating to the following:

8.5.5.1. Invitation to Bid;

8.5.5.2. Pre-qualification, if any;

8.5.5.3. Pre-bid Conference;

8.5.5.4. Submission and Opening of Bids;

8.5.5.5. Bid Evaluation;

8.5.5.6. Post-qualification, if any;

8.5.5.7. Awarding and Contract Signing; and

8.5.5.8. Joint filing before the ERC.

8.6. Pre-Bid Conference

8.6.1. The TPBAC, Joint TPBAC or TPA shall conduct a pre-bid conference to address the queries from the prospective bidders.

8.6.2. The pre-bid conference shall discuss, among other things, the eligibility requirements, the TOR and the technical, legal and financial components of the PSA to be bid out.

8.6.3. The TPBAC, Joint TPBAC or TPA shall reply to the written queries or clarifications of the GenCos who have purchased the Bid Documents in the form of Bid Bulletins.

8.6.4. Decisions of the TPBAC, Joint TPBAC or TPA amending any provision of the Bidding Documents shall be issued in writing through a Supplemental/Bid Bulletin at least seven (7) working days before the deadline for the submission and receipt of bids.

8.6.5. Supplemental/Bid Bulletins may be issued in the following circumstances:

8.6.5.1. Request of the prospective GenCos for clarification(s) on or for an interpretation of any part of the Bid Documents; and

8.6.5.2. Upon the initiative of the TPBAC, Joint TPBAC or TPA for purposes of clarifying or modifying any provision of the Bidding Documents. Any modification to the Bid Documents shall be identified as an amendment.

8.7. Bid Evaluation Criteria and Process

8.7.1. The TPBAC, Joint TPBAC or TPA shall undergo a qualification evaluation of the legal, technical, and financial requirements submitted by GenCos using the criteria indicated in the Bid Documents.

8.8. Receipt and Opening of Bids

8.8.1. The bidders shall be required to submit their bids on or before the deadline stipulated in the Bid Documents and the supplemental Bid Bulletins.

8.8.2. The opening of bids shall take place in the presence of all qualified bidders and the TPBAC, Joint TPBAC or TPA.

8.8.3. The TPBAC, Joint TPBAC or TPA shall proceed to determine the winning bidder using the evaluation criteria prescribed in the Bid Documents.

8.8.4. The winning bidder should undergo a pre-/post-qualification process in order to determine whether the concerned bidder complies with and is responsive to all the requirements and conditions as specified in the TOR and other pertinent bidding documents.

8.9. Within five (5) working days upon signing of the PSA, the DU and the winning bidder shall jointly file the PSA to the ERC, copy-furnished the DOE and NEA, in case of ECs.

8.10. Each CSP shall be completed within five (5) months from the time of publication of invitation to bid until submission of the PSA to the ERC.

8.11. All expenses incurred in the conduct of the CSP shall be shouldered by the DUs. The DUs may, however, recover these expenses through the TOR.

SECTION 9. DIRECT NEGOTIATION IN FAILED CSPs

9.1. Direct negotiation may be made by the DUs after at least two (2) failed CSPs and there is no outstanding dispute on the conducted CSP.

9.2. A CSP, after following the process as contemplated in this Policy, is considered failed only when, during its conduct, any of the following circumstances exists:

9.2.1. No proposal was received by the DU;

9.2.2. Only one GenCo submitted an offer; or

9.2.3. Competitive offers of prospective GenCos failed to meet the requirements prescribed in the bid documents.

SECTION 10. COMPLIANCE TO RENEWABLE ENERGY LAW

Pursuant to Republic Act No. 9513, or the "Renewable Energy Act of 2008," DUs and Retail Electricity Supplier (RES) shall comply with the DOE Department Circulars to be issued pertaining to non-fiscal incentives.

SECTION 11. NEA'S ASSISTANCE TO ECs

11.1. NEA shall be responsible to determine the technical and institutional capability of TPBAC or Joint TPBAC of the ECs and the qualifications of its officers and members in conducting a fair and transparent CSP in accordance with this Policy.

11.2. For ECs with limited capability to undertake CSP, NEA shall provide the necessary assistance and resources including, but not limited to, the mobilization of competent manpower, which shall be at no expense to the EC.

SECTION 12. REGULATORY SUPPORT

12.1. The ERC, in the exercise of its powers and functions under the EPIRA shall establish and impose existing fines/ and or penalties for non-compliance of electric power industry participants to support the enforcement of this Policy.

12.2. The ERC shall have the power to review whether the parties have complied with the requirements of CSP and shall issue appropriate regulations upon as may be necessary.

12.3. The ERC shall develop a PSA template that shall be used by electric power industry participants within 60 days upon the effectivity of this Policy.

12.4. The ERC shall develop rules and procedures to address dispute arising from the conduct of the CSP within 60 days upon the effectivity of this Policy.

12.5. The NEA shall develop rules and procedure to support this Policy within 60 days upon its effectivity.

SECTION 13. PROTEST MECHANISM AND DISPUTE RESOLUTION

13.1. Decision of the TPBAC, Joint TPBAC or TPA at any stage of the CSP may be questioned by filing a written request for reconsideration within three (3) calendar days upon receipt of written notice or upon verbal notification. The TPBAC, Joint TPBAC or TPA shall decide on the request for reconsideration within seven (7) days from receipt thereof.

In the event, that the request for reconsideration is denied, decisions of the TPBAC, Joint TPBAC or TPA may be protested in writing to the governing board of the DU or its duly authorized officer/s.

The protest must be filed within seven (7) calendar days from receipt of the resolution denying its request for reconsideration. A protest shall be made by filing a verified position with the governing board of the DU or its duly authorized officer/s, accompanied by the payment of a non-refundable protest fee which shall be determined by the concerned TPBAC, Joint TPBAC or TPA.

The verified position paper shall contain the following information: name of bidder, address, name of project, brief statement of facts, issue to be resolved and such other matters and information pertinent and relevant to the proper resolution of the protest.

The position paper is verified by an affidavit that the affiant has read and understood the contents thereof and that all allegations therein are true and correct of his personal knowledge or based on authentic records. An unverified position paper shall be considered unsigned and produces no legal effect and non-payment of protest fee will result to the outright dismissal of the protest.

Protests shall be resolved within seven (7) calendar days from receipt thereof. Decision of the governing board of the DU or its duly authorized officer/s shall be final. Court action may be resorted to after protests have been resolved with finality.

13.2. Any conflict or dispute of any kind between the parties in connection with the implementation of the contract, the parties shall make every effort to first resolve amicably by mutual consultation or shall be submitted to arbitration in the Philippines according to the provisions of Republic Act No. 876 (Arbitration Law) and Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004) or by mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution.

SECTION 14. FINES AND PENALTIES

14.1. Without prejudice to criminal liability, non-compliance with any provision of this Policy shall, after due process, subject to the non-complying party to administrative sanctions following the ERC's Amendment on the Policy to Govern the Imposition of Administrative Sanctions in the Form of Fines and Penalties Pursuant to Section 46 of Republic Act No. 9136, such as but not limited to:

14.1.1. Failure to comply with the conduct of CSP;

14.1.2. Failure to submit reportorial requirements relative to CSP and/or PSA;

14.1.3. Disclosing confidential classified information;

14.1.4. Soliciting or accepting, directly or indirectly, any gift, gratuity, favor, or any monetary value from prospective CSP participants; and

14.1.5. Gross negligence or serious misconduct of TPBAC, Joint TPBAC or TPA members.

SECTION 15. TRANSITORY PROVISION

Upon the effectivity of this Policy, all prospective PSAs shall hereafter be procured in accordance with this Policy.

SECTION 16. REPEALING CLAUSE

16.1. Sections 3 and 4 of DOE Department Circular No. DC2015-06-0008 are hereby repealed. All other parts of Department Circular No. DC2015-06-0008, which are not affected thereby, shall continue to be in full force and effect.

16.2. Any issuance made by any GOCCs regarding CSP inconsistent with this Policy is hereby repealed.

16.3. Nothing in this Policy shall be construed as to amend, supersede, or repeal any of the mechanism or institutions already existing or responsibilities already allocated or provided for under any existing law, rule, or contract.

SECTION 17. SEPARABILITY CLAUSE

If for any reason that any section of this Policy is declared unconstitutional or invalid, such parts not affected shall remain in full force and effect.

EIGHTEENTH CONGRESS OF THE)
REPUBLIC OF THE PHILIPPINES)
First Regular Session)

SENATE

S.B. No. 362

Introduced by SEN. WIN GATCHALIAN

AN ACT
INSTITUTIONALIZING REFORMS IN THE PROCUREMENT OF SUPPLY BY DISTRIBUTION UTILITIES FOR THE CAPTIVE MARKET BY MANDATING A COMPETITIVE SELECTION PROCESS FOR POWER SUPPLY AGREEMENTS

EXPLANATORY NOTE

Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001, declares it the policy of the State to ensure the quality, reliability, security, and affordability of supply of electric power, to ensure transparent and reasonable prices of electricity in the regime of free and fair competition and full public accountability, and to protect the public interest as it is effected by the rates and services of electric utilities and other providers of electric power.

The use of a competitive process to cultivate private sector participation in the generation sector has long been recognized by the Department of Energy (DOE). In 2004, the first Competitive Selection Process (CSP) was mandated in National Power Corporation — Small Power Utilities Group (NPC-SPUG) areas.[1] In 2015, the scope of the CSP was extended to all distribution utilities in procuring their respective power supply agreements (PSAs).[2] From 2015 until 2018, the DOE, Energy Regulatory Commission (ERC), and National Electrification Administraion have released various policy issuances mandating a CSP. However, these issuances have led to confusion

[1] DOE Circular DC2004-01-001 entitled "Prescribing the Rules and Procedures for Private Sector Participation in Existing NPC-SPUG Areas Pursuant to Rule 13 of the Implementing Rules and Regulations of the Electric Power Industry Reform Act of 2001." 26 January 2004.
[2] DOE Circular DC20 15-06-008 entitled "Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) Securing Power Supply Agreements (PSA)." 11 June 2015.

in the industry specifically on what CSP procedure should be followed and what the exemptions to the CSP are, if any. This confusion has led to a number of court cases, and a recent Supreme Court decision which requires CSP on all PSA applications submitted on or before 30 June 2015.[3] Hence, there is a need to institutionalize the CSP in order to enhance regulatory certainty, competition, and transparency.

This proposed measure mandates a centralized CSP conducted by a Third Party Auctioneer for all the uncontracted demand of the captive market. The CSP shall be conducted using an electronic network-based platform, and can can only be undertaken if it is in accordance with the approved Power Supply Procurement Plan of each distribution utility. PSAs shall also be standardized for the protection of consumers. For example, all PSAs shall now include a provision for replacement power. Lastly, ERC shall no longer review and approve each PSA provided it went through the CSP and follows the standardized PSA format.

Given the foregoing, the immediate passage of this measure is sought.

WIN GATCHALIAN

[3] G.R. No. 227670. 03 May 2019.

EIGHTEENTH CONGRESS OF THE REPUBLIC OF THE PHILIPPINES)
First Regular Session)

SENATE
S.B. No. 362

Introduced by Senator WIN GATCHALIAN

AN ACT
INSTITUTIONALIZING REFORMS IN THE PROCUREMENT OF SUPPLY BY DISTRIBUTION UTILITIES FOR THE CAPTIVE MARKET BY MANDATING A COMPETITIVE SELECTION PROCESS FOR POWER SUPPLY AGREEMENTS

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:

CHAPTER I

GENERAL PROVISIONS

SECTION 1. *Short Title.* – This Act shall be known as the "Competitive Selection Process for Power Supply Agreements Act".

SEC. 2. *Declaration of Policy.* – It is hereby declared the policy of the State to:

(a) Ensure the quality, reliability, security, and affordability of electric power supply;
(b) Make certain that procurement of power supply agreements by distribution utilities engenders transparency, enhances certainty of supply, and guarantees stability of electricity prices to captive consumers; and
(c) Protect public interest by ensuring least cost rates and quality of service to captive customers while the country has not yet transitioned to full retail competition.

SEC. 3. *Scope and Application.* – This Act shall apply to all distribution utilities in the procurement of supply for their captive market including those in the off-grid areas, except in the case of new power providers, qualified third parties, and as otherwise provided in Section 25 of this Act. It provides for the manner by which the procurement is to be undertaken, the required review procedure, and the timelines to be observed in such procedure.

SEC. 4. *Definition of Terms.* – For purposes of this Act, the following terms shall be defined as stated below: *Provided,* That other terms used in this Act but not defined herein shall be understood to mean the way they are defined in Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001, and its implementing rules and regulations:

(a) *Affiliate* refers to any natural or juridical person which, alone or together with other natural or juridical persons, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another natural or juridical person. Affiliates shall include a subsidiary company, a parent company and the subsidiaries, directly or indirectly, of a common parent;

(b) *Bid* refers to the offer of a price by a generation company or a supply aggregator during the competitive selection process to serve the power demand volume put forward for procurement by a distribution utility or a group of distribution utilities, on their own or through a demand aggregator. The price is the generation charge converted to per kilowatt hour inclusive of all costs passed on to the consumers as determined by the Energy Regulatory Commission (ERC);

(c) *Captive market* refers to the electricity end-users who do not have the choice of a supplier of electricity, as determined by the ERC in accordance with Republic Act No. 9136;

(d) *Competitive selection process (CSP)* refers to a procedure wherein a distribution utility or a group of distribution utilities, on their own or through a demand aggregator, undertake a transparent and competitive procurement of power supply agreements, in accordance with the provisions of this Act;

(e) *Demand aggregator* refers to a natural or juridical person registered and licensed with the ERC, offering services for the consolidation of the power demand volume of distribution utilities for the purpose of subjecting it to a CSP;

(f) *Distribution utility (DU)* refers to any electric cooperative, private corporation, government-owned utility, or existing local government unit which has an exclusive franchise to operate a distribution system in accordance with its franchise and Republic Act No. 9136, including those whose franchise area covers economic zones;

(g) *Electric cooperative (EC)* refers to a DU organized pursuant to Presidential Decree No. 269, otherwise known as the National Electrification Administration Decree as amended;

(h) *Electronic network-based platform* refers to a computer network system as well as the instruments and apparatuses allowing the execution of related methods of operation and a plurality of user client devices capable of connecting to the communication network;

(i) *Force majeure or fortuitous event* refers to an extraordinary event which is not foreseen, or which, though foreseen, is inevitable. Such event may be produced by two general causes: (1) by nature, such as a typhoon, storm, tropical depression, flood, drought, volcanic eruption, earthquake, tidal wave, or landslide, and (2) by the act of man, such as an act of war, sabotage, blockade, revolution, riot, insurrection, civil commotion, or any violent or threatening action;

(j) *General conditions* refers to provisions which are generally applicable to all power supply agreements as determined by ERC;

(k) *Generation company* refers to any person or entity authorized to operate facilities used in the generation of electricity;

(l) *Invitation to bid* refers to a letter of invitation, whose contents are determined by the ERC, for generation companies and supply aggregators to submit a bid for a power demand volume put forward for procurement by a DU or a group of DUs, on their own or through a demand aggregator;

(m) *Market operator* refers to the independent market operator of the Wholesale Electricity Spot Market pursuant to Republic Act No. 9136;

(n) *Off-grid* refers to areas that are not connected to the main high voltage backbone system;

(o) *Particular conditions* refers to additional terms in the power supply agreement not found in the general conditions introduced either by the DU, generation company, or supply aggregator;

(p) *Power Supply Agreement (PSA)* refers to a contract between a generation company or a supply aggregator and a DU whereby the latter purchases electricity from the former;

(q) *Power Supply Procurement Plan (PSPP)* refers to the assessment of a DU of a variety of its demand side and supply side resources, as part of its Distribution Development Plan resulting in a comprehensive power supply procurement schedule to meet customer electricity demand while ensuring an optimal supply mix for its captive market and taking into account existing government policies;

(r) *Reserve price* refers to the price set by ERC as a ceiling for each particular CSP;

(s) *Supply aggregator* refers to any natural or juridical person, registered and licensed with the ERC to sell power to DUs by combining generation capacities of generation companies and supply from the Wholesale Electricity Spot Market;

(t) *Third party auctioneer (TPA)* refers to a natural or juridical person mandated to coordinate and administer the conduct of all CSPs; and

(u) *Wholesale Electricity Spot Market (WESM)* refers to the electricity market created under Republic Act No. 9136.

CHAPTER II

POWERS AND FUNCTIONS OF GOVERNMENT AGENCIES

SEC. 5. *The Department of Energy.* – In addition to its powers and functions under Republic Act No. 7638, otherwise known as the Department of Energy Act of 1992, as amended, the DOE shall:

(a) Exercise its supervisory power over the CSP by ensuring that the general principles provided in this Act are complied with;

(b) Determine the components of the PSPP in accordance with Sections 4(q) and 15 of this Act, and in consultation with ERC, NEA, National Power Corporation (NPC), and the DUs; and

(c) Ensure that all submitted PSPPs are aligned and consistent with the annual Power Development Plan and the Philippine Energy Plan with the end in view of ensuring sufficient power supply while eliminating over procurement of power by DUs.

SEC. 6. *The Energy Regulatory Commission.* – In addition to its powers and functions in Republic Act No. 9136, the ERC shall:

(a) Promulgate the CSP Regulations pursuant to Section 9 of this Act;

(b) Establish the reserve price for every CSP, in the exercise of its rate-setting power. In so doing, the ERC shall take into consideration, among others, a DU's demand profile, the available supply in the market, pricing benchmarks, and a reasonable rate of return;

(c) Verify whether each CSP has complied with all procedures and requirements as specified in Section 20 of this Act; and

(d) Regulate the TPA pursuant to Sections 9 and 17 of this Act, including the reasonable fee for its services.

SEC. 7. *National Electrification Administration.* – In addition to its powers and functions under Presidential Decree No. 269, Creating the National Electrification Administration, as amended, and Republic Act No. 9136, the NEA shall:

(a) Assist and equip ECs in the formulation and creation of their PSPPs; and

(b) Facilitate the voluntary aggregation of ECs upon their request.

CHAPTER III

GENERAL PRINCIPLES OF A CSP

SEC. 8. *General Principles.* – DUs shall procure their power requirements through a CSP and the WESM, except as otherwise provided in Sections 22, 23, and 25 of this Act. All CSPs shall be governed by the following principles:

(a) Ensure sufficient and reliable power capacity is built in a timely manner, and acquired at the least possible cost by:
   (i) Enjoining completion of each CSP within a reasonable period of time;
   (ii) Making certain that every CSP is open to all technologies and resources subject to the load, operational, and system requirements of the concerned DU, including market considerations, and existing and future policies pursuant to applicable laws, rules, and regulations;
   (iii) Having an undisclosed reserve price for each CSP, as determined by the ERC, above which no offer shall be accepted;

(b) Eliminate barriers to entry and maintain regulatory stability by:
   (i) Establishing a sole and centralized TPA tasked with conducting the various CSPs of all DUs;
   (ii) Mandating a clear and transparent CSP procedure with uniform requirements; and
   (iii) Requiring standardized forms, documents, and contracts for the CSP; and

(c) Implement an effective monitoring and evaluation system to detect anticompetitive bidding behavior among CSP participants, which includes consumer consultation and representation in the CSP.

SEC. 9. *CSP Regulations.* – The CSP Regulations shall be promulgated by the ERC in consultation with all private and public stakeholders within thirty (30) days from the formulation of this Act's implementing rules and regulations. The CSP Regulations shall include, among others:

(a) Duties, responsibilities, guarantees, and liabilities of all CSP participants in accordance with Chapter IV of this Act;

(b) Rules, procedures, requirements, and timelines of the following:
   (i) The entire CSP including rules and guidelines for the evaluation of bids and awarding of PSAs: *Provided,* That the complete procedure shall not

exceed ninety (90) days from the issuance of the invitation to bid until to the awarding of the PSA to the winning bidder;

(ii) Qualification, procurement, and performance indices for the TPA including:

(1) Detailed scope of work,

(2) Bonds and guarantees,

(3) Cost recovery mechanism and reasonable fees for the services of TPA, except as otherwise provided in Section 17 of this Act,

(4) Monitoring and evaluation framework, and

(5) Prohibited acts and penalties

(iii) Registration of all CSP participants with the TPA,

(iv) Registration and licensing of demand aggregators and supply aggregators,

(v) Determination of the reserve price of every CSP,

(vi) Preparation of the particular conditions of a PSA,

(vii) Negotiated PSAs in accordance with Sections 22, 23, and 25 of this Act, and

(viii) Grievance and dispute resolution mechanism;

(c) Standardized contents of an invitation to bid and all other documents and forms necessary in the conduct of the CSP;

(d) Standardized general conditions of a PSA in accordance with Section 19 of this Act;

(e) Fines and penalties for non-compliance with any of the CSP Regulations; and

(f) Other such rules, procedures, and requirements that will ensure the effective regulation of the CSP.

CHAPTER IV

CSP PARTICIPANTS

SEC. 10. *Participants.* – The participants to the CSP are DUs, demand aggregators, generation companies, and supply aggregators, which shall all be duly-registered with the TPA. All CSP participants shall undergo training in accessing the CSP electronic network-based platform utilized by the TPA

SEC. 11. *Mandatory Registration.* – Upon the promulgation of the CSP Regulations, CSP participants shall register in accordance with Section 9(b) (iii) of this Act: *Provided,* that such registration shall bind the CSP participant to specific duties, responsibilities, guarantees, and liabilities pursuant to Section 9(a) of this Act. The ERC shall exercise ownership over the said registry which the TPA shall develop, update, and maintain. The TPA shall turn over such registry to the ERC upon the end of its contract or at any time the ERC deems it necessary.

SEC. 12 . *Distribution Utilities.* – Each DU shall:

(a) Prepare its annual PSPP pursuant to Section 15 of this Act;

(b) Based on this PSPP, the DU shall:

   (i) Determine the power demand volume it shall put forward for procurement through a CSP, and

   (ii) Formulate the schedule for its CSP in accordance with the power demand volume determined;

(c) Be prohibited from passing on the reasonable fee for the services of the TPA to its captive customers; and

(d) Be liable for all provisions in the PSA together with all the other signatories such as generation companies and supply aggregators.

SEC. 13. *Demand aggregator.* – Demand aggregators shall serve as mere representatives of DUs in the CSP and shall not have the legal personality to enter into any PSA on behalf of the aggregated DUs. Generation companies and the transmission concessionaire, as well as any of their affiliates, shall be prohibited from acting as a demand aggregator.

SEC. 14. *Supply aggregator.* – Supply aggregators shall demonstrate sufficient financial and technical capabilities to ensure timely delivery of power demand volume put forward for procurement by DUs. The transmission concessionaire and its affiliates shall be prohibited from acting as a supply aggregator.

SEC. 15. *Power Supply Procurement Plan.* – Every DU shall prepare and submit its annual PSPP to the DOE as part of its annual Distribution Development Plan. In the preparation of the PSPP, the DU shall undertake a cost-benefit analysis of the power supply requirements for its captive market taking into consideration, among others, prevailing price in the market, energy demand forecasting, load, system, and operational requirements, other market considerations, and existing and future policies pursuant to applicable laws, rules, and regulations.

The PSPP shall be updated annually and approved by the Board of Directors of the DU and submitted to DOE on or before the 15th of March of each year. In the case of ECs, the submission shall include the NEA. In the case of off-grid areas, the submission shall include the NPC. DOE, with NEA in the case of ECs and NPC in the case of off-grid areas, shall endorse the submitted PSPP within thirty (30) days from receipt to the ERC and the TPA. The endorsed PSPPs shall be posted by the ERC in the electronic portal as provided under Section 27 of this Act.

CHAPTER V

THIRD PARTY AUCTIONEER

SEC. 16. *Powers and Functions of the Third Party Auctioneer.* – The TPA shall:

(a) Be the sole body that coordinates and administers the conduct of all CSPs;

(b) Provide and manage a secure electronic network-based platform for the bidding component of the CSP, subject to CSP Regulations, and the implementing rules and regulations of this Act;

(c) Be liable for any negligence, abuse, delay, or preferential treatment in the conduct of the CSP including security breaches to the electronic platform;

(d) Be entitled to recover its costs and a reasonable fee for its services, except as otherwise provided in Section 17 of this Act; and

(e) Be regulated and its operation monitored and evaluated by the ERC.

SEC. 17. *Qualification and Operations of the Third Party Auctioneer.* –The market operator shall initially serve as the TPA for two (2) years from the commencement of its operations which shall be no later than one (1) year from the effectivity of this Act. The market operator shall not be entitled to a reasonable fee for its services but shall endeavor to use all of its existing systems and electronic platforms available to mitigate the costs of the conduct of the CSP. It shall submit an implementation plan to DOE and ERC within two (2) months from the effectivity of this Act.

At the end of two (2) years, the ERC shall contract and appoint, after competitive bidding, a new TPA whose contract term shall be determined by ERC: *Provided,* That the market operator shall not be precluded from joining the competitive bidding. The new TPA shall have vast experience in competitive bidding, sufficient knowledge of the electric power industry, and a demonstrated ability to manage and conduct the CSP.

The ERC shall review, at least once a year, the performance of the TPA according to a monitoring and evaluation framework incorporated in the CSP Regulations in accordance with Section 9(a)(ii)(4) of this Act: *Provided,* That ERC can at any time, *motu proprio* or upon complaint, determine negligence, abuse, delay, preferential treatment, or non-performance by the TPA and impose penalties upon any finding of such.

SEC. 18. *Disqualification as Third Party Auctioneer.* – All generation companies, transmission utilities, DUs, retail electricity suppliers, demand aggregators, supply aggregators, corporations involved in upstream exploration, development, and production as well as downstream operations, and all their affiliates, and all the members of the board of directors, officers, and employees, including their relatives up to the fourth degree of consanguinity or affinity are prohibited from acting as, being affiliated with, or having any stake in the TPA.

CHAPTER VI

FEATURES OF A CSP

SEC. 19. *Standardized Contracts.* – All contracts, forms, and documents used for the CSP shall be standardized and unified. PSAs shall have general conditions and particular conditions. The general conditions shall include a maximum contract period to be determined and adjusted regularly by ERC, and a provision for replacement power, the cost of which shall be shouldered by the generation company or supply aggregator. The particular conditions shall be reviewed and approved by the ERC pursuant to Section 9(b)(vi) of this Act.

SEC. 20. *Results and Approval.* – The TPA shall submit a report to ERC after the determination of the winning bidder within a period of time determined by ERC. The ERC shall, within fifteen (15) days from its receipt of the report, issue a resolution indicating whether or not the conduct of the CSP is compliant with this Act, its implementing rules and regulations, and the CSP Regulations. It shall likewise indicate whether the winning bid is below the reserve price. All PSAs awarded through a CSP and given a resolution of compliance shall be submitted to the ERC and shall no longer be subjected to its review and approval.

SEC. 21. *Non-Compliance with CSP Procedures and Regulations.* – Upon ERC's finding of non-compliance by any CSP participant or the TPA with this Act, its implementing rules and regulations, and the CSP Regulations, it shall order the TPA to re-administer the entire CSP subject to fines and penalties as determined by the ERC.

SEC. 22. *Force Majeure or Fortuitous Event.* – A DU may enter into an interim negotiated contract with a generation company or supply aggregator on the basis solely of force majeure or fortuitous event: *Provided,* That the interim negotiated contract shall be effective immediately but shall be subject to a full review by the ERC in the exercise of its rate-making power, the results of which must be concluded and released within thirty (30) days from the parties' submission of all documents; *Provided further,* That the interim negotiated contract shall have a maximum period of one (1) year and the price shall not be higher than the reserve price for similarly situated power demand volume put forward for procurement.

SEC. 23. *Failed Bidding.* – On the day of actual bidding, failed bidding happens under the following circumstances:

1. When there are no bids submitted for two consecutive rounds;
2. When there is only one bidder and its bid is above the reserve price for two consecutive rounds; or

3. When there is more than one bidder and all bids are above the reserve price for two consecutive rounds.

Upon a failed bidding, the DU can enter into a negotiated contract with a generation company or supply aggregator: *Provided,* That the contract shall be subject to a full review of ERC in the exercise of its rate-making power, the results of which must be released within ninety (90) days from the parties' submission of all documents.

SEC. 24. *Negligence and Abuse.* – Any allegation of negligence or abuse on the part of the TPA at any stage of the CSP shall be filed with the ERC: *Provided,* That this is without prejudice to any civil or criminal case against the TPA.

SEC. 25. *Off-Grid Areas.* – The DOE shall provide a different CSP procedure in consultation with NPC and NEA for those off-grid areas with small demand, security problems, and any other similar criteria. No CSP shall be required for the supply of the NPC to the DUs in off-grid areas.

CHAPTER VII

TRANSPARENCY

SEC. 26. *Observers.* – The TPA shall, in all stages of the CSP, ensure that DOE, ERC, NEA, NPC, and other interested parties as determined by DOE are informed and that their representatives are allowed to observe.

SEC. 27. *Electronic Portal.* – The ERC shall develop or procure an electronic portal which shall serve as the primary source of information on the CSP: *Provided,* That the ERC shall ensure the integrity, security, and confidentiality of all documents submitted through the electronic portal.

In all stages of the CSP, the TPA shall ensure that information from generation companies, supply aggregators, DUs, and demand aggregators shall be posted on the electronic portal to ensure equal access of information for all the CSP participants: *Provided,* That no proprietary information shall be posted on the electronic portal.

CHAPTER IV

PROHIBITED ACTS AND PENALTIES

SEC. 28. *Confidentiality.* – Prior to their official release, no aspect of the documents used in any CSP shall be divulged or released to any prospective generation company, supply aggregator, DU, demand aggregator, or any other person or entity having direct or indirect interest in the PSAs subject of CSP.

SEC. 29. *Administrative Offenses.* – The following acts, when committed by a government official or employee, shall be considered administrative offenses:

a) Breach of confidentiality as provided under Sections 27 and 28 of this Act;
b) Wilful acts which delay the operationalization of the CSP; and
c) Failure to comply with the mandated timelines prescribed under Sections 9, 15, 17, 20, 22, 23, and 34 of this Act.

SEC. 30. *Administrative Penalties.* – Any government official or employee found guilty of the act stated in Sections 29 (a) and (b), on the first offense shall be suspended from service for six (6) months and one (1) day to one (1) year without pay, and on the second offense shall be dismissed from service that shall carry with it perpetual disqualification from holding public office.

Any government official or employee found guilty of the act stated in Sec. 29 (c), on the first offense shall be reprimanded, on the second offense shall be suspended from service for one (1) to thirty (30) days, and on the third offense shall be dismissed from service that shall carry with it perpetual disqualification from holding public office.

SEC. 31. *Criminal Offenses.* – The performance of the following acts by any person shall be considered a criminal offense:

1) Disclosure of the reserve price by any individual before the proclamation of the winning bidder;
2) Tampering with the CSP software;
3) Manipulation of any stage of the CSP procedure to unduly favor any participant;

4) Commission of cybercrime as defined by Republic Act No. 10175, otherwise known as the Cybercrime Prevention Act of 2012, including the manipulation or interference with the electronic network-based platform for bidding and the electronic portal of the ERC;
5) Negligence or abuse in the conduct of the CSP, including in the management and operation of the electronic network-based platform for the bidding component of the CSP;
6) Violation of Section 27 of this Act; and
7) Collusion among CSP participants.

SEC. 32. *Criminal Liability.* – Any person found guilty of the acts stated in Section 24 shall receive a punishment of *prision mayor* and a fine ranging from Five hundred thousand Philippine pesos (P500,000.00) to Fifty million Philippines pesos (P50,000,000.00)

CHAPTER V

FINAL PROVISIONS

SEC. 33. *Prospective Application of CSP.* – The coverage of the CSP as specified in this Act shall have prospective application. PSAs filed before the ERC prior to the operationalization of this Act, shall be exempt from its coverage.

SEC. 34. *Implementing Rules and Regulations.* – The DOE, in consultation with ERC, NEA, NPC, and public and private stakeholders shall formulate the implementing rules and regulations of this Act within thirty (30) from its effectivity.

SEC. 35. *Transitory Provision.* – Pending the formulation and effectivity of the implementing rules and regulations and CSP Regulations, the existing ERC Resolutions on CSP shall continue to apply.

SEC. 36. *Separability Clause.* – If any portion or provision of this Act is declared unconstitutional, the remainder of this Act or any provisions not affected thereby shall remain in force and effect.

SEC. 37. *Repealing Clause.* – Any law, presidential decree or issuance, executive order, letter of instruction, rule or regulation inconsistent with the provisions of this Act is hereby repealed or modified accordingly.

SEC. 38. *Effectivity.* – This Act shall take effect fifteen (15) days following its complete publication in the Official Gazette or a newspaper of general circulation.

Approved,

The Center for Empowerment, Innovation and Training on Renewable Energy (CentRE) is a not-for-profit association of RE advocates, developers, researchers, experts and social impact investors pursuing full deployment of RE in the country to address energy poverty, high electricity rates, and climate change in a just, sustainable and democratic manner.

With diverse expertise of its members – CSOs, private industry players, electric cooperatives, academic centers and individuals engaging on energy, climate, environment and good governance – the CentRE is envisaged as a hub for knowledge, social innovation, policy studies, advocacy and community empowerment towards achieving 100 percent renewable energy.

Its goals: RE-CLAIM – realize **RE** through **C**apacity building, **L**inkages, **A**dvocacy, **I**nnovation and **M**obilization.

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