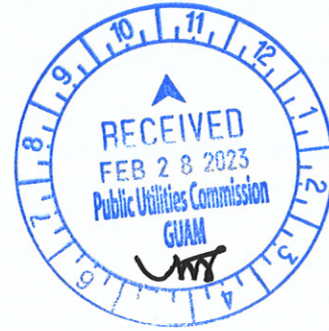


1 **D GRAHAM BOTHA, ESQ.**
2 **General Counsel**
3 **Guam Power Authority**
4 **688 Route 15, Suite 302**
5 **Mangilao, Guam 96913**
6 **Ph: (671) 648-3203/3002**
7 **Fax: (671) 648-3290**



8 **BEFORE THE GUAM PUBLIC UTILITIES COMMISSION**

9 **IN THE MATTER OF:**

10 The Application of the Guam Power Authority)
11 to Approve the Piti 8&9 Contract Extension)
12 with Marianas Energy Company.)

GPA DOCKET NO. 23-11

PETITION FOR CONTRACT REVIEW

13 **COMES NOW**, the GUAM POWER AUTHORITY (GPA), by and through its counsel
14 of record, D. GRAHAM BOTHA, ESQ., and hereby files GPA's Petition for the Public Utilities
15 Commission of Guam to review and approve GPA's request to approve the Piti 8&9 contract
16 extension with Marianas Energy Company (MEC), as follows:

17 **BACKGROUND**

18 The Guam Power Authority in 1996 contracted an Independent Power Producer (IPP) for
19 a Build, Operate and Transfer (BOT) project to construct Piti 8 & 9 power plant which
20 commenced in January 1999. The Marianas Energy Company (MEC) currently manages and
21 operates the plant under the Energy Conversion Agreement (ECA) under a five-year extension
22 which expires in January 2024. GPA and MEC have mutually agreed to negotiate a five (5) year
23 extension to the contract beginning January 2024. The revised Consent Decree was approved by
24 the U.S. District Court of Guam in January 2022, extending the commissioning of the new
25 combined cycle power units until April 2024. The Piti 8 & 9 baseload units are critical for
26 production of 38% of the energy for Guam until approximately one year after the commission of
27 the new Ukudu power plant. Without an extension given the current continued labor challenges,
28 GPA would be challenged to hire and train personnel to manage, operate, and maintain the Piti 8
& 9 power plant upon the expiration of the amended ECA in January 2024. The proposed

1 extension of the ECA would provide for Fixed O&M estimated fees of \$7.9M annually; Variable
2 O&M estimated fees of \$1.5M annually, and annual major overhaul of \$.8M for projects needed
3 to ensure plant reliability. The CCU in Resolution FY2023-09 has approved GPA's request to
4 approve the Piti 8&9 contract extension with Marianas Energy Company (MEC), subject to PUC
5 approval.

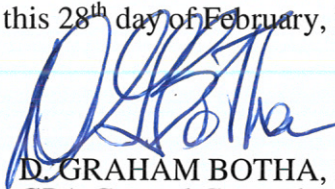
6 DISCUSSION

7 GPA hereby petitions the PUC, pursuant to the Contract Review Protocol for the Guam
8 Power Authority, approved by the PUC, to review and approve the Piti 8&9 contract extension
9 with Marianas Energy Company (MEC). In support of this Petition, GPA hereby provides the
10 PUC with Consolidated Commission on Utilities (CCU) Resolution No. FY2023-09, which
11 authorizes the General Manager to petition the PUC for approval of the Piti 8&9 contract
12 extension with Marianas Energy Company (MEC), subject to PUC review and approval. Said
13 resolution and its exhibits are attached herein as Exhibit A, and incorporated by reference herein
14 as if fully set forth.

15 CONCLUSION

16 The PUC should approve GPA's request to approve the Piti 8&9 contract extension with
17 Marianas Energy Company (MEC). The continued operation of the Piti 8 & 9 power plant is
18 critical to the power system, and is reasonable, prudent, and necessary.

19 **RESPECTFULLY SUBMITTED** this 28th day of February, 2023.

20
21 
22

23 D. GRAHAM BOTHA, ESQ.
24 GPA General Counsel
25
26
27
28

Selma HG Blas

From: Colleen Chlarson <cchlarson@guampuc.com>
Sent: Tuesday, February 28, 2023 9:51 AM
To: Candice M. Ananich; horeckylaw@teleguam.net; lpalomo@guampuc.com
Cc: Graham Botha; Selma HG Blas; Reginald E. Diaz
Subject: RE: Electronic Filing GPA Docket 23-11 Petition for Contract Review

Dear GPA:

This serves to acknowledge your email and attachment (23 pages). Please submit the original signed petition at your next convenience. Thank you.

Sincerely,

Colleen N. Santos Chlarson
Assistant Administrator
Public Utilities Commission of Guam
414 West Soledad Avenue
GCIC Building, 2nd Floor, Suite 207
Hagåtña, Guam 96910
Email: cchlarson@guampuc.com
Tel: (671) 472-1907 / Fax: (671) 472-1917

From: Candice M. Ananich <cmananich@gpagwa.com>
Sent: Tuesday, February 28, 2023 9:49 AM
To: horeckylaw@teleguam.net; lpalomo@guampuc.com; cchlarson@guampuc.com
Cc: Graham Botha <gbotha@gpagwa.com>; Selma HG Blas <sblas@gpagwa.com>; Reginald E. Diaz <rediaz@gpagwa.com>
Subject: Electronic Filing GPA Docket 23-11 Petition for Contract Review

Good morning!

This is an electronic filing of, GPA Docket 23-11 Petition for Contract Review, The Application of the Guam Power Authority to Approve the Piti 8&9 Contract Extension with Marianas Energy Company.

Hard copies will be delivered before the end of the week. Please contact me if you have a problem accessing any of the attachments.

Thank you.

Candice M. Ananich
Guam Power Authority - Operations
Mailing Address: P.O. Box 2977, Hagatna, Guam 96932-2977
Physical Address: 688 Route 15, Mangilao, Guam 96913
Telephone: (671) 648-3000 ext. 3089 | Fax: (671) 648-3290



GPA RESOLUTION NO. FY2023-09

RELATIVE TO AUTHORIZATION OF PITI 8 & 9 CONTRACT EXTENSION

WHEREAS, the twenty (20) year Energy Conversion Agreement (ECA) between the Guam Power Authority (GPA) and Marianas Energy Company (MEC) to Build, Operate and Transfer (BOT) the Piti 8 & 9 baseload generators commenced in January 1999; and

WHEREAS, GPA entered into a negotiated Consent Decree with the U.S. EPA in 2020, stipulating to convert Piti 8 & 9 to ultra-low sulfur fuel, retire Cabras 1 & 2 baseload units, commission 100 MW of renewable energy generation, and commission new combined cycle units; and

WHEREAS, Piti 8 & 9 are baseload units critical to produce 38% of energy for Guam until approximately one (1) year after the commissioning of the new Ukudu combined cycle units and until adequate reserves are obtained; and

WHEREAS, the ECA expired in January 2019, and GPA petitioned and was approved for a five-year extension by the CCU and PUC in April 2018; and

WHEREAS, the COVID-19 pandemic, permitting issues, adverse weather, and labor and supply chain limitations adversely impacted GPA's ability to timely fulfill some Consent Decree compliance requirements, resulting in GPA's petition to the U.S. EPA to modify the Consent Decree milestone schedule; and

WHEREAS, the revised Consent Decree was approved by the U.S. District Court of Guam in January 2022, extending the commissioning of the new combined cycle units until April 2024; and

WHEREAS, a five (5) year extension of the current contract ensures the stable management and operation of Piti 8 & 9 by MEC, complementing the modified Consent Decree milestone schedule and;

1 **WHEREAS**, without such extension and in consideration of the continued labor
2 challenges, GPA will be challenged to hire and train personnel to manage, operate, and maintain
3 the Piti 8 & 9 Power Plant upon the expiration of the amended ECA in January 2024; and

4 **WHEREAS**, the Piti 8 & 9 units are the most reliable and efficient units in the GPA power
5 system, and must be operated and maintained by experienced management, operation and
6 maintenance personnel during the next few years, particularly until the new Ukudu Power Plant
7 and the Phase IV renewables are commissioned;

8 **WHEREAS**, without a contract extension, MEC will not continue to manage and operate
9 the power plant, and will have difficulty in retaining existing workers beyond January 2024; and

10 **WHEREAS**, upon the commissioning of the new Ukudu Power Plant, the capacity factor
11 and use of the Piti units are expected to decrease allowing for solicitation of a new contract based
12 on its future use; and

13 **WHEREAS**, GPA and MEC have mutually agreed to negotiate a five-year extension of the
14 contract starting in January 2024 pursuant to Article 32 of the ECA as indicated in the attached
15 exhibit, "MEC Contract Extension Agreement"; and

16 **WHEREAS**, approval is requested to allow the General Manager to negotiate an extension
17 of the ECA with MEC for an additional five years, and to petition the PUC for approval of the
18 contract extension.

19 **NOW, THEREFORE, BE IT RESOLVED**, by the Consolidated Commission on Utilities, subject
20 to the approval of the Public Utilities Commission, as follows:

21 1. The General Manager of GPA is authorized to negotiate an extension of the Energy
22 Conversion Agreement (ECA) for management, operations, and maintenance of the
23 Piti 8 & 9 power plant with Marianas Energy Company with the following contract
24 parameters as set forth in the attached Exhibit, "MEC Contract Extension Agreement":

25 a. Term: 5 years

26 b. Fees:

27 i. Fixed O&M Fee = \$7.730/kW per month estimated at \$7,936,546 annually

28 ii. Variable O&M Fee = \$0.0028/kWh estimated at \$1,548,624 annually

- 1 iii. Cylinder Lube oil and emulsifier passed thru at cost to GPA (estimated at
2 \$1,671,989 and \$1,259,300 respectfully) unchanged from current ECA
3 iii. Annual Approval by GPA of Capital Improvement priority projects and of
4 Major Overhaul (\$800,000) to ensure plant reliability and continued
5 operation

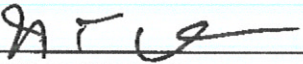
6 2. The General Manager is authorized to petition the PUC for approval of the contract
7 extension.
8

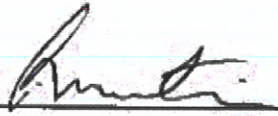
9 **RESOLVED**, that the Chairman certifies and the Board Secretary attests the adoption of
10 this Resolution.
11
12
13

14 **DULY AND REGULARLY ADOPTED AND APPROVED THIS 21st day of February, 2023.**
15

16 Certified by:

Attested by:

17
18
19
20 
21 JOSEPH T. DUENAS
22 Chairperson
23 Consolidated Commission on Utilities
24
25
26


PEDRO ROY MARTINEZ
Secretary
Consolidated Commission on Utilities

1
2 I, **Pedro Roy Martinez**, Secretary for the Consolidated Commission on Utilities (CCU), as
3 evidenced by my signature above do certify as follows:

4 The foregoing is a full, true, and accurate copy of the resolution duly adopted at a regular
5 meeting of the members of Guam Consolidated Commission on Utilities, duly and legally held at
6 a place properly noticed and advertised at which meeting a quorum was present and the
7 members who were present voted as follows:

8
9 Ayes:

5

10 Nays:

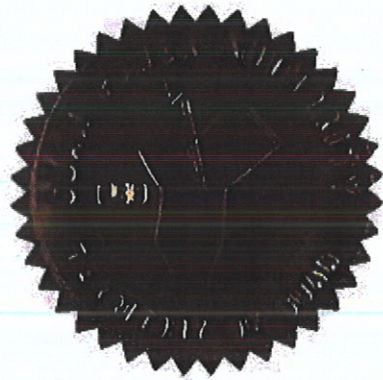
0

11 Absent:

0

12 Abstain:

0





GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O.BOX 2977 • AGANA, GUAM U.S.A. 96932-2977

Issues for Decision

Resolution No. FY2023-09:

Independent Power Producer (IPP) Contract Extension Piti 8&9 Units

What is the project's objective? Is it necessary and urgent?

Piti 8&9 reliable capacity is crucial most crucial over the next five years as the new Ukudu 198 MW power plant is commissioned and Phase IV renewable bids with full shifting energy storage systems are awarded and commissioned in late 2026. A reliable and efficient Piti Plant is crucial in avoiding Load Shedding and producing energy at lower cost most especially because of the high cost of fuel we are experiencing. MEC converted Piti 8&9 to Ultra-Low Sulfur Diesel (ULSD) in July/September 2022. MEC continues to fine tune plant operation and maintenance resulting from the conversion from residual fuel oil to ULSD. Piti is now providing clean energy and is compliant with all USEPA rules and Regulations as required by the USEPA consent decree. GPA has limited production capacity until the new 198MW Ukudu plant is commissioned and plant has gone thru the shakedown period of about a year.

The Piti 8&9 88 MW plant has been and continues to be the most reliable plant in the system. Marianas Energy Corporation (MEC) Management, operators and maintenance employees have successfully operated the plant reliably for the past 24 years. MEC has all the institutional knowledge and experience in operating this complicated plant successfully and reliably. In addition, MEC has an established engine engineering, technical representatives and spare parts cadre of support

The Piti 8&9 plant is currently the most efficient plant in the system. Plant produces energy on ULSD at about 15.4 net kWh/gal and at today's oil prices is \$0.09 to \$0.13/Net kWh cheaper than Cabras and the reserve units. Plant produces over 600,000,000 kWh annually translating to anywhere from \$55M to \$80M in lower fuel cost in comparison to the other generators. Any decrease in reliability will result in an increase in LEAC negatively impacting our ratepayers

MEC has requested for an expedited extension (letter attached) of their contract for another 5 years. MEC is experiencing difficulties retaining experienced employees because the current contract expires January 2024 and job security has become a major concern amongst its employees. The military buildup has been attracting employees away from MEC also, similar to GPA.

Where is the location?

Piti Units 8&9 are located on Cabras Island, Piti.

How much will it cost?

The Annual O&M cost is approximately \$11M and recapitalized annual investments of about \$3M.

When will it be completed?

The contract extension is for the period January 2024 thru January 2029.

What is its funding source?

Revenue funds

GPA WORK SESSION

Presentation To: Consolidated Commission on Utilities

February 14, 2023



ISSUES FOR DECISION



GPA RESOLUTION NO. FY2023-09

Performance Management Contract Extension for Piti 8&9 Units

What is the project's objective? Is it necessary and urgent?

The Marianas Energy Corporation Performance Management Contract for Piti 8&9 expires January 2024. Piti 8&9 are the most reliable and efficient units in the GPA System and must be operated and maintained by experienced management, operations and maintenance personnel most especially during the next few years as the new Ukudu Power Plant and Phase IV renewables are commissioned. The Piti Plant has been managed, operated and maintained by the Independent power Producer MEC since the commissioning of the units in 1999 and contract extended by CCU and PUC in 2018 mainly for the reasons an additional extension is being requested today. This resolution is for an additional extension of five(5) years in order to continue providing reliable low cost energy for our ratepayers as GPA transitions to the New Ukudu power Plant and the addition of new renewables by 2026.

Where is the location?

Piti Units 8&9 are located on Cabras Island, Piti.

How much will it cost?

The Annual O&M cost is approximately \$11M

When will it be completed?

The contract extension is for the period January 2024 thru January 2029.

What is its funding source?

Revenue funds



Capacity (MW) Projections

Date:	CY 2023	CY 2024	CY 2025	CY 2026	CY 2027	CY 2028	CY 2029	CY 2030
Current Operable Capacity								
Ukudu Power Plant Commissioned (CY 2025)			198	198	198	198	198	198
Cabras Steam (Retired CY 2025)	100	100	0	0	0	0	0	0
Piti 8&9 (MEC)	88	88	88	88	88	88	88	88
BASELOAD TOTAL	188	188	286	286	286	286	286	286
NON-BASELOAD TOTAL	161	161	161	161	161	161	161	161
TOTAL CONVENTIONAL CAPACITY	349	349	447	447	447	447	447	447
Full Shifting Renewables (Firm Capacity):								
Phase IV CY 2023 Bid-COD CY 2026 (50% Firm)				90	90	90	90	90
Phase V CY 2025 Bid-COD 2028 (50% Firm)						90	90	90
Firm ESS Capacity				90	90	180	180	180

Total Firm Capacity:

349 349 447 537 627 627 627

Peak Demand (2% Growth)	265	270	276	281	287	293	298	304
Minimum Reserve (55% of Peak Demand)	146	149	152	155	158	161	164	167
Capacity Balance	-62	-70	20	101	92	173	164	155

Reliability period of concern (Red)

Cautionary Period during ESS Mobilization (Yellow)



Piti 8&9 Annual Cost

Fiscal Year	Fuel Handling	Other Contractual	Total O&M	Monthly Average	Capital Projects Completed
FY2019 Feb-Sept	\$ 1,654,846	\$ 5,902,587	\$ 7,557,433	\$ 944,679	\$ 1,444,179
FY2020	\$ 1,938,304	\$ 9,135,527	\$ 11,073,831	\$ 922,819	\$ 3,865,510
FY2021	\$ 1,789,002	\$ 9,365,143	\$ 11,154,146	\$ 929,512	\$ 2,519,393
FY2022	\$ 2,545,125	\$ 9,355,771	\$ 11,900,896	\$ 991,741	\$ 1,199,014
FY2023 - Dec	\$ 410,830	\$ 2,526,023	\$ 2,936,854	\$ 978,951	\$ -
	\$ 8,338,108	\$ 36,285,052	\$ 44,623,160	\$	\$ 9,028,097

A Reliable and Efficient Piti Equates to Lower LEAD

Date:

Dec-22

Piti ULSD \$/bbl	\$	120.65
Reserve ULSD \$/bbl	\$	123.43
Cabras 0.2%LSRFO	\$	141.05

Base Load Plant:

Piti 8/9					
	\$	15.40	Fuel \$/gal	\$	0.1865
Cabras 1/2	\$	12.47		\$	0.3197
					0.1332

Non-Base Load Plants:

Medium Speed Diesels					
Yigo Diesel	\$	13.70	Fuel \$/gal	\$	0.2145
Yigo CT	\$	12.31		\$	0.2387
Macheche CT	\$	11.48		\$	0.2560
Piti 7	\$	10.93		\$	0.2689
Dededo CT	\$	9.01		\$	0.3262
	\$	8.09		\$	0.3633
Reserves Average				\$	0.2779
					0.0914



Justification for the 5-Year Contract

- Piti 8&9 reliable capacity is crucial most crucial over the next five years as the new Ukudu 198 MW power plant is commissioned and Phase IV renewable bids with full shifting energy storage systems are awarded and commissioned in late 2026. The successful commissioning and operations of these two significant projects would allow GPA to retire aged legacy units between 2025 thru 2030. A reliable and efficient Piti Plant is crucial in avoiding Load Shedding and producing energy at lower cost most especially because of the high cost of fuel we are experiencing.
- Ukudu's original commissioning date changed from Oct 2022 to April 2024. Construction and other potential delays may move the commissioning date to 3rd quarter 2024.
- MEC converted Piti 8&9 to Ultra-Low Sulfur Diesel (ULSD) in July/September 2022. MEC continues to fine tune plant operation and maintenance resulting from the conversion from residual fuel oil to ULSD. Piti is now providing clean energy and is compliant with all USEPA rules and Regulations as required by the USEPA consent decree.
- GPA has limited production capacity until the new 198MW Ukudu plant is commissioned and plant has gone thru the shakedown period of about a year.
- The New 180 MW plus bid for renewables issued in Dec 2022 is targeted for commissioning in 2026. We anticipate this new Full Shifting Energy Storage System will require about 1 to 2 years for GPA to determine what percentage of the new renewable project would be considered as firm capacity allowing GPA to evaluate what units could be retired by 2029.

Justification for the 5-Year Contract Extension

- The Piti 8&9 88 MW plant has been and continues to be the most reliable plant in the system. Marianas Energy Corporation (MEC) Management, operators and maintenance employees have successfully operated the plant reliably for the past 24 years. MEC has all the institutional knowledge and experience in operating this complicated plant successfully and reliably. In addition, MEC has an established engine engineering, technical representatives and spare parts cadre of support
- The Piti 8&9 plant is currently the most efficient plant in the system. Plant produces energy on ULSD at about 15.4 net kWh/gal and at today's oil prices is \$0.09 to \$0.13/Net kWh cheaper than Cabras and the reserve units. Plant produces over 600,000,000 kWh annually translating to anywhere from \$55M to \$80M in lower fuel cost in comparison to the other generators. Any decrease in reliability will result in an increase in LEAC negatively impacting our ratepayers
- MEC has requested for an expedited extension (letter attached) of their contract for another 5 years. MEC is experiencing difficulties retaining experienced employees because the current contract expires January 2024 and job security has become a major concern amongst its employees. The military buildup has been attracting employees away from MEC also, similar to GPA.
- I recommend the MEC contract be extended another 5 years in view of the critical importance. The plant is certainly crucial to meeting energy needs until the new Ukudu plant is commissioned and stable and as we commission more renewables by 2026.



180 Cabras Highway
Piti, Guam 96915
Tel: (671) 477-3060
Fax: (671) 477-3154

January 18, 2023

Mr. John M. Benavente, P.E.
General Manager
Guam Power Authority
P.O. Box 2977
Hagatna, Guam 96932

RE: ECA Extension for Marianas Energy Co. (January 2024 to January 2029)

Hafa Adai Mr. Benavente,

This letter is to confirm the following:

MEC and GPA have agreed to extend the existing ECA contract for an additional 5-years, subject to approval of the Consolidated Commission on Utilities and the Guam Public Utilities Commissions.

The changes to the agreement are summarized in the following pages and will be incorporated into the contract amendment once all necessary approvals are received.

Agreed to by the following authorized parties:

Rino T. Manzano

Rino T. Manzano
General Manager
Marianas Energy Co.

01/18/2023

Date

John M. Benavente, P.E.
General Manager
Guam Powe Authority

Date


FEATURE	CURRENT	NEW REQUIREMENT	CONTRACT SECTION
Ownership	IPP	GPA, with Capital Lease	Clause 2 The Project Clause 14 Transfer of Ownership
Format/Structure	MEC ECA	MEC ECA, with changes applied to Fees and Payments, <i>in thousands</i>	Clause 2 The Project Clause 11 Fees
		Major Overhaul 800	
		Fixed O&M 7,938 \$7.730/kW/mo	ECA#4, Clause 3.14.2
		Variable O&M 1,550 \$0.0028/kWh/mo	ECA#4, Clause 3.14.3
		TOTAL (Subject to Escalation) 10,288	ECA Eight Schedule
Insurance	<p>GPA is the main insured.</p> <p>GPA is responsible for property insurance and any deductibles for the Plant.</p> <p>GPA will provide valuation and/or full replacement values.</p> <p>For avoidance of doubt, insurance premiums borne by MEC shall be full pass through cost to GPA.</p> <p>MEC is responsible liable insurance, worker's compensation, and automobile insurance.</p>	Same	Clause 13 Insurance (ECA #4 Clause 3.9)
Contract Period	5 Year Extension: January 2019 to January 2024.	Second 5-Year Extension: January 2024 to January 2029	Clause 1 Definition of Terms
ULSD Fuel	<p>GPA supplies and pays for fuel</p> <p>Current Requirements:</p> <p>(1) GPA reimburses IPP for expenses in major maintenance & repair of fuel supply system</p> <p>(2) GPA takes care of Waste Oil Hauling</p>	Same	Clause 9 Supply of Fuel & Start-up Electricity Fourth Schedule - Specifications of Fuel Supply and Start-up Electricity Fuel Management Agreement
Cylinder Lube Oil	<p>MEC is responsible for the procurement of Lube Oil.</p> <p>Lube Oil cost shall be a full pass-through cost to GPA based on the actual procurement cost of MEC.</p> <p>GPA to provide tax exempt status to MEC in a timely manner.</p> <p>GPA is responsible for any lube price index adjustments.</p>	Same	Clause 9.2 Supply of Fuel & Start-up Electricity (ECA #4 Clause 3.7) Fourth Schedule - Specifications of Fuel Supply and Start-up Electricity Fuel Management Agreement
Emulsifier	<p>Effective on September 2022 due to the completion of ULSD conversion of Piti 8 & 9 Power Plant.</p>	<p>MEC is responsible for the procurement of Emulsifier.</p> <p>Emulsifier cost shall be a full pass-through cost to GPA based on the actual procurement cost of MEC.</p> <p>GPA to provide tax exempt status to MEC in a timely manner.</p> <p>GPA is responsible for any lube price index adjustments</p>	
Availability Guarantee	<p>90% EAF</p> <p>Total Downtime Hours should not exceed 876 hours, with additional hours added for each year there is a major overhaul.</p> <p>Any unused hours (i.e. if total downtime is less than 876) carries forward to the next contract year.</p>	<p>90% minimum</p> <p>Penalty if AF is below 90%, applied as a deduction to the Fixed Management and Variable O&M Fees for every% below 90%</p>	Sixth Schedule - Electricity Delivery Procedures Eighth Schedule - Fees for Power and Energy

FEATURE	CURRENT	NEW REQUIREMENT	CONTRACT SECTION
Permits	GPA shall be responsible for all permits, licensees and approvals for plant to ensure all regulatory requirements are met.	Same	Clause 2 -The Project, Sec. 2.5 (ECA #4 Section 3.15)
CIP	Capital Investment Plan approximately \$18M was agreed upon by GPA and MEC for the initial 5-year extension. CIP payments via the Recapitalization Fee in ECA #4. Projects and Budget are carried out by MEC and inspected by GPA to confirm completion.	2024-2029 CIP are currently being identified. Future CIP will be submitted to GPA for approval once extension has been granted.	Clause 4.1 ECA #4 Clause 3.14.1

February 15, 2023

MEMORANDUM

TO: Rino Manzano
Marianas Energy Co.

FROM: Anita P. Arriola, Esq. 

DATE: February 15, 2023

RE: Extension of Energy Conversion Agreement ("ECA") between Guam Power Authority ("GPA") and Marianas Energy Company ("MEC").

This Memorandum addresses whether it is legal and valid to extend the ECA between GPA and MEC for two (2) five-year periods after transfer of the Power Station to GPA. The short answer is Yes.

A. Background

On June 22, 1996, the Governor of Guam called an emergency special session of the Guam Legislature to address the ongoing emergency and urgent need to ensure the adequacy and reliability of Guam's electrical power generation system, and the shortage of electrical power generation capacity. Public Law 23-103 was enacted to provide for emergency procurement for Guam's power generation and further authorized GPA to procure power generation, substation and transmission services upon a declaration of emergency. Executive Order No. 96-23 declared the existence of emergency conditions in Guam regarding the adequacy and reliability of the electrical power generation system and authorized GPA to procure power generation, substation and transmission services, pursuant to Public Law No. 23-103.

GPA issued a request for proposal for, among other things, the construction, operation and maintenance of baseload power plant in accordance with the emergency procurement requirements of 5 G.C.A. § 5215. Enron Development Management, Ltd. ("Enron") submitted a statement of qualifications, an interest in providing such services, and a proposal for the construction, operation and maintenance of the requested baseload power plant. GPA, upon evaluation of the submitted proposals, determined that Enron was the best qualified to provide the services set forth in the request for proposals, and the parties negotiated the terms and conditions of the ECA.

GPA and Enron Development Piti Corp. ("EDPC"), Enron's assignee, executed the ECA on September 30, 1996. The ECA provided, among other things, that EDPC would design,

develop, and construct a Power Station at its cost, with GPA to supply fuel in a quality and quantity required under the ECA for the construction and commissioning of the Power Station. The ECA provided for a "Build, Operate and Transfer" ("BOT") structure, in which EDPC would build, own and operate the Power Station for twenty years, after which the Power Station would be sold and transferred to GPA under the terms and conditions of the ECA. The BOT model allowed EDPC to finance and construct the Power Station through a public-private partnership with GPA. EDPC eventually assigned its rights, title and interest in the ECA to an affiliate, Enron Development Piti LLC ("EDPL").

MEC became the successor and assignee to the rights, title and interest of EDPL under the ECA.

B. Legal Discussion

Article 32 of the ECA provides:

This Agreement may be amended at any time by mutual agreement of the parties in writing and signed by a duly authorized representative of each party.

Prior to 2018, the ECA was amended three times.¹

1. The PUC Order of May 31, 2018 explicitly granted GPA's request for a five-year extension of time under the ECA. The PUC is estopped or has waived any right to complain that the five-extension is invalid.

In June 2018 GPA and MEC proposed to enter into a five-year contract extension for MEC's continued management and operation of the Power Station beyond January 2019. GPA sought approval from the Public Utilities Commission ("PUC") to allow the five-year contract extension. The PUC issued an Order on May 31, 2018 ("the PUC Order") in *In the Matter of the Application of the Guam Power Authority to Approve the Piti 8 & 9 Contract Extension with Marianas Energy Company*, GPA Docket 18-13, granting GPA's request for a five-year extension of time under the ECA. The PUC Order states unequivocally:

The ECA clearly gives the Parties the right to "amend" the agreement by mutual agreement of the Parties. The agreement in no manner places any restrictions upon the parties regarding the amendment parties regarding the amendment power. *It is a broad, unlimited power.*

(Emphasis added).

¹ In Amendment No. 1, EDPL agreed to waive its right to receive net heat rate bonus payments under the ECA, provided that the net heat rate was calculated as provided in the Amendment. Amendment No. 2 provided for an amendment and restatement of Clause 3.7 of the ECA concerning the demolition contract for the demolition and removal of existing equipment, piping, supports, conduit, electrical systems and asbestos abatement at units 1, 2, and 3 at the Piti power plant. Amendment No. 3 provided for, among other things, Clause 17.3 relating to the Basic Documents and Credit Agreement Obligations and Clause 19.2 relating to the assignment or transfer of Owner's obligations under the ECA.

After issuance of the PUC Order, GPA and MEC executed Amendment No. 4 to the ECA, providing for the five-year extension. Based on the PUC Order and Amendment No. 4, the GPA-MEC contract extension is valid and binding. The five-year extension of the ECA began in January 2019 and expires in January 2024. From January 2019 to the present, the PUC did not complain that the PUC Order was invalid or mistaken. Further, due to the explicit provisions of the PUC Order and the passage of time since the PUC Order has been in effect, PUC is estopped from now arguing that the PUC Order was mistaken or invalid. *See Mobil Oil Guam, Inc. v. Lee*, 2003 Guam 15 ¶ 23 (a person is precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he would otherwise have had); 6 G.C.A. § 5106(3) (whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot be permitted to falsify such declaration, act, or omission). The PUC also waived any right to claim that the PUC Order was invalid when it approved the “broad, unlimited power” of amendment in the ECA and approved the five-year extension. *See Yanfag v. Cyfred, Ltd.*, 2009 Guam 26 ¶ 20 (a waiver occurs when a person voluntarily and intentionally relinquishes a known right or privilege); *GHURA v. Dongbu*, 2001 Guam 24 ¶ 16 (waiver is the intentional relinquishment of a known right).

2. Transfer of the Power Station to GPA does not terminate the ECA or the parties’ rights and obligations under the ECA. GPA and MEC may agree on a further extension of the ECA contract under the explicit provisions of the ECA, under the authority of the PUC Order, and under GPA’s enabling statute.

The Power Station was transferred to GPA in January 2019. There is nothing in the ECA which states that after transfer of the Power Station, the ECA terminates and the parties’ rights and obligations under the ECA also terminate. To the contrary, Article 26 of the ECA provides:

Survival of Provisions. In order that the parties may fully exercise their rights and perform their obligations hereunder, such provisions of this Agreement that are required to insure such exercise or performance *shall survive the termination of this Agreement for any cause whatsoever.*

Accordingly, Article 32, the “Amendments” provision, continues to survive and apply and the MEC and GPA may amend the ECA to provide for a further five-year extension of the ECA.

In addition, Amendment No. 4 explicitly allows for further amendments and extensions of the ECA. Clause 2.8 was amended to provide:

From and after the Transfer Date, Owner shall continue to operate and manage the Power Station for the purpose of converting fuel of GPA into electricity for a period of five (5) years from January 29, 2019 at 12:01 p.m. to January 29, 2024, *including any further extensions as mutually agreed in writing by the Parties.*

(Emphasis added). At no time did the PUC disapprove or reject the above Amendment No. 4.

Even apart from the PUC Order and Amendment No. 4, GPA’s enabling statute gives GPA plenary authority to agree to contract extensions in precisely this context:

The Guam Power Authority may enter into long term contracts for a period up to and not exceeding thirty (30) years for renewable energy contracts, *purchased power agreements*, refurbish-operate-maintain contracts, and *buildoperate-transfer contracts* that cost Thirty Million Dollars (\$30,000,000) or more. *Nothing herein shall repeal, limit, or otherwise prohibit any law or regulation authorizing the Authority to enter into any contract for a longer period.*

12 G.C.A. § 8104(n) (emphasis added).

The Guam Power Authority may enter into performance management contracts (PMC) to manage any part of the island wide power system *with a base period up to five (5) years and no more than two (2) five (5) year renewal option periods*, not exceeding a total of fifteen (15) years, including the base period and all option periods. *Nothing herein shall repeal, limit, or otherwise prohibit any law or regulation authorizing the Authority to enter into any contract for a longer period.*

12 G.C.A. § 8104(o) (emphasis added).

In sum, the PUC Order, Amendment No. 4 and GPA's enabling statute all authorize a further amendment of the ECA for another five-year extension of the ECA. As discussed more fully below, the current operation and management of the Power Station fully support another five-year extension.

3. The conditions and circumstances supporting the first five-year extension continue to exist today and fully warrant another five-year extension.

The same concerns prompting the PUC Order and Amendment No. 4 continue to exist today:

- GPA does not have the staff to manage, operate and maintain the Power Station itself;
- It is crucial that the Power Station continue to operate and provide 88 MW of production capacity until GPA's new generation plants are online. A contract extension will help to ensure that the Power Station continue to operate in the hands of an experienced contractor that has maintained high plant efficiency and reliability in the past;
- An extension of the ECA is necessary to ensure continued reliability of the Power Station by MEC until GPA can commission a new power plant;
- To put this matter out to bid now could result in disruption of plant operations. The time between now and when the current five-year extension expires (January 2024) does not allow enough time for the bid process, a transition period, and a learning curve, if a new plant operator were selected;

- Finally, the bid process itself could lead to uncertainty as to which contract would continue to operate and manage the Power Station. With MEC, GPA knows that it is getting an experienced plant operators that has successfully operated the Power Station for over 20 years.

For all of the foregoing reasons, a second five-year extension of the ECA is authorized by the ECA and the law, and is warranted under the present circumstances and conditions.


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