30 July 2009

Brig. Gen. Zia Ahmed, psc (Retd.)
Chairman
Bangladesh Telecommunication Regulatory Commission (BTRC)
IEB Bhaban (5, 6 & 7 floor)
Ramna, Dhaka-1000
Bangladesh

Dear Sir:

Response to public consultation on SMP Determination & Regulation Procedure

LIRNE*asia*, a think tank engaged in telecommunications policy work in the Asia Pacific, wishes to make this submission to you in response to the Public Consultation on SMP Determination and Regulation Procedure as announced via your website.

We sincerely appreciate your commitment to openness demonstrated through this action. We hope you will further enhance the transparency by publishing on your website all responses received on this consultation.

Given that several African nations including South Africa have recently engaged in activities related to competitiveness determinations, we requested the input from colleagues of Research ICT Africa (RIA), a research network working across the African continent and affiliated to LIRNE*asia*. Their full submission/report is attached. The key points can be summarized in two contrasting examples:

- Bangladesh's initiative has a direct parallel to what South Africa has attempted by creating a seemingly sophisticated legal and regulatory framework for ensuring competitiveness, including defining relevant markets/market segments and defining SMP conditions. Yet due to complexities or contradictions within the law itself, each process to determine market dominance has stalled or not reached conclusion. The negative impacts are many. The regulator's inability to intervene when South African consumers face termination rates 100 percent higher than those of Botswana, Kenya and Uganda is just one. Because no meaningful intervention can be made before the competition framework is implemented, the regulator has simply stood by even as termination prices rose 500 percent in five years.

- In contrast to South Africa, that has been bogged down for more than two years on a statutorily required termination pricing public hearing due to it onerous market definition and market dominance requirements, its smaller neighbor Namibia has taken nine months to rule on an interconnection dispute and slashed the interconnection rate by 50%. The rate will further reduce every 6 months according to the final decision. In order to achieve this Namibia conducted an in depth benchmarking study on using the most widely applied cost standard, the forward-looking long-run incremental cost (LRIC) of termination of an efficient operator, as the benchmark. The key here is that the benchmark, while based on efficient operators in many (often developed) countries, was adapted to fit Namibia's market size, level of competition and overall level of development.

Implementing complicated market definitions or SMP determinations is often difficult, even within the sophisticated and progressive governance structures found in developed countries. Implementing them in South Asia, given our levels of development, would be (at best) complicated and (at worst) unfeasible.

We urge the BTRC to view with caution solutions that are taken "as-is" from developed countries and recommended without recognizing the ground level realities of Bangladesh.

Once again we laude you for the best-in-class approach you have taken to ensure transparency into the regulatory process by opening up this matter for public consultation.

Please do not hesitate to contact me at helani@lirneasia.net should you need further information. Further interactions with us and our colleagues in Africa can be arranged, should you so wish.

Thank you.

Sincerely,

H. Galpaya

Helani Galpaya

Chief operating Officer and Indicator Specialist

Attachments: **ICT Africa's response to LIRNEasia on the proposed SMP policies in Bangladesh** *submitted to*

LIRNE*asia*

Rapid Response
For Bangladesh Telecommunications Regulatory Commission on Significant Market Power

28 July 2009

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A BRIEF OVERVIEW OF THE FAILURES OF A COMPLEX SECTOR COMPETITION FRAMEWORK IN SOUTH AFRICA AND THE SUCCESS OF BENCHMARKING REGULATION IN NAMIBIA.

The electronic communications sector in South Africa currently finds itself in an interregnum following a series of interventions intended to open up the sector and enable competition. In 2006 the Electronic Communications Act, which started as the Convergence Bill, was finally enacted, with the intention of preparing the sector for a converged and competitive environment. Specifically, it sought to ensure a non-discriminatory access regime, an effective competition framework and efficient and equitable spectrum assignment and use in a technologically neutral licensing framework.

The EC Act is now the primary legislation regulating the electronic communications industry in South Africa. It sets out specific rules for the industry and then provides the independent regulator, ICASA, the Minister, and the Universal Service and Access Agency of South Africa (USAASA) with the requisite authority to regulate the industry by implementing the various provisions of the EC Act. Emulating the market segmentation and dominance competition framework of the European Union, Chapter 10 of the Act specifically deals with competition. But the asymmetries of information that exist between the operators and the regulator and the lack of capacity within the regulator to regulate the complex competition framework established by the law have completely paralysed the sector with regard to pro-competitive measures and left South Africa trailing some of its neighbours such as Botswana and more recently Namibia that have adopted more pragmatic approach that acknowledge their institutional and skills constraints.

The new Act attempts to deal with competition matters in terms of ex post and ex ante regulation.

Ex Post

Section 67(1) of the EC Act provides that ICASA may direct a licensee or exempt service provider to cease or refrain from engaging in an anti-competitive act, if such person has engaged in an act or intends to engage in any act that is likely to substantially prevent or lessen competition by, among other things, (a) giving an undue preference to, or (b) causing undue discrimination against.

Ex Ante

Determining Anti-competitive Acts and Complaint ProceduresSection 67(2) provides that ICASA must prescribe regulations:

- Setting out what actions will be to give an undue preference or cause undue discrimination against;
- Detailing procedures for complaints, and for monitoring and investigations; and
- Indicating penalties that may be imposed for failure to comply with an order to cease or refrain from taking an anti-competitive action.

Section 67(3) of the Act provides that the regulations also must specify that ICASA may refrain from exercising powers in terms of subsection (1) if to do so would be consistent with the objects of the Act. However, no ruling to refrain may be made unless the service is or will be subject to competition sufficient to protect consumer interests, or if it would likely impair the establishment or continuance of a competitive market for that service.

Defining Markets, Significant Market Power and Ineffective Competition

Section 67(4) provides that ICASA must prescribe regulations defining relevant markets and market segments where there is ineffective competition, and must determine which service providers have significant market power in those markets and market segments, after which it may impose pro-competitive licence conditions on those licensees.
The determinations are also relevant to the efficient and effective regulation of interconnection and facilities leasing.
Section 67(5) provides how ICASA will determine significant market power. A licensee has significant market power in the relevant market or market segment where ICASA finds that the particular individual licensee or class licensee:
Is dominant;

- Has control of essential facilities; or
- Has a vertical relationship that it determines could harm competition in the market or market segments applicable to the particular category of licence.

'Dominant' is defined with reference to section 7 of the Competition Act. Section 7 of the Competition Act indicates that a firm is dominant if it:

- Has at least 45% of that market;
- Has between 35 and 45 percent of that market, unless it can show that it does not have market power; or
- Has less than 35% of that market, but has market power.

'Market power' (as opposed to significant market power) is defined with reference to the Competition Act as:

> "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."

'Essential facility' is defined in the EC Act as:

> "an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act."

'Vertical relationship' is defined in the Competition Act as "the relationship between a firm and its suppliers, its customers, or both."

With respect to defining markets and market segments, section 67(6) of the EC Act provides that ICASA must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments.
When determining the effectiveness of competition in the relevant market or market segment, ICASA must take the following factors, among others, into account:

- An assessment of relative market share of the various licensees in the defined markets or market segments; and
- A forward looking assessment of the market power of each of the market participants over a reasonable period in terms of, amongst others:
- actual and potential existence of competitors;
- the level, trends of concentration, and history of collusion, in the market;
- the overall size of each of the market participants;
- control of essential facilities;
- technological advantages or superiority of a given market participant;
- the degree of countervailing power in the market;

- easy or privileged access to capital markets and financial resources;
- the dynamic characteristics of the market, including growth, innovation, and products and services diversification;
- economies of scale and scope;
- the nature and extent of vertical integration; and
- the ease of entry into the market, including market and regulatory barriers to entry.

Pro-competitive Licence Conditions, Including Pricing

Section 67(7) of the EC Act provides that pro-competitive licence terms and conditions to be imposed by ICASA may include but are not limited to terms and conditions relating to:

- Interconnection and facilities leasing (subsections (a), (c))
- Penalties for failure to abide by terms and conditions (subsection (b))
- Obligations to publish information (subsections (d) and (e))
- Obligations requiring separate accounting and accounting methods (subsections (f), (g), and (i))
- Pricing (subsection (h))
- South African broadcasting content (subsection (i))

Section 67(8) deals with the review of pro-competitive conditions, inter alia. It provides that, where ICASA undertakes a review of the pro-competitive terms and conditions, it must also review the market determinations and decide whether to modify the pro-competitive conditions set by reference to a market determination. If ICASA determines that a licensee to whom any pro-competitive condition applies is no longer a licensee possessing significant market power in that market or market segment, ICASA must revoke the applicable pro-competitive conditions. If ICASA determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment, the pro-competitive conditions are no longer proportional ICASA must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality.

But the sector regulator ICASA has not made any of the determinations required by chapter 10 as in the last three years.

In line with the provisions of the EC Act, ICASA, instituted a number of processes that have either stalled or not reached conclusion within the statutory period prescribed due to complexity or contradictions within the law with require market dominance assessments before action can be taken. Several of the areas in which ICASA is required to act, now, as a result of the competition framework set out in the Act, arguably are dependent on the market definitions required from the regulator in Chapter 10 of the EC Act. ICASA has set in motion a process to prescribe the competition framework anticipated by Chapter 10 in order to implement the pro-competitive remedies anticipated by the EC Act. Draft regulations were gazetted for public comment in March 2008 and public hearings held in June 2008. However, this framework has not yet been finalised.

In 2006 in line with its mandate to improve consumer welfare, ICASA sought to regulate the termination prices of mobile phone calls which had risen by over 500 percent in five years and currently are more than 100 percent higher than termination rates in Botswana, Kenya, Uganda, and Tanzania. A public inquiry was held which included the publication of Discussion Documents in January 2007 on the termination market and the leased lines market in May 2007. Public hearings were held on both in the course of 2007. A Findings document on termination was published by ICASA in November 2007, which primarily concluded that that the competition framework envisaged in Chapter 10 would require implementation before any meaningful intervention could follow. The leased line market enquiry did not yield a findings document within the statutory 180-day period, but it is anticipated that a similar finding would have ensued.

Similarly, enquiries into spectrum allocation, particularly high demand WiMax spectrum, which started in 2006 have not been concluded following public hearings and the publication of a Findings document in June 2008. It is unclear what the delay in this process is attributable to, but the licence conversion process and the proposed recent approach of pricing spectrum to international benchmarks may have had some effect.

The failure to introduce these pro-competitive measures has had a chilling effect on new and aspirant entrants to the market and is unquestionably a major contributor to the much-lamented high cost of communications in the country. President Jacob Zuma in his first State of the Nation address on 3 June 2009, emphasised the reduction of the costs of communications as a priority of the new administration.

NAMIBIA

Meanwhile in Namibia, it has taken nine months from the declaration of an interconnection dispute to a industry resolution through a ruling by the Namibian Communications Commission based on a benchmarking study to slash the interconnection rate by nearly half. This has placed Namibia at the cutting edge of regulatory price intervention on the continent and placed a lot of pressure on its much larger neighbour, South Africa, who has been bogged down for more than two years on a statutorily required termination pricing public hearing due to it onerous market definition and market dominance requirements.

Without a legal and regulatory framework in place, the NCC ruled in terms the mobile operator licences which require cost based termination rates for interconnections between operators.

Following and extensive consultation with the operators following an in depth benchmarking study on determined prices and the termination costs underlying them, Telecom Namibia, CellOne and MTC agreed on the following compromise model:
- The termination rate ceiling as from 1st July 2009 for mobile to mobile, mobile to fixed and fixed to mobile calls will be N$0.60 per minute, charged in per second intervals.
- Operators terminating international calls for an operator with an international voice licence will receive N$0.60 per minute, charged in per second intervals, for the termination of calls.
- Operators with an international voice gateway will be restricted to the transit charge of N$0.60 per minute, charged in per second intervals, plus the international settlement fee payable to the foreign operator for terminating that call. The international settlement fees will be calculated each month based on the average for the last month for each destination.

The termination ceiling will be reduced further every 6 months until the estimated cost of an efficient operator of N$0.30 per minute, charged in per second intervals, has been reached.

Reasoning

Regulators across Europe and Africa agree that termination rates should be based on the cost of providing the termination service. CellOne's and MTC's licences, Namibia's ICT policy and the draft bill discussed currently by parliament require the same.

The most widely applied cost standard is the forward-looking long-run incremental cost (LRIC) of termination of an efficient operator. Termination rates at cost of termination will

remove economic distortions witnessed in Europe and Africa today and prepare the markets for a smooth transition to IP-based Next Generation Networks.
Symmetry between mobile and fixed termination rates supports fixed-mobile convergence and removes distortions that would advantage mobile operators. It is also quite clear from international best practice that asymmetric termination rates are not the best tools to facilitate market entry. More effective mechanisms exist that do not lead to economic distortions and entrenched traffic imbalances.

A benchmarking study conducted by *Research ICT Africa* on behalf of the NCC indicates that the cost of termination of an efficient operator in Namibia is N$0.24. The prescribed ceiling for the 1 January 2011 for termination rates includes a 25% mark-up over the estimated cost of termination. Operators can negotiate lower termination rates including Sender Keeps it All or Bill & Keep.

Any other operator can request a revision of termination rates by demonstrating that its forward-looking long-run incremental cost of termination is above the prescribed ceiling. This should be done using LRIC methodology based on the EU recommendation from May 2009. The results of such a study need to be presented to the regulator in a transparent and sufficiently unbundled way.

The NCC will closely monitor the market developments and a review of termination rates will be conducted every two years to ensure that termination rates are kept current in light of declining cost and rate trends.

CellOne and MTC requested further regulatory interventions to level the playing field. These are under consideration by the NCC.

THE BENCHMARKING STUDY CAN BE DOWNLOADED FROM THE NCC'S WEBSITE at http://www.ncc.org.na/page.php?pn=publication