

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.

x ----- x

G.R. No. 192088

**Certiorari and Prohibition
with Application for a
Temporary Restraining
Order and/or Preliminary
Injunction**

CONSOLIDATED REPLY

PETITIONERS, through counsel, most respectfully state that

1. Petitioners received copies of the replies of the respondents on the following dates:

Respondent	Date	Date Received
Trans-Asia Oil and Energy Development Corporation	4 June 2010	11 June 2010
National Irrigation Administration	17 June 2010	22 June 2010
Korea Water Resources Corporation	18 June 2010	2 July 2010
San Miguel Corporation	29 June 2010	8 July 2010
Power Sector Assets and Liabilities Management Corp.	22 June 2010	8 July 2010
Metropolitan Waterworks and Sewerage System	19 July 2010	2 August 2010

2. On 22 September 2010 petitioners received a copy of this Honorable Court's Resolution dated 10 August 2010 directing them to file their Consolidated Reply to the Comments to the Petition for Certiorari filed by respondents within ten (10) days from receipt of the Resolution or until 2 October 2010.

3. On 30 September 2010 petitioners filed their Motion for Extension of Time to File Consolidated Reply requesting for an additional period of thirty (30) days from 2 October 2010 or until 1 November 2010 within which to file their Consolidated Reply to respondents' Comments.

4. Hence, the instant Consolidated Reply is timely filed.

The Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction is a proper remedy.

5. 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,”¹ (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.”²

6. 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.”³ The determination of the winning bidder is not merely a ministerial function but a discretionary one.⁴

7. 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-

¹ Comment with Urgent Motion to Lift Status Quo Ante Order, dated 22 June 2010, par. 50, p. 25 (hereafter PSALM Comment)

² PSALM Comment, par. 53, p. 26.

³ *Liga ng mga Barangay National v. The City Mayor of Manila*, G.R. No. 154599, 21 January 2004.

⁴ 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.

8. 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"⁵ 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.

The issuance of a Notice of Award did not render the instant Petition moot and academic.

9. PSALM argued that the issuance of the Notice of Award and the subsequent ratification of said notice rendered the Petition moot and academic.⁶

10. 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.⁷ Based on the facts before this Honorable Court, this final act has not yet been done in the case at bar.

⁵ PSALM Comment, par. 53, p. 26.

⁶ Ibid, par. 57, p.27.

⁷ Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction, dated 12 May 2010, page 4, last par.

11. Moreover, as pointed out by the petitioners, the water protocol has not yet been finalized.⁸ 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.

12. 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.⁹

13. In *Randolf David, et al. v. Gloria Macapagal Arroyo*,¹⁰ 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.

14. 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 jurisprudence especially with respect to the people's right to water. Unless PSALM is

⁸ Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction, dated 12 May 2010, page 8, Submission VI.

⁹ *Ibid*, page 54, Prayer, 1 and 2.

¹⁰ G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 and 171424, 3 May 2006.

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.

15. 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.

The present controversy does not constitute a political question.

16. 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.*"¹¹

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

¹¹ G.R. No.L-10520, 28 February 1957.

18. In *Osmeña v. COMELEC*,¹² 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.

19. 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.

Petitioners have the requisite standing to institute the present action.

20. PSALM argued that petitioners do not have standing to file the instant Petition allegedly on the following grounds: (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 PSALM¹³ and does not have the standing to assert the rights of the underprivileged sectors to which it provides legal services;¹⁴ (b) Petitioner Bello has no standing because the action complained of does not infringe upon his prerogatives as a legislator¹⁵ and he has not executed a Certification and Verification of Non-Forum Shopping;¹⁶ (c) Petitioners FDC, Akbayan and APL have not demonstrated any injury

¹² G.R. Nos. 100318, 100308, 100417, 100420, 30 July 1991.

¹³ PSALM Comment, par. 71, p. 33.

¹⁴ *Ibid*, par. 73, p. 34.

¹⁵ *Ibid*, par. 74, p. 34.

¹⁶ *Ibid*, par. 74, p. 34.

to themselves;¹⁷ 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.¹⁸

21. At the outset, it is worth emphasizing that petitioners namely, IDEALS, FDC, Akbayan, APL and Representative Walden Bello, brought the instant case before this Honorable Court as taxpayers or with members as taxpayers, or as Filipino citizens or with members who are Filipinos asserting the promotion and protection of a public right, aside from being directly injured by the proceedings of PSALM.¹⁹

22. The legal standing of herein petitioners to file the instant petition is clearly and unequivocally supported by jurisprudence.

23. For instance, in *Akbayan v. Aquino*,²⁰ 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.

24. In *Francisco et al. v. The House of Representatives*,²¹ 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

¹⁷ Ibid, par. 76, p. 35.

¹⁸ Ibid, par. 78, p. 36.

¹⁹ Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction, dated 12 May 2010, page 21, par. 3.

²⁰ G.R. No. 170516, 16 July 2008.

²¹ G.R. No. 160261, 10 November 2003.

that involves the assertion of a public right to water, among others, of paramount importance to the people.

25. Even if the rule laid down in the case cited by PSALM²² 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.”²³

26. 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.

27. 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

²² PSALM Comment, par. 69, p. 32.

²³ *Randolf David, et al. v. Gloria Macapagal Arroyo*, G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 and 171424, 3 May 2006.

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.”²⁴ 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.

28. As regards the allegation that petitioners, as taxpayers, have no standing to file the instant petition,²⁵ in addition to and in support of their allegations heretofore pleaded,²⁶ petitioners invoke the rule laid down in *Chavez v. Public Estate Authority*,²⁷ thus:

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

29. Moreover, 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.”²⁸

²⁴ *MEDISERV, Inc., v. Court of Appeals*, G.R. No. 161368, 5 April 2010.

²⁵ *PSALM Comment*, par. 78, p. 36

²⁶ *Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction*, dated 12 May 2010, page 22, pars. 2 and 3.

²⁷ *Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002.

²⁸ *Tan v. Macapagal*, 43 SCRA 677 (1972).

30. Petitioners being directly injured by the acts of PSALM, as taxpayers or with members as taxpayers; as Filipino citizens or with members who are Filipino citizens asserting the promotion and protection of a public right, they have the clear legal personality to institute the present action.

Respondent PSALM did not conduct the public bidding in an open and transparent manner.

31. 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.

32. 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.

33. 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.

34. 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.²⁹ 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.

35. 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,³⁰ and to provide for the orderly and transparent privatization of the assets and liabilities of the NPC.³¹ PSALM conveniently skirted this issue which was squarely raised in the petition.

36. PSALM lamely argues that petitioners' reliance on *Chavez v. Public Estates Authority* as regards the application of the Government Auditing Code is misplaced.³² The reason put forward by PSALM is that *Chavez* involved property which had become unserviceable for any cause or was no longer needed.³³ 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.³⁴

²⁹ PSALM Comment, par. 81-82, p. 37.

³⁰ Section 47 (d), R.A. 9136 and Rule 23, Section 4 (d), IRR of R.A. 9136.

³¹ Rule 2 (i), IRR of R.A. 9136.

³² PSALM Comment, par. 88, p. 39.

³³ *Ibid.*

³⁴ Petition for Certiorari and Prohibition with Application for a Temporary Restraining Order and/or Preliminary Injunction, dated 12 May 2010, page 27.

37. Petitioners submit that the manner of Angat HEPP privatization has two elements: (a) openness and transparency; and (b) public bidding.³⁵ The criterion to for public bidding has been elaborated by this Honorable Court in *Chavez*,³⁶ 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.*)

38. 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.

39. Considering further that *Chavez*³⁷ 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 entities in their procurement of goods, infrastructure and consultancy

³⁵ 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*”.

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

³⁷ *supra*

services”³⁸ 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.”³⁹

40. PSALM stated that it “relied upon xxx COA Circular 89-296 regarding the rules for the public bidding of the Angat HEPP.”⁴⁰ Said Circular, however, deals with divestment or disposal of property and other assets of the government⁴¹, which have requirements that are not followed in the “format generally used by government entities in their procurement”.⁴²

41. COA Circular 89-296⁴³ 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)

b. sufficient time frame between publication and date of auction;

³⁸ PSALM Comment, par. 85, p. 38.

³⁹ Ibid, par. 89, p. 39.

⁴⁰ Ibid, par. 90, p. 40.

⁴¹ 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.

⁴² PSALM Comment, par. 85, p. 38.

⁴³ Annex “S”, PSALM Comment

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.)

42. Even *assuming arguendo* that the interpretation by this Court in *Chavez*⁴⁴ 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*⁴⁵ 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.

43. 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.⁴⁶ 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.⁴⁷

44. As PSALM admitted, petitioner IDEALS sent a letter dated 20 April 2010 to PSALM requesting certain documents and information relating to the privatization of Angat HEPP. Instead of acceding to petitioner IDEALS' request, PSALM denied it

⁴⁴ *Supra.*

⁴⁵ *Supra.*

⁴⁶ Article 8, Civil Code of the Philippines

⁴⁷ Jurado, Desiderio, *Civil Law Reviewer*, p. 9, (2006), citing *Pesca v. Pesca*, G.R. No. 136921, 17 April 2001.

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.”

45. This Honorable Court should likewise not be hoodwinked by PSALM’s 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.

46. 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*.⁴⁸

47. 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.

48. 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.

49. PSALM, in a last-ditch effort to foil petitioners’ demands for transparency and accountability, invoked *Valmonte v. Balmonte*,⁴⁹ 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

⁴⁸ *Supra*.

⁴⁹ 170 SCRA 276 (1989).

petitioners' right to information. Thus, PSALM's misguided reliance on *Valmonte v. Belmonte* is an abuse and misuse of jurisprudence.

50. 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."⁵⁰ 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.

51. 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.

⁵⁰ PSALM Comment, par. 99, p. 43.

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.

52. 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.”⁵¹ 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.

53. 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.”⁵²

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.

The transfer of Water Rights to Korea Water Resources Corporation under the terms of the sale of Angat HEPP violates the Water Code of the Philippines.

54. 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

⁵¹ PSALM Comment, par.105, p. 45.

⁵² PSALM Comment, par. 105, p. 46.

sale of the Angat HEPP.”⁵³ It also asserts that “there has been no unilateral transfer of water rights to date,”⁵⁴ 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.

55. 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.⁵⁵ (*italics and underscoring supplied*)

56. 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.⁵⁶

57. 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.*

⁵³ Ibid, pars. 126-127, p. 55.

⁵⁴ Ibid, par. 112, p. 48.

⁵⁵ PSALM Board Resolution No. 2010-0416-001, Annex Q, p. 2, PSALM Comment.

⁵⁶ 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.

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.*

The terms of the sale of Angat HEPP constitute a relinquishment of government control over the Angat Dam, in violation of Article XII, Section 2 of the Constitution.

(A) Under the terms of the sale, control over the non-power components of the Angat Dam Complex will be given to the buyer.

58. 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.⁵⁷ (italics and underscoring supplied)

59. 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.⁵⁸ (italics and underscoring supplied)

⁵⁷ Section 2, O&M Agreement, p. 11, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

⁵⁸ 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.

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

60. 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.

61. The Water Protocol is necessary to ensure that water for domestic consumption will have priority over power production as embodied in the Water Code. 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, 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.*⁵⁹ (italics and underscoring supplied)

62. 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

⁵⁹ Letter of DPWH Secretary Hermogenes Ebdane to PSALM dated 15 August 2006, Annex 9, MWSS Comment.

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.”⁶⁰

63. 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 not affect the occurrence of Closing Date and SELLER’s Compliance Date, as the case may be.⁶¹ (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.⁶² (italics and underscoring supplied)

64. 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

⁶⁰ PSALM Comment, par. 27, p. 14.

⁶¹ Section 2.10, Asset Purchase Agreement, p. 3, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

⁶² Section 3.14, Operation and Maintenance Agreement, p. 14, PSALM Board Resolution No. 2010-0416-001, Annex Q, PSALM Comment.

State, and that such activities must be undertaken with Filipino citizens or corporations or associations with at least 60% Filipino equity.

65. Petitioners also wish to point out that the absence of a signed Water Protocol at this point in time 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.

PRAYER

In view of the foregoing, it is respectfully prayed that:

1. The Status Quo Ante Order dated 24 May 2010 issued by this Honorable Court be maintained and/or Preliminary Injunction be immediately issued directing public respondents from continuing with the bidding process for the Angat HEPP, specifically enjoining them from proceeding with the next step of issuing a notice of award to any of the six contending bidders in order to prevent serious and irreparable injury to the Filipino people.

2. 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.

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

4. This case be immediately set for oral arguments.

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. 29 October 2010.

BY COUNSEL FOR THE PETITIONERS

ANTONIO SALVADOR

IBP No. 7744331/ 01-15-10/ Quezon City
PTR No. 323800/ 01-15-10/ Quezon City
Roll of Attorneys No. 38140
MCLE Compliance No. III-0009621/ 03-17-10

RONALD CRISANTO P. MERCADO

IBP No. 824370/04-14-10/ Quezon City
PTR No. 3846043/ 05-14-10/ Quezon City
Roll of Attorneys No. 58219

MARIBEL I. ARIAS

IBP No. 774330/ 01-15-10/ Quezon City
PTR No. 3288262/ 01-15-10/ Quezon City
Roll of Attorneys No. 39318
MCLE Compliance No. III-0012038/ 04-06-10

TANYA KARINA A. LAT

IBP No. 774332/ 01-15-10/ Quezon City
PTR No. 3288264/ 01-15-10/ Quezon City
Roll of Attorneys No. 47509
MCLE Exemption No. III-001277/ 04-07-10/ Pasig City

MARWIL NACOR LLASOS

IBP No. 817562/ 02-03-10/ Albay
PTR No. 0029888/02-02-10/ Daraga, Albay
Roll of Attorneys No. 51259
MCLE Compliance No. III-0018817/ 09-16-10

EXPLANATION

Pursuant to Section 11, Rule 13 of the Revised Rules of Court, this Consolidated Reply was served to the parties through registered mail with return card due to lack of manpower to personally serve the same.

MARWIL NACOR LLASOS
Counsel for Petitioners

Copy furnished:

By personal service:

Supreme Court of the Philippines
Manila

By registered mail:

Atty. Ma. Luz L. Caminero
Acting President and Chief Executive Officer
Power Sector Assets and Liabilities Management
Corporation.
7th Floor Bancmer Building, 6756 Ayala Avenue, Makati
City

Atty. Diosdado M. Allado
Administrator
Metropolitan Waterworks and Sewerage System
Administration Building, MWSS Complex,
489 Katipunan Road, Balara, Quezon City

Attys. Genever M. Dionio, Ailyne C. Agtuca-Selda and
Pepito L. Padilla
Counsel for National Irrigation Administration
NIA Legal Services Department
NIA Bldg., NIA Road, Diliman, Quezon City

Attys. Anna Bianca L. Torres, Luther D. Ramos, Roy Enrico
C. Santos and Mark Anthony C. De Leon
Counsel for Private Respondent Korea Water Resources
Corporation
Puyat Jacinto and Santos Law Office
12 Floor, Manila bank Building
6772 Ayala Avenue, Makati City

Quiason Makalintal Barot Torres Ibarra and Sison
Counsel for First Gen Northern Energy Corporation
21st Floor Robinson-Equitable Tower 4
ADB Avenue cor. Poveda Street
1605 Ortigas Center, Pasig City

Mr. Ramon S. Ang
President
San Miguel Corp.
40 San Miguel Avenue, Mandaluyong City, Metro Manila

Mr. Antonio R. Moraza
President,
SN Aboitiz Power - Pangasinan, Inc.
2/F Herco Center, 114 Benavidez St., Legaspi Village,
Makati City

Mr. Francisco L. Viray
President and CEO
Trans-Asia Oil and Energy Development Corporation
Level 11, Phinma Plaza, 39 Plaza Drive, Rockwell Center,
Makati

Atty. Rosa Christina R. Hermoso
Counsel for DMCI Power Corporation
Represented by its President, Mr. Nestor Dadivas
3rd Floor Dacon Building, 2281 Don Chino Roces Avenue
Extension, 1231 Makati City

Attys. Raul D. Ragandang, Bel D. Derayunan and Aniceto
A. Calabaquib, Jr.
Counsel for Respondent PSALM and MWSS
Office of the Government Corporate Counsel
3rd Floor, MWSS Building, Katipunan Road
Balara, Quezon City

Attys. Francis H. Jardeleza and Mary Rose S. Tan
Counsel for Respondent SMC
San Miguel Corporation, Office of the General Counsel
40 San Miguel Avenue
1550 Mandaluyong City

Attys. Cecilio B. Gellada, Jr., Liberty Z. Dumlao, David I.B.
Ocampo, and Maria Concepcion B. Mendoza-Baldueza
Counsel for Respondent Power Sector Assets and
Liabilities Management Corporation
7th Floor, Bankmer Building
6756 Ayala Avenue, Makati City

Republic of the Philippines)
Quezon City, Metro Manila) S.S.

AFFIDAVIT OF SERVICE

I, **EDGARDO CASILIHAN**, of legal age, single, Filipino, with office address at 4th Floor, MB Building, #6 Kalayaan Avenue, Quezon City, after having been duly sworn in accordance with law, do hereby certify and state that:

1. I am one of the administrative staffs of Petitioner Initiatives for Dialogue and Empowerment through Alternative Legal Services (IDEALS), Inc.;
2. On 29 October 2010, I proceeded to the Quezon City Post Office and sent/served by registered mail copies of the Consolidated Reply entitled Initiatives for Dialogue and Empowerment through Alternative Legal Services (IDEALS), Inc., et al. vs. Power Sector Assets and Liabilities Management Corp., et al., for filing with the Supreme Court to the following:

Respondents:	
Atty. Ma. Luz L. Caminero Acting President and Chief Executive Officer Power Sector Assets and Liabilities Management Corporation. 7 th Floor Bancmer Building, 6756 Ayala Avenue, Makati City	
Atty. Diosdado M. Allado Administrator Metropolitan Waterworks and Sewerage System Administration Building, MWSS Complex, 489 Katipunan Road, Balara, Quezon City	
Attys. Genever M. Dionio, Ailyne C. Agtuca-Selda and Pepito L. Padilla Counsel for National Irrigation Administration NIA Legal Services Department NIA Bldg., NIA Road, Diliman, Quezon City	

<p>Attys. Anna Bianca L. Torres, Luther D. Ramos, Roy Enrico C. Santos and Mark Anthony C. De Leon Counsel for Private Respondent Korea Water Resources Corporation Puyat Jacinto and Santos Law Office 12 Floor, Manila bank Building 6772 Ayala Avenue, Makati City</p>	
<p>Quiason Makalintal Barot Torres Ibarra and Sison Counsel for First Gen Northern Energy Corporation 21st Floor Robinson-Equitable Tower 4 ADB Avenue cor. Poveda Street 1605 Ortigas Center, Pasig City</p>	
<p>Mr. Ramon S. Ang President San Miguel Corp. 40 San Miguel Avenue, Mandaluyong City, Metro Manila</p>	
<p>Mr. Antonio R. Moraza President, SN Aboitiz Power - Pangasinan, Inc. 2/F Herco Center, 114 Benavidez St., Legaspi Village, Makati City</p>	
<p>Mr. Francisco L. Viray President and CEO Trans-Asia Oil and Energy Development Corporation Level 11, Phinma Plaza, 39 Plaza Drive, Rockwell Center, Makati</p>	

<p>Atty. Rosa Christina R. Hermoso Counsel for DMCI Power Corporation Represented by its President, Mr. Nestor Dadivas 3rd Floor Dacon Building, 2281 Don Chino Roces Avenue Extension, 1231 Makati City</p>	
<p>Attys. Raul D. Ragandang, Bel D. Derayunan and Aniceto A. Calabaquib, Jr. Counsel for Respondent PSALM and MWSS Office of the Government Corporate Counsel 3rd Floor, MWSS Building, Katipunan Road Balara, Quezon City</p>	
<p>Attys. Francis H. Jardeleza and Mary Rose S. Tan Counsel for Respondent SMC San Miguel Corporation, Office of the General Counsel 40 San Miguel Avenue 1550 Mandaluyong City</p>	
<p>Attys. Cecilio B. Gellada, Jr., Liberty Z. Dumlao, David I.B. Ocampo, and Maria Concepcion B. Mendoza-Baldueza Counsel for Respondent PSALM 7th Floor, Bankmer Building 6756 Ayala Avenue, Makati City</p>	

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of October 2010 in Quezon City.

EDGARDO CASILIHAN
Affiant

CTC No.: 27556090, Date/Place Issued: 01.22.2010, Quezon City
Professional Driver's License ID No.: D06-95-149099, valid until 10.13.2010

Republic of the Philippines)
Quezon City) S.S.

SUBSCRIBED AND SWORN to before me this 29th day of October 2010 at Quezon City, affiant exhibiting to me his Community Tax Certificate No. 27556090 issued on 22 January 2010 in Quezon, Philippines and his Professional Driver's ID with ID No. D06-95-149099 valid until October 13, 2010, as competent proof of his identity.

Doc. No. _____ ;
Page No. _____ ;
Book No. _____ ;
Series of 2010.