

Like a Swiss Cheese: The Holes in the Alternative Mode of Procurement Under Department of Energy Department Circular No. DC 2021-09-0030

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I. INTRODUCTION.....	775
II. POWER SUPPLY AGREEMENT: AN AGREEMENT IMBUED WITH PUBLIC INTEREST.....	777
A. <i>The Features of a Power Supply Agreement</i>	
B. <i>A PSA Is an Agreement Imbued with Public Interest</i>	
III. THE ALTERNATIVE MODE OF PROCUREMENT: DOES IT REALLY PROMOTE COMPETITION AND TRANSPARENCY IN THE PROCUREMENT OF PSAS?.....	782
A. <i>Expanding the Recognized Procurement Processes Under the CSP</i>	
B. <i>The CPB and AMP</i>	
C. <i>Differences Between a CPB and AMP</i>	
D. <i>Potential Competition Concerns That May Arise from the Conduct of an AMP</i>	
IV. SUMMARY AND CONCLUSION.....	794

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The Author would like to thank Mr. Stephen Bombay for proofreading the Article. The views and opinions expressed in this Article are those of the Author and do not necessarily reflect the official policy or position of any company or agency he is connected to or has previously been connected with.

Cite as 67 ATENEO L.J. 774 (2023).

I. INTRODUCTION

Captive consumers are unfortunately at the mercy of distribution utilities (DUs) since DUs can pass on their power cost and other operating expenses (costs) to them.¹ Given that the DUs were granted exclusive franchises over specific areas by Congress,² captive consumers do not have a choice but to accept the electricity prices charged by their respective DUs hook, line, and sinker, no matter how exorbitant these prices can be.³ The ability of the DUs to pass on the cost of electricity to their captive consumers divest the former of any incentive to procure electricity from generation companies (“GenCos”) in a least-cost manner⁴ which, unfortunately, results to the detriment of consumers.

On 8 June 2001, Congress passed the Electric Power Industry Reform Act of 2001 (EPIRA), a law which aimed to revolutionize the electric power industry in the Philippines.⁵ Its desired outcomes are as follows: (1) “[t]o ensure the quality, reliability, security[,] and affordability of the supply of electric power;”⁶ (2) “[t]o ensure transparent and reasonable prices of electricity[;]”⁷ (3) to promote “free and fair competition and full

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1. *Alyansa Para Sa Bagong Pilipinas, Inc. v. Energy Regulatory Commission*, et al., G.R. No. 227670, May 3, 2019, available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064> (last accessed Jan. 31, 2023).
 2. *Id.*
 3. *See id.*
 4. Raul V. Fabella, *The Market Testing of Power Supply Agreements: Rationale and Design Evolution in the Philippines* (Energy Policy and Development Program Working Paper 2016-03R, Aug. 2016), at 12, available at https://mpr.ub.uni-muenchen.de/87725/1/MPRA_paper_87725.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/GW2Y-Z4PK>].
 5. *An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001]*, Republic Act No. 9136 (2001).
 6. Adoracion M. Navarro, et al., *Post-EPIRA Impacts of Electric Power Industry Competition Policies* (Philippine Institute for Development Studies Discussion Paper Series No 2016-15, May 2016), at 4, available at <https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1615.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/LS68-QBRB>] (citing *Electric Power Industry Reform Act of 2001*, § 2 (b)).
 7. Navarro, et al., *supra* note 6, at 4 (citing *Electric Power Industry Reform Act of 2001*, § 2 (c)).

accountability”⁸ in obtaining the best electricity rates for consumers;⁹ and (4) “[t]o protect [] public interest[.]”¹⁰ Under the EPIRA, the Department of Energy (DOE) must “[f]ormulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy[.]”¹¹ In other words, the DOE is the government agency which supervises the restructuring of the electric power industry by formulating and laying down policies which will bring about the objectives of the EPIRA into reality.¹²

To promote free and fair competition in the DU’s procurement of their Power Supply Agreements (PSAs), the DOE issued Department Circular No. DC 2015-06-0008 (DC 2015).¹³ DC 2015 mandates DUs to undergo a competitive selection process (CSP) in securing their uncontracted demand through PSAs.¹⁴ Mandating the DUs to undergo a CSP in the procurement of their PSAs is how the DOE secures a reliable and affordable source of electricity for the public while promoting competition in the power industry.¹⁵ To clarify the terms in conducting a CSP, the DOE issued Department Circular No. DC 2018-02-0003 (DC 2018), which adopts and prescribes the policy for the CSP in the procurement of a PSA.¹⁶ Although DC 2015 appears to have mandated the conduct of CSP for all DUs, DC 2018 carved out certain instances when some DUs may be exempted from undergoing CSP.¹⁷

8. *Id.*

9. Navarro, et al., *supra* note 6, at 4 (citing Electric Power Industry Reform Act of 2001, § 2 (j)).

10. Electric Power Industry Reform Act of 2001, § 2 (f).

11. *Id.* § 37 (a).

12. *See id.* § 37.

13. Department of Energy, Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA), Department Circular No. DC 2015-06-0008, Series of 2015 [DOE Dept. Circ. No. DC 2015-06-0008] (June 11, 2015).

14. *See id.* § 3.

15. *See id.* § 1.

16. Department of Energy, 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, Department Circular No. DC 2018-02-0003, Series of 2018 [DOE Dept. Circ. No. DC 2018-02-0003], whereas cl. para. 9 (Feb. 1, 2018) (as amended).

17. *Id.* § 2.2.

In 2021, the DOE expanded the modalities of CSP through Department Circular No. DC 2021-09-0030 (DC 2021).¹⁸ Although DC 2021 reiterated that DUs shall continue to adopt Competitive Public Bidding (CPB) as the primary mode of procurement under CSP, it now allows DUs to resort to an Alternative Mode of Procurement (AMP) for New Technology.¹⁹ By expanding the procurement processes under the CSP, the DOE recognizes that there are other power supply procurement processes in addition to CPB that will ensure transparency and competition in the procurement of PSAs.²⁰

Given this backdrop, this Article focuses on the potential anti-competitive concerns that may arise from the introduction of the AMP as a recognized procurement process under the CSP, and recommends solutions to address these concerns. Chapter II examines features of a PSA and determines what makes it an agreement different from others based on a competition law standpoint. This Chapter also argues that a PSA is an agreement imbued with public interest and the negotiation of its terms, especially the power rates, should therefore always be made in a transparent and competitive manner. Chapter III examines the differences between an AMP and CPB and argues that due to the Unsolicited Proposal (USP) and Competitive Challenge mechanisms, the conduct of an AMP may not be sufficient to ensure free and open competition in the procurement of PSAs which a CPB guarantees. It also includes an assessment of how the AMP may be detrimental to competition. Finally, Chapter IV summarizes and concludes the discussion.

II. POWER SUPPLY AGREEMENT: AN AGREEMENT IMBUED WITH PUBLIC INTEREST

A PSA is not an ordinary agreement because it does not only affect the contracting parties (i.e., the GenCo and DU), but it also has an impact on the lives of the millions of captive consumers who are not privy to the PSA.²¹ Unlike an ordinary agreement where the contracting parties are free to discuss the terms of their agreement without external interventions, the PSA

18. Department of Energy, Amending Certain Provisions of and Supplementing Department Circular No. DC 2018-02-0003 on the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreement for the Captive Market, Department Circular No. DC 2021-09-0030, Series of 2021 [DOE Dept. Circ. No. DC 2021-09-0030] (Sept. 24, 2021).

19. *Id.* § 7.

20. *Id.* whereas cl. para. 7.

21. *Alyansa*, G.R. No. 227670.

is further reviewed and approved by the Energy Regulatory Commission (ERC) before it can be valid.²² Considering the nuances in the execution of a PSA, it gives rise to a unique set of competition concerns which do not exist in other agreements. In line with this, two questions emerge: (1) What exactly are the features of a PSA which warrant a closer scrutiny under competition lens; and (2) Why is a PSA an agreement imbued with public interest? This Chapter answers these questions by examining the features of a PSA and concluding that the interplay of these features makes it an agreement imbued with public interest.

A. The Features of a Power Supply Agreement

An agreement or a contract is regarded as the law between the parties because it contains provisions to which the contracting parties agree to be bound.²³ Thus, obligations arising from an agreement or a contract have the force and effect of a law which can be enforced in court if breached by either party.²⁴ As mentioned, the PSA is different from a normal agreement because it possesses certain features which makes it unique. More than just affecting the contracting parties, the PSA also has an impact on those who are not privy to it²⁵ because, as explained above, the DU is allowed to pass its costs to the captive consumers or to those who do not have any option to choose from whom they would buy electricity.²⁶ An examination of these features is, therefore, critical to determine why a PSA may have a negative impact on competition. In this regard, this Article submits that a combination of the following features separates a PSA from an ordinary contractual agreement: (1) exclusivity; (2) long-term duration; (3) the large amount of electricity contracted per PSA; and (4) the ability of DUs to pass on its costs to the

22. Electric Power Industry Reform Act of 2001, § 25 & Energy Regulatory Commission, 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, Energy Regulatory Commission Case No. 2018-002 RM [ERC Case No. 2018-002 RM], art. I (c) (Apr. 17, 2018).

23. *Morla v. Belmonte*, G.R. No. 171146, 661 SCRA 717, 730 (2011) (citing *Roxas v. De Zuzuarregui, Jr.*, G.R. No. 152072, 481 SCRA 258, 276 (2006) (citing *Almeda v. Court of Appeals*, G.R. No. 113412, 256 SCRA 292, 299 (1996); *Reta v. National Labor Relations Commission*, G.R. No. 112100, 232 SCRA 613, 616 (1994); *City of Manila v. Intermediate Appellate Court*, G.R. No. 71159, 179 SCRA 428, 436 (1989); & *Bagadiong v. Vda. De Abundo*, G.R. No. 75395, 165 SCRA 459, 463 (1988))).

24. *Morla*, 661 SCRA at 730 (citing *Roxas*, 481 SCRA at 276).

25. *Alyansa*, G.R. No. 227670.

26. *Id.*

captive consumers (hereinafter collectively referred to as the “PSA Features”).

At its core, a PSA is “a bilateral agreement between a [GenCo] and a [DU] for the purchase and supply of power.”²⁷ By virtue of being a bilateral agreement, a GenCo is obligated to supply power to a DU for a specified term, usually for a period of 20 years.²⁸ The long-term duration of a PSA is further aggravated by the fact that the GenCo is obligated to supply exclusively all the power it generates to its partner DU.²⁹ A combination of the exclusivity and lengthy duration of an agreement is usually suspect under competition law because it locks in the supply of a certain product for a particular customer for a considerable period leading to the foreclosure of other suppliers from the market.³⁰ For purposes of illustration, assume that there are only three GenCos capable of supplying electricity in Luzon, namely GenCos X, Y, and Z, and that the only DU in Luzon is DU W, which has an annual demand of 10,000 megawatts (MW). DU W was able to execute a PSA with GenCo X, wherein GenCo X will exclusively supply 10,000 MW of electricity to DU W for a period of 25 years. Considering the long-term duration and exclusiveness of the said PSA, GenCos Y and Z will most likely exit the market because all the demand for electricity in Luzon for the next 25 years has already been contracted under the PSA between GenCo X and DU W.

Moreover, the subject matter of a PSA always pertains to an essential good — electricity — and the amount of electricity contracted per PSA is usually large.³¹ The importance of electricity in our daily lives cannot be

27. Francisco Villa, Energy Investment Forum (PowerPoint Presentation by the Director of Planning and Information Service, ERC, December 2014), at 12, available at https://www.doe.gov.ph/sites/default/files/pdf/e_ipo/leif_2014_2.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/4SA3-RRXM>] & ERC Case No. 2018-002 RM, art. II (m).

28. An examination of the term of Meralco’s PSAs in *Alyansa* would show that the terms of its PSAs were usually for 20 years. *Alyansa*, G.R. No. 227670.

29. DOE Dept. Circ. No. DC 2021-09-0030, § 7 (“A PSA shall be awarded to a Power Supplier that will supply the whole or a portion of the electric power requirements of a DU[.]”).

30. Amabelle C. Asuncion, *Exclusive Only*, BUSINESSMIRROR, Aug. 14, 2019, available at <https://businessmirror.com.ph/2019/08/14/exclusive-only> (last accessed Jan. 31, 2023) [<https://perma.cc/X4N3-UV3G>].

31. *Alyansa*, G.R. No. 227670 (wherein the PSAs of Meralco constitute almost all of its demand).

stressed enough given that humanity's modern way of living is highly dependent on electricity,³² and the PSA is the agreement responsible for supplying electricity to captive consumers.³³ Worse, DUs pass on their costs to the captive consumers. This practice does not encourage DUs to procure electricity in a least-cost manner.³⁴ Since DUs have a complete monopoly over the distribution of electricity within their franchise area, the only time they are subjected to the process of competition is when they conduct a CSP.³⁵ This is the reason why the Supreme Court held in *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission, et al.*³⁶ that the ERC deprived an entire generation of the benefit of CSP when it decided to postpone its implementation to a later date, which gave Meralco and other DUs an opportunity to procure a majority of their uncontracted demand without the benefit of a CSP.³⁷

B. A PSA Is an Agreement Imbued with Public Interest

Although electricity can be supplied either through a PSA or the Wholesale Electricity Spot Market,³⁸ most energy transactions in the Philippines are contracted via PSAs.³⁹ For the period of 26 November 2019 to 25 November 2020, around 83% of energy transactions were still contracted through PSAs:

32. See Jude Clemente, *Energy as a Foundation of Modern Life*, 35 J. ENERGY & DEV. 33, 33-34 (2011) & Lars Löfqvist, *Is There a Universal Human Right to Electricity?*, 24 INT'L J. HUM. RTS. 711, 711 (2020).

33. See Villa, *supra* note 27.

34. Fabella, *supra* note 4.

35. *Alyansa*, G.R. No. 227670.

36. *Id.*

37. *Id.*

38. Electric Power Industry Reform Act of 2001, § 30. Section 30 provides that "the DOE shall establish a [WESM]." *Id.*

The WSEM is where electricity is traded as a commodity in the Philippines. Philippine Electricity Market Corporation, About PEMC, *available at* <https://www.wesm.ph/about-us/about-pemc> (last accessed Jan. 31, 2023) [<https://perma.cc/FYY9-VPPP>].

39. Philippine Electricity Market Corporation, Annual Market Assessment Report 2020, at 27, *available at* <https://www.wesm.ph/market-outcomes/market-assessment-reports/annual-market-assessment-report> (last accessed Jan. 31, 2023) [<https://perma.cc/DT4G-S92B>]. PSAs are referred to as "bilateral contracts" in this report. *Id.* (In the website, select "Annual Market Assessment Report 2020" and click the PDF file.).

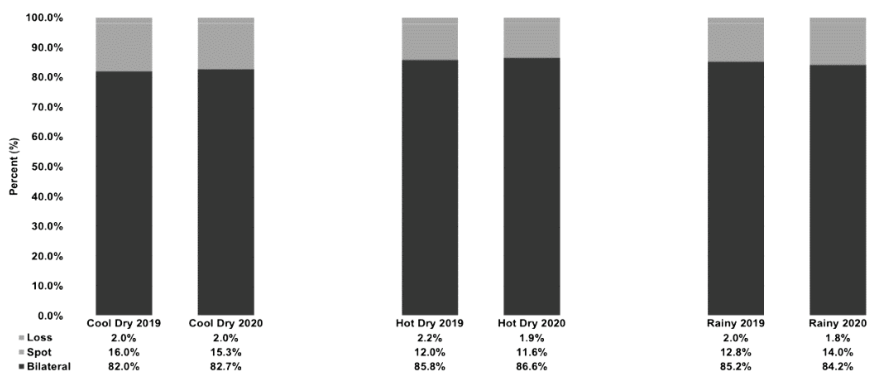


Figure 1. Energy Transactions of PSA v. Wholesale Electricity Sport Market⁴⁰

Figure 1 provides that the supply of energy is mostly procured by DUs via PSAs.⁴¹ Considering that most of the energy transactions are made through PSAs,⁴² the business of supplying and distributing power cannot therefore be left entirely in the hands of private entities.⁴³ To reiterate, a PSA is not just binding on the contracting parties because its repercussions also ripple to captive consumers.⁴⁴ A PSA which contains an expensive power rate, for example, will persist for at least two decades, and such rate cannot be renegotiated until the end of its term.⁴⁵

If GenCos and DUs are totally free to negotiate the terms of their PSA without government intervention, then they may agree to gouge captive customers by charging an exorbitant power rate for a long period. Unlike in a normal contract, wherein the lower the price of the product is, the better it is for the buyer, the DU lacks the incentive to secure the least expensive power rate because it is not the entity paying the costs as it can pass the same to the captive consumers.⁴⁶ Unfortunately, there is no alternative for the captive consumers but to continue paying their electric bills because their options are limited to either purchasing electricity at a high cost or living a

40. *Id.* at 27, fig. 32.

41. *Id.*

42. *Id.*

43. *See generally* Asuncion, *supra* note 30.

44. *Alyansa*, G.R. No. 227670.

45. *Id.*

46. *See id.*

life without electricity. It is on this basis from which this Article submits that a PSA is an agreement imbued with public interest because it affects the lives of millions of captive consumers.

The interplay of the PSA Features has an impact on people's lives, which is why it is crucial for the government to regulate how DUs procure their PSAs.⁴⁷ In this regard, the DOE plays a difficult and important role in balancing the need to secure a stable and reliable source of electricity while ensuring that DUs procure power in a least-cost manner.⁴⁸ It was on the right track when it mandated DUs to conduct a CSP in the procurement of their PSAs which was previously synonymous to the conduct of a CPB.⁴⁹ Unfortunately, with the issuance of DC 2021, the DOE expanded the recognized procurement processes under the CSP policy to include AMP⁵⁰ which, as will be discussed below, may potentially result in a bevy of competition concerns.

III. THE ALTERNATIVE MODE OF PROCUREMENT: DOES IT REALLY PROMOTE COMPETITION AND TRANSPARENCY IN THE PROCUREMENT OF PSAS?

Pursuant to its mandate to formulate rules and regulations to implement the objectives of the EPIRA,⁵¹ the DOE issued DC 2021 which allows DUs to resort to an AMP in the procurement of their uncontracted demand for New Technology.⁵² DC 2021 defines New Technology as “a technology that is novel or a novel use or arrangement of existing technology that has not yet been commercially operating or applied in the country upon effectivity of the Circular.”⁵³ Consequently, DC 2021 expanded the definition of the CSP under DC 2018 (from CPB alone⁵⁴ to CPB and AMP)⁵⁵ to ensure competition and transparency in the procurement of the PSA.⁵⁶ With the inclusion of the AMP as an additional modality of CPB, a question arises:

47. See generally Electric Power Industry Reform Act of 2001, § 2 (f) & ERC Case No. 2018-002 RM, art. 1.

48. See Electric Power Industry Reform Act of 2001, §§ 37 (d) & (e) (ii).

49. See DOE Dept. Circ. No. DC 2015-06-0008, § 1.

50. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

51. Electric Power Industry Reform Act of 2001, § 37 (p).

52. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

53. *Id.* § 2.

54. DOE Dept. Circ. No. DC 2018-02-0003, § 3.8.

55. DOE Dept. Circ. No. DC 2021-09-0030, § 2.

56. *Id.* whereas cl. para. 5.

Can the conduct of a transparent and competitive selection process be ensured through an AMP? This Chapter answers this question by comparing the differences between CPB and AMP and arguing that allowing an Original Proponent (OP) to submit a USP and giving it a right to match under the AMP raises a new set of competition concerns which are not present in a CPB.

A. Expanding the Recognized Procurement Processes Under the CSP

Prior to the issuance of DC 2021, the CSP and CPB referred to the same process of subjecting the procurement of a DU's PSA via competitive bidding.⁵⁷ In this regard, Section 3.8 (in relation to Section 3.7) of DC 2018 categorically states that CSP and CPB shall be used interchangeably —

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 the Policy. *For purposes of, and throughout the Policy, the terms 'Competitive Bidding' and 'CSP' shall have the same meaning and shall be used interchangeably.*⁵⁸

The CSP refers to the process that a DU conducts to ensure that the procurement of its PSAs is made in a “transparent and competitive” manner.⁵⁹ Previously, a DU could only comply with the CSP requirement of the DOE by conducting a CPB.⁶⁰ The synonymy of CSP and CPB vanished when the DOE issued DC 2021 which expanded the definition of CSP to include AMP.⁶¹ Currently, the CSP refers to either CPB or AMP.⁶²

57. DOE Dept. Circ. No. DC 2018-02-0003, § 3.8.

58. *Id.* §§ 3.7 & 3.8 (emphasis supplied).

59. DOE Dept. Circ. No. DC 2018-02-0003, § 3.8.

60. *Id.*

61. DOE Dept. Circ. No. DC 2021-09-0030, § 2.

62. *Id.*

DC 2021 retained the definition of Competitive Bidding under DC 2018, but it amended the definition of CSP to accommodate an AMP —

3.8 ‘*Competitive Selection Process*’ or ‘*CSP*’ refers to the process wherein a Power Supplier or, in the case of off-grid areas, a NPP is chosen to supply electric power requirements of a DU *through transparent and competitive bidding or alternative mode of procurement* undertaken by a DU or by Aggregated DUs to secure supply of electricity based on the evaluation criteria adopted by the DUs.⁶³

DC 2021 also refers to the concept of Competitive Bidding as a CPB which are likewise used interchangeably in this Article. In justifying the need to include AMP as a recognized CSP, the DOE explained that it “recognizes that there are other power supply procurement modalities [] for the requirements of the consumers that will ensure competition and transparency in the procurement of PSA[.]”⁶⁴

B. The CPB and AMP

For the most part, the conduct of CSP under DC 2021 resembles the step-by-step process enumerated in DC 2018 with some minor additions: (1) Preparation of Bid Documents; (2) Review of the terms of reference (TOR), draft instruction to Bidders, Supplemental/Bid Bulletin, and other related documents (new step); (3) Publication and Posting; (4) Pre-Bid Conference; (5) Bid evaluation criteria and process; and (6) Submission, receipt, and opening of bids.⁶⁵ This process is an elaboration of, and is in line with the steps provided under DCs 2018 and 2021 in their definition of Competitive Bidding.⁶⁶

With respect to an AMP, it is a procurement process newly recognized by DC 2021 which a DU can resort to for New Technology.⁶⁷ Interestingly, DC 2021 defines an AMP by clarifying that DUs shall still adopt the CPB in the procurement of PSAs,⁶⁸ thereby insinuating that CPB remains the preferred mode of procuring PSAs under the CSP. The submission of a USP is essential to the conduct of AMP because an AMP only commences when

63. *Id.* (emphasis supplied).

64. *Id.* whereas cl. para. 7.

65. *Id.* § 7.

66. Compare DOE Dept. Circ. No. DC 2018-02-0003, § 3.7, with DOE Dept. Circ. No. DC 2021-09-0030, § 2.

67. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

68. *Id.*

a GenCo submits a USP to the DU which then confers such GenCo an OP status.⁶⁹

Section 2 of DC 2021 defines a USP as “a power supply proposal submitted by a Power Supplier to a DU, which is not in response to a solicitation or request issued by the latter, to undertake a PSA with the DU.”⁷⁰ DC 2021 further provides that, “[a]t any given year, the capacity to be procured through a USP under AMP shall not exceed [] 25% of the DU’s peak demand for the year of the USP’s required commercial operations minus any capacity previously procured through USP for commercial operations in the same year.”⁷¹

To ensure competition and transparency in the procurement of PSAs via an AMP, the DOE requires the DU to conduct a Competitive Challenge after it finds the terms of the USP acceptable.⁷² The Competitive Challenge gives the other GenCos an opportunity to tender an offer to the DU to challenge the USP.⁷³ The bids submitted by the other GenCos during the Competitive Challenge stage must be responsive to the agreed terms of reference between the DU and the OP, and the offered price should be lower than that of the OP.⁷⁴ The Competitive Challenge also grants the OP the right to match the price proposal of the lowest calculated bid among the other GenCos.⁷⁵ If successful, the PSA is awarded to the OP.⁷⁶ Notably, the Competitive Challenge is akin to a Swiss Challenge which is a “hybrid mechanism between the direct negotiation approach and the competitive bidding route.”⁷⁷

69. *Id.*

70. *Id.* § 2.

71. *Id.* § 7.

72. *Id.*

73. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Alyansa*, G.R. No. 227670 (citing *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, 733 SCRA 68, 81-82 (2014) (citing Piyush Joshi & R.V. Anuradha, *Competition Concerns in Concession Agreements in Infrastructure Sectors* (Report by Clarus Law Associates, June 2009), at 46, available at <https://www.cci.gov.in/images/marketstudie/en/docs1652438464.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/8KB7-KUJZ>])).

The recognition of the AMP as an accepted mode of procurement under the CSP precedes the issuance of DC 2021. In a 2020 ERC case⁷⁸ concerning the approval of certain PSAs, the ERC allowed parties to conduct the CSP through Swiss Challenge which is similar to the Competitive Challenge of an AMP —

11.4. CELCO requested the Energy Regulatory Commission's (ERC) guidance on the conduct of CSP through Swiss Challenge. *The Honorable Commission replied on 17 January 2019 that CELCO may proceed with the conduct of CSP, citing a DOE Letter it received on 29 November 2018 allowing Swiss Challenge as it is not excluded in the CSP Policy*[.]

11.5. In view of the ERC's assurance, CELCO resumed the conduct of CSP through Swiss Challenge. During Pre-bid Conference, eligible bidders DPC and BIPCOR attended. However, both failed to submit their respective proposals on the scheduled date of submission and opening of comparative proposals[.]⁷⁹

Moreover, Article IV, Section 4 of the rules of ERC in governing the execution, review, and evaluation of PSAs entered into by DUs for the supply of electricity to their captive market also recognizes USPs (Swiss Challenge) as a valid procurement process under CSP.⁸⁰

C. Differences Between a CPB and AMP

An examination of the respective definitions of a CPB and an AMP reveals that the main differences between the two procurement processes are the following: (1) the instance when a CPB and an AMP may be resorted to; (2) the act which triggers the commencement of the respective procurement processes; and (3) the existence or absence of the right to match, as the case may be. First, a DU may only resort to an AMP for New Technology,⁸¹ while a CPB may be conducted by DU in any form of technology unless it is exempted from conducting a CSP.⁸² Second, the process of CPB

78. In the Matter of the Application for Approval of the Power Supply Agreement (PSA) Between Camotes Electric Cooperative, Inc (CELCO) and Camotes Island Power Generation Corporation (CAMPCOR) with Prayer for Provisional Authority or Interim Relief, ERC Case No. 2020-12 RC, Aug. 11, 2020, available at <https://www.erc.gov.ph/ContentPage/62017> (last accessed Jan. 31, 2023) (Click the "Order_2020-012RC" to access the file).

79. *Id.* ¶¶ 11.4 & 11.5 (emphasis supplied).

80. ERC Case No. 2018-002 RM, art. IV, § 4.

81. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

82. *See id.* § 1. Section 2.2., as amended by DC 2021, provides for the grounds of issuance of a Certificate of Exemption from the DOE —

2.2.1.1. Any generation project funded by grants or donations, and will become fully-owned, operated, and controlled by the DU within its franchise area, subject to ownership and market-share limitations as provided under relevant laws and issuances. 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 excluding taxes to be paid by the DU; *Provided also*, that the generation project or facility shall be structurally and financially unbundled from the DU's business segment such that the generation rate from such project or facility can clearly be distinguished from the distribution rates of the DU; *Provided finally*, that the generation project shall not be transferred or assigned to an affiliate or subsidiary Power Supplier of the DU.

2.2.1.2. Negotiated procurement of emergency power supply wherein the cooperation period of the corresponding Emergency Power Supply Agreement (EPSA) shall not exceed one (1) year, and such EPSA shall be filed immediately before the Energy Regulatory Commission (ERC) upon the issuance and within the effectivity of the COE-CSP; *Provided*, that the DU shall prove and certify that it has performed all the necessary and required due diligence, and solicited proposal from at least one (1) power supplier for EPSA to address the emergency situation and to avert and/or mitigate its consequences, and the offer/s from the available Power Supplier/s shall be attached in the request for COE-CSP; *Provided also*, that the procurement of emergency power supply shall not be entitled to any form of subsidy. *Provided finally*, that the rate shall be equivalent to or lower than the latest ERC-approved generation tariff for same or similar technology in comparable areas.

2.2.1.3. Any generating plant to be embedded in the DU, utilizing indigenous energy resources in the franchise area of the DU, subject to ownership and market-share limitations as provided under relevant laws and issuances, unless it intends to sell generated power outside of the embedded area, in which case, it shall undergo CSP with respect to its excess power. The size of the generation plant shall have a maximum capacity of 10 MW per Luzon DU and 5 MW per Visayas and Mindanao DU.

2.2.1.4. The provision for power supply by the National Power Corporation (NPC) in off-grid areas prior to and until the entry of New Power Providers (NPP) and in emergency circumstances, in which case, a copy of the PSA between the Electric Cooperative (EC) and the NPC shall be submitted to the DOE and the National Electrification Administration (NEA), in case of ECs.

2.2.1.5. The provision for power supply by the Power Sector Assets and Liabilities Management (PSALM) Corporation or its successors-

commences after the DU prepares and publishes its bid documents for the conduct of public bidding,⁸³ while it is the OP's submission of an acceptable USP to the DU which commences an AMP.⁸⁴ Finally, unlike in a CPB, there is a Competitive Challenge under an AMP and this mechanism grants the OP the right to match the lowest price proposal tendered by the other GenCos prior to the conclusion of an AMP.⁸⁵

D. Potential Competition Concerns That May Arise from the Conduct of an AMP

Before analyzing the potential competition concerns that may arise from an AMP, it is important to explain why there is a need for the DOE to mandate DUs to undergo a CSP in the procurement of their PSAs. As mentioned in Chapter II, the PSA is different from any other agreements because of its features which makes it an agreement imbued with public interest. Due to the existence of a captive market and its ability to pass on its costs to the captive consumers, a DU lacks any incentive to procure PSAs in a least-cost manner.⁸⁶ In this regard, the CSP aims to solve this “incentive-less” situation by forcing the DU to conduct a CSP which would require it to procure its PSA through competitive means.⁸⁷ By requiring the DUs to conduct CSP, the DOE is basically forcing the process of competition into them with a hope that the end-product arising from such process will achieve the objectives of the EPIRA.

I. The Potential Harm on Competition Resulting from the PSA Features

As mentioned earlier, long-term exclusive agreements are usually suspect under competition law due to their potential harmful effects on

in-interest through bilateral contracts for the power produced from the undisposed generating assets and [I]ndependent Power Producer (IPP) contracts. Request for exemption must be submitted to the DOE at least three (3) months prior to the expiration of the Contract of Supply of Electric Energy (CSEE) or intended cooperation period. Upon its execution, the DU or EC shall furnish the DOE and NEA, respectively, with a copy of the CSEE between the DU and the PSALM.

DOE Dept. Circ. No. DC 2021-09-0030, § 1.

83. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

84. *Id.*

85. *Id.*

86. Fabella, *supra* note 4, at 13.

87. *Id.*

competition.⁸⁸ The European Union (EU) Competition Commission stated in its Guidelines on Vertical Restraints⁸⁹ that the longer the duration of the exclusive agreements (also known as single branding agreements) is, the more significant foreclosure is likely to be —

(298) Under the heading of ‘single branding’ fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier.

...

(302) If competitors can compete on equal terms for each individual customer’s entire demand, single branding obligations imposed by a single supplier are generally unlikely to restrict competition appreciably unless the ability of customers to switch between suppliers is rendered difficult by the duration and market coverage of the single branding obligations. The higher the proportion of its market share that a supplier sells under a single branding obligation and *the longer the duration of the single branding obligations, the more significant foreclosure is likely to be*. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant undertakings.⁹⁰

In the European Commission case of *EDF*,⁹¹ *Electricité de Strasbourg S.A. (EDF)*, a dominant entity engaged in the business of supplying electricity in the French market, entered into several long-term exclusive contracts with its large industrial customers for the supply of electricity.⁹² The EU Competition Commission noted that the “result of the [] contracts combined with [] volumes covered and the duration of the contracts is that [] principal supplier seeking to acquire industrial customers from EDF for the whole of their needs would come up against EDF’s market foreclosure.”⁹³

The United States (U.S.) also acknowledges that long-term exclusive agreements raise antitrust or competition concerns “[t]o the extent that they have a restrictive effect on the operations of purchasers or sellers, they impose the economic costs that antitrust policy associates with the inhibition of free

88. Asuncion, *supra* note 30.

89. European Commission, Guidelines on Vertical Restraints, 2022 O.J. (C 248) 1.

90. *Id.* ¶¶ 298 & 302 (emphasis supplied).

91. Long-Term Contracts France, Commission Decision, Case COMP/39.386 (Mar. 17, 2010).

92. *Id.* ¶ 2.

93. *Id.* ¶ 33.

[] market forces.”⁹⁴ Similar to the EU, long-term exclusive agreements under the U.S. framework are also considered as having an exclusionary effect and, as a result, are evaluated on a case by case basis (the “rule of reason” approach).⁹⁵ In this regard, the Federal Trade Commission of the U.S. considers the following factors in determining the propriety of a long-term exclusive agreement: “(1) the length of the contract term; (2) the more outlets or sources covered; and (3) the fewer alternative outlets or sources not covered.”⁹⁶

Given the trend in the EU and the U.S., the Philippine Competition Commission (the Commission) would most likely treat long-term exclusive agreements as agreements that raise competition concerns.⁹⁷ Depending on the attending facts, such agreements may be captured by Section 14 (c) of the Philippine Competition Act which prohibits any agreement that has an “object or effect of substantially preventing, restricting[,] or lessening competition[.]”⁹⁸

An example of a long-term exclusive agreement is a PSA because it is an agreement between the GenCo and the DU wherein the former would exclusively supply the latter electricity for a long period. Worse, a PSA is not simply a long-term exclusive agreement because it also allows a DU to pass its costs to the captive consumers.⁹⁹ In this regard, the PSA Features ticks all the red flags which the EU and U.S. have identified in evaluating the potential impact of a long-term agreement on competition.

The interplay of the PSA Features raises competition-related concerns for several reasons. *First*, the long-term duration, exclusiveness, and the large

94. John H Shenefield, *A Survey of the Antitrust Law of Exclusive Agreements*, 6 U. RICH. L. REV. 225, 225 (1972).

95. *See id.* at 226 (citing *Standard Oil Co. of NJ v. United States*, 221 U.S. 1, 66 (1911)).

96. Federal Trade Commission, *Exclusive Supply or Purchase Agreements*, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or> (last accessed Jan. 31, 2023) [<https://perma.cc/MF7N-CD95>].

97. *See* Asuncion, *supra* note 30.

98. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefore [Philippine Competition Act], R.A. No. 10667, § 14 (c) (2015).

99. *See Alyansa*, G.R. No. 227670.

amount of electricity contracted per PSA give rise to the possibility that other GenCos will be foreclosed in the market for the supply of electricity if they fail to secure a PSA of their own.¹⁰⁰ *Second*, captive consumers are directly affected by the terms of the PSA given that the costs are passed to them by the DU.¹⁰¹ *Third*, a PSA which charges an expensive electricity rate would effectively lock-in and gouge the captive consumers for a long period.¹⁰² *Finally*, a DU's lack of incentive to procure its PSA in a least-cost manner encourages it to maximize its profit by entering into a long-term PSA with a GenCo for the exclusive supply of all its power demand in exchange for an expensive power rate.¹⁰³ To mitigate the anti-competitive concerns that may arise from the PSA Features, DUs are required to conduct a CSP to ensure that the terms of their PSA will undergo competitive process rather than just being an agreement whose terms were directly negotiated by the parties concerned.¹⁰⁴ This is why it is important that the DOE only recognizes the gold standard for a procurement process in the conduct of a CSP.

2. Competitive Public Bidding: The Gold Standard for Procurement Processes

The role of a CSP in promoting transparency and competition in the procurement by the DUs of PSAs cannot be stressed enough. Due to the importance of a CSP, any procurement process it recognizes should only be the best to ensure that the PSAs procured under such process are chosen under a free and competitive regime. In this respect, the CPB is the gold standard for a procurement process because, unlike an AMP, it is not a cross between a direct negotiation approach and a competitive bidding route as it is purely the latter.

In *Alyansa*, the Court recognizes the importance of CPB in ensuring that the DUs procure their PSAs in a least-cost manner —

As part of its regulation of this monopoly, the State requires distribution utilities to subject to *competitive public bidding* their purchases of electricity from power generating companies. Competitive public bidding is *essential* since the power cost purchased by distribution utilities is entirely passed on to consumers, along with other operating expenses of distribution utilities.

100. See *Asuncion*, *supra* note 30 & *Fabella*, *supra* note 4, at 12–13.

101. See *Alyansa*, G.R. No. 227670 & *Fabella*, *supra* note 4, at 12.

102. See *Fabella*, *supra* note 4, at 13.

103. *Id.* at 12–13.

104. DOE Dept. Circ. No. DC 2021-09-0030, § 7.

Competitive public bidding is the most efficient, transparent, and effective guarantee that there will be no price gouging by distribution utilities.

Indeed, the requirement of competitive public bidding for power purchases of distribution utilities has been adopted in the United States, Europe, Latin America, India, and many developing countries. This requirement is primarily aimed at ensuring a fair, reasonable, and least-cost generation charge to consumers, under a transparent power sale mechanism between the generation companies and the distribution utilities.¹⁰⁵

As the gold standard for procurement processes, requiring DUs to conduct CPB in the procurement of their PSAs will mitigate the harmful effects of the PSA Features on competition because the CPB guarantees that the DU will be forced to search for the best terms for its captive consumers despite having no incentive to do so. Thus, even if the PSA is a long-term, exclusive agreement for the supply of a large amount of electricity which allows a DU to pass its costs to the captive consumers, the CPB mitigates the harm resulting from the PSA Features by ensuring that the terms of the same were arrived at through competitive process.

3. The Alternative Mode of Procurement Raises Competition Concerns

Unlike the CPB, allowing an OP to submit a USP and conferring it with a right to match would not promote transparency and competition in the procurement of PSAs, even if an AMP can only be resorted to by a DU for New Technology. For the reasons stated below, the Author submits that an AMP should not be recognized as a CSP policy given that it is incapable of making sure that the PSAs will be procured in a competitive manner.

First, the definition of New Technology under DC 2021 is vague and general in scope because it does not sufficiently explain what may be considered by the DOE as a novel use or arrangement of an existing technology and when such technology is considered to have been commercially operating or applied in the Philippines. For example, a solar

105. *Alyansa*, G.R. No. 227670 (citing International Renewable Energy Agency, *Renewable Energy Auctions in Developing Countries*, at 9–10, available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2013/IRENA_Renewable_energy_auctions_in_developing_countries.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/8JAX-3KS3>] & Susan F. Tierney & Todd Schatzki, *Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices* (Analysis Group White Paper, July 2008), at i, available at https://www.analysisgroup.com/globalassets/content/insights/publishing/competitive_procurement.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/URC6-K85M>] (emphasis supplied).

powerplant which uses conventional solar technology but is powered by a different version or variation of battery cells, may be considered as New Technology under this definition. As a result, this lack of clarity may incentivize GenCos to introduce slight variations in their existing technology to allow them to conduct their CSP by AMP.

Second, by simply submitting a USP to the DU, the OP attains a first-mover advantage in an AMP which empowers it to dictate the terms of the bid and increases the likelihood of collusion between the OP and DU. For example, OP X may easily coordinate with DU Z to agree on a set of bidding terms that are favorable to OP X. As a result, the tailor-fitted bidding terms will be limited to those set by OP X which grants it an undue advantage against the other GenCos. Thus, the collusion between OP X and DU Z defeats the purpose of a Competitive Challenge since it will be difficult for the other GenCos to offer terms better than those provided in the USP if these were purposely made to suit OP X's interests.

Third, the AMP also incentivizes the OP to coordinate with the DU regarding the submission of a "cover USP." A cover USP is a proposal submitted by the OP which is not genuine and is designed to serve as an erroneous reference from which the other GenCos will base their bids from. For example, let us assume that OP X can supply electricity to DU Z at ₱6.00 per kilowatt hour (kWh). Instead of offering said rate to DU Z, it decided to coordinate with DU Z for the purpose of submitting a cover USP wherein OP X proposes to supply electricity at ₱15.00 per kWh. Upon approval by DU Z of the cover USP, the ₱15.00 per kWh becomes the reference price from which the other GenCos will base their bids from. Although the lowest calculated bid from the winning GenCo may be lower than ₱15.00 per kWh, said bid will still likely be closer to ₱15 per kWh than ₱6.00 per kWh since the reference price is ₱15.00 per kWh. Assuming that the lowest calculated bid is ₱12.00 per kWh, OP X can easily match it by offering a price of ₱11.50 per kWh which is still far from what it is capable to supply at ₱6.00 per kWh. This situation will not happen in a CPB where all bids submitted by the GenCos are opened at the same time because there is no OP in a CPB who has an opportunity to set an erroneous reference price and match the lowest calculated bid.

Finally, the existence of a right to match may dissuade other GenCos from participating in the Competitive Challenge because such right may send a signal to them that there is already a chosen winner, and that the Competitive Challenge is merely a formality to satisfy the requirements of

DC 2021.¹⁰⁶ Thus, instead of promoting competition, other GenCo bidders may be reluctant to spend time and money in studying and preparing a bid,¹⁰⁷ which therefore defeats the purpose of a CSP.

Considering that an AMP grants other interested parties the opportunity to challenge the incumbent through the conduct of a Competitive Challenge, the Author submits that the conduct of an AMP may promote competition if only the agreement involved is not a PSA. As previously mentioned, however, a PSA is not just an ordinary agreement because it possesses certain features which makes it an agreement imbued with public interest. Thus, the existence of the PSA Features makes it dangerous to recognize a procurement process that combines a direct negotiation approach with the competitive bidding route. This is not the case with the CPB because such process exclusively treads the route of competitive bidding — a path which does not permit any form of direct negotiation that may be used by the parties as an avenue to collude. Should there be collusion in the conduct of a CPB, it will have to involve at least all the bidding GenCos which is difficult to sustain because the more members a cartel has, the more difficult it is to maintain.

IV. SUMMARY AND CONCLUSION

This Article shows that the AMP may not be enough to mitigate the harmful effects of the PSA Features on competition. In examining the competition concerns that may arise in the procurement of a PSA, this Article enumerates the PSA Features that distinguishes it from other agreements and concludes that a PSA is an agreement imbued with public interest. It also argues that considering the threat which the PSA Features pose on competition, the government needed to regulate the procurement of PSAs by requiring all DUs to conduct a CSP whenever a purchase of power from GenCos via PSAs is made. In effect, the CSP guarantees that even if the DU lacks incentive to procure its PSAs in a least-cost manner, the conduct of a CPB will ensure that the concerned DU will be required to procure its PSAs under

106. See also Letter from Matuwid na Singil sa Kuryente Consumer Alliance, Inc. to the Energy Regulatory Commission, at 1-2 (Oct. 8, 2018) (available at <https://www.erc.gov.ph/Files/Render/media/Matuwid%20na%20Singil%20sa%20Kuryente.pdf>) (last accessed Jan. 31, 2023) (The letter indicates the Comments of the Matuwid na Singil sa Kuryente Consumer Alliance on the ERC's 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).

107. *Id.*

a transparent and competitive regime. Unfortunately, upon the issuance of DC 2021, the DOE expanded the definition of a CSP to include the AMP. In this regard, this Article provides reasons why an AMP may be insufficient in ensuring that the procurement of PSAs will be made in a transparent and competitive manner.