



Republic of the Philippines
SENATE
Pasay City

COMMITTEE ON PUBLIC SERVICES
JOINT WITH THE
COMMITTEES ON FINANCE and ECONOMIC AFFAIRS

February 1, 2018

Dr. GILBERT M. LLANTO

President

Philippine Institute for Development Studies
18F Three Cyberpod Centris, North Tower
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Dear **Dr. Llanto**:

The Chairman of the Committee on Public Services joint with the Committees on Finance and Economic Affairs will conduct a **public hearing** on **February 15, 2018, Thursday, 10:00 a.m.** at **Sen. Tañada and Sen. Pecson Rooms, 2F Senate of the Philippines, GSIS Building Complex, Roxas Blvd., Pasay City**, on the following:

1. **Senate Bill No. 1441** - AN ACT FURTHER AMENDING COMMONWEALTH ACT NO. 146 OR THE PUBLIC SERVICE ACT, AS AMENDED (Introduced by Senator Grace Poe)
2. **Senate Bill No. 1594** - AN ACT PROVIDING FOR THE DEFINITION OF PUBLIC UTILITY, FURTHER AMENDING FOR THE PURPOSE COMMONWEALTH ACT NO. 146, OTHERWISE KNOWN AS THE 'PUBLIC SERVICE ACT', AS AMENDED (Introduced by Senator Win Gatchalian);
3. **Senate Bill No. 1291** - AN ACT FURTHER AMENDING COMMONWEALTH ACT NO. 146 OTHERWISE KNOWN AS THE PUBLIC SERVICE ACT, AS AMENDED (Introduced by Senator Juan Miguel F. Zubiri);
4. **Senate Bill No. 1261** - AN ACT FURTHER AMENDING COMMONWEALTH ACT NO. 146 OR THE PUBLIC SERVICE ACT, AS AMENDED (Introduced by Senator Richard J. Gordon);
5. **Senate Bill No. 695** - AN ACT AMENDING SECTION 13(B) OF COMMONWEALTH ACT NO. 146, AS AMENDED AND FOR OTHER PURPOSES (Introduced by Senator Paolo Benigno "Bam" A. Aquino IV); and
6. **House Bill No. 5828** - AN ACT PROVIDING FOR THE DEFINITION OF PUBLIC UTILITY, FURTHER AMENDING FOR THE PURPOSE COMMONWEALTH ACT NO. 146, OTHERWISE KNOWN AS THE 'PUBLIC SERVICE ACT', AS AMENDED.

In this connection, we would like to invite you as one of our resource persons to share your views and comments on the aforementioned bills. You may submit your comments or proposals in your position paper prior to the said hearing. Attendance and representation for this public hearing is of primary importance.

Any queries and/or confirmation of attendance please contact our assisting staff, **Mr. Larry Barruga at 5526601 loc. 3321/8338246** or you can call this representation at **Globe Mobile No.: 0917-528-6487**. As regards to documents you may want to furnish the committee, my email address is senatepublicservices@gmail.com or send through fax at telefax numbers: **552-6750/552-6888**.

Your presence will be highly appreciated. Thank you.

Very truly yours,
SEN. GRACE POE
Chairperson

By Authority of the Chairperson:


Atty. Niniveh B. Lao
Acting Legislative Committee Secretary

COMMENTS ON SB 1441, SB 1594, SB 1291, SB 1261, SB 695, AND HB 5828

Submitted by Dr. Ramonette B. Serafica, PIDS Senior Research Fellow

Amending the Public Service Act to redefine the coverage of “public utility” will effectively remove the foreign equity restrictions in several service industries. This will be an important reform that has the potential to improve service quality, access and affordability, which in turn will have positive economy-wide spillover effects. Other amendments are also long overdue particularly the increase in the applicable penalty and fines, which should influence the behavior of regulated firms.

Given that each service has its unique industry structure and rationale for regulation, it would be best for the PSA not to be too prescriptive in setting specific rules that should be adopted across the board. Additionally, principles of good governance in public service regulation and regulatory management systems (e.g. transparency, evidenced-based rule-making, monitoring and evaluation of the effectiveness of existing regulatory measures) could be enshrined in the amended PSA. These should then guide the formulation of sector-specific laws, regulations, and regulatory procedures.

Definition

SB 695 uses the terms public utility and public services interchangeably and these are defined in the explanatory note as having “simultaneous characteristics of being a natural monopoly and a vital public necessity”. The public utility and public service enumeration is limited to electricity transmission or distribution system, gas or petroleum pipeline distribution system, water pipeline distribution system or sewerage pipeline system. Delisted business or services are then covered in the transitory clause. The other bills distinguish a public utility from a public service in that the former is considered a natural monopoly while the latter is not. The public utility enumeration is similar to SB 695. Thus, in all the proposals the industries that will remain nationalized (i.e. at least 60 percent owned by a Philippine national) are the same with the explanation given these are natural monopolies.

It should be noted that whether or not a certain economic activity is a natural monopoly depends on both cost and demand conditions. A particular service could be a natural monopoly given a small market but with larger consumer base another firm could feasibly enter the market. Given the various services covered in the PSA, it is conceivable that some service industries (or components of its network) still exhibit natural monopoly properties in certain situations or markets within the country and therefore should be regulated as such.

Indeed, the test of natural monopoly is relevant to the issue of whether or not the introduction of competition (i.e. the entry of one or more additional firms in one or all segments of an industry) is workable and, by extension, determines the proper role of regulation. It is not directly relevant to ownership issues (i.e., should it be nationalized or not, should it be government-owned or not). Since the purpose of amending the definition is to reduce the industries covered by the Constitutional restriction on foreign equity participation, a shorter public utility enumeration should be sufficient with no further explanation needed on whether it is a natural monopoly or not. This will ensure that the relevant agency will be able to regulate as appropriate.

Penalties

There is a need to increase the amount of the fine from the existing PhP 200 per day which was set in 1936. The Public Telecommunications Policy Act of the Philippines (RA7925) does not have a penal provision. Thus, the fees that the NTC could impose are based on the PSA and this is one of the limitations that it has faced in regulating the telecommunications industry.

However, none of the bills indicate a new amount except to say that it could be “up to”, “not exceeding”, or “a maximum of” PhP 5 million per day. The lack of a specific amount could lead again to a very low fine. The adjustment of fines to account for inflation is also necessary. To ensure consistency in the formula adopted, a single agency should be assigned to determine the adjustment multiplier.

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 of the US, which was enacted “to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect” could offer guidelines (e.g., roles of agencies and procedures in setting the initial “catch-up adjustment” and the subsequent adjustments for inflation).

Rate-setting

Allowing the regulator to adopt performance-based regulation is appropriate. More generally, the provision in SB 1594 to allow the administrative agency to “adopt alternative forms of internationally-accepted rate-setting methodology as it may deem appropriate and will promote efficiency” provides the agency with flexibility to set rates that will help achieve its desired regulatory outcomes. However, the same paragraph also states that the rates prescribed shall be “non-discriminatory” thereby limiting the ability of the regulator to pursue social or equity objectives, if any (e.g. lower prices for marginalized sectors).

Comprehensive baseline survey

SB 1441, SB 1291, and SB 1261 propose the conduct of a comprehensive baseline survey of public services and public utilities governance. Any regulatory system has two important dimensions: regulatory governance and regulatory substance (see **Box 1**). According to Brown, et al. (2006), a proper evaluation of regulatory effectiveness needs to look at both dimensions.

Since the Public Service Act and the proposed amendments include issues on governance (e.g. processes or proceedings) and substance (e.g. rate setting), it would be more useful to do a comprehensive survey and evaluation covering the two dimensions for the purpose of improving the regulation of public utilities and public services (SB 1594, HB 5828).

Complementary measures

Addressing national security risks

Most if not all of the sectors that would be liberalized (i.e. allowing higher foreign equity participation) with the PSA amendment may involve infrastructure that could be considered “critical”. Thus, it is important to ensure that adequate safeguards are in place to mitigate the risks to national security. There is no single definition of “critical infrastructure” and countries have different interpretations of what is “critical” and what is considered “infrastructure”. For example, Canada’s critical infrastructure consists of “those physical and information technology facilities, networks, services and assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security or economic well-being of Canadians or the effective functioning of governments in Canada” while for the United Kingdom “the [Critical National Infrastructure] comprises those assets, services and systems that support the economic, political and social life of the UK whose importance is such that loss could: 1) cause largescale loss of life; 2) have a serious impact on the national economy; 3) have other grave social consequences for the community; or 3) be of immediate concern to the national government.” (OECD 2008, page 4)

Table 1 provides examples in other countries of sectors and activities associated with national security concerns. According to Wehrlé and Pohl (2016), approaches to national security risks can involve (i) partial or total prohibitions of foreign investment in specified sectors (prohibitions); (ii) prior

government review of all investment proposals that meet legally defined criteria (reviews); and (iii) scrutiny systems that identify individual, potentially problematic transactions, which are subsequently subjected to reviews. They add that outright sector-wide prohibitions of foreign investment have become relatively rare, particularly among advanced economies. Sector specific or cross-sectoral reviews or investment scrutiny mechanisms are now observed more frequently.

To balance the need for foreign investment while addressing national security concerns, a complementary measure (i.e. separate from the PSA amendment) could be introduced. An effective mechanism must be carefully designed to avoid abuse or misuse for purposes other than protecting national security (to remove or reduce competition, for example). The readiness and quality of institutions that would implement such a mechanism should also be taken into account. OECD (2009) provides recommendations for the design and implementation of investment policies relating to national security while minimizing possible negative impacts on investment flows. Some key principles include transparency of policies, proportionality of measures and accountability of implementing authorities.

Creation of a Regulators' Forum

Given the number of regulators and the potential for overlapping jurisdictions (e.g. technical issues with implications for competition) as well as the rise of converging industries due to new technologies (e.g. transport and ICT as illustrated by the transport network vehicle services or TNVS) the relevant Congressional Oversight Committee of the regulators might want to consider creating a Regulators' Forum to facilitate information exchange and experiences and a better understanding of the regulated sectors/entities. It could also involve other regulators not listed in the amended PSA (e.g. those in charge of financial services, health, education). Increased dialogue among regulators will be especially useful to better manage the impacts of new technologies and encourage innovation that will ultimately improve public services.

References

Brown, Ashley C., J. Stern, B. Tenenbaum, and D. Gencer. 2006. *Handbook for Evaluating Infrastructure Regulatory Systems*. Washington, DC: World Bank. DOI: 10.1596/978-0-8213-6579-3

OECD. 2008. Protection of 'critical infrastructure' and the role of investment policies relating to national security.

OECD. 2009. Guidelines for recipient country investment policies relating to national security

Wehrlé, F. and J. Pohl. 2016. Investment Policies Related to National Security: A Survey of Country Practices. OECD Working Papers on International Investment, 2016/02, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5jlwrrf038nx-en>

**Box 1. TWO IMPORTANT DIMENSIONS OF REGULATION:
GOVERNANCE AND SUBSTANCE**

Regulatory governance is the “how” of regulation

Regulatory governance refers to the institutional and legal design of the regulatory system and is the framework within which decisions are made. Regulatory governance is defined by the laws, processes, and procedures that determine the enterprises, actions, and parameters that are regulated, the government entities that make the regulatory decisions, and the resources and information that are available to them. It involves decisions about the following:

- Independence and accountability of the regulator.
- Relationship between the regulator and policymaker(s).
- Autonomy of the regulator.
- Processes—formal and informal—by which decisions are made.
- Transparency of decision-making by the regulator or other entities making regulatory decisions.
- Predictability of regulatory decision-making.
- Accessibility of regulatory decision-making.
- Organizational structure and resources available to the regulator.

Regulatory substance is the “what” of regulation

Regulatory substance refers to the content of regulation. It is the actual decisions, whether explicit or implicit, made by the specified regulatory entity or other entities within the government, along with the rationale for the decisions. It typically involves decisions about the following:

- Tariff levels.
- Tariff structures.
- Automatic and nonautomatic cost pass-through mechanisms.
- Quality-of-service standards.
- Handling of consumer complaints.
- Investment or connection obligations and reviews.
- Network access conditions for new and existing customers.
- Accounting systems.
- Periodic reporting requirements.
- Social obligations.

Source: Brown, et al. (2006, pages 19-20)

Table 1. Sectors and activities associated with national security concerns in select countries

Country	Sectors and activities associated with national security
Australia	<ul style="list-style-type: none"> • Investment in “prescribed sensitive sectors” valued at over AUD 252 million, which include: i) security/defence (manufacture/supply of military goods or equipment or technology to Australian Defence Force or other defence forces, or that can be used for military purpose; encryption and security technologies and communication systems; operation of nuclear facilities); ii) infrastructure (transport, telecommunications and the media); iii) natural resources: extraction of uranium or plutonium • Acquisitions of land • Investment of 5% or more in the media sector, regardless of value • Business and agri-businesses acquisitions over stipulated threshold
China	<ul style="list-style-type: none"> • Security/national defence: Military and military related businesses • Strategic enterprises: major equipment manufacturing industries • Other sectors including infrastructure and transportation services, energy and resources, agricultural products, and key technologies
Mexico	<ul style="list-style-type: none"> • Education and port services; shipping companies; construction/operation/exploitation of general railways and public services of railway transportation where foreigners wish to acquire directly or indirectly more than 49% of the capital stock of the company • Other sectors that are otherwise not restricted under the foreign investment law if the investment exceeds a monetary threshold (approximately USD 262 million in 2014)
United States	<ul style="list-style-type: none"> • “Critical infrastructure” (defined under FINSA as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security”; this includes “major energy assets”) • “Critical technologies” (which include defence items controlled under the International Traffic in Arms Regulations; export controlled and dual use items controlled under the Export Administration Regulations for national security, chemical and biological weapons proliferation, nuclear proliferation or missile proliferation reasons; items controlled under the Export and Import of Nuclear Equipment and Materials Regulations; and selected items controlled under the Export and Import of Select Agents and Toxins Regulations – e.g. activities that may threaten plant, animal or human health) • Businesses that provide products, technical data, technology or services – either as a prime contractor, a subcontractor, or a supplier to prime contractors - to US government agencies, state and/or local governments • Potentially any other sector or activity as long as the “covered transaction” is determined by the reviewing body that it may have an impact on the national security of the United States

Source: Wehrle and Pohl (2016) Table 3 pages 23-24