

16 JUNE 2020

CRAN
COMMUNICATIONS HOUSE
ROBERT MUGABE AVENUE
WINDHOEK
NAMIBIA

Received
16/06/2020


Dear Sir/Madam,

RE: PUBLIC NOTICE: THE APPLICATION FOR RECONSIDERATION BY DIMENSION DATA, IN RE; AWARD OF LICENSE TO THE MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF WINDHOEK.

Dimension Data Namibia noted your request for submissions regarding CRAN's previous issuing of a Class Comprehensive Telecommunications Services License to City of Windhoek.

Kindly find our submission herewith.

1. Introduction

Namibia is a constitutional democracy governed by the Rule of Law. It is the responsibility of every public office bearer to respect and uphold the law. CRAN also has a duty to uphold the laws pertaining to it, and thus comply with Article 18 of Namibian Constitution, which prescribes that all administrative bodies, such as CRAN, shall act fairly and reasonably and comply with the requirements imposed on such bodies and officials by common law and any relevant legislation.

Section 2(k) of the Communications Act no. 8 of 2009 ensure that it is CRAN's mandate to ensure fair competition and consumer protection in the telecommunications sector. Section 33 expressly prohibits any practice or activity which prevents, restricts or distorts competition. CRAN can be seen as guilty of such a practice or activity as any other party.

Since independence Namibia has made great strides in growing several industries, the telecommunications industry being one of them. We should not forget that these successes were made possible by a well-regulated free market economy. Total tax revenue accounts for 93% of government's income. It is from this income that more than 100,000 government employees receive their salaries and have access to private medical care for their whole families. From this income government employees receive pension benefits for life, schools, roads and other infrastructure, tens of thousands receive financial support for tertiary education and close to two million Namibians receive public healthcare.

It is every government agency's duty to ensure that our free market economy thrives, as also specifically provided for in the Communications Act, and it would be extremely irresponsible where decisions are made, not only to restrict our free market economy, but to actively destroy it. When we take the latter route, we may enrich a few individuals, but the people of Namibia will suffer greatly for it.

By awarding the City of Windhoek a Class Comprehensive Telecommunications Services License CRAN has not only failed to follow the laws designed to protect all stakeholders in the telecommunications industry, but played an active and substantial role to erode the free market economy in the telecommunications industry, by assisting City of Windhoek to prevent, restrict or distort competition in the telecommunications industry as eluded in section 33 (1) of the act; this while CRAN was well aware of the city's well documented intention to do so.

We say this as CRAN awarded the said license well-knowing that City of Windhoek has on several occasions in the past attempted to monopolise telecommunications in our capital, even forcefully so, by using the City Police to intimidate other players in the sector. CRAN was also aware of the High Court judgement in this regard, and that the judgement specifically interdicted City of Windhoek from interfering with the installation of infrastructure by licensed operators. City of Windhoek then also confirmed its ambition for total

domination of the telecommunications space by publishing proposed regulations which will give the city full control over all other licenced operators.

For these, and the reasons elaborated on hereunder, we implore that CRAN withdraws the license previously granted to City of Windhoek or reconsider as mandated by section 31 of the communications act, should CRAN be of the opinion that the license is not valid, and needs re-consideration.

2. Non-compliance with prescriptions on public consultations as per section 40 of communications act.

After receipt of the city's application for a license, section 40 of the communications act compelled CRAN to request input from the public based on an application for a Class Network Facilities License. Input was provided to CRAN on that basis. Affected parties may also have elected not to provide input, based on the notice referring to this specific licence. Without any further notice to the public, and solely out of own motion, CRAN decided to award a completely different, and far wider class license to the City of Windhoek. In doing so CRAN did not apply the law and acted unlawfully. More specifically, it seems CRAN denied the public, and stakeholders in the telecommunications industry, a fair opportunity to provide input relevant to what CRAN had to assess or intended to do. Due to this statutory non-compliance the license awarded to City of Windhoek is void, and we urge CRAN to confirm this publicly.

3. Statutory Limitations in the Local Authorities Act of 1992 & amendments

The Municipal Council of the Municipality of Windhoek is a statutory body, governed by the Local Authorities Act of 1992. As a statutory body its rights and duties are provided for, and limited, in this Act and its amendments.

The city's powers cannot exceed the powers expressly provided for in the Act unless otherwise amended. Section 30 of the Act is clear on the city's duties

and these duties do not include the provision of any telecommunications/internet services provision but only allows it to enter, subject to regulations, into joint business ventures. It is also deemed that the joint business should focus on duties as already stipulated in section 30 of the local authority's act and again there is no provision for such services. This remains the position whether the city provides such services directly, or through a joint venture, which, as it was reported, the city intends to do, in partnership with Huawei (and not Telecom as per CRAN's explanation for providing the license to City of Windhoek).

CRAN has a duty to adhere to all the laws of the country. CRAN can and should not be a facilitator for any party to breach any law. As a result of the limitation in the Local Authorities Act, CRAN could not have awarded a license to the City of Windhoek, well-knowing that the City of Windhoek would act outside of its statutory powers in attempting to exercise the rights normally associated with a telecommunications license.

4. Restriction on Trenching

CRAN is aware of proposed regulations by the City of Windhoek to regulate trenching and excavations on streets. There can be no doubt that the overall intention of this proposed regulation is for City of Windhoek to have the exclusive right and discretion to decide who may install fibre optic infrastructure and provide related telecommunications services in our city. We are not aware of any efforts or actions by CRAN to uphold section 33 of the Communications Act, which section places a specific duty on CRAN to regulate any uncompetitive conduct. We are of the opinion that CRAN had the sole duty to put an immediate stop to the city's plans. If CRAN has indeed done nothing in this regard, it further raises the suspicion that CRAN might be facilitating, if not being a key player, in setting up an unlawful and uncompetitive scheme to monopolise telecommunications in Windhoek. We really like to believe that this is not the case, for the consequences are extremely far-reaching. Giving the city a license and, knowingly know they also control who may install fibre optic

infrastructure is creating an environment where you have both the referee and the player on the same side.

CRAN is also aware, from the face of proposed regulations, that City of Windhoek intends to legislate its use of police force to protect the monopoly now looking likely as facilitated by CRAN. The proposed regulations appear to be a move towards monopolist and state capture, where statutory amendments are pushed for the gain of a few individuals, and not for the purpose as expressed in the city's empowering legislation, or for public good governance. This should not be acceptable, and CRAN has a clear duty to protect the Namibian public against this.

5. Competition Laws

Section 23 of the Competition Act of 2003 states that "Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited"

As per the section provided above, City of Windhoek intends to become a telecommunications provider, albeit through a joint venture in which it will hold unnamed shareholding percentages, while City of Windhoek will also become the sole gatekeeper of its competition in this sector. There can be little doubt that this will be an agreement or undertaking aimed at prevention or substantial lessening of competition in trade of services, and thus will be a contravention of our competition laws.

The penalty for contravening this provision is 10% of annual revenue. For the City of Windhoek such penalty will amount to about N\$400 million dollars. Given CRAN's prior knowledge as explained above, it can be assumed that CRAN has facilitated the lessening of competition and was thus part of a concerted practice. The same penalties may thus be levied against CRAN, which levy will

ultimately be paid from fees paid by all licensed operators as well as the city residents.

6. Huawei and the Right to Privacy

We return to the duty of public functionaries in a constitutional democracy. You have an obligation to uphold our Constitution. Under Article 13 our Constitution guarantees the right to privacy as a fundamental human right. Accordingly, all persons have a right to privacy in their homes and communications.

Article 13 states that “No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.”

It has now become clear that, as a direct result of the license CRAN provided to City of Windhoek, the city intends to partner with Huawei (and not Telecom as mentioned before) to monopolise telecommunications in our capital. International reports over the last two years indicate that there are several countries who have raised serious concerns over the integrity of Huawei and its connections with the Chinese Communist Party.

This has also been reported in the New York Times which article is available online. Security concerns have led to the banning, or substantial increased monitoring of Huawei infrastructure. Countries such as the United States, Australia, United Kingdom, Germany and Japan have all banned Huawei and their plans to roll out 5G due to unsurmountable security concerns and privacy of its citizens.

We urge CRAN to make a proper assessment of the consequences of City of Windhoek holding such license and entering into a partnership with Huawei,

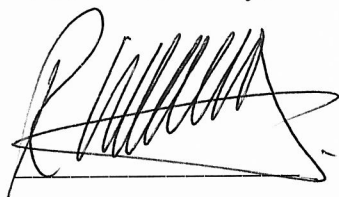
which information we believe was withheld from CRAN at the time of the application by City of Windhoek, but which information has since become publicly available, while we received no indication that CRAN intends to act on same.

7. Conclusion

Lastly, given all our concerns above, and as per media reports, we fear that it might be certain individuals who are seemingly pushing an agenda of self-enrichment, using public funds or foreign debt, as we especially fail to see the benefit of the city's scheme for the public. If CRAN is not acting as an autonomous statutory regulatory body, but instead acting on external pressure, we hereby wish to urge CRAN to provide this information to all stakeholders, with an explanation on the legality and desirability of CRAN making decisions on such a basis.

We trust CRAN will give due regard to our submissions herein and look forward to receiving the outcome.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rowan Kleintjes', with a large, stylized flourish at the end.

Rowan Kleintjes

Managing Director