AES Watch
Secretariat: c/o CenPEG Office, 3/F, College of Social Work and Community Development Building,
Magsaysay Ave., University of the Philippines, Diliman, Quezon City
Telefax: 929-9526; Email: info@cenpeg.org, cenpeg.info@gmail.com

March 5, 2012

HON. SIXTO S. BRILLANTES, Jr.
Chairman
Commission on Elections
and
Commissioner Rene V. Sarmiento
Commissioner Lucenito N. Tagle
Commissioner Armando C. Velasco
Commissioner Elias R. Yusof
Commissioner Christian Robert S. Lim
Commissioner Augusto C. Lagman

Dear Chairman Brillantes:

We are representatives of at least 45 organizations and groups with a strong advocacy for independence, probity, and integrity especially in promoting democratic governance and against electoral fraud of all types.

We bonded together for the first time two years ago for the first nationwide automated elections of May 2010 in the course of our collective studies and observations on the efficacy as well as legal and industry compliance of the election technology to be used for implementing the Poll Automation Law (RA 9369).

Results of our studies and field monitoring had been presented to the Comelec and in forums for validation, thereafter published and submitted to Congress, the Executive Department, and other government agencies and publicly disseminated. These findings include the "errors and bugs" found in the software program that the Comelec had asked the technology provider to correct or fix and certified with the U.S.-based SysTest Lab. To help enhance the implementation of the automation law in future elections, we submitted appropriate proposals to congressional bodies in aid of legislation.

Fourteen months to the 2013 elections, we now write pursuant to the right granted under par. (e) Section 3 of the Implementing Rules and Regulations (IRR) of RA 9184 covering Public Monitoring of the procurement process. Our group, the Automated Election System Watch (AES Watch), would like to express its concerns regarding certain aspects of the preparations being undertaken for this critical exercise. This expression of concern focuses on the automation of the coming election, particularly the specific technology to be used and the provider to be chosen.

In this regard, we have received reports that the Comelec is seriously considering two (2) options: Option 1 is for COMELEC to exercise its supposed extended option to purchase the COMELEC PCOS machines and related paraphernalia; and Option 2, is for a new bidding to be conducted in which SMARTMATIC shall be allowed to participate as one of the bidders.

On Option 1

We strongly oppose the first option for the following reasons:

AES Watch
Secretariat: c/o CenPEG Office, 3/F, College of Social Work and Community Development Building,
Magsaysay Ave., University of the Philippines, Diliman, Quezon City
Telefax: 929-9526; Email: info@cenpeg.org, cenpeg.info@gmail.com

1. The Option to Purchase under the July 10, 2009 Automation Contract between Comelec and Smartmatic-Tim Corp. has long expired, hence, there is no longer any valid option that may be exercised

2. The extension of the option unilaterally offered by Smartmatic in its December 10, 2010 letter likewise expired on March 31, 2011 without Comelec taking any action to exercise the extended option.

3. Likewise, the Revised Extended Option to Purchase granted by Smartmatic in its Letter of April 1, 2011 contains certain contract modifications.

Under the Term Sheet signed by Comelec with Smartmatic on April 28, 2011 pursuant to said April 1, 2011 letter, various items not covered by the original Offer to Purchase, were included in the Term Sheet.

However, on June 1, 2011, the Comelec served notice of cancellation of the Term Sheet contract. As a result, Smartmtic demanded the amount of P60 Million pursuant to a proviso in the Term Sheet which obligates Comelec, in case of cancellation, to pay Smartmatic at least 10% of the services.

On September 23, 2011, Smartmatic again wrote the Comelec regarding the status of the pending Option to Purchase the PCOS machines and other equipment used during the 2010 automated elections. The company also informed Comelec that there will be a 20% price increase that shall be maintained until December 21, 2011. This letter is now pending action by the Comelec *en banc*.

Based on the aforesaid facts, it is clear that the Smartmatic proposal is totally different from the terms and conditions under the original Option to Purchase stipulated in the Comelec-Smartmatic-Tim Corp. Contract. As such, it is a totally new contract proposal altogether and, if accepted by Comelec, will be a clear violation of the rules on procurement which require public bidding.

In this connection, we urge you to take heed of various recommendations issued by the Comelec Advisory Council (CAC) against the purchase of the Smartmatic PCOS machines. In its post-election report of June 2010, the CAC recommended "that the COMELEC NOT exercise the option to purchase the AES...Smartmatic/TIM did sign a contract with Comelec guaranteeing 100% transmission capability so they should be penalized for the shortfall" and "...the time stamp issue...gave voters another reason to doubt the system and Smartmatic/TIM should be penalized accordingly."

Similarly, the present CAC, in Resolution 2012-003, February 8, 2012, asked that the option to purchase "should not be exercised" since, among other reasons, this "prevents the COMELEC from taking advantage of the best possible and less expensive technology currently available" and "will prevent other prospective vendors from competitively participating in the bidding process."

On Option 2

We respectfully submit that the non-compliance by Smartmatic-Tim of the minimum requirements and capabilities that impaired the accuracy, security, and auditability of the May 2010 elections should be a ground for disqualifying the company from participating in the bidding for the 2013 elections.

AES Watch
Secretariat: c/o CenPEG Office, 3/F, College of Social Work and Community Development Building,
Magsaysay Ave., University of the Philippines, Diliman, Quezon City
Telefax: 929-9526; Email: info@cenpeg.org, cenpeg.info@gmail.com

The findings on this matter by at least eight (8) Philippine and international election monitoring groups representing various expertises including the House Committee on Suffrage and Electoral Reforms (14th Congress) and the assessments of former Comelec Chairman Christian Monsod, independent research groups like CenPEG composed of IT and legal minds and social scientists based in the academe and monitoring by AES Watch's coalition members like NAMFREL and DLSU College of Computer Studies nationwide of the conduct of the May 2010 automated polls remain undisputed and should inform us to seriously take a second look at whether Smartmatic should be allowed again to supply the technology in the coming elections.

The American organization, Carter Center, in its final report ("Carter Center Limited Mission to the May 2010 elections in the Philippines," Aug. 5, 2011, 70 pages), stated:

"SysTest [the U.S.-based election technology certification agency] also prepared a list of issues that were discovered during the course of its testing process. Smartmatic was then provided the opportunity to resolve the issues most of which related to best practices followed within the industry for the writing of software code.

"According to the final SysTest report, Smartmatic then 'brought all of those cited findings [that had been classified] as having the potential for either 'critical' or 'major' impacts on the voting system into compliance with the [Voluntary Voting System Guidelines] requirements.'' SysTest noted, however, that one unresolved issue – the lack of extensive nonexecutable commenting in the code base – could affect long-term maintenance of the software, although not necessarily impacting the immediate use of the AES."

Incidents during the last automated election show the many faults in the system, not to mention acts inconsistent with good faith by Smartmatic for which it should be blacklisted. One of the still unresolved electoral protests is the Biliran automated election which revealed a number of technical inconsistencies that affected the valuation of the votes.

Another glaring example is the case of irregularities uncovered by the camp of former North Cotabato Governor Pinol. Quoting the Philippine Daily Inquirer (September 17, 2011):

"Instead of local election results, a compact flash (CF) card used in one of the precincts in Pikit, North Cotabato yielded the results of the elections in Colombia. ... The data containing the results of Colombia's election were found after the CF card was decrypted... Aside from the CF card, PINOL'S camp also found ballots which were smaller than the official Commission on Elections (COMELEC) ballots and ballot boxes which contained ballots intended for different precincts."

Counsel for Pinol, in an Omnibus Manifestation and Urgent Motion before the COMELEC, Second Division, cited serious errors consisting, among others, of mislabelling of ballot boxes, measurement of ballots and missing copies of election returns, statement of votes and minutes of voting.

Considering their use in previous election exercises in another country, as shown in the compact flash cards (cf) used in the Cotabato election for governor, the question of how old the PCOS machines are becomes a major concern. Was Smartmatic acting in good faith in the performance of its contract with Comelec in the light of this discovery? Was there ever an admission or representation during the contract preparation and execution that the election paraphernalia were already used in a previous election or, worse, previous elections? Where was transparency in the bidding process?

AES Watch
Secretariat: c/o CenPEG Office, 3/F, College of Social Work and Community Development Building,
Magsaysay Ave., University of the Philippines, Diliman, Quezon City
Telefax: 929-9526; Email: info@cenpeg.org, cenpeg.info@gmail.com

Please note that the case of the CF cards (which were not certified a week before the elections and then allegedly reconfigured or changed without certification again, after the May 3, 2010 fiasco) according to industry standards, remains a serious technical malfeasance that has not been fully explained to this day.

Furthermore, until now the Smartmatic-Tim has not been made to account, among other things, for the following questionable acts (as validated in the official Forensic Report on the 60 PCOS machines found in a private Antipolo house owned by a Smartmatic technician, submitted to the Hon. Senate President, Juan Ponce Enrile and Hon Speaker of the House, Prospero Nograles last June 9, 2010 or a month after the Elections):

1. Disabling of the Ultra-Violet (UV) Security Mark Sensor of the PCOS machines on the election day of 2010. Subsequent emergency procurement of portable UV lamps at the cost of PhP30 million was a complete waste of public funds. The lamps were neither fully utilized nor effective for the purpose for which they were intended.

2. The Source and Hash codes of PCOS machines and other related AES system modules which by law were supposed to be safe and secured at the vault of the Bangko Sentral ng Pilipinas were in fact unsecured and kept at the Comelec office.

3. The company claimed under oath that all PCOS machines had Digital Certificates as signatures when in fact the technicians of Smartmatic failed to show or present proof of the machine version of digital signatures giving credence to the belief that in fact, no such digital signature exists.

4. Forensics investigations found the Smartmatic PCOS machines to have console port which allowed unsecured access to the operating system of the PCOS machine, a major vulnerability which "could be exploited to manipulate the actual operations of the voting machines." Has Smartmatic provided the technical explanation to this major loophole?

Non-compliance of major technical requirements in the Terms of Reference (TOR) and the contract for any venture should guide decisions and choices for any future procurement, in this case, for automated elections. Calling the technical glitches caused by faulty system preparations and misrepresentation of ownership as part of "birth pains" will only trivialize the many violations by the contracted vendor of major provisions in the AES Terms of Reference and Contract.

In the May 2010 elections, Smartmatic as the contracted technology provider did not deliver the goods fully and well, and in fact disabled major security features in the system. With its lacklustre performance in many vital aspects of the 2010 project implementation, Smartmatic-Tim is far from proving it met the standard provision in Sec. 10 (12) of RA 9369 with regard to *demonstrated capability* and thus failed in meeting the mission-critical requirements for all its entire claim of meeting the 99.9% accuracy target in the last elections.

We therefore believe that whether under Option 1 or Option 2, the election technology provider in the May 2010 polls, Smartmatic-Tim should no longer be an option and should be disqualified altogether from participating in the 2013 elections.

Only then will we start to accept that the present Comelec, as the country's premier election agency, is truly "evolving" and in step with the thrust of the present government's *"Matwid na Daan"* for transparency and accountability in the elections. Why the seeming element of favouritism despite the gross lapses and non-compliance? Violators should be penalized, not cuddled and given preferential treatment. For isn't this the purpose of accountability, to halt the ongoing acceptance of wrongdoing in order to move forward?

AES Watch
Secretariat: c/o CenPEG Office, 3/F, College of Social Work and Community Development Building,
Magsaysay Ave., University of the Philippines, Diliman, Quezon City
Telefax: 929-9526; Email: info@cenpeg.org, cenpeg.info@gmail.com

The Comelec should open wide its doors to all other technology providers that can comply with the highest standards of transparency, accountability and Philippine laws as well as help provide the best suitable technology system at the most affordable cost to Filipino taxpayers.

Signed for AES Watch on March 5, 2012 by:

HON. Teofisto J. Guingona, Jr.
Former Vice President
Republic of the Philippines
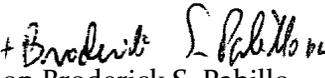
Bishop Broderick S. Pabillo
Chair
National Secretariat for Social Action
Catholic Bishops Conference of the Phils (CBCP)
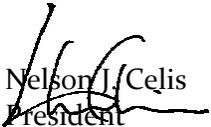
Nelson J. Celis
President
Philippine Computer Society Foundation
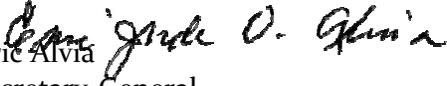
Eric Alvia
Secretary-General
National Movement for Free Elections
(NAMFREL)
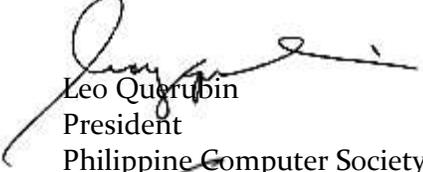
Leo Querubin
President
Philippine Computer Society

Judge Dolores Español
Chair
Transparency International-Phils

Bishop Deogracias Iniguez
Chair of the Commission on
Public Affairs-CBCP
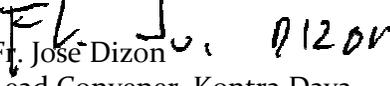
Fr. Jose Dizon
Lead Convener, Kontra Daya
Solidarity Philippines
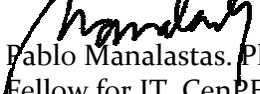
Pablo Manalastas. PhD
Fellow for IT, CenPEG
& Ateneo/UP Faculty for Computer Science
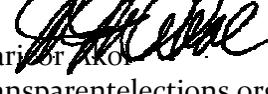
Marlon Akol
Transparentelections.org

Maria Gracia Cielo Padaca
Kaya Natin Movement for Good Governance
& ethical Leadership

Evi-Ta T. Jimenez
Executive Director
CenPEG

Annaleah Escresa
Spokesperson
WE Watch

Edmundo Casino
Vice President
Philippine Computer Society

Rev. Beltran Pacatang
Chairman, Board of Trustees
Healing Democracy Foundation
Monitor, May 2010 Elections
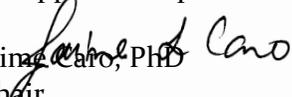
Jaime Caro, PhD
Chair
IT Training Center
University of the Philippines

Felix Muga, PhD
Fellow for Electoral Studies
CenPEG
Philippine Outstanding Scientist, 2004

Fr. Rex Reyes
Secretary General
National Council of Churches
in the Philippines (NCCP)
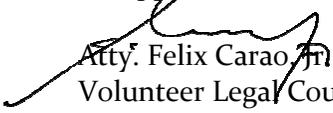
Atty. Felix Carao, Jr.
Volunteer Legal Counsel, AES Watch
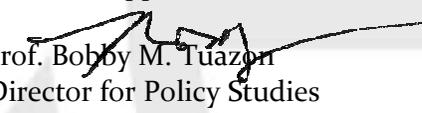
Prof. Bobby M. Tuazon
Director for Policy Studies
CenPEG

Cc: Senate Committee on Electoral Reforms and People Participation
    Comelec Advisory Council
    House Committee on Suffrage and Electoral Reforms

Page 5 of 5 pages