

**AN EVALUATION OF THE LICENSING REGIME UNDER THE INFORMATION  
AND COMMUNICATION TECHNOLOGIES ACT OF 2009**

**BY**

**MALAMA MORGAN MUKONDE**

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the award of Bachelor of Laws Degree (LLB)

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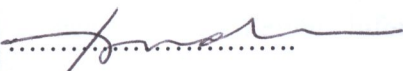
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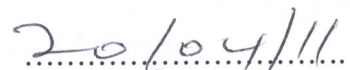
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## ABSTRACT

It is not a secret that global economies are no longer shaped by huge reserves of natural resources alone because developed economies are driven more by the power of information. After all, information is power. It must be noted that licensing of electronic communications is one of the most important instruments that could be employed in the context of the on going communication sector reform in Zambia. Licensing should evolve to ensure that it remains relevant and beneficial. It is a well known fact that Information and Communication Technology is not an end in itself but is used to achieve commercial and social ends, and it is these that may be changed by technological development in a way which outdates the regulation.<sup>1</sup> In light of technological advances, it is necessary to have in place a strong regulatory framework capable of addressing the interests of both service providers and consumers as well as responding to the social and economic factors prevailing in the country. In summary, it has been identified that the industry practice in Zambia is far ahead of the current legal framework, hence the need for reform.

In view of the foregoing, this essay examines the licensing regime under the Information and Communication Technologies Act<sup>2</sup> and seeks to advance recommendations on how best it may be reformed so as to address the on going technological developments in the country. The methodology consists of an examination of published and unpublished materials as well as interviews with key personnel at the Zambia Information and Communication Technology Authority. Firstly, the essay examines the regulatory framework that governed the ICT sector in Zambia prior to the enactment of the ICT Act of 2009. Secondly, it examines the licensing regime under the newly enacted ICT Act of 2009 and lastly, the essay examines the concept of Technology neutrality and its impact on the regulation of the ICT sector at international, regional and national level. The findings indicate that the legal regime prior to the enactment of the ICT Act was inadequate in that, the Communications Authority's autonomy was not insulated against external interference, secondly, it did not provide for issues such as, *inter alia*, interconnection by service providers and dispute resolution and the licensing regime was not technology and service neutral. It is further established that the ICT Act of 2009 addressed some of the lacunas in the previous legal regime. However, it is concluded that generally the legislation remains unchanged, as for instance the exercise of discretionary power by the minister and the licensing regime not being technology and service neutral. In view of the findings and conclusion, the following recommendations are advanced, *inter alia*, enhancing the autonomy of the Zambia Information and Communications Technology Authority, change of the current licence format, change of current regulatory model and finally, vesting the mandate to determine and prescribe licence fees in the Zambia Information and Communications Technology Authority.

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<sup>1</sup> Chris Reed, Taking Sides on technology Neutrality( London: Queen Mary University, 2007) P.275

<sup>2</sup> Act No.15 of 2009

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## **DEDICATION**

This paper is dedicated to my mother, Matilda Kabungo, thank you for your selfless love and support and to my late father Morgan Mukonde, thank you for your instruction and wisdom.

I also dedicate this work to my entire family for their unwavering support and love.

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## **TABLE OF STATUTES**

- The Information and Communication Technologies Act (No.15 of 2009)
- The Independent Broadcasting Authority Act (No.17 of 2002)
- The Radio-communications Act, Cap 169 (Repealed)
- The Telecommunications Act, Cap 469 (Repealed)
- The Information and Communication Technologies (Fees) Regulations (SI No.34 of 2010)

## **NON ZAMBIAN LEGISLATION**

- The Electronic Communications Act of 2005 (South Africa)
- The Independent Communications Authority of South Africa Act of 2000
- The South African Independent Broadcasting Act of 1993 (Repealed)
- The South African Telecommunications Act of 1996 (Repealed)

## **LIST OF ABBREVIATIONS**

<b>FCC:</b>	<b>Federal Communications Commission(U.S.A)</b>
<b>ICT:</b>	<b>Information and Communication Technology</b>
<b>ICASA:</b>	<b>Independent Communications Authority of South Africa</b>
<b>OFCOM:</b>	<b>Office of Communications (United Kingdom)</b>
<b>TCRA:</b>	<b>Tanzania Communications Regulatory Authority</b>
<b>ZICTA:</b>	<b>Zambia Information and Communications Technology Authority</b>
<b>ZCC:</b>	<b>Zambia Competition Commission</b>

## CHAPTER ONE

### General Introduction

#### 1.1 Introduction

To begin with, Information and Communication Technology is not an end in itself but is used to achieve commercial and social ends, and it is these that may be changed by technology development in a way which outdates the regulation.<sup>1</sup> Over the past decades, there has been tremendous development in the area of Information and Communications Technologies (ICT's). This development can be attributed to fundamental technological developments like Computerization and Digitalisation. Computerization essentially involves the development of computers in the production and consumption parts as well as within the network infrastructure. Digitalisation involves technological development from analogue to digital.<sup>2</sup> Thus with the advent of such technological advances, it is necessary to have in place a strong regulatory system or framework capable of addressing the interests of both service providers and consumers as well as responding to the social and economic factors prevailing in the country.

#### 1.2 Statement of the Problem

The Information and Communication Technology sector in Zambia has been subject to regulation by legislation and changes to the laws have occurred in the recent past. The sector was initially governed by the repealed Telecommunications and the Radio-communications Acts. The above pieces of legislation were repealed and replaced by the Information and Communication Technologies Act<sup>3</sup>. More so, an examination of the existing literature reveals that very little attempts have been made to test the relevance and effectiveness of the licencing regime of the electronic communication industry under the Information and Communication Technologies Act since its enactment. Thus this essay explores the innovations of the Act<sup>4</sup> and the potential challenges it poses with regards licencing of electronic communication in Zambia. Furthermore, licencing is a key regulatory tool through which public authorities exercise control<sup>5</sup> but in recent years, it has been noted that technological developments have led to convergence of Information

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<sup>1</sup> Chris Reed, Taking Sides on Technology Neutrality. P.275

<sup>2</sup> [www.med.govt-nz/busit.int/digital/](http://www.med.govt-nz/busit.int/digital/) ( Accessed: 12<sup>th</sup> December 2010)

<sup>3</sup> Act No.15 of 2009

<sup>4</sup> Act No.15 of 2009

<sup>5</sup> P.Selznick. Focusing Organizational Research on Regulation:(London: Oxford Press, 1998) P.4

and Communication Technologies (ICTs) which has literally resulted in the fading of the boundaries between broadcasting, telecommunications, information technology and multi-media<sup>6</sup> this in turn has brought about new broadcasting innovations such as, inter alia, internet broadcasting, which technological advancement requires forward looking regulatory framework. Thus this research also aims at ascertaining whether the Act<sup>7</sup> has addressed the issues raised.

Further, the paper aims at investigating on how the Act<sup>8</sup> has addressed the issue of consumer affairs or in other words the interests of consumers of electronic communication in Zambia.

### **1.3 Objectives of the Research**

The main objective of this research is to evaluate the impact with regards licencing of electronic communications of the new Information and Communication Technologies Act<sup>9</sup> on the information and communication technology sector in Zambia. What are the innovations, potential challenges occasioned by the Act and lastly, what recommendations may be advanced.

### **1.4 Rationale and Justification of Research**

Zambia, being part of a global village like any other African country, is under the onslaught of the globalization of communication. This globalization has resulted in various areas including technological developments in broadcasting being rendered permeable to distant influence.<sup>10</sup> There has been technological developments in the recent years which in turn calls for a regulatory framework for electronic communications networks and services (ECNS) which is forward looking, if it is to anticipate the types of dynamic changes that will result from future delivery of services over upgraded platforms based on different technologies. These technological advances present new challenges in regulation of such areas and thereby raising the need to identify gaps in regulations and review the effectiveness of existing legal and regulatory frameworks.

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<sup>6</sup> H.Bussiek, *Covergence of New Technologies*.(Canada: Hampton Press, 2005) P.234

<sup>7</sup> Act No.15 of 2009

<sup>8</sup> Act No.15 of 2009

<sup>9</sup> Act No.15 of 2009

<sup>10</sup> C.Arthur, *The Globalisation of Communications: Some Religious Implications*. (Geneva: At World Council of Churches,1998) P.4

## **Specific research questions**

- (i) What is the Concept of regulation and its rationale?
- (ii) What are the innovations and potential challenges of the new ICT Act No.15 of 2009?
- (iii) What is Technology Neutrality?
- (iv) Is there a unified licencing system under the ICT Act.

## **1.5 Research Methodology**

The study will be based on both primary and secondary sources, essentially, the methodology consists of an examination of published and unpublished materials and this information will include articles, paper presentations, student obligatory essays, reports and statutes relevant to the subject matter and interviews with key personnel at the Zambia Information and Communication Technology Authority will be undertaken as well.

## **1.6 The Concept of Regulation**

Regulation is an elusive concept, notwithstanding, the widely accepted definition is that, it is sustained and focused control exercised by a public agency over activities that are valued by a community.<sup>11</sup> The particular activity of interest discussed in this paper is electronic communication which is one of the vital services that the world depends on given the technological changes and growing movement towards making the world a global village. Electronic communication services refers to services provided by means of one or more electronic communications networks<sup>12</sup> and electronic communications networks essentially refers to transmission systems and other resources which permit the conveyance of signals by wire, radio, optical or other electro-magnetic means, including satellite networks, internet, mobile terrestrial networks to the extent that they are used for the purpose of transmitting signals.<sup>13</sup> Thus the electronic communications industry can be fairly considered to be an industry providing major means through which people are able to communicate and transact.

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<sup>11</sup> P.Selznick, Focusing Organizational Research on Regulation. P.2

<sup>12</sup> The Information and Communications Technologies Act (No.15 of 2009), S.2

<sup>13</sup> The Information and Communications Technologies Act (No.15 of 2009), S.2

The ultimate objective of regulation of entities is to secure consumer interest and balance them against the need to attract investment.<sup>14</sup> Regulation is often thought of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities, but the influence of regulation may also be enabling or facilitative as for example in the case of the Information and Communications Technologies Act, where airwaves are regulated so as to allow broadcasting operations to be conducted in an ordered fashion rather than left to the potential confusion of an untrammelled market. Moreover, it is quite evident from the foregoing that regulation plays a public role as a means to address public needs, thus it becomes imperative for the government to play an active role in reaching this end.

### **1.7 Consumer demand for Regulation**

Given that regulation sometimes fails, and has its own costs and problems, some argue the case for private self-regulation, reinforced by common, commercial and contract law.<sup>15</sup> One rationale for regulation is that public pressure may resist such an alternative. Although there are costs involved, the consumer may demand regulation, supervision and various forms of compensation mechanisms. There is an evident consumer demand for regulation and hence, irrespective of theoretical reasoning, there is a welfare gain to be secured if, within reason, this demand is satisfied.<sup>16</sup> More so, if regulatory and supervisory agencies are viewed as supplying regulatory, monitoring and supervisory services, then if there is a rational consumer demand for these services it is economical for them to be supplied.<sup>17</sup> Thus the costs of regulation are not dead-weight costs. However, there is a major limitation to this particular rationale in that, the consumer may have an illusion that regulation is a free good in which case demand is distorted. The solution to this problem is that consumers need to be made aware that regulation is supplied at a cost, even if the price cannot be precisely calculated.<sup>18</sup>

### **1.8 The Rationale for Regulation**

Government regulation of business has been established for a number of reasons, all of which merit continued re-examination. At one extreme is the case of “natural monopoly” a situation in which economies of scale ( that is, falling unit costs with increasing output) are so pervasive that

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<sup>14</sup> P.Selznick, *Focusing Organizational Research on Regulation*. P. 76

<sup>15</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*:(FSA Occasional paper,1999), P.30

<sup>16</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*. P.30

<sup>17</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*. P.30

<sup>18</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation* . P.32

free competition might lead to a single firm in the market, able to exercise monopoly power.<sup>19</sup> An unregulated monopolist may be in a position to charge excessive prices, restrict output and discriminate among buyers.<sup>20</sup> In contrast to monopoly and inadequate competition, regulation is often considered justifiable to prevent excessive or destructive competition. One form of the argument is that in markets where there may be a tendency towards natural monopoly a preferable course would be to avoid the costs of monopoly pricing or of monopoly regulation by maintaining several competitors, even though a perfectly regulated monopolist could provide services at lower cost.<sup>21</sup> Another consideration is that even though competition may be viable it might result in swings in output and prices which some would judge too severe and too costly to consumers and producers.<sup>22</sup> Regulation is thus said to be necessary to maintain stability and protect the equity of firms in the industry.<sup>23</sup> Another rationale often raised on behalf of regulation is that ill-defined property rights make it necessary for the Government to allocate certain “public resources” in order to prevent their overuse. The airwaves are one example of a scarce resource that would be rendered much less useful without some control over its use.<sup>24</sup> The environment is another example of resource where there are conflicting claims on its use and where governments have intervened to allocate resources.<sup>25</sup>

In the final analysis, the purpose of regulation in the information and communication technology sector is generally analyzed in three categories; firstly, remedying market failures, which includes, inter alia, problems attached to scarce resources and the establishment of an asymmetric interconnection regulation to limit the market power of incumbent operators.<sup>26</sup> Secondly, promoting a social agenda, which primarily includes the setting up of rules for

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<sup>19</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*. P.40

<sup>20</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*. P.40

<sup>21</sup> S.P.Montana, *An Approach to the International Regulatory Issues*.(8 BUJ Sci & Tech , 2002) P.704

<sup>22</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*. P.46

<sup>23</sup> D.Llewellyn, *The Economic Rationale For Financial Regulation*. P.46

<sup>24</sup> P.S. Ryan, *Wireless Communications and Computing at a Crossroads: new paradigms and their impact on theories governing the public’s right to spectrum access*:( 3J Telecomm & High Tech, 2005) P.239

<sup>25</sup> P.S. Ryan, *Wireless Communications and Computing at a Crossroads: new paradigms and their impact on theories governing the public’s right to spectrum access*. P.239

<sup>26</sup> A.Henten *Some Implications for Regulation of ICT and Media Convergence*.(University of Denmark, 2002) P.25

universal service.<sup>27</sup> The third purpose is to advance certain industrial developments and to create a dynamic business environment for certain industrial potentials.<sup>28</sup>

### 1.9 Regulation, competition and consumer protection

Benston argues with emphasis that one of the major costs of regulation to the consumer and benefits to regulated institutions, is that it frequently reduces competition<sup>29</sup>. Regulation should not impede competition but should enhance it and make it more effective in the market place.<sup>30</sup> Nevertheless, however well-intentioned, regulation has the potential to compromise competition and to condone, if not in some cases endorse, unwarranted entry barriers, restrictive practices and other anti-competitive mechanisms.<sup>31</sup> As there are clear consumer benefits and efficiency gains to be secured through competition, regulation should not be constructed in a way that impairs it, regulation and competition need not be in conflict, on the contrary, if properly constructed they are complementary.<sup>32</sup> Moreover, one of the roles of regulation is to authorize or licence suppliers of the prescribed services, in this role there is a case for excluding companies that can not or will not meet certain minimum standards of consumer protection.<sup>33</sup> In the final analysis, effective competition is the major component of consumer protection and the assurance of good products or services at competitive prices.<sup>34</sup> The purpose of regulation is therefore, not to displace competitive pressure or market mechanisms, but to correct for market imperfections and failures which produce sub-optimum outcomes and distort consumer choice.<sup>35</sup> Therefore, to the extent that regulation enhances competition and through this, efficiency in the industry, it creates a set of markets that work more efficiently and through which consumers gain.<sup>36</sup>

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<sup>27</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence .P.25

<sup>28</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.25

<sup>29</sup> G.J.Benston, Regulating Financial Markets: A Critique and Some Proposals,(Hobart Paper No.135, London:Institute of Economic Affairs) P. 32

<sup>30</sup> G.J.Benston, Regulating Financial Markets: A Critique and Some Proposals. P. 32

<sup>31</sup> G.J.Benston, Regulating Financial Markets: A Critique and Some Proposals. P. 32

<sup>32</sup> D.Llewellyn, The Economic Rationale For Financial Regulation.P.47

<sup>33</sup> D.Llewellyn, The Economic Rationale For Financial Regulation. P.48

<sup>34</sup> D.Llewellyn, The Economic Rationale For Financial Regulation. P.48

<sup>35</sup> D.Llewellyn, The Economic Rationale For Financial Regulation. P.48

<sup>36</sup> D.Llewellyn, The Economic Rationale For Financial Regulation. P.48

## 1.10. Regulation in Practice

To begin with, the ICT sector in Zambia is regulated by the Zambia Information and Communication Technology Authority pursuant to the ICT Act No.15 of 2009. The Act has set minimum standards which ought to be adhered to by all providers of electronic communications networks and services. To illustrate, section 6(1) of the Act provides that:-

“The Authority shall regulate the provision of electronic communication services and products and monitor the performance of the sector, including the levels of investment and the availability, quality, cost and standards of the electronic communication services.”

Moreover, section 6(2) (f) of the Act provides that:-

“The Authority shall promote the interests of consumers, purchasers and other users of information and electronic communications services, including, in particular, persons with disabilities and the aged in respect of the accessibility, quality and variety of the services and equipment.”

In addition, section 6(2) (g) of the Act<sup>37</sup> empowers the Zambia Information and Communication Technology Authority to promote competition among persons engaged in commercial activities relating to the provision of information and communication technology and efficiency and economy on the part of persons so engaged. In addition, section 8 of the Act<sup>38</sup> provides as follows:-

“The Authority shall consult the Zambia Competition Commission on any matter relating to competition in the sector.”

The Zambia Competition Commission is empowered to coordinate with the Zambia Information and Communications Technology Authority with regards issues relating to competition in the ICT sector by section 43 of the Competition and Consumer Protection Act<sup>39</sup> which provides as follows:-

“The Commission shall for the purpose of coordinating and harmonizing matters relating to competition in other sectors of the economy, enter into a memorandum of understanding with any regulator in that sector, in the prescribed manner and form.”

Therefore, from the foregoing, it is evident that consumer protection as well as competition in the ICT sector is indeed promoted by the Act<sup>40</sup>. Furthermore, the Zambia Information and

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<sup>37</sup> The ICT Act No.15 of 2009

<sup>38</sup> Act No.15 of 2009

<sup>39</sup> Act No.24 of 2010

<sup>40</sup> The Information and Communication Technologies Act (Act No.15 of 2009)

Communication Technology Authority is pursuant to section 12(a) (b) empowered to issue licences to applicants who are capable of meeting the obligations, terms and conditions of the licence. The Information and Communication Technologies Act<sup>41</sup> provides for consumer affairs under Part VII, in which such matters as quality of services are highlighted and enforcement mechanisms prescribed. Thus minimum standards for consumer protection are maintained.

### **1.10.2 Conclusion**

The foregoing chapter has given the general introduction of this paper and has attempted to highlight the general nature of regulation and its rationale with particular reference to consumer protection and competition in the ICT sector, particularly in Zambia. The second chapter will focus on the regulatory framework that governed the ICT sector prior to the enactment of the ICT Act No.15 of 2009.

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<sup>41</sup> Act No.15 of 2009

## CHAPTER TWO

### **The Regulatory Framework Governing the Information and Communication Technology Sector prior to the enactment of the Information and Communication Technologies Act**

#### **2.0 Introduction**

This chapter shall essentially examine the regulatory framework that governed the Information and Communication Technology sector prior to the enactment of the Information and Communication Technologies Act.<sup>42</sup> The Information and Communication Technology sector was previously governed by the repealed Telecommunications Act<sup>43</sup>, the Radio-communications Act<sup>44</sup> and the Independent Broadcasting Authority Act.<sup>45</sup> This essay will briefly highlight the salient provisions of the above Acts. Secondly, the regulatory independence enjoyed by the regulator of the Information and Communication Technology sector under the repealed legal framework will be explored. Thirdly, the chapter shall highlight the salient features of the Information and Communication Technology policy and lastly, the legal framework under which the regulator of the Information and Communication Technology sector operated will be analysed.

#### **2.1 The Telecommunication Act**

The Posts and Telecommunications Corporation Limited was until 31<sup>st</sup> July 1994, mandated to manage the radio spectrum on behalf of the government of the republic of Zambia.<sup>46</sup> With the advent of plural politics and liberalization of the various sectors of the economy, the government unshackled the industries and allowed private participants in the running of the economy.<sup>47</sup> Basically, structural adjustment reforms under the auspices of the World Bank and International Monetary Fund (IMF) led to the enactment of the Telecommunications Act,<sup>48</sup> under which the

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<sup>42</sup> Act No.15 of 2009

<sup>43</sup> Cap 469 (repealed)

<sup>44</sup> Cap 169 (repealed)

<sup>45</sup> Act N0.17 of 2007

<sup>46</sup> V.Sornamohan. Zambia raises USD 4 million for Rural ICT Fund: <http://www.networkworld.com/news>, (Accessed 19/11/09)

<sup>47</sup> V.Sornamohan. Zambia raises USD 4 million for Rural ICT Fund: <http://www.networkworld.com/news>, (Accessed 19/11/09)

<sup>48</sup> Cap 469 (repealed)

defunct Communications Authority was created to oversee the liberalization of the telecommunication industry in the country.<sup>49</sup>

The foregoing state of affairs was necessitated by the need to remove the monopolistic tendencies inherent within the one party state that were prevailing at the time. The 1994 Telecommunications Act was on 28<sup>th</sup> August, 2009 repealed and replaced by the Information and Communication Technologies Act<sup>50</sup>, under which section 4 provides for the continuation and renaming of the authority from Communications Authority to Zambia Information and Communications technology Authority. It was in response to the need to regulate the private sector that the Zambian government in 1994 established the Communications Authority. This regulatory body has ever since regulated and coordinated the private industries and encouraged effective competitive practices. The authority plays its role by balancing the interests of investors against maintaining consumer welfare.<sup>51</sup>

Mr. William Harrington, the then Minister of Communications and Transport in presenting the Telecommunications Bill<sup>52</sup> observed and commented thus:-

“the intention is the enhancement of standards in the Telecommunications services of our liberalized economy adopted.<sup>53</sup>”

The minister further noted that the Telecommunications Bill [No.24 of 1994] intended to:-

(i) Remove the monopoly conferred on the Posts and Telecommunications Corporation Limited to provide Telecommunications services in the country.

(ii) Separate postal services from telecommunications services, hence the establishment of Zamtel.

(iii) Establish the Telecommunications Authority and Board of Regulators.

(iv) Vest the Telecommunications administration into the Telecommunications Authority under the provisions of the Act and the general directions of the Minister.

(v) Vest the power to license in the Telecommunications Authority.<sup>54</sup>”

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<sup>49</sup> Cap 469 (repealed)

<sup>50</sup> Act No.15 of 2009

<sup>51</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia( University of Witwatersrand: Paper Presentation, 2009) P.11

<sup>52</sup> Telecommunications Bill (No.24 of 1994)

<sup>53</sup> Official Verbatim Report of the Parliamentary Debates of the 3<sup>rd</sup> Session of the National Assembly (21<sup>st</sup> January to 17<sup>th</sup> March, 1994.) P.1678

<sup>54</sup> Official Verbatim Report of the Parliamentary Debates of the 3<sup>rd</sup> Session of the National Assembly. P.1678

The divesting of monopoly conferred on the Posts and Telecommunications Corporation Limited was very important and incidentally, the establishment of the Telecommunication Authority goes with the removal of the monopoly as it is imperative to provide a level playing field.

The minister noted that:-

“it is necessary to have an autonomous regulator who shall be independent. There are several issues that need to be regulated when dealing with a liberal telecommunications environment and private participation in the provision of these services is one of them.”<sup>55</sup>

Therefore, in 1994, the Telecommunications Act was enacted and pursuant to section 3 of the Act the Communications Authority was established. What emerges from the preamble to the repealed Act is that the Act was intended to regulate the provision of Telecommunication services to, from and within Zambia. Telecommunication was defined by section 2 of the repealed Act as:-

“the transmission of speech, music or other sounds, visual images, electronic or other data, signal capable of being interpreted as or converted to sounds, images or data, signal for the actuation or control of machinery or apparatus by telephone, facsimile, telex, teleprinter or any other device or means other than radio-communication whose principle utilizes electrical, magnetic, electromagnetic or electrochemical energy or any combination of them.”

Furthermore, with regards licencing of telecommunication services under the repealed Act, section 6(1) provided for service licence. This licence empowered the licensee to establish a telecommunication system of the kind or description specified in the licence and to provide a telecommunication service by means of that system. However, section 6(3) of the Act seemed to be vague and quite problematic in that it suggested that a service licence may in express terms grant to the licensee for a term of years the exclusive privilege of undertaking, subject to any limitations contained in the licence the activities prescribed to be carried on under the licence. The import of the subsection seems to be that it conferred monopoly with regards the services or activities in respect of which the licensee had been given exclusive privilege. This state of affairs would for all intents and purposes be unprogressive.

Moreover, section 7(1) provided for supplier's licence. This licence authorized the licensee to supply telecommunication apparatus in accordance with provisions of the Act and the conditions of the licence. The licencing regime under the repealed Act seems to have had some progressive

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<sup>55</sup> Official Verbatim Report of the Parliamentary Debates of the 3<sup>rd</sup> Session of the National Assembly. P.1679

provisions as well, for instance, section 8(2)(e) required the licensee not to show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description as regards any aspect of the service to be provided under the licence. The other provision is section 8(2)(f) which basically required the licensee as regards any service provided under the licence to provide, at no additional charge, such additional or special facilities to customers who are blind or otherwise disabled as are reasonably appropriate to meet their needs.

## **2.2 The Radio-communications Act**

As earlier alluded to, the defunct Communications Authority was established pursuant to section 3 of the repealed Telecommunications Act. The Communications Authority was mandated through the Radio-communications Act<sup>56</sup> to manage the radio spectrum. The Radio-communications Act was intended to regulate the provision of radio-communication services as well as providing for the functions of the Communications Authority. Furthermore, section 2 of the repealed Radio-communications Act, defined radio-communication as:-

“the transmission and reception of sounds, graphic images or impulses wholly or partly by means of Hertzian waves”

Radio-communication service was defined as:-

“a service whose primary activity is the transmission or reception of radio-communications.”

The Communications Authority was responsible for the overall management and administration of the frequency spectrum pursuant to section 5(1) (b) of the repealed Act. In addition, section 4(1) of the repealed Act provided the scope for the Communications Authority’s general supervision and control of the radio-communication services, including receiving and approving applications for radio licences.

Furthermore, section 6(4) of the repealed Act authorized the licensee to establish and operate one or more radio stations at such places as may be specified in the licence and to provide a radio-communication service by means of the station or stations in accordance with the provisions of the Act and the conditions of the licence.

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<sup>56</sup> Cap 169 (Repealed)

### **2.3 The Independent Broadcasting Authority Act**

The enactment of the Independent Broadcasting Authority Act<sup>57</sup> was a historical development as the media now had a law to establish an independent body to monitor the broadcasting industry. The Independent Broadcasting Authority had power through its board to issue out licenses for public, commercial, community and subscription broadcasting services. This was pursuant to section 5(2) of Act. The Act had a mandatory provision which stipulated that the Independent Broadcasting Authority was not to be subject to the directions of any other person or authority. This provision encapsulates the notion that regulatory bodies should be independent of both government and broadcasting operators.<sup>58</sup>

### **2.4 Regulatory Independence of the Information and Communications Technology sector Regulator under the repealed legal framework**

To begin with, regulatory independence relates to the ability of the regulator in any sector to be able to independently carry out the functions and duties that it was established to perform without any interference, whether direct or indirect, from any other person or legal entity.<sup>59</sup> This entails that the regulator should be able to make decisions that are not in any manner influenced by any external source, whether that source is from the Government, operators or any other stakeholders in the sector. It must however be noted that this interference is different from the consultation that the regulator must undertake in order to enhance transparency in its decision making and operations.<sup>60</sup>

It has been suggested that:-

“regulatory independence is vital to maintain consumer confidence in the integrity of the new regulatory regime.....in all practical aspects, the regulatory arm should control and manage the discharge of the approved regulator’s functions without prejudice to undue interference from those in post for representative roles<sup>61</sup>”

It is further suggested that regulatory independence is very crucial in instilling confidence in the Regulator, not only from a consumer point of view, that an independent Regulator will have the

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<sup>57</sup> Act No.17 of 2002

<sup>58</sup> P.Matibini, *The Struggle for Media Law reform in Zambia* (Lusaka: at Media Institute of Southern Africa,2006) P.8

<sup>59</sup> C.Prins and M.Schellekens, *Starting Points for ICT Regulation* (The Hague: TMC Asser Press, 2006) P.77

<sup>60</sup> I. Nonde, *How Independent is the ICT sector regulator in Zambia* P.14

<sup>61</sup> Consumer Focus, *Campaigning for a fair deal; Regulatory Independence;*( London:Routledge,2009) P.48

trust and cooperation of all the relevant stakeholders in the sector if it is taken, through its regulatory decisions, to be a fair, transparent and accountable for its decisions.<sup>62</sup> More so, Eberhard has in fact stated that:-

“it was hoped that independent and accountable regulatory agencies would depoliticize tariff-setting and would improve the climate for operational management and private investment through more transparent and predictable decision making....independence is not an absolute principle or an end itself. Regulatory independence and accountability are means to an end viz- facilitating affordable and quality infrastructure and services to consumers while providing incentives for improved operational efficiencies, financial viability and new investment.<sup>63</sup>”

My understanding of Eberhard’s assertion is that regulatory independence should never be viewed as automatic or inevitable simply because the statute establishing the regulator states so. Regulatory independence can be enshrined by establishing legal requirements that may strengthen the decision making process and mechanism within which regulation takes place. Others have argued, to which I am in agreement that:-

“there is a broad agreement that at the heart of regulatory independence is the right and freedom of the Regulators to make decisions such as tariff determinations without the prior approval of any other Government entity and no entity (other than a court or a pre-designated appellant panel or arbitrator) can override the Regulator’s decisions.<sup>64</sup>”

In concluding this section of the paper, it is also critical that it is clearly stated and understood that regulatory independence is not only about protection against political interference but also about avoiding regulatory capture by operators and potential investors in the sector.<sup>65</sup> Regulatory capture occurs where the regulator is seemingly influenced in its decision making process by those who are said to have “captured” the regulator.<sup>66</sup> This should be avoided at all costs. And a regulator should never be seen to be on the side of any operator over another. This last point now seems easy to envisage since there is no longer a Government owned incumbent in the sector.

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<sup>62</sup>I. Nonde, How Independent is the ICT sector regulator in Zambia P.4

<sup>63</sup> Anton Eberhard. The Independence and accountability of Africa’s infrastructure Regulators: Reassessing Regulatory Design and Performance.( Keynote address 4<sup>th</sup> AFUR Annual Conference: 25<sup>th</sup> April 2007, Livingstone, Zambia)

<sup>64</sup> A. Brown, J, Stern, B, Tenenbaub and D. Geneer, Handbook for Evaluating Infrastructure Regulatory Systems (Washington D.C: World Bank, 2006) P.9

<sup>65</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia . P .6

<sup>66</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia. P .6

## **2.5 Analysis of the Information and Communication Technology Policy and the repealed Legal Framework**

Having endeavored to define or highlight some of the key features of regulatory independence, I shall now shift the focus to the actual provisions of the Information and Communication Technology Policy and the provisions of the law will also be discussed generally under the structural and operational approach to regulatory independence. Lastly the problem of convergence of ICTs will be highlighted.

At the onset it is important to note that traditionally any law that is enacted is ordinarily premised on the policy of the arm of Government that is mandated to run the affairs of the Country in any given sector.<sup>67</sup> In Zambia, under the Executive arm of the Government, the Ministry of Communications and Transport is the Government ministry responsible for overseeing the Government's interests in the Information Communications and Technology sector. As such the Ministry is responsible for policy development ordinarily before any law making is done.

In departure from the norm, in Zambia the Telecommunications Act of 1994 was enacted before the formalization of the ICT Policy. The Policy was only formally adopted in April 2006, 12 years after the enactment of the law.<sup>68</sup>

### **2.5.0 Policy Environment under which the repealed legal framework operated**

Notwithstanding the late formalization of Information and Communication Technology Policy, I shall highlight some of the salient features that are cardinal in discussing the extent of the Authority's independence at the time;

Under section 7.6 of the said Policy, the role of the regulator is tabulated with, inter alia, the following functions;

“(d)Stimulating investment, innovation, and a “level playing field” where competitive entry is permitted in the ICT sector.

(h)Promoting public confidence in the ICT market by establishing transparent regulatory, licencing and operational policies and guidelines including tariffs, interconnection agreements, and dispute resolution and consumer rights/obligations.<sup>69</sup>”

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<sup>67</sup> I. Nonde,How Independent is the ICT sector regulator in Zambia P . 6

<sup>68</sup> I. Nonde,How Independent is the ICT sector regulator in Zambia P . 6

<sup>69</sup> National Information and Communication Technology Policy,( Ministry of Communications and Transport: Zambia ,April 2006) P. 61

It would appear that this was the nearest that the Policy got in attempting to state what regulatory independence would be exercised by the Authority.<sup>70</sup> The policy does dwell on some of the concepts that were earlier alluded to, for instance, promoting confidence by establishing transparent regulatory processes and creation of a level playing field in a competitive sense.<sup>71</sup>

However, it is important that the ICT Policy does specifically recognize the need for the Authority to be “independent” in clear and unequivocal terms. This is crucial because it signifies that the policy maker has “accepted” the notion of regulatory independence, be it in a somewhat limited manner.<sup>72</sup> Therefore it would have been essential for the Policy Maker to unequivocally state the notion of regulatory independence in very clear terms.

### **2.5.1 Legal Framework under which the Information and Communication Technology sector regulator operated**

As alluded to earlier, the repealed Telecommunications Act was the main piece of legislation that governed the functions of the Authority. The Radio-communications Act<sup>73</sup> was also crucial in the operations of the Authority as it essentially dealt with issues of scarce resources, namely spectrum and numbering.

Again, I shall endeavor to look at the salient features of these pieces of legislation that are relevant to the discussion at hand.

### **2.5.2 Structural Independence of the defunct Communication Authority under the repealed legal framework**

Under section 3(1) of the repealed Telecommunications Act, it was stated that:-

“There is hereby established the Communications Authority, which shall be a body corporate with a common seal, capable of suing and being sued and subject to the provisions of this Act, capable of performing all such acts as a body corporate may by law do or perform.”

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<sup>70</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia. P . 6

<sup>71</sup> National Information and Communication Technology Policy. P. 61

<sup>72</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia. P. 7

<sup>73</sup> Cap 169 (Repealed)

The author is of the opinion that the establishment of the Authority in these terms was crucial to its independence. The Authority in this section was being created as a statutory entity separate from the policy maker (Minister). The logical assumption is that the regulator and the policy maker are totally separate entities and therefore they are not involved in the execution of their respective functions. This is crucial because, there should be institutional and managerial independence, i.e. the regulator should be based outside the Ministry and should have full control over the appointment and management of staff.<sup>74</sup>

The Telecommunications Act provided further that the Authority was to supervise and promote the provision of telecommunication services throughout Zambia.<sup>75</sup> This section is similar to section 4(1) and (2) of the repealed Radio-communications Act which gave the Authority overall supervisory control over radio-communications. These two sections are also very crucial in that they recognized the Authority as being the sole regulator of the sector. Once more, the logical assumption to be made is that the Authority as the sole regulator in the sector was to enjoy regulatory independence. The sole exercise of the regulatory functions is essential to regulatory independence. However, in light of the legal framework under discussion it seems there was a departure from the aforementioned proposition. The Telecommunications Act in section 5 (4) undermined the ability of the Authority to exercise sole responsibility on the performance of its functions. It stated as follows:-

“In the exercise and performance of its powers and functions, the Authority shall be subject to the control and direction of the Minister.”

This sub-section in my opinion significantly eroded the principle of separation of the policy maker and the regulator. The latter could not be expected to be fully independent if it could be subject to the control and direction of the policy maker (the Minister). A practical example of this state of affairs was in the issuance of an individual licence, like the much sought after mobile licence<sup>76</sup>, the Authority had to generally wait for a Ministerial directive before undertaking the process leading up to issuance of such a licence. The minister exercised this power and the authority merely implemented his decision.

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<sup>74</sup> A. Brown, J, Stern, B, Tenenbaub and D. Geneer, Handbook for Evaluating Infrastructure Regulatory Systems P.16

<sup>75</sup> Section 5(1) of the repealed Telecommunications Act, cap 469

<sup>76</sup> The licensing framework under the repealed Telecommunication Act did not distinguish between a network or service licence, it categorized licences into the actual type of service to be offered.

### **2.5.3. Regulation of Tariffs under the repealed legal framework**

Moreover, the Authority under the law had no specific powers to regulate tariffs. Section 5(2) (b) of the repealed Telecommunication Act provided that one of the functions of the Authority shall be:-

“to promote the interests of consumers, purchasers and other users of telecommunication services(including, in particular, those who are disabled or of pensionable age) in respect of the prices charged for, and the quality and variety of, such services and apparatus supplied for the purposes of such services.”

As can be seen the function to promote the interest of consumers in respect of prices charged was very general and there were no specific regulations concerning the regulation of tariffs. As a result of this state of affairs, the operators merely notified the Authority of the tariffs that were to be applied. The effect of this was twofold, firstly, the operators tended to overlook the Authority in issues relating to the setting of tariffs and secondly the consumers tended to be exploited by the operators without any protection from the Authority.<sup>77</sup>

### **2.5.4. Dispute Resolution under the repealed legal framework**

The other inadequacy in the legal framework was that the Authority had no power under the law to intervene in the on-going impasse in the mobile sector on the issues of interconnection rates.<sup>78</sup> The various licences issued mandated the operators to interconnect with each other on commercial terms, what transpired is that operators entered into agreements which provided for the resolution of all conflicts through an arbitration process. Arbitration being a private process had excluded the authority from intervening and therefore conflicts had been prolonged at the expense of the consumer and the sector as a whole.<sup>79</sup>

### **2.5.5 Operational Independence of the defunct Communications Authority**

The key area of focus in discussing the operational autonomy that was enjoyed by the Authority is the appointment procedure of key personnel. Brown and others have argued that ideally:-

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<sup>77</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.15

<sup>78</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.15

<sup>79</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.16

“there has to be legal protection whereby commissioners<sup>80</sup> may not be dismissed without due cause<sup>81</sup>”

Furthermore, section 3 (2) of the repealed Telecommunications Act stated that:-

“The powers and functions of the Authority shall be exercised and performed by a Board of Regulators appointed by the Minister.”

As can be seen from this provision, the policy maker was the one who appointed the regulators from a list of constituencies that were provided for in the said Act, which was essentially silent on whether the Minister could or could not reject a proposed name of a potential appointee.<sup>82</sup> As a result the Minister exercised a lot of discretionary power over the appointment of independent regulators.<sup>83</sup> This sort of situation has led some scholars to comment that:-

“The appointment of regulators remains largely a Government responsibility....the consequences can be inappropriate choice of commissioner without the requisite skills or experience.... In addition, some agencies are severely hampered by delays in appointments. And in many cases, the majority of regulators are replaced simultaneously they don't have staggered terms. As a result institutional development and memory is hampered.<sup>84</sup>”

Notwithstanding, the minister could not arbitrarily disappoint a regulator. He did not have the same leeway as he exercised in appointments. The Act was clear with regards the circumstances under which the regulator would cease to be a member of the board of regulators.<sup>85</sup>

## 2.6. Convergence of Information and Communication Technologies

Since 1994, Zambia had made significant strides in liberalizing the airwaves, thereby allowing private sector participation in the sub-sector of broadcasting.<sup>86</sup> However, broadcasting and telecommunication were regulated separately notwithstanding the fact that the Communications Authority through the Radio-communications Act was in charge of the technical aspects of

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<sup>80</sup> In Zambia, there is a Board of Regulators, as opposed to having Commissioners we have part time Board Members

<sup>81</sup> A. Brown, J. Stern, B. Tenenbaub and D. Geneer, Handbook for Evaluating Infrastructure Regulatory Systems P.42

<sup>82</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.16

<sup>83</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.16

<sup>84</sup> Tremole, S & Shah, N. Wanted: Good Regulators for Good Regulation (Journal of Regulation and Compliance, 2006) P.48

<sup>85</sup> The Second Schedule to the Telecommunications Act provided the circumstances under which a Board Member would vacate his Office

<sup>86</sup> V. Sornamohan. Zambia raises USD 4 million for Rural ICT Fund: <http://www.networkworld.com/news>, (Accessed 19/11/09)

radio-communication. Meanwhile, convergence of Information and communication technologies (ICTs) resulted in emergence of services such as internet broadcasting which is capable of offering over a single network services falling within the domain of broadcasting and telecommunication. Moreover, since internet broadcasting is done over computer networks, it did not fall within the scope of regulation provided for the Authority under the Act.<sup>87</sup> As such, this regulatory structure was not ideal in relation to the regulation of new and advanced technological services such as internet broadcasting among other things

## 2.7. Conclusion

This chapter embarked on an examination of the regulatory framework that governed the Information and Communication Technology sector prior to the enactment of the Information and Communication Technologies Act. It is quite evident from the foregoing that the regulatory framework governing electronic communications services was not adequate in that it had a lot of lacunas, as identified in the various sections of the chapter, such as, it did not cater for issues such as interconnection and infrastructure sharing by service providers and dispute resolution was not sufficiently provided for. Moreover, the defunct Communication Authority had no specific powers to regulate tariffs under the repealed legislation. In addition the sector regulator's autonomy was not insulated against external interference. Moreover, in view of the technological advancement of the country generally, the technological developments led to the convergence of Information and Communication Technologies, in light of this fact, it has been noted that the regulatory framework did not address, inter alia, the issue of having a technology-neutral licensing framework, which entails that identical services should in principle be regulated in the same way, regardless of their means of transmission<sup>88</sup>, as it follows that services such as broadcasting and telecommunication can be offered over a single network.

The next chapter will examine the current legal framework regulating the Information and Communication Technology sector in Zambia with a view to ascertain whether or not the identified lacunas in the previous legal regime have been addressed by the newly enacted Information and Communications Technologies Act.

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<sup>87</sup> The Radio-communications Act, cap 169 [Repealed]

<sup>88</sup> See e.g. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Principles and guidelines for the Community's audiovisual policy in the digital age, COM (1999) 0657 final, note 17

## CHAPTER 3

### Licensing of Electronic Communications under the Information and Communication Technologies Act

#### 3.0 Introduction

The Information and Communication Technology sector in Zambia is at present governed by the Information and Communications Technologies Act.<sup>89</sup> This Act repealed and replaced the Telecommunications and the Radio-communications Acts. This chapter highlights the classification of licences under the Act<sup>90</sup> and discusses the innovations introduced by the Act and its potential challenges.

#### 3.1 Classification of licences under the Information and Communication Technologies Act.

Before the enactment of the Information and Communication Technologies Act<sup>91</sup> licensing of electronic communications was governed by the repealed Telecommunications Act.<sup>92</sup> Under the repealed Act, section 6(1) provided for service licence. This licence empowered the licensee to establish a telecommunication system of the kind or description specified in the licence and to provide a telecommunication service by means of that system. However, section 6(3) of the Act was vague and quite problematic in that it suggested that a service licence may in express terms grant to the licensee for a term of years the exclusive privilege of undertaking, subject to any limitations contained in the licence the activities prescribed to be carried on under the licence. The import of the subsection seems to be that it conferred monopoly with regards the services or activities in respect of which the licensee had been given exclusive privilege. This state of affairs would for all intents and purposes be unprogressive.

Moreover, section 7(1) of the repealed Act provided for supplier's licence. This licence authorized the licensee to supply telecommunication apparatus in accordance with provisions of the Act and the conditions of the licence. The licencing regime under the repealed Act seems to have had some progressive provisions as well, for instance, section 8(2)(e) required the licensee

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<sup>89</sup> Act No.15 of 2009

<sup>90</sup> Act No.15 of 2009

<sup>91</sup> Act No.15 of 2009

<sup>92</sup> Cap 469(Repealed)

not to show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description as regards any aspect of the service to be provided under the licence. The other provision is section 8(2)(f) of the repealed Act which basically required the licensee as regards any service provided under the licence to provide, at no additional charge, such additional or special facilities to customers who are blind or otherwise disabled as are reasonably appropriate to meet their needs.

In a nutshell, the licensing regime under the repealed Telecommunications Act did not distinguish between a network or service licence, it categorized licences into the actual type of service to be offered.<sup>93</sup>

At present, the Zambia Information and Communications Technology Authority is under parts III, IV and VI of the Information and Communication Technologies Act empowered to prescribe the manner of application for electronic communication licences and assignment of scarce resources as well as prescribing their standard terms and conditions.<sup>94</sup> Under the Act's licensing regime, the Authority is empowered to issue licences that are broadly categorized as follows:

**(a) Network Licence:** This licence category is provided for by section 10(1)(a) of the Act. This licence allows the holder of the licence to construct, own or make available an electronic communications network, or to provide a network service.

**(b) Service Licence:** This licence category is provided for under section 10(1)(b) of the Act. A licence holder under this licence category is allowed to provide one or more electronic communication services.

The Act has further classified the Network and Service licenses into two, namely individual licence and class licence.<sup>95</sup>

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<sup>93</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.15

<sup>94</sup> The Zambia Information and Communication Technology Authority: Licensing Guidelines (2009) P.2

<sup>95</sup> S. 10(2)(a) and S.10(2)(b) of the Information and Communication Technologies Act, respectively.

### (i) Individual Licence

These are major network or service licenses with significant economic and social impact and significant regulatory obligations.<sup>96</sup> This licence may also require the extensive use of radio frequency spectrum and other finite resources.<sup>97</sup> These licenses are issued conditionally through a competitive process announced at the instance of the Authority, which announcement will include the mode, procedure and other pertinent issues related to the issuance of the license such as performance guarantee.<sup>98</sup> It must also be noted that the Authority determines the procedure to be followed in acquiring licenses and such procedure is dependent on the type of license to be acquired.<sup>99</sup> Furthermore, pursuant to the Information and Communication Technologies (Fees) Regulations<sup>100</sup> the following have *inter alia*, been designated as individual network licences; mobile cellular, fixed internet. The following have, *inter alia*, been classified as individual service licences; mobile cellular and international voice.<sup>101</sup>

### (ii) Class Licence

These are types of licenses which have lesser social and economic impact than individual licences.<sup>102</sup> These licenses may be applied for through an open application process by an applicant.<sup>103</sup> The Information and Communication technologies (Fees) Regulations<sup>104</sup>, classifies the following as, *inter alia*, Class network licences; wireless internet and public pay phone. The following have, *inter alia*, been classified as Class service licenses; internet service provider (ISP).<sup>105</sup>

## 3.2 Innovations brought by the Information and Communication Technologies Act.

The Information and Communication Technologies Act was enacted into law on the 28<sup>th</sup> August, 2009. In presenting the Information and Communication Technologies bill, the minister of Communications and Transport, Professor Lungwangwa said:-

<sup>96</sup> The Zambia Information and Communication Technology Authority:Licensing Guidelines(2009) P. 3

<sup>97</sup> The Zambia Information and Communication Technology Authority:Licensing Guidelines. P. 3

<sup>98</sup> The Zambia Information and Communication Technology Authority:Licensing Guidelines. P. 3

<sup>99</sup> The Zambia Information and Communication Technology Authority:Licensing Guidelines. P.3

<sup>100</sup> Statutory Instrument,( No.34 of 2010)

<sup>101</sup> Statutory Instrument,( No.34 of 2010)

<sup>102</sup> Statutory Instrument,( No.34 of 2010)

<sup>103</sup> Statutory Instrument,( No.34 of 2010)

<sup>104</sup> Statutory Instrument ( No.34 of 2010)

<sup>105</sup> Statutory Instrument ( No.34 of 2010)

“It is necessary to introduce this bill in order to address the gap in the legal and regulatory framework because the current Telecommunications Act has such serious deficiencies that the legal framework is not reflective of the developments that have taken place since 1994. You may wish to know that technology changes every six months, thus, the sector is very dynamic. In summary, the industry practice is far ahead of the current legal framework, hence the need for the overhaul...it is not a secret that global economies are no longer shaped by huge reserves of natural resources alone because developed economies are driven more by the power of information. After all information is power. In order to access information on health, education and the social well-being of individuals, ICTs have become the cornerstone of such developments.”<sup>106</sup>

In justifying the bill, the Minister further asserted that:-

“The Communications Authority as an institution needs to expand its mandate from just telecommunications to cover the other broad areas...the convergence of technologies has created new products and services that cannot be regulated under the current legal and regulatory framework; and in line with regional and global practice, there is a new approach to regulation in areas not covered in the current law such as interconnection, infrastructure sharing and dispute resolution.”<sup>107</sup>

Furthermore, the minister commented on the new Information and Communication Technology Policy of 2007 as follows:-

“the context of this bill is that Zambia has developed the National ICT Policy which was launched on 28<sup>th</sup> March, 2007. The policy provides for a radical shift in line with global communication trends. The mobile phone is fast becoming a device for all services, including mobile television broadcasting.”<sup>108</sup>

The preamble to the Information and Communication Technologies Act provides that it is:-

An Act to continue the existence of the Communications Authority and re-name it as the Zambia Information and Communication Technology Authority; provide for the regulation of information and communication technology; facilitate access to information and communication technologies; protect the rights and interests of service providers and consumers; repeal the Telecommunications Act, 1994 and the Radio-communications Act, 1994; and provide for matters connected with or incidental to the foregoing.

The first innovation introduced by the Act is that the licencing regime has introduced a distinction between a network and service licence. The licensing regime under the repealed Telecommunications Act did not distinguish between a network and service licence, it simply categorized licences into the actual type of services to be offered.<sup>109</sup>

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<sup>106</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly( 4<sup>th</sup> August 2009) P.1

<sup>107</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly P.1

<sup>108</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly P.2

<sup>109</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.10

Secondly, the other welcome development under the Act is that the Authority is now empowered to regulate tariffs. This is provided for under section 47 of the Act. Section 47 is couched in the following terms:-

“47. (1) Subject to the other provisions of this Act, a Licensee may set and revise tariffs in relation to electronic communications services.

(2) A licensee shall, in setting any tariffs under subsection(1) observe the following principles

(a) tariffs shall be transparent and non-discriminatory, and be based on the cost of providing the service;

(b) cross subsidies shall be eliminated; and

(c) tariffs shall not contain discounts that unreasonably prejudice the competitive opportunities of other licensees providing electronic communications services to the public.

(3) A licensee shall submit to the Authority for approval, the tariffs the licensee intends to charge including the justification, prior to their introduction.

(4) The Authority shall approve or reject the proposed tariffs within thirty days of receipt.”

In light of the foregoing, it is evident that the Authority now has an upper hand in the determination of tariffs and it necessarily follows that consumer exploitation will be substantially minimized in view of the protection from the Authority. Furthermore, section 41 of the Act now authorizes the Authority to provide a reference interconnection offer in case of the parties failing to agree on a suitable agreement that has to be approved by the Authority. In the final analysis, this state of affairs will go a long way in helping consumers given the fact that the ultimate goal regulators seek to achieve is consumer protection as highlighted in the preceding chapters.

The other innovation is that section 7(1) of the Act empowers the Authority to issue such guidelines as are necessary for the better carrying out of the provisions of the Act. Previously, such guidelines could only be effected in Statutory Instruments, issued by the minister of Justice and invariably, issuance of such Statutory Instruments would take time, however with this new innovation, guidelines which are equally binding as statutory instruments may be issued by the Authority in record time.<sup>110</sup>

The other innovation introduced by the Act is found under section 67 which provides that all service providers shall, in respect of their specific services meet such minimum standards of quality of service as the Authority may specify and publish; deal reasonably with consumers and address consumer complaints in accordance with the guidelines issued by the Authority under the Act. Such provisions never existed under the repealed legislation.

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<sup>110</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.12

The other welcome development is the aspect of interconnection agreements which entails that a licensee may negotiate and agree with another licensee with the aim of using same electronic communication network for purposes of enabling the provision of electronic communication services to the public. This is provided for under section 41 of the Act. Interconnection was not provided for under the repealed legislation. The previous state of affairs was an eyesore and a danger to public health as you would find that at one location, there are three masts, three towers and three generators for three different service providers. But now in view of interconnectivity, there is an understanding among the service providers so that one facility is used by them all.

### **3.3 Potential Challenges**

Notwithstanding, the innovations highlighted above, in most instances however, the legislation remains unchanged as for instance the exercise of discretionary power enjoyed by the minister. This state of affairs may be illuminated by considering the following provisions. Firstly, section 5 of the Act spells out the Autonomy of the Authority in the following terms:-

“Except as otherwise provided in this Act, the Authority shall be an autonomous body and shall not be subject to the directions of any other person or authority.”

However, section 6(3) of the Act, is to the effect that:-

“the minister may give to the Authority such general directives with respect to the carrying out of its functions under this Act as the Minister considers necessary or expedient and the Authority shall give effect to the directives.”

This provision for all intents and purposes imposes a mandatory obligation on the Authority to abide by the directions given by the Minister regarding its functions under the Act and consequently, this undermines the Authority’s autonomy.

Secondly, in as much as the Authority may be presumed to be self-governing, the presumption must be cautioned by the fact that much room has been left for the minister to dictate many areas that remain undefined.<sup>111</sup> By way of illustration, the thorny area is with regards “access agreements” provided for under section 43(1) of the Act apparently drafted with the International Gateway (IGW) in mind.<sup>112</sup> Section 43(6) of the Act empowers the minister by statutory

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<sup>111</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia.( Paper submitted to the UNCTAD multi-year meeting on Services, Development and Trade: The Regulatory and Institutional Dimension, Geneva, 17-19<sup>th</sup> March 2009) P.12

<sup>112</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia. P.12

instrument to prescribe matters and other particulars to be included in access agreements. This position clearly implies that although the Authority would regulate the kind of infrastructure required to implement access agreements, how the gateway tariffs are determined may be dictated by the minister via statutory instruments.

In the final analysis, albeit one may speak of the Authority advocating for better competition and cost reflective tariffs in the area of interconnection and other core arrangements, with regards access agreements, the wording of the section gives latitude for the exercise of ministerial discretion, this state of affairs consequently undermines the autonomy of the regulatory authority particularly in economic regulation which is provided for under Part V of the Act.<sup>113</sup>

The other potential challenge pertains to the issue of setting fees for various electronic communication licences under part III of the Act. It is part of the responsibility of the Authority to issue licences but the issue of who is to determine the scope and level of fees to be charged is not clearly defined, again this is an area where ministerial influence may play a significant role and incidentally, there is no provision that further consultation with the public would be necessary in this area.<sup>114</sup>

The other area of concern is the issue of universal access and service fund which is provided for under section 70(1) of the Act and designed for financing the universal access and service.<sup>115</sup> This facility has for its object the promotion of widespread availability and usage of electronic communications in remote, un-served or under-served areas and communities.<sup>116</sup> The fund is administered by the Authority. However, the Act does not specify how the universal access fund is to be serviced financially. The Act provides under section 70(4) that the minister on recommendation by the Authority, shall provide regulations which may include the sources of funding and the manner in which the fund will be paid<sup>117</sup>. The annual contributions payable by any licensee to the fund, shall not exceed the amount prescribed by the minister.<sup>118</sup>

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<sup>113</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia P.10

<sup>114</sup> A. Russell. 3G Services in Zambia: Review of Vodacom v Zain, (Zambian Economist, 6<sup>th</sup> August 2009) P.1

<sup>115</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia P.14

<sup>116</sup> S.70(2) of the Act

<sup>117</sup> S.70(4) (b) of the Act

<sup>118</sup> S.70(4) (e) of the Act

This state of affairs has the potential of deflecting investment in the sector as it follows that licencees are stretched and burdened financially by incurring additional financial obligations in addition to taxation in general.<sup>119</sup>

The other area of concern is in the First Schedule of the Act, particularly, section 1(5) (b) to (e) which provisions excludes politicians and their immediate family members from being appointed to the board. It is a notorious fact that most citizens have political inclinations. It is just that some people participate in active politics openly. These provisions have excluded many Zambians who might be highly qualified from being on the board. The provisions are somewhat discriminatory or at least indirect discrimination and a violation of human rights.<sup>120</sup>

Furthermore, the other drawback is section 74 (2) of the Act which provides that:-

“the Minister shall not appoint the tribunal unless the appellant deposits with the Minister such sum as the Minister considers will be sufficient to pay the costs, including the allowances payable to the members of the tribunal, likely to be incurred in connection with the appeal.”

This provision in my view is a serious oversight on the part of the Government. It is not proper that the Minister be the one to determine what amount would be sufficient for the tribunal to sit, such issue should be left to the Authority which in any event is well placed to determine the issue.

### **3.4 Conclusion**

This chapter has examined the electronic communications licencing regime under the Information and Communication Technologies Act. The chapter highlighted some of the innovations introduced by the newly enacted Act some of which have addressed the lacunas in the repealed legislation which were identified in chapter two of this essay. Generally, the legislation remains unchanged as for instance the exercise of discretionary power by the minister. Moreover, it has been asserted that technology neutrality is the proper approach to Information

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<sup>119</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia.( Paper submitted to the UNCTAD multi-year meeting on Services, Development and Trade: The Regulatory and Institutional Dimension, Geneva, 17-19<sup>th</sup> March 2009) P.14

<sup>120</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly. ( speech by Mr.Muyunda MP.) P.3

and Communication Technology regulation.<sup>121</sup> However, a perusal of the Act indicates that the concept has not been fully given effect, apart from the general provision in section 6(2) (h) of the Act which empowers the Authority to promote research, development and use of new and appropriate technologies in the sector and promote the manufacturing and production of relevant apparatus.

Furthermore, with regard radio-communication under the Act the Authority is in charge of the technical infrastructure aspects of broadcasting, such as allocation of frequencies, however broadcasting services licences are issued by the Ministry of Communications and Transport (the Independent Broadcasting Authority Board when it becomes operational).<sup>122</sup> This state of affairs overlooks the reality of convergence and the need to have communication services that is Telecommunications, radio-communications, broadcasting regulated under the umbrella of one agency and the necessity of having legislation that is technology neutral so as to ensure that technological developments in the ICT sector are adequately covered without need for constant amendment.<sup>123</sup> The next chapter will examine the concept of Technology neutrality vis-à-vis electronic communications networks and services regulatory framework.

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<sup>121</sup>Chris Reed, Taking Sides on Technology Neutrality.P.1

<sup>122</sup> I. Nonde,How Independent is the ICT sector regulator in Zambia. P.6

<sup>123</sup> Garnham, Nicholas, Constraints on multimedia convergence\_(Oxford University Press, 1999) P.64

## CHAPTER FOUR

### **The Concept of Technology Neutrality and the Electronic Communications Networks and Services regulatory framework.**

#### **4.1 Introduction**

Technology neutrality has long been held up as a guiding principle for the proper regulation of technology, particularly the information and communications technologies.<sup>124</sup> This chapter shall firstly, outline the definition of the concept of Technology neutrality, secondly, it shall highlight the achievable aims of Technology Neutrality and finally, the chapter shall examine how the concept has been applied at international as well as regional level.

#### **4.2 Definition of the Concept of Technology Neutrality**

The concept of “Technology neutrality” is one of the key concepts which underpins the new regulatory framework for electronic communications networks and services (ECNS) which came into effect on 24<sup>th</sup> July 2003 across the European Union.<sup>125</sup> It has often been asserted that technology neutrality is the proper approach to ICT regulation,<sup>126</sup> but those making this assertion use the concept in a number of divergent senses, for instance, Technology neutrality has been espoused to mean that:-

“identical services should in principle be regulated in the same way, regardless of their means of transmission.<sup>127</sup>”

Technology neutrality has also been defined to mean that:-

“legislation should define the objectives to be achieved and should neither impose, nor discriminate in favour of, the use of a particular type of technology to achieve those objectives.<sup>128</sup>”

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<sup>124</sup> Chris Reed, Taking Sides on Technology Neutrality. P.264

<sup>125</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7<sup>th</sup> March 2002 on a common regulatory framework for electronic communications network and services (Framework Directive), OJ 108/33 of 24.4.2002

<sup>126</sup> Chris Reed, Taking Sides on Technology Neutrality. P. 1

<sup>127</sup> See e.g. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Principles and guidelines for the Community’s audiovisual policy in the digital age\_COM (1999) 0657 final, note 17

<sup>128</sup> See e.g. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a new Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review p.14

In essence, technology neutrality seeks to ensure regulatory even-handedness for relatively homogeneous products provided in a single market using alternative technologies for delivery.<sup>129</sup>

### 4.3 Achievable aims of Technology Neutrality

Technology neutral regulation appears to have three main aims: future proofing, online and offline equivalence, and encouraging the development and uptake of the regulated technology.<sup>130</sup> Future proofing means producing law and regulation which can continue to apply to new technological developments without constant amendment.<sup>131</sup> Regulation that is based on specific technology can quickly become outdated and may lead to inefficient investment by market players.<sup>132</sup> It should be clear that technology indifferent regulation avoids this trap, unless a technological advance is so disruptive that it effectively overturns the fundamental assumptions on which that regulation is based.<sup>133</sup>

### 4.4 Technology Neutrality at International Level

The liberalization of the telecommunications market, first in the United States and then in Europe, led to calls for the new regulatory regimes to be technology neutral<sup>134</sup> and technology neutrality has continued to be a pervasive concept in that field, influencing among others the debates on convergence with broadcasting.<sup>135</sup> In July 1997 the US Government published its Framework for Global Electronic Commerce, which stated:-

“rules should be technology neutral, that is, rules should neither require nor assume a particular technology and forward looking, that is, rules should not hinder the use or development of technologies in the future.”<sup>136</sup>

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<sup>129</sup> P. Alexiadis and M. Cole, The Concept of Technology Neutrality and the new ECNS regulatory framework. ( *ecta review*, 2010) P.76

<sup>130</sup> Chris Reed, Taking Sides on Technology Neutrality. P.275

<sup>131</sup> Chris Reed, Taking Sides on Technology Neutrality. P.275

<sup>132</sup> See e.g. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a new Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review COM (1999) 539 final, 10 November 1999 p.14

<sup>133</sup> See e.g. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a new Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review p.14

<sup>134</sup> J.R. Kresse, Privacy of Conversations Over Cordless and Cellular Telephones (Geo Mason :UL Rev, 1987) P.9

<sup>135</sup> Herbert Ungerer, The Case of Telecommunications and internet markets. (International Journal of Communications Law and Policy, 2000) P.5

<sup>136</sup> <http://www.technology.gov/digeconomy/framework.htm> (Accessed 4/1/2011)

In the United States, the position of the Federal Communications Commission has been to support the growth of electronic communications services wherever possible through the promotion of competition via a technology-neutral paradigm.<sup>137</sup>

The concept has also quickly caught the imagination of regulatory bodies outside the United States. For instance, the concept of technology neutrality is one of the key concepts which underpins the new regulatory framework for electronic communications networks and services which came into effect on 24<sup>th</sup> July 2003 across the European Union.<sup>138</sup> In the United Kingdom, the Office of Communications (Ofcom) was established in December 2003 as a result of the Communications Act 2000 and it became the regulator for broadcasting and telecommunications.<sup>139</sup> Ofcom's position has also been to advance technology neutral usage rights, this is evident from its liberalized licencing regime. As from 2006, licences auctioned by Ofcom do not specify the service or technology to be used by licencees.<sup>140</sup>

#### **4.5 Technology Neutrality at Regional Level**

Technology neutrality has also been espoused extensively by national legislators in the Common Market for East and Southern Africa (COMESA) region. For instance, in Tanzania, reforms in the communications and broadcasting sectors stated in the early 1990s.<sup>141</sup> Licensing was used as a vehicle to control market entry and to impose regulatory obligations.<sup>142</sup> Tanzania like many other countries has moved away from licensing framework which is based on specific types of technologies and services towards a technological and service neutral converged licensing framework for Telecommunication and Broadcasting sectors.<sup>143</sup> The Tanzania Communications Regulatory Authority (TCRA) has asserted that:-

“one of the key goals in moving to a converged licensing framework is to achieve technology neutrality...this term means that a licensee retains the ability to choose the technology and

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<sup>137</sup> J.Nancy, *The New Medium for a New Medium.* (Washington DC:Broadband Outlook Conference,2002) P.23

<sup>138</sup> See.Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services(Framework Directive,OJ L 108/33 of 24.4.2002)

<sup>139</sup> H.Bussiek, *Covergence of New Technologies.* P. 5

<sup>140</sup> Ofcom, *Spectrum Liberalisation.* (Consultative document, 17<sup>th</sup> September 2004) P.6

<sup>141</sup> TCRA, *Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania.* (Dar es Salaam International Conference: January 2005) P.2

<sup>142</sup> TCRA, *Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania* P.2

<sup>143</sup> TCRA, *Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania* P.2

equipment to be used to provide the licensed service. Therefore, technology neutral licensing framework provides a fair and predictable regulatory regime, flexible enough to embrace technological and market development...Service neutral licensing framework allows licence holders to take signals from the market as to which services are most in demand or most cost-effective. A generic licence then empowers operators to offer a variety of different services and applications tailored to fluctuations, in market demand. Thus, converged licensing framework that incorporates technology and service neutrality increases the scope of applications and services that any operator can provide using its choice of technologies”<sup>144</sup>

In South Africa, the concept of technology neutrality and the reality of convergence of Information and Communication Technologies (ICTs) have been addressed. The Information and Communication Technologies sector in South Africa is governed by the Independent Communications Authority of South Africa (ICASA). ICASA is a converged regulator. This was done through an enabling legislation.<sup>145</sup> The Independent Communications Authority of South Africa Act<sup>146</sup> provided for the merger of two previously separate regulators, namely the South African Telecommunications Regulatory Authority and the Independent Broadcasting Authority.<sup>147</sup>

The Independent Communications Authority of South Africa was established in July 2000.<sup>148</sup> The Electronic Communications Act of 2005 provided for legislation that sought to promote the convergence of telecommunications, broadcasting and computing technologies, thereby repealing wholly or substantially the South African Telecommunications Act of 1996 and the Independent Broadcasting Act of 1993.<sup>149</sup> In respect to its licensing regime, ICASA has already converted to a technology neutral license regime. The conversion to a technology-neutral licensing regime was done pursuant to the Electronic Communications Act.<sup>150</sup> ICASA completed the licence conversion process in January 2009.<sup>151</sup>

In Zambia, the concept of Technology neutrality has not been fully given effect. This is so notwithstanding the fact that one of the justification advanced by the Minister of

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<sup>144</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.2

<sup>145</sup> The Independent Communications Authority of South Africa Act of 2000

<sup>146</sup> The Independent Communications Authority of South Africa Act of 2000

<sup>147</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa.(Elephant Hills, 2010)

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<sup>148</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa. P.6

<sup>149</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa. P.6

<sup>150</sup> Electronic Communications Act of 2000[South Africa]

<sup>151</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa.P.11

Communications and Transport during the presentation of the Information and Communication Technologies bill was that it was intended to facilitate the introduction of a new licensing framework which is independent of technologies being deployed by service providers.<sup>152</sup>

Nevertheless, a perusal of the Act<sup>153</sup> clearly shows that the licensing framework is not fully technological and service neutral. In addition, the Information and Communication Technologies (Fees) Regulations<sup>154</sup> has prescribed what technologies or services are to be offered under the individual network licences and individual service licences. Similarly, it has also prescribed what technologies or services are to be offered under the class network licences and class service licences. This state of affairs in any event precludes licencees from taking signals from the market as to which services are most in demand or most cost-effective, moreover, such a framework is not flexible enough to embrace technological and market development.

It must be noted that the Authority is in charge of the technical infrastructure aspects of broadcasting, such as allocation of frequencies, however broadcasting service licences are issued by the Ministry of Communications and Transport.<sup>155</sup> This state of affairs overlooks the reality of convergence and the need to have communication services such as Telecommunications, radio-communications, broadcasting regulated under the umbrella of one agency.

Finally, in light of the above and in view of third- generation mobile service (3G) which service facilitates access to various ICT services such as Internet access and broadcasting services via a mobile phone and currently being offered, inter alia, by Airtel,<sup>156</sup> there is need to move away from a licensing framework which is based on specific types of technologies and services towards a technological and service neutral converged licensing framework for Telecommunications and Broadcasting sectors.

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<sup>152</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly. P.2

<sup>153</sup> Act No.15 of 2009

<sup>154</sup> Statutory Instrument No.34 of 2010

<sup>155</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia. P.6

<sup>156</sup> A. Russell. 3G Services in Zambia: Review of Vodacom v Zain. P.18

## **4.6 Conclusion**

This chapter highlighted the nature of the concept of technology neutrality, its achievable aims and how the concept has been adopted and implemented at international as well as regional level. What emerges from this chapter and indeed the preceding chapters is that licensing is one of the most important instruments that could be employed in the context of the ongoing communications sector reform. Licensing should evolve to ensure that it remains relevant and beneficial. In summary, the industry practice in Zambia is far ahead of the current legal framework, hence the need for reform. The next chapter will highlight the conclusions arrived at in light of the findings in the preceding chapters and propose recommendations.

## CHAPTER FIVE

### Conclusion and Recommendations

#### 5.0 Introduction

This chapter makes conclusions and recommendations based on the issues raised and the findings in previous chapters.

#### 5.1 Conclusion

Having evaluated the licensing regime under the Information and Communication Technologies Act and its impact on the information and communication technology sector in Zambia, the following are the conclusions;

Firstly, it must be noted that the purpose of regulation under the information and communication technology sector is generally analyzed in three categories, namely; remedying market failures, promoting a social agenda and advancing technological and industrial developments and creating a dynamic business environment for industrial potentials.<sup>157</sup> Under remedying market failures, the issues include, *inter alia*, the establishment of an asymmetric interconnection regulation to limit the market power of the incumbent operators<sup>158</sup> and the problems attached to scarce resources, that is, assignment of frequencies, access to numbers and names.<sup>159</sup> With respect to promoting a social agenda, the issue is primarily the setting up of rules for universal access and service.<sup>160</sup>

With regards the purpose of remedying market failures, the Information and Communication Technologies Act has addressed the issue in the following manner; section 41 provides for interconnection. Interconnection agreements enable a licensee to negotiate and agree with another licensee with the object of using same electronic communication network for purposes of enabling the provision of electronic communication services to the public.<sup>161</sup> Interconnection was not provided for under the repealed legislation. The previous state of affairs was a danger to

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<sup>157</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.25

<sup>158</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.25

<sup>159</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.25

<sup>160</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.25

<sup>161</sup> S.41(1) of the Act

public health as you would find that at one location, there are three masts, three towers and three generators for three different service providers. But now in view of interconnectivity, there is an understanding among the service providers so that one facility is used by them all. Moreover, the Act now authorizes the Zambia Information and Communications Technology Authority to provide a reference interconnection offer in case of the parties failing to agree on a suitable agreement that has to be approved by the Authority.<sup>162</sup> In the final analysis, this state of affairs will go a long way in helping consumers given the fact that the ultimate goal regulators seek to achieve is consumer protection as highlighted in the preceding chapters.

The Act has also dealt with the issue of scarce resources under the Part V, dealing with technical regulation. Section 53 provides for frequency assignment, while spectrum and number assignment has been provided for under section 54 of the Act.

With respect to the purpose of promoting a social agenda, the Act provides for universal access and service fund under section 70(1). The fund is designed for financing universal access and service.<sup>163</sup> This facility has for its object the promotion of widespread availability and usage of electronic communications in remote, un-served or under-served areas and communities.<sup>164</sup>

The Act has however fallen short of achieving the third purpose, namely advancing technological and industrial developments and creating a dynamic business environment for industrial potentials.<sup>165</sup> It must be noted that in justifying the Information and Communication Technologies Bill(2009), the Minister asserted that the Communications Authority as an institution needed to expand its mandate from just telecommunications to cover the other broad areas, that the convergence of technologies had created new products and services that could not be regulated under the repealed legal and regulatory framework; and that in line with regional and global practice, there was a new approach to regulation in areas not covered in the repealed law.<sup>166</sup> The minister further said that the intention of the Bill was to facilitate the introduction of a new licensing framework which would be independent of technologies deployed by service

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<sup>162</sup> S.41(3) of the Act

<sup>163</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia. P.14

<sup>164</sup> S.70(2) of the Act

<sup>165</sup> A. Russell. 3G Services in Zambia: Review of Vodacom v Zain. P.18

<sup>166</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly. P.1

providers.<sup>167</sup> The minister also acknowledged the reality of convergence as he asserted that the National ICT Policy provided for a radical shift in line with global communication trends. He made particular reference to the fact that the mobile phone was fast becoming a device for all services, including mobile television broadcasting.<sup>168</sup>

Notwithstanding the intent and spirit of the Information and Communication Technologies bill(2009) and the acknowledgement of the reality of convergence by the policy maker (minister), a perusal of the Act clearly shows that the licensing regime is not fully technological and service neutral, as it follows that the Information and Communication Technologies (Fess) Regulations<sup>169</sup> has prescribed what technologies or services are to be offered under the individual network licences and individual service licences. Similarly, it has also prescribed what technologies or services are to be offered under the class network licences and class service licences. This state of affairs in any event precludes licencees from taking signals from the market as to which services are most in demand or most cost-effective, moreover, such a framework is not flexible enough to embrace technological and market development.<sup>170</sup>

Furthermore, with the advent of third- generation mobile service (3G), capable of offering bundles of ICT services such as broadband Internet access and broadcasting services all in one package, currently being offered by, *inter alia*, Airtel,<sup>171</sup> there is need to move away from a licensing regime which is based on specific types of technologies and services towards a technological and service neutral converged licensing regime for Telecommunications and Broadcasting sectors.

Coming to the independence of the Communications Authority, the Act does recognize the autonomy of the authority, but at the same time numerous provisions exist in the legislation that have a limiting effect on the regulatory independence exercised by the Authority. For instance, it can be seen that the Policy Maker (through the Minister of Communications and Transport) exercises a lot of discretionary powers that are only subject to check in an administrative court of

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<sup>167</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly P.2

<sup>168</sup> Official Verbatim Report of the Parliamentary Debates of the National Assembly P.2

<sup>169</sup> Statutory Instrument No.34 of 2010

<sup>170</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia. P.14

<sup>171</sup> A. Russell. 3G Services in Zambia: Review of Vodacom v Zain. P.18

law.<sup>172</sup> This state of affairs is illuminated by the following provisions. Firstly, section 5 of the Act spells out the Autonomy of the Authority in the following terms:-

“Except as otherwise provided in this Act, the Authority shall be an autonomous body and shall not be subject to the directions of any other person or authority.”

However, section 6(3) of the Act, is to the effect that:-

“the minister may give to the Authority such general directives with respect to the carrying out of its functions under this Act as the Minister considers necessary or expedient and the Authority shall give effect to the directives.”

This provision for all intents and purposes imposes a mandatory obligation on the Authority to abide by the directions given by the Minister regarding its functions under the Act and consequently, this undermines the Authority’s autonomy. Secondly, in as much as the Zambia Information and Communications Technology Authority may be presumed to be self-governing, the presumption must be cautioned by the fact that much room has been left for the minister to dictate many areas that remain undefined.<sup>173</sup>

In the final analysis, it must be noted that in spite of the innovations introduced by the Act as highlighted in chapter three, in most instances, the legislation remains unchanged

## **5.2 Recommendations**

In light of the above conclusions, a number of recommendations come to mind.

### **5.2.1. Enhancing the Autonomy of the Authority**

The recommendation that can be made to remedy the problem of the Authority’s limited regulatory independence would be to encourage the Policy Maker to fully allow the sector to be regulated. The direct benefit of this has already resulted in more players in the sector<sup>174</sup> providing a much more diverse range of services. This can be attributed somewhat to the existence of the National ICT policy of 2007 and legal framework that is in place under which the Authority has attempted to be a truly transparent, accountable and independent regulator.

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<sup>172</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia. P.15

<sup>173</sup> T.Kaira. Understanding the dynamics of competition in Telecommunications Services in Zambia. P.12

<sup>174</sup> There are for example 3 Mobile Operators in the Country which has a population of only about 11 million people.

### 5.3.1 Change licence format

Licensing is one of the most important instruments that could be employed in the context of the on going communications sector reform. Licensing should evolve to ensure that it remains relevant and beneficial.<sup>175</sup> It must be noted that a number of countries, inter alia, Tanzania and South Africa have moved away from licensing framework which is based on specific types of technologies and services towards a technological and service neutral converged licensing framework for Telecommunication and Broadcasting sectors.<sup>176</sup> One of the key goals in moving to a converged licensing framework is to achieve technology neutrality, this term means that a licensee retains the ability to choose the technology and equipment to be used to provide the licensed service. Therefore, technology neutral licensing framework provides a fair and predictable regulatory regime, flexible enough to embrace technological and market development. Service neutral licensing framework allows licence holders to take signals from the market as to which services are most in demand or most cost-effective. A generic licence then empowers operators to offer a variety of different services and applications tailored to fluctuations, in market demand. Thus, converged licensing framework that incorporates technology and service neutrality increases the scope of applications and services that any operator can provide using its choice of technologies<sup>177</sup> In view of the above, it is recommended that Zambia should introduce a converged licence format.

### 5.3.2 Proposed converged license format

Under the new converged licensing framework, licences are organized into four categories based on services rather than technology as follows:-

- (i) **Network Facility Licence (NF)**; this licence authorizes ownership and control of electronic communication infrastructure. Examples of facilities within the scope of this licence includes,

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<sup>175</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.2

<sup>176</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.2

<sup>177</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.2

*inter alia*, Earth Stations, Public Payphone facilities, Radio communication transmitters and links and Satellite hubs.<sup>178</sup>

(ii) **Network Service Licence (NS)**; this licence gives authorization to operate electronic communication networks in order to deliver services. Examples of network services include, *inter alia*, broadcasting distributions services, cellular mobile service and access applications service.<sup>179</sup>

(iii) **Application Service Licence (AS)** ; this licence authorizes reselling or procurement of services from Network Service operators. The salient feature of this licence is that the licensee does not own network infrastructure nor operate a network. Examples include, *inter alia*, internet providers, virtual mobile provider.<sup>180</sup>

(iv) **Content Service Licence (CS)**; this licence authorizes the provision of content such as Satellite broadcasting, broadcasting terrestrial free to air TV, Terrestrial radio broadcasting and other electronic media.<sup>181</sup>

#### 5.4.1 Licence Fees

Licence fees form an important aspect of regulation in the telecommunication and broadcasting sector.<sup>182</sup> In setting licence fees, regard must be had to policy objectives, operator profitability and the regulator's revenue requirements.<sup>183</sup> The licence fees should be set in such a way as to spur competition by lowering barriers to market entry, exerting downward pressure on prices and stimulating innovations in services and technologies.<sup>184</sup> It must be noted that with regards the issue of setting fees for various electronic communication licences under part III of the Act, it is part of the responsibility of the Authority to issue licences but the issue of who is to determine

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<sup>178</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.4

<sup>179</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.4

<sup>180</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.4

<sup>181</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.4

<sup>182</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.6

<sup>183</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.6

<sup>184</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.6

the scope and level of fees to be charged is not clearly defined, again this is an area where ministerial influence may play a significant role<sup>185</sup>

In view of the foregoing, it is recommended that the Zambia Information and Communication Technology Authority should be conferred with the mandate to, *inter alia*, determine and prescribe the fees or levies payable on an application for, or the grant or renewal of a licence. The mechanism for calculating the fees or levies should generally be based on the principle that administrative fees should not impose unnecessary costs on the communications sector.<sup>186</sup> Once the overall level of cost-recovery is set, the costs should be allocated among the licensees or market participants and this allocation ought to be based on factors such as revenues, licensed coverage areas and types of services.<sup>187</sup>

### **5.5.1. Change current regulatory model**

There are two main options for countries to decide on the most suitable structure for regulatory bodies for communications technologies in view of convergence. One option is to have a converged regulatory authority in charge of all sectors of communication, in order to, *inter alia*, streamline licensing processes, to manage the frequency spectrum efficiently and speed up technological development. The other is to have separate authorities for broadcasting and telecommunications.<sup>188</sup> Zambia is still using the unconverged or sector specific regulatory model where regulation of broadcasting and telecommunication is regulated by two separate bodies. The disadvantage of sector specific regulatory models is that sufficient resources may not be available to staff the different regulatory agencies and there may be duplication for regulatory activities that are common to different industries especially in the face of convergence.<sup>189</sup>

Under the Act<sup>190</sup> the Authority is in charge of the technical infrastructure aspects of broadcasting, such as allocation of frequencies, however broadcasting services licences are issued by the Ministry of Communications and Transport (the Independent Broadcasting

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<sup>185</sup> A. Russell, 3G Services in Zambia: Review of Vodacom v Zain. P.1

<sup>186</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.7

<sup>187</sup> TCRA, Consultative Document on the Implementation of the Converged Licensing Framework in Tanzania. P.7

<sup>188</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.25

<sup>189</sup> Garnham, Nicholas, Constraints on multimedia convergence. P.64

<sup>190</sup> Act No.15 of 2009

Authority Board when it becomes operational).<sup>191</sup> This state of affairs overlooks the reality of convergence and the need to have communication services that is Telecommunications, radio-communications, broadcasting regulated under the umbrella of one agency and the necessity of having legislation that is technology neutral so as to ensure that technological developments in the ICT sector are adequately covered without need for constant amendment.<sup>192</sup>

The advantages of having a converged regulator is that, firstly, there is better co-ordination between initiatives in the different areas, secondly, there is efficient usage of manpower resources and avoidance of duplication of work.<sup>193</sup> The other advantage is that it meets the challenge posed by service convergence by bringing in related skills under one roof.<sup>194</sup> This model also better meets the need for flexibility in terms of its internal administration's ability to meet market realities. In other words, it gives the regulatory authority and its staff the flexibility to better handle the continuous technological and regulatory changes and developments within the ICT sector.<sup>195</sup>

It must be noted that the National Information and Communication Technology policy document of 2005 proposed to have the (ICT) sector brought under an autonomous regulator to ensure a smooth transition to full convergence.<sup>196</sup> The ICT policy document envisaged the transformation of the existing regulators in the communications sector into a converged regulatory agency and recommended the repeal or amendment of the Telecommunication Act,<sup>197</sup> Radio-communications Act<sup>198</sup> and the Independent Broadcasting Authority Act.<sup>199</sup>

Therefore, the argument that the distinctive regulatory aspects of broadcasting require a distinctive regulatory agency for broadcasting is in principle and in reality untenable. As it

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<sup>191</sup> I. Nonde, How Independent is the ICT sector regulator in Zambia . P.6

<sup>192</sup> Garnham, Nicholas, Constraints on multimedia convergence P.64

<sup>193</sup> Garnham, Nicholas, Constraints on multimedia convergenc P.64

<sup>194</sup> H.Bussiek, Coverage of New Technologies. P. 6

<sup>195</sup> H.Bussiek, Coverage of New Technologies. P. 6

<sup>196</sup> The National Information and Communication Technologies Policy document(2005)

<sup>197</sup> Cap 469(Repealed)

<sup>198</sup> Cap 169 (Repealed)

<sup>199</sup> Independent Broadcasting Authority Act of 2002

follows that such distinctive aspects may as well be dealt with adequately by one agency which on the other hand also handles other distinctive aspects of telecommunication.<sup>200</sup>

In view of the above, it is recommended that the current regulatory model employed by Zambia should be amended so as to bring about broadcasting and telecommunication under the ambit of one regulatory body which is autonomous and highly professional. This state of affairs will be in line with global and regional trends. As highlighted in chapter four, in the United Kingdom, the Office of Communications (Ofcom) was established in December 2003 as a result of the Communications Act 2000 and it became the regulator for broadcasting and telecommunications.<sup>201</sup> At regional level, particularly in South Africa, the Information and Communication Technologies sector is governed by the Independent Communications Authority of South Africa (ICASA). ICASA is a converged regulator. This was done through an enabling legislation.<sup>202</sup> The Independent Communications Authority of South Africa Act<sup>203</sup> provided for the merger of two previously separate regulators, namely the South African Telecommunications Regulatory Authority and the Independent Broadcasting Authority.<sup>204</sup>

The Independent Communications Authority of South Africa was established in July 2000.<sup>205</sup> The Electronic Communications Act of 2005 provided for legislation that sought to promote the convergence of telecommunications, broadcasting and computing technologies, thereby repealing wholly or substantially the South African Telecommunications Act of 1996 and the Independent Broadcasting Act of 1993.<sup>206</sup>

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<sup>200</sup> A.Henten Some Implications for Regulation of ICT and Media Convergence. P.34

<sup>201</sup> H.Bussiek, Coverage of New Technologies. P. 5

<sup>202</sup> The Independent Communications Authority of South Africa Act of 2000

<sup>203</sup> Ibid

<sup>204</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa. P.6

<sup>205</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa. P.6

<sup>206</sup> ICASA. Annual Report of the Independent Communications Authority of South Africa. P.6

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