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S E N A T E

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COMMITTEE REPORT NO. 78

Submitted by the Committee on Public Services on OCT 26 2011

RE : P.S. RES. 477

Recommending the adoption of the recommendations incorporated therewith.

Sponsor : Sen. Ramon B. Bong Revilla, Jr.

MR. PRESIDENT:

The Senate Committee on Public Services to which P. S. Res. 477 was referred, as introduced by Sen. Arroyo, *entitled:*

"RESOLUTION
DIRECTING THE SENATE COMMITTEE ON PUBLIC SERVICES TO CONDUCT A REVIEW IN THE EXERCISE OF ITS OVERSIGHT POWERS, OR AN INQUIRY IN AID OF LEGISLATION, OF THE REPORTED SHARE-SWAP DEAL AND RELATED TRANSACTIONS THEREON, IF ANY, BETWEEN PHILIPPINE LONG DISTANCE TELEPHONE, CO. (PLDT) AND DIGITEL MOBILE PHILS., INC (SUN CELLULAR), WITH THE END IN VIEW OF DETERMINING WHETHER THE TRANSACTION IS CONSISTENT WITH, OR ARE NOT IN VIOLATION OF CERTAIN PROVISIONS OF THEIR RESPECTIVE LEGISLATIVE FRANCHISES AND THAT THE ARRANGEMENT WOULD BE TO THE PUBLIC INTEREST."

In the exercise of its continuing mandate under the Constitution to look into franchises it granted "when the common good so requires," the Committee respectfully submits the following:

I PREFATORY STATEMENT

Pursuant to P.S. Resolution No. 477 introduced by Hon. Sen. Joker Arroyo, the Committee on Public Services conducted an inquiry into the proposed share-swap deal between Philippine Long Distance Telephone Company ("PLDT") and Digitel Telecommunications Philippines, Incorporated ("Digitel") to determine whether (1) the PLDT-Digitel transaction is consistent with, or not in violation of, certain provisions of their respective legislative franchises and (2) whether the arrangement would be in the public interest.

The Committee held two public hearings on May 31, 2011 and June 07, 2011, which were attended by representatives of PLDT, Digitel, Globe Telecoms, Inc. ("Globe"), Eastern Telecommunications Philippines, Inc., Text Power, Text Mate, the National Telecommunications Commission, the Securities and Exchange Commission and the Philippine Stock Exchange.

II THE PLDT-DIGITEL SHARE-SWAP AGREEMENT

On March 29, 2011, PLDT, JG Summit Holdings, Inc. ("JGS"), Express Holdings, Inc., Solid Finance (Holdings), Limited and Mrs. Elizabeth Yu Gokongwei entered into a Sale and Purchase Agreement under which PLDT agreed to purchase 3,277,135,882 shares of common stock of Digitel, representing approximately 51.55% of the issued and outstanding capital stock of Digitel. Apart from the Digitel shares, PLDT purchased the following assets:

a) Convertible Bonds which, at the option of the holders, are convertible or exchangeable into common shares in the capital stock of Digitel at the per value of P 1.00 per share; *and*

b) Advances made by JGS to Digitel, amounting to PhP34, 118,544,087.00 including accrued interest as of December 31, 2010.

In payment of the total consideration of PhP69, 198,024,410.00, PLDT agreed to issue 27,679,210 new shares of common stock at the issue price of PhP2, 500 per share. The transaction was originally intended to be completed by 30 June 2011 but the deadline was extended to end of July.

III PRESENTATION OF POSITIONS OF PARTIES CONCERNED

Globe Telecommunications, through its representative, manifested that they are not opposing the deal entered into between PLDT and Digitel (SUN) *per se*. The Motion to Intervene that they filed with the National Telecommunications Commission prays for the government to put conditions and safeguards in case it decides to approve the deal so that the issue of the exercise of monopolistic powers and influence by one group may be addressed and that any tendency towards monopolistic practices may be curbed through government intervention.

Globe also manifested that the swap-deal might lead to monopolistic and inordinate pricing because PLDT would acquire more market power. In mobile

telecommunications, PLDT will get 70 percent of the market share and 75 percent in the landline market share.

PLDT, on the other hand argued that with the combined optimized networks, they can create a robust nationwide mobile broadband backbone which could provide mobile broadband services to around 95 percent of the geographic areas which would be beneficial to the public.

Eastern Telecommunication, one of the new players in the field of Telecommunications has stated that they also filed with the NTC a Motion to Intervene, not to oppose the deal but praying to impose conditions on the deal.

The representative from TXTm8, a consumer advocacy group manifested that they are not opposing the deal but the dangers that may be created by the transaction need to be addressed. The solutions, according to the advocacy group, would come from a competition policy document submitted to NTC.

On all the issues raised by the opponent and the proponent, the NTC took the position that the issues raised are under study and subject to consideration during the hearings conducted by the NTC on the transaction, and that, unless all evidences have been submitted and gathered, and proceedings have been finished, they cannot give their comments on the matter.

IV DISCUSSION OF THE ISSUES AND FINDINGS

1. **Is the proposed share-swap between PLDT and Digitel consistent with, or not in violation of, certain provisions of their respective legislative franchises?**

After reviewing the provisions of the respective legislative franchises of PLDT and Digitel, and after taking into account the relevant provisions of the Public Telecommunications Policy Act of 1995, this Committee is of the view that the proposed acquisition by PLDT of a controlling interest in Digitel (including, indirectly, Digitel Mobile Phils., Inc.) is clear of any legal infirmity and is consistent with, and is not in violation of, the said legislative franchises.

The subject transaction involves the acquisition by a duly enfranchised telecommunication company, PLDT, of a controlling interest in another duly enfranchised telecommunication company, Digitel. The transaction is, therefore, in pursuit and furtherance of the businesses and operations contemplated under the respective legislative franchises of PLDT and Digitel, hence the same does not require the approval of Congress.

The Committee notes that at the first hearing, Globe Telecom admitted that the transaction was legal. In fact, Globe Telecom admitted that it was not questioning the legality of the merger. In this regard, the Committee has taken cognizance of the similarities between this deal and the earlier acquisition by Globe of Isla Communications way back in the year 2001. Moreover, although Globe vehemently insisted that there were no formal negotiations involved, it was established in the hearings that there were at least some preliminary discussions between Globe and Digitel to indicate the former's interest in acquiring the assets of Digitel.

2. Does the transaction result in a business combination or practice prohibited by law?

At the hearings, the issue raised was whether the share-swap between PLDT and Digitel constitutes violation of the law prohibiting monopolies, cartels and combinations and practices in restraint of trade.

Sec. 19, Article XII of the 1987 Constitution states: *"The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."*

Furthermore, Article 186 of the Revised Penal Code on *"Monopolies and Combination of Trade"*, states that penalties shall be imposed upon:

1. Any person who shall enter into any contract or agreement or shall take a part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market;
2. Any person who shall monopolize any merchandise or object of trade or 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; xxxxxxxxxx

In *Tatad v. The Secretary of the Department of Energy and the Secretary of the Department of Finance,* G.R. No. 124360, 5 November 1997, the Supreme Court ruled that "*the Constitution's Article XII, Section 19, is anti-trust in history and spirit. It espouses competition. We have stated that only competition which is fair can release the creative forces of the market. We ruled that the principle which underlies the constitutional provision is competition. Competition is the underlying principle of the provision. The objective of the anti-trust law is "to assure a competitive economy based upon the belief that through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services and, thus matches their desires with society's opportunity costs. Additionally, there is reliance upon "the operation of the 'market' system (free enterprise) to decide what shall be produced, how resources shall be allocated in the production process, and to whom various products will be distributed. The market system relies on the consumer to decide what and how much shall be produced, and on competition, among producers who will manufacture it.*"

Thus, the Supreme Court likewise, in *Agan vs. PIATCO*, G.R. No. 155001, 5 May 2003, held that "*monopolies are not per se prohibited by the Constitution but it may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public*". Clearly, the Constitutional mandate is that a monopoly is not prohibited, it is, however, regulated.

To date, the Philippines has no comprehensive "anti-trust" legislation in place. A number of jurisprudence, however, has clarified the concepts of monopoly and combinations in restraint of trade.

In *Garcia v. Executive Secretary*, G.R. No. 132451, 17 December 1999 as reiterated in *Energy Regulation Board v. Court of Appeals,* G.R. No. 113079, 20 April 2001, the Supreme Court held that "*the simplest form of monopoly exists when there is only one seller or producer of a product or service for which there are no substitutes. In its more complex form, monopoly is defined as the joint acquisition or maintenance by members of a conspiracy, formed for that purpose, of the power to control and dominate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the*

intention and purpose to exercise such power. Where two or three or a few companies act in concert to control market prices and resultant profits, the monopoly is called an oligopoly or cartel. It is a combination in restraint of trade."

The foregoing concepts are also not defined under R.A. No. 7925 or the Public Telecommunications Policy Act of the Philippines. The Revised Penal Code has provisions penalizing monopoly and unfair competition. These provisions, however, did not define clearly the conditions necessary for an economic activity to be considered a monopoly, unfair competition or a combination in restraint of trade.

PLDT, Globe and Digitel Mobile Phils. Inc. currently have the following corresponding shares of the cellular market:

Smart Communications (a subsidiary of PLDT)	52%
Sun Cellular (Digitel)	16.7%
Globe Telecommunications	30%

With the share-swap agreement between PLDT and Digitel Mobile Phils., Inc., Smart Communications and Sun Cellular would have a combined percentage of about 70% of the cellular market.

The Committee is aware that developments in the telecommunications industry are peculiarly fast-paced and rapidly evolving with global and technological advances in this age of heightened demand, competition and ultra-modern information technology. Thus, it has become the trend globally for telecommunications firms to merge to ensure and optimize the provision of efficient, current, and effective telecommunications services. Acquisition, merger, and consolidation have become the natural phenomena worldwide (e.g. AT&T and Bell South; Alcatel and Lucent). The Committee takes cognizance of this trend and the need and urgency for the country to remain competitive.

Understandably, telecommunication service providers in modern and emerging economies have had to resort to mergers and consolidations to supplement, complement and upgrade the types of services they provide to their vast consumer and customer bases and to achieve economies of scale.

The telecommunications industry requires massive infrastructure requiring huge capital expenditures. This type of industry requires a large customer base to remain viable. As a consequence, few industry players can remain economically and financially viable without exploring the opportunities for growth beyond marketing and promotional strategies.

Agreements or transactions such as the subject share-swap deal between PLDT and Digitel, therefore, may be viewed as natural or logical options or courses for industry players to explore and are expected occurrences in the telecommunications industry.

Clearly, a monopoly is not prohibited *per se* by the Constitution; it is to be regulated or prohibited only when the public interest so requires. The underlying consideration, therefore, in regulating or prohibiting monopolies is the public interest.

The Supreme Court, in *The National Coal Company v. The Public Utility Commission*, G.R. No. 23047 (January 30, 1925), has pronounced that "*There is no such thing as a monopoly where a property is operated as a public utility under the rules and regulations of the Public Service Commission and the terms and provisions of the Public Utility Act.*" In *Villa Rey Transit, Inc. v. Ferrer*, G.R. No. L-23893 (October 29, 1968), the Supreme Court held that "*There can be no danger of price controls or deterioration of service because of close supervision of the Public Service Commission.*"

These pronouncements of the Supreme Court bear significance on the matter at hand since the parties involved in the proposed share-swap transaction, PLDT and Digitel, are both public utilities, are both under the close supervision of the National Telecommunications Commission, and are both subject to the provisions of the Public Service Act.

Except for concerns and fears raised by Globe and other parties, there is as yet no basis or any overt act committed by PLDT and/or Digitel to indicate the commission of proscribed practices in restraint of trade. The fears or scenarios of price escalation and unfair competition cannot be substantiated merely on the basis of the share-swap agreement *per se*. As to whether the foregoing share-swap deal resulting in the capture of about 70% of the cellular market constitutes a monopoly, unfair competition or combination in restraint of trade, this cannot be determined absent a clear showing of any specific punishable act, the elements of which must be clearly established.

Congress, the Executive and its regulatory agencies are not powerless in exercising its powers to address any prospective violation of the terms, conditions and limitations of the franchises granted to public utilities.

Clearly, there are sufficient safeguards within RA 7925 to deal with the public interest and consumer welfare issues raised. In addition to this, under the franchises

granted to PLDT and Digitel, under Act 3436 as amended and RA 9180, respectively, such franchises are subject to amendment, alteration or repeal by Congress of the Philippines when the public interest so requires. Thus, the option of Congress to review, amend, alter or repeal PLDT and Digitel's franchises remain when such abuses of these telecommunications companies arise or public interest so requires.

Furthermore, should there be any rate adjustments, changes or reduction in the benefits or types of services being provided by Digitel or any telecommunication service provider for that matter, the National Telecommunications Commission has sufficient regulatory and adjudicatory powers to address these with public interest and consumer's welfare, and to maintain, at all times, a level, healthy and fair competition environment among the various industry stakeholders.

As discussed in greater detail below, the National Telecommunications Commission (NTC), in particular, primarily bears the duty and responsibility as well as the regulatory powers to ensure the protection of the consuming public and to foster a healthy competitive business environment in the telecommunications sector.

While, as earlier stated, there is as yet no specific and comprehensive anti-trust statute in force in the country, there is clear constitutional and statutory mandate to establish and maintain a competitive environment in the telecommunications industry. Apart from Article XII, Sec. 19 of the Constitution, Sec. 4(f) of Republic Act No. 7925 mandates that the growth and development of telecommunications services under a policy, among others, where "*a healthy competitive environment shall be fostered*".

3. Is the PLDT-Digitel share swap transaction injurious to public interest?

PLDT cites that competition in the cellular telecommunications industry has intensified with the increased availability of affordably priced handsets offering a range of new functions and the introduction by competitors of new and improved plans for postpaid subscribers, reduced rates per minute and aggressive marketing and promotional strategies. The principal bases of competition are price, including handset cost, quality of service, network reliability, geographic coverage and attractiveness of packaged services. Smart's network leads the industry in terms of coverage with 10,316 cellular/mobile broadband base stations as of December 31, 2010.

As a result of competitive pressures, service providers have introduced "bucket" plans providing unlimited voice and text services, and other promotions. While most of the "bucket" priced plans currently available in the market are being offered on promotional bases, Smart, Globe and Sun Cellular continue to launch other services that are designed to encourage incremental usage from existing subscribers and also to attract new subscribers.

Cellular operators also compete actively in launching innovative products and VAS. The growing range of cellular products and services include not only text messaging but also multi-media messaging, voice mail, text mail, international roaming, information-on-demand, mobile banking, e-commerce, mobile data, cellular internet access and internet messaging.

On February 14, 2006, Smart opened its 3G network in selected key cities nationwide, making video calling, video streaming, high speed internet browsing and special 3G content downloads on its 3G network available to subscribers with 3G handsets. Likewise, Globe has been rolling out its 3G network.

With the share-swap deal, Sun Cellular has committed that it will continue providing the services it has provided before the share-swap deal. In fact, Sun Cellular has committed that its unlimited voice and text services will become bigger and will include a wider coverage. With the financial resources of PLDT, Digitel Mobile Phils Inc. will be able to sustain, continue and further promote the unlimited voice and text services which they have pioneered under the Sun Cellular Plan. Moreover, it is the intention of PLDT to make Sun Cellular the umbrella brand for all its unlimited services.

PLDT expressed its assurance to sustain, continue and promote the services currently enjoyed by consumers, public interest and consumer's welfare is not compromised. Both PLDT and Digitel confirmed to the Committee that the very popular unlimited service of Sun Cellular - SUN UNLI - will continue and will in fact be expanded to cover the entire country.

PLDT likewise confirmed that the PLDT-Digitel transaction will allow both companies to combine and optimize their networks and that with this Digitel customers all over the country will enjoy much sooner the advantages and benefits of enhanced and faster broadband services. Broadband internet access all over the country is a national goal since it is an important tool for national development. A transaction that stands to facilitate and hasten the deployment of a reliable

nationwide broadband backbone and related services should be encouraged as this will undoubtedly bring the benefits and advantages of the advances in digital information to the countryside.

But despite assurances from the parties to the subject share-swap deal, this Committee is duty bound to address the serious concerns about the potentially injurious effects of the market concentration that would result with the combined PLDT-Digitel's capture of an estimated 70 up to as much as 73% share of the Cellular Mobile Telephone Services "CMTS" market. There are fears, therefore, that the PLDT-Digitel deal may undermine the market dynamism that has always been and continues to be beneficial to the consuming public.

In this regard, the Committee finds it crucial and instructive to provide a brief overview of the relevant facts and developments, the policy and regulatory framework, as well as the current market position of telecommunications industry players in the Philippines and abroad- the backdrop against which the subject transaction as well as any future developments of similar nature or effect in the market must be appreciated and studied:

Industry Overview

Prior to the PLDT-Digitel Deal, there were basically three dominant company groups in the CMTS market -- the PLDT Group which includes Smart, Piltel (which uses the Talk 'N Text brand), and Connectivity Unlimited Resource Enterprise, Inc. ("CURE") (which uses the Red Mobile brand); the Globe Group (which includes Globe and Touch Mobile brands); and Digitel (which uses the Sun Cellular brand).

Business in the CMTS market is totally dependent on the Radio Frequency (RF) Spectrum made available to the telecommunications companies ("telcos") by the government. The RF Spectrum has been called the "lifeblood of the telecommunications industry". The wider the band (or bandwidth) allocated to a telco, the more services (voice, SMS, data and internet) it can sell in the market[1]. The more the number of frequencies, the more capacities it can carry to accommodate more customers.

The RF Spectrum is a resource owned by the government and the law recognizes that it is a scarce public resource[2]. During the hearings, the Senate

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[1]See Letter of NTC Commissioner Gamaliel A. Cordoba to Sen. Ramon "Bong" Revilla, Jr. dated 06 June 2011, p. 5.

[2]Section 4(c) of RA 7925.

President had occasion to emphasize this fact and cited the case of Singapore where telcos were even made to pay the government millions or billions of dollars for the 3G frequencies[3]. In Indonesia, the 3G frequencies were auctioned for over US$1,000,000,000.00 (One Billion Dollars). In the CMTS market today, the scarce radio frequencies available for a wider range of applications are referred to as the Third Generation Mobile Telecommunications or 3G[4].

In 2005, the government through NTC decided to allocate the five (5) sets of 3G frequencies to telcos under certain parameters and conditions specified in Memorandum Circular No. 07-08-2005 (Rules and Regulations on the Allocation and Assignment of 3G Radio Frequency Bands). Among these parameters and conditions were the following:

1. The frequency bands (5 sets) shall be made available for assignment or allocation to not more than five (5) qualified telcos.
2. Telcos with more than 50% of common stock owned by the same person or group of persons shall be considered as associated applicants and shall be allowed to elect only one among them as sole applicant to proceed with the application for allocation of the 3G frequencies.
3. The applicant for 3G allocation shall undertake to interconnect with all 3G networks, cellular mobile telephone networks, local exchange networks and all other public networks.
4. The applicant shall also undertake to share its network and facilities with other 3G players in areas where demand does not allow more than one 3G network.
5. An applicant that is a consortium shall provide details of all its members including details of ownership and control structure.

The NTC has assigned four (4) sets of 3G bandwidths to four (4) telcos -- Smart (15 MHz), Globe (10MHz), Sun Cellular (10MHz) and CURE (10MHz). The remaining set or band of frequencies was not assigned but is now subject of litigation[5].

Subsequently, PLDT acquired an additional 3G frequency (10MHZ) resulting from the conversion from 2G to 3G of PLDT's subsidiary Piltel's 10MHz assignment in

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[3]The manner by which NTC allocated the 3G bandwidths, whereby government is believed to have lost substantial revenues, is another matter that deserves an inquiry of its own.

[4]The NTC explains 3G thus: "Applications services includes wide-area wireless voice telephone, mobile internet access, video calls and mobile TV, all in a mobile environment. With the help of 3G, we can access many new services too. One such service is the GLOBAL ROAMING." (See Letter of NTC Commissioner Gamaliel A. Cordoba,*supra*)

[5]TSN, 31 May 2011, pp. 69-70.

the 850MHz AMPS band. PLDT then went on to acquire CURE and its corresponding 10MHz assignment.

With the effective acquisition by PLDT of Digitel, PLDT now owns three (3) of the four (4) assigned 3G frequency blocks while Globe only holds one. This is in addition to the converted Piltel frequency assignment earlier described. Thus, from an initial 3G assignment of only 15MHz given to Smart, the PLDT group's 3G frequency holdings have now ballooned to 45MHz in just six (6) years, while Globe's 3G frequency assignment of 10MHz has remained unchanged to date. In short, a 3G frequency ratio of 4.5:1 exists in favor of the PLDT Group. It thus appears that what the NTC tried to avoid when it initially limited the PLDT-Group to one 3G block of 15MHZ has been effectively overturned by PLDT's subsequent mergers and acquisitions.

Looking back when the NTC allocated the 3G frequencies, a major consideration for the allocation was the establishment of multiple players in the market that would compete against each other on a more level playing field. After all, the frequencies, being scarce government assets for public service, cannot be left to the control of one or two telcos. But the developments subsequent to the assignment of the 3G frequencies have evidently worked to reverse this underlying policy.

The liberalization of telecommunications in 1995 was a result of gross violations of PLDT's Universal Service Obligation (USO). The rollout of telecommunications services in the rural areas suffered because of the virtual monopoly given to PLDT in the 60's, 70's and 80's. The Committee takes cognizance that as recently as 1995, telecommunications services left a lot to be desired. We might recall the acerbic observation of Singapore's Prime Minister Lee Kuan Yew, "*In the Philippines, 95% are waiting for a telephone and 5% for a dial tone*".

The significant barriers to entry in our country can foreseeably be more than magnified by the re-concentration of 3G frequencies under one entity and will certainly deter other entities from competing in the market. There would be no room for another Sun Cellular to emerge and challenge the PLDT telcos and Globe with newer, better technology or cheaper pricing strategies and innovative services, even 4G technology.

4. **Whether NTC has sufficient powers under RA 7925 to protect public welfare and consumer interest particularly in exercising its jurisdiction over the PLDT-Digitel transaction.**

Article III, Sec. 5.(d) of RA 7925 provides that the NTC shall be responsible to: "Protect consumers against misuse of a telecommunications entity's monopoly or quasi-monopolistic powers by, but not limited to, the investigation of complaints and exacting compliance with service standards from such entity." Further, Article VI, Sec. 17 of the same law states that: "The Commission shall exempt any specific telecommunications service from its rate or tariff regulations if the service has sufficient competition to ensure fair and reasonable rates or tariffs. The Commission, shall, however, retain its residual powers to regulate rates or tariffs when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists and the rates and 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."

An associated safeguard to competition is for the NTC to review, rationalize and reallocate the scarce radio spectrum pursuant to Sec. 4(c) of RA 7925 which requires the government to "*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*". NTC, as the principal administrator of RA 7925 pursuant to Sec. 5 thereof is in fact obligated to review the spectrum allocation and assignment periodically under Section 15.

NTC's Memorandum Circular No. 07-08-2005 is an example of NTC exercising its regulatory authority to foster a healthy competitive environment by, in effect, ruling on the allocation of the 3G frequencies in such a manner that multiple players will be competing against each other in the market. The NTC must see to it that the telcos comply with the underlying policy and it has the concomitant authority to make sure that the statutory requirement of wider access be observed by all telcos at any time, even when the frequencies have already been awarded. Otherwise, NTC will be rendered inutile and incompetent not only in enforcing its own rules but also in its performing its responsibility to foster a healthy competitive environment.

In this connection, NTC's power to review radio frequency assignments carries with it the power to order their divestiture, reassignment and/or modification. This is evident, for example, in Section 7 of NTC M. C. No. 02-4-83:

> *"7. The assignment of radio frequency(ies) as well as the grant of radio licenses shall be* ***temporary*** *and* ***may be recalled, reassigned, modified or changed*** *as the Commission deems necessary,* ***in***

pursuance of its program to rationalize the use of radio frequency spectrum." (emphasis supplied)

Parenthetically, there is a need for the NTC to be transparent about the allocation of the scarce radio frequencies. It was learned through this inquiry that such information is not publicly available.

The Committee previously noted that mergers and acquisitions in the telecommunications industry are a natural activity worldwide. Upon closer look at specific examples of this activity, through information on the internet, one would invariably find that regulators in other jurisdictions have in fact instituted measures to ensure that effective competition is sustained and not undermined by mergers and acquisitions. In some instances, the players themselves have had to disgorge their networks of spectrum. Examples of these are:

- Argentina: M&A of Telefonica and Bellsouth in 2005 [35MHZ of combined spectrum is returned to the government].
- Brazil: Merger of Oi Telecom and TeleNorte Cellular in 2008 [Oi Telecom returns TeleNorte's 15MHZ in the 850MHZ band immediately and the other remaining frequencies in 18 months].
- Chile: Chile Telefonica and Chile Bellsouth in 2005 [sell 25MHZ of its spectrum].
- Denmark: – Telia [to return one set of GSM 900/1800MHZ frequency by 2005].
- India: Idea Cellular and Spice Com in 2008 [surrender UASL licenses in overlapping regions].
- Peru: TEM Peru required to hand back 1 of its licenses in 2005.
- Ukraine: Vimpelcomand Kyivstar in 2010 [re-farm its spectrum and relinquish excess spectrum].
- United Kingdom: Orange and T-Mobile in 2009 [one quarter of the combined spectrum in 1800MHZ band is divested].
- U.S.A.: Verizon and Altel in 2008 [divest spectrum assets in 100 markets in 22 states].

Regulation on Market Power

In other jurisdictions, regulators limit the market concentration of dominant telcos to preclude the undermining of competition. For example, in the U.S., the combined Cingular and AT&T Wireless entity was required to divest of customers and other assets in 13 markets in 2004. Four years later, the combined Verizon Wireless and Altel had to give up its market in areas all over 20 states.

Another example is South Korea, where, in 2000, the combined SK Telecom and Shinsegi was required to divest its market share from 57% to less than 50%.

Last August 30, 2011, the United States Justice Department sued to block the $39 Billion acquisition by AT&T of T-Mobile. The Deputy Attorney General said that "*the combination of AT&T and T-Mobile would result in tens of millions of consumers all across the United States facing higher prices, fewer choices and lower quality products for their mobile wireless services*". "*AT&T's elimination of T-Mobile as an independent, low-priced rival would remove a significant competitive force from the market.*"

Below is a representation of the U.S. cellular market shares, pre- and post-merger:

Pre-Merger			Post –Merger		
1.	Verizon	34.5%	1.	AT&T	43%
2.	AT&T	32%	2.	Verizon	34.5%
3.	Sprint	17%	3.	Sprint	17%
4.	T-Mobile	11%	4.	Various	5.5%
5.	Various	5.5%			

The resulting market share that a combined AT&T – T-Mobile would enjoy would only be 43% compared to the estimated 73% combined market share of PLDT and Digitel due to the share-swap deal.

Significant Market Concentration Regulation

In modern markets today, having a dominant market share or Significant Market Concentration ("SMC") triggers the imposition of handicaps on a telco. In the European Union, a market share of 40% gives rise to a presumption of SMC, which obligates the telco to provide non-discriminatory interconnection service, among others. In Trinidad & Tobago, a telco with a market share above 150% of the average share in the market is considered dominant and therefore be subject to handicaps.

The U.S. Justice Department uses a sophisticated metric, the Herfindahl-Hirschman Index ("HHI") to assess market concentration.

The imposition of market share limit is not new in Philippine regulatory experience. In our electric power sector, Republic Act No. 9136 known as the EPIRA

(Electric Power Industry Reform Act) specifically prohibits a company or related group from owning, operating or controlling more than 30% of the installed generating capacity of a grid and/or 25% of the national installed generating capacity. This ensures the presence of at least 4 groups in the generation sector.

The NTC has even taken this direction when it commenced the process for the adoption of a Competitive Framework Document[6], but the same appears to have been abandoned.

V RECOMMENDATIONS

In view of the foregoing, the Committee hereby recommends:

1. That the NTC thoroughly review and monitor the operations of all telecommunications companies to guard against any undue impositions and practices that would undermine public interest and consumers' welfare. The NTC must ensure that any merger, consolidation, acquisition or transaction of a similar nature that would result in significant market concentration within the telecommunications industry will not, in any way, thwart the benefits that should otherwise inure to the benefit of the consuming public under a competitive environment.

2. That the NTC review all the terms and conditions of the share swap-deal between PLDT and Digitel in its overall context, considering its implications on the competitiveness of the industry and the welfare of the consumers while taking into account the Constitutional proscription against the impairment of the obligation of contracts. The review should likewise specify appropriate measures to be taken including, if so warranted, the disgorgement of current excess frequencies in conformity with the policy underlying NTC Memorandum Circular No. 07-08-2005 and in accordance with legal and clear-cut processes and rules in the exercise of the NTC's regulatory powers.

3. That the NTC intensively implement a responsive spectrum assignment policy to include the following safeguards: [1] Caps on the total spectrum bandwidth by technology use (e.g. 2G, 3G, BWA, LTE, etc.) under the control of an entity or a group of associated entities; [2] Equitable future

[6] See R. Aldaba, PLDT-Sun Acquisition: Good or Bad? Policy Notes, Philippine Institute for Development Studies, No. 2011-08 (April 2011)

allotments of spectrum block following international best practice; and [3] Process for the immediate recall of spectrum in consonance with the enforcement of caps on total bandwidth and other requirements.

4. That the NTC pursue with dispatch the process for the promulgation of the Competitive Framework Document and to adopt the use of the Herfindahl-Hirschman Index ("HHI") to measure market concentration. It should institute regulatory measures as are already within its authority pursuant to existing laws and the Constitution including, but not limited to, the imposition of Significant Market Concentration obligations, divestment of frequencies, unbundling of network services and resale of services.

5. That the NTC submit a report containing all information, issuances, rules and regulations concerning the current allocation and assignment of all frequencies in the spirit of transparency and for the further study of the Committee to ensure that such distribution, utilization and the manner of allocation of these limited and valuable national resources are in keeping with the national interest and the protection of the consuming public.

6. That Congress immediately enact an anti-trust legislation that is sufficiently comprehensive to enhance and strengthen the competitive framework in the telecommunications industry, in view of protecting and advancing public interest.

7. That Congress immediately pass the bill reorganizing the NTC and strengthening its regulatory powers.

Respectfully submitted:

RAMON BONG REVILLA, JR.
Chairman
Committee on Public Services

RALPH G. RECTO
Vice-Chairman
Committee on Public Services

MEMBERS:

EDGARDO J. ANGARA

JOKER P. ARROYO

PIA S. CAYETANO

GREGORIO B. HONASAN

PANFILO M. LACSON

LOREN B. LEGARDA

MANUEL "Lito" M. LAPID

SERGIO R. OSMEÑA III

TEOFISTO L. GUINGONA III

***EX- OFFICIO* MEMBERS:**

JINGGOY P. EJERCITO ESTRADA
President Pro-Tempore

ALAN PETER CAYETANO
Minority Floor Leader

VICENTE C. SOTTO, III
Majority Floor Leader

JUAN PONCE ENRILE
Senate President

JOKER P. ARROYO

REITERATIVE DISSENT

I had filed a dissent to the original P.S. Resolution No. 477 on the PLDT-Digitel deal which was signed by only four (4) bona fide members out of the fourteen (14) members of the Committee.

The dissent was anchored on the recent ruling of the Supreme Court in *Gamboa vs. Teves,* GR No. 176579, promulgated on June 28, 2011 were the High Court decreed that **PLDT does not meet the minimum requirement under the Constitution that Filipinos must own at least 60% of the capital of a public utility company like PLDT.** The Supreme Court which lopsidedly voted 10-3 against PLDT, derided PLDT's *"kind of ownership and control of a public utility (as) a mockery of the Constitution."*

Not being compliant with the Constitution, PLDT, if it has to continue its operations, must first correct its ownership structure as required by the Constitution.

In fact, PLDT did schedule a special stockholders' meeting on September 20, 2011 precisely to solve its constitutional violation, but it was cancelled "due to an anticipated lack of quorum." As matters stand, it operates in continuing violation of the Constitution.

Yet, a revised Committee Report No. 477 is being routed as if by right PLDT can continue to make business deals even before it has complied with the constitutional proscription.

The Senate cannot at present support any transaction of PLDT until it has corrected its ownership structure. To do so would be to countenance an unconstitutionality.

Respectfully submitted,

JOKER P. ARROYO

JOKER P. ARROYO

DISSENT

I am constrained to register this dissent in light of an overriding constitutional issue. The Supreme Court had just ruled that PLDT as a public utility, is in violation of the Constitution.

> **"In short, Filipinos hold less than 60 percent of the voting stock, and earn less than 60 percent of the dividends, of PLDT.** This directly contravenes the express command in Section 11, Article XII of the Constitution that "[n]o franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to x x x corporations x x x organized under the laws of the Philippines, **at least sixty per centum of whose capital is owned by such citizens x x x.**"
>
> "To repeat, (1) foreigners own 64.27% of the common shares of PLDT, which class of shares exercises the **sole** right to vote in the election of directors, and thus exercise control over PLDT; (2) Filipinos own only 35.73& of PLDT's common shares, constituting a minority of the voting stock, and thus do not exercise control over PLDT; (3) preferred shares, 99.44% owned by Filipinos have no voting rights; (4) preferred shares earn only 1/70 of the dividends that common shares earn;[63] (5) preferred shares have twice the par value of common shares; and (6) preferred shares constitute 77.85% of the authorized capital stock of PLDT and common shares only 22.15%. This kind of ownership and control of a public utility is a mockery of the Constitution.
>
> x x x
>
> "Indisputably, construing the term "capital" in Section 11, Article XII of the Constitution to include both voting and non-voting shares will result in the abject surrender of our telecommunications industry to foreigners, amounting to a clear abdication of the State's constitutional duty to limit control of public utilities to Filipino citizens. Such an interpretation certainly runs counter to the constitutional provision reserving certain areas of investment to Filipino citizens, such as the exploitation of natural resources as well as the ownership of land, educational institutions and advertising businesses. The Court should never open to foreign control what the Constitution has expressly reserved to Filipinos for that would be a betrayal of the Constitution and of the national interest. The Court must perform its solemn duty to

defend and uphold the intent and letter of the Constitution to ensure, in the words of the Constitution, "a self-reliant and independent national economy *effectively controlled* by Filipinos."

[Gamboa vs. Teves, GR No. 176579]

The High Court directed the Chairperson of the SEC "to apply the (Court's) definition of the term "capital" x x x and if there is a violation of Sec. 11, Article XII of the Constitution, to impose the appropriate sanctions under the law."

The vote was a lopsided 10-3 against PLDT, promulgated on June 28, 2011. Yet, the Committee Report makes no mention of the Supreme Court's decision.

The Committee Report however maintains that "there is effectively no comprehensive anti-trust legislation in the Philippines" thereby suggesting that this somehow precludes Congress from involving itself in the inequities in the operation of public utilities and has left this function to the National Telecommunications Commission.

The constitutional command is self-executing, it does not need supporting legislation according to the Supreme Court in the same Gamboa case on PLDT:

"Section 11, Article XII of the Constitution, like other provisions of the Constitution expressly reserving to Filipinos *specific* areas of investment, such as the development of natural resources and ownership of land, educational institutions and advertising business, is ***self-executing***. There is no need for legislation to implement these self-executing provisions of the Constitution. The rationale why these constitutional provisions are self-executing was explained in *Manila Prince Hotel v. GSIS,*[66] thus:

> x x x Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing. If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic. That is why the prevailing view is, as it has always been, that ---
> ...in case of doubt, the Constitution should be considered self-executing rather than non-self-executing. ...**Unless the contrary is clearly intended, the provisions of the Constitution should be considered self-executing, as a contrary rule would give the legislature discretion to determine when, or whether, they shall be effective.** These provisions would be subordinated to the will

> of the lawmaking body, which could make them entirely meaningless by simply refusing to pass the needed implementing statute. (Emphasis supplied)

Until PLDT restructures its ownership structure to conform to the decision of the Supreme Court, it is respectfully submitted that the Committee would do well to hold in abeyance any action in the proceedings.

The Committee can discuss anew the issues before it if and when PLDT complies with the Supreme Court decision.

PLDT in the meantime is estopped from consummating the swap-deal with Digitel in light of the Supreme Court decision.

Respectfully submitted,

JOKER P. ARROYO

REPUBLIC OF THE PHILIPPINES
Senate
MANILA

Senate
Office of the Secretary
'11 OCT 26 P4:22

Panfilo M. Lacson
Senator

October 3, 2011

HON. RAMON BONG REVILLA, JR.
Chairman
Committee on Public Services
Senate of the Philippines
Pasay City

Dear Senator Revilla:

This representation is in receipt of the proposed Committee Report prepared by the Committee on Public Services on the share-swap deal between the Philippine Long Distance Telephone Company (PLDT) and Digitel Telecommunication Philippines, Incorporated (DIGITEL).

After a thorough review of the Committee Report, please be informed that the undersigned cannot subscribe to the view that said landmark agreement does not need the approval of Congress, is clear of any legal infirmity and consistent with their respective legislative franchises. With all due respect, this representation believes that the Committee erred on this issue necessitating this **DISSENT**.

Republic Act No. 9180, otherwise known as the "Act Granting the Digitel Mobile Philippines Incorporated A Franchise to Construct, Install, Establish, Operate, and Maintain Telecommunications Systems Throughout the Philippines specifically provides in Section 16 the following:

> **Sec. 16. – Sale, Lease, Transfer, Usufruct, Etc. - The grantee shall not lease, transfer, grant the usufruct of, sell nor assign this franchise or the rights and privileges acquired thereunder to any person, firm, company, corporation or other commercial or legal entity, nor merge with any other corporation or entity, *nor shall the controlling interest of the grantee be transferred, whether as a whole or in parts and whether simultaneously or contemporaneously, to any such person, firm, company, corporation or entity without the prior approval of the Congress of the Philippines.* Any person or entity to which this franchise is sold, transferred or assigned, shall be subject to the same conditions, terms, restrictions and limitations of this Act.**

Senate of the Philippines, Room 525, GSIS Financial Center, CCP Complex, Roxas Boulevard, Pasay City, Philippines
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Said provision of the Digitel franchise cannot be any clearer with regard to the requirement that the transfer of controlling interest of the company needs the approval of Congress in order for it to be valid and effective. The provision was incorporated in the franchise of the company precisely to make sure that the company that will acquire Digitel should also be subjected to the same thorough process that Digitel underwent when the franchise was granted to it way back in 2002.

Further, this representation is of the conviction that the adoption of the report will set a bad precedent as it will show an abdication and surrender by Congress of its mandated authority to approve and/or reject the share-swap agreement and other future similar deals involving the telecommunications sector in favor of the National Telecommunications Commission (NTC).

It is noteworthy and ironic that while the Committee recommends that Congress should immediately pass a bill ***reorganizing the NTC and strengthening its regulatory powers,*** the Committee also leaves the disposition of the PLDT-Digitel deal to the sole discretion of the said agency.

In view of the foregoing, I vote against the adoption of the Committee Report.

Very truly yours,

PANFILO M. LACSON
Senator

Copy furnished:

All Members