TELCONOPOLY: OVERTHROWING THE SHADOW OF REGULATORY CAPTURE AND OPPORTUNISM IN PHILIPPINE TELECOMMUNICATIONS THROUGH INTERCONNECTION AND AN EFFECTIVE GOVERNMENT COMPETITION POLICY*

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> "If the government is to tell big business men how to run their business, then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it? Must capture the government? They have already captured it."
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> *-Woodrow Wilson*[1]

* Awardee, Professor Salvador T. Carlota Prize for Best Paper in Administrative Law and the Law on Public Officers (2011). *Cite as* Marcelino G. Veloso III, *Telconopoly: Overthrowing the Shadow of Regulatory Capture and Opportunism in Philippine Telecommunications through Interconnection and an Effective Government Competition Policy,* 85 PHIL. L.J.602, (page cited) (2011).

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[1] WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE, 201-202 (Library Reprints, first ed. 1906).

INTRODUCTION

Today, four out of every five Filipinos own a cellphone.[2] This percentage is expected to reach 98 percent by the end of 2015.[3] In a country where about 45 percent of the population make less than $2.00 a day, the meteoric rise of cellphone ownership, both previous and forthcoming, is phenomenal as it is meaningful.[4] The numbers suggest that mobile communications, once a luxury during the 1990s, has since become a ubiquitous service that is now universally affordable. This can be inferred to have been caused by the demonopolization and deregulation of the telecommunications industry and the resulting environment of competition brought about by multiple mobile carriers.

It may seem then that the Philippines, after enduring decades of a monopolistic regime, has emerged successful in implanting a competitive habitat for various telecommunication entities. A closer examination of the status quo and recent developments in the field will reveal however that an economic stalemate has taken root wherein only two telecommunication entities have effective control of the market. This situation, despite the decline of prices in recent years, specifically results in an inefficient duopoly rather than a truly competitive environment.

More importantly, the advent of these strong telecoms in the face of an ostensibly weak regulator suggests the existence of regulatory interference. Considering that a compromised agency, whether by regulatory capture or opportunism, is detrimental to the public interest, the government should take the necessary steps to ensure that effective competition exists in the market despite

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[2] Mary Ann Ll. Reyes, NTC sees continued growth in mobile, broadband subscription, PHIL. STAR, Sept. 20, 2010, *available at* http://www.philstar.com/Article.aspx?articleId=614042&publicationSubCategoryId=66. - The NTC expects the number of mobile telephone service subscribers in the country to register a double-digit increase by the end of this year, from over 77 million last year [2009]. Since the population of the Philippines was 94 million in 2010, by inference, a double digit increase from 77 million in 2009 would safely lead to more than an 80 percent mobile penetration rate by the first quarter of 2011.

[3] Paolo Montecillo, RP saturated with cellphones by 2015, PHIL. DAILY INQUIRER, Oct. 1, 2010, available at http://business.inquirer.net/money/topstories/view/20101001-295423/RP-saturated-with-cellphones-by-2015.

[4] The World Bank, Poverty headcount ratio at $2 a day for 2006 [at 2005 international prices], *available at* http://data.worldbank.org/indicator/SI.POV.2DAY. *See also* Doris Dumlao, 23 million Filipinos living below Asia-Pacific poverty line, PHIL. DAILY INQUIRER, Aug. 27, 2008, *available at* http://globalnation.inquirer.net/news/breakingnews/view/20080827-157167/23-million-Filipinos-living-below-Asia-Pacific-poverty-line *citing* an Asian Development Bank Study with data from 2006.

this being considered a liberalized and deregulated space.[5] In particular, this writer posits that the government's first step lies in allowing the regulator to initiate universal and reasonable interconnection between telecom operators. Interconnection, as will be explained later, is a contentious issue which has continuously plagued the industry since its inception.

This article, which is divided into five parts, will focus solely on enhancing competition between cellular service providers. Although it will touch upon other facets of the telecommunications industry such as the fixed-line sector and international gateways, the purpose of the same will be limited to describing the evolution of the state of mobile communications in the country.

Part I will briefly recount the history of the telecommunications industry, from the beginnings of a virtual monopoly, to the rise of multiple mobile carriers and the subsequent establishment of the extant telecom duopoly.

Part II will enumerate the instances that portray the agency's susceptibility to (if not actual existence of) regulatory interference, whether this be in the form of private and/or political intervention.

Part III will explain the concept of interconnection, its legal characterization and why it is the most relevant issue in spurring and maintaining competition among mobile carriers.

Part IV will then trace the disputes which have arisen out of mobile interconnection issues and examine how the regulator has handled the same in the last decade to determine whether regulatory interference continues to be an extant problem.

Part V makes proposals to solve the problem of interconnection, particularly the utilization of the agency's rate-fixing powers, to force interconnection despite the deregulated atmosphere and the ostensible weakness of the regulator. It suggests that the judiciary be complicit in this task by adopting the government's policy to recreate a competitive environment for mobile

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[5] *See* Rafaelita Aldaba, Opening up the Philippine Telecommunications Industry to Competition, World Bank Institute (May 2000), at 5, *available at:* http://economics.fizteh.ru/articles/management/competition/philippines1-arpel3voc20.

telecommunications. Furthermore, it proposes to delegate the franchising authority of Congress to the administrative agency in order to enable it to easily admit competition to the industry. Thereafter, this part will examine a draft Senate bill that seeks to remedy the combined issues of regulatory interference and the threat of non-competition.

Based on the foregoing, the article suggests that enhancing competition in the industry can diminish rent-seeking behavior while ensuring the independence of the regulator. But to achieve this goal, the regulator must be able to regulate the cost of interconnection between all mobile carriers whether this be supported through, or upheld by, administrative, judicial and/or legislative action

I. HISTORY OF THE MOBILE TELECOMMUNICATIONS INDUSTRY

> "Aspiring monopolists will... devote resources to the acquisition of the monopoly right. A government will more than likely grant monopoly privileges to various groups of politically influential people. Cartels and anti-competitive behavior will be maintained and politicians will react to the demands of the more vociferous and well organized interest groups."
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> - *P.A McNutt*[6]

A. Pre-Liberalization: A Virtual Monopoly

The Philippine Long Distance Telecommunications Company (PLDT) was the country's sole national telecommunications provider from 1932 to 1992. The company itself was a merger of four telephone companies - the earliest of which was the Philippine Island and Telegraph (PIT) Company which began its operations as early as 1905.[7] In 1928, PIT merged with Cebu, Panay and Negros Telephone Companies to form PLDT.

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[6] P.A. MCNUTT, THE ECONOMICS OF PUBLIC CHOICE 105-106 (1996).

[7] Kim Dong-Yeob, Market liberalization and development: South Korean and Philippine Telecommunications Service Industry in the 1990s, 17 KASARINLAN 69, 85 (2002).

The colonial Philippine Congress granted PLDT its original 50-year franchise to operate a national telephone system in 1932.[8] Initially, the telecom was largely owned by the General Telephone and Electronics (GTE) Corp., an American firm. A group of Filipino businessmen led by the Cojuangco family would, through the intercession of President Ferdinand Marcos in 1968,[9] acquire the shares held by GTE.[10]

Though there were 60 other provincial telephone companies prior to liberalization in the early 1990s, PLDT was able to own and control the infrastructure by which all calls passed.[11] PLDT became the dominant player in the telecommunications industry because it was the only company with congressional authority to operate a national network.[12] Justice Reynato Puno succinctly explains the rationale of natural monopolies and why this was virtually granted to PLDT at the time:

> In the early years of our economic history, monopolies in certain industries had to be allowed. They have to be entertained in industries which are high-risk, capital intensive and indispensable to economic growth. No company will risk venture capital in these industries unless they are accorded favored treatment, usually a monopoly status, for a certain time. Even then, administrative mechanisms were put in place to regulate their activities especially their pricing policies to protect the interest of the consuming public. Indeed, a great part of the United States would still be a wilderness if it did not allow monopolies in its railroad and telecommunications industries. We adopted this proven strategy and allowed monopolies in some of our industries like electric power, transportation and telecommunications. It is in line with this strategy that Congress granted to petitioner PLDT a monopoly status for a certain time. No company would then invest in our telecommunications industry but petitioner PLDT did, assumed the risk and undeniably played a vital role in our economic development which cannot be

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[8] *See* Act No. 3436, as amended. This franchise has since been renewed by various laws.

[9] LORRAINE CARLOS SALAZAR, GETTING A DIAL TONE: TELECOMMUNICATIONS LIBERALIZATION IN MALAYSIA AND THE PHILIPPINES 103 (Institute of Southeast Asian Studies, 2007).

[10] Philippine Long Distance Company, Enabling the Nation, *available at*: http://www.pldt.com.ph/about/Pages/history.aspx.

[11] RICARDO MANAPAT, WRONG NUMBER: THE PLDT TELEPHONE MONOPOLY 37-38 (The Animal Farm Series, 1993).

[12] SALAZAR, *supra* note 9, at 104.

> dismissed as insignificant. For this reason, our Constitution does not ban monopolies as evil per se for they are not.[13]

Furthermore, in return for the grant of monopoly rights, "PLDT would assume a universal service obligation (USO) to be funded through cross-subsidies from its international revenues."[14]

1. Poor Quality of Service

Instead of being productive as envisioned, the period that PLDT enjoyed this "natural monopoly" has been generally characterized by the entire sector's poor and inadequate service. Notably, telephone density had increased by only 1.7 percent despite forty years of Philippine independence with service coverage representing only 16 percent of the total land area of the country.[15] By 1991, there were over 650,000 telephone applications nationwide. And of this number, 76 percent stemmed from Metro Manila alone with 11.5 percent coming from the different parts of Luzon. By 1993, the backlog in nationwide applications pending with PLDT rose to almost 790,000.[16] Aside from this mounting accumulation of unaddressed applications, other problems were prominent, namely: (a) an unbalanced distribution of service between rural and urban areas, (b) an outdated infrastructure, and (c) an inadequate interconnection of fixed-line telecoms.[17]

2. Vested Interests

In the midst of this bleak outlook of the industry, PLDT sought to increase its profits through the implementation of a Subscriber Investment Plan (SIP) whereby all PLDT subscribers were mandated by law to invest in PLDT to enable it to raise equity and finance its expansion program.[18] The law was promulgated a few months after the declaration of Martial Law in the country.[19]

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[13] PLDT v. City of Davao, G.R. No. 143867, Mar. 25, 2003, (Puno, J., dissenting).

[14] Ken Zita, Philippine Telecommunications Brief, *available at* http://www.ndaventures.com/drupal/?q=node/18. *See also* Michel Kerf & Damien Geradin, Controlling Market Power in Telecommunications: Anti-Trust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences, 14 BERKELEY TECH. L. J., 919, 922-923 (1999).

[15] Dong-Yeob, *supra* note 7, at 83, *citing* Abrenica, *infra* note 40.

[16] MANAPAT, *supra* note 11, at 54, *citing* PHIL. DAILY INQUIRER, Sept. 10, 1992 and Jan. 29, 1993.

[17] Dong-Yeob, *supra* note 7, at 83, *citing* Abrenica, *infra* note 40.

[18] Pres. Dec. No. 217 (1973).

[19] Proc. No. 1081 (1972).

According to Salazar, the SIP was the first indicator of PLDT's privileged position in the Marcos government, to wit:

> In theory, the SIP would broaden public ownership of the company while raising the capital that was needed for network expansion. But because the shares carried no voting rights, mandatory investors held about 85 percent of the total company equity shares but had no say in how the company was run. Section 5 of P.D. 217 allowed for the conversion of these preferred shares into common voting stock. Yet, PLDT managed to avoid such conversion by liberally interpreting the time frame in which they required to take place. Thus, PLDT theoretically had a wide public ownership, but only a small group of businessmen controlled the company.[20]

After almost a decade of reaping substantial profits from the implementation of the aforesaid plan, another SIP application was filed by PLDT and this was immediately granted by the regulator. Upon appeal, the Supreme Court annulled the regulator's order. Justice Jose Abad Santos, in concurring with the majority opinion, disdainfully remarked, "the PLDT is reported to have made over 100 Million pesos in profits in just six months[.] But with its service so poor that even the First Lady has taken notice [of it, the company] should think of improved service before [an] increase [in] profits."[21]

Since the ruling dictatorship had vested interests in PLDT,[22] attempts by other telecoms to compete in the market were immediately shot down. When an emerging competitor, then independent Pilipino Telephone Corporation (Piltel), sought to introduce additional fixed telephone lines it was ordered to stop.[23]

Republic Telephone Company (Retelco), "then the country's second largest telephone outfit, quickly faded into oblivion when Marcos ordered it to merge with PLDT."[24] According to Salazar, the merger pushed through despite the objections of Retelco's owners because Marcos threatened to withdraw the

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[20] SALAZAR, *supra* note 9, at 110-111.

[21] Bautista v. NTC and PLDT, G.R. No. L-60987, Aug. 31, 1982 (Abad Santos, J., concurring.)

[22] *See* Yuchengco v. Sandiganbayan, G.R. No. 149802, Jan. 20, 2006. *See also* SALAZAR, *supra* note 9, 103-104.

[23] Mary Grace Mirandilla, Achieving Universal Access through Liberalization, Regulation, and Deregulation: The Case of the Philippine Telecommunications and ICT Sector, at 5, *available at* http://www.cprsouth.org/past-conferences/cprsouth2/papers-presented/

[24] MANAPAT, *supra* note 11, at 36.

company's franchises. The merger was described as a shotgun wedding that led to a bigger and stronger PLDT.[25]

3. Control of the Noose of Interconnection

On the other hand, PLDT, as the sole national carrier had the power to "allow, slow down, or deny" inter-provincial and overseas calls made by the provincial telephone companies. This was PLDT's power of controlling interconnection. Interconnection is the process by which telecom operator A allows its network to be utilized by telecom operator B for the purpose of connecting subscribers of A to subscribers of B. The power of denying interconnection can easily be demonstrated by examining the relationship of the prospective competitors with the dominant monopolist. Since small telephone companies could only operate within their respective provincial areas, they could not, by themselves, connect to telephone subscribers based in other provinces or those based outside the country. In order to reach the latter, the provincial telecoms would require access (or interconnection) to either PLDT's national network or its international gateway. Finding it impossible to operate without interconnection, some of these companies eventually sold themselves to PLDT.[26] An excerpt from Hilarion Henares aptly describes the situation then existing:

> When PLDT was forced to interconnect with Retelco which operated in the areas just outside of Manila, PLDT utilized the interconnecting links to choke off calls to the Retelco area, plaguing the callers with busy signals. Writer Letty Magsanoc recalls with poignancy, when as a student, she had in her house a Retelco phone that never rang, cutting her off far from the madding crowd of other teenagers growing up. The Retelco (Republic Telephone Co.) of the Santiago family just gave up and sold out to the PLDT its 51,767 phone network for P731 million, pocketing P200 million in equity, free of capital gains tax, courtesy of Marcos.[27]

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[25] SALAZAR, *supra* note 9, at 113.

[26] *Id.* at 106.

[27] HILARION HENARES, GIVE AND TAKE, PLDT chokes off connections and gateways, at 158-159 (Philippine Folio, 2006). PLDT would later employ the same tactic with Bayan Telecommunications in 1995. (*See* SALAZAR, *supra* note 9, at 267.)

Because of political control over the regulator and the ability to dictate the terms of interconnection with the rest of the competition, the monopoly was secure.

B. Liberalization: Breaking the Chains

It would take a massive shift in both law and policy before the monopoly could be effectively challenged. The 1987 Constitution would lay the groundwork for subsequent deregulation and competition by means of Art. XII, Sec. 19, *viz.*:

> The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

This provision has been held to be the bulwark of the nation's competition policy as explained in the seminal case of *Tatad v. Secretary of Energy*, *viz.*:

> Beyond doubt, the Constitution committed us to the free enterprise system but it is a system impressed with its own distinctness. Thus, while the Constitution embraced free enterprise as an economic creed, it did not prohibit per se the operation of monopolies which can, however be regulated in the public interest. Thus too, our free enterprise system is not based on a market of pure and unadulterated competition where the State pursues a strict hands-off policy and follows the let-the-devil devour the hindmost rule. Combinations in restraint of trade and unfair competitions are absolutely proscribed and the proscription is directed both against the State as well as the private sector. This distinct free enterprise system is dictated by the need to achieve the goals of our national economy as defined by Section 1, Article XII of the Constitution which are: more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged. It also calls for the State to protect Filipino enterprises against unfair competition and trade practices."
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> *Section 19, Article XII of our Constitution is anti-trust in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying*

> *principle of section 19, Article XII of our Constitution...* We subscribe to the observation of Prof. Gellhorn that the objective of anti-trust law is 'to assure a competitive economy, based upon the belief that through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services, and thus matches their desires with society's opportunity costs.' He adds with appropriateness that there is a reliance upon 'the operation of the 'market' system (free enterprise) to decide what shall be produced, how resources shall be allocated in the production process, and to whom the various products will be distributed. The market system relies on the consumer to decide what and how much shall be produced, and on competition, among producers to determine who will manufacture it.'
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> *Again, we underline in scarlet that the fundamental principle espoused by section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market.* But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed with suspicion.[28] (Italics supplied.)

The government's adoption of this constitutional mindset resulted in three concrete steps taken by immediately succeeding administrations to subject PLDT to competition. The first involved the liberal interpretation of existing franchises; the second, the implementation of mandatory interconnection between local telecoms and the grant of more licenses to operate cellular networks; and finally, the third involved the enactment of laws to spur competition between PLDT and the newer carriers.

1. Liberal Interpretation of Franchises

As early as November 1987, the Aquino administration began to liberally interpret existing franchises of other telecoms despite opposition from PLDT.[29]

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[28] Tatad v. Secretary of Energy, G.R. No. 124360, Nov. 5, 1997.

[29] Edna Espos, Institutions, Regulation and Performance: The Case of Philippine Telecommunications, 47 PHIL. J. P. A. 1-4, (2003), *available at* http://www.undp.org.ph/downloads/Governance

The first of such franchises was that belonging to Express Telecommunications (Extelcom).

At the time, PLDT also had a pending application to install and operate a Cellular Mobile Telephone System (CMTS) for domestic and international service not only in Manila but also in the provinces. Extelcom applied for provisional authority from the National Telecommunications Commission (hereinafter, "the Commission") to install and operate its own cellphone network pursuant to a congressional franchise granted as early as 1958. The threat of competition forced PLDT to oppose the application claiming priority of preference in the operation of such service under the "prior operator" or "protection of investment" doctrine.[30]

Notably, the legislative franchise granted to Extelcom was limited to "... the reception and transmission of wireless messages on *radiotelegraphy and/or radiotelephony...*" After the Commission granted the CMTS application based on a liberal interpretation of the franchise, the order was subsequently upheld in *PLDT v. NTC and Cellcom, Inc.* (hereinafter "*PLDT I*") by a close 8-7 vote in the Supreme Court, *viz.*:

> ... the NTC [had] construed the technical term "radiotelephony" liberally as to include the operation of a cellular mobile telephone system. While under Republic Act 2090 a system-wide telephone or network of telephone service by means of connecting wires may not have been contemplated, it can be construed liberally that the operation of a cellular mobile telephone service which carries messages, either voice or record, with the aid of radiowaves or a part of its route carried over radio communication channels, is one

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[30] *See* Batangas Transportation v. Orlanes, G.R. No. L-28865, Dec. 19, 1928 - "The rule has been laid down, without dissent in numerous decisions, that where an operator is rendering good, sufficient and adequate service to the public, that the convenience does not require and the public interests will not be promoted in a proper and suitable manner by giving another operator a certificate of public convenience to operate a competing line over the same route. xxx The Government having taken over the control and supervision of all public utilities, so long as an operator under a prior license complies with the terms and conditions of his license and reasonable rules and regulation for its operation and meets the reasonable demands of the public, it is the duty of the Commission to protect rather than to destroy his investment by the granting of a subsequent license to another for the same thing over the same route of travel. The granting of such a license does not serve its convenience or promote the interests of the public."

> included among the services under said franchise for which a certificate of public convenience and necessity may be applied for.[31]

The liberal interpretation of the franchise paved the way for Extelcom to create its own cellular network - the first-ever in the country.

2. NTC Enables Competition in the Mobile Sector

Pursuant to a Department of Trade and Communications (DOTC) Circular issued a month after *PLDT I* was promulgated, more mobile licenses were granted to the following companies in 1992: Piltel, Islacom, Globe and Smart.[32] These companies would later become known as the progenitors of the country's cellphone industry. It has been noted though that despite this first blow against the PLDT hegemony, the introduction of competition at this juncture "via multiple mobile service providers did not benefit the common Filipino because of the high cost of mobile phones."[33]

3. The Twin Executive Orders and the Public Telecommunications Act

A joke made by the Singaporean Prime Minister Lee Kuan Yew during his visit to Manila in November 1992 seems to have likewise spurred the political branches of government into action. He quipped that "98 percent of Filipinos are waiting for a phone line, and the other two percent are waiting for a dial tone." To his credit, this aptly summarized the environment at time. "The telecommunications sector was seen not only as lacking, given its very low telephone density, but it was also perceived to be inefficiently managed, considering that the waiting time for telephone installation was measured in years."[34] According to Justice Antonio Carpio:

> "[Before liberalization], it took Metro Manilans several years, sometimes 15 years, to get a telephone line. Most Filipinos in the provinces could not even hope to get a telephone line in their lifetime. [When] Lee Kuan Yew of

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[31] PLDT v. NTC (hereinafter "PLDT I"), G.R. No. 88404, Oct. 18, 1990.

[32] DOTC Circ. No. 92-269 (Nov. 11, 1992) - This Circular allowed open entry to the CMTS market, subject to the availability of frequency spectrum. *See* SALAZAR, *supra* note 9, at 237.

[33] Mirandilla, *supra* note 23, at 5.

[34] Erwin Alampay, Telecom Regulatory and Policy Environment in the Philippines: Results and Analysis of the 2008 TRE Survey, *available at*: http://www.lirneasia.net/wp-content/uploads/2009/02/tre_philippines_final_2008nov11.pdf

> Singapore described our telecommunications system at that time... it was national humiliation."[35]

Responding to the embarrassing comment by a fellow head of state, the newly-elected President Fidel Ramos issued two executive orders in 1993. These issuances appear to have been the brainchild of Justice Carpio himself who was then Presidential Legal Counsel of the Ramos administration.[36]

Executive Order No. 59 simply made interconnection mandatory between public telecommunication carriers.[37] Based on this significant development, PLDT could no longer unilaterally refuse to interconnect its network with competing telecom entities. [38] This was a milestone since it reinforced the judicial pronouncements made of interconnection in the earlier case of *PLDT I*, the relevant text of which will be discussed in Part III.

Meanwhile, Executive Order No. 109 required all mobile phone and international exchange market entrants to install from 300,000 to 400,000 fixed telephone lines within a certain number of years with priority given to underserved and unserved municipalities.[39] These executive orders were later supplemented by

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[35] Justice Antonio Carpio, Final Words to the Iskolar ng Bayan, April 16, 2008, *available at*: http://www.upmin.edu.ph/index.php?option=com_content&view=article&id=597:justice-antonio-carpios-message-to-the-2008-graduates-&catid=46&Itemid=97

[36] *Id.* - "As Presidential Legal Counsel, I advised President Ramos that the solution was simple and did not need budgetary appropriation or legislation, but only required political will because the existing monopoly would fiercely resist the solution. I recommended to the President to issue an Executive Order mandating existing telecom companies like PLDT to interconnect with any new company that entered the telecoms industry. The President issued the Executive Order and new companies, like Globe and Smart, rushed to enter the industry. Competition became intense among the telecom companies. Telecom companies offered instant connection through cellular phones, sometimes with free handsets. In Metro Manila, telecom companies could install landlines in less than two weeks. xxx Of course, I was viciously attacked in the press by those who lost their privileged monopoly. But it was a small price to pay to see a fisherman in Basilan call with his cell phone the fish vendor in Zamboanga City to ask for the current market price of lapu-lapu. That is how the country became connected during the Ramos Administration."

[37] *See* Exec. Order No. 59, §2 - Interconnection between NTC authorized public telecommunications carriers shall be compulsory. Interconnection shall mean the linkage, by wire, radio, satellite or other means, of tow or more existing telecommunications carriers or operators with one another for the purpose of allowing or enabling the subscribers of one carrier or operator to access or reach the subscribers of the other carriers or operators.

[38] *See* Republic v. PLDT, *infra* note 128 - for a classic example of how could easily PLDT could refuse interconnection even when it was the government itself that was applying for the same.

[39] This executive issuance heralded the Service-Area-Scheme (SAS) wherein the country was divided into 11 service areas. Gateway and cellular franchise holders were to provide local exchange lines - fixed telephone lines which would be connected to the public switch telephone network - in their assigned areas in return for the authorization granted to them to operate in highly profitable cellular and international gateway

Republic Act No. 7925, otherwise known as the Public Telecommunications Act, the governing law of Philippine telecommunications today.

At the onset of liberalization and the rise of mobile carriers, optimism in the industry was high. According to Abrenica, the liberalization of the telecoms sector during this period contributed to the bail out of the sagging Philippine economy by triggering an investment surge from 1994 to 1997.[40] With the number of carriers rushing in to fill the void, the Philippines suddenly had more operators and potential operators than most countries in Southeast Asia put together.[41]

C. Post Liberalization: The Fruits of Temporary Freedom

1. The Rise of Mobile Subscriptions v. Fixed-Line Subscriptions

Interestingly, instead of the fixed-line teledensity improving exponentially, this being the intended thrust of reforms, it was the mobile phone aspect of the industry which saw unprecedented growth. This is not to say that the number of fixed-line subscriptions did not increase but rather that when juxtaposed with the number stemming from cellular service subscriptions, the former certainly paled in comparison.

Table No. 1: Mobile and Fixed-Line Subscription Growth from 1991 to 2006[42]

operations. Gateway and cellular operators were required to install 300,000 and 400,000 telephones, respectively, within three years. Thus, a telecommunication operator with both cellular and gateway franchises must install 700,000 lines (*see* Aldaba, *supra* note 5, at 20). Though envisioned as a means to increase fixed-line teledensity quickly, the scheme failed because more than half of the telecoms failed to comply with their obligations reportedly due to the peace and order situation in a number of rural areas; (b) the Asian financial crisis; and (c) the lack of interest of consumer subscription of fixed-lines. (*See* Mirandilla, *supra* note 23, at 6 and SALAZAR, *supra* note 9, at 280-286.)

[40] Joy Abrenica, Reforming the Telecommunications Industry: Prospects and Challenges, Economic Policy Agenda Series: Foundation for Economic Freedom (1999a)

[41] Asiaweek, Aug. 31, 1999, *available at* http://articles.cnn.com/1999-08-31/world/96_1004_biz4_1_bayantel-pldt-phone-lines?_s=PM:ASIANOW *quoting* Jason Billings, SBC Warburg in Hong Kong.

[42] NTC Annual Reports, 1991 and 2006.

Time	Fixed Line Subscribers	Mobile Subscribers
1991	648,000	36,000
2006	3,367,252	42,846,500
Percentage Gain (1991-2006)	419%	118,918%

The dramatic increase in mobile subscribers was certainly an accident considering that this "collateral service" was hardly contemplated by the framers of the executive orders and the Public Telecommunications Act. Regardless of the government's lack of intent, the boost in numbers can be explained by several factors which were prevalent at the time, namely: (a) the new-found affordability of cellphones, (b) the number of mobile service providers competing with each other, and (c) the continuing lack of interconnection between the fixed-line services of provincial telecom providers.

2. The Beginning and the End of the Telecom Gold Rush

Table No. 2: Mobile Market Share in 1998[43]

Telecommunications Entity	Percentage of the Market
Smart	45%
Piltel (PLDT subsidiary)	23%
Extelcom	13%
Globe	13%
Islacòm	6%

[43] Serafica, *infra* note 44, at 12.

Towards the end of 1998, there were five major mobile companies competing for market share. And with the number of companies involved, it was expected that only two or three multi-service firms would survive the initial stage of competition.[44] This proved to be accurate after two major corporate mergers were finalized: the first merger was between PLDT and Smart in 2000 and the second, between Globe and Islacom in 2001. The third major corporate merger would arise a decade later between Smart and Sun Cellular.

Because the Public Telecommunications Act contained no provisions addressing monopoly and mergers, "the PLDT-Smart and Globe-Islacom mergers went smoothly without being challenged for underlying competitive risk."[45] This was especially true for the PLDT-Smart merger which was initiated during the latter part of 1998 and completed in 2000. As gleaned from Table No. 2 above, Smart was then the industry leader in the mobile market. On the other hand, PLDT was still the leader in the fixed-line sector, controlling close to 60 percent of the market despite the presence of more than eight other local exchange carriers.[46] Since PLDT already had a mobile subsidiary (Piltel) which controlled 23 percent of the mobile market,[47] the merger with Smart allowed PLDT to dominate both the mobile and fixed-line aspects of the industry in a single blow. With the decline of Extelcom as a viable source of competition in the mobile space, the only serious contender that could compete with the combined strength of PLDT and Smart was Globe.

Later in 2003, a third major player would begin its operations to join the extant rivalry between Smart and Globe. It is significant to note that Sun Cellular, a latecomer to the industry, managed to gain immediate market share by

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[44] Ramonette Serafica, Competition in Philippine Telecommunications: A Survey of the Critical Issues, PASCN Discussion Paper No. 2000-15 (2000), at 22, *available at*: http://serp-p.pids.gov.ph/serp-p/details.php?pid=514&param=

[45] Epictecus Patalinghug & Gilbert Llanto, Competition Policy and Regulation in Power and Telecommunications, Discussion Paper Series No. 2005-18, Philippine Institute for Development Studies (2005), *available at*: http://siteresources.worldbank.org/INTPHILIPPINES/Resources/EpictetusPatalinghug.pdf.

[46] Serafica, *supra* note 44, at 12.

[47] PLDT purchased 32 percent of Piltel in 1975 and increased its holdings to 50 percent in July 1998. It would later acquire over 92 percent of Piltel and buy out the remaining shares from minority stockholders late in 2009. *See* Minges, et al., Pinoy Internet: Philippines Case Study, at 8, International Telecommunication Union. (Geneva: ITU, 2002.), *available at*: http://www.itu.int/asean2001/reports/material/PHL%20CS.pdf., Doris Dumlao, Smart buying out Piltel minority shareholders, PHIL. DAILY INQUIRER, June 22, 2009, *available at*: http://business.inquirer.net/money/topstories/view/20090622-211761/Smart-buying-out-Piltel-minority-shareholders

introducing "unlimited services." Thus, instead of charging for each individual transaction, unlimited text messaging and calls for Sun-to-Sun transactions could be had for a fixed aggregate price. In reaction, the dominant incumbents filed their respective petitions with the Commission seeking a cease and desist order against the newcomer on the grounds of "predatory pricing."[48] When this contention was rebuffed by the regulator, both Globe and Smart began to offer the same "unlimited services" to prevent the erosion of their respective consumer bases.[49] Notwithstanding the success of the disruption in the market, Sun was later accused by the same dominant mobile operators of not providing quality service allegedly due to poor connection rates and increased dropped calls. Sun, however, claimed that it was Smart who was to blame.[50] It would take an order from the Commission itself for the dispute between Smart and Sun to be resolved.[51]

PLDT, through Smart and Piltel, would consistently retain its mobile market share throughout the years. On the other hand, Globe's share would wane paralleling Sun Cellular's sudden unexpected rise in the industry.[52]

Table No. 3: Mobile Telecom Market Share from 2003-2010[53]

	2003	2007	June 2010
Smart	57.5%	56.1%	53.3%
Globe	39%	38.1%	27.9%

[48] *See* NTC Memo. Cir. 09-07-02, §3(h) - In general, a charge will be considered predatory if it is below the appropriate cost of supplying the service, and/or is at a level that is so low that it cannot be sustained in the long term when compared to the charges for Interconnect Services.

[49] Mirandilla, *supra* note 23, at 15.

[50] Clarissa S. Batino, Digitel says link-up with Smart still problematic, PHIL. DAILY INQUIRER, at B-5, May 9, 2005; *see also* Clarissa S. Batino, Connection woes with Smart seen to cost Sun P5M a month, PHIL. DAILY INQUIRER, at B-2, Mar. 29, 2005 - According to Sun: "The intermittent voice call and SMS links failure have been adversely affecting the company's efficiency to the detriment and prejudice of [our] subscribers. Our monitoring shows that our calls are able to pass through the interconnect links, but when it is about to reach Smart's network, the calls [would] not pass through anymore."

[51] *See* discussion in Part IV.B.3.

[52] Paolo Montecillo, Sun claims No. 1 spot in postpaid subscription, PHIL. DAILY INQUIRER, *available at*: http://business.inquirer.net/money/topstories/view/20100923-293938/Sun-claims-No-1-spot-in-postpaid-subscription

[53] Erwin Alampay, *supra* note 34, at 9 - for 2003 market share. Patalinghug & Llanto, *supra* note 45, at 23 - for 2007 market share. Mary Ann Ll. Reyes, Sun Cellular grabs lead in postpaid mobile subscriptions, PHIL. STAR, Sept. 24, 2010, *available at*: http://www.philstar.com/Article.aspx?articleId=614666&publicationSubCategoryId=66 - for 2010 market share.

Sun	3.3%	5.6%	18%

On March 29, 2011, PLDT acquired a majority stake in Sun Cellular,[54] thus endangering the already tenuous environment of competition in mobile communications. With the merger, PLDT would effectively control more than 70 percent of the market in both pre-paid and post-paid subscriptions. Though at the time of this writing, the deal has yet to be approved by the Commission,[55] it has already evoked anti-trust concerns from consumer groups,[56] notable individuals in the private sector,[57] as well as Congress.[58]

[54] Doris Dumlao, PLDT takes control of Gokongwei-led Digitel in P74B share swap deal, Mar. 29, 2011, PHIL. DAILY INQUIRER, *available at*: http://business.inquirer.net/money/breakingnews/view/20110329-328255/PLDT-takes-control-of-Gokongwei-led-Digitel-in-P74B-share-swap-deal

[55] Kimberly Jane Tan, NTC told to study effects of PLDT's Digitel acquisition, GMAnews.tv, March 31, 2011, *available at*: http://www.gmanews.tv/story/216628/business/ntc-told-to-study-effects-of-pldts-digitel-acquisition

[56] Doris Dumlao, Paolo Montecillo, Gil C. Cabacungan Jr., PLDT-Digitel Deal: End of unlimited calls, texts feared, PHIL. DAILY INQUIRER, March 31, 2011, *available at*: http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20110331-328512/End_of_unlimited_calls,_texts_feared

[57] Solita Collas-Monsod, Need for anti-trust law highlighted, PHIL. DAILY INQUIRER, April 1, 2011, *available at*: http://opinion.inquirer.net/inquireropinion/columns/view/20110401-328830/Need-for-anti-trust-law-highlighted; *see also* Boo Chanco, Will Gokongwei find happiness with MVP?, PHIL. STAR, April 1, 2011, *available at*: http://www.philstar.com/Article.aspx?articleId=671700&publicationSubCategoryId=66

[58] Gil C. Cabacungan Jr., Solons fear monopoly to rise from PLDT purchase of Digitel, PHIL. DAILY INQUIRER, March 31, 2011, *available at*: http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20110331-328495/Solons-fear-monopoly-to-rise-from-PLDT-purchase-of-Digitel

II. THE REGULATOR

> "Built into the DNA of the most important agencies created to protect innovation, is an almost irresistible urge to protect the most powerful instead. The FCC is a perfect example. With so much in its reach, the FCC has become the target of enormous campaigns for influence."
>
> - *Lawrence Lessig*[59]

A. The NTC's Early Relationship with PLDT

1. During the Marcos Era

As described in Part I, the Commission's early days as a regulator has been marked by its closeness to both the telecom giant and the government. Ceferino Carreon, a retired army general, was appointed by President Ferdinand Marcos to serve "as the concurrent head of all major government offices dealing with telecommunications then involving the BOC, the TCB, and the BuTel."[60] The Telecommunications Control Bureau (TCB) was then the country's radio regulatory office.[61] The Board of Communications (BOC), on the other hand, was the first quasi-judicial body with adjudicatory powers over matters involving telecommunications services.[62] The National Telecommunications Commission was created as a result of a merger between TCB and the BOC in 1979.[63]

In explaining the relationship between the first NTC Commissioner and PLDT, Manapat alludes to the former's role in ensuring the latter's prolonged rule as a monopolist, *viz.*:

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[59] Lawrence Lessig, Reboot the FCC, Newsweek, Dec. 23, 2008, *available at*: http://www.newsweek.com/2008/12/22/reboot-the-fcc.html

[60] MANAPAT, *supra* note 11, at 37.

[61] NTC Profile, History, *available at*: http://portal.ntc.gov.ph/wps/portal/!ut/p/_s.7_0_A/7_0_A0 - In 1931, Act No. 3846, *also* known as the Radio Control Law, was enacted. The Radio Control Office was subsequently renamed in 1974 to the Telecommunications Control Bureau in 1974.

[62] *Id.* - The Board of Communications (BOC) was created under the Integrated Reorganization Law.

[63] *See* Exec. Order No. 546, §19(d).

> The Bureau of Telecommunications (BuTel) supervised the government telephone service (GTS). The GTS provided telephone services to Metro Manila, several major cities, and all government offices in the country. It was also charged to maintain the national telecommunications backbone. Also called the trunkline, this backbone served as the "communications highway" through which all telephone calls passed. The GTS was dismantled by Commissioner Carreon. More importantly, the elimination of the GTS can be said to have created PLDT's national monopoly. With the national trunkline gone, only PLDT would have the 'communications highway' essential for telecommunication services. PLDT could, therefore, easily kill any potential or actual competitor by denying it the use of its own telecommunications backbone.[64]

The "dismantlement" of the government telephone system was actually a part of the National Telecommunications Development Plan of 1981, which proposed to expand the country's telephone capacity to 3.56 million lines in 2002.[65] But due to the fact that the GTS was PLDT's only source of nation-wide competition, the scheme was rather suggestive of regulatory interference.

2. During the Cory Aquino Government

The Commission under the Aquino government appears to have taken a different route in dealing with the monopoly as gleaned from agency action subsequent to the adoption of the 1987 Constitution. As discussed earlier, this involved the liberal interpretation of franchises to enable existing telecoms to utilize cellphone technology as an additional service for public consumption. Yet despite its early success immediately after the dictatorship ended, the Commission's attempt to break PLDT's monopoly in other aspects of the industry proved to be unsuccessful in light of stiff obstacles allegedly emanating from both the government and the courts.

With regard to enhancing competition in long distance telephone services, Manapat recounts undue political interference in the NTC regarding one carrier's application to operate an international gateway, *viz.*:

> Jose Luis Alcuaz, who served as [NTC] Commissioner, was fired only a few hours before he was to testify at a Senate investigation on alleged graft in

[64] MANAPAT, *supra* note 11, at 37.
[65] SALAZAR, *supra* note 9, at 113.

> government on November 1989. Alcuaz was trying to break up monopolies in the telecommunications industry but encountered what he described as "undue influence from three presidential relatives." xxx [He claimed that the "political appointees" in the DOTC] were trying to stop the approval of the applications of Philippine Global Communications (PhilCom) to operate an international gateway that would have broken the monopoly that PLDT enjoyed. The PLDT is owned by cousins of Mrs. Aquino. xxx Alcuaz said that he was willing to reveal under oath before Congress what he regards as interference of presidential relatives. But before he was to go before Congress, he was summoned by Mrs. Aquino and was told to just concentrate on his job as NTC commissioner. When Alcuaz insisted on testifying, Mrs. Aquino terminated him. Alcuaz's superior, [DOTC Secretary] Reyes, then asked the Senate committee on public services, transportation, and communications to cancel the scheduled hearing, a request promptly granted by the senators.[66]

Prior to his removal by the President, Commissioner Alcuaz was able to grant the application filed by another carrier, this time Eastern Telecommunications Philippines Inc. (ETPI), to operate its own international gateway. ETPI's franchise was broadly worded as Congress granted it the right to: "... land, construct, maintain and operate telecommunication systems cable, or any other means now known to science or which in the future may be developed *for the reception and transmission of messages* between any point in the Philippines to points exterior thereto."[67]

At the time, the operation of international voice calls was a highly lucrative enterprise in the Philippines.[68] Considering the potential effect of competition in this sector, the NTC order granting the application was subsequently questioned by PLDT. On August 27, 1992, the Supreme Court in *PLDT v. NTC and ETPI* (hereinafter, "*PLDT II*") rendered its initial decision which virtually favored the monopoly on rather tenuous grounds. Despite the broad wording of the franchise, the Court adopted PLDT's arguments and held that the franchise cannot be interpreted to include a telephone exchange system.

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[66] MANAPAT, *supra* note 11, at 37. *See also* SALAZAR, *supra* note 9, at 122.

[67] *See* Rep. Act. No. 808 as amended by Rep. Act No. 5002.

[68] *See* Records of the Committee on Transportation and Communications 49, House of Representatives (9th Cong., 1st sess., Nov. 19, 1992.). Here PLDT's Vice-President for Legal Affairs was explicit in stating that international long distance calls were the creme of the crop. "That's where the money is, it's in dollars, that's why everybody wants to go international, nobody wants to go to local service."

Otherwise, it would "strain interpretation into incredulous limits." According to the majority opinion written by Justice Hugo Gutierrez:

> The word "message," as used in the franchise and in the telecommunication industry has a peculiar meaning when used with reference to communication systems. The literal or common meaning can not be applied to key words in a franchise for highly technical and scientifically advanced services so as to broaden a legislative grant beyond its plain and intended meaning.
>
> xxx
>
> The clear intention of the law granting the franchise cannot be disputed. If Congress had contemplated the use of telephone, the law would have stated so. Undeniably, telephone technology was already existing in 1952 when R.A. 808 [ETPI's original franchise] was enacted. To construe the phrase "telecommunication system by cable or any other means now known to science or which in the future may be developed for the reception and transmission of messages" so as to include telephones is well-nigh preposterous. Indeed, telephones did not have to be discovered or developed. They were not for the future. They were already existing at that time.[69]

Thus, since the ETPI franchise was merely limited to the "the reception and transmission of messages," which in the Court's opinion could not possibly refer to phone calls, ETPI's application to operate a "combined international and substantially extensive domestic telephone system [was] without any legislative authority."[70]

One would think that the rather liberal stance adopted by the Court in the earlier case of *PLDT I*,[71] would once more find application given the atmosphere of liberalization permeating the industry. As highlighted in Part I, the Court in *PLDT I* considered the word "radiotelephony" in the applicant's franchise as being equivalent to a cellphone system... despite the glaring fact that cellphone technology had yet to be invented when the franchise was granted.

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[69] PLDT v. Eastern Telecommunications Philippine, Inc. (ETPI) and NTC (hereinafter "PLDT II"), G.R. No. 94374, Aug. 27, 1992.

[70] *Id.*

[71] PLDT I, *supra* note 31.

In *PLDT II*, decided two years after *PLDT I*, the issue revolved around an even broader phrase which was certainly susceptible of an interpretation that would serve the dictates of competition in the same manner that "radiotelephony" was considered "a cellphone system." In favoring the arguments of PLDT, however, the majority of the Supreme Court held that: "franchises are always interpreted strictly against the franchise holder, never liberally, and certainly not in a strained and exaggerated manner."[72] Unable to accept the absurdity of the proposition, Justice Florentino Feliciano espoused a scathing review of the ponencia in his dissent, to wit:

> [T]he majority has uncritically embraced an eccentric interpretation urged by the PLDT, an interpretation with absolutely no legal or other basis, save PLDT's own bare assertion. This is commonly known as "boot-strapping" or self-levitation, something which the Court, in other contexts, has vigorously rejected. The extraordinary interpretation peddled by the PLDT is in fact contradicted by PLDT's own legislative franchise, something overlooked by the majority. What must not be lost sight of is that PLDT's highly selective arguments are designed solely to frustrate the NTC's order to interconnect PLDT's domestic system with Eastern's proposed international gateway facility and thereby to protect and further expand PLDT's monopoly position in the Philippine telecommunication industry.

A motion for reconsideration was subsequently filed by both the NTC and ETPI.

In the meantime, allegations would surface that the actual *ponencia* of this first decision was not written by Justice Gutierrez but by Eliseo Alampay, the counsel for PLDT.[73] On February 21, 1995, the Supreme Court, without tackling the allegation that its first decision was ghost-written by the counsel of one of the disputing parties, reversed itself in *PLDT v. NTC,* [74](hereinafter, "*PLDT III*"), *viz.*:

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[72] The vote was 10 to 4 with 1 vacancy. Those who concurred with the majority opinion written by Justice Gutierrez were Chief Justice Narvasa and Justices Cruz, Bidin, Medialdea, Regalado, Davide, Jr., Nocon, Bellosillo and Melo. Those who agreed with the dissenting opinion of Justice Feliciano were Justice Padilla, Griño-Aquino and Romero.

[73] In re: Emil Jurado, A. M. No. 93-2-037 SC, Apr. 6, 1995 *citing* PHIL. DAILY INQUIRER, Jan. 28, 1993.

[74] PLDT v. NTC (hereinafter, "PLDT III"), G.R. No. 94374, Feb. 21, 1995.

> In the first place, the existing legislative franchise of Eastern authorizes it to land, construct, maintain and operate "*telecommunications* systems" for the purpose of effecting "the reception and transmission of messages between any point in the Philippines to points exterior [to the Philippines]." "*Telecommunication*" is, in itself, a comprehensive term. Etymologically (tele [from the Greek] + communication), it means simply *communication over distance*, making *no* limiting reference to the means or mode of such communication.
>
> In the second place, the legislative franchise of Eastern itself *expressly* elaborates that the "*telecommunication* systems" which Eastern may install, maintain and operate may be "by cable or any other means now known to science or which in the future may be developed." It is very difficult to craft language more comprehensive in scope than the foregoing phrase. Clearly, the species of method or the particular modality of *reception* and *transmission* of messages across the territorial boundaries of the Philippines, was of secondary importance to the legislative authority which granted the franchise.
>
> In the third place, there is *no basis at all in Eastern's legislative franchise* for a supposed distinction (which PLDT tries very hard to suggest) between voice and non-voice transmissions or messages and for a supposed limitation upon Eastern to transmit and receive only non-voice messages. The statute simply does *not* distinguish between voice or oral and data or non-voice messages or transmissions: the statutory text speaks simply of "*messages.*" There is a basic and well-known scientific reason why the statute makes no such distinction. Voice messages do not travel via wires (cables whether submarine or underground or aerial) or any other media *qua* voice (i.e., as sound waves); voice transmissions, exactly like data (or non-voice) messages, travel in the form of electronic impulses through cables (or any other media) and are simply converted at the point of reception or destination into other forms visually or audibly perceptible by human beings."[75] (Italics supplied by the Court)

In a related administrative case decided three months after the aforesaid motion for reconsideration was resolved, the Supreme Court had the opportunity to discuss the allegations of ghost-writing for the first time:

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[75] The majority opinion was written by Justice Feliciano and the following Justices concurred with the same: Justices Padilla, Romero, Bellosillo, Quiason, Puno, Vitug, Kapunan, and Mendoza. Justices Narvasa, Bidin, Regalado, Davide, Jr., and Melo dissented while Justice Francisco took no part.

> What may be called the seed of the proceeding at bar was sown by the decision promulgated by this Court on August 27, 1992 in the so-called "controversial case" of *PLDT II*. In that decision the Court was sharply divided; the vote was 9 to 4, in favor of the petitioner PLDT. Mr. Justice Hugo E. Gutierrez, Jr., wrote the opinion for the majority. A motion for reconsideration of the decision was filed in respondent's behalf on September 16, 1992, which has recently been resolved.
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> In connection with this case, G. R. No. 94374, the "Philippine Daily Inquirer" and one or two other newspapers published on January 28, 1993, a report of the purported affidavit of a Mr. David Miles Yerkes, an alleged expert in linguistics. This gentleman, it appears, had been commissioned by one of the parties in the case, Eastern Telephone Philippines, Inc. [ETPI], to examine and analyze the decision of Justice Gutierrez in relation to a few of his prior *ponencias* and the writings of one of the lawyers of PLDT, Mr. Eliseo Alampay, to ascertain if the decision had been written, in whole or in part, by the latter. Yerkes proffered the conclusion that the Gutierrez decision "looks, reads and sounds like the writing of the PLDT's counsel."
>
> ETPI counsel, former Solicitor General Estelito Mendoza and former Law Dean Eduardo de los Angeles, have since declared that none of the lawyers or officers of the corporation had ever authorized the release of the Yerkes affidavit. In any event, Mr. Justice Gutierrez has since made public his own affidavit in indignant traverse of the Yerkes document; and two other experts commissioned by the PLDT have submitted studies and reports impugning the Yerkes conclusions.[76] xxx
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> As might be expected, [however] the Yerkes "revelations" spawned more public discussion and comment about the judiciary and the Supreme Court itself, much of it unfavorable. There were calls for impeachment of the justices, for resignation of judges. There were insistent and more widespread reiterations of denunciations of incompetence and corruption in the judiciary. Another derogatory epithet for judges was coined and quickly gained currency: "Hoodlums in Robes."[77]

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[76] In re: Emil Jurado, *supra* note 64, at n. 7.
[77] *Id.*

Four days after the Yerkes affidavit was publicly released by the Philippine Center for Investigative Journalism (PCIJ), Justice Hugo Gutierrez resigned from the Supreme Court.[78]

The discussion of this side issue becomes relevant since, if true, it would cast a shadow of capture, not on the part of the Commission, which is the subject of this article, but on the Supreme Court itself. Was a member of the Court complicit in ensuring the security of the PLDT monopoly in its first decision in 1992? The question appears to have been answered by the Court in the preceding text but the suggestion that a sitting Justice might have been made a mouthpiece of PLDT is important when taken in conjunction with other industry developments at the time. Notably that PLDT was doggedly hampering the regulator's objective of spurring competition between existing telecoms, rendering the NTC's hands tied either by unfocused administrative supervision or by protracted court action.

3. During Ramos' Liberalization of the Industry

The implementation of the two executive orders and the subsequent passage of the Public Telecommunications Act during the Ramos' administration enabled the NTC to, temporarily at least, ward off the clutches of what seemed to be a continuation of direct and indirect regulatory interference from both PLDT and the government itself. Notably, President Ramos, unlike his predecessors, had no apparent pecuniary interests with the telecom giant.

The Public Telecommunications Act of 1995 was considered a milestone because it literally codified the policy of telecommunications liberalization after seven decades of monopolistic control. The fact that the law provided for liberalization did not mean however that it also provided a mechanism for effective regulation of the industry. Neither did liberalization imply that the mere influx of telecom operators would weaken the power of the monopolistic regime to interfere with regulatory affairs. According to Sheila Coronel, 2003 Magsaysay Awardee for Journalism, Literature and the Creative Communication Arts, "with

[78] Philippine Center for Investigative Journalism, Journalism with an impact, *available at*: http://www.pcij.org/impact.html

[President] Ramos, PLDT lost its monopoly but kept its privileges as the dominant carrier by influencing decision making in Malacañang, Congress, and the courts."[79]

But unchecked liberalization did have its merits, particularly in its transformation of the Philippine regulatory gestalt. The melee of carriers penetrating the industry, the rush of infrastructure build-up through-out the archipelago, and the resulting spike in consumer interest in a public utility that for decades had been quite lacking in meeting the nation's demands, created a highly deregulated environment with almost minimal intervention from the NTC. It is widely believed that the regulator's relative inaction immediately after liberalization proved to be beneficial to the country. As explained by Mirandilla:

> It was when the government allowed the market to develop its own business models and adopt innovative pricing schemes [that] the mobile sector witnessed exponential growth, with subscription jumping more than 100 percent between 1999 and 2000. Due to affordability and convenience, mobile technology [provided] a substitute to traditional basic fixed services and extended access to formerly unserved population such as the urban poor and rural users, making it a significant tool to achieving universal access for many developing countries. [80]

The advantage of the government's deregulated approach, as timely as it was, cannot however be considered to be the prime factor in improving the erstwhile deplorable state of Philippine telecommunications. As mentioned earlier in Table No. 1, increased teledensity around the country was largely due to the rise of *mobile* subscribers. The thrust of the executive and legislative initiatives was on improving fixed-line, rather than cellular, teledensity. In fact, during the congressional deliberations, no emphasis at all was placed on mobile technology. There was even a suggestion that cellular service operators be considered a separate value-added service not requiring a congressional franchise.[81] With this in

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[79] SHEILA CORONEL, PORK AND OTHER PERKS : CORRUPTION & GOVERNANCE IN THE PHILIPPINES, 112-149 (Philippine Center for Investigative Journalism, Evelio B. Javier Foundation and Institute for Popular Democracy,1998)

[80] Mirandilla, *supra* note 23, at 6.

[81] *See* Records of the Technical Working Group Committee on Transportation and Communications 7, House of Representatives (9th Cong., 1st sess., Mar. 18, 1993.) - However, Atty. Salalima, as counsel for International Communications Corporation (ICC), pointed out that to not require cellphone providers to acquire a franchise would be detrimental to current franchise holders and society at large. *Id.*, at 33. The ICC is now Bayan Telecommunications while Atty. Salalima is now chief legal counsel for Globe.

mind, the mobile boom that the country experienced can certainly be said to have been more of an unintended consequence rather than a by-product of legislation.

Part I detailed the present state of the telecommunications industry with regard to market shares currently held by the two dominant telecom operators.[82] Now that competition in the industry has reached an arguable impasse, this writer posits the government should take the necessary steps to re-regulate the industry for the purpose of ensuring maximum benefits to the subscribing public. At present, however, the Commission's capacity to impose itself in the face of a deregulated environment easily becomes suspect considering two factors: (a) its independence from both political and corporate influence continues to be a pressing issue; and (b) its powers as a regulator seem to be extremely limited in enforcing a policy of competition.

B. Institutional and External Weaknesses of the Regulator

1. The Revolving Door Policy

In order to examine the regulator's susceptibility to political interference, the Commission's place in the government hierarchy will be briefly described. The NTC was originally placed under the administrative supervision of the Ministry of Transportation and Communications. [83] When President Corazon Aquino overhauled the bureaucracy, the NTC was made an attached agency of the Department of Transportation and Communications (DOTC).[84] The NTC would thereafter undergo a lengthy phase of confusion.

President Joseph Estrada transferred the administrative supervision of the NTC from the DOTC to the Information Technology and Communication Council (ITECC).[85] After EDSA 2, the ITECC was placed under the direct supervision of President Gloria Macapagal-Arroyo.[86] In 2004, she would transform the ITECC into the present day Commission on Information and

[82] *See* however the forthcoming rollout of San Miguel's Liberty Telecom, at note 103.
[83] Exec. Order. No. 546 (July 23, 1979)
[84] Exec. Order. No. 125-A (Apr. 13, 1987)
[85] Exec. Order No. 264 (July 12, 2000)
[86] Exec. Order No. 18 (May 25, 2001)

Communications Technology (CICT).[87] The CICT was created to formulate medium-term and long-term plans for the information and communications technology sector. In 2005, however, the NTC would revert back to the DOTC[88] only to once again be transferred to the CICT in 2008.[89] Though the CICT retains administrative supervision over the NTC, when the latter acts as a quasi-judicial entity, its decisions are final and can only be reversed by court action.[90]

The series of changes occurred at the time that the mobile sector was experiencing incredible growth. Besides the number of administrative transfers and the various policy considerations of the different umbrella agencies in which the NTC found itself to be under, another complication stemmed from the fact that the appointed commissioners of the NTC lacked fixed terms of office, leaving them susceptible to political pressure. In a fairly recent speech, Senate President Juan Ponce Enrile observed that "the turnover of Commissioners within the 30 years of NTC's existence [has been] noticeably fast, as seventeen (17) Commissioners have served in this seemingly 'small' agency. The shortest tenure has been for only four (4) months while the longest since 1979 is a little over 5 years."[91]

Based on this trend, a 2004 World Bank report concluded that because of routine political interference in the Philippines, "the [telecommunications] sector is essentially hostage to political expediency."[92] This is largely due to a revolving door policy employed by the appointing authority to summarily remove commissioners whenever a change of leadership takes place or whenever contentious political issues surface. Thus, it has been a matter of course in the NTC for a commissioner to suddenly resign, be abruptly terminated, or be quickly replaced. And in all cases

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[87] Exec. Order No. 269 (Jan. 24, 2004)

[88] Exec. Order No. 454 (Aug. 16, 2005)

[89] Exec. Order No. 648 was signed on Aug. 6, 2007 but was only released by the Malacañang Records Office on Dec. 23, 2008. *See* Erwin Oliva and Alexander Villafania, NTC transfers back to CICT, PHIL. DAILY INQUIRER, Jan. 7, 2009, *available at*: http://newsinfo.inquirer.net/breakingnews/regions/view/20090107-181943/NTC_transfers_back_to_CICT

[90] From 1979 to 1997, decisions of the NTC were solely signed by the NTC Commissioner. When this was contested, the Supreme Court ruled that the NTC was a collegial body notwithstanding the designation of the two other Commissioners as mere deputies. *See* GMCR, Inc. v. Bell Telecommunications, G.R. No. 126496, April 30, 1997.

[91] S. B. No. 3465, Committee Report No. 785, 14th Cong., 1st sess., Jan. 27, 2009 (Sponsorship Speech of Senator Juan Ponce Enrile)

[92] Zita, *supra* note 14, at 8.

no persuasive reason would be advanced by the appointing authority, the sacked commissioner, or his replacement.[93]

Espos alludes to the various changes in the appointing authority as the source of the transient stay of several NTC Commissioners, to wit:

> Former President Estrada unceremoniously fired all 3 Commissioners he had appointed over a dispute in the allocation of cellular frequency, a matter already decided by the Commission and was on appeal in the courts. He replaced them with people connected to PLDT. These officials were also replaced by President Macapagal-Arroyo; the Chairman with a retired military General from the military faction who supported her against Estrada and the two Deputy Commissioners with career officials of the NTC.[94]

In sum, because of confusing administrative transfers and erratic changes at the helm of the agency itself, the regulator's adoption, how much more enforcement, of a *consistent* policy of competition - at least regarding the mobile aspect of telecommunications - was never seriously entertained by anyone save for the regulators themselves.

2. Fiscal Dependency

The Commission also lacks fiscal autonomy. For the last decade, the NTC's annual appropriation from Congress has been less than 10 percent of its annual total income.[95] "As a result, the NTC struggles to perform its tasks such as keeping industry players in check or enforcing penalties and sanctions. This set-up

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[93] *See* generally: Erwin Oliva, Industry shocked, surprised over NTC chief's resignation, PHIL. DAILY INQUIRER, Nov. 28, 2006, *available at*: http://newsinfo.inquirer.net/breakingnews/infotech/view/20061128-35198/Industry_shocked,_surprised_over_NTC_chief's_resignation; Tony Bergonia, NTC exec unceremoniously told to resign, PHIL. DAILY INQUIRER, Aug. 13, 2007, *available at*: http://newsinfo.inquirer.net/breakingnews/nation/view/20070813-82306/NTC_exec_unceremoniously_told_to_resign; TJ Burgonio, NTC chief quits, PHIL. DAILY INQUIRER, July 31, 2009, *available at*: http://newsinfo.inquirer.net/breakingnews/regions/view/20090731-218172/NTC_chief_quits.

[94] Espos, *supra* note 29, at 7.

[95] Edgardo Cabarrios, Competition in the Philippine Telecommunications Sector, at 4-5 (2007), *available at*: http://www.dlsu.edu.ph/research/centers/aki/_pdf/_conferences/manilaConference/competitioninthePhilippintTelecommunicationsSector.pdf. *See also* Paolo Montecillo, NTC seen surpassing income target, PHIL. DAILY INQUIRER, Dec. 21, 2010, *available at*: http://business.inquirer.net/money/topstories/view/20101221-310110/NTC-seen-surpassing-income-target.

also opens the system to regulatory capture."[96] As observed by former NTC Commissioners Heceta and Sarmiento:

> Per NTC's Annual Report, the total supervisory collection of NTC in comparison with the more than P500 billion investments in the telecommunications and broadcast sector is barely 0.03 percent. *This figure would mean that the investment to regulation expense ratio of around 3,600 would indicate NTC's administrative efficiency. This does not, however, indicate an effective method of regulation.* For example, funds allotted to NTC for the purchase or maintenance of equipment or facilities for administrative, monitoring and enforcement at the NTC are practically nil. Most of the NTC's facilities, equipment,, and vehicles are old, outdated or could hardly be explained for lack of funds, Also, NTC lacks qualified personnel, facilities and equipment needed for mobility, training, and effectiveness. An increase in appropriation for badly needed facilities for mobility and inspection, improved salaries, an updated library of books, training and electronic materials, etc. will improve NTC's effectiveness as a regulatory body for a very dynamic and robust sector.[97] (Italics supplied.)

3. Restricted Role of the NTC in the Authorization Process

Entry into the Philippines' telecommunications market requires government approval in the form of two primary documents: a congressional franchise and a regulator's certificate.[98] The first is further conditioned by the constitutional requirement that foreign equity in the telecommunication company is limited to 40 percent and that the life of the franchise does not exceed fifty years.[99]

The second step in the approval process involves an application from the NTC for a Certificate of Public Convenience and Necessity (CPCN) for the type

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[96] Mirandilla, *supra* note 23, at 14.

[97] KATHLEEN HECETA & JORGE SARMIENTO, II REGULATION OF THE TELECOMMUNICATIONS SECTOR 89 (Jorge Sarmiento, 2008).

[98] Rep. Act. No. 7925, §16.

[99] CONST. art. XII, §11. *See* Serrano & Quevedo, *infra* note 106, at 104 - "Ownership of telecommunication companies were... the subject of debate in the proceedings of the 1986 Constitutional Convention. The debate was whether control and ownership be limited to a 60-40 ratio or 75-25 ratio or 2/3-1/3 ratio. One delegate suggested that it its the desired objective that in due time the public utilities should be 100 percent Filipino owned. At that time, however, there were public utility corporations lobbying for the retention of the 60-40 ratio, for fear of having to pay-off foreign equity partners if and when the 2/1-1/3 ratio were approved by the body, which was estimated to cost P1.2 billion pesos."

of service the mobile operator wants to offer. "Through the CPCN, the Commission assigns the area of operation, determines the allowable rate that could be charged for a service, and manages the allocation of radio spectrum or frequency."[100]

The two-step process - that of acquiring an initial legislative franchise and then an administrative license - can be likened to the same process required of broadcast media operators. The rationale for the latter has been explained by the Supreme Court in this wise:

> The complexities of our dual franchise/license regime for broadcast media [or telecommunications] should be understood within the context of separation of powers. The right of a particular entity to broadcast over the airwaves [or operate a telecom network] is established by law —i.e., the legislative franchise — and determined by Congress, the branch of government tasked with the creation of rights and obligations. As with all other laws passed by Congress, the function of the executive branch of government, to which the NTC belongs, is the implementation of the law. In broad theory, the legal obligation of the NTC once Congress has established a legislative franchise for a broadcast media station is to facilitate the operation by the franchisee of its broadcast stations. However, since the public administration of the airwaves is a requisite for the operation of a franchise and is moreover a highly technical function, Congress has delegated to the NTC the task of administration over the broadcast [or radio] spectrum, including the determination of available bandwidths and the allocation of such available bandwidths among the various legislative franchisees. The licensing power of the NTC thus arises from the necessary delegation by Congress of legislative power geared towards the orderly exercise by franchisees of the rights granted them by Congress.[101]

Since the Commission cannot act until a franchise is granted, the potential telecom operator is saddled with the task of either securing one from Congress or purchasing shares of stock from an existing grantee.[102] This additional procedure is

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[100] Erwin Alampay, *supra* note 34, at 9.

[101] Divinagracia v. Consolidated Broadcasting System, Inc. and People's Broadcasting Service, Inc., G.R. No. 162272, April 7, 2009

[102] *See* PLDT I, *supra* note 31 - "A distinction should be made between shares of stock, which are owned by stockholders, the sale of which requires only NTC approval, and the franchise itself which is owned by the corporation as the grantee thereof, the sale or transfer of which requires Congressional sanction. Since stockholders own the shares of stock, they may dispose of the same as they see fit. They may not, however, transfer or assign the property of a corporation, like its franchise. In other words, even if the

cumbersome for the applicant considering that it is the regulator itself which actually determines (a) whether or not competition in the field is warranted, (b) whether the applicant can serve as a qualified operator, and (c) whether the radio spectrum can be allocated to the applicant. The necessity of congressional intervention, therefore, becomes an inutile yet expensive endeavor and makes the entry of potentially competitive firms in today's market rather difficult.[103]

4. Negative Effects of Protracted Court Litigation

Judicial review of agency action is a common feature of regulatory adjudication in the Philippines.[104] What muddles the process are two well-known extant facts: (a) courts suffer from a tremendous backlog of cases; and (b) the appeals process is expected to last for several years.[105] The effect of protracted court action renders timely sector-specific resolutions moot in light of the speed of advancements in technology that may have already developed in the interim.[106]

Indeed, the ability of carriers to prevent intended regulation by the expedience of court action has arguably caused two unintended consequences: (a) it has made the Commission uncertain in implementing its intended reforms;[107]

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original stockholders had transferred their shares to another group of shareholders, the franchise granted to the corporation subsists as long as the corporation, as an entity, continues to exist The franchise is not thereby invalidated by the transfer of the shares. A corporation has a personality separate and distinct from that of each stockholder. It has the right of continuity or perpetual succession."

[103] Since the congressional franchise is likewise limited by the requirement that foreign equity be limited to 40 percent, there have been no new players in the industry. *See* Paolo Montecillo, NTC expects revenue increase to slow, BUSINESSWORLD, Oct. 20, 2008, *available at*: http://www.gmanews.tv/story/128050/NTC-expects-revenue-increase-to-slow. But this statement is without prejudice to the forthcoming entry of San Miguel Corporation to the telecommunications market. As a giant in other public utilities such as power generation and distribution, toll roads and airports, its full participation in the industry may herald the sole glimmer of unlikely competition to the current leaders in the telecom field. *See* Paolo Montecillo, SMC acquires more Liberty Telecom shares, Conglomerate now holds 41.48 percent interest in telco, PHIL. DAILY INQUIRER, Nov. 4, 2010, *available at*:http://business.inquirer.net/money/topstories/view/20101104-301478/SMC-acquires-more-Liberty-Telecom-shares]].

[104] *See* San Miguel Corp. v. Secretary of Labor, G.R. No. L-39195, May 16, 1975; CARLO CRUZ, PHILIPPINE ADMINISTRATIVE LAW 142-146 (Central Book Supply, 2007).

[105] Alfredo Tadiar, Unclogging the Court Dockets, Trade and Investment Policy Analysis and Advocacy Support Project (1999), *available at* http://serp-p.pids.gov.ph/serp-p/download.php?d=600. *See also* Gerardo Sicat, Legal and Constitutional Disputes and the Philippine Economy, 82 PHIL. L.J. 1, 29-38 (2007).

[106] *See* Joan Serrano & Frederico Quevedo, Convergent Technologies: Confronting Constitutional Issues and Regulatory Challenges, 75 PHIL. L.J. 88, 113-117 (2000).

[107] *See* NTC's statements regarding its lack of capacity to regulate during the Senate hearings in Part IV.B.7, *infra.*

and (b) it has prevented new market entrants from demanding that the NTC set reasonable rates of interconnection.[108] Both issues will be discussed in Part IV.

5. Vague Agency Powers Regarding Interconnection

Once the authorization process is complete and the telecom becomes operational, the primary role of the regulator is to ensure that competition exists. Though it has been argued that prices have continually gone down as a direct result of market forces,[109] an effective competition policy is still necessary based on two concerns: "Firstly, we want to make sure that such benefits are not temporary. Secondly, we want to be able to enjoy the benefits of competition to its fullest. As long as threats to competition exist and as long as opportunities for increasing consumer welfare exists then there must be continuous efforts to improve the competitive environment and to guard the competitive process."[110] In addition, the words of Justice Feliciano, which were first elucidated in his dissent in *PLDT II* and subsequently reiterated in the ponencia of *PLDT III*, come to mind:

> The fundamental point is that customers' choice and competition among carriers are essential if reasonable prices and efficient and satisfactory service are to be maintained and the public's needs adequately served.[111]

And the most important facet of an effective and efficient telecommunications competition policy is that of interconnection.

Though the Commission has been given the mandate *to require interconnection* between contracting telecom operators, its ability *to determine the rate of interconnection*, also called the access charge, has continued to be a subject of intense debate. The regulation of the rate of interconnection actually becomes the central

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[108] Riza Olchondra, Lower access charges between telcos could reduce SMS fees says NTC, PHIL. DAILY INQUIRER, Jun. 5, 2008, *available at*: http://newsinfo.inquirer.net/breakingnews/infotech/view/20080605-140969/Lower-access-charges-between-telcos-could-reduce-SMS-fees - NTC Commissioner Ruben Canobas has admitted that the NTC's proposal to lower access charges may be questioned before the courts, as happened to its circular mandating SIM registration and no expiry for cellphone load. xxx That circular was shelved indefinitely because of a temporary restraining order that ripened into a court injunction in 2001.

[109] Erwin Oliva, Telco prices have been going down--Smart spokesperson, PHIL. DAILY INQUIRER, Jun. 6, 2008, *available at*: http://newsinfo.inquirer.net/breakingnews/infotech/view/20080602-140252/Telco-prices-have-been-going-down--Smart-spokesperson

[110] Serafica, *supra* note 44, at 27.

[111] *See* PLDT II (Feliciano, J., dissenting), *supra* note 69, and PLDT III, *supra* note 74.

thesis of this paper since it suggests that a proper implementation thereof can reduce the susceptibility of the regulator to be compromised by capture or interference while allowing effective competition to take root among existing and forthcoming public telecommunication entities.

III. THE CONCEPT OF INTERCONNECTION

> "When rights, worth millions of dollars, are awarded to one businessman and denied to others, it is no wonder if some applicants become overanxious and attempt to use whatever influence they have (political and otherwise), particularly as they can never be sure what pressure the other applicants may be exerting."
>
> -*Ronald Coase*[112]

A. The Economic Rationale for Interconnection

"The most prominent regulatory problem in the Philippine telecom market [was, and still is] the interconnection issue."[113] To reiterate, interconnection is the process by which telecom provider A uses the network of provider B for the purpose of connecting subscribers of the former to subscribers of the latter. Despite the initial presence of multiple carriers and over a decade of developments in the mobile industry, interconnection has proven to be a constant source of conflict. As explained by the International Telecommunications Union, the leading United Nations agency for information and communication technology issues:

> The regulation of the terms and conditions under which competing firms have access to essential inputs provided by rivals has become the single biggest issue facing regulators of public utility industries. This issue is both theoretically complex and inherently controversial. Since the development of competition and the success of liberalization often depend on the access terms and conditions chosen, there is also a strong public policy interest in getting these terms and conditions "right". At the same time, new entrant

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[112] Ronald Coase, The Federal Communications Commission, 2 J.L. ECON. 1, 37 (1959).

[113] Quote taken from Dong-Yeob's interview with Edgardo Cabarios, Director of the Common Carriers Authorization of the NTC. *See* Dong-Yeob, *supra* note 7, at 88.

> firms and incumbents often have a substantial financial stake in the outcome and therefore a strong interest in negotiating aggressively.[114]

To further emphasize the importance of interconnection, a former chairman of the Federal Communications Commission of the United States explains that:

> For competition to be successful at maximizing consumer benefits and innovation in the telecommunications market, carriers that compete for customers must also provide competitors with access to those customers. Shared access to customers occurs through interconnection, and access to all customers is necessary both for successful entry and for continued competition. *If the incumbent, with the vast majority of customers, does not interconnect with new entrants, it is unlikely that the new entrants will remain economically viable.*
>
> *The price of interconnection could serve as a significant barrier to entry for new networks. An incumbent monopolist has an incentive to demand a high price to terminate calls originating on a new entrant's network and pay nothing for calls originating on its own network.*
>
> Thus, the primary purpose of mandated interconnection is to foster a competitive environment that is fair to all competitors. Because the incumbent service provider has the vast majority of customers, a new entrant must be able to interconnect in order to provide full access to its customers. Without the ability to interconnect, new entrants would be severely restricted in their ability to compete with the incumbent.
>
> Policymakers should consider introducing competitive safeguards to protect against the exercise of market power by incumbent carriers during the transition to competition. *The most fundamental of these competitive safeguards involves regulation of the terms and conditions governing interconnection with the existing monopoly provider's network.*[115] (Italics supplied.)

In addition to the aforementioned arguments, another economic rationale for requiring reasonable costs of interconnection in the market is efficiency.

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[114] ITU ICT Regulation Toolkit, Module 1.4, Interconnection, *available at*: http://www.ictregulationtoolkit.org/en/Section.3114.html *citing* OECD, Access Pricing Report, at 8, *available at*: http://www.oecd.org/dataoecd/26/6/27767944.pdf.

[115] William E. Kennard, Connecting the Globe: A Regulator's Guide to Building a Global Information Community, Federal Communications Commission, June 1999, *available at*: http://www.fcc.gov/connectglobe/

Obviously, the creation of a telecommunications network is costly, more so in an archipelago such as the Philippines. For a new market entrant to duplicate an incumbent carrier's national infrastructure in the short and medium term is an impossible feat. In the mean time, smaller telecom operators would be disadvantaged by the incumbent players due to the latter's pre-existing infrastructure which presumably covers a wider geographic base. An analogous situation is highlighted in *Tatad v. Secretary of Energy* wherein new players in the oil industry were seen to suffer from the incumbent's advantage of having their own refineries, *viz.*:

> [It] cannot be denied that our downstream oil industry is operated and controlled by an oligopoly... Petron, Shell and Caltex stand as the only major league players in the oil market. All other players belong to the lilliputian league. As the dominant players, Petron, Shell and Caltex boast of existing refineries of various capacities. The tariff differential of 4 percent therefore works to their immense benefit. Yet, this is only one edge of the tariff differential. The other edge cuts and cuts deep in the heart of their competitors. It erects a high barrier to the entry of new players. New players that intend to equalize the market power of Petron, Shell and Caltex by building refineries of their own will have to spend billions of pesos. Those who will not build refineries but compete with them will suffer the huge disadvantage of increasing their product cost by 4 percent. They will be competing on an uneven field.[116]

To adopt the words of former NTC Commissioners: "having the infrastructure and [disallowing competitors from accessing] the same is tantamount to having no infrastructure at all."[117]

The direct beneficiary, therefore, of regulated interconnection rates would be the access-seeking telecom operator. The ultimate beneficiary, however, is the consuming public because of the resulting environment of competition brought about by the reduction of said rates. The rate of interconnection between public telecommunication service providers in the Philippines, as will be described later in comparison with other Asian countries, is unreasonably high. The advantages of having this rate regulated may best be described by discussing the disadvantages of retaining the existing rates.

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[116] *See* Tatad v. Secretary of Energy, *supra* note 28.

[117] HECETA & SARMIENTO, *supra* note 97, at 60.

Thus, to illustrate the consequences of perpetuating the existing rate of interconnection, consider the following real life example: when a Globe subscriber calls a Smart subscriber, an *inter*-network call is made because there are two networks involved. Globe in order to access Smart's network, pays an interconnection fee of P4.00 per minute. In contrast, when a Globe subscriber calls a fellow Globe subscriber - this time an *intra*-network call because only one network is involved - the cost of connecting the call is greatly reduced since there is no second carrier and thus no interconnection fee to pay.

With these factual premises, the "unlimited" *intra*-network services, first offered by Sun Cellular and subsequently adopted by both Globe and Smart, start to make sense. Instead of subscribers paying P6.50 per minute of call for *inter*-network calls (which is composed of the interconnection fee plus other costs of the call), a cheaper rate is charged for mere *intra*-network calls. Thus, both the subscriber and the telecom save money when *intra*-network calls are made. Through this ingenious marketing strategy, the carrier is able to accomplish three profitable goals: (a) first, it eliminates the interconnection fee it pays to the terminating carrier; (b) second, by sheer consumer economics, the strategy ensures that subscribers will tend to favor *intra*-network calls; and (c) lastly, existing subscribers, in order to increase their savings, are incentivized to encourage personal contacts to subscribe to the same *intra*-network carrier. This appears to be a valid marketing strategy for mobile operators, save for one noticeable caveat: because intra-network transactions are much more affordable than the exorbitant rate involved in inter-network connections, telecom operators create an environment whereby competition is prevented from taking place.

Ideally then, the regulator is to be charged with a dual-edged role: (a) mandating interconnection; and (b) regulating the rate of interconnection. Reasonable access charges, in turn, would eliminate the inefficiency of duplicating networks while giving the smaller telecoms a much needed opportunity to compete. When mobile operators in the Philippines started to gain market share, the NTC was faced with this "unique challenge" of regulating interconnection between private, dominant telecom operators. According to Mirandilla, "prior to this, no other market in the world (developed or developing) had drafted and enforced rules on private mobile carriers. All previous experience involved a dominant fixed line carrier. After deregulation, re-regulation through

interconnection rules became an imperative to create real competition in the now strong mobile sector."[118]

B. The Characterization of Interconnection Agreements

Verily, the refusal of well-established telecommunication carriers to lower the existing rate of interconnection is based on the underlying fact that the interconnection fee not only produces a significant amount of profit but it also serves as an additional barrier against new market entrants who would attempt to lower the overall cost of mobile services. As explained by Serafica:

> Being bilateral in nature, [the] settlement of the terms of interconnection is determined by the relative bargaining strengths of the carriers. Access payments usually make up a significant portion of the operating costs of a new entrant (e.g., 30-40 percent) while it is a source of revenues for incumbents particularly in the beginning when the direction of calls is from subscribers of the new carriers to the subscribers of incumbents. Thus, the access charge is very important to business survival.[119]

Bearing this in mind, interconnection contracts between existing dominant carriers have the potential to fall within the ambit of restrictive agreements. According to Edwards:

> [Restrictive agreements] are agreements among independent business enterprises that diminish competition among the participants or deprive other concerns of opportunities to compete. In economic discussion, this type of restriction is often referred to indiscriminately as monopolistic. At law, this may be considered a conspiracy in restraint of trade.
>
> Restrictive agreements are the easiest ways to reduce competition. The incentive to restrict exists wherever joint action can improve the bargaining strength of the participants. The opportunity to restrict exists... if there is any way to prevent easy entry into the market by new competitors. xxx The government can easily discover restrictive agreements if it knows what it is looking for; and it can usually destroy them without great difficulty. Where

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[118] Mirandilla, *supra* note 23, at 6.
[119] Serafica, *supra* note 44, at 21.

> such destruction is difficult, the reason is usually that the arrangement has gone so long unchallenged as to have become a part of business habits.[120]

Indeed, unregulated interconnection agreements between carriers in this jurisdiction have achieved a state of permanency which have remained "unchallenged [for so long] as to have become a part of business habits." Likewise in point is the fact that the regulator has been well aware of these arrangements for sometime now and has tried, with varying levels of success, to destroy such agreements when prompted by competing telecom operators.[121]

Considering that the execution of these restrictive agreements can be categorized as combinations in restraint of trade,[122] affected parties might have recourse to Art. 186 of the Revised Penal Code.[123] Unfortunately, the provision has historically failed to serve as an effective deterrent to monopolies and combinations in restraint of trade, *viz.*:

> In a letter to the Executive Director of the Office of United Nations and International Organizations, answering a questionnaire of the UN Secretary General on, among other matters, how effective in practice has been Articles 185 and 186 of the Revised Penal Code penalizing machinations in public auctions and monopolies and combinations in restraint of trade, respectively, the then Minister of Justice [now Senate President Juan Ponce Enrile] responded with candor that as far as he is aware, "no business enterprise has yet been indicted under the anti-trust provisions of the Revised Penal Code, nor has any official been successfully impeached by the legislature.[124]

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[120] CORWIN EDWARDS, MAINTAINING COMPETITION, REQUISITES OF A GOVERNMENTAL POLICY 17-18 (McGraw-Hill, 1949).

[121] *See* the discussion in Part IV.B involving the series of mobile interconnection disputes which have plagued the telecommunications industry.

[122] Tatad v. Secretary of Energy, *supra* note 28 - "A combination in restraint of trade is an agreement or understanding between two or more persons, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority. Combination in restraint of trade refers to the means while monopoly refers to the end."

[123] REV. PEN. CODE, Book II, §186 (1) - The penalty of prision correccional in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon: (1) Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market...

[124] *See* Tristan Catindig, The ASEAN Competition Law Project: The Philippine Report (2001), at 4, *available at*: http://www.jftc.go.jp/eacpf/02/philippines_r.pdf, *citing* Department of Justice Opinion No. 160,

On the other hand, Art. 28 of the New Civil Code, which penalizes unfair competition, appears to be of dubious application as well considering the sentiments of Dr. Arturo Tolentino, *viz.*:[125]

> What Article 28 of the New Civil Code prohibits is unfair competition. In order to qualify the competition as "unfair," it must have two characteristics: (1) it must involve an injury to a competitor or trade rival, and (2) it must involve acts which are characterized as "contrary to good conscience," or "shocking to judicial sensibilities," or otherwise unlawful; in the language of our law, these include force, intimidation, deceit, machination or any other unjust, oppressive or high-handed method. *The public injury or interest is a minor factor; the essence of the matter appears to be a private wrong perpetrated by unconscionable means.*[126] (Italics supplied.)

C. Justifying Interconnection Regulation

Initially, interconnection was treated as a pure creature of contract. In *Republic v. PLDT*, the government, through the Bureau of Telecommunications (BuTel), sought to interconnect the now defunct government telephone system (GTS) to PLDT's nation-wide network.[127] PLDT resisted BuTel's proposal prompting the government to file an action to compel PLDT to execute an interconnection agreement. The Court held that though the parties could not be forced to enter into a contract without the consent of PLDT, the government could still require PLDT to interconnect pursuant to the government's inherent power of eminent domain, *viz.*:

> We agree with the court below that parties can not be coerced to enter into a contract where no agreement is had between them as to the principal terms and conditions of the contract. Freedom to stipulate such terms and conditions is of the essence of our contractual system, and by express

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series of 1983, Oct. 17, 1983. Senate President Enrile would later sponsor S. B. No. 123 (14th congress, 1st sess., 2009) or the proposed "Competition Act of 2009." *See* Inquirer.net, Enrile pushes for anti-trust bill ok: To penalize unfair trade practices, April 29, 2009, *available at*: http://business.inquirer.net/money/topstories/view/20090429-202175/Enrile-pushes-for-anti-trust-bill-ok.

[125] CIVIL CODE, Book I, §28 - [U]nfair competition in agricultural, commercial, or industrial enterprises or in labor through the use of force, deceit, machination or any other unjust, oppressive or high-handed method shall give rise to a right of action by the person who thereby suffers damage.

[126] I TOLENTINO, CIVIL CODE OF THE PHILS., COMMENTARIES AND JURISPRUDENCE, 123 (1990 ed.)

[127] At the time, BuTel was maintaining 5,000 telephones and had 5,000 pending connection applications. PLDT was also maintaining 60,000 telephones and also had 20,000 pending applications. Through the years, neither of them has been able to fill up the demand for telephone service.

> provision of the statute, a contract may be annulled if tainted by violence, intimidation, or undue influence (Articles 1306, 1336, 1337, Civil Code of the Philippines). *But the court a quo has apparently overlooked that while the Republic may not compel the PLDT to celebrate a contract with it, the Republic may, in the exercise of the sovereign power of eminent domain, require the telephone company to permit interconnection of the government telephone system and that of the PLDT, as the needs of the government service may require, subject to the payment of just compensation to be determined by the court.*[128] (Italics supplied)

This initial paradigm of interconnection as a contractual matter was established as early as 1969. As such, interconnection could only be considered mandatory when the government itself was involved as an interconnecting applicant through the use of its power of eminent domain. Two decades later, the Supreme Court had the opportunity to revisit its original conception of interconnection and revise the same for the sake of promoting competition in *PLDT I* and *PLDT III*, *viz.*:

> [T]he Municipal Telephone Act of 1989... mandates interconnection providing as it does that "all domestic telecommunications carriers or utilities ... shall be interconnected to the public switch telephone network." Such regulation of the use and ownership of telecommunications systems is in the exercise of the plenary police power of the State for the promotion of the general welfare.
>
> Art. XII, Sec. 6 of the 1987 Constitution recognizes the existence of that power when it provides: "The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."
>
> *The interconnection which has been required of PLDT is a form of "intervention" with property rights dictated by "the objective of government to promote the rapid expansion of telecommunications services in all areas of the Philippines, ... to maximize the use of telecommunications facilities available, ... in recognition of the vital role of communications in nation building ... and to ensure that all users of the public telecommunications service have access to all other users of the service wherever they may be within the Philippines at an acceptable standard of service and at reasonable cost.* (DOTC

[128] Republic v. PLDT, G.R. No. L-18841, Jan. 27, 1969.

> Circular No. 90-248). Undoubtedly, the encompassing objective is the common good. The NTC, as the regulatory agency of the State, merely exercised its delegated authority to regulate the use of telecommunications networks when it decreed interconnection.[129] (Italics supplied)

From its initial characterization of the interconnection agreement being purely contractual in *Republic v. PLDT*, the Court in *PLDT I* and *PLDT III* appears to have recognized that the NTC has the right to enforce mandatory interconnection on the basis of statutory authority for the promotion of the public welfare. Therefore, insofar as forcing the parties to enter into interconnection agreements was concerned, post-liberalization jurisprudence, law and policy have been consistent: interconnection is mandatory. However, as will be gleaned in the succeeding section, no clear role was assigned to the Commission in *actually regulating the rate of interconnection between the parties*. Since this was not considered an issue of significant importance during the deliberations in Congress, the status *quo* - that is, exorbitant interconnection rates - would be retained despite the influx of new telecommunication entities to the market.

D. Statutory Development of Interconnection Regulation

1. Exec. Order No. 59 v. the Public Telecommunications Act

Note that one of the purposes of mandatory interconnection as held in *PLDT I* and *PLDT III*, was to "ensure that all users of the public telecommunications service have access to all other users of the service wherever they may be within the Philippines at an *acceptable standard of service and at reasonable cost.*" The foregoing judicial pronouncement seems to have set the tone for mandatory interconnection during the Ramos Administration. Executive Order No. 59 states that:

> Sec. 2. Interconnection between NTC authorized public telecommunications carriers shall be compulsory... xxx
>
> Sec. 6. Interconnection shall be negotiated and effected through bilateral negotiations between the parties involved subject to certain technical/operational and traffic settlement rules to be promulgated by the

[129] PLDT I, *supra* note 31; PLDT III, *supra* note 74.

> NTC; *Provided,* that if the parties fail to reach an agreement within ninety (90) days from date of notice to the NTC and the other party of the request to negotiate, the NTC shall, on application of any of the parties involved, determine the terms and conditions that the parties have not agreed upon but which appear to the NTC to be reasonably necessary to effect a workable and equitable interconnection and traffic settlement.

In this original set-up, the contracting parties were given a chance to negotiate the terms and conditions of interconnection "*subject to certain technical/operational and traffic settlement rules.*" If they failed to agree to certain terms, the Commission could act in behalf of the party applying for interconnection and thus "determine the terms and conditions that the parties have not agreed upon but which appear to the NTC to be reasonably necessary to effect a workable and equitable interconnection and traffic settlement." The impetus for mandatory interconnection was thus still very much apparent. On the other hand, the rate of interconnection was initially subjected to regulation either *prior* to bilateral negotiations (in the form of technical, operational, and traffic settlement rules) or in the *event of disagreement* of the parties, whereby the NTC would take a proactive role in settling certain terms and conditions.

In enacting the Public Telecommunications Act, the law and policy relating to this significant issue seems to have taken a subtle turn. Section 18 of the law focuses its attention on contractual arrangements, *viz.*:

> The access charge/revenue sharing arrangements [also known as interconnection agreements] between all interconnecting carriers shall be negotiated between the parties and the agreement between the parties shall be submitted to the Commission. *In the event the parties fail to agree thereon within a reasonable period of time, the dispute shall be submitted to the Commission for resolution.*
>
> In adopting or approving an access charge formula or revenue sharing agreement between two or more carriers, xxx the commission shall ensure equity, reciprocity and fairness among the parties concerned. In so approving the rates for interconnection between the telecommunications carriers, the Commission shall take into consideration... xxx (Italics supplied)

Nominally, the phrase "access charges or revenue sharing arrangements" replaced the more commonly termed "interconnection agreements." But a deeper

comparison of the executive order of 1993 and the law of 1995 shows that, ostensibly, the latter reduced the role of the Commission in regulating interconnection rates. Notably the NTC's power to promulgate rules to be followed prior to party negotiations and its power to determine the terms of interconnection which the parties have failed to agree upon were not incorporated into the new law. As opposed to the dictates of the older executive order, the Public Telecommunications Act seems to allow dominant carriers to drag their feet in coming to an agreement with newer or smaller telecoms.

The nuances seem to be minor but with this apparent shift in policy, interconnection appears to have been left to contract law, the regulating agency's ability to intervene limited to cases of irresolvable disagreement or prejudice to public interests. According to Dong-Yeob: "such a relaxed regulatory mechanism, [at the time, already] raised apprehensions about the environment for fair competition between the existing company and the new entrants."[130]

2. Unfocused Intent of the House of Representatives for Interconnection

The deliberations of the Public Telecommunications Act in the House of Representatives buttress the fact that very little attention was paid to the regulation of interconnection. What is striking however is that the issue was raised very early during the initial deliberations on the proposed bill filed by Representative Jerome Paras, then the Chairman of the House Committee on Transportation and Communications. When he asked the Executive Department's opinion on the draft bill, then Undersecretary Josefina Lichauco of the DOTC was insistent that more focus should be given to interconnection, to wit:

> No major comments anymore, Your Honor except one, and [it is with regard] to the use of the word "interconnection." You see the word "interconnection" [is] used very much and I would like to think that the term should have been defined.
>
> In fact, off the line discussions with you, Your Honor, *I had told you that there is a draft bill on interconnection as an imperative because everyone today knows that without interconnection to the PSTN (public switch telephone network) - an interconnection among carriers, enforced by the NTC as a real imperative not just on paper*

[130] Dong-Yeob, *supra* note 7, at 85.

> *- the development of telecommunications in the country will be very difficult.* I think it will not be served.
>
> Right now, PLDT, is in the process of discussion with quite a number of carriers and with the Department on interconnection. *Between discussing and physically interconnecting is a [world] of difference*, Your Honor. And when you delay the forging of an agreement on interconnection, to the extent, it detracts from the development of the telecommunications industry. And when you delay [xxx]... everybody is at the mercy of the dominant carrier... I think the interconnection, the issue of interconnection merits a particular paragraph here or a separate bill by itself.[131] (Italics supplied)

Though it might be surmised that her concern was based on interconnection issues among fixed-line carriers, the mobile sector being yet at its infancy in the early 1990s, the same principle applied: the lack or the delay of interconnection would be detrimental to any effort to improve the industry. The response of Representative Paras to the Undersecretary's suggestion was encouraging but non-committal:

> I confirm that very recently the DOTC has submitted a draft proposal, a draft bill on mandatory interconnection. It has not yet been filed and my suggestion would be, that depending upon the merits of this bill, if at all, we will have to pass this bill. I would plan that it should... instead of being a separate bill, be integrated into the main bill [filed by both Representatives Matti and Paras]. Because, again, as I read the bill, there is really nothing that would make this a separate item. It can be integrated since it deals with the same subject matter. As a matter of fact, interconnection is already treated in the main bill itself and this proposed interconnection bill of the DOTC speaks of the details of the interconnection. So there is no harm if we integrate this, the portions that we would think [are] necessary to be

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[131] The sentiment would be supplemented by Undersecretary Teodoro Encarnacion of the Department of Public Works and Highway (DPWH), who then headed the technical staff committee responsible for the preparation of the infrastructure development framework of the Ramos administration: "For communications... [we] will allow for more often (sic) entry of private firms as well as provision of operational assistance and financial incentives to private telecom operators. This means a competitive atmosphere and no monopoly. And then the plan will adopt a clear and simpler (sic) rules for interconnection of all public telecom networks..." *See* Records of the Committee on Transportation and Communications, *supra* note 60, at 38; *see also* Records of the Committee on Economic Affairs (joined by the Committees on Public Works, Transportation and Communication, Energy, Appropriations and Legislative Franchises) 13, House of Representatives (9th Cong., 1st sess., Mar. 25, 1993.)

> integrated to give teeth to that proposal if at all we shall finally decide to include the whole or any portion of this bill, in the main bill...[132]

And yet, despite this initial concern for interconnection, the momentum for the same seems to have escaped notice during later hearings. The issue would only be raised three times in the course of the deliberations: twice by the technical working group (TWG) of the same congressional committee and once during the actual plenary debate of the bill.

The first time it was raised as an issue, there was a question as to whether fixed-line carriers and mobile carriers would be able to interconnect. The presiding chairman of the TWG addressed the point by stating that interconnection should occur between the two modalities without discrimination.[133]

Interconnection was then discussed for the second time as an incidental matter in relation to toll sharing agreements, *viz.*:[134]

> THE PRESIDING OFFICER: I find some problems... when we have a small operator negotiating with a giant on toll sharing [also known as interconnection]. *Mukhang hindi level ang playing field. Pag sinabi ng [dominant operator], 'sige ayaw ninyong magconnect, huwag.*" So what are we trying to promote here is some sort of a level field where it is fair, transparent, *alam ang* rules *ng* game... xxx
>
> MR. MAGAY (PAPTELCO): Mr. Chairman... we go back to Exec. Order 59 which provides not only for mandatory interconnection but also for sharing and settlement. *Mayroon doon* eh. And then our discussion *doon* sa reorganization bill, we also included that portion, na the NTC can initiate *motu proprio*, by itself, *iyong* investigation into the question of toll sharing in order to increase the sharing agreement *kung nakikita ng NTC na malaki ang kinikita ng gateway operator.* That is the sufficient power or the strengthening of the NTC that you are referring to... for the good of the industry.

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[132] Records of the Committee on Transportation and Communications, *supra* note 60, at 39.

[133] Records of the Technical Working Group on Communications (Transportation), *supra* note 72, at 64-65.

[134] The phrase "toll sharing" agreement/formula was originally lumped together with "revenue-sharing" agreements in S. B. No. 11 and with "access charge and revenue-sharing" agreements in H. B. No. 14028. After the bicameral conference, the term "toll sharing" was scrapped in favor of just "access charge and revenue-sharing" agreements.

> MR. ONG (PhilCom): But Mr. Chairman, no one can prevent you from indicating that in the bill if you want to. That is part of the police power of the legislative authority.
>
> MR. AMPIL (PLDT): Well, just by way of addition, on the assumption that this pronounced government policy of allowing parties to negotiate among themselves is thrown out the window, because that policy says that the parties are free to negotiate. And only if they are unable to reach an agreement shall government step in. In other words, it is a radical throwing out of the policy.
>
> xxx
>
> THE PRESIDING OFFICER: *What we could place in the law and I'd like to suggest this, is a framework. Now the details to implement the framework, how much the percentage, the mechanics for distributing the subsidy, the amount to local exchanges [arising from the aforesaid toll sharing agreements], could probably be tossed as implementing rules and regulations [by the] NTC. As I have said, I suggested awhile ago that in trying to formulate this bill, let's assume that we have a strong NTC and which is very capable.*[135] (Italics supplied.)

Note the opposition fielded by the dominant carrier, PLDT, in relation to the perceived threat of regulating the toll-sharing agreements between carriers.

The last time interconnection was raised as an issue in the House of Representatives was when Representative Rodolfo Albano, Jr. sought to clarify whether there would be "linkages amongst competing companies." Representative Paras confirmed that there would be, highlighting that "access charges would be determined by the telecom parties and duly registered with the NTC."[136]

Despite the meager attention given to it during the aforementioned deliberations, Representative Paras, in his sponsorship speech of House Bill No. 14028, gave paramount importance to interconnection and this has since been cited by jurisprudence, to wit:

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[135] Records of the Technical Working Group on Communications (Transportation), House of Representatives 57-61 (9th Cong., 1st sess., Mar. 25, 1993.)

[136] 5 Records of Plenary Proceedings 164-165, House of Representatives (9th Cong., Dec. 5, 1994.)

> There is also a need to promote a level playing field in the telecommunications industry. New entities must be granted protection against dominant carriers through the encouragement of *equitable access charges and equal access clauses in interconnection agreements and the strict policing of predatory pricing by dominant carriers. Equal access should be granted to all operators connecting into the interexchange network. There should be no discrimination against any carrier in terms of priorities and/or quality of service.*[137] (Italics supplied.)

3. The Nonchalance of the Senate in Tackling the Issue of Interconnection

Even worse than the nominal statements made in the Lower House, the deliberations made in the Upper Chamber were actually bereft of regulating the rate of interconnection. The issue was only mentioned once during the entire deliberations in the Senate and only as one of many "*other key policy provisions*" of the proposed bill. In the sponsorship speech of the senate bill's chief architect, Senator John Osmeña said:

> Interconnection among carriers is made mandatory in order to provide a full range of connection possibilities to customers. Where there are a number of operators of comparable size, interconnection is unlikely to pose a major problem because it is in everybody's best interest to resolve problems as quickly as possible. However, when a new competitor is entering a market dominated by an established carrier, the dominant carrier has every incentive to delay the establishment of connections and to impose ridiculous access charges.[138]

But though he alluded to mandatory interconnection in his speech, perhaps in reference to President Ramos' Executive Order No. 59, Senator Osmeña focused on other aspects of the proposed bill during the deliberations particularly that relating to: (a) Executive Order No. 109 as an "unconstitutional usurpation of legislative authority;" (b) the regulation of market entry through congressional franchises; and (c) the proposed policy to deregulate the industry due to graft and corruption existing in both the NTC and the DOTC.[139]

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[137] 3 Records of Plenary Proceedings 552, House of Representatives (9th Cong., Dec. 5, 1994); also cited in PLDT v. City of Davao, G.R. No. 143867, Mar. 25, 2003.

[138] 4 Record of the Senate 73, 872, 9th Cong., 1st sess. (Sponsorship Speech of Sen. Osmeña).

[139] *Id.*, at 869-872.

4. The Irregular Procedure adopted by the Bicameral Conference Committee

As exemplified by the deliberations leading to the pertinent house bill, there was an initial intent by the House of Representatives to ensure that the Commission's role in regulating interconnection would be included in the law. The senate bill, as proposed and eventually approved by the Upper House, likewise contained the provision which would enable the regulator to "*approve or adopt*" the access charge agreed upon by the carriers despite this not being discussed at all. But the role of the Commission in determining the rate of interconnection was left vague and unclear. Could it intervene and actually set a rate of interconnection in case the agreement proved to be detrimental to the public interest? This role, as explained earlier in Part III.D.1, was indirectly addressed by Executive Order No. 59 by requiring the Commission to initiate pre-negotiation regulation in the form of specific rules to govern bilateral agreements.

Salazar briefly explains the circumstances and the irregular procedure adopted by the Bicameral Conference Committee which led to this surprising omission considering that, at the time, there were existing bills in both Houses of Congress calling for a clearer NTC role on interconnection, *viz.*:

> On February 20, 1995, when the Bicameral Conference Committee met to reconcile the provisions of Senate Bill No. 11 and House Bill No. 14028. Only two of the 16 members were present in the meeting - Senator Osmeña and [Representative] Paras. In a seven-minute meeting, Osmeña and Paras agreed on the provisions of the bill, with Osmeña reiterating that "the intention of the law is that there should be minimum discretion of the part of the NTC."
>
> Curiously, only Senator Osmeña's personal staff was present in the meeting and the entire House Committee staff was absent. In contrast to the Senate Committee staff, which was basically composed of the personal staff of the Senator who heads the committee, House Committee staff comprised of permanent employees who remain in the same committee even if the Chairperson changes. Thus, the House structure leads to better documentation and institutional memory. With this particular bill, the head of the House Committee Secretariat for Transportation and Communication recalled that *the House staff was not informed of the date of the Bicameral Conference Committee meeting.* Instead, it was just given copies of the final draft of the law, which was unusual and contrary to practice. It seemed, however, that this was

> not a simple oversight. Senator Osmeña stated on record that he was responsible for two important points in the telecommunications law that were inserted at the Bicameral Conference Committee level: first... *xxx and second, removing the role of the NTC in interconnection agreements, which amended EO 59. Osmeña explained that the two insertions were a result of rivalry between himself and his brother, who controlled the DOTC and the NTC. xxx With regard to the law being silent on the role of the NTC in interconnection agreements, Osmeña admitted that PLDT lawyers suggested this idea to him.* PLDT wanted interconnection to be negotiated between parties as opposed to being mandated by the NTC. Without a clear role for the NTC, PLDT could again choose to delay interconnection with its competitors.[140] (Italics supplied.)

Thus, instead of improving the powers of the Commission with regard to regulating interconnection, the chief author of the law in the Senate level was observed to have been the very culprit in watering-down Executive Order No. 59, the game-changer in the industry. Whether Executive Order No. 59 was actually amended by the newer law, however, becomes another subject of inquiry which will be tackled in Part V.

IV. INTERCONNECTION REGULATION IN THE MIDST OF REGULATORY INTERFERENCE

> "Although regulation is begun with the good intentions of those who promote and pass the laws, somewhere along the line regulators may become pawns of the regulated firms.""
>
> - *Richard B. McKenzie and Gordon Tullock*[141]

A. Regulatory Capture and Opportunism

Since the regulator has been a historical subject of direct and indirect interference by private and governmental sources and since the law itself seems ambivalent in determining the regulator's role in spurring competition, the ability of the Commission to regulate must be viewed from a practical perspective. It

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[140] SALAZAR, *supra* note 9, at 247-248, *citing* Coronel, *supra* note 79.

[141] RICHARD B. MCKENZIE AND GORDON TULLOCK, MODERN POLITICAL ECONOMY: AN INTRODUCTION TO ECONOMICS, at 220 (1978).

becomes significant to question whether the conditions prevailing from the time of President Marcos to President Ramos - that is, an environment with strong corporate or ulterior government influence - have persisted in the last decade of telecommunications regulation. Thus, the first question to be asked is a broad one: "Is the NTC a captured agency?"

To answer the question affirmatively would require more evidence and a thorough discussion of other aspects of the telecommunications sector beyond the scope of this paper. But the question need not be dodged completely and instead be used as a starting point of a more definitive inquiry: "If the agency, at present, can be considered captured by illegitimate interests, how can it be freed? And if, otherwise, considering its weakened state as a regulator, how can it avoid capture or escape the detrimental influences originating from corporate and political sources?"

This writer posits that the answers to both questions are the same and involve the isolation of the regulator from the incumbent carriers through the introduction and subsequent maintenance of competition in the market. The end result would discourage rent-seeking behavior and transfer the regulator's responsibility of enforcing competition to the very market it seeks to regulate.[142] And as explained in the previous sections, competition in the industry can only be achieved by mandating and regulating the rate of interconnection between telecom operators.

1. The Theories of Regulatory Capture

Generally, allowing competitive forces to police an industry is considered more efficient than having a regulator step in and fix prices.[143] But in an industry such as mobile telecommunications, having no regulation at all and allowing a purely *laissez faire* scenario to operate, has likewise been observed to be detrimental

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[142] *See* Serafica, *supra* note 44, at 21 - "Considering that the regulator alone cannot provide the necessary countervailing power against market power, this function should be shifted not only to the market itself, distributing power not only among firms but also between the market - the suppliers and the consumers."

[143] *See* Robert D. Willig, Public versus Regulated Private Enterprise, Proceedings of the World Bank: Annual Conference on Development Economics, 155-180 (1993). *See also* Christina Spyrelli, Regulating the Regulators? An Assessment of Institutional Structures and Procedural Rules of National Regulatory Authorities, 8 INT'L. J. COMM. L. & POL'Y 1, 8-9 (2004).

to the public weal. This has been the principal observation of noted scholars who have advocated regulation in the telecommunications sector. As compiled by one author on the subject:

> Professors Jean-Jacques Laffont and Jean Tirole use the example of New Zealand, where regulatory oversight was abolished, then reinstated, to demonstrate the "difficulty of ensuring competition in the absence of regulation."
>
> Professor Howard Shelanski finds that innovations have been more rapidly developed in competitive telecommunications markets, and he writes that "regulators and enforcement officials should be wary of claims that, by adhering to policies designed to preserve competition, they will impede firms from deploying innovations or bringing new services to consumers."
>
> Perhaps most tellingly, Professor Lawrence White, generally not a supporter of regulation, told the Washington Post: "I even half choke on the words as I say them, but there's got to be regulatory intervention. Otherwise, the whole issue of local competition is truly a joke."
>
> The regulatory gestalt is also changing to recognize this reality. Former FCC Chairman William Kennard has noted that "[i]ntroducing competition in monopoly markets requires consistent pro-competition intervention by the government . . . . This thought that if the government gets out of the way, competition will somehow spontaneously bloom, I just don't get it."
>
> Perhaps surprisingly, [another former] FCC Chairman Michael Powell, an avowed believer in laissez-faire economics, recently shared the following telling comment: "One of the things I find as a regulator, the pattern is always the same. An innovator loves a free market--until they get big. Then they want to pull up the ladder. One of our more sacred responsibilities is to never take the heat off big companies.[144]

An environment where the regulator is made subject to private interests may be considered to be even more harmful than an environment where there exists no regulation at all. The first situation is what is commonly known as regulatory capture.

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[144] Reza Dibadj, Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame? 81 WASH. U. L. Q. 1, 14-15 (2003).

The basic hypothesis of capture, as introduced by George Stigler in *The Theory of Economic Regulation*, "is that an industry may use (or rather abuse) the coercive public power of the State to establish and enforce rules in order to obtain *private* benefits." [145] His article has generated several theories explaining the concept.[146] The Toulouse School theory, for example, is based on the assumption that the regulator can acquire information detrimental to the regulated firms and use this to encourage rent-seeking behavior by not reporting the same to Congress, as principal of the administrative agency, *viz.*:

> The agency, i.e. the supervisor, regulates the firms' rate of return and the prices. The regulated firm, i.e. the agent, disposes over private information regarding its costs. While the regulator has the time and resources to discover the real nature of the firm, in other words, to know whether the firm is efficient (low costs) or inefficient (high costs), the Congress, i.e. the principal has to believe in the information provided by the regulator. The regulatory agency can thus hide information from the Congress and obtain an information rent by colluding with the firms if the firm benefits from this retention of information.[147]

> Where there is limited competition, a captured regulator can work as an enforcement mechanism to horizontal collusion between firms. Indeed, in oligopolistic markets, firms could benefit from collusion through fixing higher prices, dividing the geographic market between them, or dividing and reducing the quantity to raise prices.[148]

In the case of PLDT, its early relationship with the NTC appears to have been based on this model of regulatory capture.

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[145] Frédéric Boehm, Regulatory Capture Revisited – Lessons from Economics of Corruption, Internet Center for Corruption Research, at 4 (2007), *citing* George J. Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MANAG. SCI. 3-21 (1971).

[146] *See* Richard Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MANAG. SCI. 335-358 (1974).

[147] Boehm, *supra* note 145, at 10, *citing* LAFFONT AND TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION. (MIT Press, 1993).

[148] *Id.*, at 17.

2. Regulatory Opportunism by Design

When Congress finally stepped in to remedy the situation, it enacted the Public Telecommunications Act of 1995. The law, however, has been characterized by "its excessive generality and [its] incomplete coverage of the issues."[149] The incompleteness of the reform agenda, as exemplified by the means by which the role of the regulator regarding interconnection was watered down from the executive order in 1993 to the law in 1995, must have inadvertently set the stage for the present-day troubles of the regulator. As explained by Boehm:

> [The] World Bank and the Inter-American Development Bank note that public service sector reforms occurred sometimes in an environment of "incomplete reforms and immature regulatory frameworks." Such settings clearly open the risk for opportunistic behavior: *regulated firms may capture the reform for their own narrow interests ('regulatory capture'), or politicians may abuse regulatory powers for own purposes ('regulatory opportunism', or capture by the political sphere).* As emphasized by Estache and Martimort (1999), corruption, regulatory capture and regulatory opportunism are transaction costs of regulation, and undermine the stated aims of these reforms. Efficiency is compromised, and the gains from reform are unequally distributed: they benefit the ones engaged in corrupt deals at the costs of users and, in the end, society.[150] (Italics supplied)

What appears to be generally occurring in the mobile setting today, as will be described later, is a form of indirect capture created through regulatory opportunism. Here the regulator is "captured by the political sphere." This can be gleaned from the actions of the regulator and the concomitant reaction of the government, as influenced by private parties. This concept becomes relevant in examining attempts of the regulator to reform the industry in the last decade.

As explained in Part II, after the NTC grants the cellular service provider the authority to operate, its primary duty is to ensure that competition exists. This task is primarily accomplished through (a) interconnecting the networks of the various carriers to each other and (b) guaranteeing that the smaller telecoms are able to access the larger ones at reasonable rates. The agency's intervention with regard to this aspect of mobile telecommunications regulation, therefore, deserves

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[149] Espos, *supra* note 29, at 44.

[150] Boehm, *supra* note 145, at 3, *citing* the World Bank, Inter-American Development Bank (2005).

much attention. If the agency is prevented from regulating interconnection, this being the primary mode of ensuring competition, it would raise the likely suspicion of either capture or interference.

B. The Mobile Interconnection Wars

Though the sector boomed with competition after the advent of the Public Telecommunications Act, this was, as discussed, largely due to an accident, prompted by the entry of mobile carriers rather than a planned course of action. Later, when these competing mobile carriers, particularly the ones with smaller market shares, sought to connect their subscribers to subscribers of the dominant mobile telecoms, the issue of interconnection took center stage. Though initially the Commission was adamant in exerting itself, its attempt at regulating interconnection rates in later years proved once again to suffer from delays and inconsistencies. Whether this pattern in the last half of the decade was caused by regulatory interference will be examined in light of the Commission's attempts in mandating interconnection.

1. First Volley: Smart and Globe SMS Dispute

The first major interconnection dispute broke out between Smart and Globe involving the short messaging service (SMS) in 1999. At the time, Smart was the mobile industry leader controlling about 45 percent of the market. Globe, however, was the first to develop and propagate SMS as a service to its subscribers. Since text messaging proved to be very popular in the Philippines and since this service was exclusively limited to Globe subscribers, the innovating telecom quickly gained market share. When Smart adopted the technology to likewise offer "text messaging," it sought to interconnect its system to that of Globe's more popular SMS network. The latter, evidently enjoying its rapid success in the market, refused to grant Smart's request, prompting the complaint filed by Smart in the NTC.

The regulator issued its decision finding both of the parties "equally blameworthy" for their lack of cooperation in the submission of the documentation required for interconnection and for having "unduly maneuvered

the situation into the present impasse."[151] It then held that the implementation of SMS interconnection was mandatory pursuant to Executive Order No. 59. The NTC order was affirmed by the Court of Appeals. Though other issues were raised on appeal to the Supreme Court, the question of interconnection was considered final since it was not raised as an issue and was, in fact, resolved by the parties themselves on the very day that the Court of Appeals upheld the NTC order. It might be observed at this point that when the Commission and the Court of Appeals made their respective decisions, the Public Telecommunications Act of 1995 was already in force but both the regulator and the appellate court considered the earlier executive order of 1993 to be controlling.

When the Supreme Court ruled on the other issues a few years later, it had this to say about the resolution of the interconnection dispute: "Interestingly, on the same day [that the Court of Appeals decided the case], Globe and Smart *voluntarily agreed* to interconnect their respective SMS systems, and the interconnection was effected at midnight of that day."[152]

The characterization of the transaction as "interesting" becomes relevant due to the fact that the parties were only able to agree on interconnection after the alleged intercession of then President Joseph Estrada. As recounted by Mirandilla:

> The regulator played a crucial role in issuing interconnection rules to ensure competition among the different mobile operators. But since the regulator did not have the teeth to enforce the policy, interconnection negotiations did not bear fruit as the dominant carrier refused to connect the other players. It was presidential intervention that served as the tipping point that finally led to the signing of the interconnection agreement between the two dominant cellular mobile telephone service (CMTS) providers. Although there were no proceedings or account of the events that led to the signing of the interconnection agreement, this author was given privileged information by a technical consultant who was privy to the closed-door meeting of the president with representatives of mobile operators. Therefore, despite not having any written document to support the story, and understandably so, this author believes that it is important to mention this occurrence here—probably for the first time—for the purpose of understanding the key role of the executive in steering the reform process in the Philippines. While

[151] Globe v. NTC, G.R. No. 143964, July 26, 2004.
[152] *Id.*

> anecdotal evidence is not considered as scientific proof, there is value in appreciating their significance.[153]

Though it was to the public's benefit that the SMS issue was resolved post-haste, the issues surrounding the regulator's role in determining the rate of interconnection would also avoid the Supreme Court's notice and thus continue to plague the regulator until the present day.

2. Smooth Sailing for Smart and PLDT

The dispute on interconnection between Smart and Globe in 1999 stood in marked contrast with a friendlier situation between PLDT and Smart in 2001. By this time, the merger between the two companies had already concluded and the Commission was merely tasked to facilitate interconnection between the two entities. At this point in time, PLDT was the dominant fixed line operator whereas Smart was the dominant cellular provider. Interconnection pushed through without a hitch. According to then Commissioner Eliseo Rio, "the NTC recognized the efforts of PLDT and Smart to bring down telecommunication costs as this was what the President had mandated the agency to do."[154] But then the participation of the NTC here can be said to be minimal considering that the parties involved, having the relationship of parent and subsidiary, had no dispute with each other to begin with.

3. Interconnection between Sun Cellular and Smart

In 2004, the issue of interconnection would once again be raised with the entrance of Sun Cellular to the market. At the time, the cost of interconnection between Smart and Sun was much higher than the rate agreed upon by Smart and Globe. This prompted Sun to negotiate for lower rates.[155] While this dispute was

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[153] Mirandilla, *supra* note 23, at 7-8, *citing* personal communication with an NTC consultant. *See also* Leo Magno, Aftermath of Globe's war with PLDT/Smart, PHIL. DAILY INQUIRER, Nov. 29, 1999 *available at*: http://www.inquirer.net/infotech/nov99wk5/info_6.htm

[154] Mary Ann Ll. Reyes, PLDT, Smart sign agreement lowering interconnection rates, PHIL. STAR, July 3, 2001, *available at*: http://www.philstar.com/Article.aspx?articleId=94022&publicationSubCategoryId=66

[155] Patalinghug and Llanto, *supra* note 45, at 19. - "[Smart] and Sun [were then] locked in an interconnection dispute. Sun collect[ed] an access charge of P2.50 per minute on calls that originate from Smart and terminate at Sun. On the other hand, Smart collect[ed] P4.50 per minute on calls emanating from Sun and terminating at Smart. Sun proposed that the former charge be increased from P2.50 to P3.00 per

being resolved by the NTC, numerous other issues would be raised in the interim due to the disruption of the market caused by Sun's 24/7 unlimited services. Tensions escalated and the dispute, including the interconnection issue, gained national attention. On August 25, 2005, the NTC finally ordered Smart to lower the interconnection fee it was charging Sun to the same rate that it was imposing on other carriers. According to the NTC order: "Smart's unjustified position constitutes unfair competition which ultimately hurts the consuming public. Smart's continued refusal to deal with [Sun] in good faith renders imperative the commission's final and conclusive determination on the matter of revised access charges."

Smart did not appeal the decision, rendering the issue final at the level of the NTC. Note that this was the second time that the issue of interconnection failed to reach the Supreme Court.

4. The Competition Policy of 2007

The two major events involving interconnection - the first between Smart and Globe in 1999 and the second, between Smart and Sun in 2005 - portray the Commission's aggression in requiring and regulating interconnection between disagreeing mobile carriers. In 2007, the momentum for interconnection was snowballing even further as the NTC proposed a new competition policy aimed at leveling the playing field for the smaller telecom operators.

According to one account, the competition policy sought to:

> ... Promote universal access to enable every citizen to avail of telecommunications services at the most efficient and affordable rates. Its objective [was] to uphold national interest and not the corporate interest of PLDT and other telcos. It [did] not seek to punish incumbency, but only to discriminate those players that dictate their enormous market power to the detriment of users and competitors.
>
> [NTC] Commission chief Abraham Abesamis has vowed to pursue this objective to its rightful conclusion. Already, the commission has come out with draft memorandum circulars on two of its three points:

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minute and the latter be decreased from P4.50 to P4.00 per minute. Smart told the NTC that it [could not] agree to Sun's proposal because it could only encourage more bypass operators."

> interconnection and value-added services. It is also coming out with a draft memorandum circular on the obligations of those players that enjoy significant market power. This draft circular is the centerpiece of the competition policy because it will stop big telcos from committing further market abuses. xxx Abesamis wants the interconnection template in place within this year as he noted that while players generally agree on the need to interconnect, they could not agree on the terms and conditions of interconnection. Network owners dictate their terms on smaller, financially struggling service providers, putting the latter in a precarious situation. The draft memorandum circular evens up such inequity. Policy intervention becomes a matter of course to sustain competition in a multi-operator milieu as ours.[156]

Abraham Abesamis was appointed as NTC Commissioner on November 2006. The newspaper articles announcing the competition policy were published in April 2007. The Commissioner was sacked and replaced on August of the same year.

In this writer's opinion, a more descriptive account of the event from the Philippine Daily Inquirer illustrates the agency's susceptibility to interference at the time:

> Abraham Abesamis was sitting at his desk in his office at the National Telecommunications Commission (NTC) on Thursday when an unexpected guest came in to deliver a message that caught him by surprise -- he should resign. Joaquin Llagunera, head of the Presidential Legislative-Liaison Office (PLLO) and deputy executive secretary, did not give a reason for Abesamis' sacking as NTC commissioner, but his instructions were it was ASAP -- as soon as possible.
>
> Abesamis was not told why -- it was apparently not part of Llagunera's mission that day to answer that question. There was no written order, but it came from the highest official of the land - President Gloria Macapagal-Arroyo. Abesamis was asked to immediately empty his desk of his things, to pack up and leave quickly.
>
> At a loss for words and in search for answers, Abesamis lifted his phone and dialed the number of Transportation and Communications

[156] Philip Lustre, Interconnection template to correct market inequity, MANILA STANDARD, April 19, 2007, *available at*: http://www.manilastandardtoday.com/2007/april/19/business6.htm

> Secretary Leandro Mendoza. But there were no answers from Mendoza, either. The official who had jurisdiction over the NTC had no idea Abesamis was being removed. Next, Abesamis tried to call Executive Secretary Eduardo Ermita, with the same results.
>
> Why, why, why, the question rang in his mind after Llagunera had left him dumbfounded and clueless. He called up officials in Malacañang to try to arrange an audience with Arroyo, but the meeting did not come until Friday morning when he heard the bad news from the President herself. He was just told to resign. The "why" was left unanswered. But Abesamis took his marching orders "like a good soldier." xxx
>
> It was not made clear why he was being removed from the NTC... [but] when he received the message about his resignation, Abesamis was presiding over a plan that could further open up the telecommunications market to new players. On his table lay what NTC officials said was an interconnection template that would set the terms, and fees, for new and smaller telecommunications firms to be able to connect to the bigger players like Philippine Long Distance Telecommunications Co., Smart and Globe. Its objective was simple: Keep the smaller players alive by allowing calls made from their networks to connect to lines owned by the big ones, and set a fixed fee for this. The bigger telecommunications firms had described it as a move that would "penalize bigness." Pressure is heavy on the NTC not to implement the interconnection template and another policy that would add more obligations to the bigger players.[157]

5. The Reference Access Offers (RAOs)

The competition policy was shaped in part by technical assistance provided by EMERGE, a project supported by USAID.[158] According to a technical report written by Atty. Jose Gerardo Alampay, the assistance was immediately directed towards the research and preparation of potential rules to govern Reference Access Offers (RAOs). He defined these to be "default interconnection or access contracts that could be accepted at anytime by any

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[157] Tony Bergonia, NTC exec unceremoniously told to resign, PHIL. DAILY INQUIRER, Aug. 13, 2007, *available at*: http://newsinfo.inquirer.net/breakingnews/nation/view/20070813-82306/NTC_exec_unceremoniously_told_to_resign

[158] Jose Gerardo Alampay, Competition Policy for ITC Sector, Technical Assistance to the National Telecommunications Commission, Aug. 6, 2007 - this report summarizes the activities pursued and milestones achieved in connection with the EMERGE Team's assistance to the NTC (from October 2006 to July 2007) in its efforts to craft a competition policy framework for the Philippine ICT sector.

access seeker, and would streamline negotiations processes, thereby fostering easier entry by small players into the market and promoting greater competition." These contracts lay at the foundation of the interconnection template planned under Commissioner Abesamis. By this set-up:

> [All Public Telecommunication Entities would be obligated to submit their respective Reference Access Offers to be approved by the Commission.] The RAO shall be the minimum access a PTE can offer to access seekers. Access seekers can seek network access and/or access to services/applications.
>
> If an access seeker agrees to the approved RAO of an access provider, there would be no need for negotiations. The RAO shall be the interconnection agreement between the access seeker and the access provider. An access seeker can, however, negotiate for better terms. The agreement is subject to the approval of the Commission. Any portion of the agreement better than the RAO shall automatically form part of the RAO.[159]

The reasons for the establishment of such rules have been summed up by three relevant clauses, to wit:

> WHEREAS, the Commission maintains the view that interconnection agreements should be left to commercial negotiations between service providers in a market environment where effective and sustainable competition exists;
>
> WHEREAS the Commission recognizes however that the current telecommunications market is dominated by only a few players, and that therefore, market forces alone cannot be relied upon to ensure that non-dominant players are able to secure interconnection and access agreements expeditiously and under reasonable and non-discriminatory terms, to the detriment of free and sustainable competition, and ultimately, with adverse impact on consumer choice and welfare;

[159] Cabarrios, *supra* note 95, at 21.

> WHEREAS, giving access seekers the option of accepting set reference access offers from access providers will help to facilitate interconnection or access between market players.[160]

The NTC issued the Rules on Reference Access Offers (RAOs) in July 2007. These rules would figure prominently in issues concerning interconnection in 2010.

6. The Draft NTC Circulars of 2008

Notwithstanding the removal of Commissioner Abesamis, two un-numbered draft memorandum circulars aimed at reducing interconnection costs for voice calls and text messaging were proposed by his successors in the early part of 2008.

Table No. 4: Existing and Proposed Rates of Interconnection in 2008[161]

	Current Rate	Proposed Rate
Voice Calls	PHP 4.00	PHP 1.00
Text Messaging	PHP 0.35	PHP 0.15

As highlighted by Table No. 4, the directives proposed to drop the interconnection charges for voice calls and SMS, from P4.00 to a staggering P1.50 per minute of call and from P0.35 to P0.15 per SMS sent, respectively. Citing that the interconnection rates in South East Asian countries ranged from P1.24 to P1.70 per minute, the NTC claimed that it was justified in lowering the current rates for both voice calls and SMS. The overall plan of these draft circulars of 2008 was to initiate a one-time cut in interconnection fees that would disrupt the market in its entirety for the benefit of: (a) the consumers who stood to gain from increased competition; and (b) the smaller mobile operators who no longer had to pay exorbitant dues to the incumbent players.

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[160] *See* NTC Memo. Circ. No. 10-07-2007 (July 19, 2007).

[161] *See* NTC Draft Memo. Circ. of 2008, *available at*: http://portal.ntc.gov.ph/wps/portal/!ut/p/_s.7_0_A/7_0_MA

Armed with the draft circulars, the regulator proceeded to solicit comments from industry players regarding the proposed directives. The reaction from the dominant incumbents was far from friendly. Smart claimed that the NTC had no authority to impose caps on access charges since the same could only be negotiated between telecommunication companies.[162] The directives allegedly violated the telecoms' constitutional right to the non-impairment of contracts and had the effect of lessening their return on investment.[163] In addition, Smart claimed that telecom prices have been going down even without regulation.[164]

Globe, on the other hand, proposed a promotional package for SMS in lieu of acceding to the NTC directives. According to its senior vice president for corporate and regulatory affairs: "[The] circulars must be stopped... because they are contrary to law... We must guard against this purely administrative move of fixing rates via the issuance of administrative fiats exemplified by the subject circulars, lest a historical illegality repeats itself and forever haunts the telecommunication industry."[165]

When the directives for this one-time cut in interconnection fees were proposed, Smart and Globe roughly dominated the industry with the two carriers combined catering to more than 94 percent of the overall market in the country.[166]

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[162] Erwin Oliva, NTC can't put cap on SMS, voice access charges-Smart, PHIL. DAILY INQUIRER, Jun. 4, 2008, *available at*: http://newsinfo.inquirer.net/breakingnews/infotech/view/20080604-140725/NTC_can percent92t_put_cap_on_SMS percent2C_voice_access_charges--Smart.

[163] Darwin Amojelar, Telcos ward off NTC moves to lower interconnectivity fees, MANILA TIMES, Nov. 9, 2008 *available at*: http://www.manilatimes.net/national/2008/nov/09/yehey/top_stories/20081109top3.html. - "The proposed circulars would be unconstitutional as they would impair the obligations of contracts and confiscate the proper right of mobile operators to recover their investment without due process of law... If regulation is used to compel CMTS [cellular mobile telephone service] operators to engage in involuntary transactions, which results in lower returns on capital employed or economically inefficient investment, both practical [end-users will suffer] and legal and constitutional issues will arise... A cap on interconnection charges will discourage further investments in the industry as telecommunication companies cannot expect to get their return on investment in reasonable period of time... [Lowering] text and voice service charges will mean a surge in traffic, resulting in huge costs that would require expanding one's network."

[164] Erwin Oliva, Telco prices have been going down--Smart spokesperson, PHIL. DAILY INQUIRER, Jun. 2, 2008, *available at*: http://newsinfo.inquirer.net/breakingnews/infotech/view/20080602-140252/Telco-prices-have-been-going-down--Smart-spokesperson.

[165] GMAnews.tv, Globe proposes new text messaging package to cut access fees, July 15, 2008, *available at*: http://www.gmanews.tv/story/107071/Globe-proposes-new-text-messaging-package-to-cut-access-fees. *See also* Darwin Amojelar, Telcos ward off NTC moves to lower interconnectivity fees, MANILA TIMES, Nov. 9, 2008 *available at*: http://www.manilatimes.net/national/2008/nov/09/yehey/top_stories/20081109top3.html.

[166] *See* Patalinghug & Llanto, *supra* note 45, at 23.

The incentive to retain the existing rate of interconnection was thus very much pronounced despite imperious claims by the carriers that the proposals would violate the non-impairment clause and ruin competition and investments in the industry. A comparison of similar fees in other jurisdictions at the time yields the likely inference that, in so far as the incumbents were concerned, the *status quo* was much to be preferred over any intended regulation regarding access charges.

Table No. 5: A Comparison of Interconnection Rates in 2008[167]

Country	Access Charge
Indonesia	PHP 1.70
South Korea	PHP 1.46
Malaysia	PHP 1.14
Hong Kong	PHP 1.09
Thailand	PHP 0.96
Pakistan	PHP 0.87
China	PHP 0.35
India	PHP 0.30
Philippines	PHP 4.00

With a rate that amounts to almost three times the average cost of interconnection in other South East Asian countries, the standard interconnection fee in the Philippines appears to be the sole choke point which creates the anti-competitive environment. Smaller telecoms are placed at a disadvantage and become hard-pressed to compete. The dominant incumbents, on the other hand, have everything to gain by ensuring that the rates of interconnection remain high. The factors enumerated in Part III.A thus ensure the regime of the Smart-Globe duopoly, a situation which has become even more pronounced after PLDT's effective acquisition of Sun Cellular. Though it has been held that a duopoly is not *per se* detrimental to the public interest,[168] it becomes unfavorable when the incumbent carriers exert efforts to prevent competition. In this case, the prolonged maintenance of obnoxiously high interconnection fees in the Philippines suggests that the duopoly is actively engaged in retaining its status as such to the detriment

[167] Ovum, Interconnection Market Research, 2008

[168] *See* Tatad v. Secretary of Energy *supra* note 28 - By implication, if a monopoly is not per se detrimental to the public interest, then the same can equally be said of a duopoly.

of potential competition. If the draft circulars were to be implemented, the disruption would be enormous. It would, in a single blow, number the days of the extant duopoly by encouraging smaller carriers to charge less for voice calls and text-messaging.

7. The Senate Investigation and the NTC's Stance of Weakness

The momentum for reduced interconnected fees appears to have faded following opposition by the incumbent players in the first half of 2009.[169] The issue would be raised again though in June when a series of hearings were conducted by the Joint Senate Committee on Trade and Commerce and on Public Services. The inquiry was based on a host of other issues involving telecom practices, namely: (a) the disappearing pre-paid load, (b) the revenue-sharing with value-added-service providers, and (c) the implementation of the pulse-billing scheme for mobile calls.[170] The inquiries regarding interconnection appear to have been made as an incidental matter but are relevant in determining the NTC's perception of itself after it had tried to innovate the industry with its intended draft circulars on interconnection. Relevant portions of the record are produced hereunder:

> [With regard to interconnection agreements:]
>
> SENATE PRESIDENT ENRILE: ... If you have a telco and another telco and they have different subscribers, is the relationship between these telcos covered by a contract in so far as the usage of the subscriber of [one circuit] over the circuit of another, and vice versa? xxx I'm talking of the interconnection between the services and the corollary access, charges by each side for passing the call or text of a subscriber of one into the circuit of another to reach the subscriber of that other circuit.
>
> NTC DEPUTY COMMISSIONER MALILIN: There are interconnection [contracts] between the telcos.

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[169] Darwin G. Amojelar, Extelcom asks NTC to bring down interconnection rates, MANILA TIMES, Apr. 07, 2009, *available at*: http://www.manilatimes.net/national/2009/april/07/yehey/business/20090407bus9.html - At the time, it was only Extelcom who was clamoring for lowered interconnection rates.

[170] Christine Avendaño, 'I don't even know how to text' - Enrile, PHIL. DAILY INQUIRER, June 17, 2009, *available at*: http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090617-210876/I-dont-even-know-how-to-textEnrile

SENATE PRESIDENT: First question is, is this covered by contract?

NTC DEPUTY COMMISSIONER: They are, Your Honor.

SENATE PRESIDENT: So, there is a contract. If we will ask for those contracts, we can have the contracts?

NTC DEPUTY COMMISSIONER: Yes, Your Honor.

SENATE PRESIDENT: Now, are these approved - these contracts - [are] these approved by the NTC?

NTC DEPUTY COMMISSIONER: *No, your honor. Under R.A. 7925, the parties are free to enter into these contracts. The NTC only comes in to the picture, Your Honor, in the event that the contract sees to be for purposes of cut-throat competition or for manipulation, Your Honor. xxx [The NTC can only come in when] we perceive that there [exists] cut-throat competition and manipulation.*

SENATE PRESIDENT: [Are these] contracts reviewed by the NTC?

NTC DEPUTY COMMISSIONER: We review them, Your Honor.

SENATE PRESIDENT: For what purpose?

NTC DEPUTY COMMISSIONER: For purposes of determination whether there is cut-throat competition... Your Honor, when we review the contracts within the parameters whether they fall into cut-throat competition or if they will produce ruinous competition for the protection of the public.

SENATE PRESIDENT: In other words, if it is cut-throat competition, it benefits the public because that means they are going to charge low to kill each other. xxx If telco A charges for the same service that telco B renders, a rate much, much lower than telco B, below the value to recover cost of that service to telco A, then you consider that ruinous competition?

NTC DEPUTY COMMISSIONER: That is one of the symptoms for ruinous competition.

SENATE PRESIDENT: Would that not be for the benefit of the public if they want to lose money?

NTC DEPUTY COMMISSIONER: Your Honor, initially it may benefit the public but in the long run, your honor, if we only have one player, then the player that remains...

SENATE PRESIDENT: And do you review the contract to determine whether the rate charged, by A or B in my example, against the public is exorbitant, unreasonable compared to what is reasonable according to your standard?

NTC DEPUTY COMMISSIONER: We do that, your honor.

SENATE PRESIDENT: *In other words, you are reviewing the contract for purposes - not only for ruinous competition but for purposes of protecting the public.*

NTC DEPUTY COMMISSIONER: Yes, Your Honor...

SENATE PRESIDENT ENRILE: All right. I just want to establish this premise.

xxx

[With regard to revenue-sharing between telecoms and third-party content providers:]

SENATOR ROXAS: Since the last hearing, parating sinasagot ng NTC, "deregulated, deregulated." Ngayon sa tanong [ng Senate President], ang sagot ninyo, you can impose your will. We are here to determine kung nangangailangan ba ng bagong batas o aamiyendahin iyong kasalukuyang batas. Mayroon ba kayong poder, kapangyarihan para sabihin sa telco, ito lang ang isisingil ninyo sa content provider? Ito lang ang isisingil ninyo sa bawat isa kung ang tawag tatawid magmula sa Globe tungong Smart o kaya Smart patungong Globe, at ito lang ang isisingil ninyo sa mga gumagamit ng sistema ninyo? Mayroon ba kayong kapangyarihan o wala?

NTC DEPUTY COMMISSIONER: [Based on Sections 17 and 18], we don't have that power, Your Honor. Only in special cases...

SENATOR ROXAS: Kasi ang sagot mo kanina, we proposed. Ang sunod na tanong, tinangap ba? Ibig sabihin taga-propose lang kayo pero 'yung talagang nagdedesisyon...

SENATE PRESIDENT: ... Sila.

SENATOR ROXAS: ... 'Yung telco. 'Yung supposed to be na binabantayan ninyo, sinusubaybayan ninyo, sila talaga ang nagdedesisyon kung anong mga reglamento, kung anong mga regulasyon ang katanggap-tanggap sa kanila. Kung ayaw nila wala kayong kapangyarihan na i-impose ito.

NTC DEPUTY COMMISSIONER: We don't have the powers.

SENATE PRESIDENT: So, the decision that is addressed to us as legislators is either to maintain you, under the present circumstances, to maintain you as an institution and invest you with powers to protect the public... or we abolish you [considering that] as you've said, the telcos are very strong enough [and Senator] Roxas has said that they have strong leverage because of their financial size. That's the decision we'll have to make. That is my perception as a Member of the Senate.

xxx

SENATOR ARROYO: Mr. Chairman [addressing Senator Roxas], I lament quite frankly the statements made here by the NTC because they say they don't know have the power to fix rates. [Senator Arroyo proceeds to read Section 17 of the Public Telecommunications Act.] Now this is the law. "The Commission shall" [implies that the the power to establish rates and tariffs] is mandatory. The word "shall" is peremptory. Now why did you inform the Committee that you don't have the power? I am now quoting the law.

NTC DEPUTY COMMISSIONER: We have residual powers only, Your Honor.

SENATOR ARROYO: Wait a minute. xxx It is a full power. The residual power is only on certain portions.

SENATE PRESIDENT ENRILE: What the law says is that if there is... True, you deregulate them but you must guard on the fairness of the rates

> that they charge so that there is no ruinous competition. The moment you find ruinous competition, you regulate, you impose...
>
> SENATOR ARROYO: Interfere.
>
> xxx
>
> SENATOR ARROYO: NTC, will you listen to this? Because quite frankly, it is irritating that you keep on reading the same provision and that you shamelessly misinterpret the law that we made. [Senator Arroyo proceeds to read Section 18 of R.A. 7925] Now any conflict, anything that cannot be resolved by the industry, you are the ultimate arbiter. Now, if Mr. Chairman and my Colleagues in the Committee, please judge for yourself whether the answers of the NTC or whether they have the capacity or intelligence to interpret the law which they are supposed to interpret. Like this, R.A. 7925 which is the bible of the industry... And all the authority that you have comes from this and the franchise. But it seems that - I don't want to use the word collusion - but it pains me that for eight years the government did not try to lift that injunction which you keep on saying...[171] (Italics supplied.)

Though the Joint Senate Committee on Trade and Industry and Public Services had much to say about the "lax attempts at regulation" by the NTC, it subsequently agreed to a temporary stop-gap measure regarding one of the issues raised: the implementation of the six-second pulse billing scheme for mobile calls.[172] Despite the highly publicized agreement and the subsequent order issued by the NTC, the telecoms still sought to avoid full compliance and eventually secured an injunction from the Court of Appeals.[173] Senate President Enrile took the issue a step further by filing a bill in 2009, proposing to reorganize the NTC. The proposal will be tackled in Part V.

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[171] S. R. No. 1120, Records of Joint Senate Committee on Trade and Commerce and on Public Services, June 24, 2009.

[172] Christina Mendez, 6-second per pulse billing system set in December, PHIL. STAR, Aug. 4, 2009, *available at*: http://www.philstar.com/article.aspx?articleid=492971

[173] Tetch Torres, Appellate court stops NTC from implementing per-pulse phone billing, PHIL. DAILY INQUIRER, Feb. 19, 2010, *available at*: http://newsinfo.inquirer.net/breakingnews/nation/view/20100219-254131/Appellate-court-stops-NTC-from-implementing-per-pulse-phone-billing. *See also* Smart v. NTC, G.R. No. 151908, Aug. 12, 2003 - What is interesting is that the 6-second pulse billing scheme was sought to be enforced by the NTC as early as August of 2000. The telecoms were able to gain an injunction from the trial court. This was questioned by the NTC in the Court of Appeals and raised to the Supreme Court itself but was subsequently remanded to the trial court in 2003. The injunction has remained till this very day.

8. The Modified Proposal and the Duopoly Resistance to the RAOs

Despite the ruckus caused by the NTC hearings, what becomes relevant is the fact that the issue on interconnection - the most important among NTC's functions in improving the state of competition - took a backseat. The circulars on interconnection have remained draft entries to this date. What is promising, however, is the renewed attempt by the NTC to engage the issue. Instead of the one-time cut in interconnection as proposed by the draft circulars in 2008, the NTC has recently proposed to lower the rates gradually, to wit:

Table No. 6: NTC Draft Proposal of 2010 to Lower Rates of Interconnection[174]

	Current Rate	First Year	Second Year	Third Year
Voice Calls	4.00	2.50	2.00	1.50
Text Messaging	0.35	0.25	0.25	0.20

The amended proposal, despite its more lenient approach and early announcement, has been fraught with delays. The NTC claimed that one reason was the refusal of telcos to submit their reference access offers (RAOs), which refers to the statement of conditions, prices and terms that a company proposes to provide access to its network, facilities, systems or customer base to another firm."[175]

Smart, however, claimed that telecommunications firms could not be compelled by regulators to reveal their interconnection terms with other carriers. According to Smart, such information constituted trade secrets and that the regulation of interconnection violated the non-impairment clause.[176] Globe, on the

[174] Paolo Montecillo, NTC to push lower interconnection fees, PHIL. DAILY INQUIRER, Jan. 12, 2010, *available at*: http://technology.inquirer.net/infotech/infotech/view/20100112-246834/NTC-to-push-lower-interconnection-fees

[175] Mary Ann Ll. Reyes, NTC to push through with lower interconnection charges, PHIL. STAR, Feb. 2, 2010, *available at*: http://www.philstar.com/Article.aspx?articleid=545865

[176] ABS-CBN News, NTC can't compel telcos to reveal interconnection terms, Jan. 20, 2010, *available at*: http://www.abs-cbnnews.com/business/01/20/10/ntc-cant-compel-telcos-reveal-interconnection-terms - According to Smart: "[The telecoms refuse] to provide the NTC their "trade secrets" such as

other hand, was equally repulsed by the demand for RAOs, claiming that the policy "jeopardize[d] competitiveness" and "undermine[d] a carrier's right to a reasonable return on [its] investment[s]." [177] Only Sun Cellular complied with this directive but even then its representative begged not to discuss the details on the ground that terms were confidential and privy only to the interconnecting carriers.[178] It might not be remiss to note that Sun Cellular's compliance with the order was made prior to its acquisition by PLDT.

As a result of the staunch refusals made by the dominant incumbents, the NTC issued a show-cause order, asking them to explain why they should not be sanctioned for failing to submit a cost model for the RAOs. NTC Commissioner Douglas Mallillin revealed that if Globe and Smart continued to refuse, then the NTC could conduct an independent study on how much the access rates should be.[179] Another issue raised was the possibility of reduced revenues for the mobile carriers, leading to reduced tax collections for the government. The same Commissioner revealed that the NTC was closely coordinating with the Department of Finance (DOF) to study the possible implications of lowered interconnection rates.[180] There have been no updates on the issue as of the time of

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interconnection facilities and charging mechanisms. xxx [The company's] non-submission of the RAO is not designed to defraud or to seek an inconsiderable advantage, but merely to protect its trade secrets that will be ultimately disclosed [if it files] its RAO. In the absence of malice, there is no basis to sanction PLDT administratively... [This] new policy [of requiring and mandating RAOs] is void and unconstitutional since it violates the declared national policy for a free enterprise system. xxx A healthy competitive environment allows business enterprises, such as PTEs to freely make business decisions and enter into business agreements. However, by requiring PTEs to have uniform access agreements, PLDT's freedom to contract is impaired. xxx Considering that only access providers are compelled to publicly disclose their trade secrets, undue favor and preferential advantage are afforded to access seekers. Also only access seekers are given the flexibility and latitude to negotiate terms and conditions specific to their requirements."

[177] Lenie Lectura, Digitel complies with interconnection requirement, BUSINESS MIRROR, Jan. 29, 2010, *available at*: http://www.abs-cbnnews.com/business/01/29/10/digitel-complies-interconnection-requirement - According to Globe: "Interconnection without bilateral agreements and negotiations is contrary to Executive Order 59 [which prescribes the policy guidelines for compulsory interconnection of authorized public telecommunications carriers], Republic Act 7925 [Telecommunications Policy Act] and the rules of the NTC. xxx The proposed RAO policy jeopardizes competitiveness and undermines a PTEs' right to a reasonable return on investment. xxx The NTC is bereft of any power and cannot legislate and impose new obligations on PTEs via the questioned circular and order. Both the RAO circular and RAO order are... legally infirm."

[178] *Id.*

[179] Mary Ann Ll. Reyes, NTC to push through with lower interconnection charges, PHIL. STAR, Feb. 2, 2010, *available at*: http://www.philstar.com/Article.aspx?articleid=545865

[180] Lenie Lectura, Digitel complies with interconnection requirement, BUSINESS MIRROR, Jan. 29, 2010, *available at*: http://www.abs-cbnnews.com/business/01/29/10/digitel-complies-interconnection-requirement

writing.

Whether the NTC bucked from regulatory interference or legitimate concerns regarding reduced government revenues is unclear. What is certain though is that the agency has attempted to proactively regulate the rate of interconnection but has been continuously rebuffed by delays and opposition, portraying an aversion of the dominant carriers to negotiate the terms and conditions for a reasonable rate of interconnection. It further highlights the inability of the NTC to remedy the situation since the agency still chiefly relies on the contractual arrangements of the parties. The manner by which the Commission has attempted to reform the industry and the means by which it has been consistently repelled subtly exemplify that familiar shadow of regulatory capture and opportunism.

In order to jumpstart effective competition, by "leveling the playing field" so to speak, pushing for reforms today becomes an absolute necessity. Granted however that the market has been deregulated and has existed as is for quite some time, any attempt at regulation with regard to interconnection, as shown by recent events involving the issue, becomes a complicated endeavor. The next part of this paper presents possible solutions which the government may adopt (or in the case of pending bills in Congress, is contemplating to enact) to accomplish this task.

V. PROPOSED SOLUTIONS

> There are many ways of going forward, but only one way of standing still.
> *-Franklin D. Roosevelt*

This paper makes proposals in strengthening the regulatory powers of the NTC for the purpose of enhancing competition in the industry today to counter the potential or continued existence of regulatory interference. The first involves the establishment of a framework by which existing laws and their implementing rules can be analyzed to spur competition in the interim. The second, a court-dictated policy of either judicial restraint or judicial activism is proposed with regard to issues involving interconnection. Third, this paper suggests that the

regulator be granted the direct power to admit competition without needless cost and delay. And lastly, an examination of an existing Senate bill on the issue is undertaken to analyze its potential effect on the problem.

A. Re-Regulation: A Possible Interpretation of Existing Legislation

If mobile operators, both new and old, whether boasting a significant subscriber base or a certain niche in the market, were placed on equal footing through the effective regulation of interconnection, the role of the regulator in maintaining competition would be greatly reduced. In this regard, this writer posits that, if the NTC is permitted to implement its draft circulars regarding interconnection, it can once again step aside and allow market forces to shape the industry. As a corollary effect, regulatory interference is discouraged since, even if it is secured, its effect on the market would be greatly diminished in light of the reduced rate by which one carrier is able to charge another for interconnection services.

The problem of how to implement the theory, however, is not an easy one to tackle. As highlighted in Part III, the applicable law seems ambivalent in allowing the regulator to determine the cost of interconnection between the carriers. The fact that the law was made general in scope affords the agency some measure of flexibility in statutory interpretation that perhaps can be used to the regulator's advantage.

Section 17 of the Public Telecommunications Act, in particular, allows the NTC to establish reasonable rates and disregard the same in case sufficient competition exists in the market, *viz.*:

> The Commission shall establish rates and tariffs which are fair and reasonable and which provide for the economic viability of telecommunications entities and a fair return on their investments considering the prevailing cost of capital in the domestic and international markets.
>
> The Commission shall exempt any specific telecommunications service from its rate or tariff regulations if the service has sufficient competition to ensure fair and reasonable rates or tariffs. The Commission

> shall, however, retain its residual powers to regulate rates or tariffs when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists and the rates or tariffs are distorted or unable to function freely and the public is adversely affected. In such cases, the Commission shall either establish a floor or ceiling on the rates or tariffs.

On the other hand, Section 18 of the same law, explains the contract of interconnection between the parties and the manner by which the NTC can settle disputes concerning the access charge, *viz.*:

> The access charge/revenue sharing arrangements between all interconnecting carriers shall be negotiated between the parties and the agreement between the parties shall be submitted to the Commission. In the event the parties fail to agree thereon within a reasonable period of time, the dispute shall be submitted to the Commission for resolution.
>
> In adopting or approving an access charge formula or revenue sharing agreement between two or more carriers, particularly, but not limited to a local exchange, interconnecting with a mobile radio, interexchange long distance carrier, or international carrier, the commission shall ensure equity, reciprocity and fairness among the parties concerned. In so approving the rates for interconnection between the telecommunications carriers, the Commission shall take into consideration the costs of the facilities needed to complete the interconnection, the need to provide the cross-subsidy to local exchange carriers to enable them to fulfill the primary national objective of increasing telephone density in the country and assure a rate of return on the local exchange network investment that is at parity with those earned by other segments of the telecommunications industry.

In the last decade, confusion seems to have arisen as to the applicability of both provisions to interconnection charges. Is Section 18 the sole governing provision in relation to such charges, thus encouraging contractual arrangements prior to regulatory intervention, or can Section 17, which allows the exercise of the regulator's residual powers regardless of contract, be considered equally applicable? Though the question might have been answered during the Smart-Globe SMS dispute of 1999 or the Smart-Sun dispute of 2004, circumstances, whether by accident or design, have prevented the issue of interconnection rate regulation from reaching the Supreme Court. This article will therefore attempt to place both provisions within their proper roles in rate-fixing regulation. To be specific, it will

start with the theory that Section 17 and Section 18 are not mutually exclusive, and thus should be read together rather than in isolation.

1. The Quasi-Legislative Solution

Section 17 refers to rate-fixing in exercise of the NTC's quasi-legislative functions. It thus entails the regulation of a rate which is charged by all telecommunication entities. Section 18, on the other hand, refers to rate-fixing in the exercise of the agency's quasi-judicial functions. In contrast with Section 17, quasi-judicial rate-fixing occurs when the NTC acts as an administrative judge between two or more telecoms concerning the negotiation of the amount of access charges. Rate-fixing, regardless of it being performed in a quasi-legislative or quasi-judicial capacity, requires notice and hearing.[181]

When the draft memorandum circulars lowering the cost of interconnection were proposed by the NTC in 2008, Section 17 of the law might have been envisaged as statutory authority for quasi-legislative rate-fixing. The dominant telecoms, however, were adamant in insisting that since interconnection agreements were involved, Section 18 solely governed their relationship and thus the NTC could not unilaterally regulate the rate without an initial dispute between the contracting parties.

This writer posits however that even if access charges are involved, it does not automatically entail that Section 18 is the sole controlling provision. Access charges can also be classified as a species of "rates and tariffs" provided by Section 17. A rate is defined in the Administrative Code as "any charge to the public for a service open to all and upon the same terms, including individual or joint rates, tolls, classifications, or schedules thereof, as well as commutation, mileage, kilometrage and other special rates which shall be imposed by law or regulation to be observed and followed by any person."[182] The pertinent provision which defines interconnection, on the other hand, is highlighted by Section 3(k) of the Public Telecommunications Act. A more formal definition is provided by the law's implementing rules. Both will be reproduced below:

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[181] ADMIN CODE, Book VII, §9. *See* Phil. Comm. Sat. Corp. v. Jose Alcuaz & NTC, G.R. No. 84818, Dec. 18, 1989.

[182] ADMIN CODE, Book VII, §2(3).

> Interconnection - the linkage, by wire, radio, satellite or other means, of two or more existing telecommunications carriers or operators with one another for the purpose of allowing or enabling the subscribers of one carrier or operator to access or reach the subscribers of the other carriers or operators.[183]

> Access Charges – remuneration paid to a Public Telecommunication Entity (PTE) by an interconnecting PTE for accessing the facilities and/or customer base of such PTE, which are needed by the interconnecting PTE for the origination, termination and/or transiting of all types of traffic derived from the interconnection.[184]

Based on this definition, an access charge is a fee which is negotiated between the contracting telecom operators in order for subscribers of network A to communicate with network B. *However, this same interconnection fee, once agreed upon by the telecoms involved, also forms part of the cost that a subscriber pays to the public utility, particularly for voice calls and text messaging.* A liberal interpretation of the phrase "access charge" therefore would allow it to be classified as a rate since, despite being negotiated by the carriers by themselves, it is the public which ultimately pays for the same.

Based on the premise that an access charge is also a rate (or at the very least, a partial rate) which is susceptible of being regulated under Section 17, it becomes necessary to determine whether the present state of competition in the mobile sector of the industry is adequate and sufficient. If it is, then regulation through Section 17 of the law is inapplicable. The aforesaid section states that if "ruinous competition results from the [present] rates or when a monopoly or a cartel or combination in restraint of free competition exists and the rates or tariffs are distorted or unable to function freely and the public is adversely affected," then the NTC is authorized to use its residual powers to "establish a floor or ceiling on the rates or tariffs."

As described earlier, a duopoly exists in the market. The fact that high interconnection fees favor the incumbents to the detriment of the smaller players and that the existing rate in this country is obnoxiously high when compared to other Asian countries should be enough to raise concerns regarding the current

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[183] Rep. Act. No. 7925, §3(k).

[184] NTC Memo. Circ. No. 14-07-20, §2(a) (2000), amending NTC Memo. Circ. No. 08-09-95 (1995)

state of affairs in the industry. A Canadian information technology firm has given its unsolicited opinion regarding the issue:[185]

> The Philippines' current mobile access charge is one of the highest in Asia. Small [mobile] operators are susceptible to unfair competition strategies by incumbents. On the consumer side, their access to other networks [are] limited, forcing them to obtain multiple subscriber identity module (SIM) cards to take advantage of different operators' pricing plans.[186]

In a press release directed to the Aquino administration, the same firm had the following advice to give:

> The Philippine statecraft must understand the necessity of appropriate and supportive policy and regulatory framework in order to maintain a healthy and competitive ICT environment. The next administration must start to review the Public Telecommunications Policy Act of the Philippines (R.A. 7925) and should make amendments strengthening particularly the pricing methodologies and competition-related provisions.[187]

When the history of previous interconnection disputes, as discussed in Part IV.B, is considered alongside the aforementioned statements, the implication is obvious: the Philippine telecommunications industry is not (or perhaps is no longer) competitive despite the claims of industry players to the contrary. After a sudden explosive boom in the industry, anti-competitive mergers, and the subsequent retention of high access charges, a few dominant incumbent players continue to prevent free competition from truly taking place by ensuring that the cost of interconnection remains undisturbed. The retention of the existing rate, therefore, ensures the duopoly, an obvious telecommunications cartel that warrants the application of the NTC's residual powers.

The telecoms would bank on Section 18 as their primary defense in negating the power granted to the NTC under Section 17 to reduce the rates of

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[185] XMG Global, Company Profile, *available at*: http://www.xmg-global.com/cidver/WhoWeAre/company_profile.html

[186] Darwin Amojelar, Gov't told to address high interconnection charges, MANILA TIMES, *available at*: http://www.manilatimes.net/index.php/business-columns/23952-govt-told-to-address-high-interconnection-charges

[187] XMG Global, Letter to the Next Philippine President: Charting New Directions in ICT, May 5, 2010, *available at*: http://www.xmg-global.com/cidver/press_releases/varticle.html?id=234&aid=4

interconnection. They claim that to allow the NTC to determine the rate of interconnection would contravene the non-impairment clause and negate the express policy for interconnection to be a mere creature of contract. In this writer's opinion, however, Section 18, which becomes applicable when contracting parties negotiate interconnection, does not preclude the application of Section 17, a provision which applies to all telecommunication entities. The authority of the NTC to impose price floors or ceilings comes under Section 17 in the exercise of its residual powers. Thus construed, it is only after the NTC exercises its discretion as to whether or not to impose a price floor or ceiling for rates and tariffs (such as interconnection fees) that Section 18 begins to apply. This arrangement would thus mimic the original role of the NTC in Executive Order No. 59 whereby party autonomy was qualified by certain rules, to wit:

> Sec. 6 Interconnection shall be negotiated and effected through bilateral negotiations between the parties involved *subject to certain technical/operational and traffic settlement rules to be promulgated by the NTC...* (Italics supplied.)

Bearing this proposed understanding of the relationship between the two provisions of the Public Telecommunications Act, it is not correct to say that the NTC, in lowering the access charges through it proposed draft circulars, is exercising its quasi-judicial function under Section 18. To the contrary, it is actually exercising its quasi-legislative powers under Section 17 by which the NTC is given the delegated authority to determine for itself whether prevailing circumstances warrant the exercise of regulation. This must have been the interpretation of the lawmakers when it gave the NTC its existing mandate to foster "a healthy competitive environment... one in which telecommunications carriers are free to make business decisions [to] encourage their financial viability *while maintaining affordable rates.*"[188] For how else would the NTC be able to spur competition if the rate of interconnection was barred from being regulated?

2. Rate-Fixing in the Event of Monopolistic Conduct

In the unlikely event, however, that Section 17 is deemed inapplicable and the courts hold that the interconnection fee cannot be considered a rate that is

[188] Rep. Act. No. 7925, §4(f).

susceptible to the quasi-legislative rate-fixing powers of the NTC, the first paragraph of Section 18 can likewise be utilized to favor regulatory intervention.

The relevant part of the latter provision states that: "in *adopting or approving an access charge formula or revenue sharing agreement...* the commission *shall ensure equity, reciprocity and fairness among the parties concerned.*" Though the provision stresses that the agreement ought to be mutually beneficial to the contracting parties, the same should not be read in isolation from the other provisions of the law.

Notably, under the Public Telecommunications Act, the Commission is responsible for: (a) mandating a fair and reasonable interconnection... at a reasonable and fair level of charges; (b) fostering fair and efficient market conduct through, but not limited to, the protection of telecommunications entities from unfair trade practices of other carriers; and (c) protecting consumers against misuse of a telecommunications entity's monopoly or quasi-monopolistic powers by, but not limited to, the investigation of complaints and exacting compliance with service standards from such entity.[189]

A reading of the aforementioned provisions in conjunction with Section 18 would reveal that the interests of the contracting parties are not the only considerations by which the NTC adopts or approves an interconnection agreement. Verily, the implementing rules state that:

> The interconnection between [Public Telecommunication Entities] should result into a universally accessible and fully integrated nationwide telecommunications network *for the benefit of the public.* (Italics supplied.)[190]

Therefore, when parties enter into an interconnection agreement which prejudice the public, particularly by being a combination in restraint of trade, the NTC is empowered to intervene since, by virtue of the governing law, it can "mandate a fair and reasonable interconnection," "foster fair and efficient market conduct," and "protect consumers against misuse of a telecommunications entity's monopoly or quasi-monopolistic powers."[191] By virtue of this interpretation, this writer argues that when an interconnection agreement is executed to promote a

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[189] Rep. Act. No. 7925, §5(c), (d), and (e).
[190] NTC Memo. Circ. No. 14-07-20, §7 (2000).
[191] Rep. Act. No. 7925, §5(c), (d), and (e).

combination in restraint of trade, the same can be modified by the Commission so long as the agency likewise "ensure[s] equity, reciprocity and fairness among the [contracting telecom operators] concerned."

This writer submits that even Executive Order No. 59 can be deemed to be applicable notwithstanding the promulgation of the Public Telecommunications Act. Noteworthy is the fact that both the NTC and the Court of Appeals have applied the earlier executive order in mandating interconnection despite the existence of the Public Telecommunications Act.[192] In their arguments against regulated interconnection, the dominant carriers have likewise invoked Executive Order No. 59 as a source to bolster their contentions.[193] As stated earlier, under this executive order, pre-negotiation rules would govern the agreement of the parties under Section 6, *viz.*:

> Interconnection shall be negotiated and effected through bilateral negotiations between the parties involved *subject to certain technical/operational and traffic settlement rules to be promulgated by the NTC...*[194] (Italics supplied.)

The implementation of the RAOs, as discussed in IV, thus finds adequate justification since they are akin to pre-negotiated contracts by which underlying anti-competitive terms and conditions are immediately weeded out prior to actual negotiations between the parties.

Based on the foregoing, the NTC, if it were so inclined to adopt the interpretation of the relevant provisions produced in this article, can rely on two forms of agency action in spurring competition via interconnection underneath the aegis of existing laws: (a) it can opt to utilize its inherent quasi-legislative rate-fixing powers under Section 17 of the Public Telecommunications Act; or (b) it can enforce implementing rules in relation with the Commission's mandated functions when exercising its quasi-judicial rate-fixing powers under Section 18 of the same law.

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[192] Globe v. NTC, G.R. No. 143964, July 26, 2004.

[193] Lenie Lectura, Digitel complies with interconnection requirement, Business Mirror, Jan. 29, 2010, *available at*: http://www.abs-cbnnews.com/business/01/29/10/digitel-complies-interconnection-requirement

[194] *See* Exec. Order No. 59, §6.

B. Court-Initiated Competition Policy

Even if the NTC were so minded to implement the interconnection procedure detailed in the preceding section, the ability of the carriers to thwart agency action through protracted court litigation sets another roadblock that has to be considered in advocating an effective government competition policy. In particular, the capacity of the dominant carriers to prolong an interconnection dispute through delays and court action may have created a situation whereby new entrants to the market would be best served by negotiating for access charges with the dominant carrier, notwithstanding their obviously weak bargaining position, rather than be delayed indefinitely by the courts.

1. Judicial Restraint

Since technological convergence tends to render existing regulations meaningless, if courts were to grant an injunction or if litigation were to take years, the time spent in the judicial cocoon would obviously favor the existing duopoly rather than the public interest. The Court of Appeals and the Supreme Court should thus make it a policy to, more often than not, decline the exercise of *certiorari* jurisdiction with regard to the rate-fixing functions of the NTC whenever the question of interconnection is placed before it. The following pronouncement made by the Court in *PLDT v. NTC III* finds suitable justification for desistance, *viz.*:

> Courts have none of the technical and economic or financial competence which specialized administrative agencies have at their disposal, and in particular must be wary of intervening in matters which are at their core technical and economic in nature but disguised, more or less artfully, in the habiliments of a "question of legal interpretation."[195]

To repeat, unlike other issues involving the decisions or orders of the telecommunications regulator, the resolution of an interconnection question is the most relevant issue in spurring competition in the mobile industry today.

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[195] PLDT III, *supra* note 74.

2. Judicial Activism

On the other hand, instead of desisting, courts may engage the issue and apply the interpretation suggested by this contribution. Courts may likewise apply the public utility principle set forth in the landmark case of *Munn v. Illinois*, which recalls the inherent right of government to regulate businesses imbued with public interest, to allow the NTC to regulate the rate of interconnection, *viz.*:

> When private property is "affected with a public interest it ceases to be *juris privati* only." This was said by Lord Chief Justice Halemore than two hundred years ago, in his treatise *De Portibus Maris*... and has been accepted without objection as an essential element in the law of property ever since.... Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. *When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.* He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to control.[196] (Italics supplied.)

This doctrine has since been adopted in numerous decisions of the Supreme Court.[197]

Notably in *Republic v. PLDT*, "the Court allowed the Republic to exercise eminent domain, despite the absence of a 'thing' owned by PLDT, ruling that interconnection is a 'service' that can be a subject of a taking,"[198] *viz.*:

> Nominally, of course, the power of eminent domain results in the taking or appropriation of title to, and possession of, the expropriated property; but no cogent reason appears why the said power may not be availed of to impose only a burden upon the owner of condemned property, without loss of title and possession. It is unquestionable that real property may, through

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[196] 94 U.S. 113, 126 (1877) - In this case, the Court recognized that the right to regulate "may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts."

[197] *See* Fisher v. Yangco Steamship Company, G.R. No. L-8095, 31 Phil. 1, Mar. 31, 1915; North Negros Sugar Co. v. Hidalgo, G.R. No. L-42334, Oct. 31, 1936; Pangasinan Transportation Co. v. Public Service Commission, G.R. No. 47065, June 26, 1940; Luque v. Villegas, G.R. No. L-22545, Nov. 28, 1969; Republic v. Manila Electric Company, G.R. No. 141314, Nov. 15, 2002; Surigao del Norte Electric Cooperative, Inc. v. Energy Regulatory Commission, G.R. No. 183626, Oct. 4, 2010.

[198] *See* Raul Pangalanan, Property as a "Bundle of Rights": Redistributive Takings and the Social Justice Clause, 71 PHIL. L. J. 141, 164-165 (1996).

> expropriation, be subjected to an easement of right of way. *The use of the PLDT's lines and services to allow inter-service connection between both telephone systems is not much different. In either case private property is subjected to a burden for public use and benefit.* If, under section 6, Article XIII, of the Constitution, the State may, in the interest of national welfare, transfer utilities to public ownership upon payment of just compensation, there is no reason why the State may not require a public utility to render services in the general interest, provided just compensation is paid therefor. Ultimately, the beneficiary of the interconnecting service would be the users of both telephone systems, so that the condemnation would be for public use.[199] (Italics supplied)

The Court here characterized interconnection as "a property right." Applying the public utility principle to the said right, interconnection, "being devoted by the [telecom operators] to a use in which the public has an interest... [these telecom operators] must submit to be controlled by the public for the common good, to the extent of [their respective interests.]" The regulation of the rate of interconnection therefore becomes justified notwithstanding the existence of a contract.

Aside from jurisprudence citing the public utility principle, the regulation of interconnection agreements may likewise find adequate justification in *Manila International Airport Authority v. Airspan Corp., et. al.*[200] Here, various airport fees, which were contractually negotiated between the agency and the users, lessees and occupants of the agency's properties, were considered susceptible to state regulation mainly because the said agency's properties "were imbued with paramount public, and even national interest." The same concept should apply to access charges when their effect on spurring competition in the telecommunications industry - a matter deeply imbued with national interest - is taken into account.

Should the court take cognizance of the dispute, therefore, jurisprudence is readily available to permit a re-reading of the pertinent provisions of the Public Telecommunications Act based on the pertinent provisions advanced in Part V.A of this article.

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[199] Republic v. PLDT, *supra* note 128.
[200] G.R. No. 157581, Dec. 1, 2004.

C. Administrative Franchises by Legislative Delegation

During the deliberations of the Public Telecommunications Act in both Houses of Congress, the ability of the NTC to grant Certificates of Public Convenience and Necessity (CPCN) *vis-a-vis* the ability of Congress to issue legislative franchises to telecom operators was widely discussed.

In the Lower House, Representative Paras had intimated that a congressional grant should be sufficient to enable the franchisee to operate and that the NTC's role in the process should merely be ministerial.[201] DOTC Undersecretary Lichaoco explained, however, that the issuance of a CPCN could not be avoided since the NTC was the only body which was competent to: (a) determine whether the market could sustain the entry of another operator; (b) provide a specific manner by which general franchises issued by Congress could be implemented; and (c) determine whether the franchisee was technically and financially equipped to handle the public utility.[202] In acceding to this contention, Representative Paras noted that a strict criterion for the issuance of the CPCN would be necessary in order to prevent an undue delegation of legislative powers.

A more interesting debate on the issue would take place during the Senate deliberations. Senator John Osmeña in his sponsorship speech had initially opined that the Legislative power to grant franchises to telecommunication entities should be discarded:

> It follows that in segments where entry and pricing are deregulated [which results from the abandonment of the prior-operator rule], the franchising power of Congress should also be re-examined and eventually abandoned as a relic of a bygone era. Unfortunately, Mr. President, moves to abandon the franchising power of Congress have been resisted in the Lower House. The role of Congress in issuing franchises shall diminish as time goes by.[203]

Based on this earlier statement, it appears that Senator Osmeña made a *volte face* when questioned by Senator Neptali Gonzales as to the wisdom of having

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[201] Records of the Committee on Transportation and Communications, *supra* note 60, at 13.
[202] *Id.*, at 14-23.
[203] 4 Record of the Senate 73, 872, 9th Cong., 1st sess. (Sponsorship Speech of Sen. Osmeña).

applications brought to Congress in the first instance rather than this being addressed directly to the regulatory agency, *viz.*:

> SENATOR OSMEÑA: Madam President, I am glad the distinguished Gentleman asked that question. I think it is the clear and unmistakeable intent of the Committee - and we hope that we have the support of this Chamber - that there shall be no CPCs and authorities granted by the NTC to any entity that does not have a legislative franchise.
>
> SENATOR GONZALES: With that, does the distinguished Gentleman not entertain any fear or thoughts that Congress may be swamped in the first instance with applications for the issuance of a legislative franchises, Madam President? As it is, there already so many franchises being issued by Congress. Now, with this requirement that one cannot operate any public telecommunications service without a legislative franchise, then initial application will always be made to Congress.
>
> SENATOR OSMEÑA: That is correct, Madam President. We are already being swamped with application[s] for legislative franchises. *But considering (a) the importance to our economic development; (b) the scarcity of the resources; and (c) the opportunities that are open to the private sector in the operation of telecommunication enterprises, I think Congress should shorten the lease or pull back the lease from the regulatory agency.*
>
> SENATOR GONZALES: ... I am entertaining some problems with the exercise of this great power... the potential for using it for illegitimate purposes is open.
>
> SENATOR OSMEÑA: Madam President, on that issue, may I advance the proposal or the position that we in Congress are accountable; that every three or six years, we face the electorate; and that we are elected representatives of the people. So if there should be inappropriate use or abuse of power, the better the abuse or inappropriate use by the elected rather than by the unelected and the unelectable.[204] (Italics supplied.)

Senator Jose Lina, however, had expressed reservations to these answers. He raised the issue of whether it would be a better policy for Congress to delegate the power to grant franchises to agencies with the technical expertise to do so in

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[204] *Id.*, at 835.

order to leave Congress unbothered by the details and technicalities of the application, *viz.*:

> My only reservation was that Congress may not be equipped to truly evaluate, especially on a technical plane or level, this matter of telecommunications facilities and operations, including broadcast.
>
> This representation knows, and we know, that we have been granting franchises... Many are still awaiting, Madam President. I know for a fact that several television and radio stations are following up their franchises, and I just thought that the present system for Congress directly involving itself in the grant of authority may even be counter-productive in the long-run.
>
> That is a point that I would like to get across in this debate. If that will be a good point, then the other option is just to strengthen the NTC so that all those problems that have been identified as stumbling blocks in the improvement of telecommunications and broadcasting system[s] can be addressed.

It is this writer's opinion that Senator Lina's arguments should have been heeded by the Senate considering that it offers the better course of action. The time and effort involved in the two-step process of first acquiring a legislative franchise and then subsequently applying for a certificate to operate from the regulator could be dramatically lessened by delegating the power to grant franchises to the regulator. Not only would the process be more efficient for the would-be applicant and the franchising authority but the potential for rent-seeking behavior in Congress would also be greatly reduced. The NTC could then be given a free hand in determining the conditions of the market, allowing it to likewise act on the same without waiting for potential operators to acquire a franchise from Congress.

In *Francisco v. Toll Regulatory Board*, the Supreme Court upheld the legality of delegating the legislative power to grant franchises to specialized agencies, even citing the NTC as one of the said agencies, *viz.*:

> Under the 1987 Constitution, Congress has an explicit authority to grant a public utility franchise. However, it may validly delegate its legislative authority, under the power of subordinate legislation... We explained the

> reason for the validity of subordinate legislation, thus: Such delegation of legislative power to an administrative agency is permitted in order to adapt to the increasing complexity of modern life. As subjects for governmental regulation multiply, so does the difficulty of administering the laws. Hence, specialization even in legislation has become necessary. [205]

However, unlike previous charters by which the Court allowed the administrative agency to grant franchises without legislative authority, the Public Telecommunications Act is explicit in Sections 3(d) and 16 that: "No person shall commence or conduct the business of being a public telecommunications entity without first obtaining a [congressional] franchise." In order to fall within the ambit of the *Francisco* ruling, these provisions of the law should also be reviewed in order to strengthen the regulator in admitting competition to the market.

D. Institutional Independence of the NTC

Independence of administrative agencies from the political sphere has been held to provide (a) relief from political pressures, (b) consistency of policy, (c) impartiality, (d) wider popular support, and (e) continuity of policy. [206] Specifically, in rationalizing the need for an independent telecommunications regulator, the following considerations may be been taken into account:

> Telecommunications regulators will often benefit from strong legal protections against arbitrary removal; it is not rare to see telecommunications regulatory boards or commissions whose members have staggered terms in order to prevent a single government from presiding over the renewal of the whole regulatory body. In addition, telecommunications regulators are usually required to sever all their links to regulated enterprises, rather than simply refrain from intervening when a conflict of interest arises.
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> These greater efforts at protecting telecommunications regulators from undue pressure reflect the greater risks of capture they face. Telecommunications is a public service, and the conditions under which telecommunications services are provided remain politically sensitive in many countries. This increases the temptation for governments to intervene

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[205] G.R. No. 166910, Oct. 19, 2010, *citing* Kilusang Mayo Uno Labor Center v. Garcia, Jr., G.R. No. 115381, Dec. 23, 1994, 239 SCRA 386, 405.

[206] MARVER BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 142 (Greenwood Press, 1955) *citing* a study of the U.S. Board of Investigation and Research.

> with respect to tariffs or other aspects of the service. In addition, a telecommunications regulatory agency often has a stronger impact than an antitrust authority on the profitability of the operators it regulates. Exiting the telecommunications market might be costly, as some important investments are sunk. Close regulation of tariffs or quality standards are therefore likely to have a substantial impact on the profitability of telecommunications operators and those operators are likely to put pressure on regulators. Furthermore, sector-specific entities are likely to maintain closer contacts with the sector Ministry and a very small group of enterprises, as opposed to the contacts that infrastructure or economy-wide bodies would have. Thus, telecommunications-specific regulators are arguably more at risk from industry or government capture. In those conditions, in order to attract private investment in the sector, it is extremely important to protect the regulator--particularly if it is sector-specific--from undue industry or government interventions.[207] (Citations omitted).

As intimated in Part II, however, the independence of the NTC is compromised due to several factors: (a) an existing revolving door policy, (b) an "incomplete" mandate, and (c) a distinct lack of financial resources to carry out its functions. The cure for such deficiencies lies in legislation.

1. Fixed Terms for Commissioners and Fiscal Autonomy for the Agency

Opposition against the lack of fixed terms for NTC commissioners became pronounced after the sacking of erstwhile Commissioner Abraham Abesamis in 2007. Representative Joseph Santiago, then Chair of the House Committee on Information and Communication Technology, said that "the lack of fixed terms has definitely made the NTC unusually vulnerable to too much politics...Right now, the three commission members do not enjoy solid terms. Naturally, their stay in office is totally conditional on whether or not they continue to enjoy the appointing power's confidence." He thus proposed to restructure the agency, giving the NTC commissioners fixed terms using the United States' Federal Communications Commission (FCC) as a possible model to follow.[208] Late in 2009, Senate President Enrile proposed a bill to reorganize the NTC,[209]

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[207] Kerf & Geradin, *supra* note 14, at 931-932.

[208] Norman Bordadora, Fixed terms for NTC commissioners proposed, PHIL. DAILY INQUIRER, August 14, 2007, *available at*: http://newsinfo.inquirer.net/breakingnews/nation/view/20070814-82549/Fixed_terms_for_NTC_commissioners_proposed

[209] S. No. 3475, 14th Cong., §7(a) (2009) - This is proposed National Telecommunications Commission Reorganization Act of 2009. "The Commission shall be a collegial body of three Commissioners, composed

mimicking the sentiments of Representative Santiago while also granting the agency fiscal autonomy.[210]

2. Improved Mandate for Interconnection

The Senate bill likewise strengthens the powers of the NTC with regard to interconnection in this wise:

> Section 6. In addition to the powers already provided for by existing laws, not inconsistent with this Act, the Commission shall have the following powers and functions: xxx
>
> (k) Require, consistent with due process, any public service to provide access to and the use of its facilities and services, *including the interconnection with or the attachment to its facilities or equipment, on such terms and conditions and the payment of compensation, as the Commission may determine and approve;*
>
> (v) *Mandate a fair and reasonable interconnection* of systems, stations, networks, facilities and/or services of authorized network operators and other providers through appropriate modalities of interconnection that *provides a reasonable and fair level of charges so as to provide the most extensive access, availability and affordability to the public, and ensures that no single player interest controls access to facilities and services;*[211] (Italics supplied.)

The Senate bill makes no mention of the *negotiation* of interconnection agreements. Thus, if the bill, as presently worded becomes law, the practice of carrier-determined interconnection fees takes a back seat and the regulator is given the explicit power to mandate interconnection so long as the charges involved "are fair and reasonable so as to provide the most extensive access, availability and affordability to the public, [ensuring] that no single player interest controls access to facilities and services."

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of a Chairperson and two (2) Commissioners, all of whom shall be appointed by the President of the Philippines upon the recommendation of the CICT. The Commissioners shall have a fixed term of five (5) years with an option to be reappointed for another term of five years."

[210] *Id.*, §9. - The Commission shall enjoy fiscal autonomy. Its appropriations may not be reduced below the amount appropriated for the previous year and after approval, shall be automatically and regularly released. The Commission may re-align allocations to supplement any insufficient or inadequate appropriation as may be necessary to effectively discharge its duties.

[211] S. No. 3475, *supra* note 192, at §9.

It is interesting that Section 6 (w) of the proposed bill states that the NTC can "directly intervene, enjoin speedy settlement through alternative dispute resolution mechanisms and impose judgment on *on-going and protracted disputes* involving interconnection among service providers, including the final approval of any interconnection agreements." The implication of the adjectives "on-going and protracted" is that the NTC no longer has to intervene with interconnection in future disputes since this is to be regulated by it through the proposed Section 6(k). Section 6(w) would thus be relegated to *existing and past disputes* involving interconnection. It would be better though if this was clarified instead of being left to the reader to decipher from the context of the law.

Equally of note is the last clause of the proposed provision in Section 6 (v) which states that one of the factors which the NTC must consider in mandating interconnection is: "[to ensure] *that no single player interest controls access to facilities and services.*" This thereby implies that the monopolistic scenario feared is still a pressing concern, if not an existing reality, despite the liberalized and deregulated industry which the Public Telecommunications Act sought to create.

A counterpart bill was later filed in the lower house by Representatives Luis Villafuerte, Ferdinand Martin Romualdez and Rufus Rodriguez.[212] Though the senate bill authored by Senate President Enrile was certified by then President Macapagal-Arroyo for its immediate enactment,[213] it was not included among the priority bills proposed by the President Benigno Aquino in his first Legislative-Executive Development Advisory Council (LEDAC) meeting in February 2011.[214]

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[212] Abigail A. Modino, Lawmakers seek NTC reorganization to cope with IT developments, Public Relations and Information Department, 14th Congress of the Philippines, *available at*: http://www.congress.gov.ph/press/details.php?pressid=4009.

[213] S. No. 3475, 14th Cong., Legislative History, *available at*: http://www.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-3465. - The bill was certified on Feb. 1, 2010.

[214] *See* Amita Legaspi, Palace bares 17 priority bills, Feb. 7, 2011, *available at*: http://www.gmanews.tv/story/212436/palace-bares-17-priority-bills.

CONCLUSION

As the tenor of this article suggests, much of the history of the telecommunications industry in the Philippines has been plagued by regulatory interference. But the accidental growth of mobile technology would prove to be beneficial to the economy notwithstanding the nefarious effects of either regulatory capture or opportunism. The apparent advantage of the deregulated environment during the early stage of mobile competition, however, would prove to be short-lived. Today, the once abhorred monopoly of PLDT in the fixed-line sector has given way to a systematic duopoly between Smart and Globe in the mobile space. After the recent turn of events, PLDT as parent company of Smart and Sun Cellular now plays an even larger role, controlling over 70 percent of the market.

Though the existence of a duopoly is not *per se* detrimental to the public interest, it becomes so when it prevents effective competition from taking place. In this case, the refusal of the incumbent carriers to negotiate a reasonable rate of interconnection, by both regional and international standards, has created a situation whereby the general public is prejudiced by the lack of competition and smaller telecom operators are left without recourse but to create their own facilities, investing in infrastructure that it would have no need to build if interconnection rates were reasonable. In addition, to simply rely on the existing practice of contractual arrangements of the carriers to lower the rate of interconnection would ensure the existence of the duopoly since the dominant players would undoubtedly prefer the effects of high rates of interconnection: significant profits on their part and a high barrier to entry on the part of the competition.

It is true that having competition dictate market prices is much preferred over government enforced regulation over the same. But it is likewise true that, in the telecommunications industry, regulation has to exist since its absence would encourage the formation of cartels and unfair competition. In the Philippine setting, though prices of telecom services have been going down since the onset of liberalization, an economic impasse has began to settle between the telecom giants, thus prejudicing the general public who, unaware of the nefarious effect of high access charges, blindly submit to extant rates. And the duopoly, with its control of the bottleneck that is interconnection, remains secure, unthreatened by either the

market or regulatory action. The need to re-introduce competition thus becomes the regulator's most important objective. It is only after ensuring that a competitive environment exists and is maintained that it can once again relax its watch with minimal regulation, allowing the market to police itself.

This article has established, however, that historically, the regulator's acts in improving competition have been constantly rebuffed by the specter of either regulatory capture or regulatory opportunism. Considering the series of events which have transpired in the last two decades, the potential and/or actual existence of the foregoing conditions in the industry is quite strong. Furthermore, since these conditions have gone unhampered in the same time frame, the ability of these firms to interfere, either directly or indirectly, with reformative agency action may have even strengthened.

Bearing this in mind, a holistic government policy should ensure that the fruits of liberalization borne from Executive Order No. 59 and the Public Telecommunications Act are not turned rotten by the creation of another non-competitive environment - a scenario which the law originally sought to defeat. The competition policy should be enforced not merely by the administrative agency charged at regulating the telecom operators but also by the judiciary, which has the the power to negate delays, and the legislature, with its power to make reformative action permanent.

The implementation of such a policy is expected to herald:

> (1) Permanent and continuing economic benefits to the consuming public, with market competition dictating the most reasonable prices for mobile services;
>
> (2) Efficiency in telecom infrastructure build-up, with the smaller firms being able to tap existing networks at reasonable cost; and
>
> (3) The insulation of the regulator from interference, with political and fiscal independence finally being granted to the agency by the legislature.

Granted, however, that the NTC is currently not an independent institution, both politically and financially, it must attempt re-regulation based on

the confines of existing legislation to evade the transaction costs of regulatory capture and opportunism. The NTC can evade these issues by shifting the responsibility of ensuring competition to the very market it seeks to regulate. And, as proposed by this paper, this can be effectively accomplished by lowering the high cost of interconnection in the country through the built-in agency action of rate-fixing.

In this manner, smaller telecom operators, disadvantaged by the larger networks whose infrastructure now covers the entire nation, can invest in other technologies instead of investing in more infrastructures that inefficiently duplicates that of existing operators. The modified environment would also allow existing telecom operators that have a mind to challenge the plateaued cost of services to significantly lower their own prices without causing "predatory pricing." Newer domestic firms would be able to establish themselves immediately instead of having to build from the bottom-up. Consequently, it is the public at large which stands to receive greatest benefits from the domino-effect caused by lowered interconnection rates.

The Judiciary plays a role in achieving this objective. It should therefore adopt either a policy of non-interference or one of aggression when issues concerning interconnection are raised before it. Thus, courts can either decline *certiorari* jurisdiction in the face of pro-competitive agency action, or in the alternative, they can assume jurisdiction and eventually improve the state of telecommunications competition by upholding the Commission's power to set the rate of interconnection. On the other hand, Congress, which has already seen the problems inherent in the present system, can remedy the deficiencies by corrective legislation, especially in three particular aspects: (a) granting the regulator the explicit power to regulate the rate of interconnection; (b) delegating to the regulator the right to grant administrative franchises; and (c) ensuring the regular's political and financial independence, the first by fixed terms of office for its commissioners and the second, by virtue of granting it fiscal autonomy.

The industry has come a long way since its inception as a monopolistic stronghold. Now that the public has tasted the fruits of what competition has to offer, the regulator, bolstered by congress and the courts, should ensure that the market remains competitive - not just for the sake of the consumer or the industry, but for its own sake as a regulator. If it succeeds, the NTC can finally achieve a

modicum of regulatory independence - an enviable position free from the decade's long shadow of capture and opportunism.

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