REGULATING COMMUNICATIONS IN A CONVERGING ENVIRONMENT: TECHNOLOGY, MARKETS AND DILEMMAS

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INTRODUCTION

The world has embarked into a journey towards the information economy where productivity and competitiveness are measured by the capacity to efficiently generate, process, and apply knowledge-based information.[1] This new economy presents not only the prospect of exceptional economic growth but also sustainable human development.

However, the promise of prosperity in the information age remains elusive for most developing countries. Information and communication infrastructures are largely accessible only by developed countries. Furthermore, only a minority in developing societies possess the skills required for the emerging environment. Hence, the digital divide separating the information rich from the information poor becomes more pronounced.

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[1] MANUEL CASTELLS, THE RISE OF NETWORK SOCIETY 66 (1996).

One of the prime drivers of this phenomenon is the convergence of telecommunications, media, and information technology. This change does not occur solely on the technological level; it is about services and about new ways of transacting business and of interacting with society. Businesses and the consuming public benefit from the efficiency in the delivery of old services, availability of new services, and innovative ways of doing things. It also allows network operators to deliver a wide array of services over a single-platform, potentially increasing revenues while reducing costs.

This convergence-driven information economy has created a new order of things calling for new strategies. Thus, it is imperative that the Philippines develop appropriate policy and regulatory frameworks to harmonize with the opportunities and challenges of convergence.

This paper seeks to address the economic and regulatory issues presented by convergence through an analysis of the current legal structures and by providing recommendations of possible changes in the regulatory regime in line with specific policy considerations. This paper does not examine policy issues related to a wider set of services that make the Information Society a reality, such as Electronic Commerce. Nor does it primarily deal with technology; rather it addresses new business and market phenomena that are being enabled by technological developments, and which alter traditional provider-consumer relationships.

I. THE PHILIPPINE COMMUNICATIONS SECTOR AND CONVERGENCE

A. CONVERGENCE DEFINED

Convergence has been defined as the "progressive integration of the value chain of the information and content industries – telecommunications, posts, multimedia, electronic commerce, broadcasting, information technology, and publishing industries – into a single value chain based on the common use and distribution of digital technology."[2] Alternatively, convergence has been characterized by the ability of different network platforms to carry essentially similar kinds of services and the coming together of consumer devices such as the telephone, television and personal

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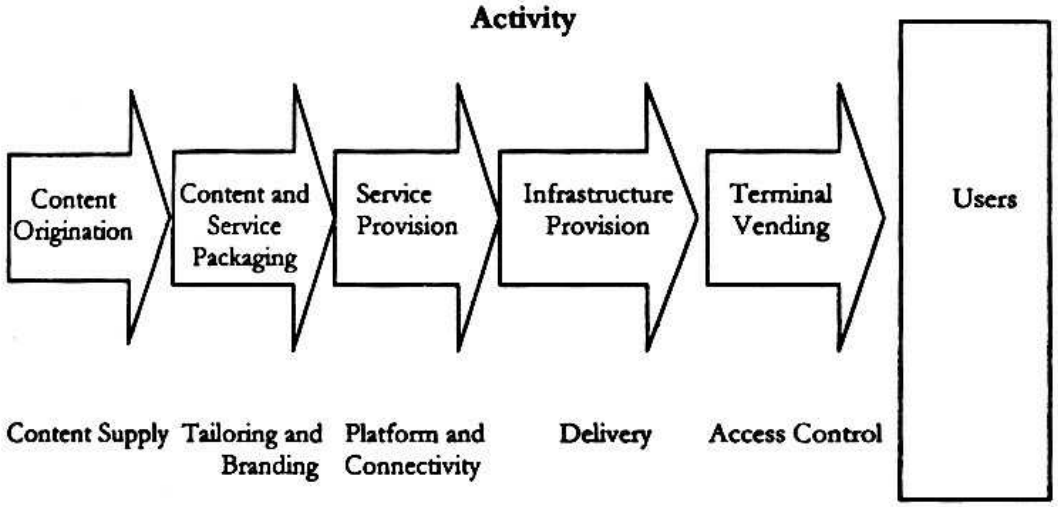
[2] WORLD TRADE ORGANIZATION (hereinafter "WTO"), IMPACT STUDY, FINAL REPORT: INCREMENTAL CHANGE OR STEP FUNCTION GAIN? POSITIONING THE PHILIPPINES' COMMUNICATION SECTOR IN THE EMERGING WTO ENVIRONMENT 6 (1999).

computer.[3] Thus, there is a shift from multiple sector specific networks to single multi-purpose networks. The Department of Transportation and Communications (DOTC) has adapted said definition because it relates to a process of market and industry restructuring and it involves the emergence of a single economic market based on digitalization and networking.[4]

Figure 1: The Emerging Value Chain[5]



The fusing of network infrastructures with computing and audio-visual technologies has brought to fore new ranges of services. Multimedia services present a large potential market for businesses and entertainment. Voice, data, electronic messages, and video services are among the primary contributors to economic growth and create new employment opportunities. They enhance the productive capabilities of economies by stimulating the creation and use of knowledge.

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[3] EUROPEAN COMM'N, GREEN PAPER ON THE CONVERGENCE OF THE TELECOMMUNICATIONS, MEDIA AND INFORMATION TECHNOLOGY SECTORS, AND THE IMPLICATIONS FOR REGULATION 1 (1997), *available at* http://europa.eu.int/ISPO/convergencegp/97623en.doc.

[4] DEPT. OF TRANSP. & COMM. (hereinafter "DOTC"), AN INFOCOMMS POLICY FOR THE INFORMATION ECONOMY: A CONSULTATIVE PAPER 53 (2000).

[5] EUROPEAN COMM'N, *supra* note 3, at 2. The source was Squires Sanders Dempsey LLP & Analysys Ltd.

B. CURRENT INDUSTRY STRUCTURE

The information and communications sector is composed of telephony, cable, satellite, broadcasting, and print. Because of the prohibition in the Telecommunications Act of 1995[6] against a single company engaging in both telecommunications and broadcasting under a single franchise, whether through airwaves or cable,[7] they operate under different sets of rules issued by the National Telecommunications Commission (NTC).

1. Telecommunications

In the early stages of telecommunications development, the Philippines had a private monopoly system, unlike state monopolies in other jurisdictions. Competition was unheard of and universal access was not a priority. Moreover, the prohibitive costs of calls made an independent line, as opposed to a party line, a luxury.

The deregulation of the industry however allowed foreign participation, resulting in increased competition, introduction of new technologies, and direct investments. However, despite efforts to improve universal access, local demand is still a serious challenge. Further, seamless interconnection remains elusive despite Exec. Order No. 59,[8] specifically in the area of access charges.

Cellular communications has seen exponential growth following the sector's deregulation in the 1990s. Wireless data has become an integral part of services offered by cellular operators particularly with the advent of wireless application protocol (WAP) enabled phones.

The Internet was the single most significant technological innovation that catalyzed the Information Age. Consequently, demand for value-added services (VAS) has seen an exponential rise in recent years. A VAS provider is an entity that offers enhanced services beyond those originally provided by a public telecommunications entity (PTE) using the transmission, switching and local distribution facilities of such carriers.[9]

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[6] Rep. Act No. 7925 (1995), *available at* http://www.ntc.gov.ph/laws/ra7925.html.

[7] § 4(j).

[8] (1983). "Prescribing the Policy Guidelines for the Compulsory Interconnection of Authorized Public Telecommunications Carriers in Order to Create a Universally Accessible and Fully Integrated Nationwide Telecommunications Network and Thereby Encourage Greater Private Sector Investment in Telecommunications."

[9] Rep. Act. No. 7925, § 3(h).

They are exempt from securing a legislative franchise, provided they do not install their own network.[10]

Another consequence of increased demand for Internet services is the need for more transponder space. Hence, high-speed Internet access is provided by backbone and distribution facilities of satellite operators. However, under Exec. Order No. 467,[11] telecommunication and broadcast entities also have direct access to all international fixed satellite systems.[12]

On the other hand, the growth of the Philippine cable television industry has been slow compared to its Asian counterparts, despite it being established back in the 1960s. The current structure is still mostly one-way, when international standards are already two-way. Some of the problems in this sector are the high costs of facilities, uncertainty in the legal framework, and the view that ownership is restricted to Filipino citizens.[13]

Convergence is rapidly changing the landscape of information and telecommunications, such that business strategies and investment initiatives are geared towards taking advantage of the myriad opportunities opened by convergence. Thus, telecommunication carriers are forming strategic alliances with cellular and cable companies.

Convergence provides the increased ability to communicate by expanding the available options to communicate. It is also a solution to high costs of communication. For example, overseas calls can now be placed through the Internet.

2. Broadcasting

Television and radio remain the most effective and cheapest sources of information and entertainment. The progress in digital technology has forced major players to upgrade their facilities. Currently, production activities are built on computer-based platforms. These investments in digital infrastructure prove valuable in view of convergence.

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[10] § 11.

[11] "Providing for a National Policy on the Operation and Use of International Satellite Communications in the Country."

[12] Exec. Order No. 467, § 1(a) (1988).

[13] Dept. of Just. (hereinafter "DOJ") Op. No. 95-1999. The DOJ is of the opinion that cable television is a form of mass media.

3. Print Media

It is projected that digital media will dominate traditional media in terms of user preference. Hence, most print publishers are harnessing the opportunities provided by the Internet through online publishing. The survival of the print industry will depend on their ability to provide aggregate content, adopt the role of information service broker, and network with service, technology, and media partners.

II. OVERVIEW OF POLICY AND REGULATORY CHALLENGES

Converging sectors will inevitably become a crucial part of the future communications industry, and policymakers and regulatory authorities must meet the major challenge of allowing market forces to move in a positive direction while addressing the lacunae in existing legal, regulatory and institutional structures. Many regulatory problems are associated with addressing pro-, as well as anti-competitive behavior due to the recognition of existing established dominant telecom players in the market, who are in a position to successfully intimidate new market entrants as well as demand leverage vis-à-vis the consuming public.[14]

Many existing laws and regulations were drafted with industry structures of years ago in mind, particularly single network structures for specific services. These will prove to be obsolete, if not completely inapplicable and inappropriate to the new technological context. Hence, there is a need for a paradigm shift in goals and methods of regulation, which requires a reexamination of assumptions in view of convergence.

Alongside these technological advancements are revolutionary market developments, including mergers and alliances of telecom companies with cable, Internet and other online services, which transform already dominant operators into even bigger and stronger monopolies or more organized oligopolies. Such will eventually lead to a market structure characterized by several large monopolies battling on interconnection issues, the costs of which are unfortunately borne by the consumers. Regulation should be able to guard against these significant market distortions.[15]

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[14] DOTC, *supra* note 4, at 30.

[15] *Id.*, at 31-32.

III. THE CHALLENGE OF BALANCING MARKET INTERESTS

The Constitution itself lays down the basic policy objective for national information and communications:

> The State shall provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects freedom of speech and of the press.[16]

This provision demands a balancing of social and economic issues and interests that arise from communications services. In a convergence-consistent environment, there is still a perceived need to clarify legal and regulatory rules which affect the economics of providing and delivering communications services – both traditional and novel – through existing and emerging communications networks.

Regulation is not an end in itself. It has always been a tool, in conjunction with market forces, for achieving policy objectives such as promoting efficiency, economic welfare, and public interest.[17]

The primary dilemma and challenge faced by the communications industry vis-à-vis convergence is the existence of different regulatory regimes for the delivery of the same service albeit through distinct communications networks. Common and classic examples are:

> (1) cable companies offering both cable TV services and cable internet, which blur legal distinctions and cause regulatory overlaps in the areas of mass media/broadcasting and telecommunications; and
>
> (2) Voice-Over Internet Protocol (or VoIP), which illustrate a cross and overlap between the regulatory regime governing telecommunication entities and that governing enhanced or VAS.

These are mere indications that the current regulatory system has not kept up with recent technological developments. The advent of technology allowing identical services to be transmitted over different

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[16] CONST., art. XVI, § 10.

[17] EUROPEAN COMM'N, *supra* note 3 at 18.

delivery systems creates the risk of overlapping and inconsistent, if not excessive, regulation.[18] The prospects of developing new services, as well as the enhancement of access to and availability of such services, should not be hampered by such overlaps. There are at least two major issues that the Government needs to resolve: (1) whether or not to abandon existing sector-specific regulation; and (2) whether new regulatory approaches are needed to address this technological phenomenon.

In reexamining the role and weight of regulation in a converging market, certain public policy and economic objectives must also be addressed:

(1) the need to ensure a uniform regulatory regime to govern analogous issues;
(2) the role of market forces especially as regards self-regulation;
(3) the need to balance interests among participants in the communications industry;
(4) the need to ensure consumer interest;
(5) the provision of universal access to services at a fairly reasonable cost;
(6) the need to secure an environment for effective competition within the industry and as a result, facilitate the competitiveness of such industry vis-à-vis the global e-services market;
(7) the need to encourage investment in services and infrastructure; and
(8) the need to ensure the economically efficient management of scarce communications resources.

IV. ASSESSING THE NEED FOR A UNIFORM REGULATORY REGIME

Among the converged environment's defining features is the possibility that any medium can convey a wider range of services than presently available. However, some opine that "it does not automatically follow that the delivery of different services over a single network or via a single service platform makes those services the same, nor that the public interest objectives underpinning regulation automatically transpose from one

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[18] UNITED KINGDOM DEPT. OF TRADE & INDUSTRY, GREEN PAPER ON REGULATING COMMUNICATIONS: APPROACHING CONVERGENCE IN THE INFORMATION AGE 2 (Jul. 1998), *available at* http://www.dti.gov.uk/converg. This paper was presented to the English Parliament by the President of the Board of Trade and Secretary of State of Culture, Media and Sport.

service to another."[19] However, regulating basically similar services differently, particularly if based on the same technological conduit, may be criticized as discriminatory, and possibly restricts competition, investment and the provision of services.[20]

On the other hand, in terms of infrastructure, it may be rational to treat different media differently. It is not amiss to point out that spectrum allocation is always infused with the problem of scarcity.

The formulation of regulatory structures is further complicated by the Internet's structure and ubiquity, which defy attempts to utilize existing regulatory objectives at the national level. Because of the new global environment, there could be migration of economic activity from an excessively or inadequately regulated state, with the consequent stunted development of the Information Society.[21]

Convergence challenges the current regulatory approaches that focus on the licensing of networks and allocation of resources based on the scarcity of both radio-frequency and of content.[22] Because of developments such as increases in network capacity, delivery of content and services through a number of platforms, competing routes to users, and digital compression improvements, scarcity may become a less significant issue.[23] Nevertheless, until the broadcasting sector shifts from analogue to digital services, capacity bottlenecks is still a problem.

Because there is a risk of that there could be overlapping regulation or that there is a need to deal with multiple regulators, there should be a rationalization of current structures to avoid barriers associated with unnecessary administration.[24] For example, where services can be offered over a single network, it may be beneficial to deal with a single regulatory authority on questions linked to that network, regardless of the services offered over it.

However, the pace of change is not uniform. Hence, the crucial question for regulators is: *How developed is convergence in the Philippine context?* The impact of convergence is insignificant in some areas, especially in less

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[19] EUROPEAN COMM'N, *supra* note 3, at 19.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*, at 20.
[24] *Id.*

developed regions. On the other hand, it is rapidly transforming the state of communications in others, especially in highly urbanized cities. The varying degrees of the impact across regions causes policy-makers and regulators to struggle over two alternative visions and scenarios:

(1) A scenario characterized by a communications industry revolutionized by convergence, thereby requiring a radically new regulatory framework; or

(2) A scenario where the convergence of communications technology and markets have not grown to a significant extent, thereby making the *status quo* regulatory regime sufficient.

Policymakers and regulators may impose a false burden on themselves to elect one of these, considering that convergence does not necessarily mean that markets become impossible to differentiate.[25] It is important to note that broadcast entertainment and information services are significantly still consumed by the public through radios and televisions. While there may be a number of households which have digital television such as web TV capable of interactive services, or consumers capable of accessing audiovisual material over the Internet, the consuming public still does not consider traditional TVs, radios and computers as interchangeable with respect to all information and communications services.

There is apparently a significant difference in the perspective regarding the state of development between the providers and the consumers of communications services. On the one hand, providers view digital technology as widely utilized before such services are delivered to the consumer. Convergence is perceived to bring major opportunities for gaining economies of scale across various business areas; creating value through the extension of services from one medium to another as technical capabilities allow greater substitution; and exploiting strategic opportunities through mergers, alliances, and other analogous investment modes and options.

On the other hand, consumers have a less clear picture on the state of development. They perceive that mass markets for digital services are not well-developed; that such development is largely dependent on how individuals and communities respond to new technology and services; and that consumer behavior and expectations will take some time to adapt and

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[25] *Id.*

change. The diverse views can be laid down in a spectrum reflective of communication service consumption patterns where one end is characterized by conventional broadcast TV and the other by Internet application services.[26]

Policy proponents assert an evolutionary path to regulating communications by employing a two-fold strategy of: (1) providing greater coherence in economic regulation across all digital delivery media by building on current regulatory schemes such as appropriate sector-specific regulation measures, and competition rules such as unfair competition safeguards; and (2) reassessing present regulatory distinctions with the goal of providing greater consistency in the regulation of similar material being delivered via different mechanisms in a non-discriminatory manner. An evolutionary approach to regulation, from an economic standpoint, essentially involves the reduction of controls to a minimum, or only as much as needed to address issues of bottleneck control, interoperability and universal access, among others. With respect to cultural and related regulation, this should be based on considerations of varying categories of service that mirror consumer expectations. This approach takes off from the determination the current regulatory structure's sufficiency in addressing convergence-related issues as well as its existing regulatory barriers.

The potential regulatory barriers to the uptake of convergence technology in communications sectors are:

(1) The problem of constitutional and statutory proscriptions leading to insufficient and inconsistent definitions;

(2) Issues on market entry and licensing requirements;

(3) Issues on access to networks, to conditional access systems and to content;

(4) Issues on access to frequency spectrum and the problem on scarcity;

(5) Issues on standards;

(6) Pricing mechanism concerns; and

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[26] *Id.*

(7) Individual consumer interests.

V. CONSTITUTIONAL PROSCRIPTIONS

Arguably, among the foremost impediments to the realization of technological convergence in the country are the incongruent constitutional limitations on ownership. The Constitution provides that:

> No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized or existing under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens.... The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.[27]

On the other hand, it also provides:

> The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.[28]

A. REASONS WHY THE CONSTITUTIONAL PROVISIONS ARE RESTRICTIVE

The Telecommunications Act states:

> The radio frequency spectrum is a scarce public resource that shall be administered in the public interest and in accordance with the international agreements and conventions to which the Philippines is a party and granted to the best qualified. The government shall allocate the spectrum to service providers who will use it efficiently and effectively to meet public demand for telecommunications service and may avail of new and cost effective technologies in the use of methods for its utilization.[29]

Although this policy statement takes restrictions' economic aspect into account, the concern has been for the different media, including new technologies, to serve the economic, political, social and cultural

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[27] CONST., art. XII, § 11.
[28] § 11(1).
[29] Rep. Act No. 7925, § 4(c).

development of the nation. Media's significant impact on values and culture motivated the Filipinization of mass media.[30] Further, a need to strengthen local production in media programming was perceived, to stimulate interdependence with global players. However, more significantly:

> [C]ommunication and information provide the leverage for power. They enable the people to act, to make decisions, to share consciousness in the mobilization of the nation. We are not so much concerned, therefore, with the media or the channels or the messages as we are about the functions of communication resources in a given society [31]

It shapes opinions and attitudes, and is a major carrier of culture by fostering the adoption of behavioral patterns bringing about social integration.[32]

Proponents of a constitutional amendment liberalizing ownership restrictions in communications industries assert that the present limitations are a disincentive to legal stability and predictability. They reason that with the present legal restrictions, more and more lawyers look for means to circumvent the constitutional limitations, providing room for diverse interpretations. The resulting legal framework is more vague, unstable and unpredictable. Further, some sectors perceive that the constitutional restrictions unduly hamper technological progress because they deprive the industry of foreign financial resources and technological expertise.[33]

B. VERTICAL INTEGRATION AS A CIRCUMVENTION

Because of the constitutional restrictions on ownership, compounded by the Telecommunications Act provision that "no single franchise shall authorize an entity to engage in both telecommunications and

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[30] V RECORD OF THE CONSTITUTIONAL COMMISSION 82 (1986).

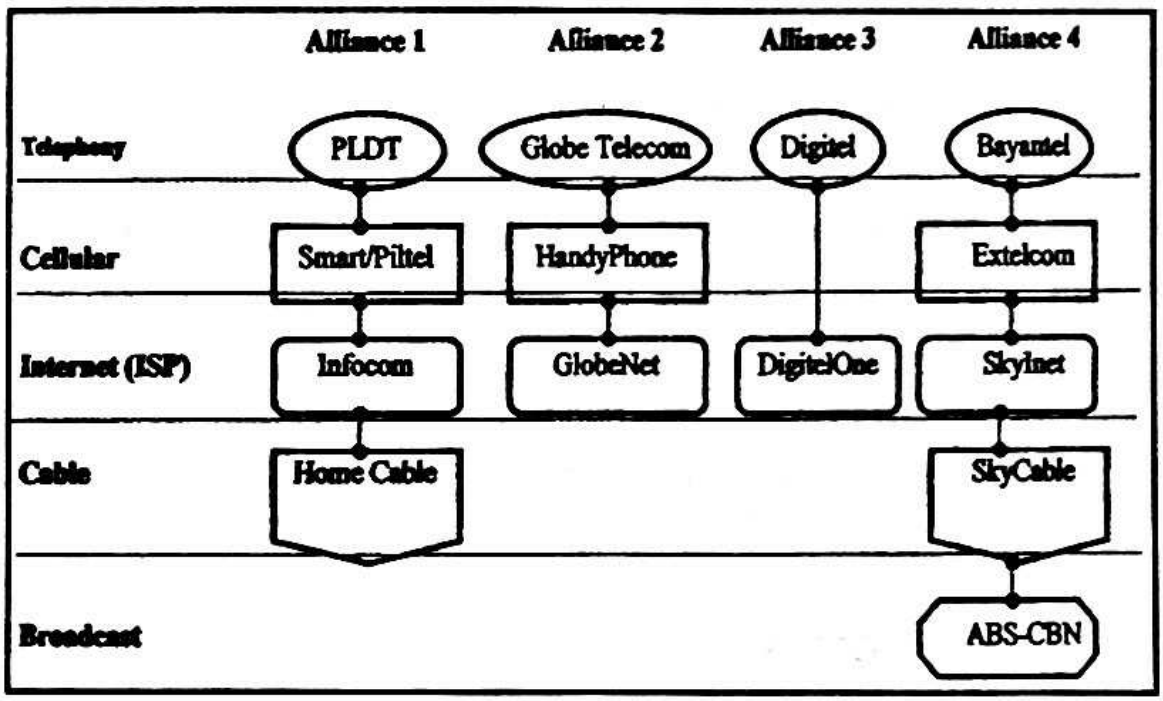
[31] *Id.*, at 83.

[32] *Id.*

[33] Felipe Gozon, *Proposed Amendment to the Mass Media, Advertising and Transitory Provisions of the 1987 Constitution*, 14 LAW. REV. 69 (2000). *See* Memorandum of the Ayala Group during the Constitutional deliberations, *quoted in* JOAQUIN BERNAS, THE INTENT OF THE 1986 CONSTITUTION WRITERS 852 (1995).

broadcasting, either through the airwaves or by cable,"[34] there has been a trend towards vertical integration:[35]

Figure 2: Vertical integration in the Philippine Information and Communications Industry[36]



The E-Commerce Act of 2000 recognizes that the physical infrastructure is separate from content and management.[37] Hence, companies may circumvent the ownership requirements by devolving into two entities: (1) a broadcasting arm that provides content and programming that must be fully Filipino owned, and (2) an infrastructure arm that holds the equipment and licenses, but may be up to 60% Filipino owned.[38]

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[34] Rep. Act No. 7925, § 4(j).

[35] The functional merging of telephone services, both fixed and wireless, with Internet, cable and broadcast.

[36] DOTC, *supra* note 4.

[37] Rep. Act. No. 8792, § 28 (2000).

[38] JESUS DISINI, JR. & JANETTE TORAL, THE ELECTRONIC COMMERCE ACT AND ITS IMPLEMENTING RULES AND REGULATIONS 42 (2000).

Tatad v. Garcia[39] sanctioned this approach and limited the Constitutional proscriptions only to the operation of a public utility.[40] It held that "while a franchise is needed to operate these facilities to serve the public, they do not by themselves constitute a public utility. What constitutes a public utility is not their ownership but their use to serve the public."[41]

VI. STATUTORY AND OTHER NON-CONSTITUTIONAL PROSCRIPTIONS

A. THE LAW ON TELECOMMUNICATIONS: ENCROACHING ON OTHER COMMUNICATIONS SECTORS

The Telecommunications Act declares the sector as "essential to the economic development, integrity and security of the Philippines,"[42] and defines:

> Telecommunications – any process which enables a telecommunications entity to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible signals or any control signals of any design and for any purpose by wire, radio or other electromagnetic, spectral, optical or technological means.[43]

It further defines:

> Public telecommunications entity – any person, firm, partnership or corporation, government or private, engaged in the provision of telecommunications services to the public for compensation.[44]

In addition to defining the overall national policy for telecommunications, the Telecommunications Act has consolidated policies and practices under Exec. Order No. 59 and 109 into law.[45] The law primarily aims to promote and govern the development of telecommunications

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[39] G.R. No. 114222, Apr. 6, 1995, 243 SCRA 436 (1995).

[40] *Id.*, at 453.

[41] *Id.*, at 452, *citing* Iloilo Ice and Cold Storage Co. v. Public Service Board, 44 Phil. 551, 557-58 (1923).

[42] Rep. Act No. 7925, § 4.

[43] § 3(a).

[44] § 3(b).

[45] Exec. Orders No. 59 and 109 (1993). "Which provides for the compulsory interconnection of authorized public telecommunications carriers" and "Which maps out a policy to improve the provision of local exchange carrier service," respectively.

operators while providing for rules on the interconnection of telecommunications service providers. It provides for, among others:

(1) The responsibilities of the regulatory authority (such as the NTC and the DOTC);
(2) A categorization of telecommunications entities;
(3) The management and allocation of radio frequency spectrum;
(4) The need to obtain a legislative franchise;
(5) Interconnection rules;
(6) The mandate of the NTC to establish rates and tariffs;
(7) Access charges and revenue sharing;
(8) The rights of telecommunications users; and
(9) Ownership of telecommunications entities.

At present, telecommunications services are regulated in terms of rates, tariffs, frequency spectrum usage, interconnection, access and interconnection charges, among others. By permitting multiple operations of local service providers in partnership with firms of varying nationalities in both domestic and international telecommunications markets, the Act, in effect, liberalized telecommunications services. This liberalization effort, however, falls short with respect to meeting the needs of industries in a converging communications environment.

Note that the law poses certain legal dilemmas to the emerging environment for convergence. The succeeding subsections discuss the significant limitations and constraints it imposes.

1. The legal definition of a VAS provider limits VAS providers from putting up and using their own network

The Act defines:

> Value-added service provider (VAS) – an entity which, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchange operators, and overseas carriers, offers enhanced services beyond those ordinarily provided for by such carriers.[46]

It further provides that:

> Provided that it does not put up its own network, a VAS provider need not secure a franchise. A VAS provider shall be allowed to

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[46] Rep. Act No. 7925, § 3(h).

> competitively offer its services and/or expertise, and lease or rent telecommunications equipment and facilities necessary to provide such specialized services, in the domestic and/or international market in accordance with network compatibility. Telecommunications entities may provide VAS, subject to the additional requirements that:
>
> a) prior approval of the Commission is secured to ensure that such VAS offerings are not cross-subsidized from the proceeds of their utility operations;
>
> b) other providers of VAS are not discriminated against in rates nor denied equitable access to their facilities; and
>
> c) separate books of accounts are maintained for the VAS."[47]

Value-added Services Providers (VASPs) which do not put up their own network are not regulated. They are monitored only through their registration with the NTC and their submission of quarterly reports on operations. The Internet, with its peculiarity and nature as virtual and borderless, is an unregulated environment. Inasmuch as Internet services are classified as VAS, they are unregulated. ISPs therefore are generally unregulated subject to the minimum requirement of NTC registration and submission of reports on operations.

A close scrutiny of the law reveals that a VAS provider is seemingly an entity which relies upon the facilities of telecommunications companies, or telcos, to offer enhanced services such as Internet access beyond those normally offered by such firms. Internet Service Providers (ISPs) fall under this definition. In view of this, the NTC, as a regulatory measure, prohibits VAS providers from establishing their own network and mandates the use of the transmission networks, toll, or local distribution of the authorized telcos.

A legal dilemma arises as a consequence with respect to the nature and functions of cable television firms which offer cable Internet. These also fall within the general class of ISPs. They are by definition of law, therefore, VAS providers. However, cable ISPs use the transmission and distribution networks of cable TV companies and not that of telcos. By law, therefore, if cable ISPs are VAS, cable TV companies must be considered telcos insofar as cable Internet is concerned. The E-Commerce Act somehow addresses

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[47] *Id.*, § 11.

this dilemma in section 28(3), which provides for a nascent classification of communications sectors involved in convergence.[48]

Hence, as a necessary consequence of their dual nature, cable TV firms are legally treated as broadcasting companies, insofar as their cable TV business is concerned, and as a telco, insofar as their Internet business is concerned. This delineation, however, leads to another legal dilemma.

2. The provision that an entity cannot engage in both telecommunications and broadcasting under a single franchise

The Telecommunications Act states that:

> No single franchise shall authorize an entity to engage in both telecommunications and broadcasting, either through the airwaves or by cable.[49]

Thus, no single company can engage in both telecoms and broadcasting (whether through airwaves or cable) under a single franchise. Hence, cable firms must secure a second legislative franchise if they want to operate as a "telco" to offer cable Internet. The requirement of two legislative franchises imposes too much of a burden to cable internet companies who logically offer both services via cable.

Exec. Order No. 436 provides a neat solution for these companies. Recognizing their unique nature, it classifies them as separate and distinct from both telecoms and broadcast companies, and categorizes them as neither.[50]

3. The legal definition of VAS, telecommunications and PTEs vis-à-vis the nature of VoIP[51]

The Telecommunications Act's definitions of VAS, telecommunications, and PTEs present a legal quandary on the legal nature of

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[48] "[T]he physical infrastructure of cable and wireless systems for cable TV and broadcast excluding programming and content and the management thereof shall be considered as within the activity of telecommunications for the purpose of electronic commerce and to maximize the convergence of ICT in the installation of the GII."

[49] Rep. Act No. 7925, § 4(j).

[50] Exec. Order No. 436, § 1 (1997), *available at* http://www.ntc.gov.ph/laws/eo-436.html. "The operation of cable television systems, as a subscriber service undertaking with a unique technology, shall be maintained separate and distinct from telecommunications or broadcast television."

[51] *Compare to* DAI-AGILE, Policy Paper on Voice-over Internet Protocol (VoIP) (unpublished paper on file with the authors).

VoIP,[52] on whether or not it is a telecommunications service or a VAS. This determination is necessary in deciding what regulatory measures are applicable to VoIP companies. There are distinct regulatory treatments governing telecommunications and VAS, such as, but not limited to:

a. With respect to public telecommunications entities:

The Telecoms Act provides that all persons or entities intending to operate as a PTE are required to obtain a legislative franchise before operation.[53] PTEs are also required to apply for a Certificate of Public Convenience and Necessity (CPCN) from the NTC before it can engage in a particular telecommunications service. Before a PTE can secure a CPCN, it must prove that it is legally, financially and technically fit to operate the service as well as show the economic basis therefor.[54]

b. With respect to VAS

The present legal framework defines ISPs as a VAS and not as a PTE, as ISPs "offer enhanced services beyond those ordinarily provided by such carriers."[55] Next, VAS providers are not allowed to put up their own network unlike PTEs. Finally, as VAS providers do not put up their own network, they are not required to obtain a legislative franchise. They only need to register with the NTC.

Should a VoIP service be treated as an enhanced service (or VAS), then it would mean that ISPs and other potential providers (other than PTEs) will be permitted to offer VoIP, but only as a separate and distinct service. In the year 2000, the NTC commenced public consultations on a proposal requiring ISPs to pay local telephone companies access charges if they engaged in Internet Protocol (IP) or VoIP telephony. However, the NTC has been examining the possibility of regulating IP telephony, as it is recognized as a means for callers to avoid paying international charges for voice calls. In many countries, Internet telephony is a threat to the revenues of traditional telephone companies. AT&T has in fact projected to lose as much of hundreds of millions of dollars worth of international calls to Internet telephony. The International Data Corp. has estimated that VoIP

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[52] Defined as referring to all types of voice communication using Internet Protocol (IP) technology, instead of traditional circuit switched technology, or simply illustrated as a phone call that uses the Internet and not the traditional public telephone network.

[53] Rep. Act No. 7925, § 16.

[54] Implementing Rules and Regulations for Rep. Act No. 7925, Rule 100(a); Revised Rules of Practice and Procedure Before the NTC, Part I, Title I, § 5 (1993).

[55] Rep. Act No. 7925, § 3(h).

already totaled 2.7 billion minutes in 1999 and could grow to as much as 135 billion minutes in 2004. The NTC admits that VoIP is difficult to monitor. This inevitably poses a regulatory problem, especially since those who offer this kind of technology in the Philippines are unlicensed, making it impossible to determine the magnitude of international calls placed through VoIP.[56]

To date, the NTC has not issued clear-cut and formal rules on this dilemma. However, its inclination may be gleaned from certain "unwritten" but published pronouncements.[57] First of all, the NTC has stated that VoIP should be treated as a telecommunications service, hence allowed only if offered by PTEs.[58] This implies that ISPs are prohibited from offering VoIP as a "stand-alone voice telecommunications service." Therefore, ISPs circumvent this position by either securing a legislative franchise and the appropriate permits from the NTC, or executing the proper arrangements with existing franchisee-telecommunications companies.

The second option addresses NTC's position that ISPs should pay access charges to the local exchange carrier to which the VoIP consumers are connected. The regulatory situation is more complicated for the Philippines than for the United States because unlike in the latter where local access rates reflect cost, Philippine telcos subsidize the local calls from other sources, such as international calls. This compounds losses when customers making international calls are lost to VoIP technology.[59]

Local telephone companies have been complaining that the offer of such services creates unfair competition because of the ease with which they bypass toll fees for long distance calls.[60] Inevitably, ISPs assume long-distance companies' function, and because they earn a lot from this service, it is but fair they pay for customers who use another company's lines in the form of access charges. Under a draft NTC memorandum, it is proposed that ISPs should enter into a commercial agreement with local exchange carriers before they can offer VoIP services, and such ISPs are mandated to use international leased lines or circuits from authorized international

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[56] Mary Ann Reyes, *NTC consults public on Internet telephony issue*, PHILIPPINE STAR, November 24, 2000.

[57] DAI-AGILE, *supra* note 51, at 6.

[58] *'Gray Areas' bound telecom regulator*, BUSINESSWORLD, May 1-18, 2002. The article quoted then NTC Commissioner Eliseo M. Rio, Jr.

[59] Reyes, *supra* note 56.

[60] Anthony Alcantara, *NTC to allow ISPs to offer Voice-over IP*, PHIL. DAILY INQUIRER.

gateway facility operators. Since the telephone companies and ISPs are completely at odds over this issue, this compromise position is being taken by the NTC to supposedly "balance the interests of the phone companies, the ISPs and the consumers."[61]

However, the NTC also holds the position that ISPs are allowed to offer VoIP as an Internet-related service. While ISPs are prohibited to offer VoIP as a stand-alone service, they are, however, allowed to offer the same as part of the bundle of its VAS services.[62] Under this scenario, the NTC will treat the same as data and not a voice service.[63]

The personal use of VoIP is currently unregulated inasmuch as individual Internet users have free access to VoIP because it is part of the many features and technologies found on the Internet. What is regulated, however, is the retailing of VoIP services, as such is only allowed as long as the necessary license or permit therefor is secured.[64] The sale of Internet Phones or other technologies, distinguished from the sale of the service such as VoIP service, which are designed to enable the use of VoIP such as Cisco's VoIP phones is neither prohibited nor regulated.[65]

4. The provision that mandates interconnection and cross-subsidization to allow resale of private leased lines

The Act provides that the NTC shall be responsible for:

> c) Mandat[ing] a fair and reasonable interconnection of facilities of authorized public network operators and other providers of telecommunications services through appropriate modalities of interconnection and at a reasonable and fair level of charges which make provision for the cross subsidy to unprofitable local exchange service areas so as to promote telephone density and provide the most extensive access to basic telecommunications services available at affordable rates to the public.[66]

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[61] *Id.* The article quotes Engr. Eduardo Cabarrios, Chief, NTC Common Carriers Accreditation Division.

[62] DAI-AGILE, *supra* note 51, at 6, *quoting* BUSINESSWORLD, *supra* note 58; Alcantara, *supra* note 60.

[63] DAI-AGILE, *supra* note 51, at 6.

[64] *Id.*, quoting Erwin Oliva & Joel Pinaroc, *NIC set to conduct probe on Netopia's VoIP services*, PHIL. DAILY INQUIRER, Jul. 2, 2003. The article also quotes Engr. Cabarrios.

[65] DAI-AGILE, *supra* note 51, at 7, *quoting* Alcantara, *supra* note 60.

[66] Rep. Act No. 7925, § 5(c).

In relation to this, Exec. Order No. 59 also mandates the NTC to "expedite the interconnection of all NTC-authorized public telecommunications carriers into a universally accessible and fully integrated nationwide telecommunications network for the benefit of the public."[67] On the basis of these, the NTC maintains that when cable TV operators offer telecommunications services such as VoIP, they should be treated as a telco.

This has two consequences. First, as telcos, cable firms are mandated to interconnect with other telcos. Second, as public services offering telecommunications services, they must allow other ISPs access to their cable networks. Thus, for instance, a Home Cable subscriber is now given the liberty to choose to continue his subscription with his ISP (not necessarily, Home Cable Internet), but this time using Home Cable's network.

To avoid these consequences, cable TV companies may argue that Exec. Order No. 436 categorizes them as separate and distinct from telcos. This, however, implies an admission of a violation of the requirement that they use a telco's facilities. Necessarily, they would cease to be treated as VAS providers as defined by law but they may then be required to secure a legislative franchise to operate, a requirement cable ISPs claim is too burdensome.

An alternative argument hinges on Exec. Order No. 436, § 6, which allows the lease and sub-lease of excess capacity from a cable TV company upon NTC approval.[68] However, adopting the NTC position, the latter are treated as public services by law and are not permitted to refuse access to other ISPs. Hence, if excess capacity exists, the NTC may not refuse an ISP which opts to lease or sub-lease bandwidth from a cable TV company. What remains unclear in the NTC's position is its treatment of an application by an ISP to lease excess capacity from any of the existing cable TV firms. This is what cable companies offering Internet services such as Destiny, Sky Internet's ZP Dee, and Infocom's NOW have to contend with.

This notwithstanding, cable firms may avoid the requirement of allowing other ISPs access to their networks by arguing that they should not

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[67] Exec. Order No. 59, § 1 (1983).

[68] Exec. Order No. 436, § 6 (1983). "A cable television operator may, with prior approval from the Commission, lease or sub-lease any excess capacity of its cable television system to a third party."

be considered a public service considering that their services are "subscribed" and should be classified as "narrow-cast" instead of broadcast.

No strong and consistent policy or legal ground has been formulated with respect to this issue.

5. The provision which requires all telecommunications entities to make a bona fide public offering of at least 30% of aggregate common stocks within 5 years from the effectivity of their franchise

The Act requires all telecommunications entities to make a bona fide public offering of at least 30% of their aggregate common stocks within a period of five years from the effectivity of their franchises or start of their commercial operations, whichever is later.[69] This requirement, while it unduly discriminates against primarily telecoms entities, is foreseen to cause inconsistent rules governing convergent industries, given the fact that such requirement is not imposed on broadcasting and cable TV operators. This requirement is a barrier to the uniform application of regulatory measures over companies in a convergent environment.

B. THE E-COMMERCE ACT OF 2000: AN ATTEMPT TO CLARIFY BLURRING DISTINCTIONS IN A CONVERGENT ENVIRONMENT

The E-Commerce Act provides that:

> [T]he physical infrastructure of cable and wireless system for cable TV and broadcast excluding programming and content and the management thereof shall be considered as within the activity of telecommunications for the purpose of electronic commerce and to maximize the convergence of ICT in the installation of the GII.[70]

Thus, the physical infrastructure of cable and wireless systems for cable TV and broadcast shall be deemed as within telecommunications activity for purposes of e-commerce and convergence. This classification allows foreign ownership of these systems' physical infrastructure by up to 40%. It is worth emphasizing, however, that programming, content and management does not fall within the purview of the "physical infrastructure."

This provision, however, only provides a temporary solution to the blurring distinctions and foreseen regulatory inconsistencies in cable

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[69] Rep. Act No. 7925, § 21.

[70] Rep. Act. No. 8792, § 28(3) (2000).

industries. As pointed out earlier, this measure attempts to solve the constitutional limitations on ownership of broadcast and mass media enterprises. In order to achieve a uniform and non-discriminatory regulatory regime, however, the above provision is insufficient. There remains a need to redefine sectors and participants in the communications industry, and make these internally and externally consistent with convergence.

C. THE LAW ON CABLE OPERATIONS: DEFINING CABLE TELEVISION SERVICE AS A UNIQUE TECHNOLOGY

Under the present legal framework, cable TV operators need to secure a provisional authority to operate from the NTC. A Certificate of Authority is issued only after a certain period and upon submission of proof of Financial Capability and Technical Feasibility.

Exec. Order No. 205[71] defines the cable TV industry as commercial mass media, making the constitutional prohibition on foreign equity participation applicable.[72] This position has been adopted by the Department of Justice.[73] As discussed, under Exec. Order No. 436, cable TV service is defined as one with a "unique technology, separate and distinct from telecommunications and/or broadcast media,"[74] although it is silent on the ownership aspect of cable TV services.

The approved House Cable TV Bill defines these services as the "delivery to subscribers of program provided by broadcast television station, satellite providers or cable operators through the wire or wireless facilities of the cable television operators." To promote the sourcing of foreign financial and technical support for cable operators, the bill expressly provides for a maximum of 40% foreign equity participation. As noted, this is consistent with section 28 of the E-Commerce Act, which now allows the same by defining that the physical infrastructure of cable and wireless systems for cable TV and broadcast, excluding programming, content and management, shall be deemed as within the activity of telecommunications for purposes of e-commerce and convergence. Again, the Constitution allows up to 40% foreign equity participation in telecommunications entities.

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[71] Exec. Order No. 205 (1987).
[72] CONST., art. XVI, § 11(1).
[73] DOJ Op. No. 85-1999.
[74] Exec. Order No. 436, § 1 (1997).

Under the existing legal framework, cable TV operators need not secure legislative franchises. Local franchises in the form of a local government resolution endorsing their operation suffices. It has been a common practice, nevertheless, for operators to secure a legislative franchise.

A provision in House Bill No. 8916, approved on third reading in October 24, 2000, provides that all cable TV service applicants and operators will be required to obtain a legislative franchise, which shall be granted on a non-exclusive basis for a period not exceeding twenty-five years. The bill also requires existing companies operating without a legislative franchise to obtain one within three years from the law's effectivity. The bill allows the award of one or more franchises within the same service area, without the unreasonable refusal to grant such a franchise to other operators seeking to cover the same service area. It prescribes a period of two years from the grant of a franchise for grantees to secure subscribers within the subject service area before Congress can grant another franchise to other interested operators there. Finally, it also provides that the NTC shall supervise and regulate cable TV systems and operations. Only upon approval of the NTC may they offer, provide and operate other cable TV system-related value added services.

D. THE LAW ON BROADCASTING: REGULATING BROADCASTING CONTENT AND PROGRAMMING

Under the Public Service Act,[75] the NTC is the regulating body for broadcasting companies insofar as the issuance of Provisional Authorities and CPCNs, frequency spectrum usage, and to a certain extent, their operation and management, are concerned. Other laws, however, prohibit or restrict certain content, such as the Revised Penal Code provisions on indecency, immorality, pornography, libel and inciting to rebellion; Pres. Decree No. 1986, which gives the Movies and Television Review and Classification Board (MTRCB) the mandate to regulate broadcasting content and programming; and Pres. Decree No. 1987, which established the Videogram Regulatory Board (VRB) for the purpose of supervising and regulating the use, production and showing of videograms.[76]

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[75] Com. Act No. 146 (1936).

[76] Pres. Decrees No. 1986 and 1987 (1985).

Radio stations are governed by the Radio Control Law[77] and Pres. Decree No. 576-A.[78] The former contains the requirements on the establishment and operation of radio transmitting and receiving stations and radio broadcasting stations. It requires radio stations to secure a congressional franchise before operating commercially. The Public Service Commission is empowered to regulate radio-communication matters, such as:

(1) the construction, location, possession, sale and transfer of radio transmitters and receivers;
(2) classification of radio stations by services;
(3) assignment of radio frequencies and call signs;
(4) rules to prevent and eliminate interference; and
(5) compliance with international radio regulations.

E. THE LAW ON PRINT MEDIA: REGULATING CONTENT TO PROTECT PUBLIC INTEREST

Print media is primarily regulated to protect public interest, as the sector is bound to be responsible with respect news dissemination. Content is specifically regulated by scattered legal provisions such as those in the Revised Penal Code. The Intellectual Property Code and related laws govern infringing content and piracy.

F. THE LAW ON SATELLITE COMMUNICATIONS: REGULATING THE USE AND OPERATION OF SATELLITE COMMUNICATIONS FACILITIES

Exec. Order No. 1987 vests the NTC with jurisdiction, control and regulation over the Philippine Communications Satellite Corporation.[79] Exec. Order No. 467 articulates the national policy on the operation and use of international satellite communications. The latter also provides policy guidelines and regulations on the operation and use of satellite communications facilities and services, with respect to:

(1) Allowing direct access to international fixed satellite systems and to international mobile satellite systems;

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[77] Act No. 3846 (1931), *amended by* Com. Act No. 584 (1950).

[78] Pres. Decree No. 576-A (1974), *available at* http://www.ntc.gov.ph/laws/pd-576-a.html. "An Act Regulating the Ownership and Operation of Radio and TV Stations"

[79] Exec. Order No. 1987 (1987).

(2) Encouraging a permissive approach to the use and operation of satellite newsgathering (SNG) earth stations;
(3) Requiring non-discriminatory interconnection of Global Mobile Personal Communication by Satellite (GMPCS) with existing terrestrial systems to comply with Exec. Order No. 59 and its implementing rules; and
(4) Allowing direct-to-home TV services.

VII. NON-STATUTORY BARRIERS TO ENTRY

A. EXISTING MARKET BARRIERS

Challenges to the regulation of convergent communications include, in addition to constitutional and statutory barriers, internal market structures that hinder the uptake and development of convergence. Existing market barriers include:

(1) the grant of monopoly or special rights over networks or services to one or a small number of companies, which may prevent others from providing the same service;

(2) the limitation of services that can be offered over a given network (for example, preventing a telecoms operator from using its network to offer entertainment services);

(3) the requirement imposed that certain services (such as free-to-air broadcast channels) be carried by the network, which reduces the scope for other services to be provided.[80]

1. Access to Users

Regulatory frameworks differ across sectors with regard to ownership and network operation. Thus, there are limited routes by which services are distributed to users. While legal monopolies may have been abolished, current telecommunications and cable TV network owners still play a predominant role in connecting users. Similarly, there is the potential to limit competition at the service level by vertically-integrated players that control bottleneck facilities.

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[80] This section's discussion is drawn from EUROPEAN COMM'N, *supra* note 3, at 15-16.

2. Regulatory Restrictions on the Use of Infrastructure

Current restrictions as to the types of services that can be carried in different infrastructures, such as the offering of VoIP, could make it difficult for operators to formulate unified strategies addressing international markets. It also prevents the realization of economies of scale, thus hampering the delivery of innovative services because of high individual costs.

3. Prices for Telecommunications Services

The demand for services is necessarily affected by the high prices for telecommunication services and for the underlying network infrastructure for service delivery.

4. Availability of Content

Although there has been expansion in the means of delivery brought on by improvements in technology and by convergence, there has been an observed bottleneck in content. An example was the controversy between Sky Cable and Home Cable with regard to exclusive distributorship agreements entered into by the former with foreign content providers, prejudicing the latter in terms of subscription base.

5. Insufficient Intellectual Property Protections

Content providers will only be willing to make content available if their intellectual property rights are sufficiently protected. Similarly, publishers and operators will only invest in innovative services if they are confident that new means of delivering information or services provide an adequate degree of protection for the intellectual and industrial effort of their organizations, as well as those of content providers.

B. POTENTIAL MARKET BARRIERS TO ENTRY

Aside from the above existing barriers, anticipated market barriers must also be considered.[81]

1. Regulatory uncertainty

There will be a progression of regulatory uncertainty as a result of the current definitions' scope, their application, and apprehension as to their application to changing market structures or service characteristics. This

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[81] This section's discussion is drawn from *id.*, at 16-17.

translates to a barrier to investment potential, as businesses are left uncertain as to the regulatory treatment that the services will receive.

2. Multiple regulatory bodies

As with the current regulatory structure, a network is required to be licensed both as telecommunications infrastructure and as a broadcasting network. This causes inefficiency in fiscal management and administration.

3. Market entry and licensing

Licensing or regulatory limitations to market entry amount to a potential barrier to the provision of services, investment, and fair competition. Policy should limit regulation where potential barriers exist, rather than extending heavier regulation to more lightly regulated sectors to equalize market conditions. Discrimination as to the standards used is justified by substantial distinctions between the different media.

4. Access to networks, conditional access systems and content

While the issue of access is principally market-driven based on commercial negotiations, asymmetry exists in the form of network-specific access rules. For example, there are written rules as to the interconnection and open network rules that apply to telecommunications networks, such as Memorandum Circular No. 9-7-93, but not to the infrastructure used for broadcasting activities nor in the cable industry. Market players that control access to the customers, through ownership of the gateways for instance, may be able to discriminate in favor of its own services.

5. Allocation of radio frequencies and other resources

The provision of services will depend on the availability of sufficient network capacity, which for many services means access to the radio frequency spectrum. Potential barriers are likely to arise as to the underlying cost-bases in network operation of different sectors, thus encouraging competitive entry into one sector rather than another based on a least cost criterion.

6. Varying approaches to the achievement of public interest objectives

The various sectors affected by convergence have different regulatory frameworks that contain a variety of measures seeking to ensure sector-specific public interest objectives. For example, universal access is highly imperative in the telecommunications sector.

7. Public confidence in new environment

Some of the consumer issues that need to be addressed are the level of protection afforded to electronic transactions, data protection, and privacy.

8. Lack of standards supporting interoperability and interconnection of converging networks

Intercommunication of users would be defeated if the market is unable to deliver products and services which are interoperable. Proprietary standards controlled by dominant players that limit such interoperability may be a potential area for State intervention.

VIII. MONOPOLY AND COMBINATIONS IN RESTRAINT OF TRADE

The Constitution deems the concentration of ownership in the hands of the few as anathema to public policy. Thus, it provides that:

> [T]he Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.[82]

According to the framers, media monopoly is an abuse or perversion of the freedom of the press, for it can be used to influence the public mind to advance selfish economic or political influence, thereby prejudicing the interest and welfare of the larger public.[83] The basic role of mass media is to stimulate the marketplace of ideas; thus, no entity should be allowed to dominate the marketplace to mislead the public.[84]

As to whether or not monopoly includes cross-ownership, it has been the consensus that this depends on whether there is control. However, the complications on the interpretation of the provision were left to Congress because the matter of stratification could not be exhausted in the deliberations. Vertical mergers were similarly left to Congress.[85]

The only law punishing monopolies and combinations in restraint of trade is the Revised Penal Code, circa 1930:

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[82] CONST., art. XVI, § 11(1).
[83] RECORD, *supra* note 30, at 191.
[84] *Id.*, at 191-92.
[85] *Id.*, at 193.

> (1) Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of trust or otherwise, in restraint of trade or commerce or to prevent by artificial means the free competition in the market;
>
> (2) Any person who shall monopolize any merchandise or object of trade and commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market.[86]

Although there have been cases decided under these provisions,[87] there have been no cases dealing with services.

Some of the reasons given for horizontal mergers include: increasing market power or gaining minimum efficient scale; cushioning the high cost of new technologies; uncertainties in the demand for new services; entrance of foreign competition; and opportunities from regulatory reform.[88] On the other hand, vertical mergers are rationalized due to: the uncertainty of demand, market positioning, and access to new skills; gaining control of channels to the consumer; moving into higher margin areas of the value chain; and stifling competition from companies in related markets.[89]

In the Philippines, the industry structure has been characterized by both horizontal and vertical mergers over the past few years. Examples of such mergers are that of Philippine Long Distance Company (PLDT) with Smart Telecommunications, which shares market dominance with its sister company Pilipino Telephone Company (Piltel); Globe Telecom and Isla Communications; and Bayan Telecommunications, Radio Communications of the Philippines (RCPI) and Express Telecommunications Company (Extelcom) all owned by Benpres Holdings Corporation.[90]

Another problem related to monopolies is the bundling of services, wherein browsers and search engines are being packaged or integrated with specific software,[91] thus giving undue preferences to content produced by the same company. As a general rule, arrangements made between content

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[86] REV. PEN. CODE, art. 186.

[87] United States v. Fulgueras, 4 Phil. 432 (1912); People v. Montilla, 52 O.G. 4327 (1956); People v. Torres, 51 O.G. 6280 (1955).

[88] EUROPEAN COMM'N, *supra* note 3, at 6.

[89] *Id.*, at 7.

[90] DOTC, *supra* note 4, at 8-9.

[91] EUROPEAN COMM'N, *supra* note 3, at 24.

providers, rights owners, and content carriers are a matter of commercial agreement. However, competition rules should apply when there are exclusive agreements between content providers and content carriers that limit consumer choice by excluding access to content provided by competitors.

One of the most pressing concerns of convergence is the concept of bottleneck facilities or technologies, that, without access to which, a third party would have difficulties in providing a service to consumers, such as gateway facilities. Competition may be undermined through:

(1) Potentially competitive services with the (vertically integrated) provider's own services may be denied access;
(2) Undue influence may be exerted by service providers to lure independent third parties to join the proprietary service package;
(3) While access is granted on non-discriminatory terms, all users may be charged a monopoly access fee;
(4) Requiring that proprietary services be sold only when bundled with non-proprietary services, thereby foreclosing related markets; and
(5) Restrictions on access terms, such as platform exclusivity clauses, to reduce competition.

In this regard, abuse only makes sense where the service provider has vertical control of the key facilities, for in the absence of vertical integration there would be little commercial justification for dissuading entry.[92]

At this point, there is a need to distinguish between access and interconnection. Access refers to the provision of bottleneck inputs by an incumbent network provider to new entrants. On the other hand, interconnection refers to reciprocal access between two networks that have to rely on each other to terminate calls.[93] The access problem concerns itself with provision of a monopoly input by a vertically separated or vertically integrated monopolist, while the interconnection problem refers to the

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[92] Campbell Cowie & Christopher Marsden, *Convergence, Competition and Regulation*, INT'L J. COMM. L. AND POL'Y (1998), *available at* www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_6_1_1998.html.

[93] Ingo Vogelsang, *Price Regulation of Access to Telecommunications Networks*, 41 J. ECON. LIT. 830, 831 (2003).

coordination of an essential input between two firms that are more or less in parity. Furthermore, as competition matures, the interconnection problem becomes increasingly relevant, as it has always been between geographically separated monopolies.[94]

Although such regulatory framework has been in place with respect to telecommunications,[95] the issue in view of convergence is whether such open access principles apply to other networks.

IX. UNIVERSAL ACCESS: ADDRESSING THE DIGITAL DIVIDE

The concept of universal access was expressed early on in the Telecommunications Act:

> The expansion of the telecommunications network shall give priority to improving and extending basic services to areas not yet served. For this purpose, the government shall promote a fair, efficient and responsive market to stimulate the growth and development of the telecommunications facilities and services, with emphasis on the accessibility by persons to basic services in unserved and underserved areas at affordable rates.[96]

The concept of universal access and service is hinges largely on the principles of universality, equality, continuity, and affordability with respect to the provision and distribution of information and communications services.[97]

In an era of a rapidly changing technological environment for information and communication, universal access and universal service remain as dynamic concepts. The concept of universal access is exemplified by every Filipino having "access to reliable information and communication services at a reasonable cost and available at a reasonable distance."[98] Universal service, on the other hand, means enabling the provision of "information and communications services in every home that wants one."[99]

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[94] *Id.*, at 831-32.

[95] *See* NTC Memo. Circ. No. 14-7-2000. "Interconnection of Authorized Public Telecommunications Carriers."

[96] Rep. Act. No. 7925, § 4(b).

[97] DOTC, *supra* note 4, at 36.

[98] *Id.*

[99] *Id.*

Given the dynamic nature of the concepts of universal access and service, the question that arises is whether rules for open access currently applied to telecommunications and digital television conditional access infrastructures should be applied more widely in the sectors affected by convergence. The DOTC has started addressing this issue in its infocomms policy paper by proposing to adopt a framework for defining universal service and access consistent with convergence and the dynamic and relative nature of such concepts.

Table 1: Framework for Defining Universal Service and Access[100]

	Stage 1	**Stage 2**	**Stage 3**	**Stage 4**	**Stage 5**
	Network Establishment	*Wide geographic coverage*	*Mass market take-up*	*Network completion*	*Service to individuals*
Universal Service goal	Acquire new technology	Geographic (maintain regional parity)	Economic (stimulate economy)	Social (achieve national cohesion)	Libertarian (individual right to communicate)
Examples of Universal Service Goals	Phone service linking all major centers Public phones and some advanced services where demand warrants	Phone service available more widely available IT services available in all major centers through telecenters	Broader residential take-up of phones Meet reasonable demands for advanced services	Phone service affordable to all Increased access to advanced services	Everyone can meet basic comm'n needs Public access to advanced services
Typical Service	License conditions on network roll-out	Profitable licenses subject to unprofitable obligations	Control speed of tariff rebalancing	Targeted subsidies	Identify and meet non-market demand

With respect to universal access and service, the Philippines still falls within Stage 1 of the definitional framework inasmuch as the Universal Access Benchmark report indicates that there still exists a significant regional disparity with respect to the availability of traditional telephony service.[101] Hence, even before beginning to address access to advanced digital services at affordable cost, the more apparent and immediate concern on the availability of a minimum of reliable and affordable telecoms services in all urban and rural areas must first be resolved.

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[100] DOTC, *supra* note 4, at 37.

[101] *Id.*

Nonetheless, with the advent of convergence, government will inevitably confront the issue of universal access and service with respect to convergent and advanced communications services. On this note, universal access with respect to these services will imply the availability of competing communications services and of such networks which will be used as channels for the delivery of such services. Government must be able to adopt a policy which will encourage open competition and investment in both network and application services across the country.[102]

Due to the current state of universal access in the Philippines, it is likely that competition in the provision of broadband network capability and advanced services in convergent industries may be restricted to some areas (more likely in highly urbanized cities), and specifically those outside a cable TV franchise. There must be room within the communications regulatory framework to encourage the innovative application and allocation of available spectrum aside from the anticipated provision from digital, terrestrial, and satellite technologies.[103]

The optimal and ideal scenario in convergence is reached when all networks are allowed to carry all forms of content. This is consistent with the principle of non-discrimination with respect to the provision and delivery of the same service through different communications channels or distribution networks across various communications entities.

To curtail the risk of social exclusion in terms of the provision of vital communications services, the challenge for government is to assure the availability of a certain level of service to all citizens, by establishing and appropriating therefor a universal service provision, making it incumbent upon the regulator to secure the delivery of said provision.[104]

X. RESPONDING TO CONVERGENCE THROUGH STRUCTURAL AND LEGAL REFORMS

A. NEED FOR NEW DEFINITIONS?

The boundaries between different sectoral regulation and different regulators are delimited by current definitions based on the activity.

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[102] U.K. Green Paper, *supra* note 18, at 26.

[103] *Id.*, at 27.

[104] *Id.*

Although it has been noted that regulation can be technologically neutral, as in the broadcasting sector, it may also be associated with the technological conduit used to deliver the service. This is exemplified by the disparity between the detailed rules of other media and the currently unregulated structure of others.[105]

There is a need for system-wide precise definitions due to the uncertainty brought about by the applicable regulations or different definitions, which create barriers to investment or to the provision of services.[106] Thus, the examination of current definitions should take into consideration whether they: (1) are sustainable in the view of current technological developments; (2) result in a service treated under more than one regulatory regime and whether such is warranted; and (3) lead to discrimination by having essentially similar networks or services regulated differently.[107]

Some of the options available are: (1) to continue with existing definitions, since these are still valid for the majority of services, while adapting these to apply to new services, taking into account their specific characteristics; or (2) create an entirely separate category for new services to co-exist with existing definitions. Determining the better option for the Philippines is hinged on assessing the current legal framework for communications vis-à-vis the state of development of convergence in the country.

Under the current constitutional and legal framework imposing different ownership restrictions and separate legal treatments for specific and distinct communications sectors, there is a need to enact legislation that will reflect a uniform policy structure consistent with convergence. This will entail the following legal reforms:

1. Separation of Carrier, Administration, and Content

An effective take-off point towards a convergence-consistent legal definition of communications sectors, proponents assert, is an executive order that will implement section 28 of the E-Commerce Act. This initially defines distinctions among communications sectors in a convergent environment, by providing that "the physical infrastructure of cable and wireless systems for cable TV and broadcast excluding programming and

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[105] EUROPEAN COMM'N, *supra* note 3, at 20-21.

[106] *Id.*

[107] *Id.*, at 21.

content and the management thereof shall be considered as within the activity of telecommunications for the purpose of electronic commerce and to maximize the convergence of ICT in the installation of the GII."

In order to work under the present legal framework, there is a need to define distinctions between carriers such as network service providers, administrators such as applications service providers, and content providers such as publishers. Below are the proposed definitions under the DOTC's three-tiered classification:

(1) Carrier (or Network Service Provider) – a service provider that allows a user or a lessee of transmission network facilities to utilize the said network for providing communications services or a service provider which utilizes network facilities and which provides a platform for the delivery of communications services;[108] or one which provides connectivity between and among application service providers and end-users through a physical infrastructure comprising of two or more sets of modes and links capable of connecting two or more defined points.[109]

(2) Administration (Applications Services Provider) - an entity providing and administering services that allow end-users to send and/or receive through a network, sound, data, image, video signals or any combination or enhancements thereof that are captured, processed, stored and communicated through electronic means.[110] These application services, include, among others, telecommunications, broadcast, CaTV, and Subscribed-Wireless TV.[111]

(3) Content (Publishers/Content Providers) – refers to providers of sound, text, still picture, moving picture or other audio-visual presentation, tactile representation or any other combination of these which is capable of being created, manipulated, stored, retrieved, and transmitted electronically.[112]

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[108] H. No. 3940, 12th Cong. 1st Sess., § 3(m)-(n) (2001).
[109] S. No. 1706, 12th Cong. 1st Sess., § 3(d)-(e) (2001).
[110] § 3(f).
[111] DOTC, *supra* note 4, at 53.
[112] H. No. 3940, 12th Cong. 1st Sess., § 3(f) (2001).

To be consistent with the given constitutional limitations on ownership in specific communications sectors, and in view of the above distinction between carrier (network) and administration (application), the following pertinent amendments are proposed:

(1) With respect to ownership and control, foreign equity participation on the network shall be up to a maximum of 40% of total capital thereof.

(2) With respect to the franchise requirement, it is ideal to completely repeal the requirement on congressional franchises. However, as a middle ground solution, it is proposed that a congressional franchise, or better yet, only a franchise from the regulatory body, should be required from carriers or network service providers. There shall be no legislative or other franchise required from application service providers or entities, or the management thereof, provided that such entities do not put up their own network.

2. Redefining Mass Media and Public Utility to be Consistent with the Convergence Value Chain

The definition of mass media and public utility must bé in line with the three-tiered approach of the communications value chain, namely network, applications (administration), and content.

"Mass media service" should be defined as referring to a type of communications service for the delivery of content which is intended to reach, or is capable of reaching, the mass general public. Hence, to be consistent with the convergence value chain: the physical infrastructure or the platform or channel to deliver such service falls within the purview of network; the entity providing and administering such service should be classified under applications or administration; and the sound, text, still picture, moving picture or other audio-visual presentation, tactile representation or any other combination of these which is eventually sent and viewed by the mass general public falls under "content."

In the same, way, a "public utility" should be defined within the parameters of the convergence value chain. "Public Utility" under Philippine law refers to a distribution company which has been granted a franchise by the Congress of the Philippines and a CPCN by the authorized appropriate agency, i.e. in the case of communications, the NTC. A public utility as a distribution company is akin to a carrier or network in the convergence value chain. As such, it is a platform for the delivery of certain

communications application services and thereby should fall within the definition of "carrier" or "network."

B. MARKET ENTRY CONSIDERATIONS AND REFORMS ON THE LAW ON FRANCHISING AND LICENSING

With regard to market entry, it has been advocated that where a network can potentially carry any service, regulation should not thwart such initiatives. If artificial restrictions are allowed, or where there are monopolies but other parts of the converged environment are open to competition, innovative services may be denied to users and create unjustified discrimination. On the other hand, it may be argued that sector-specific rights such as the granting of limited rights or limiting the use of networks to particular purposes are important ways of encouraging investment. It can also be justified that these types of restrictions are necessary where competition is at an early stage, or where a particular player enjoys a very strong position. In such cases, safeguards to ensure that potential competitors are not discriminated against, or that there are incentives for entry, should be in place. Safeguards might take the form of separate accounts or transparency requirements, structural separation or even full line-of-business restrictions, including, but not limited, to prohibitions on cross-subsidy.

Currently, there are certain areas in the computer and IT industry that are not subject to licensing requirements, such as VoIP. However, licensing is important for it is a key regulatory tool by which control can be exercised by the State.

An objective of such licensing requirements should be the reduction of barriers to entry as well as the alleviation or imposition of obligations in a consistent manner across the converged environment. One way of doing so is by adopting a degree of self-regulation to supplement the application of general laws.[113]

Finally, there is a perceived need to amend the Telecommunications Act to allow entities engaged in both telecoms and broadcasting to operate under a single franchise. While it would be ideal to remove the legislative franchise requirement, which is highly criticized as a root cause of corruption and an undue burden on communications entities, this radical

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[113] EUROPEAN COMM'N, *supra* note 3, at 21-22.

measure will undoubtedly encounter political opposition. A middle-ground measure is to initially amend the Act's pertinent provision to at least allow entities engaged in both telecommunications and broadcasting to operate under a single franchise.

C. NETWORKS, CONDITIONAL ACCESS SYSTEMS AND TO CONTENT

The emerging market will consist of several market players of varying capacities, some having strong vertically-integrated operators from the telecommunications, broadcasting and information technology industries that build on economies of scale and financial resources. Some of the issues that have to be dealt with are: the bundling of content and services, or of network capacity and services; predatory pricing; cross-subsidization of services or equipment; and discrimination in favor of own activities.[114] This point was earlier elucidated in the discussion of monopolies and combinations in restraint of trade.

D. ACCESS TO FREQUENCY SPECTRUM

Although there has been a shift from analog to digital technologies, with the consequent network capacity expansion, it has been observed that any transition would be slow regardless of user preference. Hence, resource issues will continue to be a key regulatory issue especially in the area of access to radio frequency spectrum.[115]

E. STANDARDS

One of convergence's most important consequences is the increasing globalization of services. Thus, there should be standardization to support such globalization by achieving interoperability between networks and services. Standardization is a tool that can reinforce general policy objectives, such as the creation of markets for communications services, and the regulatory framework.[116]

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[114] *Id.*, at 22-24.
[115] EUROPEAN COMM'N, *supra* note 3, at 24-26.
[116] *Id.*, at 26.

F. PRICING

Under specific NTC regulations[117] as part of the transition to fully competitive markets, controls apply to operators with significant market power such that the charges for interconnection, voice services, and leased infrastructure are cost-oriented. In that situation, price regulation is acting as a proxy for the effects of competition.[118]

G. INDIVIDUAL CONSUMER INTERESTS

In maximizing benefits and minimizing the risks to consumers, there is a need for the creation of adequate regulatory structures to protect consumers' fundamental rights and responsibilities, especially with regard to content.[119]

XI. PRINCIPLES FOR FUTURE REGULATORY POLICY

Although full convergence may still be a long way off, technological and market trends, potential barriers, and regulatory issues all point to an evolving environment that policy objectives must address. Hence, future decision-making must draw on principles that strengthen future action.[120]

1. Regulation should be limited to what is strictly necessary to achieve clearly identified objectives.

Because of the speed, dynamism, and innovation of the converging sectors, approaches that lead to over-regulation, or those that oversimplify the task by extending existing rules in the telecommunications and media sectors to largely unregulated areas, should be avoided. Furthermore, any rules put in place should be tailored to meet clearly identified objectives in a proportionate manner.

2. Future regulatory approaches should respond to the needs of users.

Regulation must prioritize meeting the needs of users in terms of choices, improved services, and lower prices, while guaranteeing the rights of the consumers and the general public.

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[117] NTC Memo. Circ. No. 14-7-2000.

[118] EUROPEAN COMM'N, *supra* note 3, at 26-27.

[119] *Id.*, at 27.

[120] This section's discussion is drawn from *id.*, at 33.

3. Regulatory decisions should be guided by a need for a clear and predictable framework.

There should be a clear and predictable framework within which business can invest. Issues that are to be left to market players should be made clear. New activities, such as VoIP, that create uncertainty as to how and if they should be regulated should be clarified. However, flexibility should be maintained to respond to changes in a fast-moving market.

4. Ensuring full participation in a converged environment.

The State should seek to ensure that everyone is able to participate in the Information Society by building on existing concepts of universal service in telecommunications and the public service mission in broadcasting.

5. Independent, effective regulators will be central to the environment.

While there is a general trend towards lighter regulation, there should be effective and independent regulators in view of increased competition brought on by convergence.

XII. OPTIONS FOR A REGULATORY FRAMEWORK[121]

Option 1: Build on the strengths and flexibilities of the current structures vis-à-vis the principle of technological neutrality

If the *status quo* would simply be extended to new technologies, current vertical regulatory models would be left in place. Hence, there would be different rules applied to the telecommunications and audiovisual or broadcasting sectors, and to a lesser extent, to publishing and information technology. The rules would be extended on an *ad hoc* basis depending on the demands of the market and the challenges of emerging technologies and services. This would entail the application of normal principles of interpretation to resolve questions of characterizing particular activities. The speed of innovation and the effectiveness of competition would dictate the pace of change, thereby allowing the regulatory framework to adapt in response to market forces.

This framework minimizes the need for change in the near future. It could also be effective in providing a predictable regulatory framework for investment, while avoiding the creation of unjustified barriers within the internal market. However, it may be susceptible to anomalies, especially

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[121] This section's discussion is drawn from *id.*, at 33-34.

discrimination, because of the classification of services, which may deter investment.

Option 2: Develop a separate regulatory model for new activities, to coexist with telecommunications and broadcasting regulation

New services and activities that traverse traditional boundaries would be placed under a distinct set of rules. By creating a new category alongside existing regulatory models, a coordinated approach is developed in relation to high-value activities that characterize a converging market. There would be a movement away from technology- or platform-based market boundaries, while allowing the traditional to adapt more gradually.

However, the principal difficulty with this option lies in determining the boundary between those new services that should be lightly regulated and those that remain subject to traditional regulation. A solution might be to identify certain types of service negatively as neither telecommunications nor broadcasting.

Option 3: Progressively introduce a new regulatory model to cover the whole range of existing and new services

This option calls for a fundamental reassessment and reform of the current regulatory regime. However, this does not entail the enactment of a whole new set of laws; rather, existing frameworks are examined to promote flexibility, remove inconsistencies, avoid discrimination within and across sectors, and continue to ensure the achievement of public interest objectives.

The new framework would encompass all sectors. Hence, there should be a broader definition of communication services to supersede those of telecommunications and audiovisual services. A new feature of the framework is proportionality, wherein the level of regulation would have to be matched with the nature of the service and the intensity of competition.

Although seemingly ambitious, it would not necessarily lead to sudden disruptive change. A gradual approach may be used by focusing on priority areas that need a consistent regulatory approach, e.g., network operation or access issues.

REGULATING VOIP: A CASE IN POINT

VoIP is an emerging technology increasingly gaining popularity in terms of use and deployment. The controversies with respect to the

provision of voice communications services, which surround the current regulatory treatment of VoIP vis-à-vis traditional telephony services, exert pressure on the NTC to establish more clear-cut rules. Policy advocates assert that there are three main regulatory options available for the NTC to adopt:[122]

1. Total "Hands-Off" Policy

This option seemed to be the most practical and most favored solution by the NTC when VoIP was still relatively novel. At the time, it was not perceived as a technology with growth prospects and therefore not a competitive threat to traditional telephony, the latter still being the most widely used form of voice communications. The potential of VoIP reaching commercial scale in the Philippines was not that apparent then, and did not create a considerable threat to telco earnings. This policy and regulatory approach was useful and beneficial because:

(1) It allowed the NTC to defer in the meantime, a prospectively controversial issue until such time as it was necessary for them to meet it head-on and deal with its specific nuances; and

(2) It enabled ISPs, especially the smaller players, to explore options in offering VoIP while no protest on the provision of such service was evident. Due to the high administrative costs associated with monitoring and eventually taking legal action on perceived competitive infractions in the provision of such service, it is possible and very likely for VoIP to operate and expand in an unregulated environment. Eventually, however, the NTC will have to clarify its rules and regulatory approach due to the likely growth in VoIP use.

The prospects for VoIP's growing popularity is grounded on inevitable consequences of future government action with regard to infocomms development:[123]

(1) Intensified government efforts for the promotion of universal access to infocomms technology will most probably carry plans for increased exploitation of VoIP services, thereby requiring more clear-cut rules on regulation.

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[122] This section's discussion is drawn from DAI-AGILE, *supra* note 51, at 7-8.
[123] *Id.*, at 8.

(2) Due to the growing deployment of VoIP, there will necessarily be an increased demand of policy guidance from the NTC. Improvements in broadband technology and IP will cause VoIP to be a tested technology thereby clarifying the prospects of such technology. Of note, there is extensive use of VoIP in a number of call centers which are established in various Asian countries including the Philippines, India and China and other countries participating in the global e-services market.

(3) VoIP technology is increasingly gaining popularity as a viable, efficient, affordable, and competitive substitute to traditional telephony. The use and number of VoIP subscribers continue to increase, as do earnings from it. Eventually, the Internet will absorb telephony services as such technology becomes commercialized, causing prices of telephony services to fall as VoIP adoption rises.[124]

Due to the abovementioned anticipated developments, there will be an increasing demand on the NTC to establish a definite regulatory regime for VoIP from the various interest groups in the infocomms sector. PTEs will definitely push for protectionist measures from increasing VoIP competition. ISPs and other prospective VoIP service providers, on the other hand, will lobby for a more formal, transparent, and predictable regulatory regime for VoIP before they make crucial decisions on investment and expansion with respect to the provision of VoIP services.

2. Deregulation of VoIP Services

This option arises from previous informal and unofficial NTC pronouncements hinting that VoIP is classified as a telecommunications service. On the other hand, one reasonably proposes the opposite, that VoIP must be treated instead as Internet or data service. The adoption of this contrary position is deemed to effectively deregulate VoIP, as this will encourage any provider to offer VoIP without foreign ownership restrictions and the heavy regulatory burden of securing a franchise.

This option strongly proposes that it is legally sound and practical to categorize VoIP as VAS, defined by law as "enhanced service beyond those ordinarily provided" by carriers or a "feature or value not ordinarily

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[124] *Id.*, *citing* Neil Goldsmith, *Voice-Enabled Internet: A Promising Future*, ADVISOR ZONE, Oct. 25, 2001.

provided by a PTE such as format, media conversion, encryption, enhanced security features, computer processing and the like."[125]

According to proponents for the deregulation of VoIP, there are a number of reasons why VoIP should be distinguished from traditional telephony as an internet application, as these two services differ in two primary areas.

First, VoIP is transmitted in digitized "packets" while traditional telephony service uses circuit-switched connection. Due to the manner of its transmission, it is difficult to monitor voice-based applications over the Internet inasmuch as "ISPs cannot distinguish between packets that contain 'voice' data from packets that carry text, graphics, or other forms of information." Hence, from a regulatory standpoint, it would be difficult to require ISPs "to block these packets from reaching their destination or to meter such transmissions."[126]

Second, the European Commission adopts the position that VoIP cannot be defined as voice telephony and hence should remain unregulated. Similarly, the Federal Communications Commission (FCC) classifies it as essentially a data service which therefore should not be regulated. The FCC took note of the inferior quality of Internet voice transmission vis-à-vis that provided by traditional PTEs. This is not to discount the fact that such technology holds great potential in the voice communication market through the provision of alternative calling options and more consumer choices for voice communications.

The merit of deregulation lies in VoIP's potential to promote affordable and universal access to Internet technology. Ideally, communications companies would be encouraged to develop new applications and increase investments However, deregulation has may potentially create an unfair, inequitable, and uneven playing field between and among telecommunications entities and VAS providers with respect to the provision of voice communications services, the main argument being that PTEs or carriers are subject to very stringent and extensive regulatory requirements while ISPs and other VAS providers offering VoIP are not.

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[125] Implementing Rules for Rep. Act No. 7925, Rule 1, § 15.

[126] DAI-AGILE, *supra* note 51, at 9, *citing* Hank Intven et al, *Internet Telephony - The Regulatory Issues* (Apr. 1998), *at* http://www.mccarthy.ca/pub_docs/docview.asp?file=mt%2Dintel%2Ehtm&language=0.

Further, ISPs are foreseen to continue using existing telecom facilities and networks which entailed significant capital expenditure and investment to put up on the part of the PTEs. Hence, full deregulation of VoIP would allow ISPs to utilize telecoms facilities and even compete against PTEs or other telcos without compensating the latter for the use of their networks.

On a final note, there are still two unresolved points to consider: (1) the movement towards the deregulation of VoIP, which will definitely face strong opposition from the PTEs and other telcos due to the competitive threat VoIP poses; and (2) the fast-changing technological environment and continued improvements in communications technology, particularly in voice communications and IP technology, which is narrowing down the gap in VoIP and traditional voice communications in terms of quality. The NTC, therefore, will be challenged to create a uniform regulatory structure for all types of voice communications service.

3. Formalization of the NTC's Unwritten Rules on VoIP.

This third option builds on the NTC's informal rules, as previously discussed. Its premise is that formalizing VoIP regulation will at least create a transparent and fairly predictable environment for prospective providers and investors. Such formal clarification is instrumental to the development of VoIP as a practical and reasonably priced option vis-à-vis traditional telephony. This formal system is expected to encourage the exploration of novel applications which will be beneficial for the consuming public.

From a regulatory standpoint, it will, however, be a key consideration that new rules should be responsive to the needs and interests of both the VoIP providers, mostly ISPs, and telcos. VoIP services should be competitively offered by ISPs within the existing context of how NTC has interpreted existing laws and policies, at the same time balancing such a position against the interests of telcos. In attempting to strike a balance, one must address questions such as: (1) how ISPs and VoIP providers will be able to get fair and equitable arrangements with the PTEs for use of the latters' networks; and (2) how to achieve a fair pricing mechanism for commercial relationships entered into by VoIP providers with PTEs as well as with other telcos.

Again, existing telcos have already made heavy capital investments and have been subjected to extensive regulation. They also bear roll-out obligations which are primarily funded by revenues derive from national long distance and international calls, revenues slowly eroded by VoIP. While these need to be addressed, on the other hand, the overall policy objective

remains to achieve an efficient and effective communications regime, or as the Telecommunications Act very well puts it, of developing and maintaining "a viable, efficient, reliable and universal telecommunications infrastructure using the best available and affordable technologies" and of "improving and extending services to areas not yet served."[127]

However, the primary policy challenge of this option remains: providing an equitable, competitive and viable pricing charging regime between the PTEs and VoIP providers.

CONCLUSION

In formulating the regulatory framework, it must be ensured that users can connect with any other user and that service providers can access these users on fair, non-discriminatory and proportionate terms. Additionally, the regulatory agency should be given powers to intervene and resolve disputes. Safeguards should also be put in place to ensure greater transparency and non-discriminatory behavior in the industry to curtail market distortions to an otherwise competitive regime.

Given that the framers of the Constitution deemed that Congress should be the one to provide for eventualities of monopoly and combinations in restraint of trade, there should be a law that clearly defines such punishable behavior specific to the concerns of convergence, such as access and interconnection.

Given that the existing regulatory structure falls short of predictability and flexibility in terms of regulatory treatment of analogous communications services delivered via different networks and through different forms, there should be amendments in the existing law that will address inconsistent regulatory policies and overlaps, such as, but not limited to a redefinition of communications services and sectors to be consistent with the dynamic concept of convergence. With respect to major communications sectors, a trichotomy of carrier/network, administration/applications, and content is proposed. Such distinctions will at least harmonize existing regulation on significant areas such as ownership and control, franchising, licensing, and other regulatory requirements.

In determining the appropriate approach to communications regulation, the following principles should be considered:

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[127] Rep. Act No. 7925, § 4(a)-(b).

(1) that regulation should be kept at a minimum and only as necessary to achieve set objectives;

(2) that regulation must be responsive and flexible to the needs of the consuming public;

(3) that regulation must be transparent, clear and fairly predictable;

(4) that regulation must be able to allow room for convergence to achieve its full potential; and

(5) that regulation must be unbiased, independent and effective enough to enable convergent industries to operate efficiently.

Considering the current state of communications development in the Philippines, the proposed regulatory approach is the evolutionary path to regulation which allows a graduation and shifting from Option 1 to Option 3 depending on the rate of growth of convergence across communications sectors.

With respect to the regulation of VoIP as an emerging technology and as a growing prospective substitute for traditional telephony, it is recommended that the NTC issue more clear-cut rules and guidelines for the deployment of VoIP. Option 2, which pertains to the deregulation of VoIP, seems to be the most viable and appropriate regulatory approach to VoIP. Such option is characterized by the categorization of VoIP as a VAS, recognizing its nature as data rather than voice. This position is deemed as the most sensible definition from a policy, economic and strategic viewpoint.

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APPENDIX A

THIRTEENTH CONGRESS OF THE REPUBLIC)
OF THE PHILIPPINES)
First Regular Session)

SENATE

S.B. No. _____ [1]

Introduced by Senator _____

AN ACT
TO PROMOTE THE EFFICIENT AND EFFECTIVE DELIVERY OF CONVERGING COMUNICATIONS SERVICES

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:

ARTICLE 1. GENERAL PROVISIONS

Sec. 1. ***Short Title.*** – This Act shall be known as the "Information and Communications Convergence Policy Act of the Philippines".

Sec. 2. ***Scope.*** – This Code shall apply to the provision of communications services and network services within the Philippines.

Sec. 3. ***Definitions.*** – For the purposes of this Act, the following terms shall be used:

a. **"applications services provider"** refers to an entity providing and administering services that allow end-users to send and/or receive through a network, sound, data, image, video signals or any combination or enhancements thereof that are captured, processed,

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[1] Consolidation of S. Nos. 1496 (Magsaysay), 1706 (Sotto), and 2588 (Jaworski), and H. Nos. 3940 (Marcos), 4356 (Paras), and 5159 (Perez). All of the 12th Congress.

stored and communicated through electronic means.[2] These application services, include, among others, telecommunications, broadcast, CaTV, and Subscribed-Wirelsss TV.[3]

b. **"broadcast service"** refers to a mass media service provided through the transmission of commercial radio or television messages for reception of a broad audience in a geographic area;

c. **"carrier"** (or **"network service provider"**) – a service provider that allows a user or a lessee of transmission network facilities to utilize the said network for providing communications services or a service provider which utilizes network facilities an which provides a platform for the delivery of communications services[4] ; or one which provides connectivity between and among application service providers and end-users through a physical infrastructure comprising of two or more sets of modes and links capable of connecting two or more defined points.[5]

d. **"Commission"** refers to the National Infocomms Commission (NIC), henceforth created, which will assume the regulatory and communications industry supervision functions currently carried out by the NTC;

e. **"communications"** refers to any communication, whether between persons and persons, things and things, or persons and things in the form of sound, data, text, visual images, signals or any other form or any combination of those forms;

f. **"communications service"** refers to a service for the delivery of communications to users by means of one or more network services and may include telecommunications services, subscribed television services, broadcasting services, internet services and other value added services;

g. **"communications service provider"** refers to entity which is authorized to provide communications services to the public;

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[2] S. No. 1706, 12th Cong. 1st Sess, § 3 (f) (2001).

[3] DEPT. OF TRANS. & COMM'N, (HEREINAFTER "DOTC"), AN INFOCOMMS POLICY FOR THE INFORMATION ECONOMY: A CONSULTATIVE PAPER 53 (2000).

[4] H. No. 3940, 12th Cong. 1st Sess., § 3(m)-(n) (2001).

[5] S. No. 1706, 12th Cong. 1st Sess, § 3 (d)-(e) (2001).

h. **"content"** refers to any sound, text, still picture, moving picture or other audio - visual representation, tactile representation or any other combination of these which is capable of being created, manipulated, stored, retrieved and transmitted electronically;

i. **"content provider"** refers to an entity which provides content.

j. **"convergence"** refers to the progressive integration of segments of the information and content industries, including telecommunications, broadcasting, electronic commerce and data processing, into a single economic market based on distributed digital technology;

k. **"convergence master plan"** refers to a long term strategic national development plan for the Philippines' communications sector;

l. **"Department"** refers to the Department of Transportation and Communications and any other Department of the Government of the Philippines which may assume functions currently carried out by the Department;

m. **"mass media service"** refers to a type of communications service for the delivery of content which is intended to reach, or is a capable of reaching, the mass general public ;

n. **"mass media service provider"** refers to an entity which is authorized to provide a mass media service;

o. **"multimedia service"** is the furnishing of simultaneous transmission of voice, video and data over common communication facilities including copper, coaxial cable, fiber optics, and/or other means including wireless delivery systems in digital format;

p. **"narrowcast service"** refers to a media service provided through the transmission of commercial messages for reception of a subscriber audience in a geographic area;

q. **"narrowcast media service"** refers to a type of communications service for the delivery of content which is intended to reach, or is capable of reaching, a limited segment of the public based on subscription;

r. **"narrowcast media service provider"** refers to an entity which is authorized to provide narrowcast media service;

s. **"network facilities"** refers to any element or combination of elements of physical infrastructure used principally for, or in connection with, the provision of network services;

t. **"network service"** refers to a service which utilizes network facilities and which provides a platform for the delivery of communications services;

u. **"numbering and addressing system"** refers to a national system for the control, administration and management of the numbering and addressing of network and communications services;

v. **"public utility"**, for purposes of this Act, refers to a distribution company akin to a carrier or network of communications services in the convergence value chain. As such, it is a platform for the delivery of communications application services.

w. **"network service provider"** refers to an entity which is authorized to provide network services or communications services to the public;

x. **"subscribed television service"** refers to a television service which is only available to consumers who subscribe for such service;

y. **"telecommunications service"** refers to a service that allows the user to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible signals or any control signals of any design and for any purpose by wire, radio or other electromagnetic, spectral, optical, technological means;

z. **"value-added service provider"** refers to an entity which, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchange operators, and overseas carriers, offers enhanced services, other than the traditional communications services ordinarily provided for by such carriers.

aa. **"universal access fund"** refers to a fund established by the Department used for the purpose of ensuring the availability of a minimum set of reliable and affordable communications services in both urban and rural communities.

ARTICLE II. NATIONAL POLICIES AND OBJECTIVES

Sec. 4. ***Purposes of this Act.*** – In order to promote the national policy objectives outlined below, this Code provides the basis for:

a. The management of an orderly transition from the existing arrangements of traditional communications industry structures to a more complex and globalized convergence environment;

b. The development of an effective national framework that responds to the global opportunities and challenges of convergence, and also addresses the specific characteristics of the Philippine market;

c. The establishment of transparent and stable regulatory and administrative processes that encourage fair and robust competition for the long-term benefits of the consumers of communication services;

d. The delegation of the respective powers and functions of the Department and the Commission; and

e. The Government's powers to develop specific implementation arrangements as the need arises.

Sec. 5. ***Declaration of National Policy Objectives.*** – The State recognizes the vital role convergence plays in the overall social and economic future of the Philippines. The services derived from convergence are essential to the development and global competitiveness of the Philippines and will be encouraged and administered in order to safeguard, enrich and strengthen the opportunities to its citizens.

Within this context, the following national policies shall be pursued:

a. To ensure fair and equitable provision of a wide range of affordable and universally accessible services over a comprehensive and efficient national infrastructure using the

best available and most appropriate technologies which are vital to nation-building and development;

b. The government shall encourage the provision of convergence services to provide opportunities and continuing enhancement to the quality of work and life;

c. A high level of confidence from both business and residential consumers in the delivery of communication services shall be promoted by providing regulatory certainty and operational conditions necessary to encourage the continued local and international investment in, and development of the Philippine communications sector;

d. The participation of business enterprises, particularly SMEs, shall be encouraged by creating a platform for widespread use of advanced value-added applications (including e-commerce) and ensuring information accessibility, security, network reliability, and integrity;

e. Convergence shall be used to preserve and enhance the cultural representation and content resources that will facilitate and nurture the national identity of the Philippines;

f. Local technologies capabilities and international technology transfer within the sector will be encouraged by recognizing that the core assets for success into the future will be our people and their skills and knowledge; and

g. A competition framework shall be established that is responsive to the technical and market realities of convergence, considers the fundamental characteristics and challenges of the communications industries of the Philippines and promotes and sustains the interests of the local sector and all its stakeholders.

ARTICLE III. SPECIFIC POLICIES

Sec. 6. ***Categories of Service Provider.*** - The convergence sector shall comprise two (2) categories of service providers, notably, network service providers and application service providers.

Network service providers shall operate physical network facilities and related infrastructure and system and provide network services to the other network service providers and to communications service providers.

Application service providers shall use network services as platform to deliver communications services to end users. Such services, include, among others, telecommunications, broadcast, CaTV, and Subscribed-Wirelsss TV, including the administration thereof.[6]

Mass media service providers are a distinct type of communications service provider which deliver mass media services to end-users. Provided that, the physical infrastructure or the platform/channel to deliver such service shall be considered as "network service provider"; the entity providing and administering such service as "application service provider /administration"; and the sound, text, still picture, moving picture or other audio-visual presentation, tactile representation or any other combination of these which is eventually sent and viewed by the mass general public as "content".

Sec. 7. ***Ownership and Management.*** – Network Service Providers, including the management thereof, other than mass media service providers, shall be owned by citizens of the Philippines, corporations or associations, cooperatives, partnerships or joint ventures organized under the laws of the Philippines, at least 60% of whose aggregate common stock is owned by such citizens. The participation of foreign investors on the governing body of any entity providing network services shall be limited to their proportionate share in its capital.

Mass media service providers, in compliance with existing laws, shall be wholly (100%) owned by citizens of the Philippines, corporations or associations, cooperatives, partnerships or joint ventures organized under the laws of the Philippines, unless otherwise amended through another law.

There shall be no ownership restriction imposed on Application Service Providers, with the exclusion of mass media.

Sec. 8. ***Market Entry.*** – Entry of new service providers in the convergence sector is generally encouraged. However, such entry must be managed to ensure that the national policy objectives are effectively pursued.

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[6] DOTC, *supra* note 3.

The entry of new network service providers and new mass media service providers shall be regulated to manage risks to ensure:

a. the orderly delivery of communications services to end-users;
b. confidence of investors in the communications sector;
c. the physical environment of the Philippines; and
d. the cultural and social values of the citizens of the Philippines.

Sec. 9. ***Franchise and other Authorization Requirements.*** – Any network service provider or mass media service provider shall first obtain a franchise and a certificate of public convenience and necessity from the Commission, and other governmental authorizations as may be required by existing laws.

Any service provider, who does not have the appropriate franchise and who because of its network coverage is required to secure such a franchise, shall obtain such requirement within three (3) years after the effectivity of this Act. Meanwhile, such network service provider shall be allowed provisionally to offer network services.

No franchise shall be required by an entity to supply communications services, provided that the entity does not own or operate a network, and provided however, that the entity shall be required to obtain from the Commission the necessary license, authority or registration to engage in the provision of communications services defined in this Act. The Commission shall identify the requirements for different communications services, as may be necessary; and adopt an administrative process to facilitate greater entry of qualified communication service providers. Hence, application service providers shall not be required to obtain a franchise for the provision of application services.

No legislative franchise shall be required for the operation of either network or application service providers. Provided, that only a franchise from the Commission shall be obtained by network service providers.

Any entity that wishes to conduct a multiple business of providing any combination of network services and communications services shall comply with the franchise and authorization requirements as defined in this Act.

In granting authority to an entity to engage in the provision of services under this Act, the Commission shall require the entity to prepare

an industry development plan which sets out a service provider's commitments to undertake a range of specific activities that contribute to the fulfillment of the national policy objectives, the development of the Philippines' communications sector and the economy as a whole.

The Commission shall publish a set of guidelines outlining the Government's requirements and expectations for industry development. These guidelines will set out the relevant policy objectives, identify certain priority areas for industry development and will specify the required format and basic content of the industry development plans.

Sec. 10. ***Authorization of Telecommunications Providers.*** – All companies authorized to furnish telecommunications, broadcast, narrowcast and value-added services, and those in related business activities brought together into convergence under this Act shall henceforth be authorized to competitively provide, through their authorized facilities, multimedia services as defined in this Act. This includes telephone companies furnishing entertainment services, and broadcast, cable television and Internet companies furnishing switched voice and data services, provided that voice communications technology provided through Internet protocol (e.g. VoIP), shall be considered as a value-added service (VAS) for purposes of this Act..

Sec. 11. ***Lease of Facilities.*** – Network service providers shall be allowed to provide network services to communications service providers and other network service providers. Network service providers shall have the right to acquire network services from other network service providers.

Communications service providers shall not be allowed to provide network services acquired from network service provider, unless the requirements set forth in Section 9 and other provisions in this Act are satisfied.

Network service providers are obliged to provide network services if duly requested by authorized communication service providers and other network service providers unless: (i) the request for service is on non-commercial terms and conditions; (ii) the provision of service is likely to cause material damage to networks facilities; or (iii) the network service provider has grounds to believe that the provision of service would be breach of the law.

Where a providing network service provider and an acquiring network service provider or communications service provider cannot agree on terms and conditions for the supply of network services, either party shall submit the matter to the Commission for resolution. The Commission shall intervene to resolve the matter only if satisfied that the parties have had a reasonable opportunity to negotiate on the terms and conditions of access and such negotiations have failed.

Sec. 12. ***Equality of Treatment.*** – Any advantage, favor, privilege, exemption, or immunity granted under existing franchises, or may hereafter be granted, shall *ipso facto* become part of franchises covered under this Act and shall be accorded immediately and unconditionally to the grantees of such franchises: Provided, however, that the foregoing shall neither apply to nor affect provisions of franchises concerning territory covered by the franchise, the life span of the franchise, or the type of service authorized by the franchise.

Sec. 13. ***Competition Practice.*** – Service Providers shall not engage in market conduct or trade practices that are detrimental to competition.

Service providers shall not discriminate between entities /persons who acquire network or communications services of a particular kind in relation to the charges for the service, timing of the service delivery, the terms and conditions on which the service is supplied and the performance conditions/ quality of the service.

Sec. 14. ***Universal Access Fund.*** – The Department shall establish a Universal Access Fund.

Service Providers will be required to make contributions to the Universal Access Fund on an equitable basis.

The Department shall appoint an independent manager of the Universal Access Fund to ensure that the contributions will be used exclusively in accordance with the purpose of the fund. The Department will ensure that the books of account and other record of the Universal Access Fund are independently audited each year in accordance with the purpose of the fund and generally accepted accounting principles and that a report of audit is made publicly available.

Sec. 15. ***Rates and Tariffs.*** – The Commission shall establish rates and tariffs, for network and communications services which are fair and reasonable and which provide for fair and just competition.

Each network service and communications service shall be separately tariffed to enable the transparent provision and charging of services. An entity providing both network and communications services shall maintain separate books of accounts for each of these services.

Network services and communications services shall be tariffed on an unbundled basis to enable service providers and users acquiring such services to receive, and to be charged for, only those services they require.

The Commission shall exempt, pursuant to an application or petition, any specific network and communications service from its rate of 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.

Sec. 16. ***Content Standards.*** – Mass media service providers shall not supply content which is indecent, obscene, false, excessively violent, defamatory, offensive or in contravention of other laws of the Philippines. Narrowcast media service providers may provide indecent programming subject to guidelines which the Commission will issue.

ARTICLE IV. RIGHTS OF USERS

Sec. 17. ***Rights of End Users.*** – Notwithstanding rights provided generally under this Act or other applicable laws, users of communications services shall be afforded the following rights.

a. Right to change from one communications service provider to another;

b. Right to non-disciplinary, reliable, and efficient communications services conforming to the minimum standards prescribed by the Commission;

c. Right to choose and pay only for the communications service(s) required;

d. Right to regular, timely, unbundled and separate service charges, accurate billing, and efficient service;

e. Right to thorough and fair investigation, and prompt resolution by the Commission of any valid service-related complaint; and

f. Right to privacy in the use of communications.

ARTICLE V. INSTITUTIONAL RESPONSIBILITIES

Sec. 18. ***Department.*** – The Department, in addition to its existing powers, functions and responsibilities, and in coordination with other concerned agencies, shall, pursuant to this Act:

a. Ensure that the national policies and objectives as set out in this Act are actively pursued;

b. Develop operational and administrative arrangements to support the establishment to a Universal Access Fund;

c. Develop and oversee the implementation of the convergence master plan in coordination with other government departments or agencies and the private sector;

d. Recommend the grant of incentives to service providers in unserved areas, educational institutions such as schools and libraries, social-service agencies, tourist destinations such as national parks, and underserved rural areas;

e. Promote the development and transfer of technologies that allow efficient deployment of communications services; and

f. Supervise the internal restructuring of the Commission. The Department shall require the Commission to submit for its approval proposals to ensure that the Commission is restructured to reflect the objectives of this Act.

Sec. 19. ***Commission.*** – The Commission, in addition to its existing powers, functions and responsibilities, shall, pursuant to this Act:

a. Formulate and implement internal restructuring to be able to implement rules and regulations regarding this Act;

b. Ensure that all entities provide services in a non-discriminatory manner;

c. Implement the convergence master plan;

d. Ensure the interconnection and inter-operability of all networks;

e. Adopt a numbering and addressing system to facilitate efficient access to communications services;

f. Formulate and implement rules to prevent unfair competition and trade practices, and to control unfair cross-subsidy;

g. Formulate and implement rules for ensuring that the content supplied by mass media service providers meets acceptable community standards;

h. Formulate and implement rules and regulations and procedures to act upon application for exemption from regulation of rates and tariffs;

i. Require the submission by service providers of periodic reports of finances, operations and industry development;

j. Formulate and implement rules and regulations and procedures to protect the rights of the users;

k. Formulate and implement rules, regulations, and procedures for the prompt issuance of authorizations, certificates, licenses and permits required of the service providers; and

l. Enforce the promulgated fines and penalties for violations of any provision of this Act.

ARTICLE VI. PENAL PROVISION

Sec. 20. ***Sanctions.*** – Failure to comply with any provision of this Act shall be dealt with in accordance with due process of law and following the schedule of fines and penalties promulgated by the Commission.

ARTICLE VII. FINAL PROVISIONS

Sec. 21. ***Policy Implementation.*** – The Commission, in consultation with the concerned agencies and sectors, shall formulate and adopt, not later than sixty days from the effectivity of this Act, the necessary implementing rules and regulations for the implementation of this Act, and shall prescribed appropriate penalties and sanctions therefor.

Sec. 22. ***Transitory Provisions.*** – Upon the effectivity of this Act, all existing and authorized providers of network and communications services shall be given three (3) years to comply with the requirements of this Act.

Existing legislative franchises of telecommunications, broadcast, Cable TV, satellite TV and other communications service entities shall be considered as franchises for the provision of network services.

Existing franchises of broadcast, Cable TV and satellite TV services entities shall be considered as franchises for the provision of mass media services.

Sec. 23. ***Separability Clause.*** – Any portion or provisions of this Act that may be declared unconstitutional or invalid shall not have the effect of nullifying other portions or provisions hereof as long as such remaining portions or provisions can still subsist and be given effect in their entirety.

Sec. 24. ***Repealing Clause.*** - All laws, ordinances, rules, regulations and other issuances or parts thereof, which are inconsistent with this Act are hereby repealed or modified accordingly.

Sec. 25. ***Effectivity Clause.*** – This Act shall take effect fifteen (15) days from the date of its publication in the Official Gazette or in at least two (2) major newspapers of general circulation, provided further that at least three (3) certified copies thereof shall have been filed with the University of the Philippines Law Center.

Approved: