

Republic of the Philippines
SUPREME COURT
Manila

INITIATIVES FOR DIALOGUE AND EMPOWERMENT THROUGH ALTERNATIVE LEGAL SERVICES, INC. (IDEALS, INC.), represented by its Executive Director, Mr. Edgardo Ligon, **FREEDOM FROM DEBT COALITION (FDC)**, represented by its Vice President, Rebecca L. Malay, **AKBAYAN CITIZEN'S ACTION PARTY**, represented by its Chair Emeritus Loretta Anne P. Rosales, **ALLIANCE OF PROGRESSIVE LABOR**, represented by its Chairperson, Daniel L. Edralin, and **REP. WALDEN BELLO**, in his capacity as duly-elected member of the House of Representatives.

Petitioners,

- v e r s u s -

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORP., represented by its Acting President and Chief Executive Officer Atty. Ma. Luz L. Caminero, **METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM**, represented by its Administrator Atty. Diosdado M. Allado, **NATIONAL IRRIGATION ADMINISTRATION** represented by its administrator Carlos S. Salazar, **KOREA WATER RESOURCES CORPORATION**, represented by its Chief Executive Officer, Kim Kuen-Ho and and/or attorneys-in-fact, Atty. Anna Bianca L. Torres and Atty. Luther D. Ramos, **FIRST GEN NORTHERN ENERGY CORP.**, represented by its president, Mr. Federico R. Lopez, **SAN MIGUEL CORP.**, represented by its President, Mr. Ramon S. Ang, **SN ABOITIZ POWER-PANGASINAN INC.**, represented by its President, Mr. Antonio R. Moraza, **TRANS-ASIA OIL AND ENERGY DEVELOPMENT CORPORATION**, represented by its President and CEO, Mr. Francisco L. Viray, and **DMCI POWER CORP.**, represented by its President, Mr. Nestor Dadivas,

Respondents.

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G.R. No. 192088
Certiorari and Prohibition
with Application for a
Temporary Restraining
Order and/or Preliminary
Injunction

MEMORANDUM FOR THE PETITIONERS

Petitioners, through the undersigned counsel and to this Honorable Supreme Court, respectfully submit this Memorandum, in compliance with the Notice dated 15 February 2011, a copy of which was received on 22 February 2011.

I. PREFATORY STATEMENT

With the passage of Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (hereinafter referred to as "EPIRA"), the government moved with the hasty privatization of the electric power industry. As the process of privatization moves on, violations of constitutionally guaranteed rights of the people in its execution unfold. These are revealed in the ongoing privatization of the Angat Hydro-Electric Power Plant (hereinafter referred to as "Angat HEPP").

This petition is presented before this Honorable Court to call for the exercise of its constitutionally declared power to determine whether or not grave abuse of discretion amounting to lack or excess of jurisdiction has been committed by the Power Sector Assets and Liabilities Management Corporation (hereinafter referred to as "PSALM") in the conduct of the Angat HEPP bidding.

Petitioners submit that the PSALM acted with grave abuse of discretion when it conducted the Angat HEPP bidding without having first released required information and pursuing same in secrecy, in disregard of the people's right to information and under circumstances that demonstrate a clear and wanton violation of the petitioners' right to water and other guarantees under the law and the Constitution, including its national patrimony provisions. Petitioners thus ask this Honorable Court to safeguard the people's right to water and to access information on government matters involving

public interest and, in general, ensure adherence to the pertinent provisions of law and the Constitution as government pursues the sale of a critical facility that affects around 97% of the water supply of Metro Manila.

II. OVERVIEW AND NATURE OF THE BIDDING PROCESS FOR THE ANGAT HEPP

2.1. On 26 June 2001, EPIRA was passed into law, seeking to “provide a framework for the restructuring of the electric power industry, *including the privatization of the assets of NPC.*”¹

2.2. In line with the stated objectives of EPIRA, public respondent PSALM was created with the mandate of conducting the privatization of the National Power Corporation (hereinafter referred to as “NPC”) assets in an “*open and transparent manner through public bidding.*”² The law did not provide for any other mode through which the sale of NPC assets may be pursued. Thus, public bidding is the only legal mode to privatize NPC assets, with the qualification and mandatory requirement that it be conducted in an “open and transparent manner.”

2.3. Since its creation, the PSALM has established its own procedural rules on the public bidding of NPC assets,³ which basically provides:

- (a) PSALM’s bidding process commences with the publication of the Invitation to Bid in two (2) newspapers of general circulation for three (3) consecutive days, as well as in the PSALM’s official website.

¹ Sec. 3, RA 9136.

² Sec. 47, (e) RA 9136.

³ [http://www.psal.gov.ph/documents/prospectus/2010/JANUARY%202010%20INDUSTRY%20PROSPECTUS_Final%20\(2\).pdf](http://www.psal.gov.ph/documents/prospectus/2010/JANUARY%202010%20INDUSTRY%20PROSPECTUS_Final%20(2).pdf).

- (b) Interested parties then submit a Letter of Intent (hereinafter referred to as "LOI") to the PSALM on or before a specified deadline. Only those who submitted their LOI on time are allowed to participate in the bidding.
- (c) As a pre-requisite to receiving the Bidding Package, interested parties execute a Confidentiality Agreement and an Undertaking, and pay a non-refundable Participation Fee. (In the case of the ANGAT HEPP, the Participation Fee was \$2,500.00.) The details of the privatization of the asset are contained in the Bidding Package. Only those who submitted a Confidentiality Agreement and Undertaking and paid the Participation Fee are allowed to participate in the actual bidding.
- (d) Interested parties then conduct their Due Diligence process by visiting and assessing the asset as well as its legal documents.
- (e) PSALM holds a Pre-Bid Conference to further explain the pre-qualified interested parties the details and processes of the privatization. After the Pre-Bid Conference, interested parties evaluate and decide on their bid, leading to their submission of their final financial bid on or before a pre-determined deadline.
- (f) On the day of the deadline, the PSALM ascertains the proposed bids and declares the highest bidder. It usually takes four (4) to six (6) months from the publication of the Invitation to Bid to the announcement of the highest bidder.

2.4. The bidding process does not terminate with the announcement of the highest bidder. After the announcement, the PSALM evaluates the documents submitted by the highest bidder. If there are no problems with said documents, the PSALM then issues a Notice of Award to the highest bidder as the winning bidder. While there shall have been a winning bidder at this point, the transfer of ownership and possession over the asset is not yet implemented until the issuance of the Certificate of Effectivity of the

Contract. The winning bidder shall then make an Up-Front Payment as a prerequisite for the turn-over of the asset. The Deed of Absolute Sale shall be executed only upon full payment of the bid price.

III.

NATURE AND PURPOSE OF THE PETITION

3.1. This is a petition under Rule 65 of the Rules of Court for Certiorari and Prohibition with an application for the issuance of a temporary restraining order and/or a writ of preliminary injunction. Petitioners come before this Honorable Court to question the bidding process of the Angat Hydro-Electric Power Plant presently being carried out by public respondent PSALM as being without or in excess of its jurisdiction and mandate, or with grave abuse of discretion amounting to lack or excess of jurisdiction.

3.2. In questioning the legality of the proceedings presently being undertaken by the public respondent PSALM, petitioners invoke Art. VIII, Sec. 5 (1) of the 1987 Constitution, which grants this Honorable Court the power to "*Exercise original jurisdiction xxx over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.*"

3.3. This suit is being brought before the Supreme Court in its original jurisdiction in view of Sec. 78 of the EPIRA which states that "*The implementation of the provisions of this act shall not be restrained or enjoined except by an order issued by the Supreme Court of the Philippines.*" Moreover, with the bidding process for the Angat HEPP already under way and the announcement of a highest bidder already made by PSALM on April 28 2010, there is no plain, speedy, and adequate remedy available under the ordinary course of law through which the rights of petitioners may be timely protected.

3.4. The Petition prays that this Honorable Court issue:

- A. A judgment permanently prohibiting public respondent PSALM from disposing of the Angat HEPP through privatization.
- B. A judgment nullifying the bidding process initiated by public respondent PSALM on January 2010 for the privatization of the Angat HEPP.
- C. A Preliminary Injunction and/or Temporary Restraining Order to enjoin the Respondents from proceeding with the next steps in the bidding process, specifically the issuance of a notice of award for the winning bidder of the Angat HEPP.

IV.

GROUNDS FOR GRANTING THE PETITION

4.1. The bidding process being undertaken by the PSALM towards the sale of the Angat HEPP is assailed as being without or in excess of public respondent PSALM's jurisdiction, or with grave abuse of discretion based on the following laws:

1. Article III, Section 7 of the 1987 Constitution, which guarantees the right of the people to information.
2. Article II, Section 28 of the 1987 Constitution, which declares a policy of full public disclosure of all government transactions involving public interest.
3. Article XII, Section 2 of the 1987 Constitution, which provides for the full control and supervision of the State in the exploration, development and utilization of its natural resources including its waters.
4. Article II, Sections 2 and 11 of the 1987 Constitution, which adopt the generally accepted principles of international law as part of the law of the land, and guarantees full respect for human rights, respectively, in relation to Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights recognizing the right of everyone to an adequate standard of living and the enjoyment of the highest attainable standard of physical and mental health.

5. Article III, Section 1 of the 1987 Constitution, which guarantees the right to life of every person.
6. Presidential Decree No. 1445 also known as the Government Auditing Code of the Philippines.
7. Presidential Decree No. 1067 also known as the Water Code of the Philippines.
8. Republic Act No. 9136 or the EPIRA, and its Implementing Rules and Regulations
9. Republic Act 386 also known as the Civil Code of the Philippines

Submissions

I.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT COMMENCED THE BIDDING PROCESS FOR THE ANGAT HEPP WITHOUT HAVING PREVIOUSLY RELEASED TO THE PUBLIC CRITICAL INFORMATION PERTINENT TO THE SALE OF THE PUBLIC ASSET SUCH AS THE TERMS AND CONDITIONS OF THE DISPOSITION, THE PARTIES QUALIFIED TO BID AND THE MINIMUM PRICE, AMONG OTHERS, IN VIOLATION OF P.D. 1445, R.A. 9136, AND JURISPRUDENCE.

II.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT REFUSED TO DIVULGE INFORMATION RELATED TO THE BIDDING BEING CONDUCTED - INCLUDING SIGNIFICANT INFORMATION CONCERNING THE TERMS AND CONDITIONS OF THE SALE, SAFEGUARDS TO THE PUBLIC INTERESTS INVOLVED, THE IDENTITY AND QUALIFICATIONS OF THE BIDDERS, ESPECIALLY OF THE SUPPOSED SUCCESSFUL BIDDER -- IN VIOLATION OF ARTICLE III, SECTION 7 AND ARTICLE II, SECTION 28 OF THE 1987 CONSTITUTION AND JURISPRUDENCE RELATING TO THE RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN⁴ AND THE POLICY OF FULL PUBLIC DISCLOSURE OF ALL GOVERNMENT TRANSACTIONS INVOLVING PUBLIC INTEREST.⁵

⁴ Article III, Section 7, 1987 Constitution.

⁵ Article II, Section 28, 1987 Constitution.

III.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT PURSUED A BIDDING PROCESS THAT IS NOT OPEN AND TRANSPARENT AND ONE THAT DISCRIMINATORILY LIMITED PARTICIPATION THEREIN TO PRIVATE SECTORS, IN VIOLATION OF THE EPIRA.

IV.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT OVERSTEPPED ITS MANDATE AND JURISDICTION IN UNILATERALLY UNDERTAKING THE PUBLIC BIDDING AND SALE OF ANGAT HEPP AND IN NOT OFFERING FIRST THE SALE TO MWSS AND NIA AS AN INGENIOUS MODE OF TRANSFERRING POWER GENERATION ASSET, IN VIOLATION OF THE CIVIL CODE OF THE PHILIPPINES AND EPIRA.

V.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ALLOWED A FOREIGN STATE-OWNED CORPORATION TO PARTICIPATE IN THE BIDDING PROCESS (AND DECLARED SUCH CORPORATION TO BE THE WINNING BIDDER), IN CONTRAVENTION OF ARTICLE XII, SECTION 2 OF THE 1987 CONSTITUTION, THE WATER CODE OF THE PHILIPPINES AND THE EPIRA.

VI.

PSALM GRAVELY ABUSED ITS DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT CONDUCTED THE BIDDING PROCESS: (A) IN THE ABSENCE OF EFFECTIVE SAFEGUARDS FOR WATER SECURITY; AND (B) IN A CONTEXT CHARACTERIZED BY LACK/ DENIAL OF ACCESS TO INFORMATION CONCERNING WATER, UNDERMINING PETITIONERS' RIGHT TO WATER AND IN VIOLATION OF ARTICLE II, SECTIONS 2 AND 11 OF THE 1987 CONSTITUTION IN RELATION TO ARTICLES 11 AND 12 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, ARTICLE III, SECTION 1 OF THE 1987 CONSTITUTION, P. D. 1067, AND R.A. 9136 AND ITS IMPLEMENTING RULES AND REGULATIONS.

V. PARTIES

Petitioners

5.1. Petitioner Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (hereinafter referred to as IDEALS) is a non-government organization providing legal services for underprivileged sectors including farmers, migrant workers, and fisherfolks. Its principal office address is 4th Floor, MB Building, No. 6, Kalayaan Avenue, Diliman, Quezon City. IDEALS is represented in this Petition by its Executive Director, Edgardo Ligon.

5.2. Petitioner Freedom from Debt Coalition-Philippines (hereinafter referred to as FDC) is a nationwide multi-sectoral coalition conducting advocacy work in the national, local and international arena, to realize a common framework and agenda for economic development. Its principal office address is No. 11, Matimpiin Street, Barangay Pinyahan, Quezon City. FDC is represented by its Vice President, Rebecca L. Malay.

5.3. Petitioner Akbayan Citizens' Action Party is a party-list organization duly registered with the Commission on Elections representing a multi-sectoral constituency that includes labor, peasant, fisherfolk, urban poor, women, and youth organizations. Its principal office address is 36-B Madasalin Street, Barangay Sikatuna, Diliman, Quezon City. Akbayan is represented in this Petition by its Chair Emeritus, former Rep. Loretta Ann P. Rosales.

5.4. Petitioner Alliance of Progressive Labor is a national alliance of various labor organizations and trade unions, duly organized and existing under Philippine laws, and is engaged in advocacy for the protection and advancement of workers' rights and interests. Its principal office address is at 94 Scout Delgado Street, Barangay Laging

Handa, Quezon City. APL is represented in this Petition by its Chairman, Daniel Edralin.

5.5. Petitioner Walden Bello is a Filipino citizen, of legal age, and a duly elected party-list representative of the Akbayan Citizens' Action Party, holding office at the Room S-514, House of Representatives, Constitution Hills, Quezon City. He is suing in his capacity as a citizen, taxpayer, and member of the House of Representatives.

Respondents

5.6. Respondent Power Sector Assets and Liabilities Management Corp. is responsible for the disposal of NPC assets, as mandated by RA 9136. PSALM is represented by its Acting President and Chief Executive Officer, Atty. Ma. Luz L. Caminero. Respondent may be served with summons and other processes of this Honorable Court at 7th Floor Bancmer Building, 6756 Ayala Avenue, Makati City.

5.7. Respondent Metropolitan Waterworks and Sewerage System has jurisdiction, supervision and control over all waterworks and sewerage system in the territory of Metro Manila. It is represented by its Administrator, Atty. Diosdado M. Allado. It may be served with summons and other processes of this Honorable Court at the Administration Building, MWSS Complex, 489 Katipunan Road, Balara, Quezon City, Philippines.

5.8. Respondent National Irrigation Administration is administrating the use of water from the Angat Dam for the irrigation of farmlands in Bulacan and Pampanga. It is represented by its Administrator, Carlos S. Salazar. It may be served with summons

and other processes of this Honorable Court at NIA Bldg., NIA Road, Diliman, Quezon City, Philippines.

5.9. Private Respondent Korea Water Resources Corporation (hereinafter referred to as “K-Water”) is a state-owned utility of the Republic of South Korea, said corporation having been declared by public respondent as the highest bidder for the Angat Hydro-Electric Power Plant. It may be served with summons and other processes of this Honorable Court through its Chief Executive Officer, Kim Kuen-Ho, at his office address at San 6-2 Yeonchuk dong, Daedeok-gu, Daejeon, Korea and/or attorneys-in-fact, Atty. Anna Bianca L. Torres and Atty. Luther D. Ramos, at their office address at Puyat Jacinto and Santos Law, 12 Floor, Manila Bank Building, 6772 Ayala Avenue, Makati City.⁶ Copies of this petition were sent to said addressees considering that said Respondent is not registered and does not have a resident agent in the Philippines as certified by the Securities and Exchange Commission.⁷

5.10. Private Respondent First Gen Corporation is a domestic corporation organized under the laws of the Philippines. It may be served with summons and other processes of this Honorable Court through its president, Mr. Federico R. Lopez, or corporate secretary, Rachel R. Hernandez, at their offices at the 3rd floor Benpres Building, Exchange Road corner Meralco Avenue, Ortigas Center, Pasig City, Philippines.

5.11. SN Aboitiz Power – Pangasinan, Inc. is a domestic corporation duly-organized under the laws of the Philippines. It may be served with summons and other

⁶ The address and name of representative of Korea Water Resources Corporation was obtained from the website of the company. Before the petition was filed, petitioners sought this information from PSALM but the latter would not divulge the same. The address and names of lawyers were given by a power management specialist of PSALM, although PSALM refused to issue a written note/ statement to that effect.

⁷ Certification of Non-Registration of Company, Annex A, Petition.

processes of this Honorable Court through its President, Mr. Antonio R. Moraza, or its Corporate Secretary, Ms. Leah I. Geraldez, at their principal office at 2/F Herco Center, 114 Benavidez St., Legaspi Village, Makati City, Philippines.

5.12. San Miguel Corp. is a domestic corporation organized under the laws of the Philippines. It may be served with summons and other processes of this Honorable Court through its President, Mr. Ramon S. Ang, or its Corporate Secretary, Atty. Francis H. Jardeleza, at their principal office at 40 San Miguel Avenue, Mandaluyong City, 1550 Metro Manila, Philippines.

5.13. Trans-Asia Oil and Energy Development Corporation is a domestic corporation organized under the laws of the Philippines. It may be served with summons and other processes of this Honorable Court through its President and CEO, Mr. Francisco L. Viray, or Corporate Secretary, Juan J. Diaz, at their principal office at Level 11, Phinma Plaza, 39 Plaza Drive, Rockwell Center, Makati.

5.14. DMCI Power Corporation is a domestic corporation organized under the laws of the Philippines subsidiary of DMCI Holdings Inc., a publicly-listed corporation. It may be served with summons through its President, Mr. Nestor Dadivas, at his office at 3rd Floor Dacon Building, 2281 Don Chino Roces Avenue Extension, 1231 Makati City, Philippines.

VI. STATEMENT OF FACTS

6.1. The Angat Dam located in Norzagaray, Bulacan was originally commissioned in 1967 to contribute to the supply of power for the Luzon grid. It is a multipurpose dam for hydropower, water supply, irrigation, and flood control. Angat

Dam is the single most important source of Metro Manila's water supply, accounting for 97% of the water supply distributed by the MWSS. It also provides irrigation for 31,000 hectares of farmlands in Bulacan and Pampanga.

6.2. The Angat HEPP is a hydroelectric power plant located in San Lorenzo, Norzagaray, Bulacan. It incorporates in its design several functional activities including power supply, irrigation, water supply, and flood control.

6.3. Hydroelectric power from the Angat HEPP is generated by the force of the water that is released from the water reservoir through Angat Dam and spins the turbines that are connected to the electricity generators. After passing through the turbines, the discharged water flows through various tailrace tunnels to the designated outlets.

6.4. The Angat HEPP has an installed capacity of 246 megawatts (MW) per hour. It consists of four main units, with each unit producing 50 MW of power, for a total of 200 MW. There are also five auxiliary units consisting of three units producing 6 MW each, one unit producing 10 MW, and one unit producing 18 MW. Water discharged from the main units goes to irrigation, while water discharged from the auxiliary units goes to domestic use.

6.5. The water level in Angat Dam has an effect on how much electricity can be generated by the Angat HEPP, which units will be used to generate electricity, and how much water can be released as a result of the electricity generation. When the water level in Angat Dam is between 180-217 meters above sea level, both the main and auxiliary units can operate at their rated capacity, and discharged water goes to irrigation and domestic use. However, if the water level falls below the critical level of

180 meters above sea level, only the auxiliary units will be allowed to operate, with the discharged water going to domestic use.

6.6. Three government entities make use of water from the Angat Dam, namely the National Irrigation Administration, National Power Corporation and Metropolitan Waterworks and Sewerage System (hereinafter referred to as NIA, NPC, and MWSS, respectively). The allocation of water from the Angat Dam between these three users is further monitored by the National Water Resources Board (hereinafter referred to as the NWRB), as mandated by Presidential Decree 424 and Presidential Decree 1067.

6.7. Expenses and responsibilities with respect to the operation and maintenance of the dam has been shared between these three users, in accordance with various agreements undertaken between the three entities and the NWRB, including an agreement on a Climate-Based Information Support System for Management of the Angat-Umiray Reservoir signed 6 March 2006 , an NPC -MWSS Agreement on the installation of Auxiliary Unit 5 signed on 9 February 1990, and an NPC-MWSS Agreement for the creation of an NPC-MWSS Taskforce to conduct Dam Safety Assessments of the Angat Dam.⁸

6.8. The three users of the Angat Dam have separate water permits for the utilization of water from the dam reservoir. In 28 November 1979, the National Water Resources Board (hereinafter referred to as NWRB) issued Water Permit No. 6504 to the NIA and Water Permit No. 6512 to the NPC for the use of water from the Angat River.⁹

⁸ Annex B-1, B-2 and B-3, Petition.

⁹ Annexes C-1 and C-2, Petition.

6.9. On 12 December 1988, the NWRB issued Water Permit No. 11462 to the MWSS for the use of water from the Angat Dam for municipal/industrial purposes.¹⁰

6.10. On 14 December 1998, the NWRB passed a water protocol through Resolution No. 02-1298 entitled “Proposed Operation Rule Curves for Angat Reservoir” which contained an operation criterion for the allocation of water between the three users of the Angat reservoir to “*safeguard against shortage of water supply during El Nino or risk of overtopping of the dam during El (sic) Nina.*” The said “water protocol” was later amended by resolution of the NWRB on 19 February 2004 and later on 28 April 2006.¹¹ In accordance with a Memorandum of Agreement by and between the NWRB and the MWSS signed on 29 December 2005, the Operation Rule Curves were again amended on 28 April 2006.¹²

6.11. Under the existing water protocol as provided by the NWRB Angat Reservoir Operation Rule, water releases for power generation is limited only to the water requirement for water supply, irrigation and river maintenance when the water surface elevation or water level is below 212 meters.

6.12. In 26 June 2001, Congress passed *into law Republic Act 9136 also known as the EPIRA which created public respondent PSALM. Under Sec 50 of RA 9136, public respondent was mandated “to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.”*

¹⁰ Annex C-3, Petition.

¹¹ Annexes D-1, D-2, and D-3, Petition.

¹² Annex E, Petition.

6.13. On 27 May 2008, the Office of the Government Corporate Counsel, upon request of public respondent PSALM's president and chief executive officer Jose C. Ibazeta, issued OGCC Opinion No. 107 which opined that PSALM is not limited to "selling" power generation plants to fulfill its mandate under EPIRA. The OGCC further held the opinion that under the EPIRA, PSALM has the legal option of transferring possession, control and operation of the Angat Facility to another entity in order "to protect potable water, irrigation and all other requirements imbued with public interest," including the adoption of early measures to address the forecasted water crisis.

6.14. On 24 September 2009, the MWSS sent a letter¹³ to then Secretary Hermogenes E. Ebdane, Jr. of the Department of Public Works and Highways, to inform him of the opposition posed by various local government units to the impending privatization of the Angat HEPP and recommending the option of a government to government transaction, wherein the "ownership, management and control will be transferred to MWSS, with reasonable compensation."

6.15. On 9 November 2009, the Commission on Human Rights issued a Human Rights Advisory on the Privatization of the Angat Dam¹⁴ where it called on the Philippine government to "*revisit and reassess* its policy with regard to the provision of its water resources vis-à-vis its concurrent obligations under the International Covenant on Economic, Social and Cultural Rights." It further called for **specific and concrete** safeguards to ensure the right to water should PSALM proceed with the Angat HEPP privatization.

¹³ Annex F, Petition.

¹⁴ Annex G, Petition.

6.16. On January 11, 2010, the PSALM posted on its website an Invitation to Bid for the Angat HEPP. The Invitation to Bid was alleged to have been published in local broadsheets until Wednesday, 27 January 2010.¹⁵

6.17. In the said Invitation to Bid, the PSALM Bids and Awards Committee required interested parties to submit Letters of Intent not later than 27 January 2010 and required the submission of a Confidentiality Agreement and an Undertaking Notice, accompanied by US\$2,500 in cash, manager's check, or cashier's check.

6.18. On 17 February 2010, a pre-bid conference between PSALM, prospective bidders and government agencies affected by the privatization was undertaken at public respondent PSALM's office.

6.19. Due Diligence or the inspection of the asset by the prospective bidders was undertaken from 12 January 2010 to one week before the deadline of bid submission, which was scheduled on 28 April 2010.

6.20. On 30 March 2010, PSALM held a forum with the prospective bidders where it discussed a *draft protocol* for the use and release of water passing through the Angat HEPP.¹⁶ During the said forum, bidders were requested to submit written comments to PSALM for endorsement to the NWRB which was tasked to produce the final version of the protocol.

¹⁵ 12 January 2010, PSALM press release: *PSALM launches sale of Angat Hydro Plant*. Annex H-1 to H-7, Petition.

¹⁶ PSALM, 05 April 2010, *PSALM discusses Angat water protocol with prospective bidders*, available at <http://www.psal.gov.ph>, last accessed on 6 May 2010.

6.21. A Draft Memorandum of Agreement to bind the users to the final water protocol was yet unsigned as of 20 April 2010.¹⁷

6.22. On 23 April 2010, Petitioners IDEALS and FDC sent a letter,¹⁸ requesting PSALM for certified true copies of documents relating to the sale of Angat HEPP. Despite repeated demands, both oral and written, PSALM refused and continuously refuses, without justifiable cause or reason, to grant Petitioners' request of said documents.

6.23. On 28 April 2010, the PSALM Bids and Awards Committee (BAC) opened the bid envelopes of six bidding firms and announced K-Water as the highest bidder with a bid of \$440.8 Million, besting the other bids submitted by First Gen Northern Energy Corp., San Miguel Corp., SN Aboitiz Power Pangasinan Inc., Trans-Asia Oil and Energy Development Corporation, and DMCI Power Corporation.

6.24. According to PSALM, K-Water's bid documents would be verified for its accuracy, authenticity, and completeness before it can *formally declare* K-Water as the winning bidder for the Angat HEPP.¹⁹ In a news article by news syndicate Dow Jones Newswires, PSALM's Acting President Luz Caminero was quoted as saying that the review of K-Water's bid documents was part of the 15-day post-qualification procedure within which period the PSALM would issue the official award.²⁰

¹⁷ Annex I, Petition.

¹⁸ Annex J, Petition.

¹⁹ PSALM, 28 April 2010 *Korean company declared highest bidder for Angat power plant*, available at <http://www.psal.gov.ph>, last accessed on 6 May 2010.

²⁰ Sandique-Carlos, 28 April 2010 UPDATE: Korea Water Offers Highest Bid for 218-MWSAngat Power Plant, available at <http://www.foxbusiness.com/story/markets/industries/utilities/update> last accessed on 7 May 2010.

6.25. On 14 May 2010, Petitioner IDEALS sent a letter²¹ to PSALM, repeating its request in the letter dated 23 April 2010 and specifically asking for the profile of Respondent K-Water. Despite repeated demands, PSALM refused and continues to refuse, without justifiable cause or reason, to grant Petitioner's request.

6.26. Hence, this Petition.

VII. STATEMENT OF THE ISSUES

7.1. Petitioners present the following issues for resolution of this Honorable Court:

A. Procedural

- a. Do petitioners have the requisite standing to file the instant Petition?
- b. Is the Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or a Preliminary Injunction a proper remedy?
- c. Did the issuance of Notice of Award render the instant petition moot and academic?
- d. Does the present controversy constitute a political question?

B. Substantive

Did PSALM act with grave abuse of discretion amounting to lack or excess of jurisdiction when:

- a. it commenced the bidding process for the Angat HEPP without having previously released to the public critical information

²¹ Annex K, Petition.

pertinent to the sale of the public asset such as the terms and conditions of the disposition, the parties qualified to bid and the minimum price, among others, in violation of P.D. 1445, R.A. 9136, and jurisprudence?

- b. it refused to divulge information related to the bidding being conducted - including significant information concerning the terms and conditions of the sale, safeguards to the public interests involved, the identity and qualifications of the bidders, especially of the supposed successful bidder -- in violation of Article III, Section 7 and Article II, Section 28 of the 1987 Constitution and jurisprudence relating to the right to information on matters of public concern²² and the policy of full public disclosure of all government transactions involving public interest?²³
- c. it pursued a bidding process that was not open and transparent and one that discriminatorily limited participation therein to private sectors, in violation of the EPIRA?
- d. it overstepped its mandate and jurisdiction in unilaterally undertaking the public bidding and sale of Angat HEPP and in not offering first the sale to MWSS and NIA as an ingenious mode of transferring power generation asset, in violation of the Civil Code of the Philippines and EPIRA?
- e. it allowed a foreign state-owned corporation to participate in the bidding process (and declared such corporation to be the winning bidder), in contravention of Article XII, Section 2 of the

²² Article III, Section 7, 1987 Constitution.

²³ Article II, Section 28, 1987 Constitution.

1987 Constitution, the Water Code of the Philippines and the EPIRA?

- f. it conducted the bidding process: (a) in the absence of effective safeguards for water security; and (b) in a context characterized by lack/denial of access to information concerning water, undermining petitioners' right to water and in violation of Article II, Sections 2 and 11 of the 1987 Constitution in relation to Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, Article III, Section 1 of the 1987 Constitution, P.D. 1067, and R.A. 9136 and its Implementing Rules and Regulations?

VIII. DISCUSSION

A. PROCEDURAL ISSUES

I. PETITIONERS HAVE THE REQUISITE STANDING TO FILE THE PRESENT PETITION.

In arguing against the standing of petitioners to file the instant Petition, PSALM posit that: (a) Petitioner IDEALS, being an entity engaged in the practice of law, has not shown any injury that it has suffered or any injury suffered by any of its members as a result of the bidding process or of the acts of respondent PSALM²⁴ and does not have the standing to assert the rights of the underprivileged sectors to which it provides legal services;²⁵ (b) Petitioner Bello has no standing because the action complained of does

²⁴ PSALM Comment, par. 71, p. 33.

²⁵ Ibid, par. 73, p. 34.

not infringe upon his prerogatives as a legislator²⁶ and he has not executed a Certification and Verification of Non-Forum Shopping;²⁷ (c) Petitioners FDC, Akbayan and APL have not demonstrated any injury to themselves;²⁸ and (d) Petitioners have no standing to sue because respondent PSALM relied upon EPIRA when it conducted the public bidding and there was no illegal disbursement of public funds.²⁹

PSALM conveniently overlooked the fact that petitioners filed the instant case either in their personal capacity, as individual persons and organizations.

The absence of lack of Certification and Verification of Non-Forum Shopping from Petitioner Bello in the file copy of PSALM was merely due to inadvertence in photocopying the same to which petitioners apologize to this Honorable Court as well as to PSALM. Nevertheless, it must be respectfully pointed out that honest mistake or unintended inadvertence is not fatal to the petition. As this Honorable Court has time and again pointed out, “[i]t is settled that liberal construction of the rules may be invoked in situations where there may be some excusable formal deficiency or error in a pleading, provided that the same does not subvert the essence of the proceeding and connotes at least a reasonable attempt at compliance with the rules. After all, rules of procedure are not to be applied in a very rigid, technical sense; they are used only to help secure substantial justice.”³⁰ Petitioners invoke the liberal construction of the rules considering that the copies filed with this Honorable Court as well as petitioners’ receiving copy have an attached Certification and Verification. It is respectfully submitted that the copy on record with the Court is more controlling than the file copies of the parties to the case.

²⁶ Ibid, par. 74, p. 34.

²⁷ Ibid, par. 74, p. 34.

²⁸ Ibid, par. 76, p. 35.

²⁹ Ibid, par. 78, p. 36.

³⁰ MEDISERV, Inc., v. Court of Appeals, G.R. No. 161368, 5 April 2010.

In this instance, petitioners filed the case as they are directly injured by acts of PSALM, as taxpayers or with members as taxpayers, as Filipino citizens or with members who are Filipinos asserting the promotion and protection of a public right,³¹ or the case is of utmost transcendental importance.³²

Petitioners stand to be directly injured by the proceedings of PSALM.

Petitioners, submit that as residents of Metro Manila, or being with members who are residents of Metro Manila who rely on the Angat Dam for 97% of their potable water supply, they stand to be directly injured or in danger of sustaining direct injury by the continuation of the bidding process without a water protocol violates the safeguard provisions of RA 9136 and other laws that seek to ensure the security of their potable water supply.³³

The Implementing Rules and Regulations of RA 9136 requires that in cases of transfer of possession, control and operation or privatization of multi-purpose hydro facilities, safeguards shall be prescribed to ensure that the National Government may direct water usage in cases of shortage to protect potable water, irrigation and all other requirements imbued with public interest.³⁴

³¹Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction, dated 12 May 2010, page 21, par. 3.

³² Petition, page 23.

³³ Petition. p.22, par. 1.

³⁴ Sec. 4, par. (e), Rule 23 of the IRR of RA 9136, cited in Petition, p.52.

Said safeguards, which take the form of a water protocol, would have ensured the protection not only of the concomitant rights of all stakeholders of Angat HEPP, but also the millions of Filipino people that could be affected thereby.

Petitioners are taxpayers or with members who are taxpayers assailing proceedings that involve expenditure of public funds and taxpayers' money.

PSALM, as a government entity, functions using public funds and taxpayers' money. The conduct of the bidding process, which includes publications of Invitation to Bid, conducting fora to selected audiences and Pre-bid Conferences, among others entails disbursement of public funds.

It must further be emphasized that the property subject of the bidding process is in the nature of a public asset, the development of which was undertaken through the use of public funds and taxpayer's money. Since its commissioning in 1967, the maintenance and operation of the Angat Dam as well as the Angat HEPP has been shouldered through public funds.³⁵

The standing of petitioners to institute the petition as taxpayers has been doctrinally reaffirmed in the case of *Chavez v. Public Estate Authority*³⁶:

Further, in *Albano v. Reyes*, we said that while expenditure of public funds may not have been involved under the questioned contract for the development, management and operation of the Manila International Container Terminal, 'public interest [was] definitely involved considering the important role [of the subject contract] . . . in the economic development of the country and the magnitude of the financial consideration involved.' We concluded that, as a consequence, the disclosure provision in the Constitution

³⁵ Petition, p. 22.

³⁶ *Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002.

would constitute sufficient authority for upholding the petitioner's standing.

Moreover, in *Tan v. Macapagal*, the Court pointed out that “as far as a taxpayer’s suit is concerned, this Court is not devoid of discretion as to whether or not it should be entertained.”³⁷

Petitioners are asserting their rights as
Filipino citizens.

In a long line of cases, this Court has ruled that ordinary taxpayers, concerned citizens and non-government organizations have the legal standing to sue when an action involves the assertion of a public right. The assertion of personal interest is satisfied by a showing that petitioner is a citizen and as such, is interested in the execution of the laws.³⁸ In this case, petitioners assert serious and multiple violations of a number of laws including the EPIRA as well as of the Constitution.

In *Akbayan v. Aquino*,³⁹ where both Akbayan and APL were also petitioners, this same Supreme Court ruled that:

In a petition anchored upon the right of the people to information on matters of public concern, which is a public right by its very nature, petitioners need not show that they have any legal or special interest in the result, it being sufficient to show that they are citizens and, therefore, part of the general public which possesses the right. As the present petition is anchored on the right to information and petitioners are all suing in their capacity as citizens and groups of citizens including petitioners-members of the House of Representatives who additionally are suing in their capacity as such, the standing of petitioners to file the present suit is grounded in jurisprudence.

³⁷ *Tan v. Macapagal*, 43 SCRA 677 (1972).

³⁸ *Severino vs. Governor General*, 16 Phil. 366 (1910); *Legaspi vs. Civil Service Commission*, G.R. No. 72119, May 29, 1987; *Chavez vs. PEA-Amari*, G.R. No. 133250, July 9, 2002.

³⁹ G.R. No. 170516, 16 July 2008.

In *Francisco et al. v. The House of Representatives*,⁴⁰ it was decided that “when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest.” The instant case is unmistakably one that involves the assertion of a public right to water, among others, of paramount importance to the people.

Even if the rule laid down in the case cited by PSALM⁴¹ is applied in the case at bar, still, the Court has held that petitioners therein have *locus standi* applying the transcendental importance doctrine and liberality rule, explaining that “when the issue concerns a public right, it is sufficient that the petitioner is a citizen and has an interest in the execution of the laws and that organizations may be granted standing to assert the rights of their members.”⁴²

In the case at bar, petitioners have satisfied the two basic requisites for *locus standi*: (1) the enforcement of a public right, and (2) espousal of the said right by a Filipino citizen. It is undeniable that petitioners are citizens of the Philippines or groups of citizens of the Philippines and part of the general public who come to this Honorable Court to seek for the enforcement of their constitutional right to information, and right to life vis-à-vis right to water and water security as affected by the irregular, illegal and unconstitutional acts of PSALM which are perpetrated in the guise of implementing the law. As Filipino citizens or with members who are Filipino citizens, petitioners are entitled to their full constitutional right to information, and more importantly, the right to life.

⁴⁰ G.R. No. 160261, 10 November 2003.

⁴¹ PSALM Comment, par. 69, p. 32.

⁴² *Randolf David, et al. v. Gloria Macapagal Arroyo*, G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 and 171424, 3 May 2006.

The case involves utmost
“transcendental importance.”

At any rate, this case is one of transcendental importance, in view of its far-reaching implications in the interpretation and implementation of national policies involving the utilization of water resources, promotion of right to life which includes the right to water, and protection of the people’s right to information in the light of the policy of the state full public disclosure, among others.

Petitioners submit that the case at bar is not an isolated incident, PSALM having already disposed and intending to dispose through privatization other multi-purpose hydro-electric power plants previously owned and managed by the NPC.

The constitutionality and legality of the bidding process being undertaken by public respondent for the sale of the Angat Hydro-Electric Power Plant has significant consequences on the planned disposal of other hydro-electric power plants presently entrusted to PSALM.

This Honorable Court has held in a number of cases that a party's standing in court is a procedural technicality, which may be set aside by the Court in view of the importance of the issues involved. The Court has many times dismissed the posturing that they were not proper parties and ruled that the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside technicalities of procedure.⁴³

⁴³ G.R. No. L-2044 (Araneta vs. Dinglasan); G.R. No. L-2756 (Araneta vs. Angeles); G.R. No. L-3054 (Rodriguez vs. Tesorero de Filipinas); G.R. No. L-3055 (Guerrero vs. Commissioner of Customs); and G.R. No. L-3056 (Barredo vs. Commission on Elections), 84 Phil. 368 [1949].

II.
THE PETITION FOR CERTIORARI AND
PROHIBITION WITH APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
AND/OR A PRELIMINARY INJUNCTION IS
A PROPER REMEDY.

Respondent PSALM alleged that the instant Petition must be dismissed for being an improper remedy on the following grounds: (a) the petition for certiorari must be dismissed because “respondent PSALM exercised neither judicial nor quasi-judicial functions when it conducted the bidding,”⁴⁴ (b) the petition for prohibition must be dismissed because “respondent PSALM was merely performing its functions xxx in complete obedience to its mandate under the EPIRA.”⁴⁵

Petitioners respectfully submit that PSALM, through its Bids and Awards Committee, by opening the bids, declaring respondent K-Water as the winning bidder, issuing the Notice of Award and ratifying said notice, exercises quasi-judicial functions, in that it “investigates facts or ascertain the existence of facts, holds hearings, and draws conclusions from them as a basis for their official action and to exercise discretion of a judicial nature.”⁴⁶ The determination of the winning bidder is not merely a ministerial function but a discretionary one.⁴⁷

The exercise of a function, even if mandated by law, cannot prevail over the exercise of a right especially when, as in the case at bar, the latter is a constitutionally-

⁴⁴ Comment with Urgent Motion to Lift Status Quo Ante Order, dated 22 June 2010, par. 50, p. 25 (hereafter PSALM Comment).

⁴⁵ PSALM Comment, par. 53, p. 26.

⁴⁶ *Liga ng mga Barangay National v. The City Mayor of Manila*, G.R. No. 154599, 21 January 2004.

⁴⁷ In *G&S Transport Corporation v. CA* (G.R. No. 120287, 28 May 2002), the Court had an occasion to rule that:

Indeed the determination of the winning bidders should be left to the sound judgment of the MIAA which is the agency in the best position to evaluate the proposals and to decide which bid would most complement the NAIA's services.

protected right. PSALM, in the process of privatizing the Angat HEPP, should have respected the limitations prescribed by the Constitution and other pertinent laws.

PSALM's bare allegation that it was merely performing its functions under the EPIRA for which it has acted in "complete obedience to its mandate"⁴⁸ is precisely one of the subjects of the petition, specifically the process undertaken therein. Very clearly, PSALM's grave abuse of discretion lies not in the fact that it had not refused to privatize or sell the Angat HEPP, but in its brazen disregard of the EPIRA's mandate to ensure, among others, open and transparent public bidding as well as safeguard measures. Far from religiously complying with these peremptory requirements of the law, PSALM cavalierly ignored them and proceeded with its flawed bidding process.

III.
THE ISSUANCE OF A NOTICE OF AWARD
DID NOT RENDER THE INSTANT PETITION
MOOT AND ACADEMIC.

PSALM argued that the issuance of the Notice of Award and the subsequent ratification of said notice rendered the Petition moot and academic.⁴⁹

PSALM could not be more wrong. The issuance of the Notice of Award and the ratification thereof are not the final steps for the privatization of the Angat HEPP. The privatization is not finished until and unless the deed of absolute sale has been executed.⁵⁰ Based on the facts before this Honorable Court, this final act has not yet been done in the case at bar.

⁴⁸ PSALM Comment, par. 53, p. 26.

⁴⁹ PSALM Comment, par. 57, p.27.

⁵⁰ Petition, dated 12 May 2010, page 4, last par.

Moreover, as pointed out by the petitioners, the water protocol has not yet been finalized.⁵¹ Hence, it is clear that the privatization of Angat HEPP is a work in progress which may be validly restrained, as in fact it was correctly restrained from proceeding by this Honorable Court.

This Honorable Court may likewise note that petitioners did not only seek to restrain the issuance of the Notice of Award but likewise prayed that a Temporary Restraining Order and/or Preliminary Injunction be issued enjoining respondents from continuing with the bidding process.⁵²

In *Randolf David, et al. v. Gloria Macapagal Arroyo*,⁵³ this Honorable Court categorically held:

The 'moot and academic' principle is not a magical formula that can automatically dissuade the courts in resolving a case. Courts will decide cases, otherwise moot and academic, if: *first*, there is a grave violation of the Constitution; *second*, the exceptional character of the situation and the paramount public interest is involved; *third*, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and *fourth*, the case is capable of repetition yet evading review.

The unequivocal holding of the Court applies in its full force to the case at bar. Petitioners have sufficiently shown that the constitutional violations committed by PSALM are grave and irreparable. The issues raised in the instant Petition are of transcendental importance to the lives of residents of Metro Manila and the general public who depend on the supply of water from Angat dam. The questions posed in the Petition will require this Honorable Court to formulate controlling principles and

⁵¹ Petition, page 8, Submission VI.

⁵² Petition, page 54, Prayer, 1 and 2.

⁵³ G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 and 171424, 3 May 2006.

jurisprudence especially with respect to the people's right to water. Unless PSALM is permanently restrained by the highest court of the land, the case is inevitably capable of repetition as other utilities lined up for privatization will be affected as regards the process of privatization and the safeguards that must be set up to protect the public interest.

Thus, assuming *arguendo* that the issuance of Notice of Award and the ratification thereof have rendered the petition moot and academic, it is respectfully submitted that this Honorable Court must take cognizance of this case and rule upon the arguments squarely raised in the petition so as to lay down necessary jurisprudence on privatization, especially on the legal parameters for the bidding process, for the guidance of all concerned.

IV. THE PRESENT CONTROVERSY DOES NOT CONSTITUTE A POLITICAL QUESTION.

Contrary to PSALM's claims, the instant case does not pose a political question. As early as *Tañada v. Cuenco*, this Honorable Court defined political questions as "*those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government.*"⁵⁴

In the case at bar, petitioners have amply argued in their Petition that PSALM's exercise of its power is limited by the Constitution, the EPIRA and other laws as well as binding norms of international law. It is obvious that PSALM has no *carte blanche*

⁵⁴ G.R. No.L-10520, 28 February 1957.

discretionary authority in the conduct of the bidding process and privatization of the Angat HEPP.

In *Osmeña v. COMELEC*,⁵⁵ this Court ruled:

And even if we were to assume that the issue presented before us is political in nature, We would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers in proper cases even political questions (*Daza v. Singson*, 180 SCRA 496), provided naturally, that the question is not solely and exclusively political (as when the Executive extends recognition to a foreign government) but one which really necessitates a forthright determination of constitutionality, involving as it does a question of national importance.

The issues raised by petitioners herein unmistakably calls for the exercise of this Honorable Court's expanded jurisdiction in determining whether or not grave abuse of discretion amounting to lack or excess of jurisdiction has been committed by PSALM in its conduct of the bidding process and/or the privatization of the Angat HEPP.

B. SUBSTANTIVE ISSUES

I.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT COMMENCED THE BIDDING PROCESS FOR THE ANGAT HEPP WITHOUT HAVING PREVIOUSLY RELEASED TO THE PUBLIC CRITICAL INFORMATION PERTINENT TO THE SALE OF THE PUBLIC ASSET SUCH AS THE TERMS AND CONDITIONS OF THE DISPOSITION, THE PARTIES QUALIFIED TO BID AND THE MINIMUM PRICE, AMONG OTHERS, IN VIOLATION OF P.D. 1445, R.A. 9136, AND JURISPRUDENCE

The insufficiency of the publication of the Invitation to Bid and the overall lack of disclosure to the public of crucial information on the disposition of the Angat HEPP amounts to violation of the right of Petitioners to be informed of the

⁵⁵ G.R. Nos. 100318, 100308, 100417, 100420, 30 July 1991.

terms and conditions and like information on the disposition as guaranteed by the law on public bidding.

PSALM has the positive duty to disclose to the public the privatization of the Angat HEPP. It is mandated to conduct the sale in an open and transparent manner, through public bidding⁵⁶ and to provide for the orderly and transparent privatization of the assets and liabilities of NPC.⁵⁷ And as will be detailed shortly, pertinent data must be disclosed to the public at the start of the disposition process.

The disposition of the NPC assets by the PSALM, by the latter's own rules, commences with the publication of the Invitation to Bid. The Invitation to Bid is reproduced below for this Court's immediate reference:

INVITATION TO BID

The Power Sector Assets and Liabilities Management Corporation ("PSALM") Privatization, Bids and Awards Committee (*the "Committee"*) invites interested parties to participate in and bid for the privatization of the following:

The 246 MW Angat Hydroelectric Power Plant located in Norzagaray, Bulacan

(*the "Asset"*). The Asset is being privatized on an "as is where is" basis.

Interested parties must submit a Letter of Interest ("*LOI*") to the Committee, which shall state the full name, address, telephone and fax numbers of the interested party, name of the principal contact, and signed by an authorized representative. All LOIs must be received by the Committee at the PSALM Office with address at the 7th Floor Bankmer Building, 6756 Ayala Avenue, Makati City, not later than **5:00 p.m. on 27 January 2010** (*the "LOI Submission Deadline"*). Only interested parties that submit an LOI by the LOI Submission Deadline shall be allowed to participate further in the privatization of the Asset.

As a prerequisite to the receipt of the Bidding Package, interested parties shall execute a Confidentiality Agreement and an Undertaking pursuant to Section 78 of RA 9136, both in the forms provided by PSALM, and pay a non-refundable fee in the amount of Two Thousand Five Hundred U.S. Dollars (U.S.\$ 2,500.00) (*the "Participation Fee"*). The Participation Fee shall be either in cash, manager's check, or cashier's check. All bank charges, if any, shall be for the account of the interested party. The Confidentiality Agreement, Undertaking, and Participation Fee must be received by the Committee on or before **5:00 p.m. on 29 January 2010**, to entitle an interested party to further participation in the privatization of the Asset.

The Bidding Package, which includes the Bidding Procedures, shall be issued during office hours (8:00 a.m. to 5:00 p.m.) from **05 February to 12 February 2010** (*the "Deadline"*) at the PSALM Office. Only interested parties or consortium (as described below) who have been issued the Bidding Package by the Deadline will be allowed to participate further in the privatization of the Asset.

An interested party that submits the LOI must be the party that will participate in the privatization process, submit a bid, and enter into the pertinent agreements. Once an interested party submits the Confidentiality Agreement and Undertaking and pays the Participation Fee, such interested party may no longer be substituted in the privatization process, except through a consortium in accordance with the terms and conditions of the Bidding Procedures, among the requirements of which are: (i) such interested party must own at least a majority of the shares outstanding and entitled to vote in such consortium; (ii) the consortium must be a juridical entity; and (iii) a letter requesting to bid through consortium must be submitted to the Committee on or before the deadline set

⁵⁶ Section 47 (d) , R.A. 9136 and Rule 23, Section 4 (d), IRR of R.A. 9136.

⁵⁷ Rule 2 (i), IRR of R.A. 9136.

for the same in the Bidding Procedures.

The schedule of the bidding activities is as follows:

Due Diligence : 12 January 2010 until one (1) week before the Bid Submission Deadline
Pre-Bid Conference : 17 February 2010, 2:00 p.m. at the PSALM Office
Bid Submission Deadline : 28 April 2010

References to the dates and times shall be based on Manila time. Should any of the above dates fall on a holiday, the deadline shall be extended to the same time of the immediately succeeding business day in Makati City.

A two-envelope bidding system shall be adopted. Interested Parties will be required to post a bid security equivalent to Four Million U.S. Dollars (U.S.\$ 4,000,000.00) in the form of an irrevocable letter of credit, which must be acceptable to the Committee. The bid security of the winning bidder shall be substituted by a performance security to guarantee prompt, faithful, and complete performance of its obligations under the transaction. The details of the privatization of the Asset are contained in the Bidding Package.

Letters of Interest, Confidentiality Agreements, and Undertakings shall be addressed and submitted to: The Chairman, Privatization, Bids and Awards Committee, PSALM Corporation, 7th Floor, Bankmer Building, 6756 Ayala Avenue, Makati City, Philippines. Inquiries and clarifications shall be addressed to Atty. Conrad S. Tolentino at the PSALM Office, at telefax number (632) 892-6029 or e-mail address cstolentino@psalm.gov.ph.

The Committee reserves the right to accept or reject any interested party or bidder or proposals or bids therefrom, or any part thereof, and/or to waive any defects contained therein and accept the offer advantageous to the Government, without offering any reason whatsoever. It does not assume any obligation to compensate or indemnify parties for any expense or loss that they may incur as a result of their participation in the privatization process, nor does it guarantee that an award will be made. Finally, it reserves the right to modify, supplement, or change the Bidding Procedures and other aspects of the privatization process at any time, including the schedule and the venue provided herein, for any reason whatsoever and without giving prior notice. Interested parties and/or bidders shall be notified subsequently of such modifications, supplements, or changes.

**PSALM Privatization, Bids and Awards Committee
(11-13 January 2010)**

A perusal of the Invitation to Bid (for the Angat HEPP) published by PSALM shows that it did not specify crucial information related to the sale of the facility such as the terms and conditions of the disposition, the qualifications of the bidders, the minimum price, among other basic details. On the contrary, the Invitation merely states that *the details of the privatization of the Asset are contained in the bidding package (see under Schedule of Bidding Activities of the Invitation to Bid, above)*. However, access to the bidding package is, generally, not open. The bidding package, which includes bidding procedures and the details relative to the disposition of the Angat HEPP, will only be made available to an interested party (or one who has submitted a Letter of Intent relative to the bidding) who is able to pay a non-refundable Participation Fee in the amount of Two Thousand Five Hundred U.S. Dollars (USD 2,500.00) and comply with other requirements such as the execution of a Confidentiality Agreement. As stated

above, only those who submitted a Confidentiality Agreement and Undertaking and paid the Participation Fee are allowed to participate in the actual bidding.

The public and, necessarily, the Petitioners' right to be informed of the bidding process, including access to the terms and conditions of the disposition, the bidding procedures, parties qualified to submit their bids, the minimum price, and like information is recognized by law. With this right comes the legal obligation on the part of the PSALM to conduct the sale through a public bidding that, being characterized as "public" must be conducted in an open and transparent manner. Without prior public disclosure of crucial information on the disposition of the Angat HEPP, and given the very narrow access allowed by PSALM to this information, the Petitioners' legal right is violated.

In its Comment with Urgent Motion to Lift Status Quo Ante Order, public respondent PSALM contended that it conducted the public bidding in an open and transparent manner.⁵⁸ Contrary to the self-serving allegations of PSALM, the fact remains that the whole bidding process conducted by PSALM was shrouded in secrecy and mystery.

Lest it be forgotten, Angat HEPP is government property sought to be privatized by PSALM. The general public has a compelling interest in the privatization of this government asset that draws its source of power from Angat dam which provides 97% of the water needs of Metro Manila and nearby provinces. Hence, full public disclosure of the transactions relating to the privatization thereof is imperative.

⁵⁸ PSALM Comment, p. 36.

Petitioners reiterate their contention that PSALM run roughshod over the public's right to be informed of the bidding process, the terms and conditions of the privatization, bidding procedures, minimum price, and other similar information. To this day, the public has yet to be apprised of the foregoing information which are being unjustly and illegally withheld by PSALM.

In denying the public's right to information, PSALM relied on Article 1326 of the Civil Code, as explained in *Desierto v. Ocampo*, that bids partake of the nature of an offer to sell.⁵⁹ Thus, according to PSALM's logic, an Invitation to Bid cannot specify all the information sought by petitioners because the conditions of the sale of Angat HEPP would still be subject to negotiation with the prospective bidders and the contract/s relating thereto would still be subject to revisions put forth by prospective bidders.

PSALM's reliance on Article 1326 of the Civil Code is misplaced. While said provision of law applies to an offer to contract with the government, it should be borne in mind that the case at bar is governed by a special law, R.A. 9136, which specifically mandates PSALM to conduct the sale in an open and transparent manner, through public bidding,⁶⁰ and to provide for the orderly and transparent privatization of the assets and liabilities of the NPC.⁶¹ PSALM conveniently skirted this issue which was squarely raised in the petition.

Petitioners likewise squarely raised in their Petition⁶² that this Honorable Court has had the opportunity to uphold the right to information of the public in public

⁵⁹ PSALM Comment, par. 81-82, p. 37.

⁶⁰ Section 47 (d), R.A. 9136 and Rule 23, Section 4 (d), IRR of R.A. 9136.

⁶¹ Rule 2 (i), IRR of R.A. 9136.

⁶² Petition, p. 26.

biddings conducted by government. Petitioners cited *Chavez v. Public Estates Authority*⁶³

where this Court categorically ruled:

Before the consummation of the contract, PEA must, on its own and without demand from anyone, disclose to the public matters relating to the disposition of its property. These include the size, location, technical description and nature of the property being disposed of, the terms and conditions of the disposition, the parties qualified to bid, the minimum price and similar information. PEA must prepare all these data and disclose them to the public at the start of the disposition process, long before the consummation of the contract, because the Government Auditing Code requires public bidding. (emphasis supplied)

In the above mentioned case, the Court based its ruling on Section 79 of the Government Auditing Code which provides that:

“Section 79. When government property has become unserviceable for any cause, or is no longer needed, it shall, upon application of the officer accountable therefor, be inspected by the head of the agency or his duly authorized representative in the presence of the auditor concerned and, if found to be valueless or unsaleable, it may be destroyed in their presence. If found to be valuable, it may be sold at public auction to the highest bidder under the supervision of the proper committee on award or similar body in the presence of the auditor concerned or other authorized representative of the Commission, after advertising by printed notice in the Official Gazette, or for not less than three consecutive days in any newspaper of general circulation, or where the value of the property does not warrant the expense of publication, by notices posted for a like period in at least three public places in the locality where the property is to be sold. In the event that the public auction fails, the property may be sold at a private sale at such price as may be fixed by the same committee or body concerned and approved by the Commission.” (emphasis supplied)

PSALM lamely argues that petitioners’ reliance on *Chavez v. Public Estates Authority* as regards the application of the Government Auditing Code is misplaced.⁶⁴

The reason put forward by PSALM is that *Chavez* involved property which had become

⁶³ *Chavez vs. Public Estates Authority*, G.R. No. 133250, July 9, 2002.

⁶⁴ PSALM Comment, par. 88, p. 39.

unserviceable for any cause or was no longer needed.⁶⁵ Be that as it may, petitioners in fact likewise argued that:

Even assuming the Government Auditing Code does not apply in the case at bar, petitioners submit that the enumerated public matters relating to the disposition of property are the minimum requirements for the satisfaction of right to information as guaranteed by any law requiring public bidding.⁶⁶

Respondent PSALM failed to contest the foregoing. In fact, PSALM even categorically admitted that there is no specific law which governs the bidding of public assets which are being divested by the government or any of its agencies and instrumentalities. PSALM went on to state that R.A. 9184, otherwise known as "An Act Providing for the Modernization, Standardization and Regulation of Procurement Activities of the Government and for Other Purposes," provides rules on public bidding pertaining only to procurement and not divestment activities of the government. If that is so, then what is the legal basis of respondent PSALM to proceed with the bidding of Angat HEPP if there is no law providing for the rules on bidding of public assets being divested by the government? What rules did PSALM follow when it proceeded with the bidding of Angat HEPP? For PSALM to proceed with bidding of public assets like Angat HEPP in the absence of a law providing for such rules is truly dangerous, if not anomalous. Nothing can check the discretion of respondent PSALM as it would appear that it has *carte blanche* authority to determine its own rules. This is laden with perilous opportunity for partiality, even corruption, not sheltered by the Constitution and the law. All the more is there a need to nullify the bid and award to respondent K-Water insofar as the bidding process was conducted, by PSALM's very own admission, was

⁶⁵ *Ibid.*

⁶⁶ Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction, dated 12 May 2010, page 27.

conducted not in pursuance of any law on bidding of public assets as in fact there is no law providing for the rules to be observed regarding divestment of public assets.

In a desperate move to cover its back in the absence of a law providing for the rules on public bidding of public assets, respondent PSALM, citing Part IV, Rule 21, Section 5(g) of the Implementing Rules and Regulations of the EPIRA, alleged that the EPIRA empowered it to “adopt rules and regulations as may be necessary or proper for the orderly conduct of its business or operations.” But where are these rules and regulations adopted by PSALM? It is only known to them. Moreover, as is obvious in the quoted provision, PSALM is merely authorized PSALM to adopt its own rules and regulations for the “orderly conduct of its business or operations.” There is nothing in the law that authorizes PSALM to promulgate rules on bidding of public assets. In fact, as PSALM already admitted, there is no specific law which governs the bidding of public assets which are being divested by the government or any of its agencies and instrumentalities.

Absent such rules and regulations provided for by law, or adopted by PSALM purportedly pursuant to its power to adopt rules and regulations for the orderly conduct of its business or operations, respondent PSALM allegedly relied on COA Circular 89-296. This bare and self-serving allegation deserves scant consideration. The so-called letter of respondent PSALM to the COA dated 16 December 2009 is not even attached to PSALM’s Reply.

Petitioners submit that the manner of Angat HEPP privatization has two elements: (a) openness and transparency; and (b) public bidding.⁶⁷ The criterion to for public bidding has been elaborated by this Honorable Court in *Chavez*,⁶⁸ thus:

We must first distinguish between information the law on public bidding requires PEA to disclose publicly, and information the constitutional right to information requires PEA to release to the public. Before the consummation of the contract, PEA must, on its own and without demand from anyone, disclose to the public matters relating to the disposition of its property. These include the size, location, technical description and nature of the property being disposed of, the terms and conditions of the disposition, the parties qualified to bid, the minimum price and similar information. PEA must prepare all these data and disclose them to the public at the start of the disposition process, long before the consummation of the contract, because the Government Auditing Code requires *public bidding*. If PEA fails to make this disclosure, any citizen can demand from PEA this information at any time during the bidding process. (*Underlining supplied.*)

Considering that Section 79 of the Government Auditing Code does not enumerate the data that must be disclosed to the public, the interpretation placed by this Court on *public bidding* applies to any law which requires public bidding. It is with more reason that the interpretation applies to EPIRA, because said law requires not only public bidding, but an open and transparent one.

Considering further that *Chavez*⁶⁹ deals with an amended Joint Venture Agreement which seeks to transfer title and ownership over government property to a single private corporation and that this Honorable Court finally laid down therein a definite ruling on the issue of right to information under the law on public bidding vis-à-vis the constitutional right to information, PSALM should have followed said minimum requirements instead of following the “format generally used by government

⁶⁷ Sec. 47(d), R.A. 9136 provides that “All assets of the NPC shall be sold in an *open and transparent manner* through *public bidding*”.

⁶⁸ *Chavez vs. Public Estates Authority*, G.R. No. 133250, July 9, 2002

⁶⁹ *Supra*.

entities in their procurement of goods, infrastructure and consultancy services”⁷⁰ with knowledge that “R.A. 9184, otherwise known as ‘An Act Providing for the Modernization, Standardization and Regulation of Procurement Activities of the Government and For Other Purposes’ xxx pertains to procurement and not divestment activities of the government.”⁷¹

PSALM stated that it “relied upon xxx COA Circular 89-296 regarding the rules for the public bidding of the Angat HEPP.”⁷² Said Circular, however, deals with divestment or disposal of property and other assets of the government⁷³, which have requirements that are not followed in the “format generally used by government entities in their procurement”.⁷⁴

COA Circular 89-296⁷⁵ provides that:

This Commission recognizes the following modes of disposal/divestment of assets and property of national government agencies, local government units and government-owned or controlled corporations and their subsidiaries, aside from other such modes as may be provided for by law.

1. Public Auction

Conformably to existing state policy, the divestment or disposal of government property as contemplated herein shall be undertaken primarily thru public auction.

Such mode of divestment or disposal shall observe and adhere to established mechanics and procedures in public bidding, viz:

- a. adequate publicity and notification so as to attract the greatest number of interested parties; (vide, Sec. 79, P.D. 1445)

⁷⁰ PSALM Comment, par. 85, p. 38.

⁷¹ Ibid, par. 89, p. 39.

⁷² Ibid, par. 90, p. 40.

⁷³ The subject of COA Circular 89-296 is “Audit Guidelines on the Divestment or Disposal of Property and Other Assets of National Government Agencies and Instrumentalities, Local Government Units and Government-Owned or Controlled Corporations and their Subsidiaries.” See Annex “S”, PSALM Comment.

⁷⁴ PSALM Comment, par. 85, p. 38.

⁷⁵ Annex “S”, PSALM Comment

- b. sufficient time frame between publication and date of auction;
- c. opportunity afforded to interested parties to inspect the property or assets to be disposed of;
- d. confidentiality of sealed proposals;
- e. bond and other prequalification requirements to guarantee performance; and
- f. fair evaluation of tenders and proper notification of award.

(Underlining supplied.)

Even *assuming arguendo* that the interpretation by this Court in *Chavez*⁷⁶ does not apply to EPIRA, the above quoted circular reveals that public bidding requires adequate publicity and notification. Said circular points to Sec. 79, P.D. 1445, otherwise known as the Government Auditing Code, to guide the manner by which publicity and notification shall be done. As stated earlier, *Chavez*⁷⁷ laid down the minimum requirement for the satisfaction of right to information as guaranteed by the Government Auditing Code and/or COA Circular 89-296.

PSALM obviously did not follow said circular because its Invitation to Bid lacks the material data required to be disclosed publicly. It is a well-settled rule that judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.⁷⁸ The *doctrine of stare decisis* follows the legal maxim—*“legis interpretado legis vim obtinet”*, i.e. the interpretation placed upon the written law by a competent court has the force of law.⁷⁹

As PSALM admitted, petitioner IDEALS sent a letter dated 20 April 2010 to PSALM requesting certain documents and information relating to the privatization of

⁷⁶ Supra.

⁷⁷ Supra.

⁷⁸ Article 8, Civil Code of the Philippines

⁷⁹ Jurado, Desiderio, Civil Law Reviewer, p. 9, (2006), citing Pesca v. Pesca, G.R. No. 136921, 17 April 2001.

Angat HEPP. Instead of acceding to petitioner IDEALS' request, PSALM denied it allegedly due to a "violation of Bidding Procedures." In its letter dated 30 April 2010 to IDEALS, respondent PSALM denied IDEALS' request for documents relating to the proposed privatization of Angat HEPP allegedly because under the so-called Bidding Procedures for Angat HEPP, PSALM can only release Bidding Documents to persons and entities which (1) submitted the required Letter of Interest to participate in the bidding process, (2) paid the US\$ 2,500 participation fee and (3) executed the required Confidentiality Agreement and Undertaking. These conditions imposed by the so-called Bidding Procedures are at war with the explicit and categorical mandate of the EPIRA that public bidding should be done in an "open and transparent manner." By no means can the requirement for Confidentiality Agreement and Undertaking be reconciled with the law's mandate that the public bidding be done in an "open and transparent manner."

Furthermore, the so-called bidding procedures are likewise contrary to COA Circular 89-296, which requires only the confidentiality of sealed proposals. Needless to state, sealed proposals do not include the Invitation to Bid, which should contain the required data that must be disclosed to the public, as mandated by the circular and the case of *Chavez*.⁸⁰

Moreover, the requirement of COA Circular 89-296 as regards confidentiality covers only sealed proposals and not all the information relating to the Angat HEPP privatization. In expanding the confidentiality of the bidding documents through its so-called bidding procedures, PSALM gravely abused its discretion amounting to lack or excess of jurisdiction.

⁸⁰ *Supra*.

All told, the “confidential” manner by which the bidding process was conducted effectively excluded the public from a bidding process impressed with paramount public interest. PSALM kept the public in the dark as to the terms and conditions of the sale of Angat HEPP. With the shroud of secrecy covering the bidding process of Angat HEPP, all the more should this Honorable Court focus the searchlight of judicial scrutiny on PSALM’s actions and stamp it with the stigma of invalidity.

II.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT REFUSED TO DIVULGE INFORMATION RELATED TO THE BIDDING BEING CONDUCTED -- INCLUDING SIGNIFICANT INFORMATION CONCERNING THE TERMS AND CONDITIONS OF THE SALE, SAFEGUARDS TO THE PUBLIC INTERESTS INVOLVED, THE IDENTITY AND QUALIFICATIONS OF THE BIDDERS, ESPECIALLY OF THE SUPPOSED SUCCESSFUL BIDDER -- IN VIOLATION OF ARTICLE III, SECTION 7 AND ARTICLE II, SECTION 28 OF THE 1987 CONSTITUTION AND JURISPRUDENCE RELATING TO THE RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN⁸¹ AND THE POLICY OF FULL PUBLIC DISCLOSURE OF ALL GOVERNMENT TRANSACTIONS INVOLVING PUBLIC INTEREST.⁸²

Despite repeated demands, both oral and written, by Petitioners IDEALS and FDC on the PSALM to divulge information and allow access to documents relating to the proposed privatization of Angat HEPP, PSALM refused to respectively disclose or provide access to said information and documents. The bidding package, which is supposed to contain material information on the privatization of the Anggat HEPP continue to be inaccessible even as the PSALM refused to allow its inspection and copying by the said Petitioners. Even after a highest bidder was announced by PSALM, it still refused to disclose details relating to the privatization of the power plant, including the identity of the bidders and especially of the supposed highest bidder. As it is, details as to the identity of bidders alone, are material information because the

⁸¹ Article III, Section 7, 1987 Constitution.

⁸² Article II, Section 28, 1987 Constitution.

possible winner will be operating a power generation utility in the country and, significantly, through a facility that requires the use water from the same source that supplies domestic water supply to 97% of Metro Manila.

Unquestionably, information on the privatization of the Anggat HEPP on account of the enormous public interest that it affects, should not have been denied the Petitioners. In failing to disclose this information, including the refusal to allow inspection and reproduction of the bidding package, the PSALM violated the following provisions of the Constitution:

(a) Article III, Section 7:

“Sec. 7. The right of the people to information on matters of public concern shall be recognized. *Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions*, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.” (emphasis supplied)

(b) Article II, Section 28:

“Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a *policy of full public disclosure of all its transactions involving public interest.*” (emphasis supplied)

In determining whether or not particular information is of public concern, no rigid test which can be applied. ‘Public concern’ like ‘public interest’ is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.⁸³

⁸³ Akbayan v. Aquino, G.R. No. 170516, 16 July 2008.

Angat Dam is the single most important source of potable water for Metro Manila, providing as it does ninety-seven percent (97%) of the water supply of the 12 million residents of the country's capital. It irrigates some thirty-one thousand (31,000) hectares of rice lands across twenty (20) municipalities and towns in Bulacan and Pampanga. Moreover, it also functions as a flood control infrastructure in Bulacan. Although the Angat Dam was originally intended to function as a Hydro-Electric Power Plant to contribute to the supply of power for the Luzon Grid, over the years, however, the Angat Dam has taken on an *indispensable* function as a source of water supply. From the nature of the Angat Dam, covering as it does both the functions of power generation and source of water supply, its privatization is well within public concern and/or public interest.

Moreover, the Implementing Rules and Regulations of R.A. 9136 recognizes that the generation of electric power is a business affected with public interest.⁸⁴

In addition, PSALM is mandated to observe that in cases of transfer of possession, control, operation or privatization of multi-purpose hydro facilities, safeguards shall be prescribed to ensure that the National Government may direct water usage in cases of shortage to protect potable water, irrigation, and all other requirements imbued with public interest.⁸⁵

The presence or absence of safeguards, including its sufficiency or insufficiency, as part and parcel of the bidding package, must be divulged to the public so that the people can know whether the law is observed, water allocation in the water rights is ensured and public officers are liable in case of departure from the rule of law. As

⁸⁴ Rule 5, Section 1, IRR of R.A. 9136.

⁸⁵ Rule 24, Section 4 (e), IRR of R.A. 9136.

already stated, the bidding package containing the details of privatization is not accessible to the general public.

Irregularities in the bidding process will not be seen if the bidding procedure itself is not disclosed to the public. As this Court held in the case of *Chaves v. Public Estates Authority*:⁸⁶

These twin provisions of the Constitution (referring to Section 7, Article III and Section 28, Article II, Constitution) seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. If the government does not disclose its official acts, transactions and decisions to citizens, whatever citizens say, even if expressed without any restraint, will be speculative and amount to nothing. These twin provisions are also essential to hold public officials "at all times x x x accountable to the people," for unless citizens have the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy.

PSALM, in a last-ditch effort to foil petitioners' demands for transparency and accountability, invoked *Valmonte v. Belmonte*,⁸⁷ which to the mind of PSALM, limits petitioners' right to information. Lest this Honorable Court be misled, *Valmonte* is the leading case on the people's right to information. It is unfortunate that PSALM cited *Valmonte* to deny petitioners' right to information. It is true that the right to information, not being absolute, is subject to limitations. However, in *Valmonte*, this Honorable Court clearly stated that such reasonable limitations apply only to the *manner* and *hours of examination*. In the case at bar, there was a wholesale denial of petitioners' right to information. Thus, PSALM's misguided reliance on *Valmonte v. Belmonte* is an abuse and misuse of jurisprudence.

⁸⁶ *Chavez v. Public Estates Authority*, G.R. No. 133250, July 9, 2002.

⁸⁷ 170 SCRA 276 (1989).

Anent petitioner IDEALS' request for information on the winning bidder, PSALM merely referred the matter to the counsel of K-Water for "appropriate action considering that the same was more knowledgeable regarding the same."⁸⁸ This admission of PSALM is very telling that its knowledge of the winning bidder is very limited. Why did PSALM allow K-Water to participate in the public bidding in the first place when PSALM's knowledge thereof is admittedly limited? Instead of complying with petitioner's request for information on the winning bidder, which turned out to be 100% foreign and state owned by the Republic of Korea, PSALM conveniently passed the buck to K-Water. This antic should not impress this Honorable Court: PSALM's actuations and actions in this case are far from being responsive to the public, contrary to what is required by Section 4(e) of R.A. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees:

(e) Responsiveness to the public. - Public officials and employees shall extend prompt, courteous, and adequate service to the public. Unless otherwise provided by law or when required by the public interest, public officials and employees shall provide information of their policies and procedures in clear and understandable language, ensure openness of information, public consultations and hearings whenever appropriate, encourage suggestions, simplify and systematize policy, rules and procedures, avoid red tape and develop an understanding and appreciation of the socio-economic conditions prevailing in the country, especially in the depressed rural and urban areas.

In sum, this Honorable Court is called upon to uphold and vindicate once more the people's right to information in public biddings conducted by the government especially of an asset of vital importance such as Angat HEPP.

III.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION
AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT

⁸⁸ PSALM Comment, par. 99, p. 43.

PURSUED A BIDDING PROCESS THAT IS NOT OPEN AND TRANSPARENT AND ONE THAT DISCRIMINATORILY LIMITED PARTICIPATION THEREIN TO PRIVATE SECTORS, IN VIOLATION OF THE EPIRA.

A. PSALM's bidding process violated the EPIRA provisions on transparency and public participation and, therefore, it is null and void and produces no legal effect.

The law mandated the PSALM to privatize NPC assets through public bidding conducted in an open and transparent manner.

Article 47 (e) of the EPIRA directed the PSALM to carry out its mandate of privatization through public bidding. The law expressly states that such public bidding be conducted in an *"open and transparent manner."* Thus, the PSALM has a positive legal duty to disclose to the public the terms and conditions for sale of NPC assets, even without anyone requesting for such disclosure. In the bidding process for the Angat HEPP, however, PSALM violated this provision by conducting the bidding in a *"confidential"* and non-transparent bidding.

Instead of conducting an *"open and transparent"* public bidding as mandated by law, the PSALM implemented a bidding process where the public was effectively excluded. It bears stressing that the PSALM *never* informed the public as to the terms and conditions for the sale of the Angat HEPP. In fact, the Invitation to Bid published by the PSALM outlined the very non-transparent bidding process it conducted: only those who paid \$2,500 and executed a Confidentiality Agreement and Undertaking were provided with the Bidding Package which contained the details, the terms and conditions, and the process for the privatization of Angat HEPP.

All these taken together show that PSALM acted without jurisdiction. Consequently, the bidding process is null and void and produces no legal effect. All the more should PSALM be enjoined from proceeding with the consummation of the sale of the Angat HEPP.

This Honorable Court should likewise not be hoodwinked by PSALM's repeated assertions that petitioners are not entitled to information regarding the bidding since "not one of the petitioners submitted a Letter of Interest pursuant to respondent PSALM's Invitation to Bid" nor did they pay the participation fee of US\$2,500.00. Petitioners are public interest groups which are concerned with the legality, regularity, and transparency of the bidding out of government assets; they are not interested in bidding for the Angat HEPP. For PSALM to justify its refusal to disclose information on these grounds is outrageously absurd, and reveals its intention to prevent public scrutiny of its actions, in violation of the constitutional principles of access to information and public accountability.

B. PSALM's bidding process violated the EPIRA provisions as it discriminatorily restricted public participation

It is the declared policy of the State to ensure fair and non-discriminatory treatment of public and private sector entities in the process of restructuring the electric power industry.⁸⁹ Even in construing the provisions of the EPIRA, the intent is to ensure the widest participation of the people.⁹⁰

PSALM unreasonably and discriminatorily limited the participation of the people when, as shown in its Invitation to Bid, crucial information on the privatization

⁸⁹ Section 2 (e), R.A. 9136.

⁹⁰ Section 75, R.A. 9136.

of the Angat HEPP (which is unquestionably a factor for effective participation) has been reserved to those who are able to submit a Letter of Intent, execute a Confidentiality Agreement/ Undertaking and pay of a Participation Fee.

By its requirements,⁹¹ PSALM actually restricted participation to those with the financial capability to bid in the privatization of the Angat HEPP and to comply with the conditions set out above. The limitations practically allowed participation only from the private sector and effectively prohibited participation of the public.

IV.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT OVERSTEPPED ITS MANDATE AND JURISDICTION IN UNILATERALLY UNDERTAKING THE PUBLIC BIDDING AND SALE OF ANGAT HEPP AND IN NOT OFFERING FIRST THE SALE TO MWSS AND NIA AS AN INGENIOUS MODE OF TRANSFERRING POWER GENERATION ASSET, IN VIOLATION OF THE CIVIL CODE OF THE PHILIPPINES AND EPIRA.

A. The Angat Hydro Complex is an indivisible thing.

Juridically, a thing is considered indivisible when, if divided into parts, its value is diminished disproportionately. On the other hand, a thing is divisible when each one

⁹¹ In its Invitation to Bid, the PSALM Privatization, Bids and Awards Committee required:

- a. interested parties to submit Letters of Intent (LOI, for brevity) not later than 27 January 2010. Only interested parties that submit an LOI by the LOI Submission Deadline shall be allowed to participate further in the privatization of the Asset.
- b. that Confidentiality Agreement, Undertaking, and Participation Fee must be received by the Committee on or before 5:00 p.m. on 29 January 2010, to entitle an interested party to further participation in the privatization of the Asset.
- c. that the Bidding Package, which includes the Bidding Procedures, shall be issued during office hours (8:00 a.m. to 5:00 p.m.) from 05 February to 12 February 2010 at the PSALM Office. Only interested parties or consortium (as described below) who have been issued the Bidding Package by the Deadline will be allowed to participate further in the privatization of the Asset.

of the parts into which it is divided forms a homogenous and analogous object to the other parts as well as to the thing itself.⁹²

The Angat Hydro Complex, which is composed of the watershed, the reservoir, the water ways, the dam structure, the aqueducts and the power generating units, is an indivisible thing. It cannot be split into parts without destroying the entire complex itself and rendering it unserviceable for any purpose.

If the waterways were disjointed from the dam structure and instead diverted towards another direction, no water would be impounded in the dam. Similarly, if the dam structure cracked and collapsed, there would be no reservoir to hold water which could be used for potable drinking water, irrigation and power generation. That the water impounded in the dam is the same water used for various purposes is proof itself of the indivisibility of the Angat Hydro Complex. Clearly, the Angat Hydro Complex is an indivisible whole that cannot be broken into parts and distributed.

B. The Angat Hydro Complex is co-owned by PSALM, the MWSS and the NIA

The entire Angat Hydro Complex is co-owned by three government agencies – the NPC, the MWSS and the NIA. This is evidenced by the fact that each of these government agencies has been spending millions of dollars for the construction, repair and maintenance of the Complex. For instance, the MWSS has financed 35% of the construction cost of the Complex.⁹³ It has also funded a number and series of repair and maintenance works at the Angat facilities.⁹⁴ The MWSS has just recently spent \$30 million for the repair and improvement of the Umiray-Angat Trans-basin tunnels which

⁹² TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE NEW CIVIL CODE OF THE PHILIPPINES IV, 252, citing 4 Sanchez Roman 93.

⁹³ CHR Advisory.

⁹⁴ *Id.*

functions as the conduit of 20 to 30% of water from the Umiray River to be the Angat reservoir.⁹⁵

It must be noted that no single government agency owns the Angat Hydro Complex. The NPC, MWSS, and NIA co-own and co-manage the entire Angat Hydro Complex.⁹⁶

C. Being a mere co-owner, the PSALM cannot sell a particular portion of the Angat Hydro Complex

As a mere co-owner of the Angat Hydro Complex, all that PSALM owns is an *undivided* or *inchoate interest* over the property.⁹⁷ Thus, it cannot pick a particular portion of the Complex, claim ownership over it, and dispose of it to the prejudice of other co-owners.⁹⁸ Therefore, PSALM cannot unilaterally dispose of the Angat HEPP since it does not have full and exclusive ownership over it. Unless a judicial or negotiated partition is had between the co-owners, all the PSALM could sell is its undivided interest.

D. PSALM is legally obliged to give any of the co-owners an opportunity to acquire by purchase PSALM's undivided interest in the Angat Hydro Complex

Article 498 of the New Civil Code expressly provides:

⁹⁵ MWSS, Umiray-Angat Transbasin Rehabilitation Project, available at <http://www.mwss.gov.ph/projects.php?id=14>, last accessed on 6 May 2010.

⁹⁶ In its Advisory, the CHR expressly referred to the MWSS as co-owner of the Angat Hydro Complex. Even the Japan International Cooperation Agency recognizes that NPC is not the sole owner of the Dam. *See* http://nwin.nwrp.gov.ph/Prog&Proj/JICA/projects/water_resources/content/03angat.htm, last accessed on 6 May 2010.

⁹⁷ *Heirs of Rosendo Lasam vs. Umengan*, G.R. No. 168156 (2006); *Acebedo vs. Abesamis*, 217 SCRA 186 (1993); *Abad v. Court of Appeals*, 179 SCRA 817, 826 (1989); *Bailon-Casilao v. Court of Appeals*, 160 SCRA 738, 745 (1988); *Santos v. Buenconsejo*, 14 SCRA 407, 409 (1965); TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE NEW CIVIL CODE OF THE PHILIPPINES II, 161, citing 3 Sanchez Roman 162.

⁹⁸ *Vagilidad vs. Vagilidad*, G.R. No. 161136 (2006); *Oliveras vs. Lopez*, 168 SCRA 431 (1988).

Article 498. Whenever the thing is essentially indivisible and the co-owners cannot agree that it be allotted to one of them who shall indemnify the others, it shall be sold and its proceeds distributed.

It is clear from the foregoing provision of law that before an indivisible thing is sold to an outsider to the regime of co-ownership, the co-owners have a positive obligation to offer their undivided interest to the other co-owners.

In this case, the PSALM unilaterally offered the Angat HEPP, a structure that is but mere part of the indivisible Angat Hydro Complex, to public bidding without first conferring with the MWSS and NIA and without giving the latter an opportunity to acquire by purchase its undivided interest over the property. This is a clear violation of the regime of co-ownership that the PSALM is legally bound to observe.

E. Even if PSALM has full and exclusive ownership over the power generating units, it cannot be denied that it is immovably attached to the Complex itself.

Assuming, but not conceding, that PSALM has full and exclusive title of ownership over the Angat HEPP, it still cannot unilaterally sell the same as it will naturally affect the utilization and management of property rights over the entire Angat Hydro Complex.

It cannot be overemphasized that the Angat HEPP is but a small structure immovably attached to the indivisible Angat Hydro Complex. It derives tremendous benefits from the sole fact of its attachment to the Complex; it cannot function, nay, it is useless, unless attached to the system of the Complex.

Owing to the peculiar nature of the Angat HEPP as the gateway of water to the aqueducts and waterways of MWSS and NIA, PSALM ought to have considered transferring the ownership over the Angat HEPP to either the MWSS or NIA for the full market value of the property.

F. Moreover, PSALM does not have full and exclusive ownership over the Water Right in Angat Dam.

It must be stressed that no single among NPC (PSALM), MWSS and NIA is the sole owner of the Water Right over the water impounded in the Angat reservoir. This is why the NWRB crafted a Water Protocol for the Angat Hydro Complex – to allocate the water in the Angat Dam amongst the three GOCCs for three competing water usage. Therefore, the NPC, MWSS and NIA are co-owners of the Water Right over the water in contained in Angat Dam. Following the legal reasoning above, the consequence of this regime of co-ownership is that none of the co-owners may unilaterally transfer the Water Right to the prejudice of other co-owners.

Assuming that PSALM has full and exclusive ownership over the Angat HEPP, it still cannot unilaterally transfer the Water Right to any private entity without running afoul the rights of the co-owners. And since the measure and limit of water appropriation is Beneficial Use⁹⁹, it is more prudent and appropriate for the PSALM to give deference to the human right to water by transferring control and ownership over the Angat HEPP to either the MWSS or NIA, at its current market value, rather than proceed with the privatization.

Even the Office of the Government Corporate Counsel (OGCC) agrees that the PSALM is not limited to privatizing the Angat HEPP under the EPIRA. In its Opinion

⁹⁹ Article 20, P.D. 1067.

No. 107, issued on 27 May 2008, the OGCC emphasized that the EPIRA and its IRR allow PSALM to resort to ingenious modes of transferring power generation assets to another entity, especially if in doing so the value and sale prices of said assets will be optimized and a greater public interest will be served. It underscored that under Section 47 (e) of the EPIRA, the PSALM has the legal option of transferring possession, control and operation of the Angat Facility to another entity in order “to protect potable water, irrigation and all other requirements imbued with public interest,” including the adoption of early measures to address the forecasted water crisis. This is in accord with the State’s avowed policy “to ensure an uninterrupted and adequate supply and distribution of potable water for domestic and other purposes.¹⁰⁰”

Thus, the PSALM, granting that it has full and exclusive ownership over the Angat HEPP, cannot simply treat the Angat HEPP as any other ordinary energy facility, as its privatization may not only be detrimental but actually a great disservice to the public.

G. Respondent PSALM admits that to maximize the use of the water from the Angat Dam, the Angat Dam Complex must be operated as an indivisible whole.

In support of its contention that the Angat Complex is a divisible thing, PSALM asserts that “water from Angat River may pass through the Dam (via Bypass tunnels) providing water supply of Metro Manila and irrigation requirements of NIA without passing through Angat HEPP.”¹⁰¹ While this may be true, the converse – that water to be used for the operation of Angat HEPP does not have to pass through Angat Dam – is *not*. For the truth of the matter is, the operation of the Angat HEPP cannot be separated from the Dam Complex from which it draws its source of power.

¹⁰⁰ Sec. 1, R.A. 6234.

¹⁰¹ PSALM Comment, par.105, p. 45.

In fact, PSALM further admits that:

“the non-use of the Angat HEPP has not been considered an efficient use of the water in the Angat Dam. Considering the downstream flow of the water from the Angat Dam, considerations of efficiency and utility prompted the construction of the Angat HEPP in order that the same water from the Angat Dam may be utilized for power generation, domestic water supply, and irrigation all at the same time.”¹⁰²

In other words, to maximize the use of the water from Angat Dam, the complex - the Reservoir, Dam, and HEPP - must be *operated* as an indivisible whole. This negates PSALM’s assertions regarding the divisibility of the Angat Dam complex.

V.

PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ALLOWED K-WATER, A FOREIGN STATE-OWNED CORPORATION, TO PARTICIPATE IN THE BIDDING PROCESS (AND DECLARED SUCH CORPORATION TO BE THE WINNING BIDDER), IN CONTRAVENTION OF ARTICLE XII, SECTION 2 OF THE 1987 CONSTITUTION, THE WATER CODE OF THE PHILIPPINES AND THE EPIRA.

The PSALM is not exempted from the encompassing authority of the Constitution. Neither does PSALM have the prerogative to disregard the provisions of extant laws governing its conduct.

As will be shown below, the PSALM overstepped, nay, deliberately violated the Constitution, the Philippine Water Code and the EPIRA, with the necessary consequence that its acts relating to the sale of the Angat HEPP must be struck down as unlawful, void, and producing no legal effect.

¹⁰² PSALM Comment, par. 105, p. 46.

A. PSALM violated the Constitutional provisions on the appropriation and utilization of water as a natural resource.

The Constitution reserves to Filipino citizens the utilization of natural resources.

Section 2, Article XII of the 1987 Constitution expressly provides:

“Sec 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. **The exploration, development, and utilization 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.** Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.”

Clearly, the Constitution mandates that the utilization of natural resources, including water resources, shall be under the *full control* and *supervision* of the State. The only way for natural and juridical persons to be involved in the utilization of such natural resources is if the State would enter into a co-production, joint venture or production sharing agreement with them. However, the Constitution specifically limited the participation in the utilization of natural resources to Filipino citizens and to corporations and associations at least 60% of whose capital is owned by Filipino citizens. The obvious intent of this Constitutional limitation is to reserve to Filipino citizens the benefits arising from the utilization of natural resources.

B. Likewise, the Philippine Water Code and its Implementing Rules and Regulations reserve the grant of Water Rights to Filipino citizens.

Since all water belongs to the State, the appropriation and use of water by natural and juridical persons are merely allowed by the State through the concession of a Water Right.¹⁰³ A Water Right is the privilege granted by the government to appropriate and use water as evidenced by a water permit.¹⁰⁴ No person, including government-owned or controlled corporations, may appropriate water without a water right.¹⁰⁵

Consistent with the Constitution, P.D. No. 1067 or the Water Code of the Philippines limits the grant of Water Right to Filipino citizens. Article 15 of the Water Code reads:

Art 15. Only citizens of the Philippines, of legal age, as well as juridical persons, who are qualified by law to exploit and develop water resources, may apply for water permits.

This limitation is further spelled out in the Water Code's Implementing Rules and Regulations (IRR) issued by the then National Water Resources Council. Section 2 of the IRR states:

Section 2. *Qualification of Applicants for Permit/Authority.* – Only the following may file an application with the Council for permit/authority:

- a) Citizens of the Philippines;
- b) Associations, duly registered cooperatives or corporations organized under the laws of the Philippines, at least 60 percent of the capital of which is owned by the citizens of the Philippines;

¹⁰³ Article 3, Water Code of the Philippines.

¹⁰⁴ Article 13, Water Code of the Philippines.

¹⁰⁵ *Id.*

- c) Government entities and instrumentalities, including government owned and controlled corporations.

Noteworthy is the provision in Section 2 (b) of the IRR which further clarified the qualification of a corporation to be able to apply for a Water Permit. Not only should at least 60% of its capital be owned by Filipino citizens, the corporation must also be duly organized under the laws of the Philippines.

Evidently, the consistent policy of our laws is to reserve to Filipino citizens the benefits of the utilization of water.

In its Comment, however, PSALM claims that petitioners have arrived at the “erroneous conclusion that water rights will be necessarily transferred to respondent K-Water as a result of the sale of the Angat HEPP.”¹⁰⁶ It also asserts that “there has been no unilateral transfer of water rights to date,”¹⁰⁷ that the NPC, MWSS, and NIA – who hold the water permits – will continue to utilize and extract water, and that K-Water will be a “mere operator” of Angat Dam.

Yet, the very documents provided by PSALM negate these assertions. Section 2.05 of the Asset Purchase Agreement expressly states that:

Before Bid Submission Deadline, NPC shall have issued a certification (the “Water Certification”) wherein *NPC consents, subject to Philippine Law, to the (i) transfer of the Water Permit to the BUYER or its Affiliate, and (ii) use by the BUYER or its Affiliate of the water covered by the Water Permit from Closing Date up to a maximum period of one (1) year thereafter.* The BUYER agrees and shall fully comply with the Water Permit and the Water Certification.¹⁰⁸ (*italics and underscoring supplied*)

¹⁰⁶ Ibid, pars. 126-127, p. 55.

¹⁰⁷ Ibid, par. 112, p. 48.

¹⁰⁸ PSALM Board Resolution No. 2010-0416-001, Annex Q, p. 2, PSALM Comment.

Once NPC transfers its water permit to K-Water, in accordance with the terms of the Asset Purchase Agreement, it gives up its authority to extract or utilize water from Angat River. This would thus explain K-Water's obligation under the Asset Purchase Agreement and the O&M Agreement to provide NPC with water free of charge:

The BUYER/OPERATOR shall provide NPC, free of charge, with electricity and water for use by NPC solely for the performance of NPC's functions under the O&M Agreement.¹⁰⁹

There is thus no gainsaying that this arrangement is in wanton violation of the Water Code of the Philippines which provides:

Article 13. Except as otherwise herein provided, *no person, including government instrumentalities or government-owned or controlled corporations, shall appropriate water without a water right, which shall be evidenced by a document known as a water permit.*

Article 15. *Only citizens of the Philippines, of legal age, as well as juridical persons, who are duly qualified by law to exploit and develop water resources, may apply for water permits.*

C. PSALM violated the law by allowing Korea Water to participate in the bidding.

K-Water, one of the bidders pre-qualified by PSALM and also declared on 28 April 2010 as the highest bidder, is a *state-owned* corporation of the Republic of South Korea. Not a single Filipino owns a fraction of a share in the said corporation. It is neither organized under the laws of the Philippines nor duly registered with the Securities and Exchange Commission of the Philippines.

The PSALM clearly acted without jurisdiction in allowing K-Water to participate in the bidding process as it knew, or ought to have known, that K-Water is neither a private entity, nor a Filipino-owned corporation. It must be remembered that the

¹⁰⁹ Section 2.08, Asset Purchase Agreement, p. 2; Section 3.05, O&M Agreement, p.12, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

prospective bidders submitted Letters of Intent to PSALM at the onset of the bidding process, which required them to reveal their nature and capital structure.

Furthermore, the PSALM conducted a Pre-Bid Conference wherein only *pre-qualified* prospective bidders were allowed to be present. There is thus no way that the PSALM could have missed the fact that K-Water is fully-owned by the government of the Republic of South Korea. What the PSALM did with this fact was to deliberately ignore it and instead it allowed the disqualified foreign entity to participate in the bidding for the Angat HEPP in clear violation of the process of privatization under the EPIRA.

D. In declaring K-Water as the highest bidder with clear intent to issue a notice of award, PSALM deliberately disregarded the Constitution and the Water Code as such sale necessarily entails the transfer of Water Rights to a foreign entity.

From the various official statements of the PSALM, K-Water can be considered as the putative winner in the bidding for the Angat HEPP.

The sale of the Angat HEPP to K-Water necessarily includes not only the transfer of ownership and management over the physical structures of the hydro-electric power plant, but also involves the transfer of Water Right previously issued to Napocor by the National Water Resources Board. Verily, the sale of the hydro-electric power plant includes the right to utilize the water resources that are impounded in the Angat Dam, for without such right, the power plant is rendered impotent and useless.

The Water Right granted to Napocor for the water requirements of the Angat HEPP cannot be unilaterally transferred or offered by PSALM to its prospective bidders.

Such a transfer and the qualification or disqualification of prospective bidders are subject to the laws and constitutional provisions governing the utilization of water resources.

PSALM repeatedly asserts that it is only the Angat HEPP and not the Angat Dam which has been sold. While this may be true, the terms of the sale of the Angat HEPP indicate that *control* over the Non-Power Components of the Angat Dam Complex – which necessarily includes Angat Dam – *will also be given to the BUYER*, in this case K-Water. Section 2 of the O&M Agreement states:

The BUYER shall *operate and maintain the Non-Power Components for a term of twenty-five (25) years* automatically renewable upon mutual agreement of the Parties for a similar period.¹¹⁰ (*italics and underscoring supplied*)

That the buyer of the Angat HEPP will have control over the Angat Dam is further confirmed by Section 2.08 of the Asset Purchase Agreement and Section 3.05 of the O&M Agreement which states:

The BUYER shall provide NPC, free of charge, with electricity and water for use by NPC solely for the performance of NPC's functions under the O&M Agreement.¹¹¹ (*italics and underscoring supplied*)

As a state-owned corporation of the republic of South Korea, K-Water is constitutionally disqualified from acquiring full ownership of the Angat HEPP since the operation of the latter necessarily involves the utilization of water, a limited and diminishing natural resource the benefits of which is zealously and rightfully reserved by our laws to Filipino citizens. PSALM's act of including Korea Water as a qualified

¹¹⁰ Section 2, O&M Agreement, p. 11, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

¹¹¹ Section 2.08, Asset Purchase Agreement; Section 3.05, O&M Agreement, pages 2 and 12, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

bidder for the Angat HEPP is anathema to the 1987 Constitution and in complete disregard of the laws governing the use of water.

VI.

PSALM GRAVELY ABUSED ITS DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT CONDUCTED THE BIDDING PROCESS: (A) IN THE ABSENCE OF EFFECTIVE SAFEGUARDS FOR WATER SECURITY; AND (B) IN A CONTEXT CHARACTERIZED BY LACK/ DENIAL OF ACCESS TO INFORMATION CONCERNING WATER, UNDERMINING PETITIONERS' RIGHT TO WATER AND IN VIOLATION OF ARTICLE II, SECTIONS 2 AND 11 OF THE 1987 CONSTITUTION IN RELATION TO ARTICLES 11 AND 12 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, ARTICLE III, SECTION 1 OF THE 1987 CONSTITUTION, P. D. 1067, AND R.A. 9136 AND ITS IMPLEMENTING RULES AND REGULATIONS.

A. The State, along with its agencies and subdivisions including public respondent herein, has an enforceable obligation under international law to recognize and protect the right to water of petitioners and the public.

This Court has, in many cases, upheld the applicability of international law principles in the Philippines. Generally accepted principles of international law, by virtue of the incorporation clause¹¹² of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations¹¹³. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislation¹¹⁴. In *Mijares v Ranada*, this court had the opportunity to elaborate on the elements necessary for customary rules of international law to be binding, as follows:

¹¹² Sec 2 Art 2 of the 1987 Constitution states that "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations."

¹¹³ Priscilla C. Mijares, et al v Hon Santiago Javier Ranada, et al, G.R. No. 139325 (2005).

¹¹⁴ Philip Morris Inc. v Court of Appeals, 224 SCRA 576 (1993).

“The classical formulation in international law sees those customary rules accepted as binding result from the combination of two elements: the established, widespread, and consistent practice on the part of States; and a psychological element known as the *opinion juris sive necessitates* (opinion as to law or necessity). Implicit in the latter element is a belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it.¹¹⁵

Both elements are readily present with respect to the state's obligation to recognize and protect the human right to water, thereby establishing such an obligation on the part of states as a generally accepted principle of international law enforceable within our jurisdiction. With respect to the domestic practice of states, South Africa, Argentina and India have all developed a substantial body of case law upholding the enforceability of the human right to water.¹¹⁶ Within the past decade, Bolivia, Uruguay, South Africa and other states have amended their constitutions to specifically guarantee the human right to water.

As early as the 1977 Protocols of the Geneva Convention, drinking water was already recognized as indispensable to survival, and the deprivation of such from civilian populations during international armed conflicts expressly prohibited as a war crime.¹¹⁷ An implied right to adequate and clean supply of drinking water would further be reiterated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹¹⁸ the Convention on the Rights of the Child (CRC),¹¹⁹ and the Convention on the Rights of Persons with Disabilities (CRPD).¹²⁰ The widespread recognition of the indispensability of clean and adequate supply of

¹¹⁵ Mijares v Ranada, *supra*.

¹¹⁶ Winkler, I, 'Judicial Enforcement of the Human Right to Water - Case Law from South Africa, Argentina and India', 2008 (1) Law, Social Justice & Global Development Journal (LGD).

¹¹⁷ Article 54 of the First Protocol states that, "it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works x x x."

¹¹⁸ CEDAW, Art. 14(2).

¹¹⁹ CRC, Art. 24 (2) (c).

¹²⁰ CRPD, Art. 28 (2) (a).

drinking water to human life would further be explicitly stated in General Assembly Resolution 54/175 of the UN General Assembly Resolution on the Right to Development in 2000, as follows:

12(a) The rights to food and clean water are **fundamental human rights**, and their promotion constitutes a moral imperative both for national governments and for the international community.

The elaboration and operationalization of the “human right to water” was later produced through the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by the Philippine government on 07 June 1974. The ICESCR explicitly guarantees to all persons the right to an adequate standard of living¹²¹ and the right to the highest attainable standard of health.¹²² The UN Committee on Economic Social and Cultural Rights (UNCESCR) was mandated to issue general comments or expert reports to guide states in their implementation of the ICESCR. In pursuance of such a mandate, General Comment No. 15 (On the right to water) was issued to guide member states of the ICESCR on their obligations with respect to the right to water in relation to Articles 11 and 12. The said General Comment 15 is explicit with respect to prohibiting States from undertaking retrogressive measures that undermine the right to water and states that if such measures are undertaken, *“the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives.”*¹²³

To conclude, there is more than sufficient use and recognition of the human right to water in international law, particularly in multilateral treaties signed and ratified by the Philippine government. Such use and recognition in international law translates into its incorporation as part of the law of our land, thereby imposing upon our State an enforceable obligation to promote and protect the right to water of its people. This

¹²¹ ICESCR, Art. 11

¹²² ICESCR, Art. 12

¹²³ UNCESCR (2002), General Comment no. 15, par. 19.

conclusion is supported by the Commission on Human Rights in its HR Advisory when it addresses the Phil. Government to “*revisit and reassess its policy with regard to the provision of its water resources vis-à-vis its concurrent obligations under the International Covenant on Economic, Social and Cultural Rights to ensure adequate standard of living to the Filipino people, which necessarily include the bounden duty to provide, ensure and sustain safe, sufficient, affordable and convenient access to drinking water.*”¹²⁴

B. Even if the right to water was not a generally accepted principle of international law, the right to water is already implicitly recognized within the body of laws in the Philippines.

Apart from the widespread practice and recognition of the right to water in international law, there is also a general right recognized within our body of laws that is further affirmed by the 1987 Constitution, for every person to have access to clean and adequate supply of water for domestic needs. Sec 1, Art. 3 of the 1987 Constitution states that “*No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.*” Sec 15, Art. 2 of the same Constitution further guarantees to “*promote and protect the right to health of the people.*” It is inherent and indispensable in the promotion and protection of the people's right to life and right to health that access to safe and adequate drinking water be ensured.

The priority accorded to ensuring water security for domestic purposes, as a matter of national policy, may also be found in several statutes, particularly in Art. 22 of PD 1067 also known as the Water Code of the Philippines which states:

Art 22. Between two or more appropriators of water from the same sources of supply, priority in time of appropriation shall give the better right, except that **in times of emergency the use of water for domestic and municipal purposes shall have a better right over all other uses;**

¹²⁴ CHR, HR Advisory A2009-011 (2009), p.7

Provided, that where water shortage is recurrent and the appropriator for municipal use has a lower priority in time of appropriation, then it shall be his duty to find an alternative source of supply in accordance with conditions prescribed by the Council.

Presidential Decree 198 further emphasizes that the creation of water districts for the provision of potable water supply to population centers of the Philippines is “*an objective of national policy of high priority.*”¹²⁵ Even RA 9136 or the EPIRA, through its Implementing Rules and Regulations, provides for the implementation of safeguards to ensure that the privatization process it directs to be undertaken will not unduly risk the security of potable drinking water.¹²⁶

These body of laws establish two things: (1) a recognition by the state of the indispensability of adequate and clean water supply to its people's health and development, and (2) an acknowledgment of the state's obligation to ensure the security and availability of such potable water supply.

C. Applying the principles embodied in the UNCESCR General Comment No. 15, the privatization of the Angat HEPP is a retrogressive measure that undermines the human right to water of residents in Metro Manila.

The UN ICESCR General Comment No. 15 has thereby become the definitive document in monitoring the implementation of the right to water with respect to the ICESCR. Paragraph 11 of the said document emphasizes the broad scope of the said right and puts in place a general standard by which to measure the fulfillment of such a right:

“The elements of the right to water must be *adequate* for human dignity, life and health, in accordance with Articles 11(1) and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be

¹²⁵ PD 198, Sec 2. Declaration of Policy.

¹²⁶ Sec 4 (e). RA 9136, Implementing Rules and Regulations.

treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable ensuring that the right can be realized for present and future generations.”¹²⁷

Paragraph 12 further identifies the three common elements or factors that are said to apply universally in all circumstances: *availability, quality and accessibility*.¹²⁸ The absence or diminution of any of these three elements translates into a violation of the right to water.

Applying the said principles to the privatization process of the Angat HEPP, it can clearly be seen that the said privatization process undermines the elements of *availability* and *accessibility*, thereby rendering the said process as violative of the right to water.

With respect to the element of *availability*, General Comment No. 15 demands that “*water supply for each person must be sufficient and continuous for personal and domestic uses*.”¹²⁹ The privatization of the Angat HEPP, however, constitutes a direct threat to the sufficiency and continuity of water supply for Metro Manila. For power generation to take place, excessive volumes of water need to be released in bulk, thereby resulting in water overflows and wastage – to the prejudice of other water users. Such conflicts have been well-noted by the MWSS in previous incidents with NPC wherein allegedly prohibited water releases from the Angat Dam have resulted in overflows in the recipient dams of Ipo and Bustos.¹³⁰ While such spills are allowable for periods wherein the water level of the dam is well above normal, they can be disastrous for Metro Manila's water supply in times of drought when such spills translate into significant

¹²⁷ UNESCR, *supra*, par. 11.

¹²⁸ UNESCR, *supra*, par. 12.

¹²⁹ *Id.*

¹³⁰ CHR, *supra*, p.3.

cuts in the available water supply. This inherent conflict between the interests of power generation plant operators and other users of a multi-purpose dam has also been emphasized by the Commission on Human Rights:

“xxx Worth noting also is NWRB’s comment that, among others, [t]he promulgation of the EPIRA Law (RA 9136), which opened the gates for market trading of electricity under WESM (Wholesale Electricity Spot Market), has adversely impacted on the water supply for irrigation in Bulacan and Pampanga due to unsynchronized/irregular water releases.”¹³¹

While public respondent has, in several news reports, alleged that such incidents may still be monitored and regulated by the NWRB even when the Angat HEPP is handed over to a private entity, it bears emphasizing that such regulation extends only to the imposition of penalties *after* such violations on the part of the HEPP operator have taken place. The state's obligation to ensure the right to water of Metro Manila residents is not sufficiently met by penalizing violations of such right to water after they have taken place. More crucial is the obligation to protect the continuity and availability of the water supply *before* such violations take place. Such an obligation is gravely compromised in a situation wherein *physical control* of the dam's water releases is turned over to a private entity motivated by profit interests in power generation.

The manner of the bidding process undertaken by public respondent PSALM has also compromised the element of *accessibility*, particularly with respect to the dimension of *information accessibility*. General Comment No. 15 explicitly includes information accessibility as one of the four dimensions of accessibility required by the right to water. It states that “*accessibility includes the right to seek, receive and impart information concerning water issues.*”¹³²

¹³¹ CHR, *supra*, p. 5.

¹³² UNESCR, *supra*, par.12.

With 97% of Metro Manila's entire water supply sourced directly from the Angat Dam, it goes without saying that changes in the ownership of the Angat HEPP and in the physical control and management of the Angat Dam are of transcendental interest to Metro Manila residents such as petitioners with respect to the security of their water supply. In spite of the significant public interest attached to the privatization of the Angat HEPP, petitioners and Metro Manila residents in general were not sufficiently informed of the structure, terms and conditions of the bidding process or the exact implications that such privatization would hold for Metro Manila's water supply. Instead, the details of the process were kept largely confidential, with the bidders themselves required to submit to a confidentiality agreement with PSALM and the processes largely restricted to pre-qualified bidders and other government agencies.

There is no showing that public respondent fulfilled its obligation as a state entity to respect petitioner's right to water by ensuring information accessibility with respect to the bid details of the privatization process. Public pronouncements made by public respondent PSALM were limited to schedule announcements and broad assurances with respect to water security. Nowhere in such public announcements nor in public respondent's website were the terms and conditions of the sale made available to the public. Nor did respondent PSALM conduct forums or briefings open to the general public. Such failure on the part of public respondent to ensure information accessibility is further amplified by its full knowledge of the controversies and issues surrounding the Angat privatization, particularly with respect to those issues raised by the CHR and the MWSS *prior* to the commencement of the bidding process. Thus, said public respondent failed miserably in providing petitioners with access to information, as required by its obligation to uphold the right to water of petitioners and the general public of Metro Manila.

The bidding process undertaken by public respondent, and the impending sale of the Angat HEPP has therefore undermined elements of the right to water, as defined by UNESCR General Comment No. 15 in relation to the ICESCR. As such, the acts constituting the said bidding process and sale of the Angat HEPP may be seen as retrogressive acts or measures. As such, public respondent bears the “burden of proving that they (retrogressive measures) have been introduced after the most careful consideration of all alternatives”¹³³

D. Notwithstanding the above, the bidding process undertaken by public respondent is null and void for having violated the minimum safeguard provisions set in place by the Implementing Rules and Regulations of the EPIRA.

Sec 4, paragraph (e) of Rule 23 of the Implementing Rules and Regulations of RA 9136 expressly provides that:

Sec 4 (e) In cases of transfer of possession, control and operation or privatization of multi-purpose hydro facilities, safeguards shall be prescribed to ensure that the National Government may direct water usage in cases of shortage to protect potable water, irrigation, and all other requirements imbued with public interest. The rights of NPC over such multi-purpose hydro facilities shall be transferred to PSALM.

Meanwhile, Sec 6, paragraphs (a) and (b) of Rule 23 reads:

Sec 6. Privatization of Hydroelectric Generation Plants

(a) Consistent with Section 47(e) of the Act and Section 4(f) of this Rule, the privatization of hydrofacilities of NPC shall cover the power component including assignable long-term water rights agreements for the use of water, which **shall be passed onto and respected** by the buyers of the hydroelectric power plants.

(b) The National Water Resources Board shall ensure that the allocation for irrigation as indicated by the NIA and requirements for domestic water supply as provided for by the appropriate local Water District(s) are recognized and provided for in the water rights agreements. NPC or PSALM **may also impose additional conditions** in the shareholding agreement with the winning bidders to ensure national security,

¹³³ UNESCR, *supra*.

including, but not limited to, the use of water during drought or calamity.

These provisions in the Implementing Rules and Regulations of EPIRA, read in conjunction with other laws recognizing the people's rights to life and health and the primacy of potable water security as a national issue of high priority, sets an obligation on the part of public respondent PSALM to ensure that water security is not compromised as a result of the privatization of multi-purpose dams previously owned by Napocor. This obligation may be met through (1) the development of concrete safeguards, (2) the assignment of long-term water rights agreements for the use of water, and (3) the imposition of additional conditions in the shareholding agreement between the PSALM or NPC and the winning bidder.

Nowhere do the rules allow for the re-negotiation of long-term water rights agreements such as the water protocol between NPC, NIA and the MWSS. Yet with the bidding process undertaken by the public respondent for the Angat HEPP, the long-term water rights agreement, which takes the form of the draft water protocol prepared by the NWRB, was made subject to comments and negotiations with the bidders *after* the bidding process had already been commenced by PSALM. Not only has the water protocol been opened to re-negotiation but such negotiations involving the government agencies *and* the bidders had not yet been concluded by 30 March 2010,¹³⁴ or less than a month prior to the final submission of bids.

The manner by which PSALM has kept the draft water protocol flexible and subject to the comments of bidders even at the time that the formal public bidding process had already commenced greatly undermined the viability of the said water protocol as a sufficient safeguard for water security, in blatant contradiction to its

¹³⁴ PSALM, 05 April 2010, *supra*.

obligation under Sec 4 of the IRR to ensure the security of other water uses sharing the multi-purpose dam.

In sum, the protection of petitioners' right to water and of public interest requires that the bidding process initiated by public respondent on 11 January 2010 be declared null and void for violating petitioners' right to water, as defined by international law and by domestic law establishing the state's obligation to ensure water security for its people.

E. There is no Signed Water Protocol in place to ensure government control over the buyer's proper use of water from Angat Dam.

Because the terms of the sale of Angat HEPP grant the buyer both NPC's water rights and control over Angat Dam, the only mechanism available to ensure government control over the buyer's use of water from Angat Dam is a signed Water Protocol that protects the rights of all concerned stakeholders.

The Water Protocol is necessary to ensure that water for domestic consumption will have priority over power production as embodied in the Water Code. It must be noted that demand for electricity is not "flat" and constant but fluctuates during different times of the day. During peak hours when demand for electricity is high, electricity prices rise; during off-peak hours when demand is low, electricity prices fall. In contrast, domestic water needs and water prices are more or less constant throughout the day. With the implementation of the Wholesale Electricity Spot Market and without a Water Protocol, the operator of the Angat HEPP would have an incentive to prioritize power production and to time its water releases accordingly - that is, to when electricity prices are higher and more profitable - to the detriment of the water needs of the

general public. This concern was already raised by the DPWH in its letter to PSALM dated 15 August 2006:

The Wholesale Electricity Spot Market (WESM) which is now being experimented by PSALM is against the principle that water for domestic consumption takes priority over power production as embodied in the Water Code. *With WESM implementation, power supply will have the priority of all other uses. It is our submission that multipurpose dams like Angat should not be subjected to WESM agreements, and therefore should not be privatized.*¹³⁵ (italics and underscoring supplied)

PSALM asserts that concerns regarding the allocation of water among NPC, MWSS, and NIA are sufficiently addressed by the Memorandum of Agreement to the Water Protocol, which provides strict guidelines regarding the operations of Angat Dam and the release of water therefrom. However, respondent PSALM has not furnished this Honorable Court with a copy of the signed Water Protocol. Neither has it asserted that all stakeholders have signed the Water Protocol. Moreover, respondent MWSS has asserted that as of 18 June 2010, “notwithstanding negotiations in good faith of all stakeholders, only respondents MWSS and NIA had signed the final draft of the Memorandum of Agreement to the Water Protocol.”¹³⁶

Under the terms of the sale of Angat HEPP, for as long as the Water Protocol has not been signed by all the parties, it will have no force and effect, and winning bidder K-Water is not legally bound to comply with it. Section 2.10 of the Asset Purchase Agreement states:

The BUYER must execute the Water Protocol on or before Closing Date; provided, that *should the other parties to the Water Protocol not sign and execute the same on or before Closing Date, the OPERATOR need not comply with the Water Protocol until all the other parties to the same have signed and executed it.* The non-execution of the Water Protocol by Closing Date shall

¹³⁵ Letter of DPWH Secretary Hermogenes Ebdane to PSALM dated 15 August 2006, Annex 9, MWSS Comment.

¹³⁶ PSALM Comment, par. 27, p. 14.

not affect the occurrence of Closing Date and SELLER's Compliance Date, as the case may be.¹³⁷ (italics and underscoring supplied)

while Section 3.14 of the O&M Agreement states:

The OPERATOR must execute the Water Protocol on or before Closing Date; provided, that should the other parties to the Water Protocol not sign and execute the same on or before Closing Date, the OPERATOR need not comply with the Water Protocol until all the other parties to the same have signed and executed it.¹³⁸ (italics and underscoring supplied)

Without the signed Water Protocol, winning bidder K-Water will have complete control over the entire Angat Dam Complex and not merely the Angat HEPP. This is in violation of Article XII, Section 2 of the Philippine Constitution which states that the exploration, development, and utilization of natural resources - including waters and all forces of potential energy - shall be under the full control and supervision of the State, and that such activities must be undertaken with Filipino citizens or corporations or associations with at least 60% Filipino equity.

Petitioners also wish to point out that the absence of a signed Water Protocol is alarming in the light of PSALM's statements that "the conditions of the sale of Angat HEPP would still be subject to negotiation with the prospective bidders and the contract/s relating thereto would still be subject to revisions put forth by prospective bidders." Is PSALM's refusal to sign the Water Protocol part of its strategy to negotiate the terms of sale with the bidders? If so, PSALM is blithely and cavalierly bargaining away the Filipino people's right to water.

¹³⁷ Section 2.10, Asset Purchase Agreement, p. 3, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

¹³⁸ Section 3.14, Operation and Maintenance Agreement, p. 14, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

PRAYER

WHEREFORE, premises considered, Petitioners most respectfully pray:

1. The bidding process initiated by public respondent on January 11 2010 be declared null and void for being violative of the Constitution, law and due process.

2. Public Respondents be permanently enjoined from disposing of the Angat HEPP through privatization.

Petitioners also respectfully pray for other and further relief that may be deemed just and equitable under the premises.

Quezon City for the City of Manila. 23 March 2011.