

Item No.: 15
Date: 02 2024 JUL

Republic of the Philippines
ENERGY REGULATORY COMMISSION
Pasig City

SANGGUNIANG PANLALAWIGAN
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13
IN THE MATTER OF THE
APPLICATION FOR
APPROVAL OF THE
ANCILLARY SERVICES
PROCUREMENT
AGREEMENT BETWEEN THE
NATIONAL GRID
CORPORATION OF THE
PHILIPPINES AND
UNIVERSAL POWER
SOLUTIONS, INC. (ORMOC
BESS), WITH PRAYER FOR
PROVISIONAL AUTHORITY

ERC Case No. **2023-069 RC**

NATIONAL GRID
CORPORATION OF THE
PHILIPPINES AND
UNIVERSAL POWER
SOLUTIONS, INC.,

Applicants.

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PARTIAL MOTION FOR RECONSIDERATION

(to the Order dated 15th August 2023)

APPLICANT Universal Power Solutions, Inc.¹ ("UPSI"), through the undersigned counsels respectfully move for the *partial reconsideration* of the Order issued by the Honorable Commission dated 15 August 2023² ("August 2023 Order") that was received on 15th March 2024, and further argues that:

1. At the onset, UPSI hereby extends its sincerest gratitude for the issuance of the August 2023 Order which "**GRANTED PROVISIONAL AUTHORITY**" to implement its Ancillary

¹ Now known as SMGP BESS Power Inc. ("SBPI")

² The Order which "**GRANTED PROVISIONAL AUTHORITY**" to implement the Ancillary Services Procurement Agreement between National Grid Corporation of the Philippines and UPSI (page 52 of the August 2023 Order).

Services Procurement Agreement (“ASPA”) with National Grid Corporation of the Philippines (“NGCP”) subject of the instant case.

2. However, and as will be discussed below, UPSI maintains that the termination of the ASPA more particularly under Section 13.3 thereof due to Material Adverse Change (the “Termination due to MAC”) can be exercised by the parties without the prior approval of the Honorable Commission.
3. With due respect, it should be stressed that the provisions of the ASPA referred to in the preceding paragraph were anchored on the Terms of Reference (the “TOR”) and instructions to bidders approved by the Department of Energy (“DOE”) through the latter’s letter dated 22 November 2022³.
4. Likewise, the Invitation to Bid has been published once weekly for two (2) consecutive weeks in a newspaper of general circulation as mentioned and tagged as “Compliant” in row seven (7) (i.e., Publication of Invitation to Bid), page thirty-seven (37) of the August 2023 Order.
5. Further, under row nine (9) page thirty-eight (38) (i.e., Bid Evaluation Criteria and Process) of the August 2023 Order, where the TPBAC is required to “*evaluate the bidders technical, legal and financial qualifications based on the criteria indicated in the Bid Documents*”, applicants herein were given the “**Compliant**” mark as regards the process on “*how the bidders were evaluated based on the documents*”.
6. It must also be noted that, under the August 2023 Order --- “*xxx the Commission found that NGCP complied with all the compliance parameters in the selection of UPSI and the procurement of its AS. Thus, the Commission holds that the Applicants are compliant with the AS-CSP requirements under the DOE 2021 AS-CSP Circular*”⁴.

³ Row three, page thirty-three (33) to thirty-four (34), August 2023 Order.

⁴ First paragraph, page forty (40), August 2023 Order.

7. The August 2023 Order positively stated that - - - *"It is apparent from Table 8 that the firm CR capacities in Visayas grid are still below the required level of 153 MW, making the timely approval of the instant ASPA Application, the procurement of which underwent a CSP, crucial and necessary, subject to the determination of least cost⁵".*

8. However, despite the foregoing, the August 2023 Order stated that the - - - *"xxx xxx xxx termination of the ASPA shall be subject to prior approval by the Commission"⁶.*

I. The termination of the ASPA under the pertinent provisions thereof does not require ERC approval.

9. UPSI hereby manifests at this stage of the provisional implementation of the ASPA that it has no intention of terminating the same. Nevertheless, notwithstanding the absence of such intention at the current stage hereof, UPSI would like to seek a reconsideration of the provision of the August 2023 Order to the extent that prior approval must no longer be necessary if warranted by the attendant circumstances pursuant to the relevant provisions of the ASPA.

10. It must be stressed at this juncture that Section 13.3 of the ASPA as regards the "Termination due to MAC was included amongst the Terms of Reference under the row "Basis of Termination of ASPA" which was the given the mark *"Consistent with the TOR"* by the Honorable Commission through the August 2023 Order (pages 26 to 29 thereof).

11. Further, it was also stated in the August 2023 Order that the ASPA where the subject provisions were incorporated was determined to be "consistent with the DOE-approved TOR⁷". With these provisions of the August 2023 Order, logic and equity dictate that either party may avail of such

⁵ First paragraph after Table 8, page forty-seven (47), August 2023 Order.

⁶ Second sentence, paragraph 1.3, page fifty-four (54) of the August 2023 Order.

⁷ First paragraph, page thirty-one (31), August 2023 Order.

remedy (i.e., Termination due to MAC) if the conditions⁸ required for the utilization thereof are present without the need of prior approval from the Honorable Commission.

12. Moreover, the presence of the statement in the August 2023 Order that the "Commission's Findings" is still "subject to final evaluation" fortifies the fact that the presence of the assailed provision concerning termination is unjustified. At the very least, with such a statement (i.e., subject to final evaluation), the provisions as regards the Termination due to MAC should not have been disturbed. This is so because the statement(s) in the August 2023 Order as regards the Termination due to MAC (i.e., the same is consistent with the DOE- Approved TOR) support the exercise of such right without prior approval rather than impose requirements other than those mentioned under Section 13.3 of the ASPA in the provisional implementation thereof.
13. Nowhere in the provisions of the Ancillary Services Procurement Plan⁹ (the "ASPP") issued by the Honorable Commission, nor in the published draft Ancillary Services Rules, was it required that the parties to an ASPA should seek prior approval from the Honorable Commission before they can validly terminate such ASPA. Based on the absence of such requirement under the ASPP, which serves as the guiding rules in the implementation of ASPAs, it therefore follows that the parties to an ASPA can validly terminate the same even without prior approval from the Honorable Commission.

II. The AS CSP carries the presumption of regularity.

14. Bolstering the elucidations concerning UPSI's position as regards the exercise by the parties of their right to terminate the ASPA pursuant to the relevant provisions thereof (*which was stated in the August 2023 Order as consistent with the DOE*

⁸ Section 13.3 of the ASPA provides for the Termination due to Material Adverse Changes as follows: a. In the event of the implementation of a law or regulation, or issuance of an administrative and/or judicial ruling, resulting in a material adverse effect on the rights and/or obligations of either Party, such Party may terminate this Agreement through written notice to the other Party within thirty (3) days of such change, effective upon receipt of such notice. The AS Provider's termination of this Agreement after the lapse of the thirty (30) day period shall fall under Section 13.1 (f) of this Agreement.

⁹ Order dated 29 March 2006, ERC Case No. 2002-253

*approved TOR*¹⁰) as discussed above, it must be recalled that the validly conducted CSP was attended and duly witnessed by the representatives from the DOE.

15. The appearance of the DOE representatives during the CSP gave not only the CSP, but also by analogy, the ASPA subject of this case the presumption of regularity in the entire process thereof.
16. Succinctly, the preceding elucidations clearly fortify the validity and the legal soundness of the TOR used by NGCP BAC where the pertinent provisions of the ASPA concerning the applicability of the Termination due to MAC (without the necessity of ERC approval) in the provisional implementation thereof are anchored upon.
17. As such, the AS CSP and the pertinent provisions of the ASPA that were given the stamp of credence should not be disregarded through the assailed August 2023 Order which is akin to a collateral attack against the validly conducted CSP by the NGCP.
18. In view of the foregoing, UPSI humbly implores the discerning wisdom of the Honorable Commission for the partial reconsideration of the August 2023 to the extent that the termination thereof, if will be availed by the parties based on the provisions of the ASPA concerning the aspect of Termination due to MAC, should no longer require prior approval by the Honorable Commission.

(Nothing follows)

¹⁰ First paragraph, page thirty-one (31), August 2023 Order.

Partial Motion for Reconsideration

Joint Application of NGCP & UPSI

ERC Case No. 2023-069 RC

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PRAYER

WHEREFORE, premises considered, it is most respectfully prayed for the Honorable Commission to *partially reconsider* its August 2023 Order and in lieu thereof to issue another order where the termination by the ASPA under Section 13 thereof will not require the prior approval of this tribunal.

Other reliefs just and equitable under the circumstances are likewise prayed for.

Respectfully submitted.

City of Pasig, 25 March 2024.

(Signature page follows)

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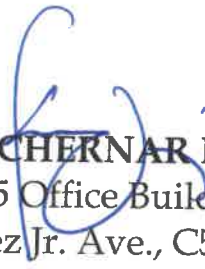
UNIVERSAL POWER SOLUTIONS, INC. ("UPS¹¹")

By:



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¹¹ Now known as SMGP BESS Power Inc. ("SBPI")

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NOTICE OF HEARING

The Executive Clerk of the Commission
Energy Regulatory Commission

All copy furnished:

Greetings:

Please take notice that the undersigned will submit this motion for the kind consideration and approval of the Honorable Commission immediately upon receipt hereof sans appearance and argument by counsel unless otherwise required.



JANELLE L. GOMENDOZA

EXPLANATION

Resort is made to service and filing by registered mail with return card instead of the preferred mode of personal service due to time constraints, distance and lack of adequate messengerial services to effect personal service and filing.



JANELLE L. GOMENDOZA

Copy Furnished:

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8. Office of the Sangguniang Panlungsod
Quezon City
9. Office of the Governor
Province of La Union
10. Office of the Sangguniang Panlalawigan
Province of La Union
11. Office of the City Mayor
San Fernando, La Union
12. Office of the Sangguniang Panlungsod
San Fernando, La Union
13. Office of the Governor
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14. Office of the Sangguniang Panlalawigan
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15. Office of the City Mayor
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21. Office of the City Mayor
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22. Office of the Sangguniang Panlungsod
Davao City
23. Office of the City Mayor
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Cebu City
25. Office of the City Mayor
Pasig City
26. Office of the Sangguniang Panlungsod
Pasig City
27. Office of the City Mayor
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28. Office of the Sangguniang Bayan
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