

Office of the Chief Executive Officer

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11 June 2020

The Chief Executive Officer
Communications Regulatory Authority of Namibia
Moth Centre
Pieter Muller Street
WINDHOEK

Dear Sir,

**RE: COMMENTS TO PARATUS APPLICATION FOR RECONSIDERATION:
AUTHORITY'S DECISION TO AWARD THE MUNICIPAL COUNCIL OF WINDHOEK
A CLASS COMPREHENSIVE TELECOMMUNICATIONS SERVICE LICENSE
(ECNS AND ECS)**

We refer to the above and the Authority decision as published in the Government Gazette No. 7196, General Notice No. 155, dated 29 April 2020. Kindly find attached, Telecom Namibia's application for reconsideration in respect of the Authority's decision to award a class comprehensive telecommunications service license (ECNS and ECS) to the Municipal Council of Windhoek (herein after referred to as COW).

yours faithfully,



L HIWILEPO
ACTING CHIEF EXECUTIVE OFFICER

TELECOM NAMIBIA LIMITED

APPLICANT

and

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA 1st RESPONDENT

MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF

2ND RESPONDENT

WINDHOEK

APPLICATION FOR RECONSIDERATION

1. INTRODUCTION

- 1.1 According to the Authority's record as received for purposes of the application for reconsideration, COW submitted a blank Network Facility License application form, dated 08 March 2018 and received by the Authority on 21 January 2019. The application form although titled Network facility License, was blank and with only parts A – C completed. The application form was gazetted on 22 February 2019 and republished again on 26 March 2019. Thereafter, the Authority on 29 April 2020, published a notice in the Gazette notifying the public that it has resolved to award COW an ECNS and ECS without first publishing an ECNS and ECS application form, from COW for public comments.
- 1.2 The Authority stated in paragraph 4 of its reasons for the decision that, considering the type of services that the COW intended to provide, the Authority (seemingly *mero moto* or on its own), was of the view that the correct license category required by COW,(although not applied for), is an ECNS and ECS. The Authority further stated that COW cannot provide all envisaged smart city services under a Network Facility License.
- 1.3 Telecom Namibian is aggrieved by the Authority's decision to grant an ECNS and ECS to COW based on the reasons stated herein below, and hereby applies for the reconsideration of the Authority's decision.



2. GROUNDS FOR RECONSIDERATION

- 2.1 The Authority acted *ultra vires* in terms of the Local Authorities Act, Commercialization Regulations, Council's resolution and its own Act regarding the processing and consideration of licenses.
- 2.2 The Authority did not properly apply its mind in its *mero motto* finding that COW cannot provide all envisaged smart city services under a Network Facility License.
- 2.3 The award of the license was not procedural in terms of licensing procedures and not in line with administrative justice.
- 2.4 The award of the license was not in line with industry accepted key objectives of licensing in the Telecommunications sector.
- 2.5 The award of this license to COW creates unfairness to licensed operators who are equipped to provide this service and it further creates confusion in the industry in that the business model is not clear and never suggested that COW would take such steps as now proposed to the detriment of other licensees.
- 2.6 The position awarded to COW by awarding this license, allows for abuse of power in that operators are limited and delayed in rolling out their own services as defined and allowed in terms of the Communications Act, by virtue of CoW delaying such attempts by operators in an effort to sustain its own interest which is not clearly communicated in their business plan. Simply put, the Regulator has created the scenario where unfair competition is encouraged in the industry.

3. THE AUTHORITY ACTED *ULTRA VIRES* THE LOCAL AUTHORITIES ACT, COMMERCIALISATION REGULATIONS, AND COUNCIL'S RESOLUTION

Local Authorities Act and the Commercialisation Regulations

- 3.1 In terms of the local Authorities Act, section 31(z) (ab) council is given powers to commercialise subject to any regulations which may be made relating thereto, any service rendered by it or any function or duty exercised or carried out by it. There exist such regulations in respect of commercialisation of services or functions of council as published in the Government Gazette No. 2492 dated 5 March 2001 and pursuant to section 31 (z) (ab) conditions under the said regulations should be complied with before council can commercialise as

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contemplated under section 31 (z) (ab) of the Local Authorities Act. While cognisant of the provisions of section 30 (3) (11) and section 31 (1) of the Local Authorities Act in as far as they pertain to ministerial prior approval, we submit that commercialisation although done by a municipal council and not a village council, is subject to the conditions set out in the commercialisation Regulations which in this instance has not been complied with.

3.2 From the Business case submitted by COW and the Authority's reasons for its decision, it is apparent that COW intends to commercialise its fibre network in line with its plans for a smart city project. In terms of regulation 2 of the Commercialisation Regulations, commercialisation can only be done with prior written approval from the minister and subject to the conditions of such ministerial approval. Regulation 3 states the form and manner of commercialisation, and stipulates that commercialisation should be done by means of acquiring all shares or registering a new company where the municipality is the only shareholder for purpose of commercialisation of such a service or by transferring all rights for commercialisation to this so-called entity by COW. In terms of the record provided to Telecom by the Authority, we have not seen the ministerial written approval for COW to commercialise its Fibre network or commence a smart city project. In the absence of such prior written approval from the minister, council's resolution and subsequent application for network facility to the Authority is unlawful.

3.3 COW ought to have registered a company in terms of the Companies Act 2004 to take care of the commercialisation of its fibre network. One would have expected that the business model would have been defined and concluded to reflect the role played by each player including those entities invited by the CoW through a published expression of interest tender. On page 3 of the Authority's decision, the Authority correctly pointed out that a license awarded by the Authority cannot be transferred. Consequently, the company ought to have been established before the application for license was submitted to the Authority and the application for license should have been made in the name of the said company and not in the name of COW.

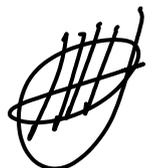


Council's resolution

- 3.4 Apart from the said resolution being invalid as it was made without prior ministerial approval, the said resolution that was attached to the application for network facility authorized the strategic executive: Electricity, to apply for a network facility to CRAN. The question that therefore follows is: since the Authority did not award the network facility that was approved, can the Authority or anyone from COW divert from council's resolution.
- 3.5 In terms of section 31 (4) of the Local Authorities Act¹, only council may alter its resolution. Seemingly, and to answer the forgoing question, no one else, except council, has the power to alter council's resolution. Therefore, the only license approved by council's resolution was that of a network facility License. The Authority is a creature of statute and as a result, it is also in our view, not allowed to alter the council's resolution as it appeared to have done. The award of an ECNS and ECS is thus not in line with the council's resolution and thus unlawful because no one was authorized to apply for an ECNS and ECS or to award an ECNS and ECS to COW.
- 3.6 The council's resolution delegated the strategic executive: Electricity to apply for a network facility to CRAN. If the person who lodged the application is not the Authorised person then such a person also acted without the required authority.
- 3.7 In conclusion, the licence awarded was awarded unlawfully.

4. THE AWARD OF THE LICENSE WAS NOT PROCEDURAL IN TERMS OF LICENSING PROCEDURES AND NOT IN LINE WITH ADMINISTRATIVE JUSTICE

¹ Section 31 (4) states that A local authority council or a management committee shall not be divested of any power delegated or assigned by it under subsection (1), (2) or (3), as the case may be and **may alter** or withdraw any decision given by the delegate in the exercise of such delegated power.



- 4.1 Literature has indicated that one of the key objectives of licensing regime is to create regulatory certainty². Operators need to know what to expect and ensure that regulations are applied uniformly and consistently. Regulatory uncertainty creates challenges for the market and can hamper investor's appetite and essentially industry growth which the Authority has a responsibility to foster. In the telecommunications industry, licensing is necessary and is used as a tool to promote competition and privatisation. Thus far, the licensing regime that has been put in place by the Authority has been clear and ascertainable, thus allowing operators to detect irregularities e.g. identifying when a license was not awarded procedurally.
- 4.2 As a regulator, the Authority is an administrative body and in terms of article 18³ of the constitution, administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation. The Communications Act⁴ has specified licensing procedures that should be followed. The Authority has a responsibility to, among others, ensure transparency with regard to market entrance and consider all applications on a non-discriminatory basis. By complying with the Act and regulations regarding licensing procedure, the Authority maintains its credibility within the industry and allow operators to remain confident in the regulatory regime⁵. We submit that the Authority has so maintained this confidence from the industry and the un-procedural handling of the COW application by the Authority stand to stain this confidence built.

² Intven, H, Oliver, J & Sepúlveda, E (2000) 'Price Regulation', in Telecommunications Regulation Handbook, Intven, H (ed), World Bank, Washington DC, available online at http://www.infodev.org/files/1083_file_module4.pdf; pages 2-1

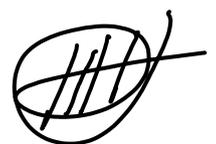
³ Article 18 of the Namibian Constitution states that Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

⁴ Section 40 of the communications Act

⁵ Intven, H, Oliver, J & Sepúlveda, E (2000) 'Price Regulation', in Telecommunications Regulation Handbook, Intven, H (ed), World Bank, Washington DC, available online at http://www.infodev.org/files/1083_file_module4.pdf; pages 2-5



- 4.3 The communications Act, the licensing procedure regulations and in fact on the Authority's website, lay out the licensing procedure. On the Authority's website, the Authority has expressly stated that no incomplete license applications will be considered. Though this is public knowledge, it did not stop COW from submitting an incomplete application form, or the Authority from undermining the licensing regime and consider this application. It is our considered view that the authority ought to have refused to consider the incomplete application form. What is more aggravating is the fact that, the Authority defended COW and its decision on page 5 of its reasons for the decision, by stating that the information not provided on the application form was provided in annexures, without indicating which annexures are referenced or providing same to Telecom together with the record to consider. We advise that based on the information received from the Authority as part of the record, it is still not clear for instance where the new network facilities will be located if COW is intending to install any, or what the make and model of the equipment is as required under part G (2) of the application form.
- 4.4 On the issue of licensing procedure, and without repeating comments made by Paratus, we support the position by Paratus that the application for ECNS and ECS ought to have been published for comments. There is nothing in the Communications Act or the licensing procedure Regulations which authorises the Authority to consider and make a decision in respect of an application without first publishing it for comments. We are not in agreement with the Authority's interpretation of regulation 11 (9) (a) of the licensing procedure, and submit that regulation 11(9) (a) does not give the Authority the power to consider an application without publishing same for comments or to replace the license applied for with another. Our interpretation of regulation 11 (9) (a) is that the word appropriate refers to the license applied for.
- 4.5 The Authority through an oral hearing realised that another license was more appropriate as alleged, then COW should have been advised to apply for the correct licence and withdraw their application for network facility. In any event, the requirements for the two licenses differ and the substitution was therefore



inappropriate in this regard. As correctly pointed out by Paratus, the further information request mechanism cannot be used to award a license not applied for or gazetted for comments. We submit that the requirements for publication in both the act and the regulations is a peremptory requirement and not optional or only done where the Authority deems it necessary. Had Telecom known that the Authority was considering awarding an ECNS and ECS to COW, Telecom would have submitted its comments to the application then.

5. THE AUTHORITY DID NOT PROPERLY APPLY ITS MIND IN ITS *MERO MOTTO* FINDING THAT COW CANNOT PROVIDE ALL ENVISAGED SMART CITY SERVICES UNDER A NETWORK FACILITY LICENSE.

5.1 The point of departure in respect of this ground is the assessment as to whether the proposed smart city project requires an ECNS and ECS as concluded by the Authority. The Authority in its reasons for decision does not clearly set out what about the smart city project points towards the fact that a network facility license will not be appropriate in the circumstances and an analysis of the revised business case and Authority's reasons will be dealt with below.

5.2 In terms of the services that COW intends to provide and how such services will be provided in the smart city project, the following is apparent from the Authority's decision and the revised business case:

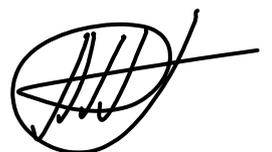
5.2.1 COW stated that it has a joint venture with Telecom for the commercialisation of its fibre project. Save for the letter of award given to Telecom by COW and attached hereto as annexure A, we dispute that COW and Telecom have entered into or signed any joint venture agreement.

5.3 On page 2, the Authority stated that the network will be linked to Telecom's network. This still doesn't indicate which services require an ECNS and ECS licence. The second last paragraph on page 2 states that after the fibre is



commercialised, operators will be engaged to set up hot spots around the city, however there is still no indication why an ECNS and ECS is required. In the same paragraph, the Authority stated that COW indicated **that it will not offer voice and data services** but only intend to commercialise and lease out the fibre. Why then did the Authority think the appropriate license was ECNS and ECS if only the fibre network will be commercialised same as what NAMPOWER has done and the other services for Smart city will be provided by other licensed operators?

- 5.4 On page 3, it was clarified again to the Authority on 23 August 2019 that COW only intend to make its fibre available for rental. Under paragraph B on page 3, it states that COW intends to become a smart city by providing a host of smart services to its residents such as public WIFI, smart metering, multimedia marketing, CCTV surveillance, and fibre to the X. The foregoing is still no indication whether the said services or connectivity will be provided by Telecom or other service providers or if it will be provided by COW itself directly to customers. Telecom Namibia has wholesale offerings in place that it offers to the market and has been providing such to other licensed service providers and the country has benefited by avoiding duplication of infrastructures across the city and other towns.
- 5.5 The business case was also examined for clarity in this aspect to consider who will provide the services under paragraph B on page 3 of the Authority's reasons for decision and same could not reveal that COW is proposing to provide anything other than just access to its fibre network. On page 6 to page 8 of the business case, one would note that COW will require a licensed operator and even made reference to utilizing Telecom street cabinets. This model of partnership is supported by Telecom and it is aligned to what we offer to the market to support all other licensed entities in Namibia. On page 8 of the business case under service provision, it is revealed that aspiring operators will be availed with the fibre to enable them to provide internet services to customers. Therefore, from our reading of the business case and the authority's submission paper, we could not infer that COW will be setting up a



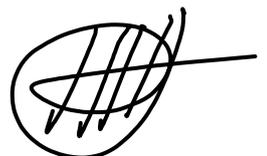
network or offering anything more than access to its fibre network which will only require a network facility license⁶ and we fail to see why the Authority concluded that what is required is an ECNS and ECS.

5.6 It is common cause that the industry is aggrieved by COW's anti-competitive behaviour of using the process for way leave approval to coerce operators to buy and install an extra duct on the ground for COW at their own cost. This practice has been highlighted to the regulator by Paratus and we have reiterated it in both in our comments to the COW By-laws and in our letter dated 06 May 2020. This matter requires the Authority's urgent intervention and should have been considered in the analysis of the application for a license by COW because, as an aspiring telecommunications service provider, COW cannot expect other operators to spend money in materials and labour to satisfy their business CAPEX needs. We therefore advice that, in as far as compliance is concerned, COW has already committed an anti-competitive act by delaying way leave approvals because of their own conflicting interest and making unreasonable demands from operators such as extra duct before approvals can be granted. The authority ought to have imposed a condition to city of Windhoek to not interfere with competition and hamper with other operators' installation in this regard.

6. THE AWARD OF THE LICENSE WAS NOT IN LINE WITH ACCEPTED KEY OBJECTIVES OF LICENSING

6.1 The incomplete application form fails to reveal any ownership held in existing telecommunications and broadcasting services. Though we are not alleging that COW have existing licenses in the two categories, we submit that indirectly, another license has been added to the number of licenses owned by the state, which factor should have been considered in the analysis of this application and decided upon. NBC, MTC, NAMPOWER, TELECOM and now COW, all directly or indirectly amount to licenses owned by the state in telecommunication and

⁶ Though still maintaining that the application for network facility is illegal

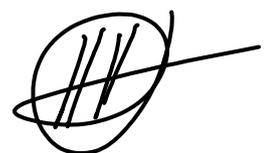


the Broadcasting sector. Ownership of licenses in broadcasting and telecommunications industry continues to be in the state and this does not align with the objective and purpose of licensing which is of privatisation and liberalisation of the market. Christopher Smith⁷ stated that the Government of Namibia has substantial interests in the telecommunications sector, and is therefore likely to exert a powerful influence on its liberalisation. This finding by this author is not wrong and the Authority needs to consider this factor in the interest of meeting the purpose of regulation such as liberalisation.

- 6.2 Furthermore, it is not clear why NAMPOWER has a network facility license and COW was awarded a ECNS and ECS licence when both of them has fibre networks which they wish to commercialise and we have already indicated why we are of the view that smart city project has not been demonstrated to require ECNS and ECS.
7. It is not clear if the license awarded to COW is for a specified geographical area or nationwide? In terms of telecommunications license conditions, COW will need to comply with conditions such as universal service obligations⁸. COW will also need to comply with quality of service obligations and in the absence of anything showing that they will build a network how will they do this on another person network?
8. The understanding created by COW by approaching carriers to monetise the fibre they had, created the expectation that the city was perusing moving towards creating an environment where existed service providers would play a role in leveraging the infrastructure they had. The business plan that would govern that multi-infrastructure was not defined by COW – created a lot of confusions because the role of Telecom or other operators was never defined,

⁷ In the report by SADC, (2013) The SADC communications environment: An assessment of policies, laws and regulations in the SADC region. Report prepared for the SADC Secretariat by LINK Centre, SADC Secretariat, Gaborone, Botswana, available online at http://www.wits.ac.za/files/tgk3b_876585001387466226.pdf; page 214

⁸ Section 38 (8) and section 39 (4) (g) of the communications act.



meaning that the Cow would not necessarily need a licence. Entities approached all have licences- and have infrastructure, there should be no need for duplication of another licence and that was the understanding created by COW in their papers and invitations to operators to participate.

9. Further to the above, we note that smart city services is a layer on top and runs on the network and COW does not need a licence for that. COW has to define the model and the role to be played by each selected player accordingly. The regulator should insist that COW define the business model- so that there is a clear understanding from the entire process and application for a licence by COW.

10. CONCLUSION AND PRAYERS

Telecom Namibia therefore submits that, a case for the reconsideration of the Authority's decision has been made out, and therefore respectfully pray that the Authority reconsiders its decision herein ad amend or withdraw its award in terms of awarding COW with a ECNS and ECS licence .

DATED 11 JUNE 2020

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Ms Damoline Muruko, Ms Petro Oberholster, Mr Willem Titus
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