



AMCHAM PHILIPPINES
The American Chamber of Commerce of the Philippines, Inc.



24 March 2023

Sen. Alan Peter S. Cayetano
Chairman
Committee on Science and Technology
Senate of the Philippines
GSIS Bldg., Financial Center,
Diokno Blvd., Pasay City
Philippines

Subject: ***Industry Position on House Bill No. 6: Open Access in Data Transmission and Providing Additional Powers to the National Telecommunications Commission***

Dear Senator Cayetano,

We would like to take this opportunity to provide our feedback and recommendations to House Bill No. 6 proposing for ***An Act Promoting Open Access in Data Transmission and Providing Additional Powers to the National Telecommunications Commission***, which was approved on 3rd reading in December 2022. We support the intention of the legislative proposal to lower barriers to market entry, fast-track and lower the cost of deploying broadband facilities, and make more spectrum available for Internet service.

However, we are concerned with the unduly broad scope of the proposed legislation, particularly the inclusion of data center service providers under the regulatory oversight of the National Telecommunications Commission. Given the policy intent of the Bill, there is no need to artificially stretch the generally accepted definition of ‘data transmission industry’ to include data center service providers (“DC Service Providers”).

A. Broad scope of the Bill which includes DC Service Providers introduces significant regulatory uncertainty and would hinder investments in this sector due to undue compliance burdens and disproportionately high additional cost on business.

The main purpose of the Bill is to lay out regulatory obligations for data transmission service providers, which are predominantly telecommunications service providers. It is not clear why DC Service Providers are included in the definition of “data transmission industry participant” when they do not offer data transmission services. There are no benefits to be gained by including DC Service Providers within the scope of the Bill but doing so will have significant negative consequences. Imposing a telecommunication regulatory regime on the data center industry would hinder the growth and undermine the development of the very ‘entrepreneurial ecosystem’ and ‘permission-less innovation’ that the Bill seeks to foster by creating unnecessary barriers to entry; deterring foreign investment; introducing undue

compliance burdens; and adding costs on business that differ from, and are counter to, regional and global practices.

For example, section 12 of the Bill would impose mandatory open access and co-location obligations. It is common in many countries for such obligations to be imposed on telecommunications network operators with substantial market power to address the specific structural features of telecommunications markets and prevent them foreclosing the market to new entrants. This is because telecommunications markets often have some form of essential bottleneck infrastructure that has natural monopoly characteristics that other network operators must access in order to offer a competing service. However, those same obligations make no sense in the context of the data center industry, which is not characterized by the same structural economic features – such as high sunk costs of network construction, demand-side network effects, large minimum efficient scale, and vertical integration – that make telecommunications markets prone to anti-competitive behavior and thus in need of open access regulation. Further the data center industry uses different technologies and business models to telecommunications network operators. Accordingly, such obligations would be very problematic and would undermine the economics and security of DC infrastructure and thus deter investment in and development of this important sector. This outcome directly conflicts with the Bill’s intent to remove ‘...barriers to infrastructure investment’, ‘encourage investments in the digital infrastructure...’, and ‘*narrow the digital divide...by encouraging the development of data transmission infrastructure and removing any barrier to competition in data transmission services...*’.

B. DC Service Providers do not offer or provide data transmission services.

Section 4 of the Bill provides that ‘*This Act applies to all persons who participate in the data transmission industry. Any person or entity whose business deals substantially with the transmission of data, including VoIP service provider, internet service providers (ISPs), and data center service providers, shall be governed by the provisions of this Act...*’. This is very imprecise, open-ended, and as a consequence, much too broad given the objects of the proposed legislation. As a result, it imposes mandatory registration requirements and related obligations (such as adherence to specific standards and audit requirements) on entities that do not provide data transmission services.

In particular, the scope of the Bill should not extend to include DC Service Providers because they do not offer or provide data transmission services. Although DC Service Providers offer access to computing resources over a telecom network, they do not operate a telecom network.



AMCHAM PHILIPPINES
The American Chamber of Commerce of the Philippines, Inc.



DC Service Providers are not currently considered or treated as providers of telecommunications or transmissions services, either in the Philippines or in other countries, because they simply operate computer servers used for the storage and processing of data. Accordingly, they are regulated differently from telecommunication services.

The businesses that store and process their data in a data center access and control that data using transmission links that are operated and supplied to them as a service by telecommunications companies. The Bill should focus on those telecommunications companies without extending beyond them into the IT industry.

This distinction is implicitly recognized elsewhere in the Bill. For example, data centers do not feature in the Bill's conception of 'the data transmission network', which the Bill describes as telecommunications network infrastructure comprising an 'international gateway or landing segment', a 'core or backbone network', a 'middle mile' segment, and a 'last mile' segment (s 3). This aligns with the conception of the telecommunications industry and with the 'categories of telecommunications entities' specified in Article IV of the Public Telecommunications Policy Act (namely the international carrier, the inter-exchange carrier, and the local exchange operator). Similarly, the envisaged rules in section 7 about allocation and assignment of radio spectrum resources; section 8 on bandwidth guarantees; section 12 about open access, co-location, and concurrent construction with 'roadworks, pipe-laying and other infrastructure'; and section 13 about paid prioritization and throttling have clearly been proposed with telecommunications networks—not data centers—in mind.

It is also important to distinguish clearly between the operators of telecommunications networks and infrastructure and the service providers that use those networks to supply services. In other countries, terms such as network service and applications service are often used respectively to describe these very different activities. However, the Bill does not adequately distinguish between these different roles, most notably in the definition of 'data transmission', which confuses control of and responsibility for the physical carriage of 'a signal over a communication medium' (i.e. the role of the network operator) with the range of potential service providers that may offer services that are accessible via that communications medium. This confusion is reinforced by that definition going on to say that 'The term data transmission includes the provision of Voice over Internet Protocol (VoIP) services...'. In practice, VoIP simply describes a method for converting an analog (voice) signal into a digital signal that is then able to be carried over a digital communications medium.

As the key definitions in the Bill do not distinguish the operation of network infrastructure from third parties' provision of services over that network, the Bill will impose the same rules and obligations on these different sectors. This is inappropriate because the Bill is principally directed at the owners and operators of network infrastructure.



AMCHAM PHILIPPINES
The American Chamber of Commerce of the Philippines, Inc.



It conflicts with the intent of the Bill, which is focused on fostering investment in, and development and construction of, transmission network infrastructure. Most of the rules and regulations envisaged in the Bill are not relevant to service providers, who have no control over the network infrastructure that connects end-users to the Internet.

Moreover, the inclusion of DC Service Providers within the scope of the Bill creates uncertainty for cloud services providers (CSPs) because that term is not defined and could be interpreted broadly. We respectfully request that the term “data center service providers” be omitted from Section 4 or, alternatively, that the term be defined in a way that makes clear it does not encompass CSPs or prohibit CSPs from building private data centers. Such a clarification would align the Bill with international norms and reinforce its stated objective ‘to encourage investments in the development of digital infrastructure of the country’.

C. The business and government users of data center services do not require the same protections as telecommunications consumers

The Bill is also intended to protect consumers’ interests, with Sections 13(a) and 16 specifying the ‘rights of end users’ of data transmission services. Such consumer protections are important to minimize the information and power asymmetries that typically exist between a telecommunications company and an individual consumer. Those same protections are not typically extended to large business customers because they make purchases on a much larger scale, which gives them greater bargaining power with the telecommunications companies.

However, DC Service Providers are mainly providing services to other businesses and to government customers and usually through a tendering process set by the buyer. DC Service Providers do not provide services to individual consumers like telecommunications companies provide services to individuals and households. As a consequence, the business and government customers that buy services from DC Service Providers do not face the same information and power asymmetries as telecommunications consumers and do not require the same level of regulatory protection. Indeed, extending telecommunications consumer protections into the DC industry may actually reduce the contracting flexibility currently enjoyed by business and government buyers.

Recommendations

To align the Bill with its policy intent and maintain consistency with both the Public Telecommunications Policy Act and international norms, the scope of the Bill needs to be refocused on ‘telecommunications entities that own or operate data transmission networks’ and not seek to extend telecommunications-specific regulation to adjacent industries such as data centers.



AMCHAM PHILIPPINES
The American Chamber of Commerce of the Philippines, Inc.



In particular, the Bill should exclude service providers that merely use telecommunication services or networks to transmit or receive information or provide access to computer resources.

In addition, we recommend the removal of onerous registration, reporting and audit requirements for service providers which do not provide data transmission services. This requirement unnecessarily burdens service providers that are not part of the telecommunications sector, especially those which do not have a material presence within the Philippines' national borders, with complex and highly costly administrative obligations. Such an approach is disproportionate to any perceived benefit to Philippine consumers, and is likely outweighed by the costs of reduced choice or higher prices. We highlight that such costly obligations may even have a deterrent effect for international investment in the Philippine economy.

Please refer to Annex A for a more detailed discussion of our inputs and recommendations, for your consideration.

We will be pleased to meet with you and your team to discuss our inputs with you. Mr. Mc Lawrence Bensal, External Affairs Manager from the American Chamber of Commerce of the Philippines will coordinate with your good office to explore how we can work with you to further refine this important policy proposal. He may be reached at contact number + 63 9455903006 and email mc@amchamphilippines.com

Thank you for your kind attention and support.

Sincerely yours,

Ebb Hinchliffe
Executive Director
AmCham Philippines

Jeff Paine
Managing Director
Asia Internet Coalition

Bensen Koh
Secretariat
Asia Cloud Computing
Association

Annex A

Article	Analysis	Recommendation
Section 3: Definition of Terms ‘Facility’ is undefined.	The term ‘facility’ is not defined despite it being central to the definitions of other terms—including ‘cellular mobile telephone service’, ‘open access’, and ‘passive infrastructure’—and to the registration (s 5) and infrastructure sharing (s 12) obligations. ‘Facility’ is a key term and should be defined for clarity.	Include a definition of the term ‘facility’ along the following lines: Any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.
Section 3(e): Definition of Terms ‘Data transmission refers to the process of sending digital or digitized analog signal over a communication medium to one or more computing networks, communication or electronic devices. It enables the transfer and communication of devices in a point-to-point, point-to-multipoint and multipoint-to-multipoint environments. The term data transmission includes the provision of Voice over Internet Protocol (VoIP) services but does not include the provision of basic telephone services’.	A data transmission service would be more accurately defined as a service for ‘carrying’, or for the ‘carriage of’, certain electromagnetic signals over a communications medium. The key action or process is the <u>carriage</u> of a signal over the medium that separates the transmitter from the receiver, not the act of transmitting (or ‘sending’) the signal over that medium (as in the case of broadcasting regulation or radiocommunications licensing). It is critical that ‘data transmission’ and the ‘data transmission industry’ be correctly defined in terms of ‘carriage’ because the policy intent and all of the obligations and prohibitions in the Bill are directed at the process of carriage—for example, interconnection (s 6(e)), spectrum utilization (s 7), bandwidth guarantees (s 8), non-discriminatory access (s 12), paid prioritization and	Redefine the term “data transmission” to specify it is “a service for the carriage of electromagnetic signals over a communications medium.”

Article	Analysis	Recommendation
	throttling (s 13). By way of analogy, if the intent was to promote competition and innovation in the supply of postal services, then it would be necessary to regulate the system of mail carriers rather than those who send or receive letters.	
Section 3(f): Definition of Terms ‘Data transmission industry participant refers to any person, firm, partnership or corporation, government or private, engaged in the provision of data transmission services to the public. This includes public telecommunications entities (PTEs) that offer data transmission services as defined under Republic Act (RA) No.7925, otherwise known as the “Public Telecommunications Policy Act of the Philippines”’.	The definition does not distinguish between entities formed or recognized under the laws of the Philippines and foreign entities that, for example, may be “participating” simply because their services are accessible by end users over the Internet. It would not be practicable or enforceable for another country to exercise extra-territorial effect of a Filipino law on a foreign entity. In line with global laws on privacy and electronic transactions, the Bill should apply only to entities formed or recognized under the laws of the Philippines to avoid potential conflicts in legal obligations between Philippine and foreign laws. This definition also fails to distinguish between companies that operate privately, such as those that support, enable, or operate internal networks, which should not be subject to the same standards as those operating publicly.	Redefine the term “Data transmission industry participant” to clarify that the Bill only applies to entities formed or recognized under the laws of the Philippines. Exclude entities that engage in data transmission services for private purposes such as those that support, enable, or operate internal networks.
Section 4: Scope	As discussed above, the scope of the Bill is too broad given the policy intent	Limit the scope of the Bill to ‘telecommunications entities that own or

Article	Analysis	Recommendation
‘This Act applies to all persons who participate in the data transmission industry. Any person or entity whose business deals substantially with the transmission of data, including VoIP service provider, internet service providers (ISPs), and data center service providers, shall be governed by the provisions of this Act...’.	behind it and includes entities that are not data transmission service providers. As a consequence, it applies telecommunications-specific regulation beyond the accepted conception of the telecommunications industry under existing Filipino law and international norms. Doing so conflicts with the policy intent of the Bill and will have negative implications for future investment in digital infrastructure. Further, concepts such as ‘participation in an industry’ and ‘dealing with the transmission of data’ are too broad and imprecise to use in such a dynamic context as the digital economy where the Internet and use of data generally are transforming and underpinning businesses and markets. The scope of the Bill should be defined in more concrete terms to avoid inappropriate application and unintended extension of telecommunications-specific regulation.	operate public data transmission networks’.
Section 5(a): Registration ‘All data transmission industry participants shall be required to register with the National Telecommunications Commission (NTC)’	As discussed above, this requirement unnecessarily burdens service providers which neither provide telecommunications nor data transmission services, especially those which do not have a material presence within the Philippine’s national borders, with complex and highly costly administrative obligations without	Remove registration requirement for service providers that do not provide data transmission services and remove associated on-going compliance obligations.

Article	Analysis	Recommendation
Section 5(c): Comply with national and global standards on cybersecurity ‘Data transmission industry participants shall likewise be required to comply with national and global best practices and standards on cybersecurity and shall be subject to a network audit by the Cybersecurity Bureau of the DICT.’	advancing the stated policy intent. Global best practices in the security realm are ever evolving and increasing in rigor, alongside technical developments. A regulation that is either regionally focused or sets specific requirements will [1] quickly become obsolete as technical advancements are made, but could permit and incentivize irresponsible companies to rely on compliance with a baseline standard, [2] lead to inconsistencies between jurisdictions, hindering foreign investment and undermining the objective of encouraging the development of and removing barriers to competition in the data transmission industry, and [3] increase the operational and compliance cost to operate in the Philippines by forcing companies to maintain multiple security compliance programs rather than adhering to global security standards.	Use internationally-recognized standards such as ISO27001, or SOC2.
Section 9(b): Arms-length Transactions and Transparency ‘Promulgate rules requiring all data transmission industry participants to file an annual report and include therein a fair and accurate statement regarding their market prices and their services. The annual report shall include all costs and charges relevant to the data transmission network segment where the participants operate.’	Such obligations and restrictions, which are designed to protect competition, should not be imposed indiscriminately on all ‘data transmission industry participants’. Such on-going compliance obligations are unduly burdensome and could impede the stated goal policy intent.	Remove these obligations.

Article	Analysis	Recommendation
Section 13(e): Prohibited Act ‘Anti-competitive Cross-subsidization – The NTC shall require separate books of accounts between different data transmission segments in order to allow identification of costs and revenues for each segment.’		
Section 12. Infrastructure Sharing and Colocation. ‘The DICT and the NTC shall promulgate policies, rules, and regulations to ensure that passive infrastructure, whether existing or built in the future, necessary or capable of supporting data transmission networks or services are: (a) made mandatory for open access and made available for co-location and co-use by the owner of network facilities, equipment, and infrastructure on an open, fair, and nondiscriminatory basis to any access seeker’s network facilities, in any segment, subject to the technical feasibility of the access seeker’s request and the network facility and infrastructure owner’s standard published offer terms, conditions, and rates’	Mandating open access indiscriminately on all participants in the data transmission sector will stifle innovation and investment in the industry. Businesses will be discouraged from investing in new infrastructure or developing better facilities if these will be shared with competitors, ultimately harming consumers by slowing their access to improve service. These provisions also fails to distinguish between companies that operate privately, such as those that support, enable, or operate internal networks, which should not be subject to the same standards as those operating publicly.	Remove the mandate for passive or private infrastructure to be for open access, and instead incentivize investment in open access infrastructure. In addition, instruct DICT and the NTC to develop policies and regulations that incentivize investment in open access infrastructure.
Section 13. Prohibited Acts (a) ... Data transmission industry participants shall not impede the end user’s right to access and distribute information and content, use and provide applications	Sections (a) and the exceptions under (c) seem to be in conflict with each other.	Amend 13(a) such that the prohibition is subject to the same exceptions.

Article	Analysis	Recommendation
and services and use terminal equipment of their choice, regardless of the end user's or provider's location or the location, origin or destination of the information, content, application or service via their data transmission service. (c) ... It shall be prohibited for a data transmission industry participant to hinder or slow down services or applications or access to specific sites in the internet except where (1) access to such sites, services or applications are prohibited by law; (2) it is necessary to preserve the integrity and security of the network and service of the provider or the equipment of the end user: Provided, That if the breach of integrity or security is caused by the equipment of the end user, the provider has to notify the end user first and give the former sufficient time to rectify the situation; and (3) it is necessary to block the transmission of unwanted communications such as spam and child pornographic materials upon the complaint of the end user or the data transmission industry participant'		