

FIRST DIVISION

[G.R. No. 147096, January 15, 2002]

**REPUBLIC OF THE PHILIPPINES, REPRESENTED BY NATIONAL
TELECOMMUNICATIONS COMMISSION, PETITIONER, VS.
EXPRESS TELECOMMUNICATION CO., INC. AND BAYAN
TELECOMMUNICATIONS CO., INC., RESPONDENTS.**

[G.R. No. 147210. January 15, 2002]

**BAYAN TELECOMMUNICATIONS (BAYANTEL), INC., PETITIONER,
VS. EXPRESS TELECOMMUNICATION CO., INC. (EXTELCOM),
RESPONDENT.**

D E C I S I O N

YNARES-SANTIAGO, J.:

On December 29, 1992, International Communications Corporation (now Bayan Telecommunications, Inc. or Bayantel) filed an application with the National Telecommunications Commission (NTC) for a Certificate of Public Convenience or Necessity (CPCN) to install, operate and maintain a digital Cellular Mobile Telephone System/Service (CMTS) with prayer for a Provisional Authority (PA). The application was docketed as NTC Case No. 92-486.^[1]

Shortly thereafter, or on January 22, 1993, the NTC issued Memorandum Circular No. 4-1-93 directing all interested applicants for nationwide or regional CMTS to file their respective applications before the Commission on or before February 15, 1993, and deferring the acceptance of any application filed after said date until further orders.^[2]

On May 6, 1993, and prior to the issuance of any notice of hearing by the NTC with respect to Bayantel's original application, Bayantel filed an urgent *ex-parte* motion to admit an amended application.^[3] On May 17, 1993, the notice of hearing issued by the NTC with respect to this amended application was published in the Manila Chronicle. Copies of the application as well as the notice of hearing were mailed to all affected parties. Subsequently, hearings were conducted on the amended application. But before Bayantel could complete the presentation of its evidence, the NTC issued an Order dated December 19, 1993 stating:

In view of the recent grant of two (2) separate Provisional Authorities in favor of ISLACOM and GMCR, Inc., which resulted in the closing out of all available frequencies for the service being applied for by herein applicant, and in order that this case may not remain pending for an indefinite period of time, AS PRAYED FOR, let this case be, as it is, hereby ordered ARCHIVED without prejudice to its reinstatement if and when the requisite frequency becomes available.

SO ORDERED.^[4]

On June 18, 1998, the NTC issued Memorandum Circular No. 5-6-98 re-allocating five (5) megahertz (MHz) of the radio frequency spectrum for the expansion of CMTS networks. The re-allocated 5 MHz were taken from the following bands: 1730-1732.5 / 1825-1827.5 MHz and 1732.5-1735 / 1827.5-1830 MHz.^[5]

Likewise, on March 23, 1999, Memorandum Circular No. 3-3-99 was issued by the NTC re-allocating an additional five (5) MHz frequencies for CMTS service, namely: 1735-1737.5 / 1830-1832.5 MHz; 1737.5-1740 / 1832.5-1835 MHz; 1740-1742.5 / 1835-1837.5 MHz; and 1742.5-1745 / 1837.5-1840 MHz.^[6]

On May 17, 1999, Bayantel filed an Ex-Parte Motion to Revive Case,^[7] citing the availability of new frequency bands for CMTS operators, as provided for under Memorandum Circular No. 3-3-99.

On February 1, 2000, the NTC granted BayanTel's motion to revive the latter's application and set the case for hearings on February 9, 10, 15, 17 and 22, 2000.^[8] The NTC noted that the application was ordered archived without prejudice to its reinstatement if and when the requisite frequency shall become available.

Respondent Express Telecommunication Co., Inc. (Extelcom) filed in NTC Case No. 92-486 an Opposition (With Motion to Dismiss) praying for the dismissal of Bayantel's application.^[9] Extelcom argued that Bayantel's motion sought the revival of an archived application filed almost eight (8) years ago. Thus, the documentary evidence and the allegations of respondent Bayantel in this application are all outdated and should no longer be used as basis of the necessity for the proposed CMTS service. Moreover, Extelcom alleged that there was no public need for the service applied for by Bayantel as the present five CMTS operators --- Extelcom, Globe Telecom, Inc., Smart Communication, Inc., Pilipino Telephone Corporation, and Isla Communication Corporation, Inc. --- more than adequately addressed the market demand, and all are in the process of enhancing and expanding their respective networks based on recent technological developments.

Extelcom likewise contended that there were no available radio frequencies that could accommodate a new CMTS operator as the frequency bands allocated in NTC Memorandum Circular No. 3-3-99 were intended for and had in fact been applied for by the existing CMTS operators. The NTC, in its Memorandum Circular No. 4-1-93, declared it its policy to defer the acceptance of any application for CMTS. All the frequency bands allocated for CMTS use under the NTC's Memorandum Circular No. 5-11-88 and Memorandum Circular No. 2-12-92 had already been allocated to the existing CMTS operators. Finally, Extelcom pointed out that Bayantel is its substantial stockholder to the extent of about 46% of its outstanding capital stock, and Bayantel's application undermines the very operations of Extelcom.

On March 13, 2000, Bayantel filed a Consolidated Reply/Comment,^[10] stating that the opposition was actually a motion seeking a reconsideration of the NTC Order reviving the instant application, and thus cannot dwell on the material allegations or the merits of the case. Furthermore, Extelcom cannot claim that frequencies were not available inasmuch as the allocation and assignment thereof rest solely on the

discretion of the NTC.

In the meantime, the NTC issued on March 9, 2000 Memorandum Circular No. 9-3-2000, re-allocating the following radio frequency bands for assignment to existing CMTS operators and to public telecommunication entities which shall be authorized to install, operate and maintain CMTS networks, namely: 1745-1750MHz / 1840-1845MHz; 1750-1775MHz / 1845-1850MHz; 1765-1770MHz / 1860-1865MHz; and 1770-1775MHz / 1865-1870MHz.^[11]

On May 3, 2000, the NTC issued an Order granting in favor of Bayantel a provisional authority to operate CMTS service.^[12] The Order stated in pertinent part:

On the issue of legal capacity on the part of Bayantel, this Commission has already taken notice of the change in name of International Communications Corporation to Bayan Telecommunications, Inc. Thus, in the Decision entered in NTC Case No. 93-284/94-200 dated 19 July 1999, it was recognized that Bayan Telecommunications, Inc., was formerly named International Communications Corp. Bayantel and ICC Telecoms, Inc. are one and the same entity, and it necessarily follows that what legal capacity ICC Telecoms has or has acquired is also the legal capacity that Bayantel possesses.

On the allegation that the Commission has committed an error in allowing the revival of the instant application, it appears that the Order dated 14 December 1993 archiving the same was anchored on the non-availability of frequencies for CMTS. In the same Order, it was expressly stated that the archival hereof, shall be without prejudice to its reinstatement "if and when the requisite frequency becomes available." Inherent in the said Order is the prerogative of the Commission in reviving the same, subject to prevailing conditions. The Order of 1 February 2001, cited the availability of frequencies for CMTS, and based thereon, the Commission, exercising its prerogative, revived and reinstated the instant application. The fact that the motion for revival hereof was made ex-parte by the applicant is of no moment, so long as the oppositors are given the opportunity to be later heard and present the merits of their respective oppositions in the proceedings.

On the allegation that the instant application is already obsolete and overtaken by developments, the issue is whether applicant has the legal, financial and technical capacity to undertake the proposed project. The determination of such capacity lies solely within the discretion of the Commission, through its applicable rules and regulations. At any rate, the oppositors are not precluded from showing evidence disputing such capacity in the proceedings at hand. On the alleged non-availability of frequencies for the proposed service in view of the pending applications for the same, the Commission takes note that it has issued Memorandum Circular 9-3-2000, allocating additional frequencies for CMTS. The eligibility of existing operators who applied for additional frequencies shall be treated and resolved in their respective applications, and are not in issue in the case at hand.

Accordingly, the Motions for Reconsideration filed by SMARTCOM and

GLOBE TELECOMS/ISLACOM and the Motion to Dismiss filed by EXTELCOM are hereby DENIED for lack of merit.^[13]

The grant of the provisional authority was anchored on the following findings:

COMMENTS:

1. Due to the operational mergers between Smart Communications, Inc. and Pilipino Telephone Corporation (Piltel) and between Globe Telecom, Inc. (Globe) and Isla Communications, Inc. (Islacom), free and effective competition in the CMTS market is threatened. The fifth operator, Extelcom, cannot provide good competition in as much as it provides service using the analog AMPS. The GSM system dominates the market.
2. There are at present two applicants for the assignment of the frequencies in the 1.7 Ghz and 1.8 Ghz allocated to CMTS, namely Globe and Extelcom. Based on the number of subscribers Extelcom has, there appears to be no congestion in its network - a condition that is necessary for an applicant to be assigned additional frequencies. Globe has yet to prove that there is congestion in its network considering its operational merger with Islacom.
3. Based on the reports submitted to the Commission, 48% of the total number of cities and municipalities are still without telephone service despite the more than 3 million installed lines waiting to be subscribed.

CONCLUSIONS:

1. To ensure effective competition in the CMTS market considering the operational merger of some of the CMTS operators, new CMTS operators must be allowed to provide the service.
2. The re-allocated frequencies for CMTS of 3 blocks of 5 Mhz x 2 is sufficient for the number of applicants should the applicants be qualified.
3. There is a need to provide service to some or all of the remaining cities and municipalities without telephone service.
4. The submitted documents are sufficient to determine compliance to the technical requirements. The applicant can be directed to submit details such as channeling plans, exact locations of cell sites, etc. as the project implementation progresses, actual area coverage ascertained and traffic data are made available.

Applicant appears to be technically qualified to undertake the proposed project and offer the proposed service.

IN VIEW OF THE FOREGOING and considering that there is prima facie evidence to show that Applicant is legally, technically and financially qualified and that the proposed service is technically feasible and economically viable, in the interest of public service, and in order to facilitate the development of telecommunications services in all areas of the country, as well as to ensure healthy competition among authorized CMTS providers, let a **PROVISIONAL AUTHORITY (P.A.)** be issued to Applicant **BAYAN TELECOMMUNICATIONS, INC.** authorizing it to construct, install, operate and maintain a **Nationwide Cellular Mobile Telephone Systems (CMTS)**, subject to the following terms and conditions without prejudice to a final decision after completion of the hearing which shall be called within thirty (30) days from grant of authority, in accordance with Section 3, Rule 15, Part IV of the Commission's Rules of Practice and Procedure. xxx.^[14]

Extelcom filed with the Court of Appeals a petition for certiorari and prohibition,^[15] docketed as CA-G.R. SP No. 58893, seeking the annulment of the Order reviving the application of Bayantel, the Order granting Bayantel a provisional authority to construct, install, operate and maintain a nationwide CMTS, and Memorandum Circular No. 9-3-2000 allocating frequency bands to new public telecommunication entities which are authorized to install, operate and maintain CMTS.

On September 13, 2000, the Court of Appeals rendered the assailed Decision,^[16] the dispositive portion of which reads:

WHEREFORE, the writs of certiorari and prohibition prayed for are **GRANTED**. The Orders of public respondent dated February 1, 2000 and May 3, 2000 in NTC Case No. 92-486 are hereby **ANNULLED and SET ASIDE** and the Amended Application of respondent Bayantel is **DISMISSED** without prejudice to the filing of a new CMTS application. The writ of preliminary injunction issued under our Resolution dated August 15, 2000, restraining and enjoining the respondents from enforcing the Orders dated February 1, 2000 and May 3, 2000 in the said NTC case is hereby made permanent. The Motion for Reconsideration of respondent Bayantel dated August 28, 2000 is denied for lack of merit.

SO ORDERED.^[17]

Bayantel filed a motion for reconsideration of the above decision.^[18] The NTC, represented by the Office of the Solicitor General (OSG), also filed its own motion for reconsideration.^[19] On the other hand, Extelcom filed a Motion for Partial Reconsideration, praying that NTC Memorandum Circular No. 9-3-2000 be also declared null and void.^[20]

On February 9, 2001, the Court of Appeals issued the assailed Resolution denying all of the motions for reconsideration of the parties for lack of merit.^[21]