

Renewable Energy Act of 2008: Legal and Fiscal Implications to Philippine Geothermal Exploration and Development

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ABSTRACT

Nearly twenty years after it was first filed, Republic Act (“RA”) No. 9513, also known as the “Renewable Energy Act of 2008” was finally signed on 15 December 2008 paving the way for a speedier and more aggressive development of the country’s renewable energy (“RE”) resources, which includes geothermal. The new legislation is the first and most comprehensive renewable-energy law in Southeast Asia and will enable the Philippines to capture a part of the soaring investments in renewable-energy development worldwide.

Public consultations were held with different stakeholders across the Philippines to assist the Department of Energy (“DOE”) in drafting the RE Act Implementing Rules and Regulations (“IRR”) culminating with the signing by the DOE Secretary of Department Circular No. DC2009-05-0008 on 25 May 2009.

1. INTRODUCTION

Despite the perceived environmental and economic benefits brought about by geothermal power development, developing geothermal resources in the Philippines have had its fair share of tough challenges with respect to social acceptability. Conventional geothermal power plants emit less greenhouse gases compared to similar-sized fossil-fuelled power plants and also reduce the dependency on imported energy usually in the form of fossil fuels.

The RE Act is a landmark legislation which the Philippine geothermal industry hopes will spur growth in exploration and development through the entry of foreign capital and the institutionalization of a system of incentives. It also seeks to promote equitable sharing of the benefits with stakeholders notably the host communities and indigenous peoples. Among the important features of the RE Act relevant to the geothermal industry are:

- The definition of geothermal as mineral resource paving the way for the entry of 100% foreign-owned corporation in geothermal resource exploration, development and utilization;
- Declaration of the RE sector as a priority investment sector that will regularly form part of the Philippine investment priority plan; and
- Provision in the law allowing the environmental compliance certificate to be issued from the appropriate regional office of the Department of Environment and Natural Resources.

The law also aims to set up a system that will allow consumers to choose green sources of energy and provides for the establishment of a Renewable Portfolio Standard (“RPS”) system, which would require electricity suppliers to source a certain amount of their energy supply from renewable resources. The RPS will also be complemented by a feed-in tariff system to encourage the speedy entry of renewable energy projects.

2. THE PHILIPPINE NATURAL RESOURCES FRAMEWORK

The principal legal concept that the Philippine government relies upon to control the utilisation and management of natural resources is the Regalian doctrine which declares that all natural resources in the territory belong to the State and therefore private ownership or title must emanate from it. This view has found expression in Article XII, Sec. 2 of the 1987 Constitution, which provides that:

All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forest or timber, wildlife, flora and fauna, and other natural resources are owned by the State.

The same provision also establishes the modes of utilising natural resources:

The exploration, development, and utilisation of natural resources shall be under the full control and supervision of the State. The state may directly undertake such activities, or it may enter into co-production, joint venture or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilisation of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country.

While the State is accorded the primary responsibility for development and utilisation of natural resources, participation by the private sector is not prohibited under the Constitution. Both the second and third mode allows such participation.

Under the second mode, three types of agreements are allowed: co-production, joint venture, and production sharing. The common element among these agreements is

the intent to give the State greater participation in decision-making and in the sharing of profits.

The third mode gives the President the option to enter into agreements with foreign wholly owned corporations. This is an exception to the general rule laid out in the constitution that the utilisation and exploitation of natural resources be left solely to Filipino corporations that is, a corporation whose capital stock is 60% owned and controlled by Filipinos. The agreement must involve either technical or financial assistance according to the general terms and conditions provided by law.

2.1 Constitutional Challenge on Foreign Ownership

The interpretation of the latter mode of private sector participation was the subject of a constitutional challenge filed before the Philippine Supreme Court on 07 February 1997. The petition was directed against Financial and Technical Assistance Agreements (FTAAs) under minerals legislation. The petitioners asserted that the law allowing FTAAAs was unconstitutional because it allows fully foreign owned corporations to explore, develop, utilize and exploit mineral resources in a manner contrary to Section 2, Article XII of the Constitution. According to the petitioners, the said constitutional provision while an exception to the nationality requirement, however, restricts the participation of fully owned corporations for large scale operations by giving either technical assistance or, in the alternative, financial assistance. Respondents on the other hand argue that the said provision in fact allows the participation of foreign-owned corporations in large scale exploration, development, and utilization of not only minerals but also petroleum and other mineral oils.

The Supreme Court in a decision issued on 01 December 2004 upheld the constitutionality of the FTAAAs declaring that full control is not anathematic to day-to-day management by the contractor, provided that the State retains the power to direct overall strategy and the State need not micro-manage mining operations and day-to-day affairs of the enterprise. Thus provisions in mining legislation allowing companies that are up to 100% foreign-owned to enter into FTAAAs with the Philippine government are allowed.

The Court held that when entering into contracts involving the exploration, development and utilization of minerals, the provisions of the Constitution and laws are deemed incorporated into the agreement. In an FTAA, the President is given the prerogative to specify terms and conditions of the contract, especially "the sharing of the net mining revenues between the contractor and the State." The judiciary will not inordinately interfere in the exercise of this presidential power of control. However, any grave abuse of discretion in the execution of any governmental prerogative – as when the power of control is surrendered or diluted in an FTAA – will have to be dealt with by the courts, after observing due process in a proper litigation. The courts may nullify specific provisions of the FTAA that are contrary to law or are manifestly and grossly disadvantageous to the nation.

2.2 Geothermal Service Contracts under Presidential Decree ("PD") No. 1442

Under PD 1442, otherwise known as "An Act Promoting the Exploration and Development of Geothermal Resources", the Government may directly explore for exploit and develop geothermal resources. It may also indirectly undertake the same under service contracts

awarded through public bidding or concluded through negotiation, with a domestic or foreign contractor who must be technically and financially capable of undertaking the operations required in the service contract provided:

- that if the service contractor shall furnish the necessary services, technology and financially, the service contractor may be paid a fee not exceeding forty per centum (40%) of the balance of the gross value of the geothermal operations after deducting the necessary expenses incurred in the operations; and
- that the execution of the activities and operations subject of the service contract, including the implementation of the work program and accounting procedures agreed upon, shall at all times be subject to direct supervision of the Government.

A service contract executed under PD 1442 may provide that the contractor shall have the following privileges:

- (a) Exemption from payment of tariff duties and compensating tax on the importation of machinery and equipment and spare parts and all materials required for geothermal operations provided, that should the contractor or its sub-contractor sell, transfer, or dispose of these machinery, equipment, spare parts or materials without the prior consent of the DOE, it shall pay twice the amount of the taxes and duties not paid because of the exemption granted;
- (b) Entry, upon the sole approval of the DOE which shall not be unreasonably withheld, and subject to such conditions as it may impose of alien technical and specialized personnel (including the immediate members of their families), who may exercise their professions solely for the operations of the contractor as prescribed in its contract with the Government under this Act;
- (c) Subject to the regulations of the Central Bank (now BSP), repatriation of capital investment and remittance of earnings derived from its service contract operations, as well as such sums as may be necessary to cover principal and interest of foreign obligations incurred for the geothermal operations; and
- (d) Other privileges provided in Section 12 of Presidential Decree No. 87 as may be applied to the geothermal operations.

The Philippines has a production sharing style of geothermal resource development regime as contained in PD 1442, and geothermal service contracts executed between the government and geothermal exploration companies.

3. GEOTHERMAL ENERGY AS A MINERAL RESOURCE

The National Geothermal Association of the Philippines ("NGAP"), the geothermal industry group in the Philippines, has successfully lobbied for the inclusion of geothermal energy in the RE Act and its classification as a mineral resource.

Under the RE Act, geothermal energy is considered renewable and the provisions of the RE Act is applicable if

geothermal energy, as a mineral resource, is produced through:

- 1) natural recharge, where the water is replenished by rainfall and the heat is continually produced inside the earth; and/or
- 2) enhanced recharge, where hot water is used in the geothermal process is re-injected into the ground to produce more steam as well as to provide additional recharge to the convection system.

Renewable Energy Resources refers to energy resources that do not have an upper limit on the total quantity to be used. Such resources are renewable on a regular basis and whose renewal rate is relatively rapid to consider availability over an indefinite period of time. These include, among others, biomass, solar, wind, geothermal, ocean energy, and hydropower conforming with internationally accepted norms and standards on dams, and other emerging renewable energy technologies.

Geothermal Resources under the RE Act refers to mineral resources, classified as renewable energy resources, in the form of: (i) all products of geothermal processes, embracing indigenous steam, hot water, and hot brines; (ii) steam and other gases, hot water, and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations; (iii) heat or associated energy found in geothermal formations; and (iv) any by-product derived from them.

In Philippine law, the term “minerals” has historically included geothermal energy. In PD 463, the term “minerals” was defined as, “all naturally-occurring inorganic substances in solid, liquid, and intermediate states including coal. Soil, which supports organic life, sand and gravel, guano, petroleum, geothermal energy and natural gas are included in this term but are governed by special laws.”

Furthermore, the governance of the exploration, development and exploitation of geothermal resources was previously placed under the jurisdiction of the then Bureau of Mines in 1967 by virtue of RA 5092, entitled “Geothermal Energy, Natural Gas and Methane Gas Law.” Although responsibility over geothermal resources was subsequently transferred to the then Bureau of Energy Development by virtue of PD 1442, in relation to PD 1206 which created the Department of Energy in 1977, the purpose evidently was not to reclassify geothermal energy but simply to rationalize the organization of the Philippine Government and to emphasize the importance of the exploration and development of energy resources.

With the reclassification of geothermal as a mineral resource, it now falls under the exemption to the 60-40 rule of Filipino ownership. where under the Constitution, the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals.

4. SERVICE (OPERATING) CONTRACT UNDER THE RE ACT

The RE Act has also introduced a new contractual system for the award of geothermal exploration and production contracts denominated as Renewable Energy Service (Operating) Contracts which refers to service agreements between the Government, through the DOE, and RE Developer over a period in which the RE Developer has the

exclusive right to a particular RE area for exploration and development.

Department Circular No. DC2009-07-0011, otherwise known as the “Guidelines Governing a Transparent and Competitive System of Awarding Renewable Energy Service/Operating Contracts and Providing for the Registration Process of Renewable Energy Developers”, was promulgated by the DOE on 12 July 2009. The circular specifies the minimum legal, technical and financial requirements for a proponent applying under the Geothermal RE Service Contract System and outlines the documentation in the open and competitive selection process.

The RE Contract shall be divided into two (2) stages: the pre-development stage and the development/commercial stage. The preliminary assessment and feasibility study up to financial closing shall refer to the pre-development stage. The construction and installation of facilities up to operation phase shall refer to the development stage.

The DOE, shall formulate and promulgate the regulatory framework containing the guidelines governing a transparent and competitive system of awarding RE Service/Operating Contracts from pre-development to development/commercial stage, among others.

The regulatory framework for the award of Service/Operating Contract will take into consideration existing related laws on the exploration, development and utilization of RE resources such as:

- (1) RA 7160, otherwise known as the “Local Government Code of 1991”, on the necessity of prior and periodic consultations with the local government units before any RE exploration activity is conducted within the respective jurisdictions. Existing projects shall be considered compliant with this requirement.
- (2) RA 8371, otherwise known as the “Indigenous Peoples Rights of Act of 1997” which provides that no agreement for the exploitation of natural resources shall be approved unless there is a prior certification from the National Commission on Indigenous Peoples (“NCIP”) that the area does not overlap any ancestral domain or that the free and prior informed consent (“FPIC”) of the concerned indigenous cultural communities or indigenous peoples (“ICCs/IPs”) has been obtained. IPRA was approved on 29 October 1997 and grants to ICCs/IPs certain preferential rights to their ancestral domains and all resources found therein.

Ancestral domains are defined as areas generally belonging to ICCs/IPs, subject to property rights within ancestral domains already existing or vested upon the effectivity of the IPRA, comprising lands, inland waters, coastal areas, and natural resources, held under a claim of ownership, occupied or possessed by ICCs/IPs by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present, except when interrupted by war, *force majeure* or displacement by force, deceit, stealth, or as a consequence of government projects or any voluntary dealings entered into by the government and private persons, and which are necessary to ensure their economic, social and cultural welfare.

In December 1998, the constitutionality of IPRA was questioned before the Supreme Court on the major ground that IPRA violated the Regalian Doctrine. In 2001, the Court held the constitutionality of IPRA but ancestral lands do not constitute part of the public domain and that it merely grants to indigenous peoples certain rights but not ownership over natural resources in these ancestral lands.

No geothermal service contract shall be approved unless there is a prior certification from the NCIP that the area does not overlap any ancestral domain or that the FPIC has been obtained from the ICC/IP concerned in accordance with the guidelines set by NCIP Administrative Order No. 1 of 2006..

The ICCs/IPs have the right to benefit from the utilization, extraction, use and development of lands and natural resources within their ancestral lands/domains and to be compensated for any social and/or environmental costs of such activities.

Accordingly, the concerned ICC/IP community shall be extended all the benefits already provided under existing laws, administrative orders, rules and regulations governing particular resource utilization, extraction or development project/activities, without prejudice to additional benefits as may be negotiated between the ICCs/IPs and the resource developer. Because FPIC is required as early in the exploration phase, the process should not be as stringent since concerns with the process could be addressed more thoroughly after the exploration yields successful results.

Since FPIC has to be obtained in accordance with customary law, the consent requires entering into a memorandum of agreement with the ICC/IP through its Council of Elders. Often times, there seem to be a lack of clear cut rules on how to arrive at a decision making process which advocacy groups have exploited to the detriment of resource developers.

- (3) Existing environmental laws and regulations as prescribed by the Department of Environment and Natural Resources (“DENR”) and/or any other concerned government agency, to include compliance with the Environmental Impact Assessment System. An Environmental Compliance Certificate (“ECC”) from the appropriate regional office of the DENR would be sufficient.

The DENR is the lead agency in environmental protection and administration. The DENR’s Environmental Management Bureau (“EMB”) is the lead agency that implements the Environmental Impact Statement (“EIS”) System and handles the review and evaluation of the environmental impact of development projects. Under the EIS System, a project proponent of environmentally critical projects and projects within environmentally critical areas must obtain an ECC prior to the commencement of the project. Under the DENR regulations, resource-extractive industries are considered environmentally critical projects.

An ECC certifies that a proposed project or undertaking will not cause significant negative environmental impact. The ECC also certifies that the proponent has complied with all the requirements of the EIS System and has committed to implement its

approved Environmental Management Plan. The ECC contains specific measures and conditions that the project proponent has to undertake before and during the operation of a project, and in some cases, during the project’s abandonment phase to mitigate identified environmental impacts.

The National Integrated Protected Areas System (“NIPAS”) Act of 1992 (Republic Act No. 7586) provides for the establishment and management of NIPAS, defining its scope and coverage. Section 14 of the NIPAS Act specifies the survey of energy resources in protected areas solely for data gathering. Any exploitation and utilization of energy resources found within NIPAS areas shall be allowed only through passage of law by Congress.

What the RE Act fails to address is to provide provisions that will facilitate the acquisition by RE developers of auxiliary rights like timber rights, water rights, easement rights and entry into private lands and concession areas. In addition, the government needs to review the complicated approval and permitting process towards reducing and expediting the procedure particularly in the level of environment and social regulations.

All agencies involved including local governments should coordinate their national policies and program most especially in land use. In some instances protected areas are declared on lands with strong potential for geothermal resource developments.

5. GEOTHERMAL ENERGY MARKETS

The RE Act provides for the establishment of a Renewable Portfolio Standard (“RPS”) system, which would require electricity suppliers to source a certain amount of their energy supply from RE resources.

5.1 Renewable Portfolio Standards

The National Renewable Energy Board (“NREB”), shall set the minimum percentage of generation from eligible renewable energy resources and determine to which sector RPS shall be imposed on a per grid basis.

Upon the recommendation of the NREB, the DOE shall formulate and promulgate the RPS Rules which shall include but not limited to the following:

- (1) Types of RE Resources, and identification and certification of generating facilities using said resources that shall be required to comply with the RPS obligations;
- (2) Yearly minimum RPS requirements upon the establishment of the RPS Rules;
- (3) Annual minimum incremental percentage of electricity sold by each RPS-mandated electricity industry participant which is required to be sourced from eligible RE Resources and which shall, in no case, be less than one percent (1%) of its annual energy demand over the next ten (10) years;
- (4) Technical feasibility and stability of the transmission and/or distribution grid systems; and
- (5) Means of compliance by RPS-mandated electricity industry participant of the minimum percentage set by the government to meet the

RPS requirements including direct generation from eligible RE Resources, contracting the energy sourced from eligible RE Resources, or trading in the REM.

The RPS will also be complemented by a feed-in tariff system to encourage the speedy entry of renewable energy projects, however, the Feed-in Tariff system under the RE Act has given priority connections to the grid for electricity generated from emerging RE resources to the exclusion of geothermal resources.

5.2 Other RE Policy Mechanisms

5.2.1 Green Energy Option

The DOE shall establish a Green Energy Option program which provides end-users the option to choose RE resources as their sources of energy.

Upon the determination of the DOE of its technical viability and consistent with the requirements of the green energy option program, end-users may directly contract from RE facilities their energy requirements distributed through their respective distribution utilities.

5.2.2 Net-metering for Renewable Energy

Net-metering refers to a system, appropriate for distributed generation, in which the distribution grid user has a two-way connection to the grid and is only charged for his net electricity consumption and is credited for any overall contribution to the electricity grid. Subject to technical considerations and without discrimination and upon request by distribution end-users, the distribution utilities shall enter into net-metering agreements with qualified end-users who will be installing the RE system.

The distribution utility shall be entitled to any RE Certificate resulting from net-metering arrangement with the qualified end-user who is using an RE resource to provide energy and the distribution utility shall be able to use this RE certificate in compliance with its obligations under RPS.

5.2.3 Transmission and Distribution System Development

The National Transmission Corporation (“TRANSCO”) or its successors-in-interest or its buyer/concessionaire and all distribution utilities (“DUs”), shall include the required connection facilities from RE-based power facilities in the Transmission and Distribution Development Plans upon approval by the DOE of such facilities. The connection facilities of RE power plants, including the extension of transmission and distribution lines, shall be subject only to ancillary services covering such connections.

5.2.4 Off-Grid RE Development

The National Power Corporation-Small Power Utilities Group (“NPC-SPUG”) or its successors-in-interest and/or qualified third parties in off-grid areas shall, in the performance of its mandate to provide missionary electrification, source a minimum percentage of its total annual generation upon recommendation of the NREB from available RE resources in the area concerned, as may be determined by the DOE. Successors-in-interest refer to entities deemed technically and financially capable to serve/take over existing NPC-SPUG areas. Eligible RE generation in off-grid and missionary areas shall be eligible for the RE Certificates.

5.3 Creation of Renewable Energy Market

To facilitate compliance with RPS, the DOE shall establish the REM and shall direct the Philippine Electric Market Corporation (“PEMC”) to implement changes to the Wholesale Electric Spot Market (“WESM”) Rules in order to incorporate the rules specific to the operation of the Renewable Electric Market (“REM”) under the WESM.

The PEMC, under the supervision of the DOE, shall establish a Renewable Energy Registrar within one (1) year from the effectivity of the RE Act and shall issue keep and verify RE Certificates corresponding to energy generated from eligible RE facilities. Such certificates will be used for compliance with the RPS.

6. INCENTIVES

The RE Act provides fiscal and non-fiscal incentives for RE investors and mechanisms to help ensure a market for renewable energy.

6.1 Fiscal Incentives

RE Developers of renewable energy facilities, including hybrid systems, in proportion to and to the extent of the RE component, for both power and non-power applications, shall be entitled to the following incentives:

6.1.1 Income Tax Holiday (“ITH”)

For the first seven (7) years of its commercial operations, the duly registered RE developer shall be exempt from income taxes levied by the National Government.

Additional investments in the project shall be entitled to additional income tax exemption on the income attributable to the investment, provided:

- the discovery and development of new RE resource shall be treated as a new investment and shall be entitled to a fresh package of incentives;
- the entitlement period for additional investments shall not be more than three (3) times the period of the initial availment of the ITH.

6.1.2 Duty-free Importation of RE Machinery, Equipment and Materials

Within the first ten (10) years upon the issuance of a certification of an RE developer, the importation of machinery and equipment, and materials and parts thereof, including control and communication equipment, shall not be subject to tariff duties, provided:

- the said machinery, equipment, materials and parts are directly and actually needed and used exclusively in the RE facilities for transformation into energy and delivery of energy to the point of use and covered by shipping documents in the name of the duly registered operator to whom the shipment will be directly delivered by customs authorities;
- endorsement of the DOE is obtained before the importation of such machinery, equipment, materials and part is made.

6.1.3 Special Realty Tax Rates on Equipment and Machinery

Realty and other taxes on civil works, equipment, machinery, and other improvements of a registered RE Developer actually and exclusively used for RE facilities

shall not exceed one and a half percent (1.5%) of their original cost less accumulated normal depreciation or net book value. In case of an integrated resource development and generation facility as provided under RA 9136, the real property tax shall only be imposed on the power plant.

6.1.4 Net Operating Loss Carry-Over (“NOLCO”)

The NOLCO of the RE Developer during the first three (3) years from the start of commercial operation which had not been previously offset as deduction from gross income shall be carried over as a deduction from gross income for the next seven (7) consecutive taxable years immediately following the year of such loss. Operating loss resulting from the availment of incentives provided for in the RE Act shall not be entitled to NOLCO.

6.1.5 Corporate Tax Rate

After seven (7) years of ITH, all RE Developers shall pay a corporate tax of ten percent (10%) on its net taxable income as defined in the National Internal Revenue Code (“NIRC”) of 1997, as amended by RA 9337. The RE Developer shall pass on the savings to the end users in the form of lower power rates.

6.1.6 Accelerated Depreciation

If an RE project fails to receive an ITH before full operation, it may apply for Accelerated Depreciation in its tax books and be taxed based on such. If it applies for Accelerated Depreciation, the project or its expansions shall no longer be eligible for an ITH.

Accelerated depreciation of plant, machinery, and equipment that are reasonably needed and actually used for the exploration, development and utilization of RE resources may be depreciated using a rate not exceeding twice the rate which would have been used had the annual allowance been computed in accordance with the rules and regulations prescribed by the Department of Finance Secretary and the provisions of the NIRC, as amended.

Any of the following methods of accelerated depreciation may be adopted:

- declining balance method; and
- sum-of-the years digit method.

6.1.7 Zero Percent Value-Added Tax Rate

The sale of fuel or power generated from renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy and other emerging energy sources using technologies such as fuel cells and hydrogen fuels, shall be subject to zero percent (0%) VAT, pursuant to the NIRC of 1997, as amended.

All RE Developers shall be entitled to zero-rate VAT on its purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities.

This provision shall also apply to the whole process of exploring and developing renewable energy sources up to its conversion into power, including, but not limited to, the services performed by subcontractors and/or contractors.

6.1.8 Cash Incentive of RE Developers for Missionary Electrification

A RE Developer, established after the effectivity of the RE Act, shall be entitled to a cash generation-based incentive per kilowatt-hour rate generated, equivalent to fifty percent (50%) of the universal charge for power needed to service missionary areas where it operates the same, to be chargeable against the universal charge for missionary electrification.

6.1.9 Tax Exemption of Carbon Credits

All proceeds from the sale of carbon emission credits shall be exempt from any and all taxes.

6.1.10 Tax Credit on Domestic Capital Equipment and Services

A tax credit equivalent to one hundred percent (100%) of the value of the VAT and custom duties that would have been paid on the RE machinery, equipment, materials and parts had these items been imported shall be given to an RE operating contract holder who purchases machinery, equipment, materials, and parts from a domestic manufacturer, provided:

- prior approval by the DOE was obtained by the local manufacturer;
- the acquisition of such machinery, equipment, materials, and parts shall be made within the validity of the RE operating contract.

6.1.11 Incentive for RE Commercialization

All manufacturers, fabricators, and suppliers of locally-produced RE equipment and components shall be entitled to:

- tax and duty-free importation of components, parts and materials;
- tax credit on domestic capital components, parts and materials;
- income tax holiday and exemption; and zero-rated value-added tax transactions.

6.1.12 Exemption from the Universal Charge

Power and electricity generated through the RES for the generator’s own consumption and/or for free distribution in the off-grid areas shall be exempted from the payment of the universal charge provided for under Section 34 of RA 9136.

6.1.13 Financial Assistance Program

Government financial institutions such as the Development Bank of the Philippines, Land Bank of the Philippines, Phil-Exim Bank and others shall provide preferential financial packages for the development, utilization and commercialization of RE projects as duly recommended and endorsed by the DOE.

6.2 Conditions for Availment of Incentives and Other Privileges

6.2.1 Registration/Accreditation with the DOE

For purposes of entitlement to incentives and privileges under the RE Act, RE Developers and manufacturers, fabricators and suppliers of locally-produced RE equipment

shall register with the DOE, through the Renewable Energy Management Bureau. The following certifications shall be issued.

- (1) DOE Certificate of Registration – issued to RE Developer upon submission of necessary requirements, including the execution of an RE Service/Operating Service Contract, and approval of application by the DOE.

For existing and new RE Projects, the RE Developer must secure an RE Service/Operating Contract prior to issuance of the DOE Certificate of Registration.

For existing RE projects, the new Service/Operating Contract shall pre-terminate and replace the existing Service Contract that the RE Developer has executed with the DOE subject the Transitory Provision of the IRR.

The DOE Certificate of Registration shall be issued immediately upon award of the RE Service/Operating Contract covering an existing or new RE Project or upon approval of additional investment.

- (2) DOE Certificate of Accreditation – issued to RE manufacturers, fabricators and suppliers of locally-produced renewable energy equipment upon submission of necessary requirements to be determined by the DOE in coordination, with the Department of Trade and Industry.

6.2.2 Registration with the Board of Investments (“BOI”)

The Renewable Energy Sector is hereby declared a priority investment sector that will regularly form part of the country’s Investment Priority Plan.

6.2.3 Certificate of Endorsement by the DOE

RE Developers, manufacturers, fabricators and suppliers of locally produced renewable energy equipment shall be qualified to avail of the incentives provided for in the RE Act after securing a Certificate of Endorsement from the DOE through Renewable Energy Management Bureau on a per transaction basis.

7. REGULATORY FRAMEWORK

The DOE shall be the lead agency mandated to implement the RE Act.

7.1 National Renewable Energy Board (“NREB”)

The NREB is created which shall be composed of a Chairman and one (1) representative from the DOE, DTI, DOF, DENR, NPC, TRANSCO, PNOC, PEMC, who shall be designated by their respective secretaries on a permanent basis: and one (1) representative each from RE Developers, Government Financial Institutions, private distribution utilities, electric cooperatives, electricity suppliers and nongovernmental organizations, duly endorsed by their respective industry associations and all to be appointed by the President of the Republic of the Philippines.

The NREB shall be assisted by a Technical Secretariat from the RMEB of the DOE, and shall directly report to the Office of the DOE Secretary or the Undersecretary. The NREB shall:

- (a) evaluate and recommend to the DOE the mandated RPS and minimum RE generation capacities in off-grid areas;

- (b) recommend specific actions to facilitate the implementation of the National Renewable Energy Program (“NREP”) to be executed by the DOE;
- (c) monitor and review the implementation of the NREP, including compliance with the RPS and minimum RE generation capacities in off-grid areas;
- (d) oversee and monitor the utilization of the Renewable Energy Trust Fund administered by the DOE;
- (e) cause the establishment of a one-stop shop facilitation scheme to accelerate implementation of RE projects; and
- (f) perform such other functions, as may be necessary, to attain the objectives of the RE Act.

7.2 Renewable Energy Management Bureau (“REMB”)

The existing plantilla of the Renewable Energy Management Division of the DOE shall form the nucleus of the REMB. The Geothermal Division formerly with the Energy Resource Development Bureau of the DOE will be transferred to REMB.

The REMB shall have the following powers and functions:

- (a) develop formulate and implement policies, plans and programs such as the NREP, to accelerate the development, transformation, utilization and commercialization of RE resources and technologies;
- (b) develop and maintain a centralized, comprehensive and unified data and information base on RE resources to ensure the efficient evaluation, analysis, and dissemination of data and information on RE resources, development, utilization, demand and technology application;
- (c) promote the commercialization/application of RE resources including new and emerging technologies for efficient and economical transformation, conversion, processing, marketing and distribution to end users;
- (d) conduct technical research, socioeconomic and environmental impact studies of RE projects for the development of RE systems;
- (e) continue to strengthen the affiliated Renewable Energy Centers nationwide;
- (f) create a unified database of RE projects for monitoring and planning purposes;
- (g) supervise and monitor activities of government and private companies and entities on RE resources development and utilization to ensure compliance with existing rules, regulations, guidelines and standards;
- (h) provide information, consultation and technical training and advisory services to RE Developers, practitioners and entities involved in RE technology and formulate RE technology-development strategies including but not limited to standards and guidelines;
- (i) develop and implement an information, education and communication program to heighten awareness of and appreciation by all stakeholders of the RE industry;
- (j) evaluate, process, approve and issue RE Service/Operating Contracts, permits, certifications and/or accreditations;
- (k) monitor and evaluate the implementation of the NREP to determine the need to expand the same; and

- (I) perform other functions that may be necessary for the effective implementation of the RE Act and the accelerated development and utilization of RE resources in the country.

7.3 Renewable Energy Trust Fund (RETF)

The RETF is established to enhance the development and greater utilization of renewable energy and administered by the DOE as a special account in any of the GFIs. It shall be exclusively used for:

- (a) finance the research, development, demonstration and promotion of the widespread and productive use of RE systems for power and non-power applications, as well as to provide funding for research and development institutions engaged in renewable energy studies undertaken jointly through public-private sector partnership, including provision for scholarship and fellowship for energy studies;
- (b) provide funding to qualified research and development institutions engaged in RE studies undertaken jointly through public-private sector partnership, including provision for scholarship and fellowship of energy studies;
- (c) support the development and operation of new RE resources to improve their competitiveness in the market provided that the grant thereof shall be done through a competitive and transparent manner;
- (d) conduct nationwide resource and market assessment studies for the power and non-power applications of renewable energy systems;
- (e) propagate RE knowledge by accrediting, tapping, training, and providing benefits to institutions, entities and organizations which can extend the promotion and dissemination of RE benefits to the national and local levels; and
- (f) fund such other activities necessary or incidental to the attainment of the objectives of the RE Act.

The use of the fund may be through grants, loans, equity investments, loan guarantees, insurance, counterpart fund or such other financial arrangements necessary for the attainment of the objectives of the RE Act provided the use or allocation thereof be done through a competitive and transparent manner.

The RETF shall be funded from:

- (a) proceeds from the emission fee collected from all generating facilities consistent with RA 8749 or the Philippine Clean Air Act;
- (b) one and a half percent (1.5%) of the net annual income of the Philippine Charity Sweepstakes Office;
- (c) one and a half percent (1.5%) of the net annual income of the Philippine Amusement and Gaming Corporation;
- (d) one and a half percent (1.5%) of the net annual dividends remitted to the National Treasury of the PNOC and its subsidiaries;
- (e) contributions, grants and donations provided that all contributions, grants and donations made to the RETF shall be tax deductible subject to the provisions of the NIRC. Towards this end the BIR shall assist the DOE in formulating the rules and regulations to implement this provisions;

- (f) one and a half percent (1.5%) of the proceeds of the Government share collected from the development and use of indigenous non-renewable energy resources;
- (g) any revenue generated from the utilization of the RETF; and
- (h) proceeds from the fines and penalties imposed under the RE Act.

For greater efficiency and administrative control, the Geothermal Division under REMB must be highly specialized and should lead the promotion and enhancement of the country's competitive advantage in geothermal resource development.

The development of comprehensive geothermal resource assessment of the country's geothermal resource potential must be made available to all stakeholders. As most of the geothermal resource assessment was conducted by Philippine National Oil Company Energy Development Corporation ("PNOC EDC") during the seventies to eighties, the government must develop technical skills within REMB of the DOE in grassroots exploration, data management and project identification with the privatization of the PNOC EDC.

8. SHARING

The RE Act has basically amended RA 9136 further amending the provisions of Energy Regulations (ER) No. 1-94, and its Attendant Rules and Procedures. E.R. 1-94 prescribed the provisions of direct benefits to local government units ("LGU") hosting energy resource development projects and/or energy generating facilities within their territorial jurisdiction.

8.1 Government Share

The government share on existing and new RE development projects shall be equal to one percent (1%) of the gross income of RE resource developers resulting from the sale of renewable energy produced and such other income incidental to and arising from the renewable energy generation, transmission, and sale of electric power except for indigenous geothermal energy, which shall be at one and a half percent (1.5%) of gross income.

For purposes of determining the government share, gross income of RE Resource Developers shall include proceeds resulting from the sale of renewable energy produced and such other income incidental to and arising from the renewable energy generation, transmission, and sale of electric power.

"Gross Income" derived from business shall be equivalent to gross sales less sales returns, discounts and allowances and cost of goods sold, consistent with Section 27, Paragraph A(7) of the National Internal Revenue Code ("NIRC") of 1997, as amended by RA 9337.

"Cost of Goods Sold" shall include all business expenses directly incurred to produce the merchandise to bring them to their present location and use, consistent with Section 27, Paragraph A(7) of the NIRC, as amended by RA 9337.

Except for government-owned and controlled corporations, the Government Share shall be distributed as follows:

National Government – 60%
Local Government – 40%

8.1.1 Share from Geothermal Resources

In cases of a power plant operator only and an integrated geothermal system, the Government Share of 1.5% shall be based on the gross income from the sale of electricity generated from geothermal energy. The cost of goods sold shall be the direct cost of electricity generated from geothermal energy and the direct cost of the geothermal system.

In case of a steamfield developer only, the Government Share of 1.5% shall be based on the gross income from the sale of the geothermal steam. The cost of goods sold shall be the direct cost of the geothermal steam.

8.1.2 Local Government Share

In accordance with Section 292 of RA 7160, the allocation and distribution of the local government share shall be as follows:

- (1) Where the natural resources are located in the province:
Province – twenty percent (20%)
Component city/municipality – forty-five percent (45%); and
Barangay – thirty-five percent (35%)
- (2) Where the natural resources are located in two (2) or more provinces, or in two (2) or more component cities or municipalities or in two (2) or more barangays, their respective shares shall be computed on the basis of:
Population – seventy percent (70%); and
Land area – thirty percent (30%)
- (3) Where the natural resources are located in a highly urbanized or independent component city:
City – sixty-five percent (65%); and
Barangay – thirty-five percent (35%)
- (4) Where the natural resources are located in such two (2) or more cities, the allocation of shares shall be based on the formula on population and land area as specified in (2).

8.1.3 Remittance of the Share of the LGUs

The share of LGUs from the utilization and development of national wealth shall be released, without need of any further action, directly to the provincial, city, municipal or barangay treasurer, as the case may be, on a quarterly basis within five (5) days after the end of each quarter, and which shall not be subject to any lien or holdback that may be imposed by the National Government for whatever purpose.

8.2 RE Host Communities/LGUs

The LGUs hosting the energy resource and/or energy generating facility shall have an equitable share in the proceeds derived from the development and utilization of energy resource and sale of electric power. Under the IRR, the host LGU refers to the following:

- (1) With respect to integrated energy generating facilities, the host LGU is where the energy generating facilities and energy resources are located. The LGU shall be entitled to a share based on the sale of electric power;
- (2) With respect to energy resources, the host LGU is where the renewable energy resources are located as delineated by geophysical and exploration surveys.

The LGU shall be entitled to a share based on the sale of renewable energy produced by the RE developer; and

- (3) With respect to non-integrated generating facilities, the host LGU is where the energy generating facility is located. The LGU shall be entitled to a share based on the sale of electric power of the generating facility.

The benefits/incentives provided under the IRR shall be allocated to the Host LGUs as follows:

- (1) Eighty percent (80%) of the local government share from RE projects and activities shall be used directly to subsidize the electricity consumption of end-users in the RE host communities/LGUs whose monthly consumption does not exceed one hundred kilowatt (100) kwh;
- (2) The subsidy may be in the form of rebates, refunds and/or any other form as may be determined by DOE, DOF and ERC in coordination with NREB; and
- (3) Twenty (20%) of the Local Government Share shall be utilized to finance local government and livelihood projects which shall be appropriated by their respective Sanggunian.

The National Government should assist LGUs in integrating potential geothermal resources into the provincial and regional development land use and natural resources use plans.

National government should develop a transparent system of accounting for and allocation of sharing of revenues and taxes with LGUs. It must expedite and streamline the release of LGU shares thru a simplified process with timeframe requirements. It should also enhance the correctness and accuracy of tax collections for purposes of ensuring that full benefits from tax collections will be received by the concerned LGUs. The expedited release of host communities' share in the national wealth will lessen local opposition to geothermal projects.

The national government should also encourage if not prioritize the use of localized geothermal energy like agriculture crop drying and refrigeration to preserve products of host communities that might normally be wasted so that these stakeholders will see its tangible use and enhanced social acceptability.

9. CONCLUSION

The RE Act is expected to promote investments in geothermal resource development with its liberal treatment of foreign investment and the establishment of a system of incentives. What the Philippine government needs to focus now is to review the complicated approval and permitting process towards reducing and expediting the procedure particularly in the level of environment and social acceptability regulations. The National Government should also assist LGUs in integrating potential geothermal resources into the local development land use and resources use plans. Hopefully a transparent system of accounting will be developed for the allocation and sharing of revenues and taxes with LGUs.

REFERENCES

National Geothermal Association of the Philippines:
Position Paper on Republic Act No. 9513 (2008).