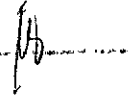


FOURTEENTH CONGRESS OF THE REPUBLIC)
 OF THE PHILIPPINES)
 First Regular Session)

8 APR 2004

SENATE
 P.S.R. No. 338

RECEIVED BY



Introduced by Senator Miriam Defensor Santiago

RESOLUTION

EXPRESSING THE SENSE OF PROFOUND CONCERN OF THE SENATE OVER THE SALE OF PNOC-EDC WITHOUT NOTICE TO THE JOINT CONGRESSIONAL POWER COMMISSION (JCPC) AND REQUIRING SUCH NOTICE THEREAFTER

WHEREAS, PNOC Energy Development Corporation (PNOC-EDC) was created in 5 March 1976 to lead the Philippines' quest for energy self-sufficiency; its mission is to explore and develop indigenous energy sources, focusing on those that are clean and renewable to ensure the preservation of the country's environment;

WHEREAS, PNOC-EDC now accounts for more than 60% of the country's installed geothermal capacity of 1,905 MW. It is responsible for making the Philippines the second largest producer of geothermal energy in the world, next only to the United States, and the world's largest wet steamfield;

WHEREAS, on 14 June 1996, then Executive Secretary Ruben D. Torres informed the Secretary of Finance that President Fidel V. Ramos has approved the proposed 40-20-40 privatization scheme of PNOC-EDC under the following methods:

1. Bidding through sealed bids for 40% of shares of stock by potential strategic investors as in the case of Petron privatization;
2. Public offering of 20% shares of stocks for small local investors or employees stock option plan after the 40% shares of stocks are bid;
3. Retention of 40% shares of stock by the National Government.

WHEREAS, according to the 5 November 1997 Minutes of the Special Meeting of PNOC Board of Directors, the Board approved and agreed in principle to adopt the recommendation given by the Financial Advisors to postpone the privatization of PNOC-EDC until market conditions improve but no formal resolution was passed;

WHEREAS, the 22 November 2004 Minutes of the Special Meeting of PNOC-EDC Board of Directors passed the following resolutions:

1. Resolution No. 74 – approving the recommendation of the Management to reactivate the privatization of PNOC-EDC, and to secure the approval of PNOC Mother Board.
2. Resolution No. 75 – approving the proposed composition of the Privatization Committee (PRIVACOM), the chair being PNOC-EDC President Paul A. Aquino.
3. Resolution No. 76 – approving the Management's request for authority to submit PNOC-EDC's privatization plan, to wit:

- a. Issuance of new shares of PNOC-EDC totaling 5 billion shares
- b. Sale of 4 billion shares of PNOC Mother in PNOC-EDC

to the Privatization Council headed by Secretary Juanita D. Amatong, in order that the PRIVACOM may proceed with the hiring of a financial advisor who shall be tasked to undertake the valuation and formulate marketing strategies to implement the privatization of PNOC-EDC.

4. Resolution No. 7 – approving the Management’s request for authority for the PNOC-EDC PRIVACOM to approve the Terms of Reference (TOP) and the selection process for the hiring of the Financial Advisor, pursuant to Republic Act No. 9184.

WHEREAS, the 10 December 2004 Minutes of the Special Meeting of PNOC-EDC Board of Directors states that one of the issues discussed was that the PNOC-EDC would pursue privatization to be able to raise funds to enable PNOC-EDC to participate in the bidding for NPC’s geothermal power plants in August 2005. The Minutes provides that PSALM has previously agreed to allow PNOC-EDC to bid in the sale of NPC’s power plants provided that the PNOC-EDC was already privatized at the time of the sale;

WHEREAS, the same Minutes states that the implementation of the privatization plan would have to be made as soon as possible to take advantage of the favorable market condition in the first quarter of 2005 and to enable PNOC-EDC to join PSALM’s bidding out of NPC power plants in August 2005; Hence, the Board passed Resolution No. 1525, among others, authorizing the reactivation of the PNOC-EDC privatization and authorizing the Management of PNOC-EDC to submit to the Privatization Council, chaired by then Finance Secretary Amatong the proposed privatization plan of PNOC-EDC;

WHEREAS, on 25 August 2005, PNOC-EDC, through its Financial Advisor, CLSA Exchange Capital, Inc., presented before the JCPC its 40-20-40 privatization plan that involves the following:

1. Sale of both primary and secondary shares to strategic investor.

The money from the primary shares will go to PNOC-EDC. The proceeds of the sale of primary shares will then go to PSALM, in consideration for the geothermal power plants owned by PSALM, which will be transferred to PNOC-EDC upon its privatization.

The proceeds of the sale of secondary shares will go to PNOC then to the National Government.

2. Sale of Secondary shares of PNOC will be sold to the public through an IPO.

The payment will go to PNOC and eventually to the National Government. The ownership of PNOC-EDC will consist of 40% for the strategic investor, 40% PNOC, and 20% general public.

WHEREAS, JCPC disapproved the 40-20-40 privatization plan; Secretary Teves was present during this hearing;

WHEREAS, during the 24 November 2005 JCPC hearing, then PNOC Chairman Eduardo Mañalac, on behalf of PSALM, presented the a new privatization plan with long-term Steam Sales Agreement (SSA);

WHEREAS, the plan involves the sale of NPC assets combined with long-term SSAs; the three aspects of the plan are the following:

1. Accelerate the sale schedule of NPC plants.
 - a. NPC/PSALM will negotiate mutually agreeable long-term SSA with PNOC-EDC which will commit a steady supply of steam for a certain period of time.
 - b. The SSA will result in the NPC geothermal plants becoming more affordable and attractive to PSALM's investors, who will themselves will not have to incur any capital outlay for the PNOC-EDC's geothermal steamfield assets.
 - c. This arrangement will entail no additional consent from PNOC-EDC creditors.
2. Empower PNOC-EDC to continue to explore, discover and develop new geothermal fields.

Through the proposed privatization plan, the PNOC-EDC will receive a new mandate to develop 330-MW of additional generating capacity by year 2012.

3. Maximize use of PNOC-EDC's Technical Professionals.

WHEREAS, JCPC deliberated on the new privatization plan during its hearings on 26 January, 23 February and 23 March 2006;

WHEREAS, on 17 May 2006, PNOC-EDC, through a letter addressed to Secretary Margarito B. Teves, Privatization Council Chair, sought the approval of its Initial Public Offering (IPO) plan:

1. Sale through IPO of approximately 30% to 40% of PNOC-EDC's outstanding capital stock (after subscribing to P1.76 to P2.5 billion shares of the newly-created P5 billion shares).
2. The proposed break up of the IPO offering into approximately equal number of primary and secondary shares, as stated in a 5 June 2006 letter of DOF Undersecretary Gabriel Singson Jr. to Mr. Paul Aquino.

WHEREAS, PNOC-EDC justified the sale through an IPO by saying that there is a strong momentum persisting in the Philippine stock market, coupled with the existing favorable international and domestic investor sentiment; PNOC-EDC said that the ideal size of its IPO is 30%, with a possible upsizing to 40%, as recommended by CLSA Exchange Capital, Inc. and its affiliates;

WHEREAS, on 25 May 2006, JCPC passed Resolution No. 2006-1, which reads:

NOW, THEREFORE, be it resolved, that this Commission endorses the proposed plan to sell as a package each geothermal plant combined with a specific long term SSA between PNOC-EDC and PSALM/NPC in accordance with the representations herein, subject to the condition that within forty five (45) days from the date of this endorsement, PNOC-EDC and PSALM/NPC shall submit for the approval of this Commission the SSA packaged with each of the geothermal power plants.

WHEREAS, what was approved by JCPC was the privatization of the geothermal plants owned by NPC/PSALM together with the steamfield assets owned by PNOC-EDC; JCPC received the proposed Geothermal Resources Contracts (GRSCs) of Palinpinon and Tongonan on 5 October 2006, 133 days after the endorsement;

WHEREAS, on 2 June 2006, the Privatization Council approved PNOC-EDC's IPO plan;

WHEREAS, in December 2006, PNOC-EDC offered its initial IPO for 6 billion common shares consisting of 3 billion primary and 3 billion secondary shares, and raised P19.2 billion gross;

WHEREAS, in July 2007, PNOC-EDC made a follow on Offering for 3 billion secondary common shares, and raised P17.1 billion;

WHEREAS, on 14 November 2007, Senator Joker Arroyo filed P.S.R. No. 203 entitled "RESOLUTION URGING THE PRESIDENT OF THE PHILIPPINES THAT IT WOULD BE TO THE INTEREST OF THE COUNTRY TO HOLD IN ABEYANCE THE FORTHCOMING BIDDING OF THE PHILIPPINE NATIONAL OIL COMPANY (PNOC) - ENERGY DEVELOPMENT CORPORATION (EDC) ON NOVEMBER 21, 2007 TO ENABLE THE SENATE TO CONSIDER CLOSELY THE IMPLICATION OF THE SALE TO THE GOVERNMENT'S ENERGY PROGRAM IN RELATION TO ITS FISCAL POSITION"; the resolution was referred to the Committee on Government Corporations and Public Enterprises;

WHEREAS, the resolution states that in selling 60% of PNOC-EDC, the government intends to raise P35 billion but what was overlooked was PNOC-EDC earned a net profit of P5.4 billion from January to October 2007; hence, its projected income for 2007 is P7.2 billion;

WHEREAS, the resolution provides that the executive branch cannot just sell profitable assets of the government when in so doing it conflicts with long established policy of the state, in this case the continuous search for indigenous sources of energy which is funded by EDC. With the sale of EDC, such search will end because the government does not include such program in the annual budget;

WHEREAS, according to the resolution, the government will sell PNOC-EDC, a crown jewel among government corporations, to bridge the budgetary shortfall caused by low tax collections which surfaced only during the budgetary hearings; it also states that the sale of EDC is not just a sale of a government corporation, it is more than these, on the line is the policy question, how can we harness our indigenous energy, if we sell the very corporation that funds is exploration;

WHEREAS, despite the call for the postponement of the scheduled bidding, the bidding pushed through;

WHEREAS, on 21 November 2007, Red Vulcan Holdings, a consortium of First Gen Corp., Spalmare Holdings BV, and Terracota Holdings Corp., has submitted the highest bid of P58.5 billion for government's 60% stake in the PNOC-EDC; Red Vulcan's offer easily surpassed the reserve price or minimum amount of P45.08 billion set by government for the bidding;

WHEREAS, the 60% stake consists of 6.0 billion common shares and 7.5 billion preferred shares of PNOC-EDC;

WHEREAS, in a letter dated 23 November 2007 to Secretary Teves, JCPC co-chairs Senator Miriam Defensor Santiago and Representative Juan Miguel Arroyo asked

the finance secretary as chair of the Privatization Council to “suspend further proceedings on the sale, to prevent more serious measures that JCPC might take to withdraw approval of the sale, and to uphold the law”;

WHEREAS, Secretary Teves was also asked to attend the JCPC public hearing on 13 December 2007 at the Senate to explain why the Council has reportedly approved the sale of PNOC-EDC, which the JCPC has already declared illegal;

WHEREAS, in a letter dated 14 December 2007 addressed to Senator Defensor Santiago, Sec. Teves reported that the government generated P94.8 billion in gross revenues from the privatization of PNOC-EDC starting from December 2006 to November 2007;

WHEREAS, according to Sec. Teves, after taking out selling expenses of P1.7 billion and taxes of P500 million, the net proceeds amounted to P92.6 billion; out of the P92.6 billion, the government received P66.7 billion, PNOC Mother received P16.7 billion and PNOC-EDC itself received P9.2 billion;

WHEREAS, he further states that the sale of PNOC-EDC has not only raised needed revenues for the government to finance infrastructures and social services, but has also paved the way for the inflow of additional investments in the country to create jobs and help assure energy security;

WHEREAS, the letter also provides that allegedly from 1990 to 2007, PNOC-EDC had remitted only a total of P1.36 billion to the national government, the highest remittance was in 2007 at P446 million; from the bidding of the government’s remaining stake in PNOC-EDC, the national government received a net of P47 billion; hence, it would take between 23 to 94 years for the national government to earn P47 billion in cash dividends from PNOC-EDC;

WHEREAS, on 17 December 2007, in a letter addressed to JCPC Executive Director Evelyn S. Rojo, PNOC-EDC, through its President, Mr. Paul Aquino, answered the questions of Senator Defensor Santiago regarding the PNOC-EDC sale; he said that, first, they proceeded with the sale without advising JCPC because JCPC is only involved in the privatization process of NPC plants under EPIRA, and PNOC-EDC, as a fuel supplier, is not covered by the EPIRA as reflected in the deliberations during the bicameral conference of the bill;

WHEREAS, Mr. Aquino said that the government’s privatization program is mandated by Proclamation No. 50 and Executive Order No 323; he said that the privatization of non-NPC assets is lodged with the Executive Branch, thus, PNOC-EDC completed the privatization based on the instruction of the President and the approval of the Privatization Council;

WHEREAS, he said that the second reason is that the privatization of PNOC-EDC has been openly announced by the government and discussed in various fora, including JCPC hearings on 23 February and 23 November 2006, and budget hearing on 31 May 2006;

WHEREAS, the open announcement he was pertaining to are a couple of newspaper articles on the privatization;

WHEREAS, what was discussed during the 23 February 2006 JCPC hearing and 31 May 2006 budget hearing was the sale of NPC assets combined with long-term SSAs; while on the 23 November 2006 JCPC hearing, it was then JCPC member Senator Sergio R. Osmeña III who inquired only about the IPO plan just before the hearing was adjourned;

WHEREAS, contradictory to his stand that EPIRA is not involved, Mr. Aquino cited EPIRA in stating the reason for the privatization; he said that the privatization of PNOC-EDC is consistent with the goal of EPIRA which is to deregulate the power generation sector dominated by government owned and controlled corporations;

WHEREAS, it should be noted that during the 25 August 2005 JCPC hearing, PNOC-EDC presented their privatization plan based on three parts: company profile, privatization plan, and **compliance with the EPIRA Law** (Emphasis supplied);

WHEREAS, the third part was discussed by Mr. Danilo Feliciano, Managing Director of CLSA Exchange Capital, Inc. He said that the main objective of the privatization plan is to show that the plan complies with the policy and guidelines set out in EPIRA; he said that once PNOC-EDC shares are transferred to a point where government's holdings are reduced to less than 51%, then they shall have complied with the mandate of EPIRA that they privatize;

WHEREAS, EPIRA, Section 62 provides:

The Commission shall, in aid of legislation, perform the following functions, among others:

(a) Set guidelines and overall framework to monitor and ensure the proper implementation of this Act;

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(d) Review and evaluate the performance of the industry participants in relation to the objectives and timelines set forth in this Act;

WHEREAS, Mr. Paul Aquino also said in the 17 December 2007 letter that "The decision to privatize the PNOC EDC was a result of certain circumstances. In 2004, the DoF declared that the \$75M foreign loan of the company shall be the last loan to be guaranteed by the government and we were advised to seek public funds to support our operations and to fund our new projects due to the financial situation of the country at the time. PNOC (Mother Company) also advised us that they cannot infuse funds due to the funding requirements of the other PNOC subsidiaries. Thus, PNOC EDC was left with no alternative except to look to the public for funds";

WHEREAS, according to news reports on the 20 November 2007 issue of *Philippine Daily Inquirer*, before the completion of the privatization of PNOC-EDC, the Department of Finance has agreed to keep national government guarantees on the company's debts subject to an increase in the guarantee fee to be paid by PNOC-EDC to the national government from one percent a year to two percent starting in January 2008 up to December 2010;

WHEREAS, in a letter to PNOC-EDC president and chief executive Paul Aquino, Secretary Teves said the government guarantees would continue to have force and effect even after the complete divestment of PNOC's interest in PNOC-EDC;

WHEREAS, during the 14 February 2008 hearing, Sec. Teves explained that the sale of PNOC-EDC is not covered by EPIRA, thus, it is outside JCPC's jurisdiction; he said that PNOC-EDC's privatization was pursuant to Proclamation No. 50 that created the Committee on Privatization and Assets Privatization Trust, Executive Order No. 323, and Republic Act No. 8758;

WHEREAS, Proclamation No. 50, issued on 15 December 1986, provides:

CONSIDERING that the government had decided to adopt, as the twin cornerstones of the program, the following parallel imperatives for the attainment of national policy:

(a) The judicious use of the corporate form of organization in the creation of government bodies for the production and distribution of economic goods and services to the public, and the need to rationalize and monitor the operations of government corporations to help bring about improved performance, assure more efficient use of resources and in general to re-orient their activities and priorities in a manner consistent with national objectives, to the end that the private sector is given primacy and the Government assumes a supplemental role, in entrepreneurial endeavors under a climate of fair competition; and

(b) Reducing the number of **government corporations which has proliferated to unmanageable proportions**; circumscribing the areas of economic activities within which government corporations may operate; and aiming to achieve these goals through the **privatization of a good number of government corporations, and the disposition and liquidation of the non-relevant and non-performing assets of retained corporations as the logical first step to their rehabilitation** (Emphasis supplied);

WHEREAS, Proclamation No. 50, Article I, Section 1, reads "It shall be the policy of the State to promote privatization through an orderly, coordinated and efficient programs for the **prompt disposition of the large number of non-performing assets of the government financial institutions, and certain government-owned or controlled corporations which have been found necessary or inappropriate for the government sector to maintain**";

WHEREAS, Proclamation No. 50, Article 4 states:

Sec. 30. Incontestability. – The determination by and decision of the Committee that the terms on which an asset is to be sold or otherwise disposed of are consistent with the objectives in this Proclamation and in the best interest of the National Government shall be conclusive. The validity of any sale or disposition concluded by the National Government acting through the Trust, its authorized agent or entity under this Proclamation shall, except for fraud, breach or material misrepresentation on the part of the purchaser, be incontestable and be binding and enforceable against the National Government and all third parties.

Sec. 31. Immunity and Indemnity Provision for Committee Members and Trustees. –

(1) No civil action shall lie against the Committee and/or the Trust and no civil or criminal action shall prosper against a member of the Committee or a Trustee in its or his discharge of the tasks and functions contemplated by this Proclamation, unless: (a) the act or omission complained of clearly relates to a mandatory provision of this Proclamation the performance of which is expressly devolved or delegated to the concerned defendant as a ministerial duty rather than a discretionary or judgment function, and (b) the act or omission is attended by fraud, bad faith, gross negligence, or violations of the provisions of the Anti-Graft Law;

(2) In the event that any member of the Committee, or a Trustee, or any member of their respective staffs during or after his incumbency, is called upon to defend his actions, related to the performance of an act, or the execution of a transaction contemplated by this Proclamation, before any administrative, judicial or legislative proceedings, the government shall provide him with counsel without cost, or shoulder and pay the cost of a counsel of his choice, as well as other costs of litigation for which he *may be held liable: Provided, that where the civil or criminal action is based on (a) of the preceding paragraph, and the member of the Committee or Trustee of their respective staffs is found guilty of the acts complained of, such member shall be fully liable to and reimburse the Government for all sums advanced by the Government in accordance with the provisions of this Section to cover cost of counsel and other costs of litigation.*

WHEREAS, on 2 December 1992, Executive Order No. 37 entitled "Restating the privatization Policy of the Government" was issued; Section 3 provides "The Government Corporate Monitoring and Coordinating Committee (GCMCC) shall review the need to retain the GOCCs which were previously approved for retention, including but not limited to those listed in Annex "B" hereof, and submit its recommendation of companies, activities or assets thereof of a second group of GOCCs for privatization, to the COP within two (2) months from issuance hereof"; PNOC-EDC was included in the list;

WHEREAS, Republic Act No. 8758, which was approved on 28 December 1999, extended the term of the Committee on Privatization and the Asset Privatization Trust provided under Republic Act No. 7181; Section 1 of the Act provides:

(c) The decision of the Asset Privatization Trust and the Committee on Privatization on the sale and disposition of assets shall be final without need of concurrence by the owner and/or the custodian agency or corporation of the asset;

WHEREAS, Executive Order No. 323 dated 6 December 2000 is entitled "Constituting an Inter-Agency Privatization Council (PC) and Creating a Privatization and Management Office (PMO) under the Department of Finance for the Continuing Privatization of Government Assets and Corporations";

WHEREAS, EO No. 323, Article I, Section 1 states "The National Government hereby restates its privatization policy to promote orderly, coordinated and efficient privatization of remaining government corporations, assets, activities and **idle properties which have been identified as unnecessary and inappropriate for the government sector to maintain**" (*Emphasis supplied*);

WHEREFORE, be it hereby resolved by the Philippine Senate, to express profound concern over the sale of PNOC-EDC without notice to the Joint Congressional Power Commission (JCPC).

WHEREFORE, be it hereby further resolved that the JCPC should be informed beforehand of any privatization plan for any agency covered by the EPIRA, on pain of sanctions as authorized by EPIRA.

Adopted,

/fldp


MIRIAM DEFENSOR SANTIAGO