



REPUBLIC OF THE PHILIPPINES  
SENATE ELECTORAL TRIBUNAL  
COA-NCR Bldg., Butasan Road, Quezon City

FRANCIS N. TOLENTINO,  
Protestant,

SET Case No. 001-16

-versus-

LEILA M. DE LIMA,  
Protestee.

X-----X

RESOLUTION NO. 16.- 104

As agreed upon by the parties, the reception of evidence of Protestant Francis N. Tolentino commenced on 29 January 2018. At the said hearing, counsel for Protestant waived the presentation of twenty-nine (29) witnesses listed in the Amended Preliminary Conference Order dated 09 May 2017 as well as the submission of their respective affidavits. He, however, manifested that he would be filing a Motion for substitution of evidence.

Hearing dates and the corresponding witnesses to be presented were set before the Hearing Commissioner. Counsel for Protestant committed to present his first round of evidence on 12 February 2018. Hearings were also scheduled on February 15, and 19 to 23, 2018.

On 05 February 2018, Protestant Tolentino filed an *Urgent Motion* praying for the postponement of the commencement of the presentation of evidence to the following week or on Monday, 19 February 2018 and for the resetting of scheduled hearing dates in accordance with such postponement.

The Executive Committee of the Tribunal granted Protestant's *Urgent Motion* on 06 February 2018, subject to the condition that the delay caused by such postponement shall be charged to the period allotted for the presentation of Movant's evidence in accordance with Rule 64 of the 2013 Rules of the Senate Electoral Tribunal.

Protestant filed another *Urgent Motion* dated 12 February 2018, praying for the resetting of the hearing date to present the affidavit of Mr. Felix P. Muga II from 19 February 2018 to sometime from 27 February 2018 to 02 March 2018 due to a medical procedure that said witness recently underwent.

On the same date, Protestant filed a *Motion for the Issuance of Subpoena Duces Tecum and Ad Testificandum* to compel the attendance of witnesses to testify and to produce pertinent election documents. Some of the witnesses listed in the Motion are not among those mentioned in the Amended Preliminary Conference Order, hence they were excluded in the subpoena issued by the Hearing Commissioner.

On 14 February 2018, Protestant again filed an *Urgent Motion* praying for the further postponement of the presentation of evidence from 19 February 2018 to Monday, 26 February 2018 and for the resetting of scheduled hearing dates in accordance with such postponement. Said *Urgent Motion* was not acted upon for lack of material time to convene the Executive Committee of the Tribunal as the pleading was filed on 14 February 2018 at 4:30 P.M., which is the closing of office hours of the Tribunal, and 16 February 2018 is a special non-working holiday. Besides, a subpoena had already been issued to the officials of the Commission on Elections (COMELEC) who were scheduled to testify on 19 February 2018. In fact, one of them had asked for clarification regarding the documents mentioned in the subpoena.

On 15 February 2018, Mr. Rouie J. Peñalba, through the COMELEC Law Department, filed a *Motion for Postponement to Comply with the Subpoena Duces Tecum and Ad Testificandum* dated 13 February 2018. According to COMELEC Law Department, Mr. Peñalba had a conflict of schedule due to a similarly dated hearing on 19 February 2018 at 8:30 in the morning at the Regional Trial Court of Manila, Branch 46, relative to Criminal Case No. R-MLA-17-00244 CR entitled "*People of the Philippines vs. Marlon Garcia, et. al.*" which was set in open court during the hearing held in 15 January 2018. In order to comply with the subpoena, Mr. Peñalba requested that he be accommodated on the 27 February 2018 hearing.



The 19 February 2018 hearing pushed through as scheduled. Five (5) witnesses from the COMELEC testified and copies of the pertinent documents were submitted to the Tribunal. During the course of the hearing, it was agreed that counsel for Protestant would present Mr. Felix P. Muga II on 27 February 2018 together with Mr. Rouie J. Peñalba who earlier manifested that he would be available on the said date.

Further, Protestant's counsel informed the Hearing Commissioner that he would be filing a motion to postpone the hearings scheduled for February 20 to 23, 2018, such that the hearing would resume on 26 February 2018. Upon being apprised that such postponement shall be charged to the period allotted for the presentation of Protestant's evidence in accordance with the 2013 SET Rules, counsel for Protestant agreed.

Thus, in the afternoon of the same day, Protestant Tolentino filed two (2) separate *Urgent Motions*: (a) an *Urgent Motion (To Admit Additional Evidence)* dated 19 February 2018, which prays that Protestant be allowed to present additional evidence as identified therein and that corresponding amendments be made to the Amended Preliminary Conference Order to reflect such additional evidence; and (b) an *Urgent Motion to Reset Hearings* also dated 19 February 2018, praying for the revision of the hearing dates agreed upon during the 29 January 2018 initial hearing and resetting the scheduled hearing dates in accordance with the schedule indicated therein which in effect would result to the postponement of the presentation of evidence to 26 February 2018, instead of 20 February 2018.

Protestant supports his *Urgent Motion (To Admit Additional Evidence)* in this wise:

"x x x considering the additional arguments in the Amended Election Protest and the Supplemental Election Protest, and given that one of the identified issues in the Amended Preliminary Conference Order is '*whether or not the purported Senatorial results in the protested areas/precincts are fraudulent, manufactured, padded, altered and distorted vote total, which do not reflect the true number of votes cast by the electorate in the protested areas/precincts*', it has become imperative, in the interest of justice, to request the Honorable Tribunal to allow the presentation of additional evidence not otherwise indicated in the Amended Preliminary Conference Order, and to introduce necessary amendments to such Order."

With respect to his *Urgent Motion to Reset Hearings*, a perusal thereof showed that Protestant included in the schedule of hearings the presentation of evidence that are the subject of his *Urgent Motion (To Admit Additional Evidence)*, despite being advised by the Hearing Commissioner to limit his evidence to those included in the Amended Preliminary Conference Order pending action on his motion by the Tribunal.

Several motions for the issuance of subpoenas were successively filed on 21, 22 and 23 February 2018. Upon close examinations of their contents, the witnesses who were being called to testify as well as the documents which were being required to be produced are among those covered by Protestant's *Urgent Motion (To Admit Additional Evidence)*. This being the case, the Hearing Commissioner could not issue the requested subpoena.

In Resolution No. 16-99 dated 20 February 2018, the Tribunal required Protestee de Lima to comment on Protestant Tolentino's *Urgent Motion (To Admit Additional Evidence)* dated 19 February 2018, within five (5) days from receipt of said Resolution. During the hearing on 27 February 2018, counsel for Protestee de Lima manifested that she has yet to receive a copy of the said motion. It was confirmed by the Protestant's counsel that the copy intended for Protestee was sent by registered mail. In order not to cause any further delay, the Tribunal furnished Protestee's counsel a copy thereof.

In the meantime, reception of evidence took place on 26, 27 and 28 February 2018. Two (2) COMELEC personnel from the Information Technology Department testified on 26 February 2018. On 27 February 2018, counsel for Protestant was not able to present Mr. Felix P. Muga II in view of the objection raised by the counsel for Protestee de Lima for his non-compliance with Rule 66 of the 2013 SET Rules which requires the submission of the Judicial Affidavit of a witness five (5) days prior to his scheduled hearing. Mr. Rouie J. Peñalba, however, was able to testify on said date. The 28 February 2018 hearing was devoted to the marking of documentary exhibits for the Protestant.



Pending resolution of his *Urgent Motion (To Admit Additional Evidence)*, and the numerous and successive motions being filed relative thereto, Protestant Tolentino filed on 02 March 2018 an *Omnibus Motion and Manifestation* praying that the Tribunal: (a) suspend the proceedings without charging to the time allowed under Rule 54 (*should be Rule 64*) of the SET Rules while the pending incidents are not yet resolved by the Tribunal; (b) allow Protestant to present additional evidence; (c) reset the scheduled hearings; (d) direct the Information and Communication Systems and Judicial Records Management Service (ICSJRMS) of the Tribunal to reissue the DVD of decrypted ballots pertaining to twelve (12) clustered precincts with working (uncorrupted) files; and (e) note the additional personnel to operate the photocopying machines of the Protestant.

While it may appear that Protestant had filed numerous Motions, ten (10) to be exact, from 12 February 2018 to 02 March 2018, relative to the reception of evidence for the Protestant which commenced on 12 February 2018, the issue all boils down to his *Urgent Motion (To Admit Additional Evidence)* dated 19 February 2018.

Complying with Resolution No. 16-99 dated 20 February 2018, Protestee de Lima submitted her *Comment/Opposition (To: Protestant's Urgent Motion to Admit Additional Evidence)* on 05 March 2018. De Lima decried the alleged fishing expedition being undertaken by the Protestant by invoking nothing but the "interest of justice." She lamented that this is not the first time that Protestant Tolentino invoked "the interest of substantial justice" as he had banked on it at every turn of his many delays and maneuverings and tactics. She pointed out that the invocation of "interest of justice" is not a magic wand that will automatically compel the Tribunal to suspend its procedural rules. She added that rules should be suspended only on "exceptionally meritorious grounds" which Protestant failed to show.

Protestee de Lima claimed that the documentary and testimonial evidence which Protestant Tolentino intends to present have no bearing on the protest. Specifically, de Lima doubted on how the submission of the names and positions of the personnel of COMELEC and Smartmatic assigned to the regional hubs located in Zamboanga City, General Santos City, Cagayan de Oro City, and Sta. Rosa City and requiring them to testify, would relate to Protestant's case theory or

to the facts already established. Rather, Protestee de Lima intimated her fear that what Protestant can achieve is undue advantage of knowing these personnel who are organic with COMELEC and are likely the same persons who will be responsible in the preparations for the next senatorial elections.

In fine, de Lima prayed for the denial of Protestant's motion so as not to prejudice any further her constitutionally guaranteed rights.

As pointed out by Protestee de Lima, the Preliminary Conference Order dictates the direction of the case and controls the subsequent course of the proceedings. The importance of the Preliminary Conference Order is provided for in Rule 44 of the 2013 Rules of the Tribunal which states:

"Rule 44. Preliminary Conference Order – Within ten (10) days from the termination of the preliminary conference, the Tribunal shall issue an order reciting the matters taken up during the preliminary conference and the action thereon. The contents of the order shall control the subsequent course of the proceedings.

Within five (5) days from receipt of the order, the parties may move for its correction." (Emphasis and underscoring supplied)

Protestant's attention is invited to the use of the word "shall" in the last sentence of the first paragraph of Rule 44. It is elementary in statutory construction that the word "shall" denotes the mandatory character of the rule.<sup>1</sup>

It has been ruled time and again that an election protest involves public interest. Thus, it has been emphasized in election cases that "the preliminary conference and its governing rules are not mere technicalities, which the parties may blithely ignore or trifle with. They are tools meant to expedite the disposition of election cases and must, perforce, be obeyed."<sup>2</sup>

<sup>1</sup> Philippine National Bank v. the Spouses Perez, G.R. No. 187640, 15 June 2011.

<sup>2</sup> C.f. Cabrera v. the Commission on Elections, G.R. 182084, 06 October 2008. (Rule 87 of the 2013 Rule of the SET allows application by analogy or suppletory application of the Rules of Court, other Administrative Circulars issued by the Supreme Court and the Rules of Procedure of the other Electoral Tribunals.)



Notwithstanding the mandatory nature of Rule 44 of the SET Rules, the Tribunal may, in its discretion, relax procedural rules to afford the parties due process and to uphold the will of the electorate, when the circumstances so require. Blind adherence to a technicality, with the inevitable result of frustrating and nullifying the constitutionally guaranteed right of suffrage, cannot be countenanced.<sup>3</sup> The Tribunal adheres to the rulings that courts have the prerogative to relax procedural rules of even the most mandatory character, mindful of the duty to reconcile both the need to speedily put an end to litigation and the parties' right to due process. In numerous cases, this Court has allowed liberal construction of the rules when to do so would serve the demands of substantial justice and equity.<sup>4</sup>

It may be recalled that the Tribunal, in resolving the issue of whether or not the instant protest should be dismissed in view of Protestant's failure to submit his Preliminary Conference Brief as required by Resolution No. 16-08 dated 08 September 2016, the Tribunal stated in Resolution No. 16-20 dated 01 December 2016, thus:

"The mission of this Tribunal is to steadfastly uphold the true will of the electorate as the sole judge of all contests relating to the election, returns and qualifications of Members of the Senate. Its Rules shall be liberally construed in order to achieve a just, expeditious and inexpensive determination and disposition of every contest brought before the Tribunal. In adherence to its mission, this Tribunal is inclined to give Protestant his day in court to prove his case not only to uphold his own interest but to ascertain and uphold the true will of the electorate."<sup>5</sup> (Emphasis and underlining supplied)

In order not to defeat the purpose of Resolution No. 16-20, that is, to give Protestant his day in court to prove his case, the Tribunal will allow the introduction of additional evidence by Protestant. The grant, however, is partial and subject to restrictions. Upon careful consideration, the Tribunal is inclined to disallow the following testimonial evidence listed in paragraph 5.2 of the *Urgent Motion (To Admit Additional Evidence)* for the reasons stated below, to wit:

<sup>3</sup> Asistio vs. Canlas Trinidad-Pe Aguirre et.al., G.R. No. 191124, April 27, 2010.

<sup>4</sup> Thenamaris Philippines, Inc. et. al. vs. CA et.al., G.R. No. 191215, February 3, 2014.

<sup>5</sup> SET Resolution No. 16-20 dated 01 December 2016, pp. 15-16.

Witness No.	Evidence	Reason
10	Rouie Peñalba, Information Technology Officer II, COMELEC's Information Department  <i>Purpose:</i> To prove that the unauthorized introduction of a new program into the transparency server violated election laws and as a result thereof, showed the vulnerability of the system and puts into question the results.	Mr. Peñalba had already testified on the matters stated in the Protestant's <i>Motion</i> on 27 February 2018.
19	COMELEC personnel who explained to Tribunal why ballots with non-matching ballot ID numbers were accepted by certain VCMs  <i>Purpose:</i> To explain to the Tribunal why the ballots with non-matching ballot ID numbers would still be accepted by VCMs.	This issue is moot. COMELEC submitted its explanation in compliance with Resolution No. 16-83 dated 22 November 2017 on 27 December 2017, copy furnished the parties.
20	Municipal Treasurer Grace A. Jomillo of Dumangas, Iloilo  <i>Purpose:</i> To explain why the ballot box for Clustered Precinct No. 8, which was turned over to the SET collection team contained ballots and election documents belonging to another Clustered Precinct (Resolution No. 16-88).	Treasurer Jomillo's explanation is already on record. She submitted her sworn statement dated 29 January 2018 and was received by the Tribunal on 30 January 2018.
21	Municipal Treasurer Alona U. Friades of Tongkil, Sulu  <i>Purpose:</i> To explain why the ballot box for Clustered Precinct No. 15 which was turned over to the SET collection team contained ballots and election documents belonging to another Clustered Precinct (Resolution No. 16-88)	Resolution No. 16-88 requiring Treasurer Friades to explain the incident did not reach her as the courier was not able to deliver the notice. The more prudent course of action is to resend the notice.
22	Municipal Treasurer Mary Ann Bautista of San Fernando, Pampanga  <i>Purpose:</i> To explain why the ballot box for Clustered Precinct No. 10 were damaged which prevented its revision (Resolution No. 16-88.)	The explanation of Treasurer Bautista has already been put on record. The Tribunal received her sworn statement dated 31 January 2018 on 15 February 2018.



23	COMELEC officer/representative who conducted the investigation on finding 2013 ballots in 2016 ballot boxes	In compliance with Resolution No. 16-83 dated 22 November 2017, the custodians of the ballot boxes already submitted their respective explanations and turned over the 2016 ballot boxes to the Tribunal.
24	SA Martini B. Cruz, Chief of NBI Cybercrime Division  <i>Purpose:</i> To explain the investigation conducted of the alleged "unusual shutdown of computer servers" at the Memory Configuration Room of the COMELEC Warehouse in Sta. Rosa Laguna, alleging possible System/Data Interference, which are violations of R.A. 10175 of the Cybercrime Prevention Act of 2012.	This issue is within the jurisdiction of the COMELEC as explained in Resolution No. 16-34. Moreover, criminal cases such as violations of RA No. 10175 is not within the Tribunal's jurisdiction.
25	Ferdinand P. De Leon, Director, Information Technology Department, COMELEC  <i>Purpose:</i> To explain the alleged "unusual shutdown of computer servers" at the Memory Configuration Room of the COMELEC Warehouse in Sta. Rosa, Laguna	Same reason as abovementioned, i.e., not within the jurisdiction of the Tribunal

The explanations submitted in connection with items Nos. 19 to 23 shall be the subject of another resolution upon evaluation of the results of the revision proceedings which was conducted on March 5 to 7, 2018.

It should be noted further that in the aforesaid *Omnibus Motion and Manifestation*, Protestant again included in the list of evidence to be presented documents which were already presented on 19 February 2018, namely: (1) Certificates of Canvass and Statement of Votes of the Protested Precincts; (2) Project of Precincts for the 2016 Automated National and Local Elections; and (3) VCMs under the COMELEC's protective custody. This being the case, there appears to be no justifiable reason to present the same anew.

Likewise, Mr. Rouie J. Peñalba had already testified on 27 February 2018. With respect to Mr. Felix Muga II, Protestant is deemed to have waived his right to present said witness for his failure to comply with Rule 66 of the 2013 SET Rules requiring the submission of the judicial affidavit five (5) days prior to the scheduled hearing. Recalling these witness shall not be allowed, as well.

With respect to the personnel who manned the regional hubs specially mentioned by Protestee de Lima in her *Comment/Opposition*, the Tribunal believes that their testimony will shed light on how this may have resulted into the alleged pre-loaded SD cards. The establishment of the regional configuration hubs and the presence of pre-loaded SD cards were specifically alleged in the Amended Election Protest.<sup>6</sup>

However, reference to the Supplemental Election Protest as a basis for the motion to admit additional evidence by the Protestant's counsel has not escaped the Tribunal's attention. Counsel is reminded to be cautious not to muddle the facts of the instant case. The *Motion to Admit Supplemental Protest* had long been denied, specifically on 01 December 2016, thru Resolution No. 16-21.

To recall further, the Preliminary Conference Order was issued on 02 March 2017 and the same was amended on 09 May 2017 upon motion of the Protestant. The agreement that the reception of evidence would commence on 29 January 2018 was made on 26 September 2017. Protestant had more than enough time to prepare his evidence, be it documentary or testimonial.

The change of collaborating counsel shall not be a ground to delay the proceedings and neither will the entry of appearance of another collaborating counsel. Received on 02 March 2018 is the *Entry of Appearance* of Maria Cecilia I. Olivas as collaborating counsel for the Protestant, with the written conformity of Protestant Francis N. Tolentino.

Foregoing premises considered, reception of evidence shall resume on 22 March 2018 and shall proceed daily until completion. No further postponement shall be allowed. In the interest of justice, the suspension from March 1 to 21,

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<sup>6</sup> Amended Election Protest, pp. 38-39.



2018 shall not be deducted from the number of hearing days allotted to Protestant for the presentation of his evidence. Protestant is, however, reminded that he had consumed twelve (12) hearing days and that the thirty (30) hearing days allowed under Rule 64 of the 2013 SET Rules cover both the pilot and non-pilot precincts.

While the Tribunal allows the presentation of the rest of the evidence itemized in Protestant's *Urgent Motion (To Admit Additional Evidence)* dated 19 February 2018 as reiterated in his *Omnibus Motion and Manifestation* dated 01 March 2018, Protestant, in requesting for the issuance of subpoena, is required to identify the witnesses listed therein by names, addresses and possibly the official positions or designations as well as the units or offices to which the witnesses belong and such other relevant information that will facilitate the issuance of subpoena. Similarly, all documents required to be subpoenaed should be clearly described and the custodians properly identified. Non-compliance with these requirements shall be deemed a waiver of the right to present said witnesses or documents as the Hearing Commissioner is directed not to issue the subpoena.

With respect to the reissuance of Digital Video Disc (DVD) of decrypted ballots pertaining to twelve (12) clustered precincts with working files, be it noted that the ICSJRMS of the Tribunal is not the origin of the files recorded in said DVDs but only served as the custodian thereof. Protestant Tolentino has to request from the COMELEC as only the COMELEC can guaranty clear and complete copies of whatever was decrypted. However, Protestant is not allowed to enlarge again the scope of his presentation of the decrypted ballots. It should be limited to the twelve (12) clustered precincts earlier authorized in the Amended Preliminary Conference Order.

Further, let it be put on record that the decryption of Secure Digital (SD) Cards was completed on 28 February 2018. As such, evidence relative to the decryption activity should now be included in the schedule of hearings.

As to the ongoing photocopying of contested ballots, the name of additional personnel to operate Protestant's photocopying machine is noted with a reiteration of the 23 March 2018 deadline for the photocopying activity which was set in Resolution No.16-94 dated 12 February 2018.

ACCORDINGLY, the Executive Committee of the Tribunal Resolves to:

1. **PARTIALLY GRANT** Protestant Tolentino's *Urgent Motion* (To Admit Additional Evidence) dated 19 February 2018;
2. **SET** the resumption of the reception of evidence for the Protestant on 22 March 2018 at 9:00 o'clock in the morning and shall proceed daily until completion, with **WARNING** that no further postponement shall be allowed;
3. **REQUIRE** Protestant Tolentino to file within two (2) days from receipt of this Resolution all Requests for the Issuance of Subpoena, subject to the following requisites: a) witnesses must be identified by name, with their respective positions or designations, the offices they represent, as well as the specific addresses where the subpoenas may be properly served; b) all documents should be clearly described and the custodians properly identified; and c) the date when the witnesses and/or documents are to be presented;
4. **REQUIRE** the Election Records and Statistics Department of the Commission on Elections (COMELEC-ERSD) to furnish Protestant Tolentino anew with uncorrupted copies of the Digital Video Disc (DVD) of the decrypted Secure Digital (SD) Cards containing to the following precincts:

Precinct No.	City/Municipality	Province
0015A	Al-Barka	Basilan
0001A	Picong (Sultan Gumander)	Lanao del Sur
0044A	Sultan Naga Dimaporo (Karomatan)	Lanao del Norte
0080A	Pikit	North Cotabato
0001A	Cordoba	Cebu
0001A	San Jose de Buan	Western Samar
0004A	Calbayog City	Western Samar
0001A	Santa Margarita	Western Samar
0001A	Bocaue	Bulacan
0029P1	Iloilo City	Iloilo
0022B	Sindangan	Zamboanga del Norte
0008B	Dipolog	Zamboanga del Norte

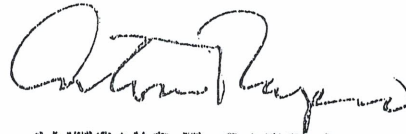


5. NOTE Protestant's *Urgent Motion* dated 12 February 2018, praying that the hearing date to present the affidavit of Mr. Felix P. Muga II be reset from 19 February 2018 to 27 February 2018 for being moot and DISALLOW the presentation of Mr. Muga in subsequent hearings as Protestant is deemed to have waived his right to present Mr. Muga's testimony for failure to comply with Rule 66 of the 2013 SET Rules;
6. NOTE Protestant's *Motion for the Issuance of Subpoena Duces Tecum and Ad Testificandum* dated 12 February 2018;
7. NOTE without action for being moot Protestant's *Urgent Motion* dated 14 February 2018, praying for the further postponement of the presentation of evidence to Monday 26 February 2018 and for the resetting of scheduled hearing dates in accordance with such postponement;
8. NOTE the COMELEC's *Motion for Postponement to Comply with the Subpoena Duces Tecum and Ad Testificandum* dated 13 February 2018 and the subsequent presentation of the testimony of Mr. Rouie J. Peñalba on 27 February 2018;
9. NOTE without action for being moot Protestant's *Urgent Motion to Reset Hearings* dated 19 February 2018;
10. NOTE Protestant's *Motion for the Issuance of Subpoena Ad Testificandum* dated 19 February 2018;
11. NOTE without action for being moot Protestant's *Motion for the Issuance of Subpoena Ad Testificandum* dated 21 February 2018; *Motions for the Issuance of Subpoena Duces Tecum and Ad Testificandum* dated 22 February 2018 and 23 February 2018;
12. NOTE the additional personnel authorized by the Protestant to operate the photocopying machine relative to the photocopying of ballots with a reminder that 23 March 2018 has been set as the deadline for the photocopying activity; and

13. NOTE the *Entry of Appearance* Maria Cecilia I. Olivas as collaborating counsel for the Protestant filed on 02 March 2018.

SO ORDERED.

08 March 2018.



ANTONIO T. CARPIO  
Senior Associate Justice  
Chairperson

*Teresita Leonardo de Castro*  
TERESITA J. LEONARDO-DE CASTRO  
Associate Justice  
Member



MARIA LOURDES "NANCY" S. BINAY  
Senator  
Member



JOEL VILLANUEVA  
Senator  
Member