Republic of the Philippines
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City

IN THE MATTER OF THE APPLICATION FOR THE APPROVAL OF THE POWER SUPPLY AGREEMENT (PSA) BETWEEN MANILA ELECTRIC COMPANY (MERALCO) AND POWERSOURCE FIRST BULACAN SOLAR, INC. (PFBS), WITH MOTION FOR CONFIDENTIAL TREATMENT OF INFORMATION,

ERC CASE NO. 2017-012 RC

MANILA ELECTRIC COMPANY (MERALCO) AND POWERSOURCE FIRST BULACAN SOLAR, INC. (PFBS),
Applicants.
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DOCKETED
Date: NOV 21 2017
By:

ORDER

Before this Commission for resolution is the *Petition for Intervention with Entry of Appearance* dated 18 September 2017 filed by CitizenWatch, Inc. (CitizenWatch) on 19 September 2017.

Prefatorily, it must be discussed that the Supreme Court has repeatedly upheld the importance of technical rules of procedure in the proper dispensation and administration of justice and in ensuring the orderly course of proceedings.

In the case of *BPI v. CA*,[1] the Supreme Court had occasion to rule that in order to ensure the expeditious and orderly administration of justice, obedience to procedural rules cannot be dispensed with. To wit:

[1] G.R. No. 168313, 06 October 2010.

> It must never be forgotten that, generally, the application of the rules must be upheld, and the suspension or even mere relaxation of its application, is the exception. This Court previously explained:
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> > The Court is not impervious to the frustration that litigants and lawyers alike would at times encounter in procedural bureaucracy but imperative justice requires ***correct observance of indispensable technicalities precisely designed to ensure its proper dispensation***. It has long been recognized that strict compliance with the Rules of Court is indispensable for the prevention of needless delays and for the orderly and expeditious dispatch of judicial business.
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> > ***Procedural rules are not to be disdained as mere technicalities that may be ignored at will to suit the convenience of a party***. Adjective law is important in ensuring the effective enforcement of substantive rights through the orderly and speedy administration of justice. These rules are not intended to hamper litigants or complicate litigation but, indeed to provide for a system under which a suitor may be heard in the correct form and manner and at the prescribed time in a peaceful confrontation before a judge whose authority they acknowledge.
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> > ***It cannot be overemphasized that procedural rules have their own wholesome rationale in the orderly administration of justice. Justice has to be administered according to the Rules in order to obviate arbitrariness, caprice, or whimsicality***.

The application of rules of procedure cannot be made to depend upon the whim and caprices of any party. Procedural rules were put in place for the protection of substantive rights – by implementing an orderly system for all interested parties to be given an opportunity to be heard within reasonable periods, without unnecessary delays.[2]

As such, the Commission's procedural rules, particularly on the period to file a Petition for Intervention under Section 2, Rule 9 of the

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[2] *Id.*

2006 ERC Rules of Practice and Procedure (2006 RPP), must be upheld at all times. The unjustified relaxation of the Commission's rules of procedure could set a dangerous precedent to all future proceedings filed before it. More importantly, it undermines the process which must be accorded its due respect. Therefore, any exercise of liberality or clemency by the Commission may only be done in the most meritorious of circumstances.

ANTECEDENTS

On 23 February 2017, Applicants Manila Electric Company (MERALCO) and Powersource First Bulacan Solar, Inc. (PFBS) filed a *Joint Application with Motion for Confidential Treatment Information* dated 10 February 2017 seeking the Commission's approval of their Power Supply Agreement.

An *Order* and a *Notice of Public Hearing*, both dated 01 June 2017, were issued by the Commission setting the case for hearing on 23 June 2017.

During the hearing on 23 June 2017, the Commission, upon motion of the Applicants, issued an Order of General Default against everyone else not present in the hearing.

On 11 July 2017, Applicant MERALCO filed its *Formal Offer of Evidence* with even date.

On 12 July 2017, Applicant PFBS likewise filed its *Manifestation and Formal Offer of Evidence with Motion for Confidential Treatment of Information* with even date.

Thereafter, on 19 September 2017, CitizenWatch filed a *Petition for Intervention with Entry of Appearance* dated 18 September 2017, praying to be an Intervenor in the instant case. It must be noted that the *Petition for Intervention* was filed eighty-eight (88) days or around three (3) months after the initial hearing and sixty-nine (69) days or around two (2) months after Applicants have rested their case.

CitizenWatch is a non-stock, non-profit association that advocates for the interests of citizens, and is geared towards the strengthening of every citizens' right to voice out their needs and concerns by actively participating in the integral process of decision

making through policy-lobbying, advocating, monitoring and evaluating the development programs in the country.

As such, it seeks to participate as an intervenor in the instant Joint Application so that the people may be heard and defended for their protection as any determination by the Commission would affect the price of electricity charged to the consumers.

On 06 October 2017, PFBS filed its *Opposition (To Petition For Intervention with Entry of Appearance)* with even date on the ground that it was already filed out of time, considering that the Applicants herein have already rested their cases in July 2017 upon the filing of their respective Formal Offers of Evidence.

PFBS likewise alleged that CitizenWatch failed to show that it has a direct and substantial interest in the approval of the *Joint Application* when it merely made general statements as to its interest, i.e. "that any decision, order, ruling or resolution in the instant case to be issued by this Honorable Commission would necessarily affect the consumers, including members of CitizenWatch" and "so that the people may be heard and defended".

The Commission then issued an *Order* dated 12 October 2017 requiring applicant MERALCO to file its Comment to CitizenWatch's Petition.

Thus, on 25 October 2017, MERALCO filed its *Opposition (to Citizenwatch's Petition for Intervention with Entry of Appearance dated 18 September 2017)* dated 24 October 2017 on the ground that the Joint Application and the Notice of Public Hearing have been published several times in various newspapers of general circulation. Likewise, during the hearing on 23 June 2017, the Commission has already issued an Order of General Default against all other persons that had not filed their intervention.

On 02 November 2017, CitizenWatch filed a *Reply to the Opposition.*

In its Reply, CitizenWatch elaborated its interest in the resolution of the *Joint Application.* CitizenWatch reiterated its advocacy, among which is to foster vigilance among government regulators in enforcing laws against illegal industry practices to protect the consuming public. It also aids in the formulation of sound,

developmental and fair policies and regulations to address the needs of citizens.

Further, the members of CitizenWatch are consumers of MERALCO. Thus, they will have to pay the generation charges passed on by MERALCO.

CitizenWatch also invoked the liberal application of rules of procedure in quasi-judicial bodies, thus:

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> 9. Technicalities and the rigid application of rules of procedure should not be used to deprive parties of the opportunity to be heard. Rules should facilitate instead of frustrating the administration of justice.

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For these reasons, CitizenWatch insists that it be allowed to participate as an intervenor herein.

ISSUE

The issue before this Commission is whether CitizenWatch, Inc. should be allowed to participate as an Intervenor in the instant case.

THE COMMISSION'S RULING

In a Commission meeting held on 17 November 2017, the Commission deliberated, and resolved to deny the Petition for Intervention filed by CitizenWatch, Inc. Be that as it may, the Commission treats the Petition for Intervention as an Opposition or Comment to the instant Application. Hence, as an Oppositor, it is not precluded from filing comments, and submitting other supporting documents, that may be considered by the Commission in the resolution of the instant Application.

DISCUSSION

I. CitizenWatch failed (a) to file its Petition for Intervention within five (5) days prior to the date of

scheduled hearing and (b) to show good cause for the belated filing of its Petition for Intervention

Section 2, Rule 9 of the ERC Rules of Practice and Procedure (RPP) governs the filing of petitions for intervention, thus:

> Section 2. Filing of Petitions to Intervene.- Petitions under this rule shall be served on the original parties and filed with the Commission **not less than five (5) days prior to the time the proceeding is called for hearing**, unless the notice of hearing fixes the time for filing such petitions, in which case such notice shall govern.
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> x x x

Based on the foregoing rule, Petitions for Intervention must be filed **at least five (5) days before the date of hearing**, or at least 5 days before the scheduled hearing on 23 June 2017. However, it must be noted that the said Petition was belatedly filed by Petitioner on 19 September 2017 or eighty-eight (88) days after the initial hearing.

The *Notice of Public Hearing* dated 01 June 2017 adopts the same five (5)-day period prior to initial hearing, *to wit*:

> All persons who have an interest in the subject matter of the proceeding may become a party by filing, at **least five (5) days prior to the initial hearing** and **subject to the requirements in the ERC's Rules of Practice and Procedure**, a verified petition with the Commission x x x. (Emphasis supplied.)

Records will bear that there was no verified petition for intervention filed by the Petitioner within the period provided in the Rules and neither did the Petitioner appear at the initial hearing held on 23 June 2017 despite several publications of the Notice of Public Hearing in newspapers of nationwide circulation and posting of the said hearing schedule on the ERC website, as well as in conspicuous places like bulletin boards of other public offices.

During the same hearing, the Commission issued an Order of General Default, upon motion of Applicants.

The effect of the issuance of an Order of General Default in proceedings before the Commission is the same as that issued in land registration cases. According to relevant laws and jurisprudence on land cases, an order of general default is issued by a court upon motion of the applicant if no person appears and answers within the time allowed.[3]

In the same case, the Supreme Court held that an order of general default is issued for the speedy resolution of cases.[4] As such, all parties who have already been declared in default shall no longer be allowed to take part in the trial but they shall be entitled to notice of subsequent proceedings.

Accordingly, the failure of the Petitioner to appear during the hearing placed it in default and barred it from participating therein.

The second part of Section 2, Rule 9 of the 2006 RPP allows the belated filing of a petition for intervention as long as it is justified by an exceptional circumstance or compelling reason that would constitute good cause acceptable to the Commission, to wit:

> Section 2. Filing of Petitions to Intervene.- x x x
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> A petition, which **for good cause shown** was not filed within the time herein limited, may be presented to and allowed or denied by the Commission or the presiding officer at the time the proceeding is called for hearing.

To reiterate, CitizenWatch filed its petition after the lapse of eighty-eight (88) days at least three (3) months from the scheduled date of initial hearing of the instant case.

A perusal of the Petition for Intervention shows that no explanation was made by CitizenWatch to justify its belated filing. Any party who seeks the exercise of liberality in the application of rules of procedure has the burden of proving that there exists exceptional circumstance or compelling reason to relax the rules. Every assertion must be accompanied by a valid explanation of the aggrieved party's failure to comply with applicable rule.[5]

The Commission, considering all attendant circumstances on a case-to-case basis, is empowered to decide which instances would

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[3] *Jose R. Martinez v. Republic of the Philippines, G.R. No. 160895, 30 October 2006.*
[4] *Id.*
[5] *Nilo T. Pates v. Commission on Elections and Emelita B. Almirante*, G.R. No. 184915, 30 June 2009.

excuse a relaxation of its own rules of procedure. Jurisprudence is replete with examples of circumstances that would warrant a liberal application of technical rules of procedure.[6]

Based on its various submissions, the only explanation advanced by CitizenWatch is that only recently that it learned of the Joint Application.

No less that Commission's enabling law, R.A. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) and its Implementing Rules and Regulations (EPIRA IRR) require several stages of publication for any application involving rates which directly affect consumers.

Section 43 of the EPIRA requires notices of public hearings for all rate cases to be published at least four (4) times. The afore-cited rule states, to wit:

> Section 43. Functions of the ERC. – x x x
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> All notices of hearings to be conducted by the ERC for the purpose of fixing rates or fees shall be published at least twice for two successive weeks in two (2) newspapers of nationwide circulation.

Consistent with the above-cited provision, the EPIRA IRR also requires a separate yet similar publication. Section 4(e), Rule 3 of the EPIRA IRR requires both notice and publication for all applications directly affecting the consuming public. The EPIRA IRR provides:

> Section 4. Responsibilities of the ERC. – x x x
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> Any application or petition for rate adjustment or for any relief affecting the consumers must be verified, and accompanied with an acknowledgement of receipt of a copy thereof by the LGU Legislative Body of the locality where the applicant or petitioner principally perates together with the certification of the notice of

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[6] *Fernando G. Manaya v. Alabang Country Club Incorporated*, G.R. No. 168988, 19 June 2007:
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In Ramos v. Bagasao, 96 SCRA 395, we excused the delay of four days in the filing of a notice of appeal because the questioned decision of the trial court was served upon appellant Ramos at a time when her counsel of record was already dead. Her new counsel could only file the appeal four days after the prescribed reglementary period was over. In Republic v. Court of Appeals, 83 SCRA 453, we allowed the perfection of an appeal by the Republic despite the delay of six days to prevent a gross miscarriage of justice since the Republic stood to lose hundreds of hectares of land already titled in its name and had since then been devoted for educational purposes. In Olacao v. National Labor Relations Commission, 177 SCRA 38, 41, we accepted a tardy appeal considering that the subject matter in issue had theretofore been judicially settled, with finality, in another case (Emphasis ours.)

> publication thereof in a newspaper of general circulation in the same locality.

In the case of *Freedom from Debt Coalition vs. Energy Regulatory Commission*,[7] the Supreme Court explained the rationale behind the publication requirements espoused by the EPIRA and its IRR, to wit:

> Obviously, the new requirements are aimed at protecting the consumers and diminishing the disparity or imbalance between the utility and the consumers. The publication requirement gives them enhanced opportunity to consciously weigh the application in terms of the additional financial burden which the proposed rate increase entails and the basis for the application. **With the publication of the application itself, the consumers would right from the start be equipped with the needed information to determine for themselves whether to contest the application or not and if they so decide, to take the needed further steps to repulse the application**. (Emphasis ours.)

Applications for the approval of Power Supply Agreements, as well as other types of applications filed with the Commission which directly affect consumers are akin to land registration cases wherein the requirement of notice and publication is indispensable.[8] Land registration cases, as repeatedly held by the Supreme Court, are in the nature of an action *in rem*. An action *in rem* is that which concerns the status of the parties therein, which affects or binds the whole word.

The Commission treats PSA applications and other rate cases as actions *in rem* because the resolution of such cases would directly affect all consumers and the general public, who ultimately bear the burden of shouldering any change in rates.

In actions *in rem*, courts or tribunals need not acquire jurisdiction over the parties as these are actions against the thing itself. Actions *in rem* require publication, not for the purpose of vesting the court with jurisdiction, but for complying with the

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[7] G.R. No. 161113,15 June 2004.

[8] *Republic of the Philippines vs. Florencia Marasigan and Hon. Court of Appeals, G.R. No. 85515, 06 June 1991*:

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Section 23 of P.D. No. 1529 is entitled Notice of initial hearing, publication, etc. and provides, inter alia, that:

> The public shall be given notice of initial hearing of the application for land registration by means of (1) publication; (2) mailing; and (3) posting.

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requirements of fair play or due process in order that the interested parties may be informed of the pendency of the application and may thereby take steps to protect their interests, or the interests of their constituents, if they are so minded. As the Supreme Court explained in the case of *De Pedro vs. Romasan Development Corporation*[9], to wit:

> Courts need not acquire jurisdiction over parties on this basis in *in rem* and *quasi in rem* actions. Actions *in rem* or *quasi in rem* are not directed against the person based on his or her personal liability.
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> Actions *in rem* are actions against the thing itself. They are binding upon the whole world. x x x
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> However, to satisfy the requirements of due process, jurisdiction over the parties in *in rem* and *quasi in rem* actions is required.
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> The phrase, "against the thing," to describe *in rem* actions is a metaphor. It is not the "thing" that is the party to an *in rem* action; only legal or natural persons may be parties even in in rem actions. "Against the thing" means that resolution of the case affects interests of others whether direct or indirect. It also assumes that the interests — in the form of rights or duties — attach to the thing which is the subject matter of litigation. In actions *in rem*, our procedure assumes an active vinculum over those with interests to the thing subject of litigation.

The case of *Alba vs. Court of Appeals and Herrera*[10] further emphasized the purpose of publication in *in rem* proceedings, thus:

> Moreover, **the publication of the order is a notice to all indispensable parties**, including Armi and petitioner minor, **which binds the whole world to the judgment that may be rendered in the petition.** An *in rem* proceeding is validated essentially through publication. The absence of personal service of the order to Armi was therefore cured by the trial court's compliance with Section 4, Rule 108, which requires notice by publication x x x (Emphasis ours)

In carrying out the above pronouncements, the 2006 RPP strictly requires two (2) kinds of publication in relation to PSA Applications, to wit:

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[9] *Aurora N. De Pedro vs. Romasan Development Corporation*, G.R. No. 194751, 26 November 2014.

[10] *Rosendo Alba, minor, represented by his mother and natural guardian, Armi A. Alba, and Armi A. Alba, in her personal capacity vs. Court of Appeals and Rosendo C. Herrera*, G.R. No. 164041, 29 July 2005.

1. Publication of the Application as a Pre-filing Requirement pursuant to Section 2, Rule 6 of the RPP, to wit:

> Rule 6, Section 2. Pre-filing Requirements for Rate Applications and Other Applications/ Petitions for Relief Affecting Consumers.- Before the Commission shall accept and docket rate applications and other applications or petitions for relief affecting the consumers, the applicant or petitioner must comply with the following requirements:
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> (b) The applicant or petitioner must **cause the publication of the entire application or petition**, excluding its annexes, and not a mere notice of filing of notice of application or petition, **in a newspaper of general circulation** within its franchise area or area where it principally operates. (Emphasis Ours).

2. Publication of the Notice of Public Hearing pursuant to Section 4, Rule 13 of the RPP, to wit:

> Rule 13. Section 4. Publication and Other Requirements.- The **notice of hearing for any application or petition for rate adjustment** or for any relief affecting the consumers shall be **published by the applicant or petitioner, at its own expense, at least twice for two (2) successive weeks in two (2) newspapers of nationwide circulation**, the last day of publication to be made not to be later than ten (10) days before the scheduled hearing.
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> All notices of hearing of any application or petition shall also be **posted on the Commission's Website** upon its issuance. (Emphasis Ours).

As pointed out by MERALCO in its *Opposition,* the public, including Petitioner, was put on notice about the Application when it published the same and the Notice of Public Hearing in the following instances:

1. As a pre-filing requirement, the Application was published in the 13 February 2017 edition of the Business Mirror, a newspaper of general circulation in the Philippines;

2. As a jurisdictional requirement, the Notice of Hearing dated 01 June 2017 was published twice for two (2) successive weeks in the 6 and 13 June 2017 editions of the Malaya Business Insight and Daily Tribune, both newspapers of general circulation in the Philippines; and

3. The said Notice of Hearing was likewise posted on MERALCO's website and business centers, as well as in the appropriate bulletin boards in the City Halls, Municipal Halls, or Provincial Capitol/Halls of the Cities, Municipalities and Provinces within the franchise area of MERALCO.

Likewise, the Notice of Public Hearing and the schedules of subsequent hearings were posted in the Commission's website.

Neither the Applicants nor the Commission is duty-bound to personally notify each person that may be affected by an Application as regards the filing and hearing thereof.

The foregoing publications and postings serve as sufficient notice to the whole world. The Commission had accordingly acquired jurisdiction over in the instant case through the submission of the Applicants of their proofs of compliance with the publication and posting requirements. Likewise, by virtue of the publication, the Commission acquired jurisdiction over any one that may be interested in the instant case, including CitizenWatch.

Accordingly, any order or decision entered in the instant case, in the absence of fraud, is conclusive upon and against all persons, regardless of whether or not they received actual notice of the proceedings.

Consequently, the Order made by the Commission acting within its jurisdiction, including an Order of General Default, is valid, even if the above-named Petitioner was not personally informed thereof. To reiterate, the Commission has already issued an Order of General Default against everyone else who failed to signify their intent to intervene in the case during the hearing on 23 June 2017. This includes CitizenWatch who failed to timely signify its intention to participate in the hearing.

In view of the foregoing, the Commission denies the Petition for Intervention for CitizenWatch's failure to (a) file its Petition for Intervention within the period prescribed by the 2006 RPP and (b) to advance a meritorious explanation as to the belated filing thereof.

II. The Commission hereby treats the Petition for Intervention as an Opposition.

It must be recalled that in the instant case, the Applicants have already rested their case, and have submitted their Formal Offer of Evidence. Hence, the proceeding has already been terminated.

Section 5, Rule 9 of the 2006 RPP provide that an Opposition or Comment to the instant Application may only be filed before the Applicants rest their case. The afore-cited rule states:

> Section 5. Opposition and Comment. - Any person other than a party of record who objects to the approval of an application, petition, or other matter which is, or will be, under consideration by the Commission, or otherwise may have some comments thereon, may file an opposition thereto or comment **thereon at any stage of the proceedings before the applicant or petitioner rests its case.** (Emphasis ours.)
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It is clear from the records of the case that the Petition for Intervention was filed sixty-nine (69) days or two (2) months after Applicants MERALCO and PFBS have submitted their respective Formal Offers of Evidence and have thus rested their case.

While the rules only allow the submission of an opposition before an Applicant rests its case, nonetheless, the rules also allow the Commission, *motu propio,* to reopen the proceedings for the reception of further evidence at any time prior to the issuance of its decision, after notice to the parties and opportunity to be heard, pursuant to Section 17, Rule 18 of the RPP, to wit:

> Section 17. Reopening of Proceedings. - Notwithstanding the provisions of Section 16, any party may file a motion for reopening of the proceedings for the purpose of taking additional evidence at any time after the presentation of evidence has been completed but before promulgation of a decision, order or resolution, if during that period there should occur or arise transactions, events or matters, whether factual or legal resulting in a changed situation of the parties. Copies of such motion shall be served upon all parties or their attorneys of record, and shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. Within ten (10) days following the service of such motion, or such shorter or longer time as the Commission shall order, any other party to the proceedings may object to the motion.
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> **The Commission may also motu proprio reopen the proceedings for reception of further evidence at any time prior to the issuance of its decision, order, or resolution, after notice to the parties and opportunity to be heard.** (Emphasis Ours).

Accordingly, in view of the Petitioner' failure to submit its Petition for Intervention on time, and after having given the Applicants an opportunity to file their Comment or Opposition thereto, the subject Petition for Intervention filed CitizenWatch is hereby treated as an Opposition.

It must be emphasized that the Commission, in resolving to admit Petitioner CitizenWatch as an Oppositor in the instant case, is mindful of the right of all interested parties to due process of law. Thus, the said Petitioner, as Oppositor, is not precluded from advancing its views and position in the instant case to the Commission under Section 5, Rule 9 of the Rules.

WHEREFORE, in view of the foregoing, the Petition for Intervention filed by CitizenWatch is hereby DENIED. Instead, CitizenWatch is given the status of an Oppositor in the instant case.

Accordingly, CitizenWatch is given a period of **ten (10) days** from receipt of this Order within which TO SUBMIT its Comment or Opposition on the Joint Application filed by Applicants MERALCO and PFBS.

SO ORDERED.

Pasig City, 17 November 2017.

FOR AND BY AUTHORITY
OF THE COMMISSION:

JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Commissioner

LS: MCC/LSP/APV

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