

SECOND DIVISION

[G.R. No. 135992, July 23, 2004]

**EASTERN TELECOMMUNICATIONS PHILIPPINES, INC. AND
TELECOMMUNICATIONS TECHNOLOGIES, INC., PETITIONERS,
VS. INTERNATIONAL COMMUNICATION CORPORATION,
RESPONDENT.**

D E C I S I O N

AUSTRIA-MARTINEZ, J.:

The role of the telecommunications industry in Philippine progress and development cannot be understated. Time was when the industry was dominated by a few -- an oligarchy of sorts where the elite made the decisions and serfdom had no choice but acquiesce. Sensing the need to abrogate their dominion, the government formulated policies in order to create an environment conducive to the entry of new players. Thus, in October 1990, the National Telecommunications Development Plan 1991-2010 (NTDP) was formulated and came into being. Designed by the Department of Transportation and Communications (DOTC), the NTDP provides for the framework of government policies, objectives and strategies that will guide the industry's development for the next 20 years. As expected, with it came the increase in the demand for telecommunications services, especially in the area of local exchange carrier service (LECS).^[1]

Concomitantly, the DOTC issued guidelines for the rationalization of local exchange telecommunications service. In particular, the DOTC issued on September 30, 1991, Department Circular No. 91-260, with the purpose of minimizing or eliminating situations wherein multiple operators provide local exchange service in a given area. Pursuant thereto, the National Telecommunications Commission (NTC) was tasked to define the boundaries of local exchange areas and authorize only one franchised local exchange carrier to provide local exchange service within such areas.

Thereafter, on July 12, 1993, then President Fidel V. Ramos issued Executive Order No. 109 entitled Local Exchange Carrier Service. Section 2 thereof provides that all existing International Gateway Facility (IGF) operators^[2] are required to provide local exchange carrier services in unserved and underserved areas, including Metro Manila, thereby promoting universal access to basic telecommunications service.

The NTC promulgated Memorandum Circular No. 11-9-93 on September 17, 1993 implementing the objectives of E.O. No. 109.^[3] Section 3 of the Circular mandates existing IGF operators to file a petition for the issuance of Certificate of Public Convenience and Necessity (CPCN) to install, operate and maintain local exchange carrier services within two years from effectivity thereof. Section 4 further requires IGF operators to provide a minimum of 300 local exchange lines per one international switch termination and a minimum of 300,000 local exchange lines

within three years from grant of authority.

To cap the government's efforts, Republic Act No. 7925, otherwise known as the Public Telecommunications Policy Act of the Philippines, was enacted on March 23, 1995. With regard to local exchange service, Section 10 thereof mandates an international carrier to comply with its obligation to provide local exchange service in unserved or underserved areas within three years from the grant of authority as required by existing regulations. On September 25, 1995, the NTC issued the Implementing Rules and Regulations for R.A. No. 7925 per its NTC MC No. 8-9-95.

Taking advantage of the opportunities brought about by the passage of these laws, several IGF operators applied for CPCN to install, operate and maintain local exchange carrier services in certain areas. Respondent International Communication Corporation, now known as Bayan Telecommunications Corporation or Bayantel,^[4] applied for and was given by the NTC a Provisional Authority (PA)^[5] on March 3, 1995, to install, operate and provide local exchange service in Quezon City, Malabon and Valenzuela, Metro Manila, and the entire Bicol region. Meanwhile, petitioner Telecommunications Technologies Philippines, Inc. (TTPI), as an affiliate of petitioner Eastern Telecommunications Philippines, Inc. (ETPI), was granted by the NTC a PA on September 25, 1996, to install, operate and maintain a local exchange service in the Provinces of Batanes, Cagayan Valley, Isabela, Kalinga-Apayao, Nueva Vizcaya, Ifugao, Quirino, the cities of Manila and Caloocan, and the Municipality of Navotas, Metro Manila.

It appears, however, that before TTPI was able to fully accomplish its rollout obligation, ICC applied for and was given a PA by the NTC on November 10, 1997, to install, operate and maintain a local exchange service in Manila and Navotas,^[6] two areas which were already covered by TTPI under its PA dated September 25, 1996.

Aggrieved, petitioners filed a petition for review with the Court of Appeals with application for a temporary restraining order and a writ of preliminary injunction, docketed as CA-G.R. SP No. 46047, arguing that the NTC committed grave abuse of discretion in granting a provisional authority to respondent ICC to operate in areas already assigned to TTPI.

On April 30, 1998, the Court of Appeals dismissed^[7] the petition for review on the ground that the NTC did not commit any grave abuse of discretion in granting the PA to TTPI. It sustained the NTC's finding that ICC is "legally and financially competent and its network plan technically feasible." The Court of Appeals also ruled that there was no violation of the equal protection clause because the PA granted to ICC and TTPI were given under different situations and there is no point of comparison between the two.^[8]

Hence, the present petition for review on *certiorari*, raising the following issues:

I

Whether or not the Honorable Court of Appeals committed a serious error of law in upholding the Order of the NTC granting a PA to Respondent to operate LEC services in Manila and Navotas which are areas already

assigned to petitioner TTPI under a prior and subsisting PA.

II

Whether or not Petitioner is entitled to a Writ of Preliminary Injunction to restrain Respondent from installing LEC services in the areas granted to it by the Order under review.^[9]

In support thereof, petitioners posit the following arguments:

1. The assignment to ICC of areas already allocated to TTPI violates the Service Area Scheme (SAS), which is the guidepost of the laws and issuances governing local exchange service;
2. ICC did not make any showing that an existing operator, TTPI in this case, failed to comply with the service performance and technical standards prescribed by the NTC, and that the area is underserved, as required under Section 23 of MC No. 11-9-93;
3. The facts and figures cited by the NTC, *i.e.*, ICC's alleged remarkable performance in fulfilling its rollout obligation and the growth rate in the installation of telephone lines in Manila and Navotas, do not justify the grant of the PA in favor of ICC, nor are they supported by the evidence on record as these were not presented during the proceedings before the NTC;
4. ICC did not comply with the requirement of "prior consultation" with the NTC before it filed its application, in violation of Sections 3 and 3.1 of MC 11-9-93;
5. ICC did not comply with Section 27 of MC 11-9-93 requiring that an escrow deposit be made equivalent to 20% and a performance bond equivalent to 10% of the investment required for the first two years of the project;
6. ICC is not financially and technically capable of undertaking the project;
7. The grant of a PA in favor of ICC to operate in areas covered by TTPI will render it difficult for the latter to cross-subsidize its operations in less profitable areas covered by it and will threaten its viability to continue as a local exchange operator.^[10]

After a review of the records of this case, the Court finds no grave abuse of discretion committed by the Court of Appeals in sustaining the NTC's grant of provisional authority to ICC.

The power of the NTC to grant a provisional authority has long been settled. As the regulatory agency of the national government with jurisdiction over all telecommunications entities, it is clothed with authority and given ample discretion to grant a provisional permit or authority.^[11] It also has the authority to issue Certificates of Public Convenience and Necessity (CPCN) for the installation,

operation, and maintenance of communications facilities and services, radio communications systems, telephone and telegraph systems, including the authority to determine the areas of operations of applicants for telecommunications services. [12] In this regard, the NTC is clothed with sufficient discretion to act on matters solely within its competence. [13]

In granting ICC the PA to operate a local exchange carrier service in the Manila and Navotas areas, the NTC took into consideration ICC's financial and technical resources and found them to be adequate. The NTC also noted ICC's performance in complying with its rollout obligations under the previous PA granted to it, thus:

With the proven track record of herein applicant as one of the pacesetters in carrying out its landlines commitment in its assigned areas, applicant can best respond to public demand for faster installation of telephone lines in Manila and Navotas.

The grant of this application is, therefore, a fitting recognition that should be accorded to any deserving applicant, such as herein applicant ICC whose remarkable performance in terms of public service as mandated by Executive Order 109 and Republic Act No. 7925 has persuaded this Commission to affix the stamp of its approval. [14]

The Court will not interfere with these findings of the NTC, as these are matters that are addressed to its sound discretion, being the government agency entrusted with the regulation of activities coming under its special and technical forte. [15] Moreover, the exercise of administrative discretion is a policy decision and a matter that can best be discharged by the government agency concerned, and not by the courts. [16]

Petitioner insists compliance with the service area scheme (SAS) mandated by DOTC Dept. Circular No. 91-260, to wit:

1. The National Telecommunications Commission (NTC) shall define the boundaries of local exchange areas, and shall henceforth authorize only one franchised Local Exchange Carrier (LEC) to provide LEC service within such areas.

The Court is not persuaded. Said department circular was issued by the DOTC in 1991, before the advent of E.O. No. 109 and R.A. No. 7925. When E.O. No. 109 was promulgated in 1993, and R.A. No. 7925 enacted in 1995, the service area scheme was noticeably omitted therefrom. Instead, E.O. No. 109 and R.A. No. 7925 adopted a policy of healthy competition among the local exchange carrier service providers.

The need to formulate new policies is dictated by evolving goals and demands in telecommunications services. Thus, E.O. No. 109 acknowledges that there is a "need to promulgate new policy directives to meet the targets of Government through the National Telecommunications Development Plan (NTDP) of the Department of Transportation and Communications (DOTC), specifically: (1) to ensure the orderly development of the telecommunications sector through the provision of service to all areas of the country; (2) to satisfy the unserved demand for telephones; and (3) to provide healthy competition among authorized service

providers.” Likewise, one of the national policies and objectives of R.A. No. 7925 is to foster the improvement and expansion of telecommunications services in the country through a healthy competitive environment, in which telecommunications carriers are free to make business decisions and to interact with one another in providing telecommunications services, with the end in view of encouraging their financial viability while maintaining affordable rates.^[17]

Recently, in *Pilipino Telephone Corporation vs. NTC*,^[18] the Court had occasion to rule on a case akin to the present dispute, involving the same respondent ICC, and the Pilipino Telephone Corporation (Piltel). In the *Piltel* case, ICC applied for a provisional authority to operate a local exchange service in areas already covered by Piltel, which includes Misamis Occidental, Zamboanga del Sur, Davao del Sur, South Cotabato and Sarangani. Piltel opposed ICC’s application but the NTC denied it, and granted ICC’s application. The Court of Appeals dismissed Piltel’s petition for review, and on *certiorari* before this Court, we affirmed the dismissal. The Court found that the NTC did not commit any grave abuse of discretion when it granted the ICC a provisional authority to operate in areas covered by Piltel. We held:

We will not disturb the factual findings of the NTC on the technical and financial capability of the ICC to undertake the proposed project. We generally accord great weight and even finality to factual findings of administrative bodies such as the NTC, if substantial evidence supports the findings as in this case. The exception to this rule is when the administrative agency arbitrarily disregarded evidence before it or misapprehended evidence to such an extent as to compel a contrary conclusion had it properly appreciated the evidence. PILTEL gravely failed to show that this exception applies to the instant case. Moreover, the exercise of administrative discretion, such as the issuance of a PA, is a policy decision and a matter that the NTC can best discharge, not the courts.

PILTEL contends that the NTC violated Section 23 of NTC Memorandum Circular No. 11-9-93, otherwise known as the “Implementing Guidelines on the Provisions of EO 109” which states:

Section 23. No other company or entity shall be authorized to provide local exchange service in areas where the **LECs** comply with the relevant provisions of MTC MC No. 10-17-90 and NTC MC No. 10-16-90 and that the local exchange service area is not underserved. (Emphasis supplied)

Section 23 of EO 109 does not categorically state that the issuance of a PA is exclusive to any telecommunications company. Neither Congress nor the NTC can grant an exclusive “franchise, certificate, or any other form of authorization” to operate a public utility. In ***Republic v. Express Telecommunications Co.***, the Court held that “the Constitution is quite emphatic that the operation of a public utility shall not be exclusive.” Section 11, Article XII of the Constitution provides:

Sec. 11. 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 under the laws of the Philippines at