Creating a Truly Independent Regulator

A Paper presented by GEORGE ETOMI & PARTNERS at the Final Legislative Interactive Session Organized by the House of Representatives Committee on Communications on October 3 - 4, 2002.

Overview

What are the issues which necessitate the need for regulation in telecommunications?

- Historically, Telecommunications as network industries are considered natural monopolies.
- A service or industry was considered a natural monopoly if it was considered wasteful for the society to have two or more of such network compete with each other.
- Provision of such services by a single entity would be most cost-effective form of supply.
- Governments provided these sorts of services as part of their social services obligation.
- Telecommunication services provided by state owned monopolies.

In the past three decades there have been revolutionary changes in the technology and market forces driving communications.

- Increasing demands for more efficient, varied and affordable telecommunications services.
- Technology innovation has created a new and most improved ways of processing and transmitting information.
- Governments worldwide have responded by formulating new policy and creating enabling legal and regulatory framework to meet the increasing and varied demand for services.

The changes in telecommunications sector were also facilitated by a shift in paradigm in the provision of utility services.

*The realization that waste and inefficiency generally characterized the operations of government owned monopolies.
*The consequent underlined need to transfer ownership from government to the private sector.
*This led to the various privatisation programmes that swept the world in the 80's from Europe to South Africa right through to Asia.
*The principal reason for privatising state run monopolies was to achieve efficiency in their operations, leading to improved quality of services and lower costs.
*State owned enterprises could not achieve these goals because their operational processes were not exposed to the rigours and discipline of the market place.

Since failure in the telecommunications sector has been identified as the monopoly status of government owned enterprises the challenge is how best to challenge is how best to introduce competition in the industry.

*Regulation of the industry remains critical even after privatisation due to the structure of the industry.
*The monopoly status of the national carrier, which is usually the incumbent, remains
*New entrants are required to interconnect if they are not to suffer undue market disadvantage.
*The focus of the regulator therefore is to ensure a level playing field for the operators and ensure that there is no abuse of dominant market position.

It is not possible to hold up any model of regulatory tradition as the ideal suitable for the peculiar circumstances of any country due to the varied socio-political and historical experiences of different countries.

*Some models possess quasi-judicial characteristics.
*Others might be departments of government with a strong tradition of effective regulation.
*The regulator could be independent and self accounting agency.

Whatever the most chosen by any country, the overriding consideration is that the **process of** regulation must be fair and transparent and supported by the ability to vigorously ensure compliance with set guidelines. The general issue involved in regulating to ensure competition in tele- communications are:

Tarrif :The most direct way of preventing abuse of a dominant position is to regulate prices of services or tarrifs.
*There are two general approaches to this issue-
*The regulator could employ rate - of - return formular or adopt a price cap model.

Quality: This deals with speed and reliability.
*Regulator would be particular about all completion rate, number of lines out of service, manner of response to subscribers' enquiries and complaints.
*Regulator issues equipment type approval to operators to ensure uniformity of standards.

Quantity: Telecommunications is recognised as essential service which cannot easily be dispensed with in modern times.
*Regulator often imposes social services obligation as part of license conditions on operators.
*This aimed at attaining policy goal of universal access.
*Operators may be required to contribute to a universal access fund to provide service to areas that are inadequately serviced for geographical or economical reasons.
*Operators may also be required to provide at their own cost free access on their networks to emergency services, such as fire department, medical and security services.

Entry and Interconnection: The number of operators in any segment of the industry is usually determined by broad policy considerations.
*The regulator, however, has the responsibility for issuing licences which contain the conditions for entry and operation.

*If denied interconnection such new entrants will suffer serious disadvantages.
*Regulator has to set guidelines for interconnection.

Independence of the regulator does not in any event mean independence from the laws and policies of the country.
*Of importance is the separation of the regulator from the industry operators.
*This inspires confidence and ensures that operators comply with international trade obligations.
*Independence in this regard is not absolute.
*Most regulators are appointed and funded by governments.
*What is important is that the regulator and its processes must be perceived to be insulated from political or operational pressures, especially where government retains ownership of the incumbent operator.
*The regulator must have the legal, and demonstrated ability to regulate in a professional and impartial manner.

Current Legal and Regulatory Regime
The NCC Decree No. 75 of 1992 (as amended) creates the regulator, NCC. The law marked the first attempt to liberalise the sector, necessitating the role of the regulator. Hitherto NITEL was the provider of tele communications services in Nigeria.

*S.4 (a) of the decree limits the NCC to "the economic and technical regulation of the privatised sector of the telecommunications industry".
*S.4 creates a dichotomy in the industry between NITEL the dominant carrier owned by government and other operators.
*NCC hamstrung at birth.
*The decree does not provide security of tenure of members of the commission.
*Their appointment and removal at the pleasure of the President and Commander in Chief.
*NCC's powers to make regulations for the industry is subject to the approval of the Minister under S.26.
*S.34 (1) provides that the Commission must submit to the Minister not later than 31st of October each year an estimate of its expenditure and income for the next succeeding year.
*The Commission's power to borrow is subject to the general authority of the Minister under S.33.
*The commission is obliged to prepare and submit to the Minister not later than 30th June each year, a report in such form as the Minister may direct on the activities of the **commission for** the preceding year, including its audited accounts and the auditor-general report on its account.
*NITEL, the dominant carrier is still owned by government and under the direct control and supervision of the Minister.

Provisions of Executive and Private Member Bill
Appointment of Commissioners:
*The Executive Bill gives the president to appoint commissioner from six geo-political zone subject to confirmation by the senate.S2(3).
*Private member bill provides for an open process of appointing members, of the commission including a public hearing by the National Assembly on a short list of candidates nominated by thaw president.S.4(6).

Tenure of Commission
*Executive bill provides for a term of 6 years in the first instance renewable for another 6 year and no more.S.3.
*Private member bill provides for an initial five year period renewable for another five only.S.4(5) .
*Private member bill addresses the tenure of the current members of the commission.S.4(5)(b).

Removal of Commissioners from Office
*Executive bill provides for removal of Commissioners if the president is satisfied that "it is not in the interest of the commission or in the interest of the public that the commissioner continues in office".S.5.
*Private member bill subjects the president's power of removal to the written approval of the National Assembly.

Funding of Commission
*Executive bill provides for the commission's fund to extend beyond all subventions and budgetary allocation from the Federal Government to other sources, including gifts and grants.S13.
*Private member bill provides the main source of the Commission's finance to be moneys appropriated from time to time for that purpose by the National Assembly in addition to administrative fees and charges,S.4(15).

General Control and Supervision
*S.62 of the executive bill states that it shall be the duty of the commission to comply with the directives of the Minister relating generally to matters of policy with regards to the exercise of its functions as he may consider necessary.
*S.63 subjects the power of the commission to make regulations in executing its functions to the approval of the Minister.
*Private member bill require the commission to furnish the National Assembly information may be required concerning its activities generaly.S4(17)
*S.4(20) of the private member bill gives the commission unfettered powers to make regulations for executing functions.

Conclusion
Whatever mode is adopted by any country, the regulator must have the legal and practical ability to arbitrate in the industry in a professional and impartial manner. Of the two bills, the private member bill clearly gives the NCC more independence and authority to run the industry. The Executive bill retains the control of the Minister in vital areas over the NCC, as provided for in the 1992 Decree.