DISMANTLING A DUOPOLY: THE APPLICABILITY OF THE ESSENTIAL FACILITIES DOCTRINE IN THE PHILIPPINE BROADBAND TELECOMMUNICATIONS INDUSTRY*

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> *"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."*
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> —Justice Reynato S. Puno[1]

I. INTRODUCTION

An effective telecommunication infrastructure is essential for a country to attain social and economic development, hence telecommunications services are imbued with a high degree of public interest.[2] Unfortunately, as far back as 1990, the Supreme Court itself recognized that despite the monopoly of the telephone system in the country by the Philippine Long Distance Telephone Co. ("PLDT"), fixed and mobile telecommunications services were inadequate.[3] In the 21st century, the demand shifted for access to the internet as the development of broadband internet was identified as critical in reducing poverty, enhancing job

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[1] Tatad v. Secretary of the Department of Energy, G.R. No. 124360, 281 SCRA 358 (1997).

[2] Boisier v. Ct. of Appeals, G.R. No. 61438, 122 SCRA 945, 956 (1983).

[3] Philippine Long Distance Tel. Co. v. National Telecomm. Comm'n, 268 Phil. 784 (1990).

opportunities, and fostering trade integration.[4] However, despite various attempts by the government to compel the current duopoly, PLDT and Globe Telecom (Globe), to provide better services and rates, the Philippine broadband telecommunications market has not yet been fully developed.

Based on the 2019 Inclusive Internet Index created by *The Economist Intelligence Unit*, the Philippines ranked 97th out of 100 countries in terms of competitiveness, which was measured by the concentration of the marketplace for internet service provision.[5] The Hirschman-Herfindahl Index (HHI) score of the Philippines was 4,313, indicating a highly concentrated market.[6] Meanwhile, in OpenSignal's State of LTE 2018 report, the Philippines' mobile internet connection speed averaged only at 9.49 megabits per second (Mbps). In comparison, Singapore ranked first, having an average download speed at 44.31 Mbps. The Philippines also lagged behind its Association of South East Asian Nations (ASEAN) neighbors, Vietnam (21.49 Mbps), Brunei (17.48 Mbps), Myanmar (15.56 Mbps), Malaysia (14.83 Mbps), Cambodia (13.90 Mbps), and Thailand (9.60 Mbps).[7]

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[4] Natalija Gelvanovska, Michel Rogy & Carlo Maria Rossotto, *Broadband Networks in the Middle East and North Africa: Accelerating High-Speed Internet Access* (2014), *available at* https://openknowledge.worldbank.org/handle/10986/16680.

[5] The Economist Intelligence Unit, *Competitive Environment Rankings*, THE INCLUSIVE INTERNET INDEX 2019 WEBSITE, *at* https://theinclusiveinternet.eiu.com/explore /countries /PH/performance/indicators/affordability/competitive-environment (last visited Apr. 20, 2019).

[6] The Economist Intelligence Unit, *Affordability*, THE INCLUSIVE INTERNET INDEX 2019 WEBSITE, *at* https://theinclusiveinternet.eiu.com/explore/countries/performance/affordability/competitive-environment/broadband-operators-market-share?highlighted= PH (last visited Apr. 20, 2019).

[7] *The State of LTE 2018*, OPEN SIGNAL WEBSITE, *at* https:// www.opensignal. com/reports/2018/02/state-of-lte# (last visited Apr. 20, 2019).

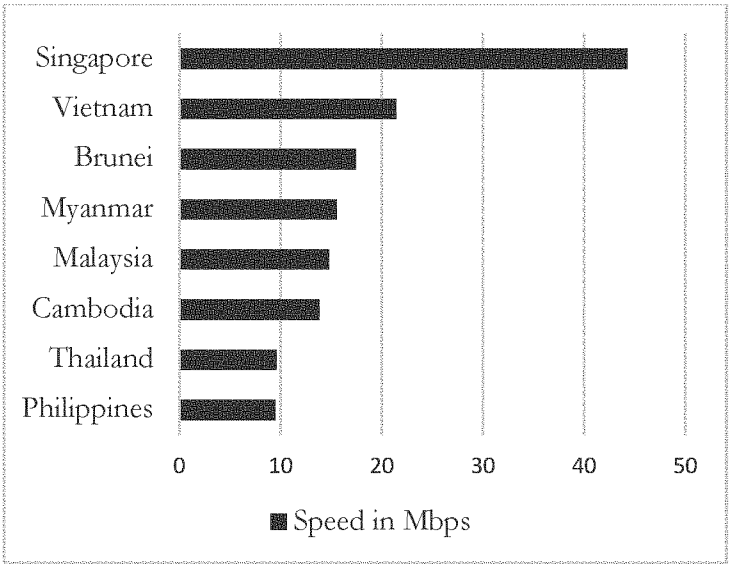

FIGURE 1. Comparison of Average Mobile Internet Connection Speeds in Selected ASEAN Countries.

Slow and expensive internet service in the country has been attributed to lack of competition, but attempts by the government to introduce a third player to increase competition in the market have thus far been unsuccessful. Against this factual scenario, this Note seeks to assess the industry through the lens of the recently enacted Philippine Competition Act ("PCA") or Republic Act No. 10667.[8] The potential role of competition law in identifying and correcting anti-competitive practices of incumbent players will be considered.

The World Bank identified the limited regulatory capacity and resources of the National Telecommunications Commission (NTC) as reasons why the telecommunications sector remains uncompetitive. Prices of broadband services in the Philippines are among the highest in the region. However, the NTC has been unable to set and implement pro-competition measures such as an unbundling policy and has resorted to a mainly passive mode of regulation.[9] Local loop unbundling has been required by regulators or competition authorities in many jurisdictions as it is necessary for broadband access and interconnection. However, in the Philippines, unbundling of the local loop has not been required and prices remain

[8] Rep. Act No. 10667 [hereinafter "PCA"] (2015). The Philippine Competition Act.

[9] WORLD BANK GROUP, *Fostering Competition in the Philippines: The Challenge of Restrictive Regulations* (2018) 10, *available at* http://documents.worldbank.org/curated/en/478061551366290646/pdf/134949-Revised-Fostering-Competition-in-the-Philippines.pdf.

unregulated.[10] Thus, incumbent operators may refuse to provide access to alternative operators or set high prices for access, which may be considered as constructive refusal. This analysis will delve into the issue of unbundling and determine whether or not the refusal of telecommunication providers to provide equal access to actual or potential alternative operators is justified by a reasonable commercial purpose or if it is tantamount to abuse of dominance under the PCA.

The Note will begin with a brief background of Philippine broadband telecommunications and will touch on the basis and development of competition policy in this industry. An analytical approach following the guidelines set forth under Section 26 of the PCA will then be taken to determine whether or not incumbent telecommunication providers, PLDT and Globe, exhibit anti-competitive conduct. Next, the discussion will delve into the essential facilities doctrine. The development of such doctrine in the U.S. and E.U. will be analyzed to determine in what manner and to what extent the doctrine may be applied in the Philippines. The Author will proceed to examine how the essential facilities doctrine may be implemented in the Philippine broadband telecommunications industry through open access or local loop unbundling. Finally, the Note will conclude with recommendations on the application of the doctrine in the Philippines, while simultaneously refuting possible objections to such.

II. THE PHILIPPINE BROADBAND TELECOMMUNICATIONS INDUSTRY

The Philippine telecommunications sector was initially dominated by PLDT, which operated as a monopoly for half a century. Because of this, former President Fidel Ramos introduced liberalization measures in the telecommunications industry. He mandated the interconnection of all telecommunications providers[11] as well as the opening of basic telephone services to new players.[12] The forced dissolution of the monopoly led to increased competition as a result of investments in the sector that meant lower costs and wider choices for consumers.[13]

On May 30, 2016, PLDT and Globe acquired from Vega Telecom, Inc. ("VTI"), a subsidiary of San Miguel Corporation ("SMC"), its

[10] *Id.* at 66.

[11] Exec. Order No. 59 (1993).

[12] Exec. Order No. 109 (1993).

[13] Romeo Bernardo, *De-monopolizing telecommunications*, BUSINESS WORLD, Sept. 29, 2011, *available at* http://www.bworldonline.com/content.php?section=Opinion&title=De-monopolizing-telecommunications&id=38461.

telecommunications assets which included coveted radio frequencies needed to provide high-speed internet services. The PHP 69.1 billion-worth acquisition virtually solidified the duopoly position of PLDT and Globe in the Philippines' mobile market.[14] Significantly, this follows a pattern of increasing market concentration through various mergers and acquisitions. In 2000, PLDT purchased Smart and Piltel. Eight years later, PLDT acquired Connectivity Unlimited Resources Enterprise Inc. ("CURE").[15] Subsequently, PLDT acquired Digital Telecommunications Philippines Inc. ("Digitel"), which operated Sun Cellular, for PHP P74.1 billion.[16] On the other hand, Globe's market power grew through the years with the acquisition of Islacom in 2001 and Bayantel in 2013.[17]

The growth of telecommunications giants PLDT and Globe have been unbridled in the past years, mainly because, unlike many other countries, the Philippines did not have a comprehensive competition policy. For example, in the United States, the Sherman Act[18] and later the Clayton Act[19] provided authorities with legal basis to prevent mergers, acquisitions, and other anti-competitive conduct of business entities that could in effect substantially reduce market competition.[20]

Prior to the enactment of the PCA, the NTC, as the main regulatory body of the telecommunications industry, had the primary duty to foster a healthy and competitive environment in the telecommunications industry. It was mandated to ensure that carriers are "free to make business decisions and to interact with one another in providing telecommunications services, with

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[14] Philippine Long Distance Tel. Co. v. Phil. Competition Comm'n, CA-G.R. SP No. 146528 (Ct. of Appeals, Oct. 18, 2017).

[15] Epictetus Patalinghug, Wilfred Manuela, Jr., Regina Manzano-Lizares & Jason Patalinghug, *Assessment of the Structure, Conduct, and Performance of the Philippine Telecommunications Industry*, Jan. 31, 2017, at 51, *available at* https://poseidon01.ssrn.com/delivery.php?ID=638096082015117023065010021017068091053039023004022060096115024720010920910170880051000070320070240260141251020790230310050700450050100790510720290860920650161050060080150700061181200830921021221171040661240730261160251150090991230700750660641000 72&EXT=pdf.

[16] Doris Dumlao, *PLDT Takes Control of Gokongwei-led Digitel in P74B Share Swap Deal*, PHIL. DAILY INQUIRER, Mar. 29, 2011, *available at* https://business.inquirer.net/518/pldt-takes-control-of-gokongwei-led-digitel-in-p74b-share-swap-deal#ixzz5kiJeCKgr.

[17] *Supra* note 15, at 52.

[18] 26 Stat. 209 (1890). An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies.

[19] 38 Stat. 730 (1914). An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes.

[20] Cielito Habito, *A Tale of Two Telecom Industries*, PHIL. DAILY INQUIRER, May 24, 2011, *available at* https://opinion.inquirer.net/5383/a-tale-of-two-telecom-industries.

the end view of encouraging their financial viability while maintaining affordable rates".[21]

This changed on August 8, 2015, when groundbreaking legislation in the form of the PCA took effect. The PCA established the main competition authority in the country, the Philippine Competition Commission (PCC). It empowers the Commission to review mergers and acquisitions or to examine the conduct of incumbent players in the industry through a competition lens. Section 14 of the PCA also provides that the PCC may "intervene or participate in administrative and regulatory proceedings requiring consideration of the provisions of this Act that are initiated by government agencies such as the [...] National Telecommunications Commission."[22] As can be gleaned from this provision, the Commission may look into matters affecting competition in the telecommunications sector, despite the presence of a regulator.

III. THE PHILIPPINE COMPETITION ACT

A. Constitutional Basis

The Philippines' policy on competition is enshrined in Section 19, Article XII of the 1987 Constitution, which provides, "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."

The PCA implements the constitutional mandate to regulate or prohibit monopolies by proscribing conduct which may fall under the following categories: (1) the prohibition on anti-competitive agreements or conduct;[23] (2) the prohibition on abuse of dominant position;[24] and (3) the prohibition on anti-competitive mergers and acquisitions.[25] This Note examines the activities of incumbent telecommunication operators PLDT and Globe in relation to the second type of proscribed conduct, namely the prohibition on abuse of dominance.

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[21] Rep. Act No. 7925 (1995), art. II, § 4(f).
[22] PCA, § 12(n).
[23] PCA, § 14.
[24] PCA, § 15.
[25] PCA, §§ 16–23.

B. Enforceability

The PCA is enforceable against "any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines."[26] The law further provides that it shall be applicable to "international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Philippines."[27] Hence, it is applicable to business entities having market dominance, such as PLDT and Globe.

Significantly, the PCA is relevant to business entities considering that certain acts which they were doing or agreements that they entered into prior the enactment of the law may now be prohibited and could lead to fines or imprisonment.[28] In this Note, the practices of PLDT and Globe will be examined from a competition perspective in order to determine whether these may be considered as abuse of dominance.

IV. REFUSAL TO PROVIDE ACCESS AS ABUSE OF DOMINANCE

The question to be answered in this analysis is: whether or not PLDT and Globe engage in anti-competitive conduct by refusing to supply access to its network elements, particularly its local loop. It is argued that the answer is in the affirmative.

In resolving any possible competition-related dispute, Section 26 of the PCA directs the Commission to do the following:

1. Define the relevant market allegedly affected by the anti-competitive agreement or conduct;[29]
2. Determine if there is actual or potential adverse impact on competition in the relevant market caused by the alleged agreement or conduct;[30]
3. Adopt a broad and forward-looking perspective, recognizing future market developments, any overriding need to make the goods or services available to consumers, the requirements of large investments in infrastructure, the requirements of law,

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[26] PCA, § 3.

[27] Id.

[28] Francisco Ed Lim, Eric Recalde & Korina Manibog, *The Philippine Competition Commission bares its teeth,* IN-HOUSE COMMUNITY WEBSITE, *at* https://www.inhousecommunity.com/article/philippine-competition-commission-bares-teeth/.

[29] PCA, § 26(a).

[30] PCA, § 26(b).

and the need of our economy to respond to international competition, but also taking account of past behavior of the parties involved and prevailing market conditions;[31]

4. Balance the need to ensure that competition is not prevented or substantially restricted and the risk that competition efficiency, productivity, innovation, or development of priority areas or industries in the general interest of the country may be deterred by overzealous or undue intervention;[32] and
5. Assess the totality of evidence on whether it is more likely than not that the entity has engaged in anti-competitive agreement or conduct including whether the entity's conduct was done with a reasonable commercial purpose.[33]

For the purpose of this Note, the analysis will be arranged in the following order: discussion on PLDT and Globe's collective dominance; examination of the provisions on abuse of dominant position; definition of the relevant market; determination of possible or actual foreclosure effects; requirements of large investments and those under the law; and a consideration of the totality of evidence. This is illustrated in *Figure* 2 below.

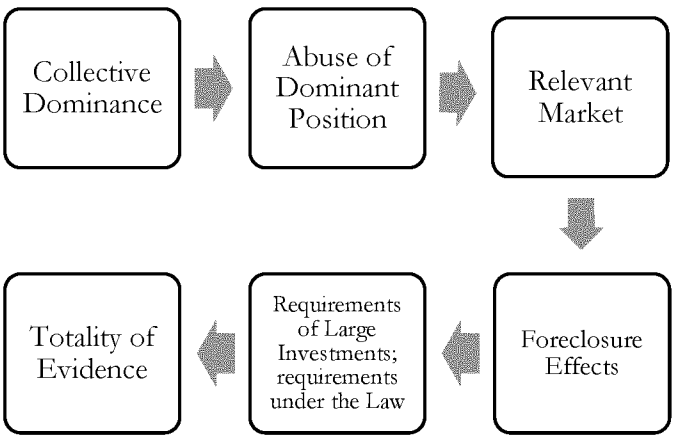

FIGURE 2. Determination of Anti-Competitive Conduct.

[31] PCA, § 26(c).
[32] PCA, § 26(d).
[33] PCA, § 26(e).

A. Collective Dominance

Prior to the discussion on abuse of dominance, it is critical to establish that the entities in question enjoy collective dominance. The PCA defines dominant position as "a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers[.]"[34]

To determine dominance, the PCA provides that "[t]he share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market" shall be considered.[35] There is also a "rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least fifty percent (50%), unless a new market share threshold is determined by the Commission for that particular sector."[36] Notably, a dominant position may be enjoyed by more than one entity, as in the current case.[37]

PLDT and Globe, as the main providers of fixed and mobile broadband services in the Philippines, hold 70% and 28% market shares respectively.[38] Hence, they have a dominant position in the market as they hold at least 50% share collectively and have the ability to control the entire market.

B. Abuse of Dominant Position

The prohibition on the abuse of dominant position is found in Section 15 of the PCA.[39] Based on this provision, the three key elements that constitute abuse of dominance are as follows:

1. One or more entities possess a dominant position in the relevant market;
2. The entity or entities engage in any of the conduct or practices enumerated in the same provision; and

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[34] PCA, § 4(g).

[35] PCA, § 27(a).

[36] PCA, § 27.

[37] FRANCISCO LIM & ERIC RECALDE, THE PHILIPPINE COMPETITION ACT: SALIENT POINTS AND EMERGING ISSUES 88 (2016).

[38] Mary Grace Mirandilla-Santos, *Philippine Broadband: A Policy Brief*, 4 POLICY BRIEFS 2 (2016), *available at* http://www.investphilippines.info/arangkada/wp-content/uploads/2016/02/BROADBAND-POLICY-BRIEF-as-printed.pdf.

[39] PCA, § 15.

3. The conduct would substantially prevent, restrict, or lessen competition.

Further, the PCA's Implementing Rules and Regulations, states that "[i]t shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict, or lessen competition, *including* [. . .]"[40] The word *including* implies that the list of acts that may be considered abuse is non-exclusive and that any conduct causing restraint of trade or causing unfair competition is penalized. Thus, cases on refusal to supply or provide access may be considered as abuse of dominance as it in effect restrains trade.

C. Relevant Market

A relevant market pertains to "the market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market[.]"[41] The same provision states that the relevant product market "comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices and their intended use."[42] The relevant market taken into consideration in this analysis is that of broadband internet services in the Philippines.

D. Foreclosure Effect

The phrase "substantially prevents, restricts or lessens competition" implies that the prohibited act must have a foreclosure object or effect on competition, but actual foreclosure is not necessary before an act can be penalized. Section 26 provides, "[i]n determining whether anti-competitive agreement or conduct has been committed, the Commission shall [...] [d]etermine if there is *actual or potential adverse impact* on competition in the relevant market caused by the alleged agreement or conduct, and if such impact is substantial and outweighs the actual or potential efficiency gains."[43] In ascertaining whether or not the act has a foreclosure object or effect, the Commission must determine if the act has the object or effect of excluding competitors out of the market and exploiting customers.

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[40] PCA Rules & Regs., Rule 3, § 2. (Emphasis supplied.)
[41] PCA, § 4(k).
[42] PCA, § 4(k)(1).
[43] PCA, § 26. (Emphasis supplied.)

In this case, PLDT and Globe control the telecommunications infrastructure in the Philippines. Control over these bottleneck facilities leads to substantial restrictive effect on competition as independent operators will be dependent on access to the infrastructure owned by incumbent giants PLDT and Globe. Because of high costs in building backhaul networks, they are not easily duplicated even though they are essential for the delivery of key services. This could have a foreclosure effect as incumbent operators may exclude potential competitors by refusing to provide equal access to their local loops or other network elements.[44]

E. Requirements of the Law

Certain barriers to entry ranging from legal to financial prevent alternative operators from entering the market. In terms of requirements imposed under the law, one barrier is the need for an operator to secure a Congressional franchise, licenses, and permits from the NTC, other national government agencies, and local government units.[45] The cumbersome process in securing such requirements may discourage new players. Another is the limitation on foreign ownership as the Constitution requires that the capital of a public utility be at least 60% owned by Filipino nationals.[46] These foreign equity restrictions discourage foreign players from entering and competing in the local market.[47]

F. Requirement of Large Investments

A broadband network is typically composed of a backbone, a backhaul, and the local loop. The backbone refers to the core network that may be made up of fiber links, wireless connectivity, or a hybrid of both that have links to the Internet; the backhaul provides the delivery of Internet services from the core to the community and/or business premises; and the local loop which connects the premises to the backhaul delivered within the community.[48] Significantly, one submarine cable has been estimated to cost approximately USD 35 million[49] while the cost of a tower is about

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[44] *Supra* note 38, at 10.

[45] *Supra* note 38, at 7.

[46] CONST. art. XII, § 11.

[47] *Supra* note 38, at 8.

[48] Rural Broadband Partnership, *What Does a Broadbank Network Look Like?, at* http://www.ruralbroadband.com/for-communities/technology-evaluation-supplier-evaluation/wireless-broadband-delivery/ (last visited Apr. 20, 2019).

[49] Chrisee Dela Paz, *'Faster, cheaper' internet via DICT's national broadband plan*, RAPPLER, Mar. 10, 2017 *at* https://www.rappler.com/business/163808-national-broadband-plan-dict-salalima.

USD 100,000.[50] Without local loop unbundling or an open access system, one entity will have to build the entire network. This underscores the need for large investments in infrastructure. Apart from the large amount of capital to be poured in by the investor, it would take time before a new player will be able to recoup investments. New players will also lack the first-mover advantage enjoyed by incumbent players PLDT and Globe.

G. Totality of Evidence

As discussed, PLDT and Globe together enjoy collective dominance. In this case, their refusal to provide access to network elements, particularly the local loop, is an anti-competitive practice that may be considered abuse of dominance under Section 15 of the PCA. This conduct substantially lessens competition as alternative operators are precluded from successfully entering the market. Without access to available telecommunications infrastructure, the elements of which are controlled by PLDT and Globe, the entry of a third player may even be rendered inutile. Consequently, the third player would be unable to price its services competitively given the associated costs. In fact, it is estimated that a new player needs about PHP 200 million to capacitate it to compete with local payers. However, such estimated amount assumes that access to infrastructure is even available.[51] Stringent legal and structural requirements also serve as barriers to entry. It is also important to note that incumbent players have engaged in other anti-competitive behavior in the past by refusing or delaying interconnection and hampering negotiations on revenue-sharing arrangements.[52]

Taking into consideration the unique structure of the telecommunications industry, which has often been acknowledged as a natural monopoly, it is necessary for NTC or the PCA to take measures in levelling the playing field. It is argued that under certain conditions, refusal to provide access, as a type of abusive behavior, may be placed within the context of the essential facilities doctrine. Significantly, the doctrine, which was judicially created in the United States and, later on, adopted in other jurisdictions, is not yet recognized in the country. However, this Note suggests that it may find application here considering that Section 15 of the PCA, the provision on abuse of dominance, is borrowed from the European Union (E.U.) which applies the doctrine based on their competition law. The legal basis for

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[50] Aerol John Pateña, *Transpacific Broadband seeks to be common tower provider*, PHIL. NEWS AGENCY, Jan. 30, 2019, *at* https://www.pna.gov.ph/articles/1060484.

[51] Mary Grace Padin, *Minimum P200 billion investments for 3rd telco player — Dominguez*, PHIL. STAR, Apr. 20, 2018, *available at* https://www.philstar.com /business /2018 /04 /20 /1807500 /minimum-p200-billion-investments-3rd-telco-player-dominguez.

[52] *Supra* note 15, at 29.

applying the doctrine will be discussed further in the succeeding part of this Note.

V. THE ESSENTIAL FACILITIES DOCTRINE

A. Under U.S. Antitrust Law

The essential facilities doctrine originated in the U.S. in the Supreme Court's decision in *United States v. Terminal Railroad Association.*[53] While the Supreme Court has occasionally but consistently referred to this landmark decision, , the Court refused to recognize it as established law in the 2004 case of *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.*[54] This reflects the reality that its application has been controversial throughout the years and its existence has been heavily debated. Note, however that it has not been repudiated by the Supreme Court, and it is still recognized as a doctrine under the U.S. antitrust law.[55]

Although the term "essential facilities" was not explicitly utilized, the case was decided under the Sherman Act[56] and later cases applying the doctrine refer to this decision. In this case, the Terminal Railroad Association of St. Louis controlled St. Louis Station, the only railroad bridge across the Mississippi River at St. Louis at the time, as well as most of the routes to St. Louis. The Court held that the practice of Terminal Road Association in denying other competitors their access to its terminal facilities unjustifiably restrained trade. Since then, the U.S. Supreme Court and lower courts have applied the doctrine in subsequent cases[57] whereby refusal of equal and nondiscriminatory access to the facilities by a dominant entity was consistently construed as a violation of antitrust laws, particularly Section 2 of the Sherman Act which prohibits monopolization.

In *MCI Communications Corp. v. AT&T*, the Seventh Circuit discussed the elements for applying the essential facilities doctrine. It applied the

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[53] United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

[54] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[55] Robert Pitofsky, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 ANTITRUST L.J. 443 (2002).

[56] 26 Stat. 209 (1890).

[57] *See* Associated Press v. United States, 326 U.S. 1 (1945); Gamco, Inc. v. Providence Fruit & Produce Building, Inc. 344 U.S. 817 (1952); Hecht v. Pro-Football, Inc. 436 U.S. 956 (1978); Otter Tail Power Co. v. United States 410 U.S. 366 (1973); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

doctrine after finding that AT&T's local telephone systems were essential because local telephone services are considered natural monopolies[58] and that consequently, AT&T had a duty to allow MCI to interconnect with it.[59] The elements enumerated by the Seventh Circuit are as follows:[60]

1. There is control of the essential facility by a monopolist;
2. The competitor is unable practically or reasonably to duplicate the essential facility;
3. The monopolist has denied of the use of the facility to a competitor; and
4. Providing the facility must be feasible.

However, a fifth element was added by the U.S. Supreme Court in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.*[61] The issue in this case pertained to the extent to which Verizon, the incumbent player in the telecommunications market in New York, was under an obligation to provide access to its local networks to new entrants. The Court considered the essential facilities doctrine inapplicable to the case at bar as there was already a regulatory structure in place and a legislative act provided for mandatory access to Verizon's facilities. In effect, the Court's decision implies that for the doctrine to be applied in the U.S. jurisdiction, there must be an absence of regulatory oversight.[62] This fifth element is notably not recognized nor applied in other jurisdictions, such as the EU.

B. Under E.U. Competition Law

Despite its U.S. origin, the development of the essential facilities doctrine in the E.U. has diverged from the general application of the doctrine in the U.S. primarily because of differences in legislation and competition policy in these jurisdictions.[63] Similarly with the U.S., the application of the doctrine in the E.U. has also been extensively debated. For instance, thinkers such as James Venit and John Kallaugher argue that the application of the doctrine should be confined to cases in which the refusal to grant access to

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[58] MCI Commc'ns Corp. v. AT&T, 708 F2d 1081, ¶ 1133 (7th Cir. 1983).

[59] *Id.* ¶ 1147.

[60] *Id.* ¶¶ 1132–33.

[61] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[62] *Id.*

[63] Mercer Harz, *Dominance and Duty in the European Union: A Look Through Microsoft Windows at the Essential Facilities Doctrine*, 11 EMORY INT'L L. REV. 190 (1997).

the facilities harms competition.[64] However, others like John Temple Lang contend that the doctrine developed independently and played a more important role in the E.U. legal sphere than in the U.S.[65] Nonetheless, the Commission of the European Communities, the Court of First Instance, the European Court of Justice, and courts of the Member States have compelled access to essential facilities even though explicit reference to the doctrine was often not made.[66] Furthermore, it is notable that in 2009, the European Commission issued a Guidance Paper on enforcement priorities in applying the provisions of the European Community Treaty on refusal to deal. Here, the European Commission also acknowledges the development of the doctrine in the E.U. and describes its application and limitations.[67]

In the EU, the first case in which the Commission of the European Communities used the phrase "essential facility" was *B&I Line Plc v. Sealink Harbours Ltd. (Sealink)*.[68] Sealink was a car ferry operator and the owner of Holyhead Harbour, while B & I was another ferry operator who wanted to have access to the port of Holyhead Harbour to operate services going to and coming from Ireland. B&I would effectively be competing with Sealink's ferry services. Berths were allocated to B&I, but the harbor was structured in such a way that B&I's vessels could not carry out its operations whenever a Sealink vessel entered or left the harbor. This became problematic when Sealink altered its sailing schedule as B&I's loading and unloading operations were adversely affected. The Commission found that Sealink was abusing its position in the supply of the harbor, which was the essential facility, by granting its competitor access on less favorable terms than those of its own service."[69] The Commission herein described an essential facility as "a facility or infrastructure without access to which competitors cannot provide services to their customers."[70] Article 102 of the Treaty on the Functioning of the European Union ("TFEU"),[71] which prohibits abuse of dominant position,

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[64] James Venit & John J. Kallaugher, *Essential Facilities: A Comparative Law Approach,* 1994 FORDHAM CORP. L. INST. 328.

[65] John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INT'L L.J. 521, 521–523 (1994).

[66] Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, 76 ANTITRUST L.J. 3 (2010).

[67] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. (L 45) 7–20 (2009).

[68] B&I Line Plc v. Sealink Harbours Ltd., (IV/34.174), 5 C.M.L.R. 255, 41 (1992).

[69] *Id.* ¶ 41.

[70] SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT 324 (2010).

[71] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [hereinafter "TFEU"], art. 102, ¶ 6, 2016 OJ (C202) 1 (Oct. 26, 2012).

was the basis cited by the Commission of the European Communities in deciding this case and in similar cases thereafter where the essential facilities doctrine was applied.

The elements of the E.U. essential facilities doctrine were established by the Commission of the European Communities in its *IMS* interim measures decision. In this decision, the Commission found that IMS Health, a provider of pharmaceutical regional sales data services in Germany, abused a dominant position in refusing to license the use of its "1860 brick structure" to NDC, which was a competing supplier.[72] According to the Commission, the criteria for the establishment of abuse are as follows:[73]

1. The refusal of access to the facility is likely to eliminate all competition in the relevant market;
2. Such refusal is not capable of being objectively justified; and
3. The facility is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility.

The essential facilities doctrine has also been applied to telecommunications networks in the E.U. Two significant cases that illustrate how the General Court of the E.U. has ruled on cases dealing with refusal to grant access in relation to telecommunications networks are *Orange Polska S.A. v. European Commission ("Orange Polska")*[74] and *Deutsche Telekom AG v. Commission and Slovak Telekom a.s. v. Commission*[75].

1. Orange Polska S.A. v. European Commission

On December 17, 2015, the General Court of the European Union upheld the 2011 Decision[76] by the European Commission fining Orange Polska, formerly Telekomunickacja Polska, EUR 27,500,000 for abuse of its dominant position in the Polish broadband access markets by refusing to supply wholesale broadband products from 2005 to 2009. These wholesale broadband products are Local Loop Unbundling ("LLU"), which involves unbundled access to the local loop and Bitstream Access ("BSA"). Orange

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[72] Case COMP D3/38.044, NDC Health/IMS Health: Interim Measures (July 3, 2001).

[73] *Id.*, ¶ 70.

[74] T-486/11, ECLI-1002 (Dec. 17, 2015).

[75] Case T-827/14, EU:T:2018:930 (Dec. 13, 2018); Case T-851/14, EU:T:2018:929 (Dec. 13, 2018).

[76] Case COMP/39.525 Telekomunikacja Polska, ¶ 578 (June 22, 2011).

Polska owned the nation-wide access network and was the only supplier of these wholesale broadband products.[77]

The European Commission considered the following behavior as constituting anti-competitive practices:

1. Proposing unreasonable conditions to new entrants or alternative operators in the agreements concerning access to BSA and LLU products;
2. Delaying negotiations in agreements pertaining to access to BSA and LLU products;
3. Limiting access to its network;
4. Limiting access to subscriber lines; and
5. Refusing to provide reliable and accurate general information to alternative operators.[78]

Unlike the *Trinko* case where the U.S. Supreme Court held that antitrust laws do not apply when access to infrastructure is granted through regulation, the Commission decided the case by applying Article 102 of the TFEU. This suggests that the application of European Competition Law is not precluded by sector-specific regulation and may be resorted to when the regulatory authorities are ineffective and unable to mandate access.[79] This approach has been affirmed in the *Deutsche Telekom* case discussed below.

2. Deutsche Telekom AG v. Commission and Slovak Telekom a.s. v. Commission

On December 13, 2018, the General Court of the E.U. decided two appeals relating to the Commission Decision on October 15, 2014. In 2014, the Commission found Slovak Telekom and its parent company Deutsche Telekom liable for engaging in an anti-competitive act by refusing to grant unbundled access to competitors to their local loops. The Commission found that Deutsche Telekom was charging competitors higher prices to access its local loop than to its own consumers. This caused a margin squeeze and in effect, alternative operators could not compete effectively with Deutsche Telekom. Ultimately, the Commission imposed a joint fine of EUR 38,838,000 on Slovak Telekom and Deutsche Telekom. The

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[77] *Id.* ¶ 643.

[78] *Id.* ¶ 712.

[79] Andras Toth, *General Court Judgement on Orange Polska - Fine for Abusive Conduct*, 4 EUR. NETWORKS L. & REG. Q. 42 (2016).

Commission also imposed an additional fine of EUR 31,070,000 to the latter for being a repeat infringer.

Slovak Telekom and Deutsche Telekom contested the Commission decision before the General Court. In its 2018 Decision, the General Court upheld the Decision that Slovak Telekom and Deutsche Telekom had abused its dominant position, finding that there was an unfair spread between wholesale and retail prices[80] but it reduced the amount of the fines imposed. As to Slovak Telecom, the General Court found that the Commission did not dispose of its obligation to demonstrate that the contested margin squeeze actually led to exclusionary effects in the market.[81] Meanwhile, in the case of Deutsche Telecom, the General Court determined that it was inappropriate to impose a higher fine on the parent company simply because it had larger turnovers.[82] It lowered the amount of the fine imposed jointly and severally on Deutsche Telekom to EUR 38,061,963 and the amount of the fine imposed on Deutsche Telekom alone to EUR 19,030,981.[83]

The Deutsche Telekom case is significant because it emphasizes the importance of not only mandating access to an essential facility but also regulating the price or royalties for allowing access to the facility in question.

VI. APPLICATION OF THE ESSENTIAL FACILITIES DOCTRINE IN THE PHILIPPINES

In legislating the PCA, Congress adopted provisions of the Hart–Scott–Rodino Act[84] from the U.S. on merger control notifications and the TFEU of the E.U. as regards anti-competitive agreements and conduct. Hence, U.S. and E.U. competition law experience may be pertinent in discussions on the interpretation of our parallel law.[85]

A. The E.U. Interpretation as Basis

Despite the essential facilities doctrine being of U.S. origin, E.U. precedents interpreting and applying such may have a more persuasive effect. This is primarily because of the similarity of our abuse of dominance

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[80] Case T-827/14, EU:T:2018:930 (Dec. 13, 2018); Case T-851/14, EU:T:2018:929, ¶ 178 (Dec. 13, 2018).

[81] Case T-827/14, EU:T:2018:930 (Dec. 13, 2018).

[82] Case T-851/14, EU:T:2018:929, ¶444 (Dec. 13, 2018).

[83] Judgment of the General Court in Case T-827/14, EU:T:2018:930 (Dec. 13, 2018).

[84] 90 Stat. 1383 (1976). Hart–Scott–Rodino Antitrust Improvements Act of 1976.

[85] *Supra* note 37, at 31.

provisions with the E.U. The proscription on abuse of dominance is found in Section 15 of the PCA and it is parallel and similar in wording to Article 102 of the TFEU[86], which is the basis of E.U. competition authorities in applying the essential facilities doctrine. Significantly, the Philippine Supreme Court has cited foreign jurisprudence as "guides of interpretation," in cases when there are no local precedents that are able to address the issues before it.[87] This is particularly true when a certain law is patterned after a counterpart in another jurisdiction[88], as in this case. Therefore, the pronouncements made by the Commission of the European Communities, the Court of First Instance, the European Court of Justice, and courts of the Member States may be looked to for guidance in applying the doctrine.

Section 15 of the PCA provides that "[i]t shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition." It further lists the following as acts that constitute abuse:

1. Selling goods or services below cost with the object of driving competition out of the relevant market;[89]
2. Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner;[90]
3. Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;[91]
4. Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially;[92]
5. Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing

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[86] TFEU, art. 102.

[87] Southern Cross Cement Corp. v. Cement Manufacturers Ass'n of the Phil., G.R. No. 158540, 465 SCRA 576, (2005).

[88] Commissioner of Internal Revenue v. Solidbank Corp., G.R. No. 148191, 416 SCRA 453 (2003).

[89] PCA, § 15(a).

[90] PCA, § 15(b).

[91] PCA, § 15(c).

[92] PCA, § 15(d).

prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially;[93]

6. Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied;[94]
7. Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers;[95]
8. Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers;[96] and
9. Limiting production, markets or technical development to the prejudice of consumers.[97]

Meanwhile, Article 102 of the TFEU provides that "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."[98] It also lists the acts that may constitute abuse. This is significantly different from the counterpart provision on prohibition of monopolies in the U.S. The table below summarizes the provisions which serve as the basis for application of the essential facilities doctrine in the U.S. and the E.U. as well as the elements for applying such.

	U.S.	**E.U.**
	Section 2, Sherman Act[99]: Every person who shall monopolize, or attempt to	Article 102, TFEU[100]: Any abuse by one or more undertakings of a dominant

[93] PCA, § 15(e).
[94] PCA, § 15(f).
[95] PCA, § 15(g).
[96] PCA, § 15(h).
[97] PCA, § 15(i).
[98] TFEU, art. 102.
[99] 26 Stat. 209, § 2 (1890).
[100] TFEU, art. 102.

Basis	monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding USD 100,000,000 if a corporation, or, if any other person, USD 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.	position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) Limiting production, markets or technical development to the prejudice of consumers; (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Elements	1. There is control of the essential facility by a monopolist; 2. The competitor is unable practically or reasonably to duplicate the essential facility; 3. The monopolist has denied of the use of the facility to a competitor; and 4. Providing the facility must be feasible;[101] and 5. Absence of regulatory oversight.[102]	1. The refusal is preventing the emergence of a new product for which there is a potential consumer demand; 2. The refusal is not justified by an objective consideration; 3. The refusal will exclude any or all competition or will eliminate any or all competition in a secondary market.[103]

TABLE 1. Comparison of the Basis and Elements of the Essential Facilities Doctrine in the U.S. and the E.U.

On the other hand, the Supreme Court or lower courts should take a nuanced approach in applying the doctrine, and nothing precludes the judiciary from creating its own standard. Even though Section 15 of the PCA is patterned after Article 102 of the TFEU, as are many of our laws are borrowed from other countries, courts should still decide how this doctrine should be applied in the Philippines by taking into consideration the peculiarities and current state of our telecommunications industry. As stated by the Supreme Court in *Sanders v. Veridiano II*:

> We should not place undue and fawning reliance upon them and regard them as indispensable mental crutches without which we cannot come to our own decisions through the employment of our own endowments. We live in a different ambience and must decide our own problems in the light of our own interests and needs, and of our qualities and even idiosyncrasies as a people, and always with our own concept of law and justice.[104]

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[101] MCI Commc'ns Corp. v. AT&T, 708 F2d 1081 (7th Cir. 1983), ¶ 1132–33.

[102] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[103] Comm'n Dec. of 3 July 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty, Case COMP D3/38.044, NDC Health/IMS Health: Interim Measures, OJ L 59, 28.2.2002 (2001), ¶ 69–70.

[104] Sanders v. Veridiano II, G.R. No. 46930, 162 SCRA 88, 99 (1988).

However, the pronouncements of the European Commission may be more persuasive in this jurisdiction not only because of our similarities in the wording of the provision on abuse of dominance, but also in regulatory framework. As to regulatory framework, it is interesting to note that there is less intrusiveness and effectiveness in the regulation of the E.U. telecommunications sector than of that in the US. Consequently, in the EU, regulations alone are oftentimes insufficient in curtailing anti-competitive behavior. It is for this reason that the E.U. Commission is accorded greater discretion in enforcing competition laws and imposing liability on entities found to exhibit anti-competitive conduct.[105] This is in stark contrast with the U.S. where detailed regulatory requirements are implemented, leaving little room for competition rules to be implemented.[106]

Similar to the EU, Philippine regulators have likewise adopted a liberal approach in regulating the telecommunications industry.[107] Hence, as a weak regulatory environment coupled with high barriers to entry have prevented the emergence of a competitive market in the Philippine broadband telecommunications industry, it may be necessary to give the Commission wider latitude in implementing competition law.

VII. MANDATING OPEN ACCESS OR LOCAL LOOP UNBUNDLING IN THE PHILIPPINES

A. Electricity Sector

The concept of mandating access is not entirely new in the Philippines as it has, in fact, already been established in the electricity sector. Republic Act No. 9136 or the Electric Power Industry Reform Act (EPIRA) of 2001 provided a framework for restructuring the industry and specifically provided the establishment of Open Access.[108] Open Access is defined under the law as the "system of allowing any qualified person the use of transmission, and/or distribution system, and associated facilities subject to the payment of transmission and/or distribution retail wheeling rates duly approved by the [Energy Regulatory Commission (ERC)]".[109] In the past, the National Power

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[105] Livia Lorenzoni, *The Role of Competition Law in Network Industries Subject to Sector-specific Regulation*, XI Derecho de la Competencia Europeo y Español, 285–286 (2013).

[106] Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1928 (2018).

[107] *Supra* note 9, at 10.

[108] Rep. Act. No. 9136 (2001).

[109] Rep. Act. No. 9136 (2001), § 4(*ll*).

Corporation ran the transmission and generation network.[110] But because of the reorganization of the electricity sector, it is now divided into four sub-sectors, specifically generation, transmission, distribution, and supply.[111]

As to regulation of the industry, the EPIRA provides for safeguards to prevent monopoly and market power abuse. In the generation sub-sector, the market share of a single entity is limited to 30% of the installed generating capacity of a grids and/or a 25% market share of the national installed generating capacity.[112] Meanwhile, the transmission sector is operated by the National Transmission Corporation[113], although it is managed by the National Grid Corporation which was granted a franchise under Republic Act No. 9511[114]. Private distribution utilities, cooperatives, and local government units then undertake to distribute electricity to end-users, subject only to regulation by the ERC.[115] A number of corporations have been awarded licenses to distribute electricity. As of May 2017, some of these distributors are Manila Electric Company, 16 smaller utilities, 7 municipal systems and 119 member-owned electric cooperatives.[116] Finally, as to electric suppliers, they are also subject to the rules of the ERC although the supply of electricity to a contestable market is not a public utility operation.[117]

B. Broadband Telecommunications Sector

The Philippine broadband telecommunications industry is composed of complex, vertically-integrated structures as incumbent entities own and maintain networks and provide all of the services directly to consumers.[118] If an open-access system were implemented in the telecommunications industry, a possible arrangement is that the physical infrastructure will be separated from the provision of services. To elucidate, the first entity will build and manage the passive national fiber infrastructure; the second entity will provide access services and manage switches, transmission equipment, and wholesale services; and the third entity will deliver retail services.[119] This is demonstrated in *Figure 3* below.

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[110] *Supra* note 9, at 82.
[111] Rep. Act. No. 9136 (2001), § 5.
[112] Rep. Act. No. 9136 (2001), § 45(a).
[113] Rep. Act. No. 9136 (2001), § 8.
[114] Rep. Act No. 9511 (2008), § 1.
[115] Rep. Act. No. 9136 (2001), § 22.
[116] *Supra* note 9, at 82.
[117] Rep. Act. No. 9136 (2001), § 29.
[118] *Supra* note 48, at 91.
[119] *Supra* note 48, at 91.

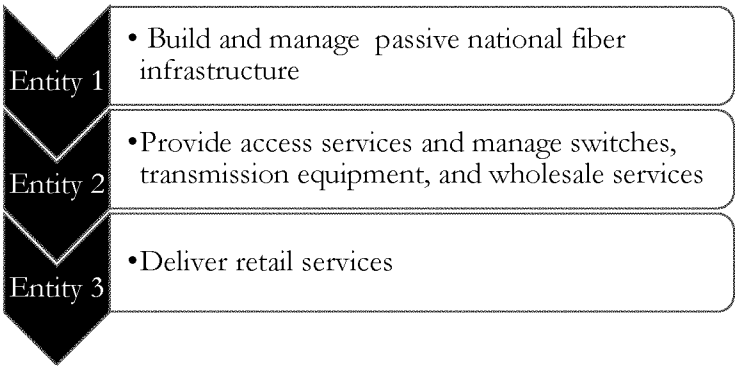

FIGURE 3. Example of an Open Access System.

However, open access policies may also be implemented through other arrangements. The Open Systems Interconnection ("OSI") layer model, for example, involves access at three layers. Open Network Access refers to the unbundling of all three layers, but unbundling may also be at certain levels. *Table 2* illustrates the various network layers.

Layer	Layer Unbundled	Wholesale Service Provided
0	(Not part of network itself)	Conduit, ducts, and collocation facilities
1	Physical	Local loop unbundling, dark fiber leasing/optical layer unbundling
2	Data Link	Layer 2 bitstream access, dark fiber and link-layer electronics at each end
3	Network	Basic network service provided, bitstream

TABLE 2. OSI Network Layers.[120]

Layer 0 access refers to elements that are not a part of the network itself but are needed in the deployment of fixed broadband networks. These include passive infrastructure that include non-electrical elements such as conduits, ducts, and collocation facilities.[121] Layer 1 denotes the physical layer which comprises passive elements such as local loop unbundling or dark

[120] ORGANISATION FOR ECON. CO-OP. & DEV., *Broadband Networks and Open Access*, OECD WEBSITE, at 9, *available at* https://doi.org/10.1787/5k49qgz7crmr-en.

[121] International Trade Union, *The importance of national fibre backbones*, ITU WEBSITE, *at* http://www.itu.int/itunews/manager/display.asp?lang=en&year=2008&issue=02&ipage=sharingInfrastructure-importance#2.

fiber.[122] Layers 2 and 3 pertain to data link and network unbundling[123] and primarily deal with active infrastructure or the electrical elements[124]. Nonetheless, however implemented, open access policies are valuable because this leads to increased competition in all layers of a broadband telecommunications network.

In many jurisdictions, regulators require local loop unbundling as it is seen as important for broadband interconnection.[125] In local loop unbundling, incumbent telecommunication operators are required to provide alternative operators, prospective or actual, with access to local loops, allowing them to offer broadband and other advanced services to existing users.

Without local loop unbundling, incumbent telecommunication operators are able to control access to consumers as they own the circuit wiring or loop that links a telecommunication network with a customer's home or business.[126] Alternative operators will then be unable enter the market if it cannot build its own local loop. For instance, they may be prevented from doing so because of constraints in cost or even if funding were available, incumbent telecommunication operators may also have agreements with home or business owners that would prevent other operators from building their own local loops in their premises. *Figure 4* illustrates a typical broadband network:

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[122] *Supra* note 120, at 8.

[123] *Id.* at 9.

[124] Rep. Act. No. 9136 (2001).

[125] Edgardo Jopson & Rose Ann Calipso, *Increasing Competition in the Telecommunications Sector of the Philippines*, RSN-PCC Working Paper No. 16-003 (AIM Rizalino S. Navarro Policy Ctr. for Competitiveness, Working Paper, 2016).

[126] Rep. Act. No. 9136 (2001).

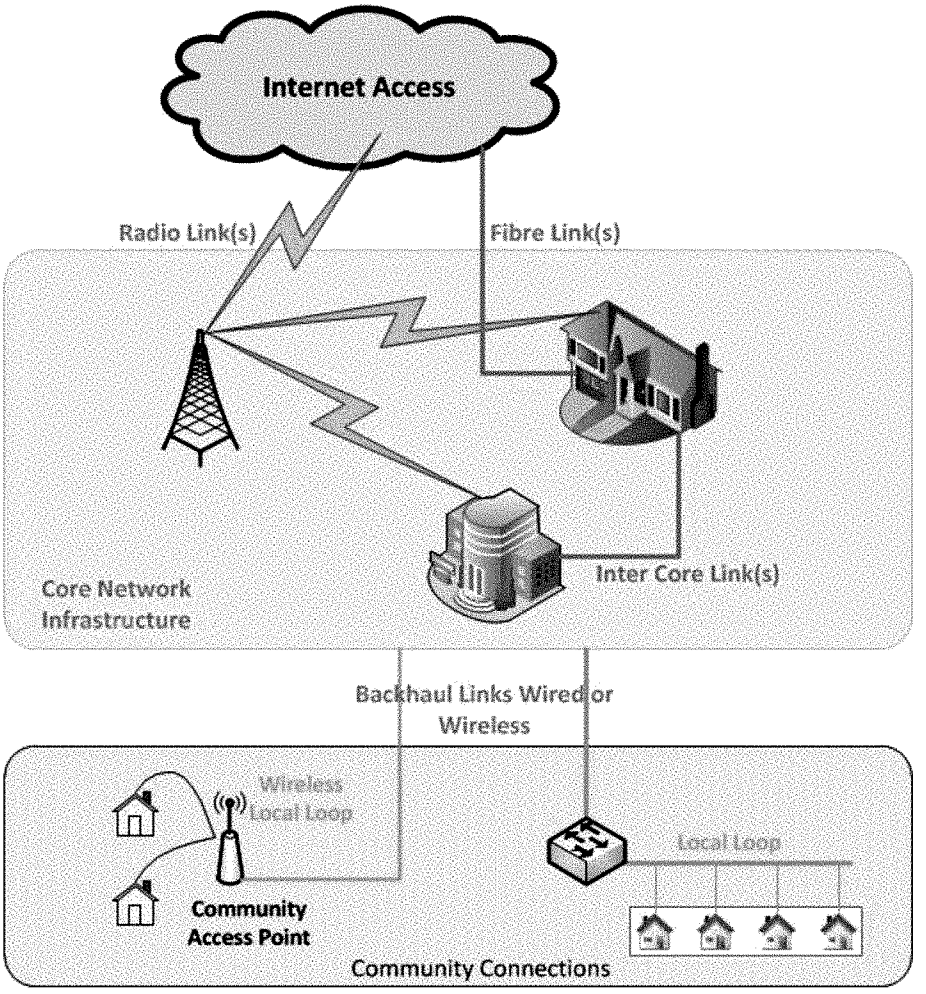

FIGURE 4. Typical Broadband Network.[127]

VIII. RECONCILING POSSIBLE OBJECTIONS TO THE APPLICATION OF THE DOCTRINE

The application of this doctrine is objectionable on two grounds. First, it may be assailed for lack of basis in imposing a duty to deal. From the perspective of the telecommunication operator, its conduct in refusing equal access to competitors may be justifiable as it has no obligation to give the latter some form of aid simply because failing to do so may offend the notion

[127] *Supra* note 48.

of fair play.[128] In other words, the generally accepted rule is that businesses need not help competitors. Similarly, it could be construed as violative of one's freedom to contract. Second, it may discourage telecommunication operators from building or improving infrastructure. However, it may be argued that the particular circumstances of the broadband telecommunications industry today necessitate the application of the essential facilities doctrine, because public interest outweighs the private interests of telecommunication operators.

A. No Duty to Provide Access

An individual or an entity has an established legal right to choose whom to deal with. In *Government Service Insurance System v. Province of Tarlac*, the Court stated that "[t]he freedom of contract is both a constitutional and statutory right."[129] Further, the Civil Code itself explicitly provides that "contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy."[130] In the absence of any law or regulation mandating access, it is difficult to find liability in an incumbent operator's refusal to grant equal access to its network elements or to impose a duty to deal.

However, it is argued that this duty may be imposed based on the PCA. Further, the right to do business and in this case, to provide telecommunications services, is not unqualified and subject to regulation. The U.S. Supreme Court has recognized that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."[131] In *Hecht v. Pro-Football, Inc.*, the first judicial decision where the phrase "essential facility" is explicitly referred to[132], the District Court stated that "[w]here facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility."[133]

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[128] Twin Labs, Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990).

[129] G.R. No. 157860, 417 SCRA 60, 64 (2003).

[130] CIVIL CODE, art. 1306.

[131] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985).

[132] Abbott Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1195 (1999).

[133] Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977).

B. Disincentive to Build Infrastructure

Telecommunication operators might also lose incentive to build infrastructure and discourage dominant firms from further investing in their facilities. In the *Opinion of the Advocate–General on Oscar Bronner GmbH & Co, KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co KG*, Advocate-General Jacobs stressed the possible detrimental effects on incentives to innovate and build infrastructure if certain assets were to be considered essential facilities[134]:

> In the long-term, it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. This, while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.[135]

As to this point, it may be argued that telecommunication operators are not necessarily on the losing end as they will be allowed to charge access fees, albeit at a regulated rate. On the contrary, it may also provide an incentive for telecommunication operators to innovate by improving the quality of their service since alternative operators will potentially be offering the same type of service.

IX. PUBLIC INTEREST AS A STANDARD

It has been repeatedly stated by the Supreme Court that the State has a right to intervene in competition and to regulate monopolies, or in this case, duopolies, when public interest so requires. As held in *Tatad v. Secretary of the Dep't of Energy:*

> 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

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[134] Opinion of the Advocate–General on Oscar Bronner GmbH & Co, KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co KG, Case C-7/97, ECR I-07791, ECLI:EU:C:1998:264 ¶ 57(6th Cham. 1998), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1566759599272&uri=CELEX:61997CC0007.

[135] *Id.*

> 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.[136]

The government also has a right and a duty to determine how public interest would be best served, particularly in the operation of public utilities such as telecommunications. As stated by the Court in *Agan v. Phil. International Air Terminals Co., Inc.*

> While it is the declared policy of the BOT Law to encourage private sector participation by "providing a climate of minimum government regulations," the same does not mean that Government must completely surrender its sovereign power to protect public interest in the operation of a public utility as a monopoly. The operation of said public utility cannot be done in an arbitrary manner to the detriment of the public which it seeks to serve. The right granted to the public utility may be exclusive but the exercise of the right cannot run riot. *Thus, while PIATCO may be authorized to exclusively operate NAIA IPT III as an international passenger terminal, the Government, through the MIAA, has the right and the duty to ensure that it is done in accord with public interest.* PIATCO's right to operate NAIA IPT III cannot also violate the rights of third parties.[137]

Thus, regardless of how the courts will apply the essential facilities doctrine in this jurisdiction, the minimum standard based on jurisprudence seems to be whether or not the operation of the public utility is in accordance with public interest. Based on the current state of the Philippine broadband telecommunications industry as discussed in the beginning of the Note, there is a lack of competition in terms of pricing and services. Thus, removing barriers to entry for additional players may help spur competitiveness in the market. Additionally, the PCA states that unencumbered market competition "serves the interest of consumers by allowing them to exercise their right of choice over goods and services offered in the market."[138] However, it

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[136] G.R. No. 124360, 281 SCRA 358 (1997).

[137] G.R. No. 155001, 402 SCRA 612, 676 (2003). (Emphasis supplied.)

[138] PCA, § 2.

is also important to note that in *Avon Cosmetics, Inc. v. Luna*, the Court takes into consideration the necessity of balancing of interests. The Court held that "[e]ach contract must be viewed vis-à-vis all the circumstances surrounding such agreement in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[139] This emphasizes the need to create standards and establish criteria for the application of the essential facilities doctrine in this jurisdiction.

X. CONCLUSION

In 1990, liberalization of the Philippine broadband telecommunications industry helped in the growth of competition. Unfortunately, since then, the regulatory framework in place has been ineffective at curbing anti-competitive practices by incumbent telecommunication operators. Thus, with the enactment of the PCA, it may be timely to consider the possibility of utilizing competition law to correct deficiencies in the market.

In this Note, it was argued that the refusal of incumbent operators to allow equal and fair access to its network elements, particularly the local loop, may be considered as abuse of dominance, which is proscribed under Section 15 of the PCA. As such, under certain conditions, competition authorities may impose a duty to deal on incumbent operators, PLDT and Globe, based on the essential facilities doctrine.

It is conceded that the concept of an essential facility is contentious. Indeed, an entity should not be forced to deal with another, unless competition in the marketplace will be vastly improved. This can be justifiable if this will reduce prices or increase output or innovation.[140] It is also essential to determine a standard that will aid key stakeholders in differentiating between a refusal to grant access that merely involves the lawful exercise of property rights and a refusal to grant access that leads to anti-competitive outcomes.[141]

Moreover, merely mandating open access or local loop unbundling will not be enough, as authorities, whether legislators, regulators, or the Philippine Competition Commission must also define the terms of access-

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[139] G.R. No. 153674, 511 SCRA 392 (2006).

[140] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles,* 58 ANTITRUST L.J. 852 (1990).

[141] *Supra* note 70, at 325.

price as well as other terms and conditions to ensure that incumbent operators will not attempt to circumvent the requirement to provide access by setting high prices. Furthermore, effective implementation would necessitate continuing supervision by either or both the regulator and the PCC.[142]

To date, no specific policies and regulations exist on open access or local loop unbundling.[143] In November 2017, the House of Representatives approved House Bill No. 6657 or the Open Access in Data Transmission Act[144], but it was not acted upon by the Senate. In the event that a similar Act will be passed, competition law will then serve as an adjunct to *ex ante* regulation. Otherwise, the Commission may be a possible venue for disputes in relation to access and the appropriate tariffs for such access if incumbent operators allow for access as part of its business strategy.

In closing, the essential facilities doctrine in the Philippines may be utilized to enhance competition in the broadband telecommunications industry, which has been largely dominated by the duopoly of PLDT and Globe. As discussed, the essential facilities doctrine may be implemented through open access or local loop unbundling. Mandating access to local loops and other facilities that are indispensable to carrying on business but are primarily controlled by incumbent telephone operators PLDT and Globe may serve as an impetus for growth and innovation as it will encourage the entry of new players and investments by both local and foreign entities. The legal basis for imposing such duty to deal in this jurisdiction may be found in the provisions of the PCA pertaining to abuse of dominant position. Doing so may be imperative if the PCC or the NTC finds that refusal to provide access to facilities by PLDT and Globe greatly diminishes and eliminates competition in the industry. Public interest considerations would then necessitate the sharing of facilities, albeit on fair and reasonable terms to both incumbent and new players.

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[142] *Supra* note 55.

[143] *Supra* note 38, at 10.

[144] H. No. 6557, 17th Cong., 2nd Sess. (2017). Open Access in Data Transmission Act.