

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

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

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

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

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

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

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

SO ORDERED.[4]

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

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

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

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

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

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

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

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

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

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

On the allegation that the Commission has committed an error in allowing the revival of the instant application, it appears that the Order dated 14 December 1993 archiving the same was anchored on the non-availability of frequencies for CMTS. In the same Order, it was expressly stated that the archival hereof, shall be without

prejudice to its reinstatement “if and when the requisite frequency becomes available.” Inherent in the said Order is the prerogative of the Commission in reviving the same, subject to prevailing conditions. The Order of 1 February 2001, cited the availability of frequencies for CMTS, and based thereon, the Commission, exercising its prerogative, revived and reinstated the instant application. The fact that the motion for revival hereof was made ex-parte by the applicant is of no moment, so long as the oppositors are given the opportunity to be later heard and present the merits of their respective oppositions in the proceedings.

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

Accordingly, the Motions for Reconsideration filed by SMARTCOM and GLOBE TELECOMS/ISLACOM and the Motion to Dismiss filed by EXTELCOM are hereby DENIED for lack of merit.[13]

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

COMMENTS:

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

CONCLUSIONS:

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

IN VIEW OF THE FOREGOING and considering that there is prima facie evidence to show that Applicant is

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

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

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

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

SO ORDERED.[17]

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

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

Hence, the NTC filed the instant petition for review on certiorari, docketed as G.R. No. 147096, raising the following issues for resolution of this Court:

- Whether or not the Order dated February 1, 2000 of the petitioner which revived the application of respondent Bayantel in NTC Case No. 92-486 violated respondent Extelcom's right to procedural due process of law;
- Whether or not the Order dated May 3, 2000 of the petitioner granting respondent Bayantel a provisional authority to operate a CMTS is in substantial compliance with NTC Rules of Practice and Procedure and Memorandum Circular No. 9-14-90 dated September 4, 1990.[22]

Subsequently, Bayantel also filed its petition for review, docketed as G.R. No. 147210, assigning the following errors:

- THE COURT OF APPEALS SERIOUSLY ERRED IN ITS INTERPRETATION OF THE PRINCIPLE OF "EXHAUSTION OF ADMINISTRATIVE REMEDIES" WHEN IT FAILED TO DISMISS HEREIN

RESPONDENT'S PETITION FOR CERTIORARI DESPITE ITS FAILURE TO FILE A MOTION FOR RECONSIDERATION.

- THE COURT OF APPEALS SERIOUSLY ERRED IN ITS FINDING THAT THE REVIVAL OF NTC CASE NO. 92-486 ANCHORED ON A EX-PARTE MOTION TO REVIVE CASE WAS TANTAMOUNT TO GRAVE ABUSE OF DISCRETION ON THE PART OF THE NTC.

- THE COURT OF APPEALS SERIOUSLY ERRED WHEN IT DENIED THE MANDATE OF THE NTC AS THE AGENCY OF GOVERNMENT WITH THE SOLE DISCRETION REGARDING ALLOCATION OF FREQUENCY BAND TO TELECOMMUNICATIONS ENTITIES.

- THE COURT OF APPEALS SERIOUSLY ERRED IN ITS INTERPRETATION OF THE LEGAL PRINCIPLE THAT JURISDICTION ONCE ACQUIRED CANNOT BE LOST WHEN IT DECLARED THAT THE ARCHIVED APPLICATION SHOULD BE DEEMED AS A NEW APPLICATION IN VIEW OF THE SUBSTANTIAL CHANGE IN THE CIRCUMSTANCES ALLEGED IN ITS AMENDMENT APPLICATION.

- CONTRARY TO THE FINDING OF THE COURT OF APPEALS, THE ARCHIVING OF THE BAYANTEL APPLICATION WAS A VALID ACT ON THE PART OF THE NTC EVEN IN THE ABSENCE OF A SPECIFIC RULE ON ARCHIVING OF CASES SINCE RULES OF PROCEDURE ARE, AS A MATTER OF COURSE, LIBERALLY CONSTRUED IN PROCEEDINGS BEFORE ADMINISTRATIVE BODIES AND SHOULD GIVE WAY TO THE GREATER HIERARCHY OF PUBLIC WELFARE AND PUBLIC INTEREST.

- CONTRARY TO THE FINDING OF THE COURT OF APPEALS, THE ARCHIVING OF BAYANTEL'S APPLICATION WAS NOT VIOLATIVE OF THE SUMMARY NATURE OF THE PROCEEDINGS IN THE NTC UNDER SEC. 3, RULE 1 OF THE NTC REVISED RULES OF PROCEDURE.

- THE COURT OF APPEALS SERIOUSLY ERRED IN ITS FINDING THAT THE ARCHIVING OF BAYANTEL'S APPLICATION WAS VIOLATIVE OF THE ALLEGED DECLARED POLICY OF THE GOVERNMENT ON THE TRANSPARENCY AND FAIRNESS OF ADMINISTRATIVE PROCESS IN THE NTC AS LAID DOWN IN SEC 4(1) OF R.A. NO. 7925.

- THE COURT OF APPEALS SERIOUSLY ERRED IN ITS FINDING THAT THE NTC VIOLATED THE PROVISIONS OF THE CONSTITUTION PERTAINING TO DUE PROCESS OF LAW.

- THE COURT OF APPEALS SERIOUSLY ERRED IN DECLARING THAT THE MAY 3, 2000 ORDER GRANTING BAYANTEL A PROVISIONAL AUTHORITY SHOULD BE SET ASIDE AND REVERSED.

- Contrary to the finding of the Court of Appeals, there was no violation of the NTC Rule that the legal, technical, financial and economic documentations in support of the prayer for provisional authority should first be submitted.

- Contrary to the finding of the Court of Appeals, there was no violation of Sec. 3, Rule 15 of the NTC Rules of Practice and Procedure that a motion must first be filed before a provisional authority could be issued.

- Contrary to the finding of the Court of Appeals that a plea for provisional authority necessitates a notice and hearing, the very rule cited by the petitioner (Section 5, Rule 4 of the NTC Rules of Practice and Procedure) provides otherwise.

- Contrary to the finding of the Court of Appeals, urgent public need is not the only basis for the grant of a provisional authority to an applicant;

- Contrary to the finding of the Court of Appeals, there was no violation of the constitutional provision on the right of the public to information when the Common Carrier Authorization Department (CCAD) prepared its

evaluation report.[23]

Considering the identity of the matters involved, this Court resolved to consolidate the two petitions.[24]

At the outset, it is well to discuss the nature and functions of the NTC, and analyze its powers and authority as well as the laws, rules and regulations that govern its existence and operations.

The NTC was created pursuant to Executive Order No. 546, promulgated on July 23, 1979. It assumed the functions formerly assigned to the Board of Communications and the Telecommunications Control Bureau, which were both abolished under the said Executive Order. Previously, the NTC's functions were merely those of the defunct Public Service Commission (PSC), created under Commonwealth Act No. 146, as amended, otherwise known as the Public Service Act, considering that the Board of Communications was the successor-in-interest of the PSC. Under Executive Order No. 125-A, issued in April 1987, the NTC became an attached agency of the Department of Transportation and Communications.

In the regulatory telecommunications industry, the NTC has the sole authority to issue Certificates of Public Convenience and Necessity (CPCN) for the installation, operation, and maintenance of communications facilities and services, radio communications systems, telephone and telegraph systems. Such power includes the authority to determine the areas of operations of applicants for telecommunications services. Specifically, Section 16 of the Public Service Act authorizes the then PSC, upon notice and hearing, to issue Certificates of Public Convenience for the operation of public services within the Philippines "whenever the Commission finds that the operation of the public service proposed and the authorization to do business will promote the public interests in a proper and suitable manner." [25] The procedure governing the issuance of such authorizations is set forth in Section 29 of the said Act, the pertinent portion of which states:

All hearings and investigations before the Commission shall be governed by rules adopted by the Commission, and in the conduct thereof, the Commission shall not be bound by the technical rules of legal evidence. xxx.

In granting Bayantel the provisional authority to operate a CMTS, the NTC applied Rule 15, Section 3 of its 1978 Rules of Practice and Procedure, which provides:

Sec. 3. Provisional Relief. --- Upon the filing of an application, complaint or petition or at any stage thereafter, the Board may grant on motion of the pleader or on its own initiative, the relief prayed for, based on the pleading, together with the affidavits and supporting documents attached thereto, without prejudice to a final decision after completion of the hearing which shall be called within thirty (30) days from grant of authority asked for. (underscoring ours)

Respondent Extelcom, however, contends that the NTC should have applied the Revised Rules which were filed with the Office of the National Administrative Register on February 3, 1993. These Revised Rules deleted the phrase "on its own initiative;" accordingly, a provisional authority may be issued only upon filing of the proper motion before the Commission.

In answer to this argument, the NTC, through the Secretary of the Commission, issued a certification to the effect that inasmuch as the 1993 Revised Rules have not been published in a newspaper of general circulation, the NTC has been applying the 1978 Rules.

The absence of publication, coupled with the certification by the Commissioner of the NTC stating that the NTC was still governed by the 1978 Rules, clearly indicate that the 1993 Revised Rules have not taken effect at the time of the grant of the provisional authority to Bayantel. The fact that the 1993 Revised Rules were filed with the UP Law Center on February 3, 1993 is of no moment. There is nothing in the Administrative Code of 1987 which implies that the filing of the rules with the UP Law Center is the operative act that gives the rules force and effect.

Book VII, Chapter 2, Section 3 thereof merely states:

Filing. --- (1) Every agency shall file with the University of the Philippines Law Center three (3) certified copies of every rule adopted by it. Rules in force on the date of effectivity of this Code which are not filed within three (3) months from the date shall not thereafter be the basis of any sanction against any party or persons.

(2) The records officer of the agency, or his equivalent functionary, shall carry out the requirements of this section under pain or disciplinary action.

(3) A permanent register of all rules shall be kept by the issuing agency and shall be open to public inspection.

The National Administrative Register is merely a bulletin of codified rules and it is furnished only to the Office of the President, Congress, all appellate courts, the National Library, other public offices or agencies as the Congress may select, and to other persons at a price sufficient to cover publication and mailing or distribution costs.[26] In a similar case, we held:

This does not imply however, that the subject Administrative Order is a valid exercise of such quasi-legislative power. The original Administrative Order issued on August 30, 1989, under which the respondents filed their applications for importations, was not published in the Official Gazette or in a newspaper of general circulation. The questioned Administrative Order, legally, until it is published, is invalid within the context of Article 2 of Civil Code, which reads:

“Article 2. Laws shall take effect after fifteen days following the completion of their publication in the Official Gazette (or in a newspaper of general circulation in the Philippines), unless it is otherwise provided. x x x”

The fact that the amendments to Administrative Order No. SOCPEC 89-08-01 were filed with, and published by the UP Law Center in the National Administrative Register, does not cure the defect related to the effectivity of the Administrative Order.

This Court, in *Tañada vs. Tuvera* (G.R. No. L-63915, December 29, 1986, 146 SCRA 446) stated, thus:

“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 is fixed by the legislature.

Covered by this rule are presidential decrees and executive orders promulgated by the President in the exercise of legislative power 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.

x x x

We agree that the publication must be in full or it is no publication at all since its purpose is to inform the public of the contents of the laws.”

The Administrative Order under consideration is one of those issuances which should be published for its effectivity, since its purpose is to enforce and implement an existing law pursuant to a valid delegation, i.e., P.D. 1071, in relation to LOI 444 and EO 133.[27]

Thus, publication in the Official Gazette or a newspaper of general circulation is a condition sine qua non before statutes, rules or regulations can take effect. This is explicit from Executive Order No. 200, which repealed Article 2 of the Civil Code, and which states that:

Laws shall take effect after fifteen days following the completion of their publication either in the Official Gazette or in a newspaper of general circulation in the Philippines, unless it is otherwise provided.[28]

The Rules of Practice and Procedure of the NTC, which implements Section 29 of the Public Service Act (C.A. 146, as amended), fall squarely within the scope of these laws, as explicitly mentioned in the case *Tañada v. Tuvera*.[29]

Our pronouncement in *Tañada vs. Tuvera* is clear and categorical. Administrative rules and regulations must be published if their purpose is to enforce or implement existing law pursuant to a valid delegation. The only exceptions are interpretative regulations, those merely internal in nature, or those so-called letters of instructions issued by administrative superiors concerning the rules and guidelines to be followed by their subordinates in the performance of their duties.[30]

Hence, the 1993 Revised Rules should be published in the Official Gazette or in a newspaper of general circulation before it can take effect. Even the 1993 Revised Rules itself mandates that said Rules shall take effect only after their publication in a newspaper of general circulation.[31] In the absence of such publication, therefore, it is the 1978 Rules that governs.

In any event, regardless of whether the 1978 Rules or the 1993 Revised Rules should apply, the records show that the amended application filed by Bayantel in fact included a motion for the issuance of a provisional authority. Hence, it cannot be said that the NTC granted the provisional authority *motu proprio*. The Court of Appeals, therefore, erred when it found that the NTC issued its Order of May 3, 2000 on its own initiative. This much is acknowledged in the Decision of the Court of Appeals:

As prayer, ICC asked for the immediate grant of provisional authority to construct, install, maintain and operate the subject service and to charge the proposed rates and after due notice and hearing, approve the instant application and grant the corresponding certificate of public convenience and necessity.[32]

The Court of Appeals also erred when it declared that the NTC's Order archiving Bayantel's application was null and void. The archiving of cases is a widely accepted measure designed to shelve cases in which no immediate action is expected but where no grounds exist for their outright dismissal, albeit without prejudice. It saves the petitioner or applicant from the added trouble and expense of re-filing a dismissed case. Under this scheme, an inactive case is kept alive but held in abeyance until the situation obtains wherein action thereon can be taken.

In the case at bar, the said application was ordered archived because of lack of available frequencies at the time, and made subject to reinstatement upon availability of the requisite frequency. To be sure, there was nothing irregular in the revival of the application after the condition therefor was fulfilled.

While, as held by the Court of Appeals, there are no clear provisions in the Rules of the NTC which expressly allow the archiving of any application, this recourse may be justified under Rule 1, Section 2 of the 1978 Rules, which states:

Sec. 2. Scope.--- These rules govern pleadings, practice and procedure before the Board of Communications (now NTC) in all matters of hearing, investigation and proceedings within the jurisdiction of the Board. However, in the broader interest of justice and in order to best serve the public interest, the Board may, in any particular matter, except it from these rules and apply such suitable procedure to improve the service in the transaction of the public business. (underscoring ours)

The Court of Appeals ruled that the NTC committed grave abuse of discretion when it revived Bayantel's application based on an ex-parte motion. In this regard, the pertinent provisions of the NTC Rules:

Sec. 5. Ex-parte Motions. --- Except for motions for provisional authorization of proposed services and increase of rates, ex-parte motions shall be acted upon by the Board only upon showing of urgent necessity therefor and the right of the opposing party is not substantially impaired.[33]

Thus, in cases which do not involve either an application for rate increase or an application for a provisional authority, the NTC may entertain ex-parte motions only where there is an urgent necessity to do so and no rights of the opposing parties are impaired.

The Court of Appeals ruled that there was a violation of the fundamental right of Extelcom to due process when it was not afforded the opportunity to question the motion for the revival of the application. However, it must be noted that said Order referred to a simple revival of the archived application of Bayantel in NTC Case No. 92-426. At this stage, it cannot be said that Extelcom's right to procedural due process was prejudiced. It will still have the opportunity to be heard during the full-blown adversarial hearings that will follow. In fact, the records show that the NTC has scheduled several hearing dates for this purpose, at which all interested parties shall be allowed to register their opposition. We have ruled that there is no denial of due process where full-blown adversarial proceedings are conducted before an administrative body.[34] With Extelcom having fully participated in the proceedings, and indeed, given the opportunity to file its opposition to the application, there was clearly no denial of its right to due process.

In *Zaldivar vs. Sandiganbayan* (166 SCRA 316 [1988]), we held that the right to be heard does not only refer to the right to present verbal arguments in court. A party may also be heard through his pleadings. Where opportunity to be heard is accorded either through oral arguments or pleadings, there is no denial of procedural due process. As reiterated in *National Semiconductor (HK) Distribution, Ltd. vs. NLRC* (G.R. No. 123520, June 26, 1998), the essence of due process is simply an opportunity to be heard, or as applied to administrative proceedings, an opportunity to explain one's side. Hence, in *Navarro III vs. Damaso* (246 SCRA 260 [1995]), we held that a formal or trial-type hearing is not at all times and not in all instances essential. Plainly, petitioner was not denied due process.[35]

Extelcom had already entered its appearance as a party and filed its opposition to the application. It was neither precluded nor barred from participating in the hearings thereon. Indeed, nothing, not even the Order reviving the application, bars or prevents Extelcom and the other oppositors from participating in the hearings and adducing evidence in support of their respective oppositions. The motion to revive could not have possibly caused prejudice to Extelcom since the motion only sought the revival of the application. It was merely a preliminary step towards the resumption of the hearings on the application of Bayantel. The latter will still have to prove its capability to undertake the proposed CMTS. Indeed, in its Order dated February 1, 2000, the NTC set several hearing dates precisely intended for the presentation of evidence on Bayantel's capability and qualification. Notice of these hearings were sent to all parties concerned, including Extelcom.

As regards the changes in the personal circumstances of Bayantel, the same may be ventilated at the hearings during Bayantel's presentation of evidence. In fact, Extelcom was able to raise its arguments on this matter in the Opposition (With Motion to Dismiss) anent the re-opening and re-instatement of the application of Bayantel. Extelcom was thus heard on this particular point.

Likewise, the requirements of notice and publication of the application is no longer necessary inasmuch as the application is a mere revival of an application which has already been published earlier. At any rate, the records show that all of the five (5) CMTS operators in the country were duly notified and were allowed to raise their respective oppositions to Bayantel's application through the NTC's Order dated February 1, 2000.

It should be borne in mind that among the declared national policies under Republic Act No. 7925, otherwise known as the Public Telecommunications Policy Act of the Philippines, is the healthy competition among telecommunications carriers, to wit:

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.[36]

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 was the intention that came to light with the issuance of Memorandum Circular 9-3-2000, allocating new frequency bands for use of CMTS. This memorandum circular enumerated the conditions prevailing and the reasons which necessitated its issuance as follows:

- the international accounting rates are rapidly declining, threatening the subsidy to the local exchange service as mandated in EO 109 and RA 7925;
- the public telecommunications entities which were obligated to install, operate and maintain local exchange network have performed their obligations in varying degrees;
- after more than three (3) years from the performance of the obligations only 52% of the total number of cities and municipalities are provided with local telephone service.
- there are mergers and consolidations among the existing cellular mobile telephone service (CMTS) providers threatening the efficiency of competition;
- there is a need to hasten the installation of local exchange lines in unserved areas;
- there are existing CMTS operators which are experiencing congestion in the network resulting to low grade of service;
-

the consumers/customers shall be given the freedom to choose CMTS operators from which they could get the service.[37]

Clearly spelled out is the need to provide enhanced competition and the requirement for more landlines and telecommunications facilities in unserved areas in the country. On both scores, therefore, there was sufficient showing that the NTC acted well within its jurisdiction and in pursuance of its avowed duties when it allowed the revival of Bayantel's application.

We now come to the issue of exhaustion of administrative remedies. The rule is well-entrenched that a party must exhaust all administrative remedies before resorting to the courts. The premature invocation of the intervention of the court is fatal to one's cause of action. This rule would not only give the administrative agency an opportunity to decide the matter by itself correctly, but would also prevent the unnecessary and premature resort to courts.[38] In the case of *Lopez v. City of Manila*,[39] we held:

As a general rule, where the law provides for the remedies against the action of an administrative board, body or officer, relief to courts can be sought only after exhausting all remedies provided. The reason rests upon the presumption that the administrative body, if given the chance to correct its mistake or error, may amend its decision on a given matter and decide it properly. Therefore, where a remedy is available within the administrative machinery, this should be resorted to before resort can be made to the courts, not only to give the administrative agency the opportunity to decide the matter by itself correctly, but also to prevent unnecessary and premature resort to courts.

Clearly, Extelcom violated the rule on exhaustion of administrative remedies when it went directly to the Court of Appeals on a petition for certiorari and prohibition from the Order of the NTC dated May 3, 2000, without first filing a motion for reconsideration. It is well-settled that the filing of a motion for reconsideration is a prerequisite to the filing of a special civil action for certiorari.

The general rule is that, in order to give the lower court the opportunity to correct itself, a motion for reconsideration is a prerequisite to certiorari. It is also basic that petitioner must exhaust all other available remedies before resorting to certiorari. This rule, however, is subject to certain exceptions such as any of the following: (1) the issues raised are purely legal in nature, (2) public interest is involved, (3) extreme urgency is obvious or (4) special circumstances warrant immediate or more direct action.[40]

This case does not fall under any of the recognized exceptions to this rule. Although the Order of the NTC dated May 3, 2000 granting provisional authority to Bayantel was immediately executory, it did not preclude the filing of a motion for reconsideration. Under the NTC Rules, a party adversely affected by a decision, order, ruling or resolution may within fifteen (15) days file a motion for reconsideration. That the Order of the NTC became immediately executory does not mean that the remedy of filing a motion for reconsideration is foreclosed to the petitioner.[41]

Furthermore, Extelcom does not enjoy the grant of any vested interest on the right to render a public service. The Constitution is quite emphatic that the operation of a public utility shall not be exclusive. Thus:

No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted to citizens of the Philippines or to corporations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. xxx xxx xxx.[42]

In *Radio Communications of the Phils., Inc. v. National Telecommunications Commission*,[43] we held:

It is well within the powers of the public respondent to authorize the installation by the private respondent network of radio communications systems in Catarman, Samar and San Jose, Mindoro. Under the circumstances, the mere fact that the petitioner possesses a franchise to put up and operate a radio communications system in certain areas is not an insuperable obstacle to the public respondent's issuing the proper certificate to an applicant desiring to extend the same services to those areas. The Constitution mandates that a franchise cannot be exclusive in nature nor can a franchise be granted except that it must be subject to amendment, alteration, or even repeal by the legislature when the common good so requires. (Art. XII, sec. 11 of the 1986 Constitution). There is an express provision in the petitioner's franchise which provides compliance with the above mandate (RA 2036, sec. 15).

Even in the provisional authority granted to Extelcom, it is expressly stated that such authority is not exclusive. Thus, the Court of Appeals erred when it gave due course to Extelcom's petition and ruled that it constitutes an exception to the rule on exhaustion of administrative remedies.

Also, the Court of Appeals erred in annulling the Order of the NTC dated May 3, 2000, granting Bayantel a provisional authority to install, operate and maintain CMTS. The general rule is that purely administrative and discretionary functions may not be interfered with by the courts. Thus, in *Lacuesta v. Herrera*,^[44] it was held:

xxx (T)he powers granted to the Secretary of Agriculture and Commerce (natural resources) by law regarding the disposition of public lands such as granting of licenses, permits, leases and contracts, or approving, rejecting, reinstating, or canceling applications, are all executive and administrative in nature. It is a well recognized principle that purely administrative and discretionary functions may not be interfered with by the courts. (*Coloso vs. Board of Accountancy*, G.R. No. L-5750, April 20, 1953) In general, courts have no supervising power over the proceedings and actions of the administrative departments of the government. This is generally true with respect to acts involving the exercise of judgement or discretion and findings of fact. (54 Am. Jur. 558-559) xxx.

The established exception to the rule is where the issuing authority has gone beyond its statutory authority, exercised unconstitutional powers or clearly acted arbitrarily and without regard to his duty or with grave abuse of discretion.^[45] None of these obtains in the case at bar.

Moreover, in petitions for certiorari, evidentiary matters or matters of fact raised in the court below are not proper grounds nor may such be ruled upon in the proceedings. As held in *National Federation of Labor v. NLRC*:^[46]

At the outset, it should be noted that a petition for certiorari under Rule 65 of the Rules of Court will prosper only if there is a showing of grave abuse of discretion or an act without or in excess of jurisdiction on the part of the National Labor Relations Commission. It does not include an inquiry as to the correctness of the evaluation of evidence which was the basis of the labor official or officer in determining his conclusion. It is not for this Court to re-examine conflicting evidence, re-evaluate the credibility of witnesses nor substitute the findings of fact of an administrative tribunal which has gained expertise in its special field. Considering that the findings of fact of the labor arbiter and the NLRC are supported by evidence on record, the same must be accorded due respect and finality.

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.^[47] 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.^[48] In *Villanueva v. Court of Appeals*,^[49] 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*,^[50] wherein it was ruled that factual findings of quasi-judicial bodies which have acquired expertise because their jurisdiction is confined to specific matters 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.

In the case at bar, we find no reason to disturb the factual findings of the NTC which formed the basis for awarding the provisional authority to Bayantel. As found by the NTC, Bayantel has been granted several provisional and permanent authorities before to operate various telecommunications services.[51] Indeed, it was established that Bayantel was the first company to comply with its obligation to install local exchange lines pursuant to E.O. 109 and R.A. 7925. In recognition of the same, the provisional authority awarded in favor of Bayantel to operate Local Exchange Services in Quezon City, Malabon, Valenzuela and the entire Bicol region was made permanent and a CPCN for the said service was granted in its favor. Prima facie evidence was likewise found showing Bayantel's legal, financial and technical capacity to undertake the proposed cellular mobile telephone service.

Likewise, the May 3, 2000 Order did not violate NTC Memorandum Circular No. 9-14-90 dated September 4, 1990, contrary to the ruling of the Court of Appeals. The memorandum circular sets forth the procedure for the issuance of provisional authority thus:

EFFECTIVE THIS DATE, and as part of the Commission's drive to streamline and fast track action on applications/petitions for CPCN other forms of authorizations, the Commission shall be evaluating applications/petitions for immediate issuance of provisional authorizations, pending hearing and final authorization of an application on its merit.

For this purpose, it is hereby directed that all applicants/petitioners seeking for provisional authorizations, shall submit immediately to the Commission, either together with their application or in a Motion all their legal, technical, financial, economic documentations in support of their prayer for provisional authorizations for evaluation. On the basis of their completeness and their having complied with requirements, the Commission shall be issuing provisional authorizations.

Clearly, a provisional authority may be issued even pending hearing and final determination of an application on its merits.

Finally, this Court finds that the Manifestations of Extelcom alleging forum shopping on the part of the NTC and Bayantel are not impressed with merit. The divisions of the Supreme Court are not to be considered as separate and distinct courts. The Supreme Court remains a unit notwithstanding that it works in divisions. Although it may have three divisions, it is but a single court. Actions considered in any of these divisions and decisions rendered therein are, in effect, by the same Tribunal. The divisions of this Court are not to be considered as separate and distinct courts but as divisions of one and the same court.[52]

Moreover, the rules on forum shopping should not be literally interpreted. We have stated thus:

It is scarcely necessary to add that Circular No. 28-91 must be so interpreted and applied as to achieve the purposes projected by the Supreme Court when it promulgated that circular. Circular No. 28-91 was designed to serve as an instrument to promote and facilitate the orderly administration of justice and should not be interpreted with such absolute literalness as to subvert its own ultimate and legitimate objective or the goal of all rules of procedure – which is to achieve substantial justice as expeditiously as possible.[53]

Even assuming that separate actions have been filed by two different parties involving essentially the same subject matter, no forum shopping was committed as the parties did not resort to multiple judicial remedies. The Court,

therefore, directed the consolidation of the two cases because they involve essentially the same issues. It would also prevent the absurd situation wherein two different divisions of the same court would render altogether different rulings in the cases at bar.

We rule, likewise, that the NTC has legal standing to file and initiate legal action in cases where it is clear that its inaction would result in an impairment of its ability to execute and perform its functions. Similarly, we have previously held in *Civil Service Commission v. Dacoycoy*[54] that the Civil Service Commission, as an aggrieved party, may appeal the decision of the Court of Appeals to this Court.

As correctly stated by the NTC, the rule invoked by Extelcom is Rule 65 of the Rules of Civil Procedure, which provides that public respondents shall not appear in or file an answer or comment to the petition or any pleading therein.[55] The instant petition, on the other hand, was filed under Rule 45 where no similar proscription exists.

WHEREFORE, in view of the foregoing, the consolidated petitions are GRANTED. The Court of Appeals' Decision dated September 13, 2000 and Resolution dated February 9, 2001 are REVERSED and SET ASIDE. The permanent injunction issued by the Court of Appeals is LIFTED. The Orders of the NTC dated February 1, 2000 and May 3, 2000 are REINSTATED. No pronouncement as to costs.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Puno, Kapunan, and Pardo, JJ., concur.

[1] Rollo, G.R. No. 147210, pp. 84-92.

[2] *Ibid.*, p. 150.

[3] *Id.*, pp. 152-163.

[4] *Id.*, p. 164.

[5] *Id.*, p. 166.

[6] *Id.*, p. 167.

[7] *Id.*, pp. 168-170.

[8] *Id.*, p. 171.

[9] *Id.*, pp. 173-181.

[10] *Id.*, pp. 182-189.

[11] *Id.*, pp. 202-203.

[12] *Id.*, pp. 217-230.

[13] *Id.*, pp. 218-219.

[14] *Id.*, pp. 224-226.

[15] *Id.*, pp. 231-271.

[16] Associate Justice Presbitero J. Velasco, Jr., ponente; Associate Justices Bernardo Ll. Salas and Edgardo P. Cruz, concurring.

[17] Rollo, G.R. No. 147210, pp. 78-79.

[18] Ibid., pp. 439-462.

[19] Id., pp. 464-484.

[20] Id., pp. 488-500.

[21] Id., pp. 81-83.

[22] Rollo, G.R. No. 147096, p. 16.

[23] Rollo, G.R. No. 147210, pp. 15-17.

[24] Rollo, G.R. No. 147096, p. 622.

[25] Commonwealth Act No. 146, Section 16 (a).

[26] Administrative Code of 1987, Book VII, Chapter 2, Section 7.

[27] Philippine International Trading Corp. v. Angeles, 263 SCRA 421, 446-447 [1996].

[28] E.O. 200, Section 1.

[29] 146 SCRA 446 [1986].

[30] PHILSA International Placement & Services Corp. v Secretary of Labor, G.R. No. 103144, April 4, 2001.

[31] Section 20 thereof provides: "These Revised Rules shall take effect fifteen (15) days after its publication in a newspaper of general circulation."

[32] CA Decision, p. 5.

[33] Rule 5, Section 5; underscoring ours.

[34] Smith Kline & French Laboratories, Ltd. v. Court of Appeals, 276 SCRA 224, 241 [1997].

[35] Bautista v. COMELEC, 298 SCRA 480, 486 [1998].

[36] R.A. 7925, Article II, Section 4 (f).

[37] Rollo, G.R. No. 147210, pp. 202-203.

[38] Social Security System Employees Association v. Bathan-Velasco, 313 SCRA 250, 252 [1999].

[39] 303 SCRA 448, 458 [1999].

[40] Indiana Aerospace University v. Commission on Higher Education (CHED), G.R. No. 139371, April 4, 2001.

[41] Yasay v. Desierto, 300 SCRA 494, 505 [1998].

[42] Constitution, Article XII, Section 11.

[43] 150 SCRA 450, 459 [1987].

[44] 62 SCRA 115, 122 [1975].

[45] Lacuesta v. Herrera, *supra*.

[46] 283 SCRA 275, 284 [1997]; citing ComSavings Bank v. NLRC, 257 SCRA 307 [1996].

[47] Concerned Officials of the Metropolitan Waterworks and Sewerage System (MWSS) v. Vasquez, 240 SCRA 502, 529 [1995].

[48] First Lepanto Ceramics v. Court of Appeals, 253 SCRA 552, 558 [1996].

[49] 205 SCRA 537, 544 [1992].

[50] 263 SCRA 313, 319 [1996].

[51] Order dated May 3, 2000, pp. 3-4.

[52] Uy v. Limsiongco, 41 Phil. 94, 101 [1920].

[53] Cabarrus, Jr. v. Bernas, 279 SCRA 388, 394-395 [1997]; Gabionza v. Court of Appeals, et al., 234 SCRA 192, 198 [1994]; Cruz v. Court of Appeals, 309 SCRA 714, 725 [1999].

[54] 306 SCRA 425, 437 [1999].

[55] 1997 Rules of Civil Procedure, Rule 65, Section 5, second paragraph.

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