

## PCC Inputs on the Third Telco Terms of Reference

(based on 8 August 2018 draft)

### Key Points:

1. Definition of Related Party
2. Prohibition on Mergers, Combinations or becoming a Related Party with a Dominant Telco
3. Voluntary Return of Frequencies should it become a Related Party with a Dominant Telco
4. Monitoring and Performance Evaluation through Information Sharing
5. Clawback of Spectrum in case of Non-Use
6. Exemption from PCC Review if Competition Issues are Addressed

	<b>Draft TOR</b>	<b>PCC Suggested Language</b>
<b>Related Party</b> <i>Sec. 1.12</i>	<p>Related Party as defined under SEC Memorandum Circular No. 19 series of 2016, dated 22 November 2016, refers to a “company’s subsidiaries, as well as affiliates and any party (including their subsidiaries, affiliates and special purpose entities), that the company exerts direct or indirect control over or that exerts direct or indirect control over the company; the company’s directors; officers; shareholders and related interests (DOSRI), and their close family members, as well as corresponding persons in affiliated companies. This shall also include such other person or juridical entity whose interest may pose a potential conflict with the interest of the company.”</p>	<p>Related Party refers to a:</p> <ol style="list-style-type: none"> <li>1. Company’s parent entity</li> <li>2. Company’s subsidiaries</li> <li>3. Company’s affiliates</li> <li>4. Any party (including their subsidiaries, affiliates, and special purpose entities) that:               <ol style="list-style-type: none"> <li>a. The company exerts direct or indirect control over;</li> <li>b. Exerts direct or indirect control over the company;</li> <li>c. <b><u>Together with the company, or the latter’s subsidiaries or affiliates, is under common control by another person;</u></b></li> </ol> </li> <li>5. The company’s directors; officers; shareholders and related interests (DOSRI), and their family members <b><u>within the fourth degree of consanguinity or affinity,</u></b> as well as corresponding persons in affiliated companies.</li> </ol> <p>This shall also include such other person or juridical entity whose interest may pose a potential conflict with the interest of the company.</p>

		<b><u>Finally, this also includes entities which have common economic interests and are not otherwise able to decide or act independently of each other.</u></b>
<b>Prohibition on Mergers, Combinations, or becoming a Related Party to a Dominant Player</b> <i>Sec.4.7(c)(viii)(1)</i>	(viii) Sworn Undertaking that the Participant shall undertake the following in the event it is selected as the NMP: 1. Amend its Articles of Incorporation that will prohibit it from merging or combining with, or becoming a Related Party to, any Dominant Telecommunications Player.	(viii) Sworn Undertaking that the Participant shall undertake the following in the event it is selected as the NMP: 1. <b><u>That in the event that the Participant merges or enters into any business combination or joint venture with a Related Party to any Dominant Telecommunications Player, or otherwise acquires, directly or indirectly, or in stages, at least 20% of the shares of stock of a Related Party to any Dominant Telecommunications Player, it shall notify the Philippine Competition Commission of the said transaction, in accordance with applicable law, rules, and regulations.</u></b>
<b>Voluntary Return of Frequencies</b> <i>Sec. 4.7(c)(viii)(3)</i>	(viii) Sworn Undertaking that the Participant shall undertake the following in the event it is selected as the NMP: 3. <i>That the Participant shall voluntarily return to the NTC the assigned Radio Frequencies without condition, should it become a Related Party to any Dominant Telecommunication even after the Commitment Period;</i>	(viii) Sworn Undertaking that the Participant shall undertake the following in the event it is selected as the NMP: 3. <i>That the Participant shall <b>mandatorily</b> return to the NTC the assigned Radio Frequencies without condition, should it become a Related Party to any Dominant Telecommunication even after the Commitment Period. Otherwise, NTC shall recall the Radio Frequencies within _____ days from failure of the Participant to return to the NTC after demand;</i>
<b>Monitoring and Performance Evaluation</b> <i>Sec. 6.4</i>	6.4 Quarterly Reports. The NMP shall submit a quarterly report to the NTC on its delivery on its Commitments and its progress in pursuing its Roll-Out Plan. In such report, the NMP shall include its total number of fixed and mobile subscribers, whether pre-paid or post-paid, and other items as may be required by the NTC.	In addition to information covered by reportorial requirements under existing laws and regulations, the following information/data can also be required from the NMP in its quarterly reports to NTC, which can also be shared to other agencies such as DICT and PCC: i. Number of subscribers (disaggregated per region; per types of service; semi-annual basis) ii. Rollout of the service and/or spectrum iii. Actual usage of the spectrum

		<ul style="list-style-type: none"> <li>iv. Geographic location of their infrastructure (with maps and coordinates) (annual basis)</li> <li>v. List of cell towers, base stations, and gateway facilities (including status of operations; co-location agreements)</li> <li>vi. Annual reports</li> <li>vii. Agreements with 3<sup>rd</sup> parties which are material to any telecommunication services</li> <li>viii. Co-use agreements</li> </ul>
<p><b>Clawback and Recall of Spectrum</b> <i>Sec. 8</i></p>	<p>Failure of the NMP to comply with any of its commitments shall be considered a breach. The NMP shall be allowed a period of six (6) months to remedy such breach. Upon failure of the NMP to remedy the breach within the period allowed, the NTC shall:</p> <ul style="list-style-type: none"> <li>a. Forfeit the Performance Security;</li> <li>b. Consider the breach to be a breach of the Special Conditions in the CPCN, impose applicable penalty and bring a quo warranto proceeding; and</li> <li>c. Consider the breach to be a breach of the Special Conditions attached to the Radio Frequencies, and thereby proceed to the process of recalling the Radio Frequencies assigned to the NMP.</li> </ul>	<p>Failure of the NMP to comply...</p> <p>xxx</p> <p><b><u>Provided, that, should the Participant fail to use any Radio Frequency Spectrum awarded to it beyond the timeframe stated in its Roll-Out Plan, the subject Radio Frequency Spectrum shall automatically revert to the government.</u></b></p>
<p><b>PCC Review</b> <i>Sec. 5.1(a)</i></p>	<p>5.1 The NTC shall issue to the selected NMP a CPCN with a term of fifteen (15) years or until the expiry of the NMP's Congressional Franchise, whichever is shorter. The CPCN shall be issued upon completion of the following:</p> <ul style="list-style-type: none"> <li>a. Philippine Competition Commission (PCC) approval of the Bidding Agreement implementation, if applicable;</li> </ul> <p>xxx</p>	<p>PCC has recommended the foregoing inputs to address the competition concerns in the terms of reference for the selection of the NMP. With these, notification and review of the transaction could be dispensed with, in accordance with PCC's power to exempt entities from review under Sec. 19(c) of the PCA. However, in the absence of the foregoing inputs in the terms of reference, PCC would be constrained to pursue a regular review of the transaction, in accordance with its mandate under Sec. 17 of the PCA.</p>