

NigComSat/NCC Controversy

In a paid advertorial in *The Saturday Newspaper of ThisDay*, 28 July 2007, NigComSat Limited, NigComSat, brought to the public space its lingering dispute with the Nigerian Communications Commission, NCC, over the allocation of frequency spectrum. According to the advertorial, "on 5th May 2007, Mr President approved specific spectrum allocation to NigComSat Limited and 'total' frequency license for any telecommunication service NigComSat may wish to offer. It is germane to state that under the extant regulations, NigComSat as a government owned company is required to apply to the Federal Ministry of Information and Communications or the President for spectrum allocation and not to the Nigerian Communications Commission (NCC). However, since Mr President's approval has been communicated to NCC, the NCC ought to comply with Mr President's directives."

Apparently, NCC, as at the date of this advertorial, was yet to comply with the presidential directive on which basis the matter had also become the subject of debate at the House of Representatives, according to newspaper reports. In the advertorial, NigComSat showcased the communications benefits that would accrue to the

Nigerian populace if the presidential directive is complied with and NigComSat is allowed to provide subscriber services. As Communications Lawyers, we would limit our analysis of this dispute to the legal issues that they throw up without debating the commercial issues. The compass for our discourse would be the Nigerian Communications Act 2003 (NCA, Communications Act or the Act) which proclaims, in its Section 1, its primary objective of creating and providing "a regulatory framework for the Nigerian communications industry and all matters related thereto . . ." Frequency Management and Allocation

Perhaps the starting point of our examination should be a determination of whether or not the Nigerian President can, under the Communications Act, assign frequency spectrum to any company for the provision of communication services. With great respect to the Nigerian President, he has no such powers

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under the Communications Act. Section 121(1) of the NCA is very specific in vesting exclusive powers in the Commission for the allocation of frequency spectrum for the communications sector when it states that “notwithstanding the provisions of any other written law but subject to the provisions of this Act, the Commission shall have the sole and exclusive power to manage and administer the frequency spectrum for the communications sector and in that regard to grant licences for and regulate the use of the said frequency spectrum”.

It is therefore not correct, as stated by NigComSat that “under the extant regulations, NigComSat as a government owned company is required to apply to the Federal Ministry of Information and Communications or the President for spectrum allocation and not to the Nigerian Communications Commission”. There are no such “extant regulations”. Perhaps we need to mention that one of the objectives of the NCA is to “ensure an efficient management including planning, coordination, allocation, assignment, registration, monitoring and use of scarce national resources in the communications sub-sector, including but not limited to frequency spectrum,

numbers and electronic addresses, and also promote and safeguard national interests, safety and security in the use of the said scarce national resources”.

Probing further, is it possible for frequency assignments to be made outside the NCA for communications services? We answer in the negative given the afore-quoted provisions of Section 121(1) of the Act. Section 122(1) of the Act supports our contention by stipulating that “subject to such exemptions as are contained in this Act or as may be determined by the Commission, no person shall intentionally transmit in any part of the spectrum to provide a service unless the person holds a frequency licence issued under this Part”.

There is indeed no exemption under the Act which NigComSat can avail itself and it would appear that NCC has not granted the company any such exemption. In effect, any frequency allocation process that goes outside the express provision of Section 121 of the Act, whether or not it derives from the Nigerian President, would be illegal and stiff penal sanctions are prescribed under Section 122(2) of the Act for such criminal infraction by any person or organisation.

As a footnote, we need to address the aspect of NigComSat's assertions that the Ministry of Information and Communications ("the Ministry") has powers to allocate frequency spectrum to government-owned companies for the provision of communications services. Prior to the enactment of the NCA, it used to be the case that frequency management and allocation for the telecommunications industry was the statutory forte of the Minister of Communications which powers were exercised on his behalf by the Ministry of Communications pursuant to the Wireless Telegraphy Act Cap [] Laws of the Federation of Nigeria 1990. However, Section 121(2) of the Communications Act transferred these powers absolutely to the NCC and spelt out explicitly that "the powers of the Minister under the Wireless Telegraphy Act so far as they relate to communications are hereby vested in the Commission". There is no carve-out or exemption in the provisions of that Section. NigComSat is therefore not correct in asserting that all that is "required" of it "as a government owned company . . . is to apply to the Federal Ministry of Information and Communications . . . for spectrum

allocation and not to the Nigerian Communications Commission . . ."

NigComSat Operating and Frequency Licences

One intriguing aspect of the NigComSat case is the fact that it seems to anchor its case on it being a government-owned enterprise. Actually, the NCA makes no discrimination between state-owned and privately-owned enterprises for the purposes of licensing and regulatory controls by the NCC. The object of the Act is inter alia the establishment of "a regulatory framework for the Nigerian communications industry" without differentiation based on ownership structure of the regulated companies. In fact, the Act aims at ensuring "fair competition in all sectors of the Nigerian communications industry" and this, it can only attain by removing the hidden subsidies and privileges that are oftentimes enjoyed by state corporations.

That obviously must have been the intention of the lawmakers when they crafted the frequency allocation provisions of Sections 121 and 122 of the Act and made them blind to state ownership of companies. In other words, all communications companies, whether privately or



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state owned, are bound by the provisions of the said Sections of the Act. More than that, Section 31 of the Act makes it compulsory for all communications services providers without exemption, to obtain operating licences under the Act from the NCC. The said Section stipulates that “no person shall operate a communications system or facility nor provide a communications service in Nigeria unless authorised to do so under a communications licence or exempted under regulations made by the Commission under this Act”.

A search at the NCC's website suggests that NigComSat does not hold any communications licence; the company, in its advertorial does not in fact claim to hold any operating or spectrum licence under the NCA, relying as it does solely on its government ownership. The NCA makes no such licensing exemption for government-owned enterprises. Nigerian Telecommunications Limited, NITEL,, it must be recalled, was wholly government-owned prior to its recent partial privatisation and yet was licensed by the Commission under the NCA for the provision of communication services. NigComSat cannot therefore rely on its government

ownership to avoid the licensing requirements and obligations of the NCA both for its operations and its frequency spectrum allocation.

Competition Issues

Without necessarily intending to cast doubts on the commercial objectives of NigComSat but given the policy shift in Nigeria from State owned enterprises to private sector provision of services generally and also the recent partial divestment of government ownership in the shares of NITEL, it is not quite clear why the Federal Government would make a complete turnaround and want to create another Government parastatal in the mould of NigComSat. If one excises the satellite arm of NigComSat, NITEL as a government-owned telecommunications company was the forerunner of NigComSat. Reading the commercial deliverables and goals of NigComSat in its newspaper advertorial, one could easily read the original blueprint of NITEL at its formation in 1985 and over the years.

But then, the years have shown the fundamental hiccups generally in Government running commercial enterprises. It is

doubtful whether there is any Federal Government-owned commercial enterprise in Nigeria that does not have its commercial objectives compromised by the inherent bureaucratic hurdles in and redtape nature of Nigeria's public service. Is there anything to show or suggest that NigComSat would not suffer the same fate?

There is no basis for such optimism, at least not on the face of the advertorial. If anything, the advertorial confirms the privileged and discriminatory status which government-owned organisations and firms traditionally enjoy and which distorts the competitive environment and constitutes a disincentive to private investments.

This discriminatory template is stark in the process by which NigComSat claims to have obtained its frequency spectrum allocation. As it proclaimed in the advertorial, it came by the frequency slot through Presidential fiat a process that offends the principles of "transparency, fairness and non-discrimination" that are entrenched in and constitute the guiding posts of the NCA. NigComSat stated in its advertorial that "the Presidential approval for spectrum and frequency allocation already indicated that the

commercial value of the spectrum will be capitalised in our equity". No other private-sector frequency spectrum user has had such a state-ordained privilege; they all have had to pay enormous sums into the state's coffers for the use of their frequency allocation slots independent of their respective equity capitalisation.

The NigComSat case typifies the traditional bending of rules and regulations by government to accommodate state-owned organisations to the detriment and disadvantage of private-sector organisations. A similar situation obtained in 2001 during the GSM spectrum auction when NITEL was exempted from the auction whereas all other interested parties had to go through the auction process. These are but examples of the regulatory and licensing distortions which are replete in the Nigerian environment when state-owned organisations have to compete for the provision of services with private-sector companies in a regulated sector or environment. More often than not, the inefficiencies and inadequacies of the state-owned or controlled organisations are made up and subsidised by the



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government with bent rules and regulatory and licensing allowances. These by themselves constitute anti-competitive practices that contradict the objective of the NCA to “ensure fair competition in all sectors of the Nigerian communications industry and also encourage participation of Nigerians in the ownership, control and management of communications companies and organisations”.

NigComSat Remedies

PUC Journal must not be understood however to suggest that NigComSat cannot provide communications services or be allotted frequency spectrum under the NCA. That is not our argument. As we have already stated, the NCA regulatory and licensing regime has no preference for state or private owned companies provided they respectively abide by the NCA provisions, statutory byelaws and their licence terms. NigComSat can and should therefore comply with NCA provisions and apply for its operating and frequency spectrum licences from the NCC in the same manner as any other

privately-owned company or organisation.

There is nothing to suggest that the NCC will not fairly consider its application. In the event that it is aggrieved by the NCC's decisions on its applications, there is still a leeway for it in the Communications Act through the judicial review process in Sections 86 to 88 thereof. In such circumstance, NigComSat can and should exploit those provisions. That way, the regulatory landscape would remain even, and the NCC would live up to its statutory goals and obligations of promoting and ensuring “fair competition in all sectors of the Nigerian communications industry” even as it encourages “local and foreign investments in the Nigerian communications industry and the introduction of innovative services and practices in accordance with international best practices and trends” objectives which, from its advertorial, NigComSat subscribes to.

Chris Ezeafulukwe's

With the merger of Platinum and Habib Bank in December 2005, Chris Ezeafulukwe was appointed

as the Company Secretary of PlatinumHabib Bank Plc in January 2006. In his capacity as

Company Secretary, he is responsible for advising the Board of Directors and management on all the legal and regulatory issues that affect the Bank, in addition to his other duties.

Prior to his present appointment, Chris was the Company Secretary and Head, Legal Services of Platinum Bank Plc. He left

Paul Usoro and Co. to join the team that set up the legal department of Platinum Bank in 2000.

He was an Associate in Paul Usoro and Co. between February 1998 and October 2000.

During his time with us, he demonstrated remarkable diligence and the ability and willingness to handle challenging tasks. He was a member of the team that provided legal consultancy services to the BPE on the

privatization programme and was the Field Legal Officer on the Gas Pipeline project undertaken in Eastern Nigeria by SGN.

Chris is a graduate of the University of Lagos and was called to the Nigerian Bar in 1997. He is

presently studying for his Master of Laws (LL.M) degree at his alma mater. Chris has participated in quite a number of local and international professional courses notably, the Corporate Governance Course at the Lagos Business School and The Company Secretaries and Corporate Legal Advisers Course at The Management School, London. He has also attended other courses organized by Phillips Consulting,

Restral Consulting, Chartered Institute of Bankers and the Economic and Financial Crimes Commission on a wide range of topics. In addition to lecturing at his Bank's training school, he receives regular invitations to speak at different professional fora. In his spare time, Chris enjoys playing table tennis, watching football and listening to music. We are proud to be associated with Chris Ezeafulukwe.

THE FIRM

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Headquartered in Lagos, Nigeria, our global outlook enables us to offer best-in-class professional services that meet the needs of the international business community. We offer our clients rewarding legal partnership which they require to become and remain industry leaders. We earn their trust by consistently delivering timely, personalised services that keep them ahead.

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- *Advocacy and Dispute Resolution Practice*
- *Communications Law Practice*
- *Maritime and Environmental Law Practice.*

Feedback

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