

JPS' COMMENTS ON
"REGULATORY POLICY FOR THE ADDITION OF NEW
GENERATING CAPACITY TO THE PUBLIC ELECTRICITY
SUPPLY SYSTEM"
(A policy document issued by the OUR)

FOREWORD

Pursuant to the All Island Electric Licence 2001 ("The Licence"), Jamaica Public Service Company Limited (JPS) is the sole distributor of electricity to members of the public throughout the island of Jamaica for a period of twenty years effective April 12, 2001. The Licence was granted in accordance with the provisions of the Electric Lighting Act.

The Office of Utilities Regulation Act established an Office of Utilities Regulation (OUR), which body is empowered to, inter alia:

"regulate the provision of prescribe utility services by licensees or specified organizations".

JPS, being a prescribed utility, is regulated by the OUR.

On or about February 10, 2006, the OUR issued to JPS for JPS' review a document titled 'REGULATORY POLICY FOR TIM ADDITION OF NEW GENERATING CAPACITY TO THE PUBLIC ELECTRICITY SUPPLY SYSTEM'. The document is further subtitled 'ELECTRICITY SECTOR REGULATORY POLICY' hereinafter referred to as (The Draft Policy).

JPS was asked to review the said document and comment on the proposals therein.

Outlined below are JPS' initial comments on sections of the draft Policy. JPS reserves the right to provide additional comments.

INTRODUCTION TO POLICY

The introduction to the draft policy states "both the Office and have the understanding that certain aspects of the Licence should be amended, subject to Ministerial approval to ensure a level playing field for all participants in the competitive process".

JPS does not share the understanding that any amendment to the All Island Electric Licence 2001(The Licence) is required to "ensure a level playing field for all participants in the competitive process".

A fair and transparent process is already guaranteed by the detailed requirements and processes outlined at Condition 18 of the Licence.

In this regard, Condition 18 Section 2 sets out a list of documents that are to be submitted to the OUR for its approval prior to the issuing any invitation to tender. The list includes reports outlining the manner in which JPS intends to conduct competition and setting out the evaluation criteria.

Further, JPS is obliged to provide tenderers with the most recent Least Cost Expansion Plan. The Office is also empowered to direct JPS to conduct a further competitive tendering process when the tendering process has not, in the reasonable opinion of the OUR, been conducted in accordance with the tender process approved by the OUR.

In any event, JPS firmly objects to any unilateral action or course of conduct by the OUR which contravenes the Terms and Conditions of the Licence. The Licence was decreed after extensive discussions by the parties. Its provisions constitute a more than adequate tool for the protection of potential stakeholders whilst recognizing the rights of JPS to conduct its business in a commercially reasonable manner in a regulated environment.

There is no acceptable precedent, either in Administrative Law or Equity, for the OUR to unilaterally depart from the Terms and Conditions in the Licence or to change the requirements or obligations JPS is required to satisfy during the period of the Licence.

JPS cannot consent to the setting of such a precedent as it opens the floodgate for JPS to be subjected to degrees of uncertainties in the regulatory framework or

protocol under which it operates. In the circumstances, we must place on record that any unilateral change imposed or proposed by the OUR, in the requirement or obligation PPS must satisfy will be challenged as procedurally ultra vires and unreasonable when viewed against principles of Administrative Law.

REGULATORY POLICY

JPS submits that the "set of principles in the governance and regulation of the electricity sector", by which the OUR admits to being guided, ought properly to include commercially reasonable Terms and Conditions for existing investors in the sector. The inclusion of such a criterion would allow for greater discussion/consensus between the OUR and JPS, as the existing distributor of electricity, as to any necessary adjustment, investment JPS will need to make to its operations to effectively distribute additional capacity.

Consistent with the omission of this criterion, however, the draft policy seemingly gives the OUR absolute discretion as to the timing and soliciting of additional capacity for the distribution network. In fact, the draft Policy expressly states that certain proposals for additional capacity may be submitted at any time, even if unsolicited. Such a submission will be accompanied by a clear expectation that, if the OUR approves of the proposal, JPS will be forced to contract with the developer and take the additional capacity, as directed by the OUR.

JPS cannot agree to such a course of action. The addition of capacity to the national grid must be effectively planned for by JPS. It should readily be appreciated that JPS may occasionally need to undertake upgrading or additional investment to the distribution system to effectively and efficiently distribute additional capacity. JPS' Least Cost Expansion Plan and the time lines set out therein were developed with this in mind.

The addition of capacity to the grid should be an exercise that is scheduled in accordance with the corresponding needs/demands of the country. JPS' operations are planned to align with a schedule of projected demand.

JPS will not hold itself responsible, and will resist any attempt to do same, for any loss suffered by any investor/developer who was not asked to dispatch. This is a most likely situation if supply is allowed to greatly exceed demand or the distribution capability of JPS. In fact, JPS is concerned that this proposal of the OUR may result in financial hardships to some developers and a loss of confidence in the local Electricity Sector by Investors. Any loss of confidence, in this regard, would likely result in more expensive financing and a resulting higher cost in the price of electricity to consumers.

LEAST COST EXPANSION PLAN

The intent of the OUR to direct that JPS prepares a Demand Forecast and Least Cost Plan every five years, or as the circumstances dictate, and update this plan annually is an onerous and ultra vires infringement of the License.

The intent is so considered as Condition 21 of the License requires JPS to prepare a Least Cost Expansion Plan which "shall conform to **Internationally accepted Best Industry Practice**". Save for extremely extenuating circumstances, such a Plan is not likely to be in need of an annual update.

Greater objection is taken, however, with the intent to hold public consultation on the plan, which implicitly means that JPS' plan may be rejected on the basis of public consultation.

JPS submits that the obligation in Condition 21 of the Licence for the plan to "conform to International accepted Best Industry Practice" is the appropriate basis on which the Plan should be evaluated. It is objective in nature and can be determined by experts in the Industry whilst avoiding the opportunity for influence or prejudice by interested parties or stakeholders.

REQUEST FOR PROPOSALS, EVALUATION OF PROPOSALS

JPS objects to the procedures set out in the in the draft Policy in relation to this issue. As admitted by the OUR, these procedures are in direct contravention of the procedures laid out at Condition 18 Section 4 of the Licence. Such conduct is in breach of settled principles of Administrative Law as no reasonable tribunal would come to a decision or willfully adopt a course of conduct that contravenes and disregard procedures prescribed in a Licence by the Minister.

Secondly, the risk of performance in distributing an adequate and reliable supply of electricity and all penalties attached to any failure to so distribute with JPS. In short, JPS, as distributor, bears the risks associated with shortfalls in generation capacity.

Consequently, a commercially reasonable approach would entrust JPS with the primary responsibility of developing Request for Proposals (RFP's) and evaluating bids submitted in response.

It is submitted that the procedures and checks and balances outlined in the Licence on this issue were designed out of recognition of JPS' commercial risks and the need for JPS to direct this process whilst the Licence simultaneously ensures that adequate safeguards exist to achieve fairness and transparency.

With specific reference to the evaluation criteria, JPS submits that, for substantial capacity addition, the ability of a developer to provide an efficient and reliable supply ought to be regarded as an important criterion in the evaluation of RFP's. Hence a developer with a record of successful delivery ought to have some weight attached to past performance.

SUMMARY

In closing, JPS restates its objections as set out above and reserves the right to challenge any procedurally ultra vires and unreasonable breach of its Licence. Additionally, JPS has concerns with certain of the technical issues/proposals put forward in the draft Policy and also reserves the right to make oral or written submissions on these issues any further observation or objection to the draft Policy found necessary.

*Jamaica Public Service Company Ltd.
March 14, 2006*