Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

NEXT MOBILE, INC., **G.R. No. 188655**
Petitioner,

-versus-

NATIONAL TELECOMMUNICATIONS COMMISSION,
Respondent.

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NEXT MOBILE, INC., **G.R. No. 189221**
Petitioner,

-versus-

NATIONAL TELECOMMUNICATIONS COMMISSION,
Respondent,

EXPRESS TELECOMMUNICATIONS CO. INC.,
Respondent-in-intervention.

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NATIONAL TELECOMMUNICATIONS COMMISSION, **G.R. No. 191656**

Petitioner,

EXPRESS TELECOMMUNICATIONS CO. INC.,
Petitioner-in-intervention.

-versus-

BAYAN TELECOMMUNICATIONS, INC.,
Respondent.

x----------x x----------x

MULTI-MEDIA TELEPHONY, INC.,
Petitioner,

-versus-

PACIFIC WIRELESS, INC., CONNECTIVITY UNLIMITED RESOURCE ENTERPRISE, INC., AZ COMMUNICATIONS, INC., NEXT MOBILE INC., SMART COMMUNICATIONS, INC., GLOBE TELECOMMUNICATIONS, INC., BAYAN TELECOMMUNICATIONS, INC., DIGITEL MOBILE PHILIPPINES, INC., CAPITOL WIRELESS, INC., AND NATIONAL TELECOMMUNICATIONS COMMISSION,
Respondents,

EXPRESS TELECOMMUNICATIONS CO. INC.,
Oppositor-in-Intervention.

G.R. No. 205603

Present:

LEONEN, *S.A.J,*
INTING,*
LOPEZ, M.,
LOPEZ, J., and
KHO, JR., *JJ.*

Promulgated:
NOV 13 2023

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DECISION

LEONEN, *J.*:

Republic Act No. 7925, or the Public Telecommunications Policy Act of the Philippines, declares as part of its national policy, that radio frequency spectrum as "a scarce public resource" shall only be allocated "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."[1] The National Telecommunications Commission, as the primary administrator of this

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* Designated additional Member per Raffle dated May 10, 2023, on official leave.

1 Republic Act No. 7925 (1995), sec. 4(c).

public resource, has the full discretion to assess and evaluate applicants to these frequency spectrums. In view of its expertise in technical matters, and institutional experience, its factual findings are entitled to great weight before this Court and will not be reversed "save upon a very clear showing of serious violation of law or of fraud, personal malice or wanton oppression."[2]

The Petitions for Review before this Court originate from the Consolidated Orders of the National Telecommunications Commission in the application for the allocation and assignment of the five available 3G Radio Frequency Bands. The parties in G.R. No. 188655, G.R. No. 189221, and G.R. No. 205603 assail the finding of their disqualification while in G.R. No. 191656, the National Telecommunications Commission assails the Court of Appeals' reversal of its findings.

Under the Public Telecommunications Policy Act of the Philippines,[3] the National Telecommunications Commission is an administrative agency primarily tasked with "[ensuring] quality, safety, reliability, security, compatibility and inter-operability of telecommunications facilities and services in conformity with standards and specifications set by international radio and telecommunications organizations to which the Philippines is a signatory."[4] Pursuant to this mandate, it began exploring the use of Third Generation Wireless Communications Technology (otherwise referred to as "3G") for voice and data services in as early as 2002.[5]

The Introduction of 3G services was seen as an important development in wireless communications, as it "support[ed] higher data transmission rates . . . increased capacity . . . [and introduced] new media services [such as] TV streaming, multimedia, videoconferencing, web browsing, email, paging, fax, and navigational maps . . . as well as high-speed bandwidths (high data transfer rates) to handheld devices."[6]

On September 24, 2004, the National Telecommunications Commission issued the first draft Memorandum Circular on the award of 3G frequency to qualified Public Telecommunications Entities. It posted the draft on its website, made copies available to interested parties, and conducted a public hearing on November 26, 2004. After, it released the second draft Memorandum Circular on June 10, 2005, and a third draft on June 14, 2005. Each iteration of the drafts followed the same procedure of public consultations as the first draft.[7]

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2 *Philippine Long Distance Telephone Company v. National Telecommunications Commission*, 311 Phil. 548, 566 (1995) [Per J. Feliciano, *En Banc*].
3 Republic Act No. 7925 (1995).
4 Republic Act No. 7925 (1995), art. II, sec. 4.
5 *Rollo* (G.R. No. 191656), p. 213.
6 *Id.*
7 *Id.* at 213–214.

On August 23, 2005, the National Telecommunications Commission promulgated Memorandum Circular No. 07-08-2005, or "The Rules and Regulations on the Allocation and Assignment of 3G Radio Frequency Bands."[8] Under the Circular, 3G frequency bands will be re-allocated and made available for assignment to not more than five qualified Public Telecommunications Entities. The applicants would be grouped into three categories: first, existing duly authorized Cellular Mobile Telecommunications System providers; second, existing duly authorized Public Telecommunications Entities without Cellular Mobile Telecommunications System authorization; and third, new Public Telecommunications Entities. Those in the first category were deemed automatically qualified as applicants since they would merely upgrade their existing frequency. Those in the second and third categories were first required to have Cellular Mobile Telecommunications System authorization so they could be considered for further evaluation.[9]

Sometime after, Smart Communications, Inc. (Smart), Globe Telecom, Inc. (Globe), Digitel Mobile Philippines, Inc. (Digitel), and Bayan Telecommunications, Inc. (Bayantel), as existing Cellular Mobile Telecommunications System providers, separately filed their respective applications for the assignment of 3G frequency. Multimedia Telephony, Inc. (MTI), Pacific Wireless, Inc. (Pacific), Connectivity Unlimited Resources Enterprise, Inc. (CURE), Next Mobile, Inc., (Next Mobile) and AZ Communications, Inc. (AZ), as new Public Telecommunications Entities, each filed their applications for a Certificate of Public Convenience and Necessity to install, operate, and maintain 3G services.[10]

During the qualifications process, Pacific and AZ failed to pass the first stage of qualifications while Next Mobile was disqualified for unpaid Supervision and Regulation Fees and Spectrum User Fees.[11]

Thus, there were only six remaining applicants for evaluation: Smart, Globe, Digitel,[12] CURE, Bayantel, and MTI. In its evaluation, the National Telecommunications Commission employed a 10-point system for each criterion under The Rules and Regulations on the Allocation and Assignment of 3G Radio Frequency Bands. Ten points were assigned for track record, 10 points were assigned for roll-out plan, and 10 points were assigned for service rates, for a total score of 30 points.[13]

On December 28, 2005, the National Telecommunications Commission issued a Consolidated Order resolving the applications. It allocated and assigned only four of the five available 3G frequencies to

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8 *Id.* at 239–253.
9 *Rollo* (G.R. No. 191656), pp. 214–215.
10 *Id.* at 215.
11 *Id.* at 216.
12 This telecommunications corporation is more commonly known to the public as "Sun Cellular."
13 *Rollo* (G.R. No. 205603), p. 177.

applicants Smart, Globe, Digitel, and CURE, which had garnered the four highest scores in its evaluation.[14] The scores of each applicant were:[15]

Applicant	Track Record	Roll-out Plan	Service Rates	Total
Smart	10	10	10	30
Globe	10	9	10	29
Digitel	9	9	10	28
CURE	5.5	5	10	20.5
Bayantel	1.5	7	10	18.5
MTI	5.5	3	10	18.5

The dispositive portion of the Consolidated Order, in part, reads:

> Since only four (4) applicants qualified as frequency assignees, the Commission hereby resolves to hold the assignment of the remaining portion of the bandwidth, specifically, 1965-1980 [MHz], in abeyance until after an applicant for the assignment thereof shall have qualified in accordance with the criteria prescribed by the Commission. The reservation of the said bandwidth takes into consideration the principle of technology-neutrality since the said bandwidth and its corresponding pair may be used either to WCDMA network utilizing 10 [MHz] x2, with the remaining 5 [MHz] intended as a guard band.
>
> The assignments of the 3G frequencies to the four (4) qualified applicants shall be subject to the terms and conditions, which shall be embodied in separate orders to be issued forthwith by the Commission.[16]

MTI, AZ, Next Mobile, Pacific, and Bayantel filed their respective motions for reconsideration of this Consolidated Order.[17] During the pendency of the motions, or on January 3, 2006, the National Telecommunications Commission issued a Supplemental Order specifying the terms and conditions required from those providers awarded with 3G frequency.[18]

On August 28, 2008, the National Telecommunications Commission denied all pending motions for reconsideration.[19]

In the interim, Next Mobile filed a Petition for Review[20] with the Court of Appeals, docketed as CA-G.R. SP No. 100937, seeking to review the assessments of the National Telecommunications Commission on its alleged unpaid Supervision and Regulation Fees and Spectrum User Fees for

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14 *Rollo* (G.R. No. 191656), p. 216.
15 *Id.*
16 *Rollo* (G.R. No. 205603), pp. 178–179.
17 *Id.* at 179.
18 *Rollo* (G.R. No. 191656), p. 216.
19 *Rollo* (G.R. No. 205603), p. 179.
20 *Rollo* (G.R. No. 188655), pp. 251–286.

2004 and 2005. Next Mobile argued that the National Telecommunications Commission should not have included the increase in its paid-in capital, resulting in the conversion of its liabilities to creditors into stockholder's equity, in the computation of its alleged unpaid Supervision and Regulation Fees and Spectrum User Fees since no actual payment for the shares were made.[21]

The Court of Appeals, however, denied[22] the Petition and affirmed the assessments. It found that the stock subscriptions as a result of the debt-to-equity conversion scheme involved the payment of money since "[t]o say otherwise would result in an absurdity, for the indebtedness would then be considered as having been wiped out for good and the previous creditors (now subscribers/stockholders) would in effect be left to run after nothing."[23] Thus, it concluded that there was no error on the part of the National Telecommunications Commission to include the increase in its paid-up capital to compute Next Mobile's Supervision and Regulation Fees and Spectrum User Fees for 2004 and 2005.[24]

Next Mobile, whose subsequent Motion for Reconsideration having been denied by the Court of Appeals,[25] filed a Petition for Review on *Certiorari*[26] with this Court, docketed as G.R. No. 188655, to assail anew the National Telecommunications Commission's assessments of its alleged unpaid Supervision and Regulation Fees and Spectrum User Fees for 2004 and 2005.

Next Mobile filed a Petition for *Certiorari*[27] before the Court of Appeals, docketed as CA-G.R. SP No. 106109, to assail the National Telecommunications Commission's December 28, 2005 Consolidated Order, on the ground that it received the Order on the same day it received the letter-assessment of its alleged unpaid Supervision and Regulation Fees and Spectrum User Fees. It argued that it was denied due process since it was disqualified based on an assessment that it had yet to receive or comply with.[28]

In a Resolution,[29] the Court of Appeals dismissed the Petition for

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21 *Id.* at 55–57.

22 *Id.* at 50–62. The February 11, 2009 Decision in CA-G.R. SP No. 100937 was penned by Associate Justice Isaias Dicdican and concurred in by Associate Justices Bienvenido L. Reyes (Chair, now a retired Associate Justice of this Court) and Marlene Gonzales-Sison of the Eighth Division, Court of Appeals, Manila.

23 *Id.* at 60.

24 *Id.* at 60–61.

25 *Id.* at 65–66. The July 2, 2009 Resolution in CA-G.R. SP No. 100937 was penned by Associate Justice Isaias Dicdican and concurred in by Associate Justices Bienvenido L. Reyes (Chair, now a retired Associate Justice of this Court) and Marlene Gonzales-Sison of the Former Eighth Division, Court of Appeals, Manila.

26 *Id.* at 10–47.

27 *Rollo* (G.R. No. 189221), pp. 194–204.

28 *Id.*

29 *Id.* at 43–44. The February 12, 2009 Resolution was penned by Associate Justice Rosmari D.

being an inappropriate remedy as Next Mobile should have filed a petition for review under Rule 43 of the Rules of Court.

Next Mobile filed a Motion for Reconsideration, arguing that the December 28, 2005 Consolidated Order was interlocutory, and was, thus, a proper subject for a petition for *certiorari*. In a Resolution,[30] the Court of Appeals denied the Motion for Reconsideration, finding that the December 28, 2005 Consolidated Order was a final order of the National Telecommunications Commission since it resolved all pending applications.[31]

Aggrieved, Next Mobile filed a Petition for Review on *Certiorari*[32] with this Court, assailing the Court of Appeals February 12, 2009 and August 14, 2009 Resolutions. This Petition was docketed as G.R. No. 189221.

Sometime in 2010, Express Telecommunications Co. Inc. (Extelcom) filed a Motion for Leave to Intervene, stating that it has an interest as one of the qualified applicants in the subject matter of the litigation, i.e., the last assignable 3G frequency. This Court granted the intervention in a Resolution[33] dated April 28, 2010 and noted its Petition-in-Intervention.

Bayantel, for its part, filed a Petition for Review[34] with the Court of Appeals, docketed as CA-G.R. SP No. 105373, questioning the December 28, 2005 Consolidated Order and the January 3, 2006 Supplemental Order on the ground that the National Telecommunications Commission arbitrarily adopted the 30-point rating system with a 20-point threshold to rank the qualified applicants. According to Bayantel, this system was not provided for in The Rules and Regulations on the Allocation and Assignment of 3G Radio Frequency Bands and that no notice was given to applicants prior to the application of the system.[35]

The Court of Appeals rendered a Decision[36] finding that the National Telecommunications Commission, in adopting the 30-point rating system, was "authorized [as an administrative body] to 'fill in' the details to

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Carandang (Chair, now a retired Associate Justice of this Court) and concurred in by Associate Justices Teresita Dy-Liacco Flores and Romeo F. Barza of the Sixteenth Division, Court of Appeals, Manila.

30 *Id.* at 46–47. The August 14, 2009 Resolution was penned by Associate Justice Rosmari D. Carandang (Chair, now a retired Associate Justice of this Court) and concurred in by Associate Ricardo R. Rosario and Romeo F. Barza of the Special Former Sixteenth Division, Court of Appeals, Manila.

31 *Id.* at 47.

32 *Id.* at 10–41.

33 *Rollo* (G.R. No. 191656), pp. 1488–1489.

34 *Id.* at 1295–1342.

35 *Id.* at 217–218.

36 *Id.* at 211–238. The August 12, 2009 Decision in CA-G.R. SP No. 105373 was penned by Associate Justice Normandie B. Pizzaro and concurred in by Associate Justices Martin S. Villarama, Jr. (Chair, now a retired Associate Justice of this Court) and Vicente S.E. Veloso of the Special Third Division.

implement the broad policies of a statute."[37] It found that the Commission did not act arbitrarily since "it is but logical . . .to gauge the track record of such [Cellular Mobile Communications System] providers on the basis of their respective [Cellular Mobile Communications System] network roll outs."[38] It likewise held that Bayantel was not deprived of due process or the right to equal protection since it actively participated in the consultations leading to the issuance of the Rules.[39]

On Motion for Reconsideration, however, the Court of Appeals rendered an Amended Decision[40] which found that since the 30-point rating system was a rule that affected third persons, it was subject to the publication requirements stated in *Tañada v. Hon. Tuvera*.[41] It found that the National Telecommunications Commission was "not in a jurisdictional position to disqualify any of the qualified applicants . . . [but] was obliged to only evaluate them in order that the best qualified applicants be assigned any of the five (5) 3G radio frequency slots."[42]

The Court of Appeals then proceeded to rule that based on the criteria of the 30-point system in the December 28, 2005 Consolidated Order, CURE would be disqualified as a new entity in the telecommunications system. It found that Bayantel deserved at least 6.5 points for track record, 8 points for its roll-out plan, and 10 points for its schedule of rate, or a total of 24.5 points, which would have qualified it for the fifth 3G frequency slot.[43] The dispositive portion of the Amended Decision reads:

> WHEREFORE, the August 12, 2009 Decision of this Court is hereby VACATED. The petition for review filed by Bayan Telecommunications, Inc. is hereby GRANTED, and the assailed Consolidated Order dated December 28, 2005 and Supplemental Order dated January 5, 2006 of the National Telecommunications Commission are hereby REVERSED and SET ASIDE insofar as petitioner's application for the 3G radio frequency assignment is concerned.
>
> Let a permanent injunction be issued against the National Telecommunications [Commission] perpetually enjoining it from resolving any application for and from awarding the remaining one (1) 3G frequency bandwidth as provided in MC No. 07-08-2005.
>
> SO ORDERED.[44]

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37 *Id.* at 233.
38 *Id.* at 234.
39 *Id.* at 235.
40 *Id.* at 159–186. The March 22, 2010 Amended Decision in CA-G.R. SP No. 105373 was penned by Associate Justice Stephen C. Cruz and concurred in by Associate Justices Vicente S.E. Veloso and Florito S. Macalino of the Division of Five. Associate Justice Normandie B. Pizzaro submitted a concurring and dissenting opinion while Associate Ricardo R. Rosario dissented, Court of Appeals, Manila.
41 230 Phil. 528 (1986) [Per J. Cruz, *En Banc*].
42 *Rollo* (G.R. No. 191656), p. 179.
43 *Id.* at pp. 180–183.
44 *Id.* at p. 185.

Copies of the Amended Decision were served on Pacific Wireless, AZ, Next Mobile, and Capitol Wireless, despite them not being a party to Bayantel's Petition for Review.[45]

As a result of the Court of Appeals' March 22, 2010 Amended Decision, the National Telecommunications Commission filed with this Court a Petition for Review on *Certiorari*, docketed as G.R. No. 191656.[46] On April 22, 2010, the Office of the Solicitor General filed an urgent motion for the issuance of a *status quo ante* order praying that this Court restore the last actual, peaceful, and uncontested status prior to the promulgation of the Amended Decision and issuance by the Court of Appeals of the writ of permanent injunction.[47] This Court granted the urgent motion on February 14, 2011.[48]

MTI, meanwhile, filed a Petition for Review with the Court of Appeals, docketed as CA-G.R. SP No. 105250, assailing the National Telecommunications Commission's December 28, 2005 Consolidated Order and January 3, 2006 Supplemental Order. In a Decision dated October 27, 2008, the Court of Appeals dismissed the Petition for MTI's failure to implead the other applicants for the 3G frequency.[49]

MTI moved for reconsideration and attached an Amended Petition impleading the other applicants. This motion was granted, and the Amended Petition was admitted by the Court of Appeals in a Resolution dated January 6, 2009.[50]

In its Amended Petition, MTI argued that the sudden imposition of a 20-point threshold violated its right to due process and protection against retroactivity and that it and Bayantel should have been ranked fourth and fifth, respectively, since CURE was disqualified as its franchise had been acquired by Smart.[51]

In a Decision,[52] the Court of Appeals dismissed the Petition. It held that the 20-point threshold, otherwise known as the two-thirds majority rule, did not go beyond the criteria of the published Rules, and thus, need not be, in itself, published.[53] It held that the threshold was necessary since without it, the National Telecommunications Commission would have to award a 3G

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45 *Rollo* (G.R. No. 189221), p. 5191.
46 *Rollo* (G.R. No. 191656) pp. 3–156.
47 *Id.* at 1468–1475.
48 *Id.* at 1737.
49 *Rollo* (G.R. No. 189221), pp. 5191–5192.
50 *Id.* at 5192.
51 *Rollo* (G.R. No. 205603), p. 188.
52 *Id.* at 173–195. The June 13, 2011 Decision in CA-G.R. SP No. 105250 was penned by Associate Justice Mario L. Guariña III (Chair) and concurred in by Associate Justices Sesinando E. Villon and Amy C. Lazaro-Javier (now an Associate Justice of this Court) of the Former Ninth Division, Court of Appeals, Manila.
53 *Id.* at 192.

frequency to an applicant without any points, as long as it was the fifth to qualify.[54] It likewise found that there was no basis for MTI to have been in fourth place and CURE to have been disqualified, since CURE was able to commit to cover 95% of the provincial capitals and 90% of chartered cities within 48 months while MTI's roll-out plan only promised a 2% coverage in two years with a commitment to meet the minimum required coverage within five years.[55]

MTI sought reconsideration of this Decision but was denied by the Court of Appeals in a Resolution.[56] Thus, it filed a Petition for Review on *Certiorari*[57] with this Court, docketed as G.R. No. 205603.

AZ, for its part, also filed a Petition for Review with the Court of Appeals, docketed as CA-G.R. SP No. 105251, to assail its disqualification. The Petition, however, was dismissed. AZ filed a Petition for Review on *Certiorari* with this Court, docketed as G.R. No. 199915. This Court denied the Petition in an unsigned Resolution dated April 11, 2012. The dispositive portion of the Resolution reads:

> The Court hereby resolves to DENY the petition. The Court of Appeals was correct in upholding the Orders of the National Telecommunications Commission (NTC) which denied the petitioner's application for a certificate of public convenience and necessity, as it did not meet the qualifications established in NTC Memorandum Circular 07-08-2005.[58]

The motion for reconsideration was denied with finality in another unsigned Resolution of this Court dated July 16, 2012. Entry of judgment was issued on September 20, 2012.[59]

This Court consolidated G.R. No. 188655, G.R. No. 189221, G.R. No. 191656, and G.R. No. 205603. The parties were later required to submit their respective memoranda for the resolution of the cases.[60]

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54 *Id.*

55 *Id.* at 194.

56 *Id.* at 199–205. The January 30, 2013 Resolution in CA-G.R. SP No. 105250 was penned by Associate Justice Sesinando E. Villon (Chair) and concurred in by Associate Justices Stephen C. Cruz and Amy C. Lazaro-Javier (now an Associate Justice of this Court) of the Special Former Ninth Division, Court of Appeals, Manila.

57 *Id.* at 12–151.

58 *Rollo* (G.R. No. 189221), p. 5196.

59 *Id.* at 5194–5197.

60 Next Mobile (*Rollo* [G.R. No. 191656], pp. 2399–2457), Bayantel (*Rollo* [G.R. No. 205603], pp. 4872–4996), MTI (*Rollo* [G.R. No. 205603], pp. 5019–5197), AZ (*Rollo* [G.R. No. 205603], pp. 4752–4767), Smart (*Rollo* [G.R. No. 205603], pp. 4774–4797, Extelcom (*Rollo* [G.R. No. 191656], pp. 2227–2386), and the National Telecommunications Commission (*Rollo* [G.R. No. 189221], pp. 5176–5278) filed their respective memoranda. Pacific Wireless manifested that it had no participation in the proceedings and, thus, would not be submitting a memorandum (*Rollo* [G.R. No. 191656], pp. 5698–5699). Digitel and Globe likewise requested that their respective memoranda be dispensed with.

Subsequent events show that Bayantel had undergone corporate rehabilitation in 2003 and that sometime in 2012, Globe acquired Bayantel's debts. In August 2013, the rehabilitation court granted a rehabilitation plan allowing Globe to convert 69% of the total debts to equity to acquire a 56.6% share in Bayantel. Globe and Bayantel later filed a joint application with the National Telecommunications Commission for the approval of the debt-to-equity transaction. The joint application was approved on July 2, 2015.[61] Globe, thus, currently owns a majority stake in Bayantel.

MTI, for its part, now known as ABS-CBN Convergence, Inc., entered into a Network Sharing Agreement with Globe on May 27, 2013, where Globe would provide network resources to MTI's subscribers.[62]

Philippine Long Distance Telephone Company (PLDT), the parent company of Smart, on the other hand, purchased CURE sometime in April 2008.[63] All of CURE's subscribers had been transferred to Smart as of June 30, 2012.[64]

On April 20, 2011, PLDT and Digitel[65] filed with the National Telecommunications Commission an application to transfer 51.55% equity of Digitel to PLDT. On October 26, 2011, the National Telecommunications Commission granted the application on the condition that while Digitel would continue its nationwide "unlimited" type of service, PLDT, through Smart, would divest itself of CURE's 10MHz 3G frequency.[66] Thus, CURE manifested that the National Telecommunications Commission had long been in control of its former frequency since June 2012.[67] PLDT is currently the parent company of Smart and owns a majority stake in Digitel.

According to the National Telecommunications Commission, the following were the assigned and vacant 3G frequencies as of 2017:[68]

BANDS	FREQUENCY RANGE	SERVICES/ TECHNOLOGY	TOTAL ASSIGNABLE CHANNELS/ BANDWIDTH	ASSIGNEES	BANDWIDTH OF ASSIGNMENT	DATE ASSIGNED MONTH-YEAR	STATUS Used or Un-used	SPECTRUM USER FEES (SUF) PAYMENT
2100 MHz	1920-1980 MHz /	3G-WCDMA	55MHz x 2	SMART	15MHz x 2	Jan – 06	Used	Paid
				DIGITEL	10MHz x 2	Jan – 06	Used	Paid

[61] Rappler, *NTC okays Globe takeover of Bayantel*, RAPPLER, July 4, 2015, *available at* https://www.rappler.com/business/industries/172-telecommunications-media/98302-globe-controlling-stake-bayantel (last accessed on September 11, 2023).

[62] *Rollo* (G.R. No. 189221), p. 5867.

[63] GMANews.TV, *PLDT unit buys Ongpin firm with license to operate 3G*, GMA NEWS ONLINE, April 28, 2008, *available at* https://www.gmanetwork.com/news/money/companies/92032/pldt-unit-buys-ongpin-firm-with-license-to-operate-3g/story/ (last accessed on September 11, 2023).

[64] *Rollo* (G.R. No. 189221), p. 6044.

[65] Digitel's mobile network is known to the public as "Sun Cellular."

[66] *Rollo* (G.R. No. 189221), pp. 6042–6044.

[67] *Id.* at 6044.

[68] National Telecommunications Commission, *List of Assigned Returned and Vacant Mobile Access Frequencies*, 2017, *available at* http://ntc.gov.ph/wp-content/uploads/2017/LIST-OF-ASSIGNED-RETURNED-AND-VACANT-MOBILE-ACCESS-FREQUENCIES.pdf (last accessed on September 11, 2023).

	2110-2170 MHz			GLOBE	10MHz x 2	Jan – 06	Used	Paid
				Vacant	10MHz x 2		Returned	
				Vacant	10MHz x 2		Under litigation before the Supreme Court.	

On September 20, 2018, the National Telecommunications Commission issued Memorandum Circular No. 09-09-2018,[69] or the Rules and Regulations on the Selection Process for a New Major Player in the Philippine Telecommunications Market. Section 3.1 of the Circular provides that the vacant returned 3G frequency, previously assigned to CURE, would be assigned to the participant selected as the New Major Player. Section 3.2 further provides that the remaining vacant 3G frequency will also be assigned to the New Major Player "[i]n the event that there is a final and executory decision or resolution by the Courts in favor of the government,"[70] referring to the present cases before this Court.

As of November 19, 2018, the National Telecommunications Commission named the consortium of Udenna Corporation, Chelsea Holdings, and China Telecom, known as Mislatel and later Dito Telecom, as the New Major Player.[71]

For clarity, only the arguments of the parties that submitted their memorandum, namely Next Mobile, Bayantel, MTI, AZ, Smart, Extelcom, and the National Telecommunications Commission, shall be discussed.

Next Mobile argues that it should not have been disqualified based on an assessment it had not yet received nor had yet been given the opportunity to pay.[72] It asserts that the National Telecommunications Commission should not have included its paid-in-capital and stock issuances from debt-to-equity conversions in the computation of its alleged unpaid Supervision and Regulation Fees since it did not receive these amounts in actual payments and were not part of its capital stock.[73] It contends that had it not been disqualified, it could have garnered 23.5 points and be ranked fourth among the qualified applicants since it was a duly authorized Public Telecommunications Entity with 139 base stations in 13 different locations, a 90% coverage for its proposed rollout, and a schedule of rates beneficial to consumers.[74]

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69 National Telecommunications Commission Memorandum Circular No. 09-09-2018, dated 20 September 2018, *available at* http://ntc.gov.ph/wp-content/uploads/2018/MC/MC-09-09-2018.pdf

70 National Telecommunications Commission Memorandum Circular No. 09-09-2018, dated 20 September 2018, *available at* http://ntc.gov.ph/wp-content/uploads/2018/MC/MC-09-09-2018.pdf

71 GMA News TV, *NTC declares Mislatel as new major player*, GMA News Online, November 19, 2018, *available at* <https://www.gmanetwork.com/news/money/companies/675299/ntc-declares-mislatel-as-new-major-player/story/> (last accessed on September 11, 2023).

72 *Rollo* (G.R. No. 191656), pp. 2410–2414.

73 *Id.* at 2414–2418.

74 *Id.* at 2418–2421.

Next Mobile pointed out that the assailed Consolidated Order was merely interlocutory as no specific frequencies had been assigned yet and that the National Telecommunications Commission itself announced that it would issue separate orders to the qualified applicants while holding in abeyance the fifth slot until an applicant qualifies.[75] It claims that being interlocutory in nature, the Consolidated Order could not have been the subject of any appeal.[76] It argues that even assuming that the Consolidated Order was not interlocutory, appeal would still be unavailable since it is only final to the four qualified applicants, and not to those still in contention for the fifth slot.[77] It further contends that even if appeal were the appropriate remedy, the Court of Appeals should have resolved its petition on the merits, instead of perfunctorily dismissing it.[78]

Next Mobile asserts that that the "winning 3G applicants" need not be impleaded since the award of the fifth slot would not have any adverse impact on those applicants that have already qualified.[79] It argues that Bayantel was not entitled to a frequency allocation since the National Telecommunications Commission had found that it had not qualified, based on its 30-point criteria.[80] It claims that Bayantel should not have qualified as it had been acquired by Globe Telecommunications, which had already been assigned a 3G frequency.[81] It contends that in allocating the final frequency to Bayantel, the Court of Appeals had arrogated unto itself a power solely vested in the National Telecommunications Commission.[82] It further argues that MTI and CURE were also unqualified since MTI has yet to prove that it had the financial capacity to undertake a 3G network rollout while CURE's original rollout plan failed to meet the minimum coverage required and it had no prior experience in installing, maintaining, or operating any telecommunications network.[83] It points out that Extelcom had no legal interest in these Petitions since it did not apply for a 3G frequency and had not participated in any of the proceedings before the National Telecommunications Commission.[84]

MTI argues that the 20-point qualification threshold should be declared void since it was not published nor deposited with the University of the Philippines (UP) Law Center, and since the 2005 Rules clearly provides that the National Telecommunications Commission's only authority is to determine which among the qualified applicants should be awarded a 3G frequency.[85] It asserts that it was among those best qualified to be awarded a frequency since it has shown that it was financially, operationally, and

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75 *Id.* at 2422–2425.
76 *Id.* at 2425–2426.
77 *Id.* at 2428–2430.
78 *Id.* at 2432–2436.
79 *Id.* at 2436–2438.
80 *Id.* at 2439–2442.
81 *Id.* at 2444-2449.
82 *Id.* at 2442–2444.
83 *Id.* at 2449–2451.
84 *Id.* at 2451–2453.
85 *Rollo* (G.R. No. 205603), pp. 5079–5110.

technically qualified.[86] It points out that there was also grave abuse of discretion when the National Telecommunications Commission applied the 30-point system since "at the time of the issuance of the questioned Consolidated Order dated 28 December 2005, petitioner MTI's Network was already of the latest cutting-edge technology and already 3G compliant. Hence, for all intents and purposes, it even had a greater ability and track record to use the 3G frequency bandwidth than the other alleged [']qualified applicants['], including those awarded with a 3G frequency bandwidth."[87]

MTI likewise contends that the "PLDT Group" should have been disqualified since PLDT's capital structure is in violation of the Article XII, Section 11 of the Constitution[88] and that CURE should have been disqualified since it was a mere shell company of Smart Communications applying "only for the sole purpose of illegally earning a quick and handsome profit by 'flipping'/selling the [frequency] to another holder of a 3G frequency bandwidth."[89] It alleges that "respondent SMART's purchase of respondent CURE's 3G frequency bandwidth allowed it to own more than half of all the awarded 3G frequency bandwidths and placed it in a position to establish a monopoly and/or combination in restraint of healthy trade and competition."[90] It maintains that these arguments did not constitute a change in theory since it "has always claimed that the questioned Orders are void insofar as they refused to award a 3G frequency bandwidth to petitioner MTI."[91] MTI, however, agrees that Next Mobile's Petition was correctly dismissed by the Court of Appeals for being the wrong mode of appeal and that it was unqualified for having unpaid Spectrum User Fees and Supervision and Regulation Fees, which violated the 2005 3G Rules.[92]

AZ, for its part, argues that the guidelines in Memorandum Circular No. 07-08-2005 were invalid since it was never deposited with the UP Law Center nor published in a newspaper of general circulation.[93] It contends that the remaining frequency must be granted to the other applicants, and not to the existing grantees, to avoid monopolization of the telecommunications market.[94] It likewise asserts that even assuming that the 30-point criteria was valid, it should have been awarded the final frequency since it garnered an aggregate of 28.5 points since it complied with the minimum paid-up capital of PHP 100 million; it had been granted an authorization to install, operate, and maintain a nationwide data communications network; it had secured a commitment with a 3G equipment vendor, Lucent Technologies; its rollout plan fully complies with the minimum coverage required; and its proposed rate structure was more economical and beneficial to consumers.[95]

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86 *Id.* at 5111–5127.
87 *Id.* at 5119.
88 *Id.* at 5126–5127.
89 *Id.* at 5127.
90 *Id.* at 5135.
91 *Id.* at 5182.
92 *Id.* at 5190–5195.
93 *Id.* at 4758–4760.
94 *Id.* at 4760–4761.
95 *Id.* at 4761–4766.

Bayantel, meanwhile, claims that its failure to implead the National Telecommunications Commission in the Petition before the Court of Appeals was not a ground for dismissing the Petition since Rule 43, Section 6 of the Rules of Court states that parties must not implead the courts or agencies.[96] It argues that the Court of Appeals correctly resolved its Petition on its merits since the non-inclusion of the National Telecommunications Commission was a mere formal defect that was corrected by the submission of subsequent pleadings.[97] It likewise maintains that there was no need to implead Smart, Globe, Digitel, and CURE in its petition since these parties had separate applications that were evaluated by the National Telecommunications Commission independently of each other, thus, impleading them would effectively be an appeal of their separate and independent applications.[98]

Bayantel asserts that the Court of Appeals had correctly nullified the 30-point ranking system since this was not part of Memorandum Circular No. 07-08-2005 and was not published with the UP Law Center, depriving Bayantel of its opportunity to be informed and favoring only those applicants that have already been part of the National Telecommunications Commission's predetermined conclusion as to who would qualify and be entitled to a frequency allocation.[99] It argues that even assuming that the 30-point system was valid, the 20-point threshold was not since it was an additional requirement that was not part of Memorandum Circular No. 07-08-2005 and was not made known to the applicants, and was not published or deposited with the UP Law Center.[100]

Bayantel maintains that the Court of Appeals correctly awarded it a 3G frequency since "assuming for the sake of argument that the point system was nevertheless invalid,"[101] it should have been awarded 24.5 points.[102] It argues that the Court of Appeals was correct in giving it 6.5 points for track record since it was still able to comply with its Cellular Mobile Telephone Service commitments despite the existence of legal prohibitions, such as the issuance of an injunctive writ in *Bayan Telecommunications v. Express Telecommunications*[103] and the stay order issued in its rehabilitation case.[104] It further claimed that it was correctly awarded eight points for its rollout plan considering that it can cover 82% of the provincial capital cities or municipalities and 87% of the chartered cities, and that its collaborative agreement with MTI was not meant to be a merger of the two parties, but merely allows them to have access to the networks and infrastructure of the other.[105]

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96 *Id.* at 4896–4898.
97 *Id.* at 4899–4901.
98 *Id.* at 4901–4917.
99 *Id.* at 4917–4940.
100 *Id.* at 4940–4949.
101 *Id.* at 4949.
102 *Id.* at 4949–4953.
103 424 Phil. 372 (2002) [Per J. Ynares-Santiago, First Division].
104 *Rollo*, (G.R. No. 205603), pp. 4953–4960.
105 *Id.* at 4960–4962.

Bayantel claims that Extelcom's argument that the Court of Appeals made a fact-finding determination in substitution of the National Telecommunications Commission should not be given any merit since the Court of Appeals may still revisit the findings of administrative agencies when there is grave abuse of discretion.[106] It likewise decries Extelcom's argument that the Court of Appeals' Amended Decision did not cover the Memorandum Circular on the Rules on the Assignment of the Remaining Allocated 3G Radio Frequency since Bayantel squarely raised the issue of the subsequent disposition of the remaining frequency with the Court of Appeals, which is the same subject as the new rule.[107] It argues that Next Mobile's assertion that its subsequent acquisition by Globe Telecom was in violation of Memorandum Circular No. 07-08-2005 is similarly unmeritorious as this event occurred years after the National Telecommunications Commission's determination of its application.[108] It contends that even assuming that the 30-point system was valid, CURE was not qualified to be assigned a 3G frequency since it did not have a track record, being a new entity, and that the National Telecommunications Commission unduly favored it despite its lack of technical and financial capacity to operate a 3G frequency.[109] It points out that awarding a 3G frequency to CURE and opening the final bandwidth for bidding will result in a monopoly of the telecommunications industry since the three holders of the frequency: Smart Communications, PLDT, and CURE, are all part of the PLDT group, and that under the new rule, previous awardees may again be awarded the remaining frequency, which may also be a member of the PLDT group, to the detriment of the consumers.[110]

Smart Communications, on the other hand, contends that the Consolidated Order was not interlocutory since it was a final judgment on all qualified applicants and to Next Mobile's disqualification,[111] as it was intended to be the governing rules and regulations on the allocation of frequency that would affect all applicants, whether qualified or unqualified.[112] It asserts that the National Telecommunications Commission correctly disqualified Next Mobile since payment of the Supervision and Regulation Fees and Spectrum User Fees, which directly relates to the financial capacity of the applicant, must be complied with in order for an applicant to qualify.[113]

Smart Communications argues that MTI should not have been allowed to raise the issue of the frequencies already awarded to the qualified applicants on appeal since its Motion for Reconsideration before the National Telecommunications Commission only sought reconsideration of

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106 *Id.* at 4963–4966.
107 *Id.* at 4976–4977.
108 *Id.* at 4966–4969.
109 *Id.* at 4971–4976.
110 *Id.* at 4978–4993.
111 *Id.* at 4779–4780.
112 *Id.* at 4780.
113 *Id.* at 4782–4784.

the denial of its application and likewise failed to implead any of the other parties.[114] It claims that the National Telecommunications Commission correctly exercised its discretion in the award of its frequency since it was the administrative agency with the expertise to make this determination[115] and in its award of 3G frequency to CURE since MTI's allegations against it were based on mere newspaper reports, which are inadmissible for being hearsay.[116]

The National Telecommunications Commission counters that it had been improperly impleaded in the Petitions of Bayantel and MTI before the Court of Appeals since Rule 43, Section 6 of the Rules of Court provides that the agency that rendered the adverse decision should not be impleaded.[117] It claimed that all applicants were indispensable and necessary parties to the Petitions before the Court of Appeals, since the nullification of the evaluation on the qualifications of one or some applicants or a modification of the points received will necessarily affect the resolution of the other applications, and the nullification of the entire 30-point system will likewise affect the qualifications of those already assigned with 3G frequencies.[118] It argued that failure to include indispensable parties already warranted outright dismissal of the Petitions since the period for appeal had already lapsed.[119]

The National Telecommunications Commission maintains that it validly exercised its quasi-judicial powers in adopting the 30-point system and the 20-point threshold since the applicants had been made aware that a quantitative process or method would be employed in the evaluation of the applications and that they would be ranked according to track record, rollout commitment, and service rates.[120] It contends that their process "eliminates bias, capriciousness and abuse of discretion . . . as it provides a definitive means of ranking . . . [that] can approximate with some degree of exactitude and objectivity how the applicants fared in the evaluation of their qualifications."[121] It argues that the 30-point system and the 20-point threshold need not be published, since these were merely interpretative regulations of a previously published regulatory rule.[122]

The National Telecommunications Commission asserts that all applicants had been informed and were afforded due process of law in the evaluation of their applications, and that there were valid distinctions between the losing applicants and other applicants considered for ranking.[123]

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114 *Id.* at 4784–4793.
115 *Id.* at 4794–4795.
116 *Id.* at 4796.
117 *Rollo* (G.R. No. 189221), pp. 5201–5204.
118 *Id.* at 5204–5208.
119 *Id.* at 5208–5216.
120 *Id.* at 5216–5220.
121 *Id.* at 5220–5221.
122 *Id.* at 5224–5227.
123 *Id.* at 5230–5232.

It contends that its findings of fact on technical and specialized matters are entitled to great weight and that the assailed Orders have already become final and executory.[124]

The National Telecommunications Commission argues that Next Mobile's Petition had been correctly dismissed by the Court of Appeals for being insufficient in form and was the improper remedy for its lost appeal.[125] It pointed out that Next Mobile was correctly disqualified for unpaid fees, since all other applicants paid their Spectrum User Fees and Supervision and Regulation Fees, even under protest.[126] It claimed that Next Mobile acted with bad faith when it argued that the Additional Paid in Capital should have been excluded in the computation since these amounts, being included in the Audited Financial Statement are clear evidence of a company's financial standing.[127] It held that CURE and Bayantel were scored differently as to track record since CURE, as a new entrant in the telecommunications industry, as opposed to an existing Public Telecommunications Entity as Bayantel, would have unimpaired capital stocks that could be fully utilized in their proposed network.[128] It insists that the Court of Appeals contradicted itself when it awarded a frequency bandwidth to Bayantel in "using the same point system it previously annulled"[129] by awarding Bayantel points contrary to the factual finding that it was unable to complete its previous existing cellular mobile telephone system authorization and ignoring its ability to commence rollout of its network due to financial rehabilitation proceedings.[130]

The National Telecommunications Commission maintains that MTI had been correctly evaluated as a non-cellular mobile telephone system since its application for a Certificate of Public Convenience and Necessity predated the issuance of Memorandum Circular No. 07-08-2005, and as such, would not have been able to comply with the requirements of a larger capital expenditure and utilization of a more advanced technology.[131] It argues that this Court should resolve this case based on the findings in *AZ Communications v. Globe Telecommunications*,[132] as "[t]he Court of Appeals was correct in upholding the Orders of the National Telecommunications Commission (NTC) which denied petitioner's application for a certificate of public convenience and necessity, as it did not meet the qualifications established in NTC Memorandum Circular No. 07-08-2005."[133]

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124 *Id.* at 5237–5239.
125 *Id.* at 5240–5246.
126 *Id.* at 5232.
127 *Id.* at 5248–5250.
128 *Id.* at 5232–5233.
129 *Id.* at 5252.
130 *Id.* at 5251–5261.
131 *Id.* at 5234–5236, 5261–5265.
132 G.R. No. 199915, April 11, 2012 [Third Division, Unsigned Resolution].
133 *Rollo* (G.R. No. 189221), p. 5276.

Extelcom, for its part, explains that "[t]he question of ['] best qualified[']] is a question of fact addressed to the sound judgment and discretion of the sole regulator authorized by law to do so—the NTC."[134] Thus, when the Court of Appeals tried to resolve this issue, it not only "weigh[ed] the evidence anew, it [also] weighed incomplete and one-sided evidence in the absence of the other 3G entrants, all of which must be considered indispensable parties."[135] It argues that "the CA Decision rendered by the division of five is an incomplete determination of the issues and cannot be said to have any legal effect on third parties."[136] It likewise points out that "the slew of petitions separately filed by the losing 3G applicants and are all presently pending before this Division of the Honorable Supreme Court has paved the way for judicial anarchy and must be dismissed especially in light of the this Division's ruling in G.R. No. 199915 entitled *AZ Communications v. Globe Telecoms, Inc., et al.*"[137]

From the arguments of the parties, the procedural issues to be resolved are: first, whether the National Telecommunications Commission was correctly impleaded in a Rule 43 Petition before the Court of Appeals; second, whether the 3G applicants were all indispensable and necessary parties before this Court; and finally, whether or not the Consolidated Order was an interlocutory order of the National Telecommunications Commission and was not capable of being appealed to the Court of Appeals.

Substantially, the following issues have been brought before this Court:

1. Whether the National Telecommunications Commission erred in setting a 30-point qualification system and a 20-point qualification threshold of the 3G frequencies based on track record, roll out plan, and service rates;

2. Whether the 30-point qualification system and a 20-point qualification threshold should have been published or deposited with the UP Law Center to be valid; and

3. Assuming that the 30-point qualification system and a 20-point qualification threshold were valid:

    a. Whether Next Mobile's application was correctly denied for failure to pay the required Spectrum User Fees and Supervision and Regulation Fees;

    b. Whether the National Telecommunication Commission correctly awarded a 3G frequency to CURE despite not having a track

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[134] *Rollo* (G.R. No. 191656), p. 2287.
[135] *Id.* at 2288.
[136] *Id.* at 2289.
[137] *Id.* at 2368.

record or capacity to roll out its services and was owned by the PLDT group, which also held frequencies for three other qualified applicants: Smart, PLDT, and Sun Cellular;

c. Whether AZ's disqualification has already attained finality by virtue of *AZ Communications v. Globe Telecommunications*;[138]

d. Whether the National Telecommunications Commission correctly assessed MTI as a non-Cellular Mobile Telecommunications System provider and denied MTI's application on the basis that MTI failed to submit the required 3G network rollout plan; and

e. Whether the Court of Appeals, using the same qualification system, correctly invalidated the award of 3G frequency to CURE and find, instead, that Bayantel was the qualified applicant to the frequency.

I

The National Telecommunications Commission argues that it had been improperly impleaded in the Petitions of Bayantel and MTI before the Court of Appeals in CA-G.R. SP No. 105373 in violation of Rule 43, Section 6 of the Rules of Court.[139]

Under Rule 43, Section 6, of the Rules of Court, a petition for review assailing the decisions of quasi-judicial agencies shall state in full the names of the parties to the case. The agency which rendered the decision or resolution should not be impleaded as a party to the case:

> SEC. 6. Contents of the Petition.—The petition for review shall (a) state the full names of the parties to the case, *without impleading the court or agencies either as petitioners or respondents*; (b) contain a concise statement of the facts and issues involved and the grounds relied upon for the review; (c) be accompanied by a clearly legible duplicate original or a certified true copy of the award, judgment, final order or resolution appealed from, together with certified true copies of such material portions of the record referred to therein and other supporting papers; and (d) contain a sworn certification against forum shopping as provided in the last paragraph of Section 2, Rule 42. The petition shall state the specific material dates showing that it was filed within the period fixed herein.[140] (Emphasis supplied)

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[138] G.R. No. 199915, April 11, 2012 [Third Division, Unsigned Resolution].
[139] *Rollo*, (G.R. No. 189221), pp. 5201–5204.
[140] RULES OF COURT, rule 43. sec. 6.

This Court has already discussed the rationale for this in *Pleyto v. Philippine National Police Criminal Investigation and Detection Group*:[141]

> It is a well-known doctrine that a judge should detach himself from cases where his decision is appealed to a higher court for review. The *raison d'etre* for such doctrine is the fact that a judge is not an active combatant in such proceeding and must leave the opposing parties to contend their individual positions and the appellate court to decide the issues without his active participation. When a judge actively participates in the appeal of his judgment, he, in a way, ceases to be judicial and has become adversarial instead.
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> The court or the quasi-judicial agency must be detached and impartial, not only when hearing and resolving the case before it, but even when its judgment is brought on appeal before a higher court. The judge of a court or the officer of a quasi-judicial agency must keep in mind that he is an adjudicator who must settle the controversies between parties in accordance with the evidence and the applicable laws, regulations, and/or jurisprudence. His judgment should already clearly and completely state his findings of fact and law. There must be no more need for him to justify further his judgment when it is appealed before appellate courts. When the court judge or the quasi-judicial officer intervenes as a party in the appealed case, he inevitably forsakes his detachment and impartiality, and his interest in the case becomes personal since his objective now is no longer only to settle the controversy between the original parties (which he had already accomplished by rendering his judgment), but more significantly, to refute the appellant's assignment of errors, defend his judgment, and prevent it from being overturned on appeal.[142] (Citations omitted)

In *Civil Service Commission v. Sebastian*,[143] the petitioner, a dismissed municipal employee, assailed an adverse Civil Service Commission decision with the Court of Appeals through a Rule 43 petition, which impleaded as party respondent the Civil Service Commission. This Court explained:

> The CA ruled that when there is no private individual as respondent in a petition for review, the public agency *a quo* is impleaded as a respondent. This is erroneous. While it is true that petitioner Mayor acted in his official capacity when he dismissed the respondent from the service, nevertheless, he was entitled to be heard on the petition. He is entitled to due process.
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> The CA relied in its own decision entitled *Edmundo Morales v. Civil Service Commission*, docketed as CA-G.R. SP No. 54706 where, citing Section 6 of Rule 135, it opined that without a public respondent, the OSG cannot be directed to comment. Such ruling, however, is not applicable in this case. There is a specific provision suitable to resolve the issue in the case at bar, that is, Section 6 of Rule 43, which clearly provides, *inter alia*, that petitioner "should state the full names of the

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141 563 Phil. 842 (2007) [Per J. Chico-Nazario, Third Division].

142 *Id.* at 871–872.

143 509 Phil. 348 [Per J. Callejo, Sr., *En Banc*].

> parties to the case, without impleading the court or agencies either as petitioners or respondents."
>
> If petitioner Mayor is not impleaded as a party-respondent in the CA, he cannot be compelled to abide by and comply with its decision, as the same would not be binding on him. No man shall be affected by any proceeding to which he is a stranger, and strangers to a case are not bound by any judgment rendered by the court. *Ergo, res inter alios judicatae nullum aliis praejudicrium facint.* A person who was not impleaded in the complaint cannot be bound by the decision rendered therein, for no man shall be affected by any proceeding in which he is a stranger.[144] (Citations omitted)

Indeed, petitions assailing the judgments of administrative agencies in the exercise of the quasi-judicial functions should not include as party respondent the administrative agency that rendered the judgment, since the agency is not the adverse party. This presupposes, however, that the prior proceeding was *adversarial* in character, wherein the administrative agency is called to settle a particular controversy between the parties.

Here, however, the application process for the 3G frequency is not adversarial in the sense that all applicants were equal competitors before the National Telecommunications Commission. The unqualified applicants were assailing the National Telecommunication Commission's finding of their qualifications. It was not necessary for them to assail the qualifications of those that were deemed qualified.

Thus, if Rule 43, Section 6 were to be strictly applied, Bayantel and MTI would have erred in impleading the National Telecommunications Commission in their Petitions before the Court of Appeals. They should have only impleaded the qualified applicants as party respondents. However, as the Court of Appeals in CA-G.R. SP No. 105373 pointed out in the March 22, 2010 Amended Decision, "what principally is at issue in this petition is not whether NTC erred in granting the four (4) other applicants' petition for 3G frequency bands but whether or not the NTC erred in denying Bayantel's similar application."[145] A strange situation arises where the parties are only questioning the assessment of their own qualifications, but would have no choice but to assail the other applicants' qualifications, since Rule 43, Section 3 requires them to be impleaded as party respondents.

The Court of Appeals likewise opined that the National Telecommunication Commission's right to due process "will not be violated because impleaded or not, its assailed Orders will be reviewed and it has the Office of the Solicitor General to defend its position."[146] While this is correct, it must also be pointed out that the controversy in this case arose

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144 *Id.* at 358–359.
145 *Rollo* (G.R. No. 191656), p. 164.
146 *Id.* at 163.

from the National Telecommunication Commission's judgment in purely technical matters that were within its expertise. Regardless of whether the Office of the Solicitor General would be called upon to defend the agency's position, the agency itself would have to be notified and explain how and why it had ruled the way it did.

The application process before the National Telecommunications Commission was, as is with adversarial proceedings, not strictly about party A versus party B. If the other qualified applicants were the only ones impleaded as party respondents, the qualified applicants would be left to defend the National Telecommunications Commission's position on Bayantel and MTI's qualifications. This would not be fair since applicants are only expected to know its own qualifications and not necessarily the disqualifications of the other applicants.

In this unusual situation, therefore, where the qualified applicants could not be considered as the adverse parties of the petitions of the unqualified applicants, the strict application of the rule on the non-inclusion of the administrative agency would not apply. Otherwise, it would force non-adversarial parties to defend positions they were not entirely privy to.

This leads to the next question of whether it was necessary to implead all the applicants in the Petitions.

Under the Rules of Court, an indispensable party is one "without whom no final determination can be had of an action."[147] A necessary party, meanwhile, is "one who is not indispensable but who ought to be joined as a party if complete relief is to be accorded as to those already parties, or for a complete determination or settlement of the claim subject of the action."[148]

As earlier discussed, the National Telecommunications Commission's assessment of the qualifications of one applicant may be reviewed apart from those of other applicants. The qualifications of those already awarded a frequency will not be affected if one of the unqualified applicants' appeals is granted. As the Court of Appeals found, "[the grant of an] application as a fifth assignee . . . will definitely not affect the interests of the four (4) other 3G frequency-assignees."[149] Those already qualified need not defend their interests, since only the fifth 3G frequency would be in contention.

However, the parties in this case question the validity of Memorandum Circular No. 07-08-2005, which set the qualifications for the allocation and assignment of 3G frequency and the December 28, 2005 Consolidated Order of the National Telecommunications Commission,

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147 RULES OF COURT, rule 3, sec 7.
148 RULES OF COURT, rule 3, sec 8.
149 *Rollo* (G.R. No. 191656), p. 164.

which awarded the 3G frequencies to four of the applicants. Any ruling of this Court regarding this would directly affect all the applicants, regardless of whether they have already been granted a 3G frequency. In *Arcelona v. Court of Appeals*:[150]

> An indispensable party is a party who has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence, without injuring or affecting that interest, a party who has not only an interest in the subject matter of the controversy, but also has an interest of such nature that a final decree cannot be made without affecting his interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. It has also been considered that an indispensable party is a person in whose absence there cannot be a determination between the parties already before the court which is effective, complete, or equitable. Further, an indispensable party is one who must be included in an action before it may properly go forward.
>
> A person is not an indispensable party, however, if his interest in the controversy or subject matter is separable from the interest of the other parties, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them. Also, a person is not an indispensable party if his presence would merely permit complete relief between him and those already parties to the action, or if he has no interest in the subject matter of the action. It is not a sufficient reason to declare a person to be an indispensable party that his presence will avoid multiple litigation.[151]

All of the applicants' interest in the 3G frequency, whether or not they have already been granted one by the National Telecommunications Commission, would be affected if Memorandum Circular No. 07-08-2005, and the subsequent December 28, 2005 Consolidated Order are eventually adjudged to be invalid. The interests of those who have already been awarded a frequency would not be separable from the interest of those who were found to be unqualified, since the entire qualification process is put in question.

Thus, while the Court of Appeals in CA-G.R. SP No. 105373 found that the four qualified applicants and the National Telecommunications Commission were not indispensable parties, it was still constrained to serve a copy of the March 22, 2010 Amended Decision to all the applicants, as well as the National Telecommunications Commission,[152] since its invalidation of the 30-point system and the 20-point threshold had a direct effect on all the parties.

In any case, "the non-joinder of indispensable parties is not a ground for the dismissal of an action, and the remedy is to implead the non-party

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150 345 Phil. 250 (1997) [Per J. Panganiban, Third Division].

151 *Id.* at 269–270 *citing* 67A C.J.S. 646–649.

152 *See rollo* (G.R. No. 189221), p. 5208.

claimed to be indispensable."[153] Considering that all the parties that will be adversely affected by any ruling on validity of the Memorandum Circular No. 07-08-2005 and the December 28, 2005 Consolidated Order are now parties in this case, it would be unnecessary for this Court to dwell further on whether the Petitions before the Court of Appeals should have been dismissed for non-joinder of indispensable parties.

This leads to the issue of whether the National Telecommunications Commission's December 28, 2005 Consolidated Order was an interlocutory order, and thus, could not be the proper subject of an appeal.

In *Denso (Phils.), Inc. v. Intermediate Appellate Court*:[154]

> The concept of 'final' judgment, as distinguished from one which has 'become final' (or 'executory' as of right [final and executory]), is definite and settled. A 'final' judgment or order is one that finally disposes of a case, leaving nothing more to be done by the Court in respect thereto, e.g., an adjudication on the merits which, on the basis of the evidence presented at the trial, declares categorically what the rights and obligations of the parties are and which party is in the right; or a judgment or order that dismisses an action on the ground, for instance, of *res judicata* or prescription. Once rendered, the task of the Court is ended, as far as deciding the controversy or determining the rights and liabilities of the litigants is concerned. Nothing more remains to be done by the Court except to await the parties' next move (which among others, may consist of the filing of a motion for new trial or reconsideration, or the taking of an appeal) and ultimately, of course, to cause the execution of the judgment once it becomes 'final' or, to use the established and more distinctive term, 'final and executory.'
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> . . . .
>
> Conversely, an order that does not finally dispose of the case, and does not end the Court's task of adjudicating the parties' contentions and determining their rights and liabilities as regards each other, but obviously indicates that other things remain to be done by the Court, is 'interlocutory,' e.g., an order denying a motion to dismiss under Rule 16 of the Rules, or granting a motion for extension of time to file a pleading, or authorizing amendment thereof, or granting or denying applications for postponement, or production or inspection of documents or things, etc. Unlike a 'final' judgment or order, which is appealable, as above pointed out, an 'interlocutory' order may not be questioned on appeal except only as part of an appeal that may eventually be taken from the final judgment rendered in the case.[155] (Citations omitted)

Next Mobile argues that the December 28, 2005 Consolidated Order was an interlocutory order since no specific frequencies had yet to be assigned to the four qualified applicants, and there was still one remaining

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[153] *Pepsico Inc. v. Emerald Pizza*, 556 Phil. 711, 719 (2007) [Per J. Nachura, Third Division].
[154] 232 Phil. 256 (1987) [Per J. Narvasa, First Division].
[155] *Id.* at 263–264.

frequency.[156] The dispositive portion of the Order reads:

> Since only four (4) applicants qualified as frequency assignees, the Commission hereby resolves to hold the assignment of the remaining portion of the bandwidth, specifically, 1965-1980 [MHz], in abeyance until after an applicant for the assignment thereof shall have qualified in accordance with the criteria prescribed by the Commission. The reservation of the said bandwidth takes into consideration the principle of technology-neutrality since the said bandwidth and its corresponding pair may be used either to WCDMA network utilizing 10 [MHz] x2, with the remaining 5 [MHz] intended as a guard band.
>
> The assignments of the 3G frequencies to the four (4) qualified applicants shall be subject to the terms and conditions, which shall be embodied in separate orders issued forthwith by the Commission.[157]

As can be seen from the assailed Order, the National Telecommunications Commission already adjudicated with finality on the qualifications of all the applicants before them. This is clear from the phrase "only four (4) applicants qualified,"[158] to the exclusion of all other applicants, including Next Mobile. That the assignment of the last remaining frequency is held in abeyance does not automatically mean that the agency's determination was not yet final. It simply means that none of the other applicants have qualified.

The issuance of further orders to the qualified applicants regarding the terms and conditions of the assigned frequencies does not also affect the finality of the National Telecommunication Commission's determination of the qualifications of the applicants. These merely set the guidelines by which the qualified applicants are allowed to exercise their allocated frequency. Any interest in these orders would belong solely to the affected applicant and will not have any effect on the qualifications of the other applicants. The Consolidated Order, thus, is a final order on the qualifications of the applicants and is appealable as such.

II

Commonwealth Act No. 146 or the Public Service Act of 1936 established under the Department of Justice Public Service Commission,[159] which was vested with the "jurisdiction, supervision, and control over all public services."[160] Public services included "wire or wireless communications system, wire or wireless broadcasting stations and other similar public services."[161] The Integrated Organization Plan under

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156 *Rollo* (G.R. No. 191656), pp. 2422–2425.
157 *Rollo* (G.R. No. 205603), pp. 178–179.
158 *Id.* at 178.
159 Commonwealth Act No. 146 (1936), sec 2.
160 Commonwealth Act No. 454 (1939), sec 13(a).
161 Republic Act No. 2677 (1960).

Presidential Decree No. 1, series of 1972, created a Board of Communications, which subsumed the functions of the Public Service Commission.[162] In 1979, under Executive Order No. 546,[163] the Board of Communications and another agency, the Telecommunications Control Bureau, was integrated into a single entity known as the National Telecommunications Commission[164] as part of the Ministry of Transportation and Communications. The Commission had the following functions:

> a. Issue Certificate of Public Convenience for the operation of communications utilities and services, radio communications systems, wire or wireless telephone or telegraph systems, radio and television broadcasting system and other similar public utilities;
>
> b. Establish, prescribe and regulate areas of operation of particular operators of public service communications; and determine and prescribe charges or rates pertinent to the operation of such public utility facilities and services except in cases where charges or rates are established by international bodies or associations of which the Philippines is a participating member or by bodies recognized by the Philippine Government as the proper arbiter of such charges or rates;
>
> c. Grant permits for the use of radio frequencies for wireless telephone and telegraph systems and radio communication systems including amateur radio stations and radio and television broadcasting systems;
>
> d. Sub-allocate series of frequencies of bands allocated by the International Telecommunications Union to the specific services;
>
> e. Establish and prescribe rules, regulations, standards, specifications in all cases related to the issued Certificate of Public Convenience and administer and enforce the same;
>
> f. Coordinate and cooperate with government agencies and other entities concerned with any aspect involving communications with a view to continuously improve the communications service in the country;
>
> g. Promulgate such rules and regulations, as public safety and interest may require, to encourage a larger and more effective use of communications, radio and television broadcasting facilities, and to maintain effective competition among private entities in these activities whenever the Commission finds it reasonably feasible;
>
> h. Supervise and inspect the operation of radio stations and telecommunications facilities;
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> i. Undertake the examination and licensing of radio operators;
>
> j. Undertake, whenever necessary, the registration of radio transmitters and transceivers; and

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[162] *See Republic v. Express Telecommunications*, 424 Phil. 372, 389 (2002) [Per J. Ynares-Santiago, First Division].

[163] Entitled "Creating a Ministry Of Public Works and a Ministry of Transportation and Communications."

[164] Executive Order No. 546 (1979), sec 9.

k. Perform such other functions as may be prescribed by law.[165]

In 1987, under Executive Order No. 125[166] and Executive Order No. 125-A,[167] the National Telecommunications Commission became an attached agency of the Department of Transportation and Communications.[168]

Congress later recognizing that "develop[ing] and maintain[ing] a viable, efficient, reliable and universal telecommunication infrastructure using the best available and affordable technologies [is] a vital tool to nation building and development,"[169] passed Republic Act No. 7925, or the Public Telecommunications Policy Act of the Philippines. Under the law, the National Telecommunications Commission was made its principal administrator, with the following responsibilities:

> (a) Adopt an administrative process which would facilitate the entry of qualified service providers and adopt a pricing policy which would generate sufficient returns to encourage them to provide basic telecommunications services in unserved and underserved areas;
>
> (b) Ensure quality, safety, reliability, security, compatibility and inter-operability of telecommunications facilities and services in conformity with standards and specifications set by international radio and telecommunications organizations to which the Philippines is a signatory;
>
> (c) Mandate 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;
>
> (d) Foster fair and efficient market conduct through, but not limited to, the protection of telecommunications entities from unfair trade practices of other carriers;
>
> (e) Promote consumers welfare by facilitating access to telecommunications services whose infrastructure and network must be geared towards the needs of individual and business users;
>
> (f) 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

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165 Executive Order No. 546 (1979), sec. 15.

166 Reorganizing the Ministry of Transportation and Communications, Defining Its Powers and Functions and for Other Purpose.

167 Amending Executive Order No. 125, Reorganizing the Ministry of Transportation and Communications, Defining Its Powers and Functions, and For Other Purposes.

168 Executive Order No. 125 (1987), sec. 18(1).

169 Republic Act No. 7925 (1995), sec. 4(a).

standards from such entity; and

(g) In the exercise of its regulatory powers, continue to impose such fees and charges as may be necessary to cover reasonable costs and expenses for the regulation and supervision of the operations of telecommunications entities.[170]

By 2015, however, Congress enacted Republic Act No. 10844, which created the Department of Information and Communications Technology. The National Telecommunications Commission became an attached agency of this Department but it "shall continue to operate and function in accordance with the charters, laws or orders creating them, insofar as they are not inconsistent with [the law]."[171]

Considering the rapid technological advances in telecommunications, government gradually shifted its attention from regulation of entry and pricing of the telecommunications providers to ensuring the quality of services and consumer protection. *Globe Telecom v. National Telecommunications Commission*,[172] summarizes this paradigm shift:

> Telecommunications services are affected by a high degree of public interest. Telephone companies have historically been regulated as common carriers, and indeed, the 1936 Public Service Act has classified wire or wireless communications systems as a "public service," along with other common carriers.
>
> Yet with the advent of rapid technological changes affecting the telecommunications industry, there has been a marked reevaluation of the traditional paradigm governing state regulation over telecommunications. For example, the United States Federal Communications Commission has chosen not to impose strict common regulations on incumbent cellular providers, choosing instead to let go of the reins and rely on market forces to govern pricing and service terms.
>
> In the Philippines, a similar paradigm shift can be discerned with the passage of the Public Telecommunications Act of 1995 ("PTA"). As noted by one of the law's principal authors, Sen. John Osmeña, under prior laws, the government regulated the entry of pricing and operation of all public telecommunications entities. The new law proposed to dismantle gradually the barriers to entry, replace government control on price and income with market instruments, and shift the focus of government's intervention towards ensuring service standards and protection of customers. Towards this goal, Article II, Section 8 of the PTA sets forth the regulatory logic, mandating that "a healthy competitive environment shall be fostered, one 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." The statute itself defines the role of the government to "promote a fair, efficient and

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[170] Republic Act No. 7925 (1995), sec. 5.
[171] Republic Act No. 10844 (2015), sec. 15(b).
[172] 479 Phil. 1 (2004) [Per J. Tinga, Second Division].

> responsive market to stimulate growth and development of the telecommunications facilities and services."[173] (Citations omitted)

In order to ensure that the public has continued access to quality service from telecommunications providers, the law grants to the National Telecommunications Commission the power to "[e]stablish and prescribe rules, regulations, standards, specifications"[174] "[in] the operation of communications utilities and services, radio communications systems, wire or wireless telephone or telegraph systems, radio and television broadcasting system and other similar public utilities[.]"[175] This includes the authority to "[g]rant permits for the use of radio frequencies for wireless telephone and telegraph systems and radio communication systems."[176]

In the exercise of this authority, the National Telecommunications Commission promulgated Memorandum Circular No. 07-08-2005, or The Rules and Regulations on the Allocation and Assignment of 3G Radio Frequency Bands. Under these Rules, only entities with existing authorizations to install, operate and maintain a cellular mobile telecommunications system or a 3G system may be considered as applicants.[177] Those with existing cellular mobile telecommunications system authorizations wishing to upgrade their networks were automatically qualified.[178] Those intending to operate a 3G system, however, must first file with the Commission "its application for authority or certificate of public convenience and necessity to install, operate and maintain a 3G mobile telecommunications system."[179] The Memorandum further states:

> a. For existing authorized PTEs, no outstanding unpaid supervision and regulations fees (SRF), spectrum user fees (SUF), radio station license fees, permit fees and other fees imposed by the National Telecommunications Commission pursuant to law, rules and regulations.
>
> b. Must submit a written undertaking that it shall interconnect with all 3G networks, cellular mobile telephone networks, local exchange networks and all other public networks pursuant to existing laws, rules and regulations on mandatory interconnection.
>
> c. Must submit a written undertaking that is shall allow [sic] the sharing of its network and facilities with other 3G players in areas where demand does not allow more than one (1) 3G network.
>
> d. Must submit written undertaking that it shall negotiate roaming agreements with other 3G networks or existing duly authorized CMTS service providers.

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173 *Id.* at 9–10.
174 Executive Order No. 546 (1979), Section 15(e).
175 Executive Order No. 546 (1979), Section 15(a).
176 Executive Order No. 546 (1979), Section 15(c).
177 NTC Memorandum Circular No. 076-08-2005, sec. 3.1.
178 NTC Memorandum Circular No. 076-08-2005, sec. 3.2.
179 NTC Memorandum Circular No. 076-08-2005, sec. 3.3.

> e. Must submit a written undertaking that it shall abide by the terms and conditions set by the Commission in cases where its negotiations for interconnection, sharing of networks and facilities and/or roaming fail to reach agreements within ninety (90) days from date of the start of negotiations for the same.
>
> f. Must submit proof of track record in the operation of mobile telecommunications systems particularly 3G networks.
>
> g. Must submit a 5-year roll-out plan to cover at least 80% of the provincial capital towns/cities and 80% of the chartered cities.
>
> h. Must submit schedule of rates for the different types of 3G services to be offered. The schedule of rates shall be the maximum rates that can be charged within the first twenty[-]four (24) months from start of commercial operations which shall not be later than thirty (30) months from date of award of the 3G radio frequency bands. Other 3G services not included in the submitted list may be offered subject to prior approval by the Commission.[180]

Parties in this case do not question the validity of the Memorandum Circular, since its issuance was within the prerogative of the National Telecommunications Commission as the administrative agency tasked to regulate the allocation of 3G radio frequency bands. The Memorandum further provides:

> 3.8 Applicants for the assignment of the herein allocated 3G radio frequency bands shall be ranked based on the track record, roll-out commitments and rates to be charged from consumers/subscribers/users.[181]

Using these criteria, the National Telecommunications Commission "evaluate all applications for the assignment of the 3G radio frequency bands and determine the best qualified applicants."[182]

Pursuant to these provisions, the National Telecommunications Commission ranked applicants according to a point system, wherein 10 points were given for track record, 10 points for roll-out commitments, and 10 points were given for customer rates.[183] It likewise adopted a two-third majority of points rule, or twenty points, as "a reasonable standard for gauging an applicant's legal, financial, and technical capabilities, such that an applicant was only considered as [']best qualified[*'] if it garnered at least 2/3 of the maximum total points."[184]

It is this 30-point system and 20-point system that is being assailed in this case, on the ground that these were not authorized by Memorandum

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180 NTC Memorandum Circular No. 076-08-2005, sec. 3.6.
181 NTC Memorandum Circular No. 076-08-2005, sec. 3.8.
182 NTC Memorandum Circular No. 076-08-2005, sec. 4.1.
183 *Rollo*, (G.R. No. 189221), p. 5185.
184 *Id.* at 5188.

Circular No. 076-08-2005.

Under Republic Act No. 7925, however, the National Telecommunications Commission is authorized to "[a]dopt an administrative process which would facilitate the entry of qualified service providers."[185] An examination of the point system would show that the Commission, in adopting a point system, merely attempted to interpret the criteria into a quantifiable standard:

> a. Must submit proof of track record in the operation of mobile telecommunications systems particularly 3G networks (3.6f of MC No. 07-08-2005).
>
> Mindful of the directive in Sec. 16 of R.A. No. 7925 that the Commission "shall not grant a subsequent CPCN for another segment of service or extend the area service coverage of an entity which has failed to satisfactorily comply with its commitments to the Commission to provide a particular service in the original area coverage under an earlier authorization," the Commission allocated points as follows–
>
> 3G being an enhancement of present-generation mobile telephony, existing CMTS carriers have a decided advantage in their experience in the operation of their respective cellular telephone networks. Applicants with existing mobile telecommunications system authorization and which have fully complied with their commitments in terms of number of existing and operational cell sites or mobile base stations sites were given seven (7) points.
>
> Applicants with existing mobile telecommunications system authorization and which have satisfactorily complied with their commitments in terms of number of existing and operational cell sites or mobile base stations sites were given six (6) points.
>
> Zero (0) point was given to applicants that failed to install cell sites or mobile base station sites, or did not install a sufficient number of cell sites or mobile base station sites based on their approved roll-out plans.
>
> Applicants with authorizations to install, operate and maintain networks other than cellular mobile telecommunications networks were rated on the basis of their compliance with their respective authorizations. Applicants that have fully complied with their respective authorizations were given five (5) points, while applicants that have satisfactorily complied with their respective authorizations were given four (4) points. Zero (0) point was given to applicants that have not made any progress in their approved network plans.
>
> New company-applicants which sufficiently demonstrated their ability to meet the criteria as set forth in Sec. 3.3 of MC No. 07-08-2005 were given four (4) points. It was determined that such number of points will maintain the advantage enjoyed by existing CMTS carriers (which can receive up to 7 points) and existing non-CMTS PTEs (which can receive up to 5 points) while taking into account the policy of encouraging

[185] Republic Act No. 7925 (1995), sec. 5(a).

the entry of new players in the industry.

Actual track record in 3G was factored in by allocating points for applicants that have partnership ventures with foreign 3G carriers or turnkey supply agreements with 3G equipment suppliers.

An additional three (3) points were given to applicants that have foreign company-partners which are operating 3G networks.

On the other hand, applicants that have no foreign company partners operating 3G networks but have commitments from 3G equipment vendors/suppliers for the supply and installation of 3G networks on turnkey basis were given an additional one-point-five (1.5) points.

Zero (0) point was given to applicants with no foreign company partner 3G network operator and with no commitments on turnkey basis from 3G equipment vendor/supplier for the supply and installation of 3G networks.

b. Must submit a 5-year roll-out plan to cover at least 80% of the provincial capital cities/municipalities and 80% of chartered cities networks (3.6g of MC No.07-08-2005)

Applicants that submitted roll-out plans covering only the minimum required coverage of 80% of provincial capital cities and municipalities and 80% of chartered cities were given seven (7) points.

Applicants that submitted roll-out plans over and above the minimum required coverage of 80% of provincial capital cities and municipalities and 80% of chartered cities were given a maximum of ten (10) points and minimum of (8) points, depending on the number of cities and municipalities to be covered by the roll-out plans submitted.

Applicants that submitted roll-out plans that do not meet the minimum coverage but made a commitment to cover the minimum required coverage within the prescribed period of 5 years were given a maximum of five (5) points and a minimum of one (1) point, depending on the number of areas covered by the roll-out plans submitted;

Zero (0) point was given to applicants that submitted roll-out plans that failed to comply with the minimum required coverage and did not submit any commitment to comply with the minimum required coverage within the prescribed period.

c. Must submit schedule of rates for the different types of 3G services to be offered. The schedule of rates shall be the maximum rates that can be charged within the first 24 months from start of commercial operations networks (3.6h of MC No. 07-08-2005)

Retail rates of 3G services directly affect or benefit the consumers. In a fully competitive environment, retail prices tend to converge to the lowest retail prices in the market. Being market-driven, it is expected that retail prices of all 3G operators will converge to the retail prices of 3G operator with the lowest retail prices. Therefore, ten (10) points was given to applicants that submitted rate proposals deemed beneficial to

consumers.[186]

Other than the allocation of points, none of those stated were new to the applicants. These were the exact same requirements under Memorandum Circular No. 07-08-2005. In *Eastern Telecommunications v. International Communication Corporation*:[187]

> The NTC, being the government agency entrusted with the regulation of activities coming under its special and technical forte, and possessing the necessary rule-making power to implement its objectives, is in the best position to interpret its own rules, regulations and guidelines. The Court has consistently yielded and accorded great respect to the interpretation by administrative agencies of their own rules unless there is an error of law, abuse of power, lack of jurisdiction or grave abuse of discretion clearly conflicting with the letter and spirit of the law.[188] (Citations omitted)

In adopting the point system, the National Telecommunications Commission merely implemented an easier way that it could objectively measure the requirements under the Circular since the Circular itself was silent on what method would be used to evaluate and rank the applicants. It merely interpreted its own existing guidelines, to "eliminate bias, capriciousness and abuse of discretion . . . as it provides a definitive means of ranking . . . [that] can approximate with some degree of exactitude and objectivity how the applicants fared in the evaluation of their qualifications."[189]

The Commission's evaluation of 3G frequency likewise is imbued with public interest, such that those allocated with these frequencies must not only show that it can undertake the installation and maintenance of its network, but also show that it is capable of providing 3G service at the widest possible coverage, even to underserved areas, at the lowest possible rates to consumers. It would not be in the public's best interest if the Commission fixes the criteria on vague unquantifiable standards, as these might result in mediocre telecommunications networks incapable of providing such a service.

III

In this case, the Court of Appeals in CA-G.R. SP No. 105373 invalidated the 30-point system and the 20-point threshold, finding that as it affected third persons, the point system should have been published per *Tañada v. Hon. Tuvera*:[190]

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186 *Rollo*, (G.R. No. 189221), pp. 5185–5188.
187 516 Phil. 518 (2006) [Per J. Austria-Martinez, Special Second Division].
188 *Id.* at 521.
189 *Rollo*, (G.R. No. 189221), pp. 5220–5221.
190 230 Phil. 528 (1986) [Per J. Cruz, *En Banc*].

> We hold therefore that all statutes, including those of local application and private laws, shall be published as a condition for their effectivity, which shall begin fifteen days after publication unless a different effectivity date is fixed by the legislature.
>
> Covered by this rule are presidential decrees and executive orders promulgated by the President in the exercise of legislative powers whenever the same are validly delegated by the legislature or, at present, directly conferred by the Constitution. Administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation.
>
> Interpretative regulations and those merely internal in nature, that is, regulating only the personnel of the administrative agency and not the public, need not be published. Neither is publication required of the so-called letters of instructions issued by administrative superiors concerning the rules or guidelines to be followed by their subordinates in the performance of their duties.[191]

According to the Court of Appeals, the point system "could not have been internal rules 'issued by administrative superiors concerning the rules or guidelines to be followed by their subordinates in the performance of their duties'" as the determination of who would be the best-qualified applicant cannot be exercised without affecting third persons.[192]

The Court of Appeals may have been under the impression that the point system employed by the National Telecommunications Commission was a standalone rule, that is, the only issuance by the Commission on the application and grant of the 3G frequencies.

What the Court of Appeals should have taken note of is that the prior issuance, Memorandum Circular No. 07-08-2005, was the issuance that set the rules and guidelines for the application and evaluation of 3G frequency applications. Public hearings were held on the first and second drafts of the Circular,[193] and Next Mobile, Bayantel, and MTI actively participated in the public consultations.[194] The Circular was published in the Manila Times on August 26, 2005, and became effective on September 10, 2005. Copies of the Circular were filed with the UP Law Center.[195]

The criteria by which the point system was based on was the one stated in Memorandum Circular No. 07-08-2005. No new criteria were set by the point system. As it stands, the point system merely gave the Commission's evaluators a set standard by which they could measure criteria

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191 *Id.* at 535.
192 *Rollo* (G. R. No. 191656), pp. 166–167.
193 *Rollo*, (G.R. No. 189221), pp. 5177–5178.
194 *Id.* at 5179.
195 *Id.* at 5182.

that were already stated in the Circular. Applicants cannot claim to be prejudiced by criteria they were already aware of. An applicant cannot, for example, claim to have been unaware of the qualifications if it was granted zero points for submitting roll-out plans that failed to comply with the minimum required coverage or for not submitting any commitment to comply with the minimum required coverage within the prescribed period.

In any case, the allocation of a 3G radio frequency is not a matter of right, but an exercise of privilege. It was within the National Telecommunications Commission's prerogative to set the procedure by which the criteria for qualification would be measured by, provided that the applicants were aware of them.

IV

Considering that the qualification system employed by the National Telecommunications Commission in their interpretation of Memorandum Circular No. 07-08-2005 was valid, the remaining issue for this Court is whether, using the same system, the Commission validly denied Next Mobile, MTI, AZ, and Bayantel's applications and approved CURE's application.

Judicial interference in technical matters within an administrative agency's expertise is not favored, as members of this Court may not necessarily be as well versed in that field as that administrative agency. Several cases have already upheld the National Telecommunications Commission's discretion in the evaluation of applications for grants of frequencies and certificates of public convenience and necessity.

This is not to say, of course, that this Court should completely refuse to review any action by the National Telecommunications Commission. Judicial review is still warranted if the Commission acts beyond the bounds of its mandate under the law. In *Globe Telecom v. National Telecommunications Commission*:[196]

> The NTC is at the forefront of the government response to the avalanche of inventions and innovations in the dynamic telecommunications field. Every regulatory action it undertakes is of keen interest not only to industry analysts and players but to the public at large. The intensive scrutiny is understandable given the high financial stakes involved and the inexorable impact on consumers. And its rulings are traditionally accorded respect even by the courts, owing traditional deference to administrative agencies equipped with special knowledge, experience and capability to hear and determine promptly disputes on technical matters.

[196] 479 Phil. 1 (2004) [Per J. Tinga, Second Division].

> At the same time, judicial review of actions of administrative agencies is essential, as a check on the unique powers vested unto these instrumentalities. Review is available to reverse the findings of the specialized administrative agency if the record before the Court clearly precludes the agency's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence, or both. Review may also be warranted to ensure that the NTC or similarly empowered agencies act within the confines of their legal mandate and conform to the demands of due process and equal protection.[197] (Citations omitted)

Thus, while judicial interference in an administrative agency's exercise of discretion in highly technical matters is generally frowned upon, it may still be warranted in a few exceptional circumstances. *Philippine Long Distance Telephone Company v. National Telecommunications Commission*[198] states these exceptions:

> It is important to recall that NTC, as the governmental agency charged with passing upon applications for Certificates of Public Convenience and Necessity (CPCNs) in the field of telecommunications, is authorized to determine what the specific operating and technical requirements of "public convenience and necessity" are in the field of telecommunications, subject of course to relevant limitations established by legislative enactments, if any. The NTC is also authorized to examine and assess the legal, technical and financial qualifications of an applicant for a CPCN and in doing so exercises the special capabilities and skills and institutional experience it has accumulated. *Courts should not intervene in that administrative process, save upon a very clear showing of serious violation of law or of fraud, personal malice or wanton oppression.* Courts have none of the technical and economic or financial competence which specialized administrative agencies have at their disposal, and in particular must be wary of intervening in matters which are at their core technical and economic in nature but disguised, more or less artfully, in the habiliments of a "question of legal interpretation."[199] (Emphasis supplied)

Thus, judicial review of technical matters under the National Telecommunications Commission's expertise and competence should only be "upon a very clear showing of serious violation of law or of fraud, personal malice or wanton oppression,"[200] otherwise, its findings are entitled to great weight in this Court.

In this case, Next Mobile was disqualified for unpaid Spectrum User Fee and Supervision and Regulations Fees. Its main argument is that the National Telecommunications Commission should not have included its paid-in-capital and stock issuances from debt-to-equity conversions in the computation of its unpaid Supervision and Regulation Fees since no

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197 *Id.* at 11–12.
198 311 Phil. 548 (1995) [Per J. Feliciano, *En Banc*].
199 *Id.* at 566.
200 *Id.*

payment was received for these stocks.[201]

Spectrum User Fee and Supervision and Regulation Fee, however, are two different fees under Republic Act No. 7925:

> SECTION 5. *Responsibilities of the National Telecommunications Commission.* — The National Telecommunications Commission (Commission) shall be the principal administrator of this Act and as such shall take the necessary measures to implement the policies and objectives set forth in this Act. Accordingly, in addition to its existing functions, the Commission shall be responsible for the following:
>
> . . . .
>
> (g) In the exercise of its regulatory powers, continue to impose such fees and charges as may be necessary to cover reasonable costs and expenses for the regulation and supervision of the operations of telecommunications entities.
>
> . . . .
>
> SECTION 15. *Radio Frequency Spectrum.* — The radio frequency spectrum allocation and assignment shall be subject to periodic review. The use thereof shall be subject to reasonable spectrum user fees. Where demand for specific frequencies exceed availability, the Commission shall hold open tenders for the same and ensure wider access to this limited resource.[202]

Under Memorandum Circular No. 10-10-97, Spectrum User Fees are "based on the amount of spectrum used, the type of service being offered and the economic classification of the areas covered by the radio stations."[203] Supervision and Regulation Fees are based on "the capital stock subscribed or paid, or if no shares have been issued, of the capital invested, or of the property and equipment, whichever is higher."[204]

To qualify for a 3G frequency, Memorandum Circular No. 07-08-2005 requires that the applicant has "no outstanding unpaid supervision and regulations fees, spectrum user fees, radio station license fees, permit fees and other fees imposed by the National Telecommunications Commission pursuant to law, rules and regulations."[205]

There is no merit to Next Mobile's argument that the National Telecommunications Commission should not have included its additional paid in capital from its debt-to-equity conversion as part of the assessment of its Supervision and Regulation Fee, on the basis that the subscription did not

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201 *Rollo* (G.R. No. 191656), pp. 2414–2418.
202 Republic Act No. 7925 (1995).
203 NTC Memorandum Circular No. 10-10-97, October 17, 1997.
204 Republic Act No. 3792 (1963).
205 NTC Memorandum Circular No. 07-08-2005, sec. 3.6.

form part of its capital stock. In *National Telecommunications Commission v. Court of Appeals*:[206]

> The term "capital" and other terms used to describe the capital structure of a corporation are of universal acceptance, and their usages have long been established in jurisprudence. Briefly, capital refers to the value of the property or assets of a corporation. The capital subscribed is the total amount of the capital that persons (subscribers or shareholders) have agreed to take and pay for, which need not necessarily be, and can be more than, the par value of the shares. In fine, it is the amount that the corporation receives, inclusive of the premiums if any, in consideration of the original issuance of the shares. In the case of stock dividends, it is the amount that the corporation transfers from its surplus profit account to its capital account. It is the same amount that can loosely be termed as the "trust fund" of the corporation. The "Trust Fund" doctrine considers this subscribed capital as a trust fund for the payment of the debts of the corporation, to which the creditors may look for satisfaction. Until the liquidation of the corporation, no part of the subscribed capital may be returned or released to the stockholder (except in the redemption of redeemable shares) without violating this principle. Thus, dividends must never impair the subscribed capital; subscription commitments cannot be condoned or remitted; nor can the corporation buy its own shares using the subscribed capital as the consideration therefor.[207]

When Next Mobile converted its creditors' liabilities to stock subscriptions, there was a corresponding increase in its capital stock. It is erroneous for Next Mobile to argue that this could not be considered as part of the capital stock since no payment was received when the liabilities were converted into equity. The consideration in this instance would be the extinguishment of the liability. The stocks their creditors subscribed to are now considered as *paid* stocks. It would have formed part of their additional paid in capital.

As of December 2005, Next Mobile had an unpaid Supervision and Regulation Fee of PHP 126,094,195.67 and a Spectrum User Fee of PHP 9,674,190.00.[208] As the National Telecommunications Commission pointed out Next Mobile did not pay these fees even under protest.[209] Next Mobile was, thus, correctly disqualified for non-payment of fees.

The matter of AZ and CURE's qualifications, on the other hand, have already been taken up by subsequent events.

In *Express Telecommunications v. AZ Communications*,[210] this Court has already stated that:

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206 370 Phil. 538 (1999) [Per J. Purisima, Third Division].
207 *Id.* at 544 *citing* the Corporation Code.
208 *Rollo*, (G.R. No. 189221), p. 5232.
209 *Id.*
210 G.R. No. 196902, July 13, 2020 [Per J. Leonen, Third Division].

> [AZ] can no longer assert any right to the last 3G radio frequency band, as the National Telecommunications Commission did not deem it qualified under the 2005 Memorandum. This finding has been affirmed by this Court with finality.[211]

The 10MHz 3G frequency granted to CURE had also long been divested to the National Telecommunications Commission.[212] As of 2018, the frequency had been granted to Dito Telecom.[213]

MTI, for its part, was assessed as a non-Cellular Mobile Telecommunications System provider and disqualified for failing to prove that it had the capacity to 80% of the provincial capital towns or cities and 80% of the chartered cities.

The facts show that MTI was evaluated as a non-Cellular Mobile Telecommunications System provider since it was only granted a provisional authority to install, operate, and maintain a nationwide public mobile telephone service on October 12, 2005, or after the issuance and effectivity of Memorandum Circular No. 07-08-2005.[214] As the National Telecommunications Commission explains:

> There are valid distinctions between a CMTS and a non-CMTS operator. As pointed out earlier, under MC 07-08-2005, 3G was treated, based on the nature of the technology itself, as a further enhancement of second-generation mobile telecommunications technology (2G) and Enhanced Data for GSM Evolution (EDGE or 2.75G). 3G is not treated as a new or unique type of service.
>
> On the other hand, to qualify for a 3G license, all applicants able to hurdle the first tier of the qualifications process are evaluated according to their compliance with their roll-out requirements vis-à-vis their existing network, among others. Corollarily, in order to comply with its roll-out obligations, a CMTS operator, as compared to a non-CMTS provider, requires a larger capital expenditure and utilization of more advanced technology. More importantly, CMTS service is a more complex telecommunications service which entails a more complex telecommunications network. Since 3G is but an upgrade of 2G, it goes without saying that a CMTS provider already has the infrastructure, the network and the technology for the enhancement (3G) of the service it seeks to upgrade (2G), in contrast to a non-CMTS operator. These substantial distinctions are more than sufficient to justify the difference in the treatment of a CMTS and a non-CMTS operator by allocating more points to a CMTS provider which was found to have fully complied with its roll-out obligations.[215]

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211 *Id.*

212 *Rollo* (G.R. No. 189221), pp. 6042–6044.

213 GMA News TV, *NTC declares Mislatel as new major player*, GMA News Online, November 19, 2018, *available at* https://www.gmanetwork.com/news/money/companies/675299/ntc-declares-mislatel-as-new-major-player/story/ (last accessed on September 11, 2023).

214 *Rollo*, (G.R. No. 189221), p. 5235.

215 *Id.*

Likewise, the Court of Appeals in CA-G.R. SP 105250 had already found that MTI's roll-out plan was belatedly submitted:

> MTI's roll-out plan, in turn, envisaged only a 2% coverage in two years, although it made a commitment to comply with the prescribed 5-year period. In its manifestation on December 9, 2005, it undertook to service at least 80% of the provincial capital towns and cities and 80% of the chartered cities. In a later pleading with the NTC, entitled motion for reconsideration, on January 12, 2006, it clarified that the coverage was meant to cover not just 100% of the provincial capital cities and towns but the 1,618 municipalities, towns and cities in the entire country. But the NTC sees through the December 9, 2005 manifestation as not exactly the roll-out plan contemplated in the Rules. The fact that it submitted a revised roll-out plan belatedly, in its MR, cannot cure the deficiency, as the Rules are explicit that the minimum requirements must be possessed by the applicant at the time of the submission of the application, and not thereafter. The NTC had reason to award only 3 out of 5 possible points.[216]

Memorandum Circular No. 07-08-2005 requires that the applicant possess the qualifications *at the time of its application.* MTI, thus, was correctly disqualified.

As discussed, factual findings of administrative agencies are entitled to great weight with this Court, especially since this Court is not a finder of facts. In *Republic v. Express Telecommunications*:[217]

> The NTC is clothed with sufficient discretion to act on matters solely within its competence. Clearly, the need for a healthy competitive environment in telecommunications is sufficient impetus for the NTC to consider all those applicants who are willing to offer competition, develop the market and provide the environment necessary for greater public service.
>
> . . . .
>
> This Court has consistently held that the courts will not interfere in matters which are addressed to the sound discretion of the government agency entrusted with the regulation of activities coming under the special and technical training and knowledge of such agency. It has also been held that 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. In *Villanueva v. Court of Appeals*, it was held that findings of fact which are supported by evidence and the conclusion of experts should not be disturbed. This was reiterated in *Metro Transit Organization, Inc. v. National Labor Relations Commission*, wherein it was ruled that factual findings of quasi-judicial bodies which have acquired expertise because their jurisdiction is confined to specific matters

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216 *Rollo* (G.R. No. 205603), pp. 193–194.

217 424 Phil. 372 (2002) [Per J Ynares-Santiago, First Division].

> are generally accorded not only respect but even finality and are binding even upon the Supreme Court if they are supported by substantial evidence.
>
> Administrative agencies are given a wide latitude in the evaluation of evidence and in the exercise of its adjudicative functions. This latitude includes the authority to take judicial notice of facts within its special competence.[218] (Citations omitted)

It is, thus, peculiar that the Court of Appeals in CA-G.R. SP No. 105373, after invalidating the 30-point system and the 20-point qualification for failing to comply with the publication requirements, proceeded to use the same point system to state that Bayantel should be assigned the last 3G frequency.[219]

The National Telecommunications Commission had awarded Bayantel zero points for its non-compliance under its previous authority as a Cellular Mobile Telecommunications Service provider to put up an operational network and 1.5 points for its supply and engineering turnkey agreement with 3G equipment supplier ZTE Corporation.[220] The Court of Appeals, however, stated that Bayantel should have gotten at least 6.5 points since its failure to fulfill its commitment under its authorization was the result of a court injunction issued in *Republic v. Express Telecommunications*[221] and a corporate rehabilitation case before the Regional Trial Court of Pasig, docketed as SEC Case No. 03-05.[222]

This reasoning is erroneous. Bayantel had been given a provisional authority to install, operate and maintain a digital Cellular Mobile Telephone Service on May 3, 2000. This grant was the subject of a permanent injunction on September 13, 2000. The permanent injunction was lifted by this Court in *Republic v. Express Telecommunications*[223] dated January 15, 2002. Thus, from 2002, Bayantel was free to use its provisional authority to put up an operational network. A subsequent petition for rehabilitation filed by its creditors, however, resulted in a stay order until June 28, 2004.[224] Memorandum Circular No. 07-08-2005 was issued on August 23, 2005.

The requirement of a track record under Memorandum Circular No. 07-08-2005 is not without basis in law. Republic Act No. 7925, Section 16 mandates that the National Telecommunications Commission should "not grant a subsequent CPCN for another segment of service or extend the area service coverage of an entity which has failed to satisfactorily comply with its commitments to the Commission to provide a particular service in the

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218 *Id.* at 397–398, 402–403.
219 *Rollo* (G.R. No. 191656), pp. 174–178.
220 *Rollo*, (G.R. No. 189221), p. 5256.
221 424 Phil. 372 (2002) [Per J. Ynares-Santiago, First Division].
222 *Rollo* (G.R. No. 191656), pp. 177, 182–183.
223 424 Phil. 372, 405–406 (2002) [Per J. Ynares-Santiago, First Division].
224 *Rollo* (G.R. No. 191656), p. 173.

original area coverage under an earlier authorization."[225] Regardless of whether or not compliance was beyond its control, the facts are clear that within the period it was issued a provisional authority until the period of the issuance of the Circular, Bayantel was unable to put up an operational network.

Considering that Bayantel is expected to provide a vital service to the general public, it is not excused from compliance with requirements simply on the basis that its noncompliance was beyond its control. This kind of reasoning will only result in substandard mediocre offerings among telecommunications networks, to the prejudice of the end users.

The Court of Appeals, thus, erred in finding that Bayantel was entitled to the last 3G frequency.

ACCORDINGLY, the Petitions in G.R. No. 188655, G.R. No. 189221, and G.R. No. 205603 are **DENIED**. The Petition in G.R. No. 191656 is **GRANTED**. The Decisions of the Court of Appeals in CA-G.R. SP No. 100937, CA-G.R. SP No. 106109 and CA-G.R. SP No. 105250 are **AFFIRMED**. The Decision of the Court of Appeals in CA-G.R. SP No. 105373 is **REVERSED** and **SET ASIDE**.

The National Telecommunications Commission's Consolidated Orders dated December 28, 2005 and August 28, 2008 regarding the disqualification of Bayan Telecommunications, Inc., Multi-Media Telephony, Inc., Next Mobile, Inc., and AZ Communications, Inc. in their application for a 3G radio frequency under Memorandum Circular No. 07-08-2005 are **AFFIRMED**. The grant of the remaining 3G bandwidth assignment of 10MHz x 2 shall be within the National Telecommunications Commission's discretion subject to the required application procedures as may be required under relevant laws, rules, and regulations.

SO ORDERED.

MARVIC M.V.F. LEONEN
Senior Associate Justice

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[225] Republic Act No. 7925 (1995), sec. 16.

WE CONCUR:

on official leave
HENRI JEAN PAUL B. INTING
Associate Justice

MARIO V. LOPEZ
Associate Justice

JHOSEP Y. LOPEZ
Associate Justice

ANTONIO T. KHO, JR.
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ALEXANDER G. GESMUNDO
Chief Justice