

On the DotPH Comments to the NTC Proposed Guidelines on the Administration of the Philippine Country Code Top Level Domain

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Abstract

The current administrator of the Philippine Country Code Top-Level Domain Name (PH ccTLD) Mr Jose Disini and his company DotPH submitted to the National Telecommunications Commission (NTC) a position paper entitled *Additional Comments on NTC Proposed Guidelines on the Administration of the .PH ccTLD*(Disini Paper) on 30 March 2004 in criticism of the The NTC Proposed Guidelines (The Guidelines) of February 2004.

The author has written this paper, in an attempt to answer the objections raised in the Disini Paper and correct the fallacies it contains. For the benefit of the reader, the Disini Paper is reproduced in its entirety in Appendix A. On the date that this paper was written, that Disini Paper could also be found in the DotPH company's web site <http://www.domains.ph/news.asp> although without the footnotes found in their original submission to the NTC. Unless otherwise noted, all quotations are taken from the Disini Paper as submitted by DotPH to the NTC during the Second Public Hearing, as found in Appendix A.

Although the author sits as an observer in the NTC Advisory Board (Adboard) and has been present in all its meetings, the author does not claim that the thoughts and arguments contained in this paper are shared by any member of the Adboard. This paper is not an Adboard document and does not reflect the official views of the Adboard nor that of the NTC.

1 On the Principle and Foundation of the NTC Guidelines

The Guidelines had been drafted by the Adboard which represents a broad section of the Philippine Internet and Information Technology Community. From the very beginning, the Adboard's goal was to create a document which would be the foundation of an *ideal* PH ccTLD Registry. Realizing that the core of the complaints were focused on the question of governance, the Adboard worked on the administrative structure and responsibilities of the administrator with the

belief that the operational details of the Registry would naturally follow from these foundation areas.

The Guidelines makes the following very clear:

1. that the PH ccTLD is a public resource
2. that the state has a sovereign right over Internet-related public policy issues
3. that the administrator of the PH ccTLD is a trustee of and is accountable to the community
4. that the PH ccTLD must be administered in an efficient,stable, fair, and transparent manner

Mr Disini contradicts items 1 and 2 by asserting:

The PH Domain is not a public resource over which the State has a sovereign right.

The Guidelines define the .PH ccTLD as a public resource over which the State has a sovereign right. However, the State has made no contribution to the development of the Internet, the DNS system, or even the establishment of the local registry itself.

To support his argument, Mr Disini invokes RFC 1591¹ and he states:

In fact, the assertion of State 'rights' flies in the face of RFC-1591(*sic*), universally recognized as the basis for which all Top Level Domains are delegated. RFC-1591(*sic*) states that "concerns about 'rights' and 'ownership' are inappropriate....(i)t is appropriate to be concerned about 'responsibilities' and 'service'." To date, the NTC has not yet identified how the Registry has failed to live up to its responsibility of providing robust domain name service, nor what problems the said service may have.

RFC 1591 was written in March 1994 by Dr Postel of the Internet Assigned Names and Numbers Authority (IANA) to clarify how ccTLDs should be administered. Although it is very clear that questions of ownership are inappropriate, *nowhere* in this document does it state that the PH ccTLD or any other ccTLD is *not* a public resource. RFC 1591 makes no such unequivocal statement. Mr Disini is therefore asserting the following statement: *Because questions of ownership (of the PH ccTLD) are inappropriate, the PH ccTLD is therefore not a public resource.*

Let us analyze, Mr Disini's logic. If Mr Disini is correct that the PH ccTLD is *not* a public resource, it logically follows that the PH ccTLD is a *private* resource. It can only be one or the other. It is either *owned by the public* (hence not any particular group or individual) or *owned by a particular group*

¹<http://www.isi.edu/in-notes/rfc1591.txt>

or individual. However, the conclusion that the PH ccTLD is a *private* resource contradicts RFC 1591. Mr Disini has grasped at illogical straws. The only logical conclusion is that Mr Disini is incorrect. The PH ccTLD *is* indeed a public resource.

Surely, Mr Disini can not claim that the PH ccTLD *is* a private resource. Not even a blind person reading RFC 1591 can make that claim. Could it perhaps be just a plain resource, neither public nor private? That is, the PH ccTLD is a resource not owned by anyone. If this is the case, then why does Mr Disini act as if he owns it? On one hand, he claims that the PH ccTLD is not owned by anyone. Yet in the past fourteen years of Mr Disini's administration, he has been the *beneficial owner* of PH ccTLD.

Some quarters have posited that the PH ccTLD is owned by the government of the United States of America (USG). There is some merit to this view because the entire Domain Name System was established under contract with the US Government. It was the US Department of Commerce which eventually pushed for the creation of Internet Corporation for Assigned Names and Numbers (ICANN) which had taken over the management of the DNS. However, it is important to note that although the USG has claimed oversight over the DNS TLD, it had never categorically claimed ownership over any ccTLD. In fact, by repeatedly and publicly encouraging the Internet stakeholders to participate in the reform process which led to the creation of ICANN, the USG has explicitly affirmed the characteristic of the DNS as a public resource.

Whether the PH ccTLD is owned by the Philippine Government or by the USG or whether it is not owned by any party at all does not alter the following facts:

- the PH ccTLD is not a private resource
- the PH ccTLD is not owned by Mr Disini

If it is *not* a private resource much less Mr Disini's private resource, why is Mr Disini profiting from the use of this resource? Why is he allowed to administer the PH ccTLD according to his own whims and caprices, tempered only by his own conscience and driven by his quest for profit *for himself and his companies*? What exactly does Mr Disini own?

Does he own the database of registrants? Mr Disini appears to think so when he questions the NTC's right to have access to the database with this statement:

The Guidelines also compel Mr Disini to give up the database of registrants and impose limitations on the use of that database. The NTC has no right to do so, in the same way that it has no rights over the database of Smart, Globe or any ISP.

The database containing the PH ccTLD domains and the IP addresses or hostname identifier of their respective DNS name servers, known as the *zone files*, is *not* owned by Mr Disini. He is merely a keeper of these files, a steward

of the files as the trustee of the community. The NTC has every right to have access to them just as the Internet community has every right to read them. This is not and never has been Mr Disini's private property. The only database he can claim ownership of is the database of his customers.

The Government Advisory Council (GAC) to the ICANN has clearly stated that²

No private intellectual or other property rights should inhere in the ccTLD itself, nor accrue to the delegee as the result of delegation or to any entity as a result of the management, administration or marketing of the ccTLD

It is clear that Mr Disini owns DotPH and all the physical resources which allow him to run the PH ccTLD Registry and Registrar business. Aside from these physical assets, what exactly does Mr Disini own? We have been waiting for a categorical statement of claims from Mr Disini since the year 2000.

Because the PH ccTLD is not a private property much less a property owned by Mr Disini and it is a resource for the use of the general public, it logically follows that the government should be involved in its policy formulation as the ultimate representative of the community. Aside from the GAC document, two other documents more recent than RFC 1591 were released by ICANN to guide how RFC 1591 should be administered.

The first document was contained in the ccTLD News Memo #1³ released in October 1997 and which states:

An additional factor has become very important since RFC 1591 was written: the desires of the government of the country. *The IANA takes the desires of the government of the country very seriously* (emphasis added), and will take them as a major consideration in any transition discussion. regarding the ccTLDs.

The second document known as the Internet Coordination Policy#1 (ICP-1)⁴ was released in May 1999. It reiterates the guidelines found in RFC 1591 by stating:

(b) TLD Manager Responsibility. TLD managers are trustees for the delegated domain, and have a duty to serve the community. The designated manager is the trustee of the TLD for both the nation, in the case of ccTLDs, and the global Internet community. Concerns about "rights" and "ownership" of domains are inappropriate. It is appropriate, however, to be concerned about "responsibilities" and "service" to the community

²Principles for Delegation and Administration of Country Code Top Level Domains, <http://www.icann.org/committees/gac/gac-ccldprinciples-23feb00.htm>

³<http://www.iana.org/ccld/ccld-news1.htm>

⁴<http://www.icann.org/icp/icp-1.htm>

It is not surprising that Mr Disini had not quoted from these two ICANN documents because they weaken his position that the government should stay away from the issue of the administration of the PH ccTLD.

The Guidelines have already concluded that the PH ccTLD should be administered in behalf of the community. The task of the Philippine Government is to look for that proper party who will ensure that the PH ccTLD is administered for the interest of the local community. Whether that party is the US Government, or the Internet Company for Assigned Names and Numbers, or Company X is another matter that the Government has to determine. What is very clear is that this party is not Mr Disini.

Unfortunately for Mr Disini, the Philippine Government does not need his permission when it seeks to act in the interest of and in behalf of the community.

2 On the Focus of the Guidelines

DotPH believes that the NTC should:

- (1) look for problems that need solving, or
- (2) if there are no problems that need solving, NTC must seek to ensure that DotPH's current standard of service is maintained.

By monitoring this standard of service and ensuring that DotPH does not perform below acceptable levels, the NTC can ensure robust and efficient Domain Name service of the .PH domain for the benefit of the local and global Internet communities.

Contrary to DotPH's assertions, the Guidelines are indeed focused on problems which need solutions. Every item in the Guidelines stems from each of the following specific points:

1. accountability of the administrator to the community
2. fair and transparent administration
3. a level and competitive domain registration environment

The National Economic Development Authority (NEDA) Study Group, the *ad hoc* group tasked by the Information Technology and E-Commerce Council (ITECC) of the Philippines to examine the issues raised against Mr Disini, in their report to the Office of the President had the following conclusion⁵:

It had also established that the more relevant issue is the lack of transparency and consultation in policy changes and management of the .ph domain, thus a governance issue. While the company sometimes attempts to engage in consultations *via* e-groups, there is an obvious break in trust between the DotPH registry and the local Internet community.

⁵Memorandum for the President from the NEDA Secretary Dante B. Canlas dated 14 January 2002 with the subject *Study Group's Findings on the .PH Controversy*

Mr Disini wants us to believe that the problem of PH ccTLD governance is not a real problem worth solving. To forestall the resolution to this problem with the attendant risk that he might be removed as the PH ccTLD administrator, Mr Disini attempts to enmesh the process into debating *minutiae*. In 2000, he had some measure of success in using this very same tactic when he had the Department of Trade and Industry (DTI) treat the complaints as mere consumer complaints.⁶ Wisely, the Adboard has steered away from the course Mr Disini has laid out for it by maintaining its focus on policies.

The fact that Mr Disini wants to debate *minutiae* rather than the fundamental problems is a great indicator of how he had administered the PH ccTLD over the past fourteen years and how he will continue to administer it if given the chance.

3 On the Violation of Mr Disini's Rights

The PH ccTLD Registry is a natural monopoly because there can only be one canonical list of PH ccTLD domains. Therefore, there can not be more than one player in the Registry business. However, there is no reason why there can not be more than one Registrar. The Registrars interact directly with Registrants, the individuals who wish to register a PH domain. The Registrars can compete against each other by offering different levels of services and prices. The Registrants can choose among the many (i.e. more than one) Registrars.

One of the aims of The Guidelines is to ensure that such a competitive multiple-Registrar environment for the PH ccTLD, as described above, is realized. For such an environment to exist two conditions are necessary:

1. each Registrar must be assured that the Registry treats every other Registrar in the same manner with no advantage or preferential treatment accorded to any Registrar.
2. the Registry must deal *only* with the Registrars and *not* deal directly with any Registrant

Condition 2 is necessary because no Registrar would be able to compete against the Registry if the Registry itself were allowed to directly solicit business from the Registrants.

Condition 1 is necessary to prevent one Registrar from gaining any undue advantage in the market. It is not unreasonable to believe that if the Registry were involved in one of the Registrars, say as a subsidiary, a directly-owned company, or as another company with inter-locking ownership, the Registry would find ways to favor its own Registrar. Perhaps this Registrar would receive lower prices, better service, or get advance notice of policies which would affect all the other Registrars. The mere fact that the Registry could have an interest in a Registrar would be a barrier to the entry of other non-Registry-affiliated

⁶Some of the complainants declared to the DTI that the mediation meetings they had arranged with DotPH were not the proper venue for such complaints.

Registrars because the latter would always be at a competitive disadvantage against the Registry-affiliated Registrar. To prevent this situation, The Guidelines has mandated that the Registry should be separate from the Registrar(s). The separation of the Registry from the Registrar will ensure that there is a level playing field in the Registrar market.

Mr Disini has a very interesting theory that this provision violates his private property rights. He claims the following:

The proposed separation of the Registry and Registrar functions requires that Mr. Disini give up his Registrar business. The NTC, by compelling Mr. Disini to do so, may be violating the Constitution. It arbitrarily takes away the Registrar business which is lawfully Mr. Disini's, and in which he has invested time, effort and money in establishing. That the NTC is planning to take it away and hand it over to other private entities to be designated by the NTC makes the situation worse.

He goes on to state:

It arbitrarily takes away the Registrar business which is lawfully Mr. Disini's, and in which he has invested time, effort and money in establishing.

He then finishes his theory by citing Article III, Section 9 of the Constitution which states that "private property shall not be taken for public use without just compensation."

In one illogical train of thought, Mr Disini has equated the separation of the Registry from the Registrar into the confiscation of his private property! In fact, nothing is being confiscated from Mr Disini. Nothing he owns is being carted away. Neither his computers, his offices, his desks, his cubicles, nor his mansions are being confiscated. Nothing he owns is being transferred from his possession to another's possession.

Mr Disini could be likened to an individual who drives an automobile without a license. The competent state authority has advised him that stricter rules would be implemented and he is asked to follow the traffic rules before he is granted a license. Mr Disini then jumps up and down claiming that the state agency has confiscated his automobile!

In fact, it is entirely up to Mr Disini to choose whether he wants to engage in the Registrar business or not. The Guidelines does not make that choice for him. Therefore, there is nothing being confiscated and nothing arbitrary in the Guidelines.

If Mr Disini chooses to remain as one of the Registrars because he thinks *being* a Registrar is his private property, then the community will search for a new organization which can competently run the Registry in his place. After all, notwithstanding the fact that he has been beneficial owner of the PH ccTLD for the past fourteen years, he does not own the PH ccTLD. Now, whether Mr Disini's Registrar business will flourish or flounder (and be taken away from

him, so to speak) in a new environment where the Registry and Registrars are separate is a question which The Guidelines can not answer.

Some have commented that separating the Registry from Registrar might be a radical step in reforming the PH ccTLD. Could there be, perhaps, other alternatives which would assure that a competitive multiple-Registrar market would exist? After more than 5 months of work and more than 12 meetings, the Adboard had found no better alternative. After two public hearings and the active solicitation of comments from all interested groups, no other alternative had been presented. The NTC and ITECC, after three meetings with Mr Disini, had not received an alternative proposal from Mr Disini. DotPH representative Mr Emil Avanceña's presentation to the Adboard in February 2004 contained no alternatives. Even the Disini Paper itself presents no alternative! Is it not logical to conclude that the separation of the Registry from the Registrar is the only available option?

If we grant Mr Disini's argument that being a Registrar is a private property he owns and that forbidding him from becoming a Registrar is a confiscation of his private property, then there is no other choice for the community. We have to look for a better operator of the Registry. This argument only forces the hand of the competent government authority.

4 On the Effects of the Guidelines on the Current Registrants

Mr Disini claims that current PH ccTLD Registrants will suffer should The Guidelines be adopted. Mr Disini cites three services which he claims will cease to function. He lists scenarios where the Registrants would be adversely affected. This is known as raising Fear, Uncertainty, and Doubt (FUD) in the minds of everyone to prevent them from making reasonable decisions. Mr Disini states his first FUD:

Furthermore, it is the consumer who will suffer by shutting down the DotPH Registrar. Consumers will face added costs and downtime because:

1) Many domains will not work. Many clients use DotPH's free Web-forwarding service to direct their domains to an existing site. These users will need to buy webhosting, since there are few registrars to turn to that offer Webforwarding for free.

Let us categorically reason away this FUD.

1. Whether the DotPH Registrar will shutdown or not is his entirely up to Mr Disini. He should not burden the NTC with his decision and the effects of his decision.
2. Should Mr Disini decide to shut his Registrar business down, then it is Mr Disini's responsibility to ensure that his clients are migrated to other

Registrars without causing any of his clients unreasonable loss of service. If Mr Disini is truly responsive to his clients as he claims, then there is no reason why he can not plan the transfer of his clients to another Registrar to ensure that his clients do not suffer any unreasonable downtime. Mr Disini would only have himself to blame should his clients suffer any downtime. The orderly transfer of DotPH Registrar's clients is not controlled by the NTC nor by the Adboard. Everything is entirely within Mr Disini's control and power. Thus, the orderly transfer of his clients and the prevention of downtime and loss of service is Mr Disini's responsibility.

3. If Mr Disini's existing clients were to transfer to another Registrar, Mr Disini would have us believe that it is a *certainty* that they would pay for the Webforwarding service which Mr Disini claims he now provides for free. Of course, this is a possibility. However, I dispute that it is a certainty. For example, it is possible that another Registrar would provide the same Webforwarding service for free to match Mr Disini's service and get Mr Disini's clients. Another possibility is for a Registrar to charge for the Webforwarding service but to *lower the Registrant fee* to attract Registrants. We can all think of different scenarios that could happen in a competitive multiple Registrar environment. The beauty of such an environment is that the competitive Registrars will create their own different business models to attract the Registrants. The Registrants can then choose the Registrar which meets their own unique needs. The only certainty in a multiple-Registrar environment is that consumers would have multiple choices where they could bring their business rather than be forced to deal with DotPH.

Mr Disini continues on to the second FUD:

2) Websites will go down. DotPH is one of the few Registrars that provides free Nameserver hosting to its clients. Existing users will have to purchase nameserver hosting or get DSL lines with fixed IP addresses and host their own nameservers.

Just like the first FUD he raised, that Websites will go down is not a certainty in a competitive multiple Registrar environment. It is not unreasonable to expect that another Registrar would offer free Nameserver hosting services to its clients, just like what Mr Disini currently offers. If Mr Disini could offer it, another Registrar could surely offer it as well. Websites will go down *if and only if* Mr Disini decides that they would go down by not creating an orderly plan for the transfer of domain names if and when he decides to shutdown his DotPH Registrar business.

Finally, Mr Disini ends with his third FUD:

3) E-mail will bounce since the Mailforwarding service will be shut down. Users will either have to pay their ISPs extra to MX mail on their ISP mailboxes or else resort to using Hotmail and Yahoo addresses. Mailforwarding gives users the freedom to change ISPs

without their mail bouncing or changing email addresses. Without this, many users will be stuck with their ISPs and be unable to shift easily.

Just like the first two FUDs, this third is not a certainty. Just like now, users would have the ability to freely change the MX records for their domains to reflect changes in their ISPs. When a user moves from one ISP to another, the user's domain name does not have to change. The domain name is not tied up with the ISP. E-mails will not bounce. Users, just like now, would still be free to change their e-mail addresses and ISPs without fear that e-mail to them would bounce.

Has Mr Disini changed his color? Is he now a consumer advocate? He decries the *possibility* that it would be with *difficulty* that consumers can select their service providers. Mind you, this is a mere possibility he is railing against. Yet he fights tooth and nail to ensure that the PH ccTLD Registrants are stuck with DotPH. DotPH is the only PH ccTLD Registry and it is the only DotPH Registrar. The DotPH Registrants have no choice and this lack of choice is not a mere possibility but the reality. The cloak of consumer advocacy does not change Mr Disini's color.

Just to assure everyone involved that these services will continue without any interruptions, PHNET officially offers to continue *exactly the same* services offered by Mr Disini at *exactly the same prices* charged by Mr Disini should Mr Disini decide to shutdown DotPH. For \$35 a year per Registrant, PHNET will provide free Webforwarding service, free Nameserver hosting, and Mailforwarding services to each and every client of Mr Disini. PHNET will continue offering such services until such time that the relevant public authority has recognized the Registrars to which the services could be transferred. The only condition to this offer is that Mr Disini provide PHNET with all the necessary Registrant information to make the transfer of records orderly and timely.

Should Mr Disini decide to shutdown his DotPH Registrar business, the only certainty is that the DotPH's services will shutdown. That other Registrars will not offer the same or similar services is not a certainty. The only real uncertainty we face is the uncertainty of Mr Disini's actions. Will he cause an orderly transfer of his clients or not? The only real fear we face is the fear of Mr Disini's power. What if he decides to just erase everyone's DNS records and cause a disruption in the DNS service? The only real doubt is the doubt we have on Mr Disini's ability to administer the PH ccTLD. These are the real FUDs. Whether The Guidelines are written or not, these real FUDs would continue to exist if Mr Disini continues to control the PH ccTLD Registry without any accountability.

5 On the Issue that the Guidelines Are Discriminatory

Mr Disini asserts that he is denied equal protection under the law because entities which he claims are similar to DotPH, the COM and NET Registries and even the GOV.PH and EDU.PH Registries, are not affected by The Guidelines. To bolster this assertion, he cites a statement from a Supreme Court decision “Equal protection of the law demands that we treat alike, alike and unalikes, unlike.”⁷

The fact of the matter is that DotPH is *unlike* the COM and NET Registries. DotPH is the *only* Registry for the Philippine ccTLD. The COM and NET Registries are registries for different domains. DotPH is *unique*. This is precisely the reason why it is a natural monopoly! If DotPH were not unique and there were other PH ccTLD Registries, then there wouldn’t be any need for The Guidelines. In fact, DotPH is very unique because it is the only business which is both the PH ccTLD Registry and the PH ccTLD Registrar.

The Registries for the GOV.PH and EDU.PH are *unlike* DotPH. They are, after all, administrators of mere subdomains of the PH ccTLD. Should DotPH remove the delegation of EDU.PH to PHNET or the delegation of GOV.PH to the Department of Science and Technology (DOST), what can these two Registries do? Neither PHNET nor DOST has the capability to modify the Registry database under the control of DotPH. Should DotPH wish to create a new subdomain AC.PH (for academic institutions) or GO.PH (for government institutions), what can PHNET and DOST do? Neither PHNET nor the DOST participates in the operation of the PH ccTLD in any shape, form, or manner. Mr Disini is the *one and only* Registry and Registrar for the PH ccTLD.

How then can the EDU.PH Registry be *alike* DotPH except for the fact that PHNET is a Registry?

6 On the Issue of Regulation

When Mr Disini complains that regulations would restrict DotPH’s activities, he is certainly correct. Rules and regulations, by their very nature, restrict the actions of those who are regulated and bound by the rules. Rules and regulations limit the ability of players to do what they want. Rules prohibiting a boxer from hitting below the belt will certainly affect boxers who hit below the belt. Rules prohibiting athletes from ingesting steroids will affect athletes who ingest steroids. Rules which dismantle monopolies will affect monopolists. Rules which ensure a fair market place will affect those who profit from an unfair market place.

The Guidelines will certainly affect the way Mr Disini runs his business. This is a fact. However, that in itself does not make the rules wrong or unfair.

⁷as quoted in the Disini Paper, Aguilar v. Court of Appeals, et al, G.R. No. 114282, Nov 28, 1995

The Guidelines will create a competitive multiple Registrar environment for the PH ccTLD. Unfortunately, because Mr Disini thrives in a market where he controls everything, Mr Disini will be affected by the Guidelines. Fortunately, The Guidelines will also favorably affect the Registrants by giving them choices in pricing and service.

Let us now examine each and every issue raised by Mr Disini.

Instead of enhancing the service provided by DotPH, the Guidelines would diminish its quality and effectively drive people away from using the .PH ccTLD.

Because Mr Disini has been the administrator of the PH ccTLD for the past 14 years without being held accountable to the local Internet community, it is understandable for him to equate the PH ccTLD with his DotPH company. Like King Louis XIV of France who exclaimed “L’Etat c’est Moi!”⁸, Mr Disini appears to now say “La PH ccTLD c’est Moi” when faced with The Guidelines.

Mr Disini misconstrues the purpose of The Guidelines as being designed to enhance the services provided by DotPH. On the contrary, The Guidelines is designed to enhance the services provided by the PH ccTLD Registry. Should DotPH be unable to provide services in a competitive multiple-Registrar market, Mr Disini should not blame The Guidelines but himself. Surely, there will be another company which would be able to take DotPH’s place.

In a competitive environment where multiple Registrars offer different levels of services at different price points, the consumer will benefit. True, the consumers will be driven away from DotPH if it fails to provide a competitive service. However, consumers will be attracted to the PH ccTLD Registry.

Mr Disini believes that fixing the price of a PH ccTLD Domain would be detrimental to the Registry. He states:

1) Regulating pricing makes the Registry less responsive to market forces and the needs of the global Internet community. It would affect the level of service that the Registry offers. Also, pricing the domain too low will shrink margins and drive away Registrars; while pricing it too high would drive away registrants. Pricing should be set by market forces and not artificially controlled by the Government.

There are a couple of misconceptions found in the above quotation. First, Mr Disini makes it appear that he is responsive to market forces. The fact is that he controls the PH ccTLD Registry. He runs the PH ccTLD Registrar. He owns an ISP. His company is a monopoly which controls the PH ccTLD registration system. The market forces do not affect him because each and every PH ccTLD Registrant has no choice but to deal with him. As the administrator of the PH ccTLD Registry, he controls the price of the PH domain registration. He sets the policies on how and who can register PH domains. As it is now, market

⁸“I am the state!” were words uttered by Louis XIV when someone used the expression “The King and the state” in his presence.

forces *do not* affect Mr Disini. It is with great duplicity that Mr Disini now claims that in a competitive environment, the PH ccTLD Registry would be less responsive to the market forces.

Second, he raises the straw man that the government will artificially control the price. For argument's sake, let us grant that this statement is true. What is the difference between this situation and the current situation? The *only* difference is who sets the price. In the current situation, it is Mr Disini who artificially controls the pricing. While a COM domain can now be registered for as little as \$8 per year, a PH ccTLD domain is still priced at \$35 per year. This was the price of COM domain in 1998! If there were real competition in the PH ccTLD market, this would not be the case. Clearly, \$35 per year is a Disini-set price, not a free market-set price.

In addition, The Guidelines envisions a company that runs the PH ccTLD on a cost-recovery basis. The total cost of running the PH ccTLD Registry would be computed, inclusive of labor and capitalization for improvements, and the PH ccTLD registration price would solely be based on this computation. Absent from this price is the profit for individuals who administer the Registry. If there is profit to be made, the profit is plowed back into the PH ccTLD operations rather than poured into the pockets of the administrator of the PH ccTLD. The Registrars will pay the Registry this fixed, regulated amount. The Registrars, based on their own business models, can set their own prices for the Registrants.

Third, the pricing will *not* drive away Registrars. In fact, this type of pricing will attract Registrars because they are free to set their own business models and their own prices according to the service they want to provide. With the Registry price set to cost-recovery, the Registrars will now have the margin to generate profits for themselves. If the price were not set by an external body, Mr Disini would still maintain control of the market by merely setting an artificially high price to reduce the margins of other Registrars which would drive them away from the market. The only players that would be left in the market would be Mr Disini's Registrar and Mr Disini's Registry.

From the preliminary calculation of the Adboard, the price of a PH ccTLD Domain should be about \$8 to \$11 per year. Should the Registry price be fixed, what will be driven away is the Registrar which relies on its monopoly and its affiliation with Mr Disini – DotPH.

In the next quotation, Mr Disini paints a poor picture of his company should its monopoly be dismantled.

2) Separating the Registry and Registrar will hamper innovation and limit the speed by which new technology is deployed. Experience has shown that Registrars will not implement systems to support the Registry's innovations unless there is sufficient market demand. This may take a while in a small, underdeveloped market like the Philippines. As Registry and Registrar, DotPH can get innovations into the market more quickly – innovations which benefit the consumer and make the .PH domain more attractive.

In fewer words than above, Mr Disini could have just said that he needs to continue monopolizing the PH ccTLD to be able to profit from it. Why does Mr Disini expect Registrars to implement systems when there is insufficient market demand? Should they implement systems just to please the Registry? On one hand, Mr Disini claims that regulations will hamper his ability to respond to market demands. On the other, he decries the fact that Registrars do not act when there is no market demand! What does he want?

Let us examine what Mr Disini had actually experienced in the market⁹. Sometime in 2000, Mr Disini tried to entice ISPs to be “Registrars” by including a PH ccTLD Domain Registration form into their websites which were linked to the DotPH registration system. The deal was for the ISPs to have a commission on the PH Domains registered through their websites. Many ISPs refused to modify their websites to accommodate Mr Disini’s “innovation.”

From this experience, Mr Disini has learned that “[r]egistrars will not implement systems to support the Registry’s innovations.” I posit that Mr Disini has learned the wrong lesson. The ISPs did not implement his “innovation” because in their analysis, the arrangement was too one-sided in favor of Mr Disini. For their efforts, the “innovation” was not worth their while because it was Mr Disini who would make the profits! The lesson to be learned is that Registrars and ISPs will not implement any system which favors only Mr Disini. For a worthy cause like the PH ccTLD perhaps the ISPs would have bothered, but not for Mr Disini’s cause nor profit.

Mr Disini asserts that the separation of the Registry from the Registrar might not be successful for a small and underdeveloped market. Granting that this indeed true, even in the absence of any proof or study to support, is this statement applicable to the PH ccTLD? How “small” and “underdeveloped” a market is the PH ccTLD? Why does Mr Disini believe that the PH ccTLD market is small and underdeveloped? What are the characteristics of a small and underdeveloped market? Mr Disini and his representatives had been repeatedly asked to quantify these two adjectives they use to describe the PH ccTLD market. Mr Disini has consistently refused to do so. Mr Disini should not take it against him if the Adboard does not believe his statements. Mr Disini’s word can not be simply accepted at face value.

In this next objection, Mr Disini believes that setting the criteria for Registrars restricts access to the PH ccTLD.

- 3) The Government seeks to define who may and may not be Registrars. This limits the Registry’s ability to expand the Registrar channel and make .PH more accessible to a greater number of users.

The Registrars would have to perform specific services and interact with the Registry. This means that there would be specific criteria that companies would have to meet before they are recognized as Registrars. The Guidelines is still silent on these criteria, except for the provision that the Registry should not have any affiliation with any Registrar.

⁹Based on the story of Mr Jason Yu of Philonline.com and Mr Robert Deluria of Tridel,Inc.

For Mr Disini, he sees the Registrars as *channels* which funnel profit to his company. It is understandable that from this point of view, the only criterion for a Registrar would be its ability to generate profits for Mr Disini and his companies.

The next objection shows Mr Disini's poor grasp of the Internet industry in the Philippines.

4) Forcing the Registry to locate its primary Nameservers in the Philippines prevents the use of the best available technology. For example, multicast nameservers – which today are the best for robust DNS service – are not available locally. In addition, we would be more susceptible to underwater cable outages. Websites and e-mail services will not work since secondary nameservers worldwide would not be updated while the Philippines is cut off from the rest of the world.

Without debating the merits of multicast nameservers, PHNET has had the ability to multicast its connection to the Asia Pacific Advanced Network (APAN) in 1998. The DOST PREGINET has multicasting capability too. Multicasting is therefore not a foreign concept nor experience in the Philippines.

Outages are facts of life in the Internet and the Philippines is not more susceptible to these events than other countries. The Internet has been designed to survive such events. Since PHNET has been involved in the Internet in 1996, there has had been no occasion when the *entire* Philippines had been *completely* isolated from the Internet. Assuming that such an event would indeed take place, the proper configuration of secondary name servers, acting as backups, would be able to handle such outages.

Mr Disini runs his company for his own personal profit. It is but natural for him to object to the not-for-profit provision in The Guidelines. He states:

5) By forcing the Registry to operate as a non-profit organization, the Guidelines limit the Registry's ability to seek capital necessary to expand and improve services.

The non-profit nature of the organization was placed in The Guidelines to ensure that no specific individual or company would profit from operating the community resource. The organization is non-profit in the sense that everything that the organization earns is plowed back into the operations of the company rather than taken out by the owners as dividends. It is well understood that the PH ccTLD Registry is a natural monopoly which wields enormous power in the market. So that this power would not be used to benefit an individual, his family, or his companies, the Adboard had written the provision that the Registry should be not-for-profit company.

Whether a not-for-profit company will not be able to seek capital to expand its services is debatable. For example, many funding agencies find it easier to issue grants to not-for-profit organizations. Many for-profit companies also find it easier to donate resources to not-for-profit organizations which they see as

working for the common good. At any rate, the price for the registration of a PH ccTLD Domain should take into consideration the ability of the Registry to expand and improve services.

Mr Disini's ability to cite principles to support a good thesis while simultaneously practicing its anti-thesis has never ceased to amaze observers. The following quote is another example of this uncanny, well-practiced ability.

The Philippines has embraced the principle of free market competition and deregulation. The Guidelines prevent, by artificial means, free competition and are most likely contrary to Article 186 of the Revised Penal Code. Contrary to the national policy of deregulation, the Guidelines attempt to control and heavily regulate the domain name system by prescribing pricing and other technical requirements, instead of allowing the market and the industry to make the regulation.

He criticizes The Guidelines for preventing free competition when it is DotPH itself which prevents free competition. The Guidelines in fact opens up the PH ccTLD market for fair competition by breaking up the monopoly enjoyed by Mr Disini and his companies. He faults The Guidelines for prescribing the price of PH ccTLD Domain. Yet, in the current situation, it is Mr Disini alone who currently sets the price of a PH ccTLD Domain. He flogs The Guidelines for regulating the PH ccTLD. Yet, currently, it is Mr Disini alone who regulates everything related to the PH ccTLD.

The current situation where Mr Disini controls the PH ccTLD Registry, the Registrar and therefore the entire PH ccTLD market can not, in any logical sense, be called a free market. The current situation where Mr Disini sets every policy which involves the PH ccTLD Domain can *not* be called unregulated and free. It is already a regulated system with Mr Disini as *the* regulator. The only thing free is Mr Disini who is free to do what he wants with the PH ccTLD.

The public would have reason to fear if The Guidelines were designed to establish a monopoly, whether a private or government monopoly in the PH ccTLD market. No amount of distortion would support the view that this is the case. The Guidelines is *not* similar to the Marcos-era Presidential Decree which established the tobacco filter monopoly for the Philippine Tobacco Filters Corporation¹⁰. In fact, The Guidelines will destroy the Disini monopoly in the PH ccTLD market.

7 On the Potential for Collusion Between NTC and .COM Resellers

Mr Disini doubts the ability of the NTC and the Adboard to debate the provisions on their own merits. He objects:

¹⁰The company was established by Herminio T. Disini. Through a presidential decree issued during the early years of Martial Law, the company was given the sole authority to import and manufacture tobacco filters in the Philippines.

The Guidelines are being formulated with the participation of entities which profit from the sale of .COM domains, including PISO representative PhilOnline.com. This could be construed as collusion since:

- 1) The Guidelines regulate DotPH yet leave COM and its resellers to operate freely.
- 2) The Guidelines appoint NTC as the body which negotiates pricing on behalf of Registrars, who also resell .COM domains.
- 3).COM resellers are on the Advisory Board, yet no one represents the Consumer or .PH Registrants

Mr Disini's paranoia gets the better of him. How can there be collusion in the Adboard when the members come from a broad sector of the IT Industry? Philonline.com does not control the Adboard and the PISO representative is just one of eight people who regularly attend the meetings. The merits of the proposals from the various members of the board are what determines whether the proposals get included or not. The Guidelines has been circulated widely and comments had been solicited through two public hearings. The process had not been held in secret.

The NTC does not act in behalf of the Registrars. It acts in behalf of the Registrants when the price for PH ccTLD is set. By determining what is a fair price for PH ccTLD Domain, the NTC would allow the Registrars to compete against each other in terms of service rather than affiliation with the Registry. By creating a competitive, multiple-Registrar market, the NTC would give the Registrants the ability to choose their Registrars based on price and service.

The consumer or PH Registrants are represented in the Adboard through PSITE, PICS, and PCS. The NTC and ITECC acts in behalf of the general public.

Let us ask the same questions of Mr Disini. Can Mr Disini cite any documents which detail how he chooses his Resellers, how he sets his prices, and how many Registrants there are in the PH ccTLD? Aside from Mr Disini and his relatives, who developed the policies he now uses to run the PH ccTLD Registry? Can Mr Disini point out who represents the Registrants in his company? In fact, can Mr Disini point out anyone in his company who makes decisions affecting the PH ccTLD who is not named Disini?

8 Conclusion

The Guidelines, is a product of more than five months of meetings which typically lasted for more than three hours. This is in addition to the research and consultations conducted by members of the Adboard on the position of the different constituencies they represent. The primary aim of The Guidelines is to create an environment where competition in the PH ccTLD market can flourish and no individual or group of individuals can control the market except by providing superior service at the most cost-effective price. Although not a perfect

instrument, it had been presented through two public hearings and subjected to an open consultation process through which it had received no serious objections nor challenges from any group nor individual except from Mr Disini and his DotPH company.

Mr Disini disagrees with the basic foundations of The Guidelines. It is not surprising that he would disagree with the provisions which are based on those foundations. The Disini Paper has shown that Mr Disini does not even recognize the power of the government to oversee the PH ccTLD. It attempts to stymie the entire reform process by

1. attempting to debate *minutiae* rather than the substantial issues and
2. raising a veiled threat that the PH ccTLD Domain Name System would cease to function should the government push for meaningful reforms

The threat is indeed real because Mr Disini controls the resources which could bring the entire PH ccTLD DNS into a halt. Should the PH ccTLD DNS be severely affected by *his* actions, Mr Disini is solely to blame, not the reform process itself.

Although Mr Disini has claimed that the Philippine government has no sovereign right over the PH ccTLD, he himself can not claim ownership of the PH ccTLD. Whether the proper entity which controls the PH ccTLD is ICANN or the USG or some other party, the Philippine government has the right to petition and negotiate with that entity in behalf of the Philippine Internet community. The Philippine government does not need Mr Disini's permission to start such negotiations.

It is the author's hope that with the full support of the local Internet community, with the exception of Mr Disini and his companies, the government will stay its course. It should be resolute in its avowed pursuit to open the PH ccTLD to the community and to ensure that a level playing field exists in the market.

A The Disini Paper

Though there is much that is legally questionable with the proposed Guidelines, dotPH seeks to ensure that the PH Domain is administered for the good of the local and global community.

The Guidelines seem to create more problems than they would solve. If the NTC is intent on providing effective oversight over DNS activities, NTC should endeavor to either:

- (1) look for problems that need solving, or
- (2) if there are no problems that need solving, NTC must seek to ensure that DotPH's current standard of service is maintained.

By monitoring this standard of service and ensuring that DotPH does not perform below acceptable levels, the NTC can ensure robust and efficient Domain Name service of the .PH domain for the benefit of the local and global Internet communities.

I. The PH Domain is not a public resource over which the State has a sovereign right.

The Guidelines define the .PH ccTLD as a public resource over which the State has a sovereign right. However, the State has made no contribution to the development of the Internet, the DNS system, or even the establishment of the local registry itself.

The only basis for the State asserting its 'rights' is that .PH was designated as the domain identifying the Philippines. But mere identification does not bestow such rights to the State.

1) Does the State have any rights over the 'Philippine Fund' that is traded on the NYSE? Can it dictate which stocks comprise that fund or where it can be traded?

2) Does the State have rights over Google keywords that include 'Philippines' and 'PH'? Can the State determine what ads are appropriate to use on Philippine keyword searches on Google? For that matter, is Yehey a public resource that the State can regulate? Yehey, the Philippine ccTLD and Google are all merely tools that help locate objects on the Net that are associated with the Philippines.

3) Is Verisign's Sitefinder service a public resource? Does the Philippine government have rights to any Sitefinder results or ads that contain the string "PH" or "Philippines", like unionbankph.com?

In all three cases, as with the DNS system, the technology was developed by private companies or the US Government. The Philippine Government provided no assistance or participation whatsoever. Hence, like any of the others, the DNS cannot be said to be a public resource over which the State has rights.

In fact, the assertion of State 'rights' flies in the face of RFC-1591, universally recognized as the basis for which all Top Level Domains are delegated. RFC-1591 states that "concerns about 'rights' and 'ownership' are inappropriate...(i)t is appropriate to be concerned about 'responsibilities' and 'service'." To date, the NTC has not yet identified how the Registry has failed to live up to its responsibility of providing robust domain name service, nor what problems the said service may have.

II. The Guidelines violate Mr. Disini's rights.

The proposed separation of the Registry and Registrar functions requires that Mr. Disini give up his Registrar business. The NTC, by compelling Mr. Disini to do so, may be violating the Consitution¹. It arbitrarily takes away the Registrar business which is lawfully Mr. Disini's, and in which he has invested time, effort and money in establishing. That the NTC is planning to take it

¹Art. III Sec. 9 of the Constitution provides that "private property shall not be taken for public use without just compensation." In addition, the exercise of the power of eminent domain is by tradition lodged with the legislative arm of government. For proper exercise of this power by the executive, there must be legislative authority granted to the executive (*Bernas I Constitution of the Rep. Of the Phil., A Commentary, 276, citing Visayan Refining Co. v. Camus, 40 Phil. 550, 559, 560 [1919]*). If there is no statutory authority, and it appears there was none granted to the NTC to "take" Mr. Disini's property, the action of NTC to take Mr. Disini's property away from him could be in contravention of the Constitutional guarantee.

away and hand it over to other private entities to be designated by the NTC makes the situation worse.

Furthermore, it is the consumer who will suffer by shutting down the DotPH Registrar. Consumers will face added costs and downtime because:

1) Many domains will not work. Many clients use DotPH's free Webforwarding service to direct their domains to an existing site. These users will need to buy webhosting, since there are few registrars to turn to that offer Webforwarding for free.

2) Websites will go down. DotPH is one of the few Registrars that provides free Nameserver hosting to its clients. Existing users will have to purchase nameserver hosting or get DSL lines with fixed IP addresses and host their own nameservers.

3) E-mail will bounce since the Mailforwarding service will be shut down. Users will either have to pay their ISPs extra to MX mail on their ISP mailboxes or else resort to using Hotmail and Yahoo addresses. Mailforwarding gives users the freedom to change ISPs without their mail bouncing or changing email addresses. Without this, many users will be stuck with their ISPs and be unable to shift easily.

Clearly, separation of the Registry and Registrar functions may be unconstitutional, and works against the interests of the general public as well.

The Guidelines also compel Mr. Disini to give up the database of registrants and impose limitations on the use of that database. The NTC has no right to do so, in the same way that it has no rights over the database of Smart, Globe or any ISP.

III. The Guidelines are discriminatory.

The Guidelines are targeted specifically at DotPH while leaving similar entities unhampered. This results in a denial of equal protection under the law².

Other Registries which compete for the same customers as DotPH – such as .COM and .NET – are free to operate as they see fit without being bound by these regulations. Even the other local registries – .gov.ph (DOST) and edu.ph (PHNet) – are exempt from the Guidelines.

IV. The Guidelines prevent .PH from competing freely by weakening it vis-a-vis .COM and other Top Level Domains.

Instead of enhancing the service provided by DotPH, the Guidelines would diminish its quality and effectively drive people away from using the .PH ccTLD.

1) Regulating pricing makes the Registry less responsive to market forces and the needs of the global Internet community. It would affect the level of service that the Registry offers. Also, pricing the domain too low will shrink

²“Equal protection of the law demands that we treat alike, alike and unalikes, unlike.” (*Aguilar v. Court of Appeals, et al, G.R. No. 114282, Nov. 28, 1995*)

“The equal protection of the law contemplates equality in the enjoyment of similar rights and privileges granted by law. It would have been discriminatory and a denial of equal protection of the law if the statute prohibited an individual or group of group (*sic*) of voters in the city from voting for provincial officials while granting it to another individual or group of voters in the same city.” (*Ceniza, et al, v. Comelec, et al., G.R. No. L523304, Jan 28, 1980*)

margins and drive away Registrars; while pricing it too high would drive away registrants. Pricing should be set by market forces and not artificially controlled by the Government.

2) Separating the Registry and Registrar will hamper innovation and limit the speed by which new technology is deployed. Experience has shown that Registrars will not implement systems to support the Registry's innovations unless there is sufficient market demand. This may take a while in a small, underdeveloped market like the Philippines. As Registry and Registrar, DotPH can get innovations into the market more quickly – innovations which benefit the consumer and make the .PH domain more attractive.

3) The Government seeks to define who may and may not be Registrars. This limits the Registry's ability to expand the Registrar channel and make .PH more accessible to a greater number of users.

4) Forcing the Registry to locate its primary Nameservers in the Philippines prevents the use of the best available technology. For example, multicast nameservers – which today are the best for robust DNS service – are not available locally. In addition, we would be more susceptible to underwater cable outages. Websites and e-mail services will not work since secondary nameservers worldwide would not be updated while the Philippines is cut off from the rest of the world.

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V. There is potential for collusion between the NTC and .COM resellers.

The Guidelines are being formulated with the participation of entities which profit from the sale of .COM domains, including PISO representative PhilOnline.com. This could be construed as collusion since:

1) The Guidelines regulate dotPH yet leave COM and its resellers to operate freely.

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