

COMPLIANCE, AN EFFECTIVE TOOL IN ATTAINING (TELECOMMUNICATIONS) SECTOR EFFICIENCY

By Dr. Joseph K. Nwude

Chief Engineer

DC Public Service Commission

1333 H Street, NW, Suite 700

Washington, DC 20005

**AT THE NIGERIAN TELECOM SUMMIT AT NICON HILTON, ABUJA,
NIGERIA**

OCTOBER 29-30, 2003

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BACKGROUND – PRELIMINARY MATTER

COMPLIANCE: The American Heritage Dictionary of the English Language provides the following definitions:

- Comply (verb): To act in accordance with a command, request, rule, wish or the like.
- Compliance (noun): A yielding to a wish, request, rule, demand, acquiescence.
- Compliant (adjective): yielding, submissive (in compliance).

REGULATORY ENVIRONMENT

- It is evident that a discussion on compliance necessarily requires a discussion of the environment in which compliance is sought, expected or demanded – the legislation, act, edict, law, and the associated regulations, rules, orders, authorizations, etc.
- At the risk of stating the obvious, legislations, acts, and laws are within the authority of the legislature or a similar body, whereas, the enabling regulations, rules, orders, authorization, etc. are the responsibilities of the executive agencies or quasi-independent executive agencies. The judiciary interprets the legislation with regard to intent, meaning and consistency with the Constitution and determines whether enabling regulations, rules, etc. are consistent with the legislation.

ENFORCEMENT

- In addition, a discussion of Compliance necessitates a discussion of Enforcement – its nature and forms, administrative structure, procedures, as well as penalties.
- The simple point we make is that to discuss Compliance we need to discuss Enforcement procedures as well as the legislation, regulation and orders on which compliance is required.

REASONABLE ASSUMPTIONS

- We will assume without proof that having laws in place to guide the provision of telecommunication services to the consumers will serve the public interest. Similarly, we will assume that having regulation for implementing such laws and an enforcement procedure to assure that the laws and regulation are complied with is also in the public interest.
- This way we can focus on the means and processes for establishing the laws and regulations, and, in particular, enforcing compliance with the laws and regulations so as to attain telecommunications service efficiency, which is also in the public interest. We will return later to discussing the benefits of Compliance and Enforcement and its role in enhancing telecommunications service efficiency.

SECTOR EFFICIENCY

Efficiency of the telecommunications sector may be viewed from the perspective of National Policy on Telecommunications and the objectives enunciated by the NCC. These include:

❖ Deregulate the industry so as to expand the number of access lines and thus increase teledensity.	❖ Provide affordable and reliable services.
❖ Facilitate the supply of telecom services and facilities.	❖ Protect consumers.
❖ Facilitate entry of private entrepreneurs into the telecom market.	❖ Foster efficient use of resources.
❖ Promote fair competition and efficient market conduct among all players in the industry.	❖ Enhance public safety.
❖ Provide universal access.	

REGULATORY ALTERNATIVES

In the US, as well as elsewhere, the traditional quasi-judicial, command-and-control regulation is being viewed as not likely to continue to provide effective and efficient regulation of the public utilities. The traditional model is being criticized as being too cumbersome and not capable of reacting with the sweeping changes necessary in the rapidly evolving utility marketplace.

US commissions are adopting alternatives to the traditional model, including the following in several combinations and different degrees:

- Legislative or Policy Model
- Regulation by Information Model
- Regulation by Negotiation Model
- Consumer Protection Model

REGULATORY ALTERNATIVES (CONTINUED)

There is no attempt, neither should there be one, to totally abandon the quasi-judicial model, neither is there an attempt to rely solely on any one of the models. On the contrary, commissions are adopting regulatory approaches and regimes best suited to their jurisdiction by combining the best features of the various models.

Features of Selected Regulatory Models

- Quasi-judicial model functions best for retrospective fact-finding, emphasizes fairness over outcomes and is reactive rather than proactive; consensus building and the introduction of innovation are especially difficult under it.
- Legislative or Policy model lays emphasis on effective decisions and primarily employs such processes as alternative dispute resolution (ADR), including such techniques as negotiated rulemaking, workshops, technical conferences (such as this Summit), advisory committees, task forces, and scientific panels (very akin to NCC's process).

Legislative or Policy Model (Continued)

- These processes can be fair if adequate notice is given and if all parties are given the opportunity to be heard. Commissions also apply such methods as procedural streamlining, such as arbitration and mediation.
- An example of this can be found in a recent (Sept. 2003) NCC Scheme – “Arbitration Scheme, Mediation Rules and Interconnection Dispute Resolution”. Other keys to commission use of the policy model are flexibility, stakeholder buy-in, a partnership with the legislature, and issue anticipation.

Regulation by Information ...

is characterized by its emphasis on empowering consumers by providing them with information and ensuring the existence of an information infrastructure (print, radio, television, world-wide-web, etc.) able to support more competitive markets.

- Providing utility service must be augmented with information so that consumers will be able to act in their own best interests. Providing useful information to consumers and policy makers and ensuring that information about utility markets and choices flows freely are methods that have the goal of creating a body of well-informed consumers.
- Properly constituted, the provision of information may create a system of self-regulation, perhaps more effective than traditional norms. In this regard, self-regulation could be achieved through the impact of market forces and the “educated” consumer behavior.

Regulation by Negotiation ...

attempts to move participants in regulatory issues further toward consensus models of decision-making. Its methods are less formal than adjudicated methods and permit people to have more active involvement in and control over the process for solving problems.

Regulation by Negotiation (Continued)

- They have been employed at the federal level in the US in part due to the Administrative Dispute Resolution Act (1990), which authorized and encouraged federal agencies to employ consensual methods. Federal agencies have also had success in using negotiations to establish government rules (known as reg-neg).
- The process is often used to mediate disputes between operators (service providers) such as in interconnection agreements. Keys for the use of regulation by negotiations include identifying the public interest, bringing all affected parties to the table, minimizing resource disparities, creating a negotiations infrastructure, ensuring that no party has a better alternative to negotiations, retaining the ability to walk away from negotiations if necessary, trusting the negotiations process, and protecting the reputation of the Commission.

Consumer Protection Model ...

is characterized by its focus on service recipients and monitoring of the market. As consumers take on more risk and are required to make more decisions in competitive markets, consumer protection is often suggested as an emerging role for public utility commissions.

Consumer Protection Model (Continued)

- Under traditional regulatory regimes, consumer protection was accomplished through the creation of proxies for competitive markets. Consumers were protected from external market failures, which were the result of there not being in place a market structure that allowed customers to have a full range of choices. Rates were set that protected consumers from price gauging and shareholders from unprofitable investments.
- The movement to introduce competition into utility markets is an attempt to protect consumers from external market failure using different means than employing regulation as a proxy for markets. As competition develops, commissions are paying more attention to protecting consumers from internal market failure, which results from unfair trade practices and include covert coercion, undue influence, deception, incomplete information, or needlessly confusing information.

Consumer Protection Model (Continued)

- With the commission movement from protecting consumers from external market failure to internal market failure came a second movement – from consumer protection to consumer enabling, that is providing them with the tools to make wise choices in competitive markets.
- Commissions will also need to protect consumers from internal market failures even in competitive markets. In order to accomplish this function, commissions should be prepared to set criteria for licensing as a screening function, respond quickly to unfair marketing and advertising practices, and umpire disputes between competitors and between customers and their suppliers.

Five Models of Commission Performance

	Quasi-Judicial	Legislative/ Policy Making	Regulation by Information	Regulation by Negotiation	Consumer Protection
Primary Focus	Fair process	Effective decisions	Free flow of information, informed consumers	Negotiation of win-win	Monitoring markets, focus on service recipients
Tools	Administrative process	Information gathering, decision making	Information collection, dissemination, education	Mediation, facilitation	Fraud prevention, economic monitoring
Success Indicators	Balance perceptions of fairness	Rapid effective decision making	Free flow of information, informed consumers	Creative outcomes, effective relationships	Maintenance of competitive markets, fraud reduction
Functions Best	In a stable environment	In a rapidly changing and novel situation	Where no party has ability to dominate flow of information	Where there is a need for innovation, relative balance of power	Under mostly workable competition
Examples, Metaphors, Models	Courts	Legislatures, corporations	SEC, <i>Consumer Reports</i>	Reg-neg, federal ADRA	Law enforcement, social welfare
Current Regulatory Applications	Regulatory proceedings	State use of ADR, industry efforts Consumer	education, labeling, complaint handling	Telco Intercom. Agreements	Slamming, cramming

ENFORCEMENT AT THE US Federal Communication Commission (FCC) [A Case Study]

The FCC's Role: FCC is the primary organization responsible for enforcement of the provisions of the US Communications Act and the FCC implementing rules. The FCC has the authority to investigate possible rule violations and to take enforcement action, if warranted. The FCC, itself, does not have the authority to take criminal action against violators. The FCC refers cases warranting criminal prosecution to the US Justice Department. This, in large measure, parallels the NCC's role.

The FCC's Authority: The Communications Act of 1934 governs The FCC's enforcement authority. The Act provides the Commission with a variety of tools to investigate violations and to ensure compliance with the Act and the Commission's rules. The NCC derives its authority from the Nigerian Communication Act, 2003. The FCC delegates its enforcement authority to its Enforcement Bureau, which is comprised of four divisions and 25 field offices with the following primary responsibilities:

The FCC's Authority (Continued)

- **Telecommunications Consumers Division** is responsible for enforcement regarding consumer-related obligations of operators such as prohibitions on slamming, resolution of formal complaints filed by consumers against operators (operator/consumer relationship)
- **Market Disputes Resolution Division** is responsible for resolution of complaints against common carriers (wireline, wireless, and international) by competitors involving competition and other market-related issues. The Division is also responsible for resolution of pole attachment complaints. Moreover, the Division participates in negotiations between carriers to facilitate settlement of disputes before complaints are filed. (operator/operator)

The FCC's Authority (Continued)

- **Spectrum Enforcement Division** is responsible for resolution of complaints and enforcement involving public safety and technical issues such as tower marking and lighting, equipment requirements, Emergency Alert System rules and unauthorized construction and operation.
- **Investigation and Hearings Division** is responsible for resolution of complaints and enforcement involving wireless licensees on non-technical matters such as unauthorized transfer of control, auction collusion and misrepresentation. The Division is responsible for operator audits and for suspected or alleged non-compliance by operators with various market-related requirements.
- **Regional and Field Offices** are responsible for handling a variety of on-scene investigations, inspections and audits in response to complaints and in support of the Commission's operations.

An important observation about the number and areas of authority of these divisions is that they are organized around issues relevant to the US Telco environment.

Enforcement Mission and Approach at the FCC

The FCC Enforcement Bureau proffers an enforcement philosophy couched in the “4F” –

4F



Firm

Fast

Flexible

Fair

aimed at achieving results couched in

2P's and 2F's



Promote competition

Protect consumers

Foster efficient use of resources

Further public safety goals

FCC's Enforcement Process- Ways FCC Learns About Possible Violations

- **Complaints**

In most cases, violations are reported to the FCC through complaints filed by another licensee, a competitor, consumer, or some other interested party. Complaints can be “formal” or “informal”. Formal complaints must contain certain information required by the FCC’s rules and may be subject to a filing fee. Informal complaints may be filed in letter format. The Communications Act imposes a time limit or “statute of limitation” by which the Commission may take certain enforcement actions (i.e. assess forfeitures) against specific violations.

- **Petition to Deny a License Application**

Violation can come to the attention of the FCC in the license application process through the filing of a petition to deny a license application or, for some services, an informal objection to such an application. Such petitions must be supported by an affidavit or declaration of a person with personal knowledge of the facts alleged.

In some cases, violation of FCC rules may result in denial of a license application after a hearing.

FCC's Enforcement Process- Ways FCC Learns About Possible Violations (Continued)

- **Admission By the Violating Party (Self Regulation)**

Some parties voluntarily report their violation to the Commission. Usually, these parties discover their violation through their own internal audit processes. The FCC encourages parties to disclose voluntarily any rule violations. The FCC may consider a party's voluntary disclosure when determining appropriate enforcement action, if any.

- **FCC-Initiated Inspections and Investigations**

The FCC's Enforcement Bureau, primarily through its agents located in 25 different places through the US, often conducts inspections of FCC-licensed facilities. Rule violations are often uncovered during these inspections.

- **Audits of Common Carriers**

The Enforcement Bureau may use field audits of a carrier's books, records and other data for the purpose of determining if that carrier is in compliance with the Act, the Commission's rules or orders.

FCC's Investigative Tools

Letters of Inquiry

The Letter of Inquiry generally is a way to get information directly from a licensee or other relevant entity. For example, to initiate an investigation into a matter, to determine whether to continue a proceeding beyond a preliminary stage of investigation or to gather more information during the course of an ongoing investigation. The FCC's rules prohibit misrepresentation or willful material omissions in responses to Letters of Inquiry. (In addition, under 18 USC Section 1001, a respondent who makes knowing and willful misrepresentation or omission may be subject to possible criminal penalties.)

FCC's Investigative Tools (Continued)

Field Inspections and Investigations

In response to a complaint or on their motion, the Enforcement Bureau's Field agents conduct inspections of FCC-licensed or regulated facilities. In many cases, these inspections reveal violation of the FCC's rules such as, operation with excessive power, operation with an expired FCC license, or failure to comply with the FCC's public inspection file regulations.

Administrative Subpoenas

A subpoena requires the recipient to release all information related to a particular matter under investigation. The enforcement bureau has the authority to issue subpoenas to obtain information necessary to complete an investigation.

Enforcement Actions

Enforcement Actions

The FCC's primary goals in enforcement are to bring licensees and others into compliance with the FCC rules and impose penalties where appropriate. The Commission and the Enforcement Bureau have a number of tools at its disposal to achieve these goals.

Enforcement Actions (Continued)

- **Letter of Admonishment/Warning**

In some cases, the FCC may determine that the violation warrants an admonishment or warning. Such a letter informs the subject that its actions violate the FCC's rules and warn the subject to take steps to ensure compliance with the rule in the future. In these cases, issuance of the warning letter may officially conclude the matter. However, the FCC may choose to monitor the subject or inspect the subject's FCC-licensed facilities at a later date in order to determine future compliance. Failure to comply with a FCC rule after issuance of a Letter of Admonishment/Warning can lead to more severe enforcement action.

- **Notice of Violation or Notice of Probable Violation (NOPV)**

Like a warning letter, the Notice of Violation informs the subject that its conduct violates the FCC's rules. However, unlike the warning letter, the subject is required to submit an explanation of its actions in response to a Notice of Violation. The response to the Notice of Violation may close the matter or may lead to further investigation or more serious enforcement action.

Enforcement Actions (Continued)

- Citation

The Citation generally is issued only in cases where the subject (1) does not hold or is not an applicant for any type of FCC license, certification, permit or other authorization; (2) is not a cable operator, and (3) is not an antenna tower owner. The Citation is similar to a warning letter in that it informs the subject that its actions are in violation of the FCC's rules. The FCC may not impose a monetary forfeiture against a subject who does not ordinarily conduct business with the FCC unless it has first issued a Citation, and the subject then continues to violate the Act or the FCC's rules.

Enforcement Actions (Continued)

- **Monetary Forfeiture**

The Commission may assess a monetary forfeiture (fine) for violations of the Communications Act and the Commission's rules. Generally, the Commission first issues a Notice of Apparent Liability ("NAL") to the subject. The NAL lays out the relevant facts and informs the subject that: (1) the Commission believes that it has violated a specific provision of the Communication Act and/or the FCC's rules; and (2) the FCC believes that a certain dollar value fine is appropriate. Forfeiture amounts are based on the Commissions' Forfeiture Guidelines.

The party receiving the NAL may either pay the forfeiture or file a response explaining why the NAL should either be reduced or canceled. If the Commission finds the forfeiture is not warranted, it will issue an Order canceling the NAL. If the recipient does not pay the forfeiture within 30 days from the date the Forfeiture Order was issued, the Commission may refer the matter to the US Department of Justice for collection action in federal district court.

Enforcement Actions (Continued)

- **Various Other Enforcement Actions include:**

Consent Decrees – agrees to take stipulated steps to ensure compliance; Cease and Desist Orders – order party to cease noncompliance without fines; license revocation – for very serious violation; seizure of equipment – in coordination with Justice Department for warrant for seizure; referral for criminal prosecution – willful violation may result in fine and or imprisonment.

Sample of FCC's Benchmark of Fines

The base amounts listed in the table are based on 40-80% of the statutory maximums. For continuing violations involving a single act or failure to act, the statutory maximum fine is one million dollars for common carriers (operators providing services to the general public) or applicant, and \$75,000 for all others.

Sample of FCC BASE AMOUNTS FOR SECTION 503 FORFEITURES Prior to 1997

VIOLATION	AMOUNT
Misrepresentation/lack of candor	Statutory maximum \$1M
Construction and/or operation without an instrument of authorization for the service	\$10,000
Failure to comply with prescribed lighting and/or marking of towers	\$10,000
Violation of public file rules	\$10,000
Unauthorized substantial transfer of control	\$8,000
Alien ownership violation	\$8,000
Failure to permit inspection	\$7,000
Interference	\$7,000
Importation or marketing of unauthorized equipment	\$7,000
Exceeding of authorized antenna height	\$5,000
Unauthorized discontinuance of service	\$5,000
Use of unauthorized equipment	\$5,000

Sample of FCC BASE AMOUNTS FOR SECTION 503 FORFEITURES Prior to 1997 (Continued)

VIOLATION	AMOUNT
Exceeding power limits	\$4,000
Failure to respond to Commission communications	\$4,000
Using unauthorized frequency	\$4,000
Construction or operation at unauthorized location	\$4,000
Violation of transmitter control and metering requirements	\$3,000
Failure to file required forms or information	\$3,000
Failure to make required measurements or conduct required monitoring	\$2,000
Failure to maintain required records	\$1,000
Unauthorized conversion of long distance telephone service (Common Carrier)	\$40,000
Violation of operator services requirements (Common Carrier)	\$7,000
Violation of pay-per-call requirements (Common Carrier)	\$7,000

Sample of FCC BASE AMOUNTS FOR SECTION 503 FORFEITURES Prior to 1997 (Continued)

Upward Adjustment Criteria

- ❖ Egregious misconduct
- ❖ Ability to pay/relative disincentive
- ❖ Intentional violation
- ❖ Substantial harm
- ❖ Prior violations of any FCC requirements
- ❖ Substantial economic gain
- ❖ Repeated or continuous violation

Downward Adjustment Criteria

- ❖ Minor violation
- ❖ Good faith or voluntary disclosure
- ❖ History of overall compliance
- ❖ Inability to pay

COMPLIANCE AND ENFORCEMENT (C&E) ENHANCE TELECOM SECTOR EFFICIENCY – CONCLUSIONS AND RECOMMENDATIONS

Compliance and Enforcement (C&E) should be a critical part of the NCC's plan to promote and preserve sector efficiency and the gains made under the Nigerian Communications Act 2003 and the NCC's implementing regulations.

ROLE OF THE OPERATOR

- As the NCC sets “Rules of the Road” to sector efficiency, all players must obey the law.
- Operators must understand that they cannot gain an advantage through unfair market practices.
- Operators must understand that if they violate communication laws, there will be significant consequences.

NCC's Role

- NCC's enforcement philosophy should include the "4Fs" – FIRM, FAST, FLEXIBLE, and FAIR
- Commit to acting quickly and concisely, manage cases aggressively, work with operators to resolve disputes quickly and fairly.
- Provide swift, clear answers to impending disputes so that Operators have a good understanding of their legal obligations.
- FIRM – Stick to an enforcement decision and see that it is implemented unless compelling evidence is provided to justify a change. Enhances NCC's credibility and sends appropriate signals to all.
- FAST – Organize and manage case dockets, set and meet time frames, provide adequate resources, track progress, communicate inevitable slippages. Develop benchmarks with extensive staff input. Builds confidence in all stakeholders, enhances NCC's credibility.
- FLEXIBLE – Recognize "special" circumstances such as new entrants, inability to pay fines based on gross revenues, good faith or voluntary disclosure, history of overall compliance, substantial economic gain, egregious misconduct, relative disincentive (deterrent), substantial harm, etc. Does not conflict with "FIRM." Where the penalties for specific violations are provided in the Law, opportunities for flexibility are limited.

NCC's Role (Continued)

- FAIR – To the extent possible, provide a level-playing field.
 - ❖ An effective way for achieving fairness is to develop benchmarks for fines, in addition to applying the enforcement process in a uniform manner. (Still retain flexibility in determining fines)
 - ❖ Benchmarking fines can be quite difficult, but needs to be done. Two options for benchmarking fines:
 - ❖ Case by case approach without guidelines but also using relevant precedent.
 - ❖ Provide guidelines and benchmark base fines on the basis of the type or nature of the violation and retain the discretion to look at the individual facts and circumstances of the particular violation (preferred from fairness perspective).

NCC's Role (Continued)

- As a general guideline, the legislature should assure that:
- The maximum amount of fines permitted for single and multiple violations must provide effective deterrent for highly profitable communications entities and provide sufficient penalty to warrant the chief law enforcement officer's attention for prosecuting fines in the courts.
- An effective C& E creates an environment of law-abiding operators, regulators and the consumer.
- NCC's credibility is enhanced when operators and consumers know that violators will be penalized in accordance with the "4F" motto.
- In order for operators to have a good understanding of their legal obligations (a prerequisite to obeying the law), NCC must provide the "rules of the road" including its regulations, enforcement process, and penalty structure.
- The penalty structure including fines should serve as both a meaningful sanction to the wrongdoers and a deterrent to others.
- An effective C&E could energize and empower the consumer and the public at large to assist the NCC in becoming aware of potential violations.
- By informing the consumer of operator violations and NCC enforcement actions, the informed consumer behavior could compel operators to become self-regulating in response to market behavior.

NCC's Role (Continued)

- The NCC should develop more specific rules of the road guidance such as:
 - ❖ Carrier to Carrier Guidelines to address operator/operator relationships – provisioning, reciprocal compensation, interconnection, etc.,
 - ❖ Quality of Service Standards (Consumer Bill of Rights) – rights and responsibilities of the consumer relative to the operator and the operator's responsibilities and rights. Such issues as help desks, call centers, and service restoration are covered here and may include installation of service, operator handled calls, transmission and noise requirements, network call completion, customer trouble reports, major service outages, service disconnection, billing and collection, customer satisfaction surveys, and public payphones.
 - ❖ Performance standards and monitoring, penalties, Performance Assurance Plans (PAP), etc.
 - ❖ “Arbitration Scheme, Mediation Rules and Interconnection Dispute Resolution” adopted by NCC in September 2003 – addressing small claims consumer dispute arbitration, arbitration rules, mediation procedures rules, and arbitration of interconnection dispute rules.
 - ❖ NCC should continue to develop and implement a scheme for operators to report, on a regular basis, essential data to enable the NCC to evaluate the state of the sector and its performance, including technical and financial data as appropriate. This must not be overly burdensome on the operators.

Closure

Compliance and Enforcement are critical to enhancing sector efficiency. The NCC must set the rules of the road to compliance; Practice the 4F motto in enforcement; And apply enforcement actions as a meaningful sanction and as a deterrent. Operators must know that violators of communications laws will be penalized. An effective c&e could energize and empower the consumer and the public at large to assist the NCC in becoming aware of potential violations. An informed consumer behavior in the market place could persuade an operator to become self-regulating.

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THANK YOU!

Question and Comments