Grant Of Licences In An Independent And Transparent Manner

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By Judith Smith[1]

> ***The regulatory process usually involves three main steps: providing people with an interest in a decision an opportunity to present their views, publishing the decision and the detailed reasons for reaching that decision and providing stakeholders an opportunity to challenge the decision through an appeal process[2]***

On the 24th June, 2002, the Supreme Court of the Bahamas held that the Public Utilities Commission of the Bahamas' (PUC) process for awarding the public fixed radiocommunications licence was not flawed for procedural impropriety. The awarding of the licence had been challenged by an unsuccessful applicant on the grounds of bias/conflict of interest and breach of natural justice citing failure to consider relevant information and failure to give reasons. The paper will chronicle the odyssey of the licence from its embryonic state to its fruition and to its baptism. The embryonic stage will deal with the formulation of the plan relating to wireless networks. The fruition represents the comparative bidding

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[2] Smith, Warrick. 1997. Utility Regulators – Decision-making Structures, Resources and Start-up Strategy; The Private Sector in Infrastructure – Strategy, Regulation, Risk (The World Bank Group) 29 - 32

process for the public fixed radiocommunications licence and the baptism will deal with the political and legal challenges the award faced. Attempts will be made in each phase to draw parallels with best practices in granting of licences in an independent and transparent manner. The paper will conclude with remarks on the advantages and disadvantages of the granting of licences in this manner.

EMBRYO

In March 2000, the legislative green light was given to create a new legal regulatory framework for telecommunications in the Bahamas, to remove monopoly rights of the government owned telephone company (BTC [3]) and to establish a licensing regime for telecommunications.[4] The PUC was to play an integral role in achieving the objectives. The Government set out its policy position for the sector by publishing the telecommunications sector policy. The policy prescribed that BTC retained the exclusive rights over voice telephony in the cellular market until March 31st, 2002 and in fixed voice until December 31st, 2002. In all other areas competition will be introduced immediately[5]. The PUC began issuing licences to Internet Service Providers (ISP). ISPs were limited to using either the cable television network or the government-owned telephone

[3] Bahamas Telecommunications Company. This company until September 2002 was known as BATELCO.
[4] Preamble to the Telecommunications Act, 1999
[5] Telecommunications Sector Policy published July 2001 - section 5.6

company to reach their customers. The PUC soon began to receive requests to establish wireless networks for internet and data services. As a result, the PUC conducted a survey of the market to ascertain potential demand for spectrum, the frequency and services to be provided. It was clear to the PUC that operators were seeking lower cost for reaching their customers. Additionally, the PUC considered that this would translate into lower prices and/or improved services to the consumer. It would seem that this was the win-win situation that competition is supposed to engender. The results of the survey was analysed and a review conducted of the frequency bands available to address the demands that the market was depicting. In September 2000, a public consultation was conducted on the proposal for the licensing wireless networks for internet and data services. The public consultation invited responses to a number of questions which touched on spectrum allocation policy, fee structure for the allocation of spectrum, competition in the spectrum allocation and procedures for the award of licences. The information obtained from the public consultation would be used to make decisions on granting individual and class licences for the use of spectrum. The consultation was opened for two (2) weeks. The responses required the PUC to conduct further studies before it could adopt a position. When those studies were completed, a statement was

published in August 2001. The statement summarized and discussed the points made by respondents and indicated the action that the PUC proposed to take.

26 responses were received to the survey and 8 responses were received on the public consultation. The Telecommunications Act, 1999 (Tel. Act) requires the PUC to "...act in a manner that is timely, transparent, objective and non-discriminatory and consistent with the objectives of this Act..."[6] The Tel Act also requires the PUC to publish its proposals on licensing procedures, types of licences... allow a reasonable period of consultation and take into account any objection or suggestion made by persons affected by the proposals before adopting the proposal."[7] Continuing to comply with the Tel Act and 'best practices' the next step was the issuance of class licences (spread spectrum and low power radiocommunications data transmission devices) and offering of an individual licence to operate a public fixed radiocommunications system.

FRUITION

Award of licences and contracts should strictly adhere to the evaluation criteria announced at the outset. The business offered to

[6] section 6(4)
[7] section 6 (5)

investors, must be clearly defined in laws, regulations, and main transaction documents (licenses, contracts of sale).[8]

In September 2001, the call-for-applications for individual licences to operate a public fixed radiocommunications system was issued. It had been decided to make the deployment of the system more attractive by including a voice component which would be automatically triggered at the end of the fixed voice exclusivity period. The spectrum allocation was in the frequency bands of 2150 – 2162 MHz and 2500 – 2690 MHz. The call-for-applications documents set out the areas on which the applications would be evaluated and the points to be awarded to these areas. Eight (8) areas were identified:

1.	Company Structure	15 points
2.	Financial Capability	40 points
3.	Economic and Market Capability	30 points
4.	Technical Details of the Systems	25 points
5.	Description of the proposed Telecommunications services	25 points
6.	Technical Management	25 points
7.	Implementation Plan	15 points
8.	Executive Summary	5 points

[8] Wellenius, Bjorn. 1997. Telecommunications Reform – How to Succeed. The Private Sector in Infrastructure – Strategy, Regulation, Risk (The World Bank Group)

Total 180 points

"Obviously those areas, which the [PUC] considered most vital to the effective undertaking of any licence granted, carried the highest number of points. Financial capability was clearly then the most important area of concern. Applicants could expect to be most heavily scrutinized in this category".[9] The document was very prescriptive of what information was expected under each of the areas mentioned above. The call-for-applications also indicated that a pre-submission meeting was scheduled. The call-for-applications costs interested persons $50.00. A couple of weeks after the issuance of the document, a pre-submission meeting was held. The Chairman of the PUC opened the meeting by saying:

> **...because only one licence per service area is being offered, the Commission has adopted a competitive process for the grant of licences and because the licence fees are based on the Commission's costs only a financial process is ruled out. Consequently, the Commission will base the selection of the successful applicant on the contents of the proposal received, in the manner set out in the call-for-applications document.[10]**

[9] judgment of Lyons, J - Bahamas General Communications Limited v PUC et. al. no. 678 of 2002
[10] Minutes of Pre-submission meeting for call-for-applications, Oct. 9, 2001

The Chairman opened the meeting and left the PUC staff to conducted the meeting. The objective of the pre-submission meeting was to ensure that the call-for-applications was understood. In order to facilitate the preparation and distribution of material for the meeting, persons were asked to submit questions in advance. At the meeting, an attendance register was taken, pre-submitted questions with answers were circulated and minutes were recorded of the proceedings. Questions raised that were not answered at the meeting were addressed and disseminated along with the minutes. Applications for the public fixed radiocommunications licence had to be submitted to the PUC by the middle of December (2001), when a public opening of the documents would occur. The public unsealing of the call-for-applications was held. Again, an attendance register was taken and record made of documents submitted.

The PUC after reviewing its resources, decided to engage independent consultants to evaluate the submissions for the licences. The consultants engaged were the consultancy arm of a major international accounting firm out of Canada. The documents were e-mailed to the consultants who, prior to arriving in the Bahamas, evaluated and ranked the applications. On arrival in the Bahamas, the consultants

conducted a training session with PUC staff on the techniques of evaluating licences.

In engaging consultants, a regulator has to be careful to avoid delegating its responsibilities to the consultants. The consultants' task was to make a recommendation, "[I]t assisted the Commission, but it was not determinative of their decision."[11] The recommendations were considered and endorsed by the Staff and then conveyed to the Commissioners who made a decision accordingly.

Interestingly prior to the announcement of the successful applicant, there were rumblings by one of the applicants. The applicant sought a meeting with the Commission and later wrote querying the evaluation process. One of the clauses in the call-for-applications advised applicants not to contact the Commission concerning the merits of any application during the licensing process.[12] The Chairman of the PUC wrote the applicant advising that "following the announcement of the successful applicant, all applicants, would be given the opportunity to discuss with the Commission's staff the strengths and weaknesses of their application if they wished.[13] In the court matter that would follow, the Court remarked on the impropriety of the correspondence coming from

[11] Judgment of Lyons, J in Bahamas General Communications Limited v PUC et. al. no. 678 of 2002 – paragraph 16
[12] clause 2.4(b) Call-for-applications
[13] Letter dated February 22, 2002

the applicant. It was seemingly in breach of conditions in the call-for-applications. This is an example of how persons attempt to subvert a process in order to vitiate the acts of the regulator.

All persons who submitted applications were notified the status and generally about the strengths and weaknesses of their application. No sooner had that occurred, an application for judicial review was applied for and granted to one of the unsuccessful applicants, Bahamas general Communications Limited (BGC). The licence amounted to the introduction of competition on a wider scale and this notion was to meet with political objections as the government had begun to embark on its privatization of the government owned telephone company.

BAPTISM

> ***When agencies are to be independent, the goal should be to select regulators with the personal qualities needed to exercise independent judgment and resist improper pressures or inducements. The selection is critical, particularly for new agencies that have yet to establish a reputation of competence and reliability***[14]

The issuance of the public fixed radiocommunications licence would pose a legal and political challenge to the PUC. The simultaneous

[14] Smith, Warrick. 1997. Utility Regulators – Decision-making Structures, Resources and Start-up Strategy; The Private Sector in Infrastructure – Strategy, Regulation, Risk (The World Bank Group) 29

challenge meant that the regulator's competence, integrity and judgment would be scrutinized and the skills at negotiations exercised.

BGC, on an ex parte application, was granted leave to apply for judicial review in relation to the awarding of the public fixed radiocommunications licence. BGC alleged bias/conflict of interest and breach of natural justice i.e. failure to consider all relevant information and failure to give reasons. The application was actually struck out on the grounds that BGC had misled the Court in obtaining leave; however the judge went on to consider the substantive arguments. The analysis will focus on the substantive arguments only.

Bias was argued on the two grounds:

a. an employee of the PUC was involved in the evaluation of the applications and that employee had a relative who was employed with an accounting firm whose partners were shareholders of one of the applicants (actually the successful applicant).

b. The Bahamian accounting firm that had performed the audit in 1999 of one of the subsidiaries of the successful applicant was affiliated wit the Canadian accounting firm hired to rank the applications.

In determining whether there was bias, the judge applied the test stated in

R v Gough [1993] AC 646. The test being "…real danger rather than the real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias…[15] While the formulation provides little clarification, the Court in that case went on more helpfully to advise:

> ***[H]aving ascertained all the relevant circumstances, the Court should ask itself, whether, having regard to those circumstances, there was a real chance of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him.***

After analyzing the participation of the PUC staff member the Court concluded that the decision makers (the Commissioners) were not in any way influenced by anything the staff member may have said or done during the limited interaction with the consultants. The evidence tendered in relation to this issue, was very comprehensive and detailed. The consultants as indicated previously had prepared their evaluation and ranking prior to arriving in the Bahamas. In small communities, it is easy to find a scintilla of homogeneity on which an allegation of bias can be tenuously perched. It was encouraging to see the robust stance of the Court.

[15] R v Gough [1993] AC 646 per Lord Goff at page 670 E-F

In attempting to impugn the objectivity of the Canadian accounting firm employed as consultants to evaluate the applications, BGC produced a letter to show that the consultants had performed audit services for a subsidiary of the successful applicant. The audit services had been performed in 1999. The accounting firm later merged and a new firm was formed.[16] The Court held that there was no link between the Canadian firm and the Bahamian firm. A firm that had since merged to create the current structure provided the audit services.

The breach of natural justice argument also had two limbs:

a. failure to give reasons

b. failure to take into account relevant information.

BGC argued that in order to avail itself of the appellate procedure provided for in the Tel. Act, the PUC was obliged to give reasons. The Court held that the process was in the nature of a competition and that commons sense dictates, "the position must be that in a competition case, particularly in the instant case, no reasons need be given other than the successful party won (because it received the most points)".[17] The Bahamas does not have a law which requires reasons to be given and the call-for-applications did not stipulate that reasons would be given.

[16] All accounting firms being discussed are major international accounting firms. The firms will have presence in many major commercial jurisdictions. However, each firm has its partners.
[17] Per Lyons J, Bahamas General Communications Limited no. 678 of 2002. paragraph 206

In advising applicants of their strengths and weaknesses, the PUC had indicated to BGC that amongst the weaknesses identified was its financial capability and listed documents that had not been submitted as per the call-for-applications. BGC claimed that the projected balance sheet had been submitted and the failure of the PUC to consider this document resulted in them not scoring higher and therefore being successful. The Court made short shrift of this argument by saying:

> **The application was weak, in the general area of financial capability. The applicant assumes that, had certain material been considered, they would have won. That defies logic. The real situation was that they may have received more points, but still may not have won.**[18]

BGC appealed to the Court of Appeal but due to a procedural error the case was dismissed.

The PUC while involved with the litigation was also aware of political objections beginning to surface about the award of the public fixed radiocommunications licence. The Government had begun earnestly to privatize BTC. The premium, that the exclusivity periods was to attract, was jeopardize, because the public fixed

[18] no 678 of 2002 paragraphs 219 - 221

radiocommunications licence with the voice component (to be activated January 1, 2004) was perceived as negating it.

It may be helpful to recap the timelines involved. The July 2001 version of the telecommunications sector policy stipulated that the exclusivity of cellular voice telephony would end March 31st, 2002 and the fixed voice December 31st, 2003. The public fixed radiocommunications licence award was announced February 27th, 2002. Effective May 2nd, 2002, the Government vacated the dates completely for the end of the exclusivity periods. A general election was held May 2nd, 2002 and the administration that had ushered in the telecommunications sector policy and the privatization of government corporations, lost the elections. The new administration continued the privatization process. The legal action was instituted in April 2002. Thus, the award of the public fixed radiocommunications licence had been announced but the execution of the licence had not taken place. Despite the mantra of transparency, the PUC found itself in a precarious position. The PUC is required to implement the sector policy. The licensee is anticipating the receipt of the licence, but there is uncertainty whether the licence can be issued since the policy that existed at the time the call-for-applications was issued had changed. The PUC

continued to consult with the Minister on the policy and the developments that had occurred in the telecommunications sector since the July 2001 TSP had been issued. These discussions were confidential and the licensee could and was not privy to these discussions[19]. There was opaqueness. A revised telecommunications sector policy was published in October 2002 and it recognized the award of the public fixed radiocommunications licence (with the voice component). The public fixed radiocommunications licence was executed on October 23, 2002 allowing voice telephony commencing January 1, 2004. The publication of the October 2002 policy represented the culmination of the efforts of the PUC to assert its independent role, resist improper pressures and establish a reputation of competency and reliability.

CONCLUSION

The approach the PUC took in licensing wireless networks compares favourably with the recommendations to provide persons with an interest in a decision an opportunity to present their views, publishing the decision and the detailed reasons for reaching that decision and providing stakeholders an opportunity to challenge the decision through the appeal process. The survey and public consultations provided

[19] section 5(1)(a) The functions of the Minister shall be – to determine after consultation with the Commission the sector policy which shall be published in the gazette.

persons with interest to present their views. The call-for-applications set out the licensing criteria and the weight attached to each. Persons again had an opportunity to ask questions and comments on the document. Aggrieved parties will not have a right of appeal under the Tel Act, are able to seek redress by way of judicial review. The participatory nature of the process has merits. But it has its shortcomings which have to weighed in the scheme of things. The process is costly, slow and can be manipulated.

a. Costly

In the PUC's budget, public consultation is a line item in the budget. Budgetary provisions have to be made for engaging consultants, advertising and promoting the public consultation in the press, preparing the documents in a variety of media accessible forms. These costs are passed on to licensees (Attachment at page).[20]

b. Slow

Preparing the document, awaiting responses and analyzing the responses takes time and slows the decision making process. A comment from Oftel's use of public consultation

Formal written consultation on complex issues is time-

[20] Economic Regulators. The Better Regulation Task Force. July 2001: 30 - 32

consuming and imposes heavy demands on stakeholders. This powerful but resource-hungry tool must therefore be used with care. The consultation document addressed concerns, primarily from the communications industry, that consultation tends to be unduly protracted and regulatory action consequently slow.[21]

b. Manipulation

The regulator can tailor the consultation to obtain results it desires. Again citing comments received on Oftel's use of public consultation:

The consultation document sought the views of stakeholders on whether Oftel tends to engage in public consultation at the optimum point in the decision making process. Some stakeholders reported a perception that Oftel has already made up its mind on the issues before some consultation documents are published, thereby diminishing the value of the consultation exercise. However, most were concerned mainly that Oftel should make clear on each occasion whether it had already identified a preferred course of action.[22]

The PUC's experience with the wireless network underscored the different skills a regulator has to use when dealing with political and legal challenges. Addressing political challenges involves uncertainty and no

[21] Oftel's use of public consultation, 09 August, 2001
[22] Oftel's use of public consultation p. 8

defined rules of engagement and negotiating skills. Arriving at a solution is based on the ability to accommodate and compromise. Dealing with legal challenges is costly, resource consuming, uncertain but has defined rules of engagement. Arriving at a solution is based on demonstrating it is right and just.

Alleging bias is not uncommon. Advocates of a position seek any connection to allege bias/conflict of interests to disqualify or vitiate a decision. It is of concern because many small countries have limited investment opportunities, small communities with interwoven kinships and limited employment opportunities from which to readily obtain skilled persons to perform regulatory work. A robust disqualification requirement could leave the regulatory body with a dearth of qualified persons or require the payment of a premium to attract and retain staff. Regulators should be alert to the tactics of an aggrieved party to allege bias on the most tenuous of basis.

As for the public fixed radiocommunications licence, it is now gearing to go to market with voice by 2005.

ATTACHMENT

Regulatory Costs

There are two groups of costs -

1. Compliance costs i.e. the costs to industry of complying with regulation including regulatory departments in companies.

- The costs and resources devoted to regulation were widely felt by our stakeholders outside the regulators' offices to be excessive and a substantial burden on new entrants.

2. Operational costs i.e. the costs of running the regulatory offices.

- The WS Atkins report[13] notes that although cost increases have been erratic, the average increase since 1991 has been 7% in real terms, well in excess of inflation.
- These costs are inevitably passed on to companies as the regulators' offices are funded by the companies in the sector.

These increases in costs should be seen in the context of the increased workload of the regulators, and the benefits to consumers of increased competition and regulation. The WS Atkins report argued that these benefits "dwarf the cost of regulation", citing for example the £1billion (in real terms) annual reduction in domestic gas bills since the opening up of the gas market in 1996. However, consumer bodies have pointed out that these benefits have not been shared by all consumers.

The question arises: why has the cost of regulation continued to increase even after correcting for special factors such as the introduction of the new electricity trading arrangements by Ofgem?

Ofgem has set a target of 3.1% cost savings on recurrent expenditure in its 2001/2 Plan and Budget[14]. This is good practice which we would like to see other regulators following.