

ORDER RE: INNOVATIVE PRICE PLANS

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PILIPINO TELEPHONE CORPORATION,

Complainant,

--versus--

ADM. CASE NO. 2005-018

DIGITEL MOBILE PHILIPPINE, INC.,

Respondent.

X ----- X

INNOVE COMMUNICATIONS, INC.,

Complainant,

--versus --

ADM. CASE NO. 2005-021

DIGITEL MOBILE PHILIPPINES, INC.,

Respondent.

X ----- X

ORDER

This resolves the Motion for Reconsideration of the Order dated 24 May 2005 (Order) filed by complainant Innove Communications, Inc. (Innove), and the Motion for Reconsideration and Clarification filed by co-complainant Pilipino Telephone Corporation (PILTEL).

Complainant PILTEL filed its motion on 09 June 2005 and asserted in the main that: (a) The assailed Order does not resolve a pending motion or incident submitted for resolution by any of the parties and is not in the nature of an interlocutory order; (b) The assailed Order is ambiguous and results in contraindications in the position taken by the Commission; (c) The assailed Order is in the nature of a rule or guideline issued pursuant to the exercise of a quasi-legislative function of the Commission and without due process to all interested and affected parties; and (d) The assailed Order is unconstitutional for being violative of prior operators' constitutional right to equal protection

Co-complainant Innove, which filed its motion on 14 June 2005, anchored the same on the following arguments, namely: (a) That the assailed Order is null and void as the Commission exercised rule-making powers in a

quasi-judicial proceeding in a dispute involving only several parties; (b) That the assailed Order violates the equal protection clause as cellular mobile telephone system (CMTS, for brevity) operators similarly situated like Exotelcom, Globe Telecom and Smartcom are not covered by the new rules as they are not parties to the case at bar and that respondent Digitel Mobile Philippines, Inc. was, as compared to complainants, differently favored without substantial distinctions; (c) That the assailed Order is a violation of procedural due process as the same has no law or rule to support itself and is not based on the evidence presented; and (d) That the assailed Order is not an interlocutory one, given, among others, the two-year time frame prescribed therein for compliance with the service performance standards.

Respondent Digitel Mobile Philippines, Inc. (Digitel) submitted its Comment to the motion filed by PILTEL on 05 July 2005 and maintained, among others, that the assailed Order is an interlocutory one that is unambiguous, unequivocal and consistent with the Commission's related pronouncements on the controversy. Digitel further posited that the promulgation of the assailed Order is a valid exercise of the Commission's quasi-judicial powers and is therefore not unconstitutional.

Shortly thereafter, on or 07 July 2005, respondent filed its Comment to Innove's motion and asserted therein that it is adopting the arguments it raised in its comment to PILTEL's motion. Respondent likewise maintained, among others, that there is no violation of the equal protection clause as the assailed Order applies with equal force to all CMTS operators. Furthermore, Innove's substantial distinction argument is misplaced as the substantial distinction in the present case is not between Digitel and other CMTS operators but between innovative and regular price plans.

Subsequently, complainant Innove submitted a Reply^[1] dated 21 July 2005 reiterating its argument that the assailed Order violates the equal protection clause since other CMTS operators, who are not parties to the case, will not be bound by the Interim Guidelines contained in the said Order. Innove further alleged, among others, that substantial distinction under the equal protection clause pertains to CMTS operators, and not between innovative and regular price plans as claimed by the respondent.

A. INTERLOCUTORY NATURE OF THE ORDER

Oddly, complainant PILTEL would argue that the question of respondent's compliance with the Service Performance Standards was never raised as one of the issues in the above-captioned administrative cases. This proposition is readily belied by the records and proceedings of the consolidated cases not to mention the written submissions of the complainants in particular. In its Supplemental Complaint, PILTEL alleged, inter alia, that Digitel is in continuous violation of Memorandum Circular No. 07-06-2002, otherwise known as the Service Performance Standards for the Cellular Mobile Telephone Service since respondent's Call Set-up Success Rate is allegedly only 38% based on "actual tests". The same argument was foisted by Innove in its own complaint whereby the matter of respondent's alleged violation of the service performance standards was based on internal tests.

As it was discussed at length in the assailed Order [2], the initial hearing of Administrative Case No. 2005-21 involved, among others, the presentation by Innove of evidence to support its position that the continuing operation of respondent's 24/7 plan violates the NTC circular on performance standards. This was done through the affidavit of Innove's witness in the person of Engineer Emmanuel Estrada who submitted a "Drive Test Report" as part of his written declarations. During the initial hearing of Administrative Case No. 2005-18, PILTEL presented its own witness Dominador Ramos Perez, Jr., who submitted a "Tabular and Graphical Presentation" to prove that respondent's call set-up success rate was only 38%. In fact, both witnesses of the complainants and their respective reports were subjected to a thorough cross-examination by respondent during

the clarificatory hearings held on April 5, April 13, and April 26, 2005[3] . Thus, and contrary to PILTEL's observation, respondent's alleged violation of the prescribed service performance standards is one of the central issues addressed in the consolidated cases.

In arguing that the assailed Order is not an interlocutory one, as it leaves nothing more to be done within the two-year period contemplated therein, both PILTEL and Innove overlook the fact that the Order was directed at their provisional prayers for the issuance of a Cease-and-Desist-Order on respondent's 24/7 plan. Since the Commission is of the belief that the provisional cease-and-desist order sought for by the complainants would not serve the public interest or promote consumer welfare, it took the position that it would be better at this stage, to adopt interim measures to protect the subscribers of the parties' innovative price plans pending a decision on the merits. In this regard, complainants are well aware that there are other equally compelling issues to be resolved before a final decision on the merits of the consolidated cases could be issued by this Commission.

To repeat, these rules and regulations allegedly violated by the respondent through its assailed service offering include - a) Section 16 (c) of the Public Service Act (requiring notice, publication, and hearing regarding individual or joint rates, toll charges, special rates, among others); b) Section 17 of Republic Act No. 7925 (establishing fair and reasonable rates and tariffs and regulating rates in view of ruinous competition, monopoly, etc.); c) Rules 7,8, 9 of the NTC Rules of Practice and Procedure (prescribing the procedure in the filing and approval of applications for certificate of public convenience); d) Section 3 (h) of NTC Memorandum Circular No. 09-07-2002 (prohibiting predatory pricing) in conjunction with Section 4 (a) (d) (f) of R.A. 7925 (on policy and objectives); e) Section 3 (b) of Memorandum Circular No. 09-07-2002 (prohibiting rate

discrimination in interconnection services); and, (f) Memorandum Circular No. 09-07-2002 since respondent's 24/7 Plan has supposedly resulted in the charging of discriminatory rates against Innove's CMTS service.

Given the complexity of the various issues which prevents this Commission from immediately deciding the consolidated cases on the merits, the Commission resolved, through the Order in question, the more pressing issue of whether it would be in accordance with public interest and consumer welfare to order a temporary and/or provisional cessation of Digitel's "24/7 Plan" by reason of allegedly sub-par performance standards.

Jurisprudence defines a final order as one which disposes of the whole subject matter or terminates a particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined; on the other hand, an order is interlocutory if it does not dispose of a case completely, but leaves something more to be done upon its merits.[4] Stated otherwise, an order is final if it puts an end to the particular matter there resolved or settles definitely the subject therein disposed of such that no further questions can come before the court except with respect to its execution. Such an order may refer to the entire controversy or to some defined and separate branch thereof. On the other hand, an order is merely interlocutory in character if it leaves substantial proceedings yet to be had in connection with the controversy. It is basically provisional in its application. [5]

Based on the foregoing criterion, the assailed Order is undoubtedly of interlocutory character because it leaves much more to be done in the above-captioned consolidated cases, that is, the determination of the innocence or culpability of respondent Digitel for the various charges imputed to it by the co-complainants in their respective administrative complaints.

B. CLARIFICATION OF THE SCOPE AND APPLICATION OF THE ASSAILED ORDER

Further in its Motion, complainant PILTEL sought for the clarification of the Order issued by the Commission with respect to its scope and application. Addressing PILTEL's request, it bears emphasis that the Order of this Commission had been sufficiently clarified in subsequent Press Statements dated 24 May 2005, 26 May 2005 and

31 May 2005. The Commission explained therein, among others, that the inflexible application of current performance standards at this time would deprive the consumers of their freedom to choose as well as discourage healthy competition in the market. Thus, in order to give consumers an informed choice among the unlimited service plans, and at the same time protect them from poor service performance, the Commission has issued guidelines with disclosure and upgrade requirements. Since it is not feasible for companies to offer unlimited text and call services twenty-four hours a day, seven days a week, without causing network congestion, especially during peak hours, which is from 6:00 am to 11:00 pm daily, unlimited service may now only be offered during off-peak hours (11:00 pm - 6:00 am). On the other hand, calls made during peak hours (6:00 am - 11:00 pm) may automatically be terminated after five (5) minutes by the operator if their disclosed drop call rate cannot be met. [6]

The Commission likewise stated therein that it did not abdicate or scrap nor has it the intention to abdicate or scrap, the existing service performance standards. Under the assailed Order, where CMTS operators are allowed to set their own minimum service performance standards, applies only to innovative price plans or to the so-called unlimited voice and text offerings, but does not apply to their regular text and call services. [7]

In other words, for regular text and call services, where CMTS operators impose a per-minute charge on voice calls and impose a charge on every text message sent, these companies still have to comply with the Commission's mandated standard of seven percent (7%) Grade of Service (GOS) and Drop Call Rate (DCR) of five percent (5%), as set forth Memorandum Circular No. 07-06-2002. On the other hand, under the rules on service performance standards for innovative price plans, CMTS operators are required to disclose their self-imposed standards to the Commission and the public. They are also expected to improve their service performance after a year by at least fifty percent (50%) of the difference between their self-imposed standards and the Commission's standards, then fully comply with current standards for regular services at the end of two years.[8]

C. VALIDITY OF THE EXERCISE OF RULE-MAKING POWER IN QUASI-JUDICIAL PROCEEDINGS

The two complainants argue further that the mode by which the Commission acted to protect consumer interest is invalid as the Commission allegedly has no authority to promulgate the assailed Order, which the two (2) complainants maintain is in the nature of a quasi-legislative rule, in a quasi-judicial proceedings.

Administrative agencies possess quasi-legislative or rule making powers and quasi-judicial or administrative adjudicatory powers. Quasi-legislative or rule making power is the power to make rules and regulations which results in delegated legislation that is within the confines of the granting statute and the doctrine of non-delegability and separability of powers. Quasi-judicial or administrative adjudicatory power on the other hand is the power of the administrative agency to adjudicate the rights of persons before it. It is the power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law. The administrative body exercises its quasi-judicial power when it performs in a judicial manner an act which is essentially of an executive or administrative nature, where the power to act in such manner is incidental to or reasonably necessary for the performance of the executive or administrative duty entrusted to it. [9]

This distinction, however, does not always hold true as an administrative pronouncement that is targeted at a specific person may be properly classified as a rule if it has the potential to affect others who may become similarly situated, or enter the industry, or can affect the interests of the general public. [10] Thus, an administrative agency is not precluded to act, in a single determination, in both a legislative and a judicial capacity. It may decide matters of policy or determine a rule for future action as well as dispose of a particular

controversy. [11]

It has likewise been held that although it is sometimes said that the preferred method of policymaking is by promulgation of rules, and it is always possible for the legislature to require an agency to define a statutory term by rulemaking, the choice whether to proceed by general rulemaking or by individual ad hoc litigation lies primarily in the informed discretion of the administrative agency. However, substantial discretion does not immunize an agency from considerations of fairness. [12]

In *Misamis Oriental Association of Coco Traders, Inc. vs. Department of Finance Secretary*, [13] the Supreme Court has had occasion to discuss the requirements for adoption of quasi-legislative rules by administrative agencies. The High Court ruled therein, among others, that ---

"In the same way that laws must have the benefit of public hearing, it is generally required that before a legislative rule is adopted there must be hearing. In this connection, the Administrative Code of 1987 provides:

"Public Participation -- If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.

"(2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.

"(3) In case of opposition, the rules on contested cases shall be observed. [14]

"In addition such rule must be published. [15]

x x x "

While the abovementioned provision does not make express reference to exceptions therefrom, it is readily apparent that the rule admits of deviations from the general rule as evidenced by the words "generally" and "as far as practicable". Furthermore, established rules of statutory construction provide that every rule is not without an exception as exemplified in the Latin maxim *Ibi quid generaliter conceditur; inest haec exceptio, si non aliquid sit contras jus basque*, which means that where anything is granted generally, this exception is implied that nothing shall be contrary to law and right. Equity as well as the exceptional situations in a case may require a departure from the established rule. Compelling reasons may justify reading an exception to a rule even where the latter does not provide any. Where the rigorous application of the law would result in preventing a fair and impartial inquiry into the actual facts of a case, the exigencies of injustice demand that the general rule should yield to occasional exceptions whenever there are weighty reasons therefor. Otherwise, the rigor of the law would become the highest injustice *summum jus, summa injuria*. [16]

In addition thereto, existing jurisprudence accord administrative agencies flexibility in issuing rules which are of a legislative character. Thus, in *Vigan Electric Light Co., Inc. vs. Public Service Commission*, [17] the Supreme

Court held *inter alia* that the rule-making power of administrative agencies may partake of a legislative character when such rules are meant to apply to all enterprises of a given kind throughout the Philippines. The Court likewise rules therein that the valid exercise of such authority does not necessarily demand previous notice and hearing.

The above-quoted ruling was further explained in the case of *Central Bank vs. Cloribel*,^[18] wherein the High Court, citing numerous foreign decisions in the field of administrative law, ruled, among others, that --

"xxx Previous notice and hearing, as elements of due process, are constitutionally required for the protection of life or vested property rights, as well as liberty, when its limitation or loss takes place in consequence of a judicial or quasi-judicial proceeding, generally dependent upon a past act or event which has to be established or ascertained. It is not essential to the validity of general rules or regulations promulgated to govern future conduct of a class of persons or enterprises, unless the law provides otherwise, and there is no statutory requirement to this effect, insofar as the fixing of maximum rates of interest payable by banks is concerned.

"It is also clear from the authorities that where the function of the administrative body is legislative, notice or hearing is not required by due process of law. See *Oppenheimer*, *Administrative Law*, 2 Md. L.R. 185, *supra*, where it is said: 'If the nature of the administrative agency is essentially legislative, the requirements of notice and hearing are not necessary. The validity of a rule of future action which affects a group, if vested rights of liberty or property are not involved, is not determined according to the same rules which apply in the case of the direct application of a policy to a specific individual.' ... It is said in 73 C.J.S *Public Administrative Bodies and Procedures*, sec. 130, pages 452 and 563: Aside from statute, the necessity of notice and hearing in an administrative proceeding depends on the character of the proceeding and the circumstances involved. In so far as generalization is possible in view of the great variety of administrative proceedings, it may be stated as a general rule that notice and hearing are not essential to the validity of administrative action where the administrative body acts in a judicial or quasi-judicial matter and its acts are particular and immediate rather than general and prospective, the person whose rights or property may be affected by the action is entitled to notice and hearing.

"[17] Procedural due process is not required, however, in the formulation and issuance of general rules and regulations, as distinguished from the rendering of determinations and decisions in adjudicatory proceedings. Nor is procedural due process required where there is no interference with life, liberty, or a vested property right...

"[18] 'Rule-making' is legislation on the administrative level, i.e., legislation within the confines of the granting statute, as required by the constitution and its doctrine of nondelegability and separability of powers. *Willapoint Oysters, Inc. v. Ewing*, 9 Cir., 174 F. 2d 676, certiorari denied, 338 U.S. 860, 70 S Ct. 101. It is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations, the latter being adjudicatory in nature. *Administrative Rule-Making*, Fuchs, 52 *Harvard Law Review* 263.

"Admitting that problems are encountered in classifying some kinds of procedures as rule-making on the one hand, or judicial or quasi-judicial on the other, no such difficulty is presented in this case. The rules and regulations which may be prescribed under No. 178 are those which relate to classes of persons and situations,

as distinguished from specific persons and situations. They are, to use the language of the Administrative Procedure Act, 60 Stat. 287, sec.2 (c), 5 U.S.C.A. sec. 1001(c) agency statements of 'general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...'

"The due process provisions do not require that there be notice and hearing before the promulgation of such rules and regulations. *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 P. 595; *Bi-Metallic Investment Co. v. Colorado*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372; *Willapoint Oysters, Inc., v. Ewing*, supra; *Guisseppi v. Walling*, 2 Cir. 144 F. 2d 608, 155 A.L.R. 76; *H. F. Wilcox Oil & Gas Co. v. State*, 162 Okl. 89, 19 P.2d 347, 86 A.L.R. 421."

Admittedly, the assailed Order was promulgated by the Commission in a quasi-judicial proceedings. However, it bears pointing out that the Commission is endowed with enough discretion, under its determinative power to dispense, after a careful consideration of the abovementioned factors, to exempt CMTS operators offering innovative price plans from complying with Memorandum Circular No. 07-06-2002. Furthermore, based on the rulings in *Vigan and Cloribel*, the Commission is likewise clothed with sufficient discretion to promulgate rules and guidelines which are of a legislative character through individual ad hoc litigation such as the above-captioned consolidated cases, and thereby subject all CMTS operators to the guidelines issued through the promulgation of the assailed Order.

In this case, considerations of public interest and the need to protect the subscribers of all carriers offering innovative price plans justify the method adopted by this Commission in the promulgation of the interim rules contained in the Order. In any event, it is worth mentioning that the rules and guidelines contained in the assailed Order were issued after the parties were given their respective opportunities to be heard and to present evidence in support of their contentions. There can therefore be no question as to the validity of the manner by which the Commission issued the guidelines governing innovative price plans.

D. BASES FOR THE PROMULGATION OF THE ASSAILED ORDER

As previously discussed, and as may be gleaned from the assailed Order, the *raison d'être* of the mode chosen by the Commission in providing interim regulatory guidelines to be followed by CMTS operators offering innovative price plans is the imperative necessity of protecting the consuming public, while at the same time allowing the market to freely interact in an environment of minimal regulation, pending a decision of the above-captioned cases on the merits. Republic Act No. 7925, otherwise known as the Public Telecommunications Policy Act of the Philippines, states in Sections 4 (f) and 5 (e) thereof that --

SECTION 4. Declaration of National Policy - Telecommunications is essential to the economic development, integrity and security of the Philippines, and as such shall be developed and administered as to safeguard, enrich and strengthen the economic, cultural, social and political fabric of the Philippines. The growth and development of telecommunications services shall be pursued in accordance with the following policies:

f) 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;

xxx xxx xxx

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:

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.

It bears stress that the telecommunications business to which all parties to the present case are engaged in is one impressed with a high degree of public interest. Thus, in resolving the issue of whether or not to order a temporary and/or provisional cessation of Digitel's "24/7 Plan" because of allegedly sub-par performance standards, the Commission is positively enjoined by law not only to take into consideration the material interests of the parties to the controversy but, more importantly, to zealously guard the welfare of the public, who stand to lose their right to choose the price-quality package that might best suit their needs with the blanket abolition of innovative price plans by reasons which are totally not imputable to them.

E. APPLICABILITY OF THE EQUAL PROTECTION CLAUSE AND THE PRIOR OPERATOR RULE

Complainant PILTEL maintains that the Order violates the prior operator's constitutional right to equal protection. On the other hand, complainant Innove asserts that the Order violates the equal protection clause since other CMTS operators are not parties to the case nor are they covered by the new rules.

The prior operator rule concept finds no application to the case under consideration for obvious reasons. In the first place, complainant PILTEL is not the pioneer nor was it the first telecommunications entity to introduce an innovative pricing plan presently being implemented by the CMTS companies. Even if it were a pioneer so to speak, its status as such does not give it an exclusive privilege to offer and maintain an innovative pricing plan. This principle finds its source in the rulings of the Supreme Court which prohibited Congress and this Commission from granting an exclusive franchise, certificate, or any other form of authorization to operate a public utility.[19]

More importantly, the necessity of doing away with the prior operator rule in the telecommunications industry is dictated by the need for a healthy competitive environment in telecommunications which is a sufficient impetus for this Commission to consider all those applicants who are willing to offer competition, develop the market and provide the environment necessary for greater public service. Furthermore, free competition in the industry may also provide the answer to a much-desired improvement in the quality and delivery of this type of public utility, to improved technology, fast and handy mobil(e) service, and reduced user dissatisfaction.[20]

There is likewise no violation of the equal protection clause as the said guidelines validly distinguish regular price plans from innovative ones, and establish rules that will govern each class of price plan, that is, the former to be governed by, among others, Memorandum Circular No. 07-06-2002, and the latter, by the Order in question. As it has been mentioned in the Order itself and the press releases explaining the rationale of the said order, the interim guidelines set forth therein apply to all CMTS operators which are presently offering, or who may be minded to offer, innovative price plans.

Contrary to the observations of complainant Innove, the interim guidelines did not discriminate against or

prejudice the complainants or other CMTS operators. Far from weighing down complainants and other carriers with an additional burden or disadvantage, the guidelines equally accorded these carriers a measure of flexibility and advantage by allowing them to set their own standards in the interim as previously mentioned. And, even if we assume for the sake of pure argument that the Order conferred an added advantage in favor of respondent, it would not result in a violation of the equal protection clause. Indeed, the thrust of the law (RA 7925) is to promote the gradual deregulation of entry, pricing, and operations of all public telecommunications entities and thus level the playing field in the telecommunications industry. [21]

F. THE NEED FOR PUBLICATION

The Commission finds merit in Innove's contention that the interim guidelines set forth in the assailed Order should be published in order that the said rules may take effect. Since the assailed Order, and consequently, the interim guidelines contained therein provides punitive sanctions in case of non-compliance, the Interim Guidelines and the clarifications herein mentioned ought to be published, and thereafter, take effect fifteen (15) days from its publication in a newspaper of general circulation and the filing of three (3) copies thereof with the University of the Philippines Law Center.

G. RULING

WHEREFORE, complainant PILTEL's motion for the clarification of the assailed Order is hereby GRANTED. Thus, the Commission hereby re-issues the following Interim Guidelines for innovative price plans together with the clarifications herein mentioned pending a decision on the merits. The respondent and the complainants including other CMTS operators offering innovative price plans are directed in the interim to --

1. Set and establish interim minimum standards for grade of service and drop call rates. These standards shall be disclosed to the Commission prior to the offering, and shall be disclosed to the consuming public through publication in all their advertising, using the following prescribed language:

"(Name of Operator) guarantees that no more than __ out of every 100 connection attempts will fail on the first try. Further (Name of Operator) guarantees that no more than __ out of every 100 calls will be prematurely terminated by the network."

1.1 For print media placements, the disclosures - including that required by rule 3 below, if applicable - must occupy 10% of the total size of the placement. For radio and TV placements, the CMTS companies shall make the prescribed disclosure at the end of each airing. Such disclosures should meet prior approval by the Commission;

2. After one year, operators must improve their GOS and Drop Call Rate at least 50% of the difference between their voluntary standard and the NTC standard. After two years, operators must meet NTC's mandated standard of Seven (7%) Percent GOS and a DCR of only Five (5%) Percent; and,

3. Operators may opt to adopt a higher drop call rate during peak hours (which shall be from 6:00 am to 11:00 pm daily), provided that the same is similarly disclosed to and approved by this Commission, and disclosed in all their advertising, using the following prescribed language:

"The guaranteed drop call rates shall not apply during peak hours (specify what these hours are). During these hours, calls shall automatically be terminated by the network after ____ minutes."

3.1 For radio and TV placements, the CMTS companies should make the prescribed disclosure at the end of each airing.

4. Since it is not feasible for companies to offer unlimited text and call services twenty-four hours a day, seven days a week, without causing network congestion, especially during peak hours, which is from 6:00 am to 11:00pm daily, unlimited service may now only be offered during off-peak hours (11:00 pm- 6:00 am). On the other hand, calls made during peak hours (6:00am - 11:00 pm) may automatically be terminated after five (5) minutes by the operator if their disclosed drop call rate cannot be met.

5. The Interim guidelines herein set-forth, where CMTS operators are allowed to set their own minimum service performance standards, applies only to innovative price plans or to the so-called unlimited voice and text offerings, but does not apply to their regular text and call services.

6. In other words, for regular text and call services, where CMTS operators impose a per-minute charge on voice calls and impose a charge on every text message sent, these companies still have to comply with the Commission's mandated standards of seven percent (7%) Grade of Service (GOS) and Drop Call Rate (DCR) of five percent (5%), as set forth Memorandum Circular No. 07-06-2002. On the other hand, under the interim rules on service performance standards for innovative price plans, CMTS operators are required to disclose their self-imposed standards to the Commission and the public. They are also expected to improve their service performance after a year by at least fifty percent (50%) of the difference between their self-imposed standards and the Commission's standards, then fully comply with current standards for regular services at the end of two years.

7. Herein respondent and such other parties that presently offer innovative price plans, or shall hereafter offer other innovative price plans are directed to strictly comply with the aforesaid interim rules as clarified, failing which, the Commission shall impose all applicable fines and penalties including the issuance of a cease-and-desist order, on these price offerings, upon notice and hearing.

Furthermore, and finding Innove's argument regarding the need for publication to be well taken, let the dispositive portion of this Order containing the Interim Guidelines including the clarifications above mentioned be published in a newspaper of general circulation, and let the said dispositive portion of this Order be filed in three (3) copies with the University of the Philippines Law Center. The Interim Guidelines herein clarified shall take effect fifteen (15) days from its publication in a newspaper of general circulation and the filing of three (3) copies thereof with the University of the Philippines Law Center.

The rest of the allegations in the two (2) complainants' respective Motions for Reconsideration are hereby denied for lack of merit.

SO ORDERED.

Adopted: 03 Aug. 2005

(SGD.) RONALD OLIVAR SOLIS

Commissioner

(SGD.) JORGE V. SARMIENTO

(SGD.) JAIME M. FORTES, JR.

Deputy Commissioner

Deputy Commissioner

[1] The Reply was in response to the Comment of Innove.

[2] Please see Order of the Commission dated 24 May 2005

[3] At that juncture, Administrative Case Nos. 2055-18 and 2005-21 were consolidated by this Commission.

[4] Ocampo vs. Republic; 9 SCRA 440

[5] Please see Tambaoan, et.al. vs. Court of Appeals, et.al.; G.R. No. 138219, September 17, 2001

[6] Please see the NTC Press Release dated 24 May 2005 entitled "NTC issues guidelines to mobile companies for innovative price plans"

[7] Please see the NTC Press Release dated 31 May 2005 entitled "NTC Replies to Congressman Santiago"

[8] Please see the NTC Press Release dated 26 May 2005 entitled "NTC explains rules on service performance standards for innovative price plans"

[9] Please see separate opinion of Justice Bellosillo in Commissioner of Internal Revenue vs. Court of Appeals; citing *Hormed vs. Helvering*, 312 U.S. 505; and *Gudminson vs. Cardollo*, 126 F 2d.521

[10] Please see 2 Am. Jur. 2d, Administrative Law § 155

[11] Please see De Leon, Administrative Law, Text and Cases, 2001 Ed., p. 83; citing I Am. Jur. 2d. 143.

[12] Please see 2 Am. Jur.2d, Administrative Law § 155

[13] 238 SCRA 63

[14] Citing Bk VII, Ch. 2, §9 thereof

[15] Citing *Tañada v. Tuvera*, 146 SCRA 446 (1986)

[16] Please see Agpalo, Statutory Construction, 4th Ed., p. 157; citing *Province of Cebu vs. Intermediate Appellate Court* (147 SCRA 447), *De Villa vs. Court of Appeals* (195 SCRA 722) and *People vs. Gutierrez* (36 SCRA 172)

[17] 10 SCRA 46

[18] 44 SCRA 307

[19] Pilipino Telephone Corporation vs. National Telecommunications Commission, 410 SCRA 82

[20] Republic vs. Express Telecommunications G.R. Nos. 147096 & 147210, January 15, 2002; Radio Communications of the Philippines, Inc., vs. NTC, 150 SCRA 450; PLDT vs. NTC, 190 SCRA 717; and Republic vs. Republic Telephone, 265 SCRA 1

[21] See PLDT vs. City of Davao and Aida Barcelona, G.R. No. 143867, March 25, 2003.

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