

In March 2007, the Nigerian Communications Commission, NCC, awarded Third Generation Mobile Telephony, 3G, spectrum licences to four companies: Celtel Nigeria Limited, MTN Nigeria Communications Limited, Globacom Limited and Alheri Engineering Limited after a tender and pre-qualification process and the payment of a deposit of USD15m into the Commission's account. Four paired blocks of spectrum were offered at a reserved price of US\$150m each; so it became unnecessary for the Commission to proceed with the planned auction process. The four awardees have 14 days from the date of provisional licence award to pay the balance of the licence fees. Nigeria thus enjoys the distinction of awarding, by auction, the first 3G licenses in the history of Africa.

The distinguishing feature of the 3G service offerings from the 2G and its other variants is the much wider video and data content and capacity. 3G service offerings include voice, slow-scan and streaming video, interactive multimedia, file and image transfer, web browsing, e-mail; information services, banking services, etc.

The 3G Auction

Cost of 3G Spectrum Licences

The total cost of USD600 million for the four 3G Licenses in Nigeria could be described as fair and reasonable in comparison with similar auctions worldwide. For instance, the 3G spectrum auction held in the United Kingdom in April 2000 raised USD32.58 billion while the Netherlands auctioned off five 3G licenses for USD2.3 billion in July 2000. Spain, on the other hand, raised only USD425 million from its sale of four 3G licences in March 2000 while in August 2000, the German auction concluded with record bids for twelve 3G licences, raising an aggregate sum of over USD 46 billion. Bidders were required to bid successfully for at least two blocks of spectrum to qualify for a licence and the six successful bidders each obtained two blocks of spectrum and 20-year licences.

The Nigerian 3G licensees were given fourteen days after the provisional licences were awarded to pay the balance of the license fees, less the USD15,000,000 deposit. In Denmark, however, the successful bidders to the

2001 3G Auction were required to pay in yearly instalments between 2002 and 2011 for their 3G licences. Lump sum obligations are viewed sometimes as disincentives to prospective bidders and may financially impact on the roll out capabilities of the new licensees.

Roll-Out Obligations

The NCC has indicated that it would not impose rollout obligations on the 3G Licensees. A comparative study of foreign experiences shows that early roll-out deadlines are unrealistic to 3G networks rollout. Regulators in Spain, Portugal and Belgium had to postpone roll-out timelines, and in certain instances, reserve the discretion to reassess the situation to reschedule new operational target dates. In Sweden and Finland, operators met the roll-out deadlines by establishing minimal network configurations used for test-run services, rather than for commercial purposes. Understandably, the roll-out of 3G systems in Nigeria will be gradual due to the heavy implementation costs;

The total cost of USD600 million for the four 3G Licenses in Nigeria could be described as fair and reasonable in comparison with similar auctions worldwide. For instance, the 3G spectrum auction held in the United Kingdom in April 2000 raised USD32.58 billion while the Netherlands auctioned off five 3G licenses for USD2.3 billion in July 2000. Spain, on the other hand, raised only USD425 million from its sale of four 3G licences in March 2000.

NDIC Judgment

The Federal High Court, sitting in Lagos, recently entered judgment in our favour in a suit in which PUC applied on behalf of the Nigerian Deposit Insurance Corporation, ("NDIC"), for the winding up of one of the banks whose operating licences were withdrawn by the Central Bank of Nigeria, ("CBN"), early in 2006. The Suit was hotly contested by two Senior Counsel's firms, one representing the majority shareholder, and the other representing the management of the Bank, allegedly put in place by the shareholders. Their arguments against the liquidation ranged from the lack of competence on the part of NDIC to apply for the winding up, to the alleged premature circumstances of the licence withdrawal by CBN.

Our arguments were fairly simple and straightforward: (i) the withdrawal of the bank's operating licence signalled the complete collapse of its substratum; (ii) NDIC Act mandatorily requires NDIC to pay the Bank's creditors and thereby become a subrogated creditor of the Bank; (iii) NDIC consequently was a contingent and prospective creditor, qualified pursuant to Companies & Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990 to present the petition; and (iv) CBN and not NDIC was responsible for the withdrawal of the Bank's operating licence and NDIC, not being CBN's agent, was not competent to comment on the basis or circumstances of the licence withdrawal. The Court upheld all our submissions and appointed NDIC as the bank's liquidator. This is actually the third of such cases that we have, within the last one year, won for the NDIC.

Celtel's 3G Licence

In our Transactional Practice, we advised Celtel Nigeria Limited, on the 3G Auction Process. Celtel is one of Nigeria's pioneer Digital Mobile Licensees and one of the recent four awardees of the 3G Spectrum Licence.

it perhaps, therefore, best left to the dictates of market forces. This is without glossing over the equally compelling argument that the absence of roll-out obligations gives an unfair advantage to new entrants into the mobile telephony market.

Use of 2G Spectrum for 3G Operations

Nigeria, like most countries, allocates spectrum on a national basis in accordance with the ITU Frequency Allocation Table assigning specific frequencies for use by particular radio services. Spectrum licensing has, from time immemorial, been subjected to strict regulation of the government because it involves the deployment of scarce resources, and is prone to interference. In different countries, Regulators traditionally determine whether the 3G technology and services can be deployed in existing 1G or 2G spectrum; deployed in new spectrum [2GHz]; or deployed through a sequence of upgrades operated in existing spectrum. Several countries like Nigeria issued 3G licenses for new spectrum (i.e. 2GHz) - perhaps in keeping with the opinion that the award of licenses for new spectrum retains the commercial value of the 2G spectrum.

However, the challenges of convergence have induced global regulatory changes in spectrum licensing, resulting in such innovative approaches to spectrum management, like technology-neutrality, spectrum trading or in-band migration. The technology neutrality approach in spectrum regulation means that "any services should be provided, though any kind of technology, in any frequency band, and the use of spectrum can be altered at any time." The main aim of mapping specific services for a particular frequency, e.g. 2G services for the 900 and 1800 MHz frequencies, was to prevent interferences. If any technology can be deployed in any spectrum, new technical rules may be required for assigned spectrum to avert interferences.

Technology neutrality cannot however be achieved in its true sense if restrictions are imposed on the use of spectra e.g. insisting that the 900 and 1800 MHz frequencies must be used only for 2G services. Technology neutrality also challenges the co-ordination of industry standards e.g. GSM deployment in Europe and Africa, and identification of specific spectrum bands for particular technologies and services. In the short term, deploying different technologies and standards is more likely to incur heavy implementation costs on the operators. In any case, signatories to the Constitution and Convention of the International Telecommunications Union ('ITU') are bound by the ITU Radio Regulations, which, in effect, influences the extent to which the policy of technology neutrality can be applied in signatory countries.

Several countries like Asian countries and the USA have applied the policy of in-band migration with the introduction of IMT-2000

systems by permitting existing mobile operation to provide 3G networks in their assigned frequencies. This decreases roll-out costs, as the operators need not acquire new licenses to operate 3G services, and has resulted in the widespread operation of 3G networks in these areas. The Regulator, NCC, explicitly stated that the recently awarded "3G spectrum is offered on a technology neutral basis within the conditions of International Mobile Telecommunications - 2000 (IMT-2000)." IMT-2000 is the global standard for 3G wireless communications as defined by a set of interdependent ITU Recommendations. IMT-2000 provides a framework for worldwide wireless access by linking the diverse systems of terrestrial and/or satellite based networks.

Resolutions made in the World Administrative Radio Conferences of 1992 and 2000 extended the scope of frequency ranges for IMT-2000 to include: 800 MHz, 900 MHz, 1800 MHz and 1900 MHz bands, in which most commercial 1G and 2G networks operate, thus enabling and encouraging regulators worldwide to facilitate migration from one generation to another on those bands. Whereas it is desirable for 2G networks to be able to migrate to IMT-2000 or 3G networks, the decision to migrate is not within the scope of the ITU. As a matter of policy, it is up to the operators to migrate from their existing networks; ITU can only provide guide-recommendations for the successful migration of existing 2G networks to IMT-2000. The migration is a gradual process and therefore, enables operators to fully utilize investments on their existing 2G networks.

Presently, operators in Brazil, Canada, Chile, Japan, Korea, New Zealand, Romania and the United States are using their 1G and 2G spectrum to operate 3G networks, given that upgrading networks to 3G is a more cost-effective option than deploying entirely new 3G systems. There is nothing in the recent award of 3G licenses to the four Nigerian operators to suggest that those licensees who currently hold 2G licenses are precluded from deploying 3G technologies in their assigned 2G spectrum. They could roll out brand new 3G networks if they have the financial capacity and/or upgrade their 2G networks to 3G standards. By converse logic, the 2G licensees who did not bid for the 3G Licences, it could be argued, may upgrade their 2G networks to 3G and provide services on their current assigned frequency spectrum.

Conclusion

On the whole, the Nigerian 3G Licences award process was fair, transparent, and conducted in line with international best practices and standards. Bidders were given the opportunity to raise queries on the auction, and the NCC duly responded to those queries.

NCC's Case

PUC represented the Nigerian Communications Commission, NCC in a Suit instituted by the Registered Trustees of the Association of Licensed Telecommunications Operators of Nigeria and 6 other private telecommunications operators (collectively referred to as "the Plaintiffs") against a State Government and some other parties including the NCC. In the Suit, the Plaintiffs challenged the constitutionality of the State's legislation ("Contested Legislation") which, in their opinion, attempted to legislate on telecommunications- an exclusive preserve of the National Assembly under the Constitution of the Federal Republic of Nigeria, 1999.

The NCC aligned with the Plaintiffs' case. As we pointed out to the Court, there seemed to be no dispute between the parties on the issue of whether the Contested Legislation regulated telecommunications practice somewhat; the dispute was more on whether the regulation was in the nature of the Nigerian Communications Act No. 19 of 2003 ("NCA") or, as the State claimed, an urban and regional planning legislation.

We, and the Plaintiffs disputed that it was an urban and regional planning legislation and pointed out distinct similarities between some provisions of the NCA and the Contested Legislation and finally submitted that the State's legislation sought to usurp NCC's functions.

The Court, in its judgment that was delivered in March 2007, upheld the Plaintiffs' and our arguments and submissions in their entirety and held inter alia that: (i) the Contested Legislation was indeed an attempt at the regulation of telecommunications practice; (ii) telecommunications matters are under the exclusive legislative list pursuant to the 1999 Constitution; (iii) the NCA had adequate provisions for the regulation of telecommunications matters; and (iv) the Contested Legislation was null, void and in excess of the State's legislative competence.

THE FIRM

Supporting business

Paul Usoro & Co, PUC, is a full-service firm, providing comprehensive legal services to leading companies, financial institutions, public agencies and governments nationally and internationally. Our clients include leading organisations in the telecommunications, maritime, oil and gas and power sectors, national and multinational companies, financial institutions, public agencies and governments at state and federal levels. Our people have been recognised amongst Nigeria's pre-eminent lawyers, widely respected for their deep insights, professionalism, responsiveness and focus. Our passion for excellence drives us to deliver the best in all that we do. We have invested in cutting edge technology and a robust reference library so we can serve our clients better.

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.

What We Do

PUC is a one-stop shop for corporate legal services; but we are more active in four practice areas, namely:

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

Contact Details

For enquiries or further information about us, please contact

The Managing Partner

Paul Usoro & Co

Legal Practitioners, Notaries, Arbitrators

Plot 1668B Oyin Jolayemi Street

P O Box 71605

Victoria Island

Lagos, Nigeria

Tel: 234 (01) 2714842-5

Fax: 234 (01) 2714846

E-mail: info@paulusoro.com

Website: www.paulusoro.com

DISTINGUISHED PUC ALUMNUS

Mfon Ekong Usoro

Mfon Ekong Usoro, founding Managing Partner, who served as head of our Maritime and Environmental Law Practice Group was appointed the Director-General and Chief Executive Officer of Nigerian Maritime Administration and Safety Agency, NIMASA, Nigeria's maritime regulatory agency in August 2006. NIMASA was created from the merger of the erstwhile National Maritime Agency, NMA, and the Joint Maritime Labour Industrial Council, JOMALIC.

She was a member of the Presidential Committee on Modalities for the Implementation of Cabotage in Nigeria and chaired the drafting sub-



committee which produced the Guidelines on the Implementation of Coastal and Inland Shipping (Cabotage) Act. She also served as a founding project team member of Ecomarine International (a West/Central African regional shipping company) with its head offices in Lomé, Republic of Togo. PUC has been involved in every aspect of the Ecomarine's activities and continues to provide secretarial and legal advisory services to the company. She played a pivotal role - as a representative of PUC - in the drafting of the Environment Management Bill 2001 on behalf of the Federal Ministry of Environment. Mfon Ekong Usoro was a member of the Inter-ministerial Bio-Safety Committee which drafted the Nigeria's Bio-Safety Guideline 2001.