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Office of the Commissioner/CEO

20 February 2009

Mr Henao Iduhu
Secretary
Department of Communication and Information
P O Box 1122
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NCD

Dear Mr Iduhu,

SUBJECT: DRAFT REPORT ON ICT POLICY PHASE 2 REFORM – ICCC SUBMISSION

I refer to the above draft report which was received by the Commission via email from your Newman James at 4:31pm on February 10, 2009. The Independent Consumer and Competition Commission (“Commission”) is very concerned that the 10 days given for comments is inadequate for perusal of the 441 page draft report and submissions on such an important policy document, and provides its comments under protest.

The Commission emphasizes that the independence of the office and processes of the regulator is critical to ensuring industry and general consumer confidence. We provide below some broad comments on some of the key recommendations. Our submission to all the recommendations is attached.

- The ICCC does not believe that transfer of all licensing powers to the new ICT Regulator to be formed out of PANGTEL is the right approach for the country. Licensing powers should be vested with an independent body that has a strong commitment to integrity, transparency, accountability and a track record of strong corporate governance and compliance with all statutory checks and balances. Giving such powers to PANGTEL will not achieve that objective.
- ICCC believes that the recommendation that PANGTEL be rebadged to be the ICT Regulator is logically flawed and is contrary to wider industry stakeholder views and should not be pursued. The ICCC is ready and willing to assume the duties and responsibilities of a converged regulator.
- The rights of existing licensees must be respected and any migration to the new regime must ensure that the Government is not liable for any damages.
- Immediate deregulation of retail prices for Telikom’s fixed network while it continues to be a monopoly is illogical.
- The liberalization of the international gateway is to be cautiously welcomed but the specifics of such liberalization need to be agreed, including any licence fee.

“ Friend to Businesses, Friend to Consumers ”

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While the ICCC agrees with recommendations associated with the opening up of the international gateway and allowing competition in other aspects of the industry under the proposed licensing arrangements, we fail to see any justification for the transfer of licensing powers and functions to PANGTEL, whether reformed or otherwise. The Commission has built up a strong track record in its short history of regulating the sector, scoring a lot of runs on the board for the country and industry stakeholders to judge. We fail to understand these recommendations in the light of majority stakeholder views that the ICCC telecommunications regulatory functions should be maintained or even further strengthened, with the ICCC accountable to Parliament and not to any specific government minister.

As part of its good governance, the ICCC has adopted a decision making process designed to ensure the decisions are fair and reasonable based on merit and very little room, if any, for biased and non-merit based decisions. Most industries that ICCC regulates are aware of this and many have expressed satisfaction in ICCC's decision making process, including those who have had decisions made against them. Before any decision is made by the ICCC, the matter is referred for analysis by the division responsible together with legal, technical and commercial advisors and recommendations made for approval by the Commissioners. The three (3) Commissioners, two from outside the ICCC, all of whom are appointed on merit, have special expertise which they contribute to the decision making process before a final decision is made. For telecommunications regulatory matters including licensing, interconnect and pricing issues, the non-resident Associate Commissioner, Mr David Dawson, who has the relevant expertise, has oversight over them, works with the ICCC regulatory team and legal team (including external legal advisors) to ensure technical and legal correctness before the matter is referred to the three Commissioners for a group decision. Such decisions are not made by one Commissioner and it is not possible for a Commissioner or anyone to influence any decision to be inconsistent with the technically and legally correct options recommended by the ICCC team.

There are both internal and external checks and balances in the decision making process which is very healthy for good governance and transparency that the draft report advocates for a regulator.

We trust that the Department of Communication and Information will consider very carefully the majority stakeholder view and make necessary changes and put forward to NEC a Report that best suits the particular circumstances of PNG and not a cut and paste solution from other jurisdictions.

Yours sincerely,



Thomas Abe
Commissioner & CEO

Encl:

ATTACHMENT 1

DETAILED ICCC SUBMISSION

ON

DRAFT REPORT ICT POLICY PHASE 2 REVIEW

PART B THE PATHWAY TO OPEN COMPETITION

1.0 LICENSING ARRANGEMENTS

Recommendation 1.1

Agree, licensing responsibilities be assigned to a single Regulator, which should be ICCC, but for timely implementation of the proposed reforms during the 12 months transition period, allow ICCC to implement the proposed operator licensing reforms including migration of current licences and codification of licensing application process whilst PANGTEL implements the proposed spectrum licensing and allocation reforms.

Recommendation 1.2

Agree to proposal for unified licensing to have three-category horizontal licensing structure comprised of Network Providers, Service Providers and Content Providers.

Recommendation 1.3

Agree, operator licences to be technology and service neutral as in 1.2 above. Also agree, keep spectrum licences separate, as it is being done currently.

Recommendation 1.4

Not an issue. Current amended Telecommunications Act introduced class licences and defined them as distinct from operator licences.

Recommendation 1.5

Not an issue. The licences are subject to the law and the effects of removal of current regulatory barriers in legislation and regulatory instruments will immediately flow to existing licences. Appropriate amendments to current licences can then be made or new replacement licences issued with terms consistent with the changes in the law.

Recommendation 1.6

Spectrum management is currently being done by PANGTEL. ICCC agrees with improving the mechanisms for spectrum allocation and assignment, consistent with the reforms proposed in operator licensing.

Recommendation 1.7

The requirement for annual licence fees to reflect actual costs of administration is already set out in section 19J of the Telecommunications Act and ICCC has been having its costs of administering Telikom's licences audited by independent auditors which are then made available to Telikom. Agree annual licence fees should be consistent and transparent, should reflect actual costs and be independently audited.

Overall, ICCC agrees with recommendations for reform in operator licences by making the licences technology and service neutral and improving licence application process. The proposed reforms can be immediately implemented without any changes for the time being to the institutional arrangements. We

believe ICCC is currently best placed to implement the proposed reforms in operator licences, and PANGTEL is currently best placed to implement the reforms in spectrum management. The perceived conflicts between ICCC and PANGTEL noted in the Report were in areas insignificant in the overall management by ICCC of operator licensing and by PANGTEL of spectrum licensing, and we do not see them impeding the implementation of the respective reforms by the two organisations. Both organisations know their functions which are clearly demarcated by legislation and, except for those few conflicts which are mainly in matters concerning PANGTEL's functions of spectrum licensing, have worked within those parameters. Like the ISM Band conflict noted in the Report and others, most conflicts are relatively minor and arose when ICCC disagreed with what PANGTEL was doing because of differences in the interpretation of law by the ICCC and PANGTEL.

The operator licensing and spectrum licensing reforms proposed are quite good. For a timely and comprehensive implementation as recommended by the Report within the specified 12 months transitional period, we believe it can best be done by concentrating time and resources on the substantive licensing reforms in the first 12 months and looking at the institutional reforms after that.

We believe PANGTEL is capable of implementing the proposed spectrum licensing reforms with its existing institutional structure and ICCC is likewise capable of implementing the proposed operator licensing reforms with its existing institutional structure. Hence, both organisations should be allowed to implement the proposed reforms within their respective current areas of responsibility. It would take time and resources first to implement the proposed reforms of PANGTEL's institutional structure to make it like ICCC and for PANGTEL to be the sole ICT Regulator, secondly to build up PANGTEL's capacity to deal with its new functions in operator licensing, and thirdly to implement both the operator licensing reforms and the spectrum licensing reforms.

As noted in the Report (p86), consultation feedback supports the view that ICCC's licensing powers have been exercised in a professional manner and ICCC's independence from political process has been commended by industry participants and observers alike.

2.0 INTERNATIONAL GATEWAY LIBERALISATION

The liberalization of the international gateway is to be cautiously welcomed but the specifics of such liberalization need to be agreed, including any licence fee. There needs to be a further study on how many gateways are sufficient for the country and the timeframes for opening up competition.

3.0 WHOLESALE REGULATION AND ACCESS

The ICCC is in general agreement with the adoption of the option 3 proposed by Freehills, with the changes proposed in the following paragraphs.

The ICCC agrees that once the legislative framework is changed to allow open access for the three types of licensed providers, ie: network providers, service providers and content providers, the recommendations for change to the access arrangements to provide a "declared" services and facilities access & interconnect regime should be implemented (R.3.1).

The changes to the law need to support transitional arrangements for access and interconnect for both network providers and service providers, whereby initial “declared” services are specifically defined but the ICCC believes the list of these services included in option 3 (Section 5.3.1), be enhanced by other services clearly necessary to support the activities of ISPs currently having VAS licences, and so “declared” services should also include:

- international voice interconnection and international data interconnection to the internet, for the period in which one international gateway is mandated;
- ADSL, VSAT and WiMAX customer access; and
- Point-to-point Ethernet transmission links.

The ICCC believes that the proposed veto by the Minister of the ICT regulator’s final decision for declaration of a service following application of due process is unnecessary and will introduce political risk which would be counter to the stated principle of the Freehills report to encouraging transparency in regulatory decisions and hence encouraging additional investment.

The approach to a benchmark test (R 3.3) the third dot point should include the words “relevant market” as follows:

- whether lack of access would pose a barrier to entry that is likely to make otherwise efficient entry into the relevant market uneconomic; and

This is to ensure availability of bottleneck or other monopoly wholesale services in one market do not affect the ability to provide retail services in another competitive market.

The Minister’s ability to veto a recommendation by the ICT regulator for a declared service (R.3.4), needs to require a statement of reasons, and should be appealable in court.

The pricing principles for telecommunications services should be embedded in the Telecommunications Act, and the list of principles in Section 5.4.2 should be augmented to ensure that “full cost recovery” does not mean that efficient component pricing rule (ECPR) is mandated. Such rules requiring opportunity profits in a competitive market being paid to the access provider for interconnect in the bottleneck market will not meet the objectives of the Freehills for fair and open competition. In addition, the secondary emphasis on economic efficiency behind full cost recovery (Section 5.4.1) is a major concern which does not accord with the international best practice examples cited in the report.

Therefore the ICCC recommends there should be the inclusion that the ICT regulator has regard to:

- the requirement for a fair and reasonable contribution to the access provider’s common costs, but not to the extent that the efficient component pricing rule (ECPR) is accepted; and
- national and international benchmarking of costs should be considered to test whether in similar situated access providers in similar country development situations, suggest that the efficient costs differ from actual costs being represented to the ICT regulator, in which case the exclusion of the inefficient costs from the actual costs may be considered by the ICT regulator.

An additional requirement needs to be imposed on all network providers which provide declared services, in that their books of account must be able to provide the actual cost information, and their operational & billing information must be able to provide the actual service volume delivery information, which would enable the ICT regulator to use the published access dispute guidelines (including detailed cost methodology under R 3.6) to allow the ICT regulator to perform an arbitration within a four month time frame. Where the availability of such information is tested and is lacking, the ICT regulator should be able to impose an accounting separation and operational monitoring guideline and/or code on that network provider.

The development of a reference interconnect offer (RIO) by a network provider must be mandated to be developed within 3 months of a service becoming a “declared” service. Telikom’s continued lack of development of an RIO under the Interconnect Code is clearly a reason to mandate such a requirement.

Lastly, the proposal by Freehills (Section 5.1.5 (1)) to remove the ICCC’s ability to declare entities and/or goods and services under the ICCC Act (Section 33(1) of the ICCC Act which is subject to a Ministerial consultation process Section 33(6)), and the proposal to remove the mobile roll-out obligations in the mobile licences are both misguided and respectively, do not factor in the ICCC other sector regulation responsibilities (for example post, ports & harbours, water, electricity, petroleum products, taxis and PMV’s) which are not the subject of the current ICT review and could be damaged by such a change to the ICCC Act, nor support the World Bank approach to the provision of a universal access scheme (UAS) and is not competitively neutral as it disadvantages Digicel and advantages Telikom again at odds with Freehills own stated objectives for the sector.

4.0 RETAIL REGULATION AND PRICING

Immediate deregulation of prices for Telikom’s fixed network is an ill conceived idea when it is still and would continue for some time to be the monopoly fixed network provider. While the Commission agrees that Telikom’s mobile prices should eventually be deregulated, such can not occur immediately until there is clear operational separation between the fixed and mobile networks in terms of costs and operations.

The Freehills Report indicates that it is very unusual to have the responsibility for licensing functions residing in the general competition regulator¹. But at the same time it recommends transfer of both the licensing and the economic (pricing) functions to the current technical regulator to form a converged regulator for the ICT sector. The transfer of economic (or pricing) functions is less of a focus for the recommendations of the Freehills Report which tend to pivot on concerns of the licensing function being misapplied rather than on concerns for the economic (and pricing) functions being undertaken by an institution with proven skills.

When overseas jurisdictions are examined to see where the economic (and pricing) functions reside, there are numerous examples where these do reside within the general competition regulator, for example the ACCC in Australia, or within a sector specific regulator, for example Ofcom in UK. There are fewer examples of these economic (and pricing) functions residing in a sector-specific technical regulator, which is PANGTEL’s current primary skill set.

¹ Page 85

PART C FUTURE OF COMMUNITY SERVICES

5.0 UNIVERSAL ACCESS SCHEME

The Commission agrees that the current roll out obligations requiring the mobile licensees to roll out their networks to 229 locations in PNG remain. This mandatory obligation ensures that these locations will receive telecommunication services even if some of these locations would have received telecommunication services regardless of the mandatory obligation.

The Commission wrote extensively in its earlier submission and believes that the Rural Connectivity Fund (RCF) should be funded by a combination of Government, Industry and Donor funding. Such universal services arrangements should be undertaken in a broader context where all other sectors are also considered. It should complement the Government's broader objectives under the current Long Term Development Strategy for all utilities we understand are being developed.

The Commission continues to believe that any regime and institution that is established to administer the rural connectivity fund must have strong independence from Government. The proposal that the Board make recommendations to the Minister and for the Minister to make the final decision on the allocation of funds does is not consistent with the principles of accountability, transparency and credibility that the Report promotes. Such arrangements could turn the RCF into a 'pork barrel' fund whereby projects are not approved based on social and economic merits, but are approved based on political considerations.

PART D SUPPORTING ARRANGEMENTS

6.0 INSTITUTIONAL ARRANGEMENTS

The ICCC agrees with the recommendation 6.1 that a new converged ICT Regulator should be the primary regulator for the ICT sector, to possess all licensing functions and powers. **However, the ICCC does not agree that PANGTEL should be reformed and reconstituted into that new ICT Regulator. Such a recommendation is:**

- **illogical,**
- **totally against the weight of evidence and argument in Chapter 6 of the Freehills report,**
- **not supported by most of the ICT industry and others consulted,**
- **would be costly to implement, and**
- **would not result in a truly independent, transparent and accountable regulator in which the ICT industry would have confidence.**

The Report goes to great lengths to discuss the various types of regulators around the world, identifies the need for independence as the most critical factor, along with transparency and accountability, with secure financial and human resources. Such a body needs to have appointments made on the basis of professional qualifications rather than political allegiances, by a body other than the line Minister, and by reference to pre-determined appointment criteria². The ICCC agrees with all of this.

The report also endorses³ a specific ICT sector regulator (fully converged if possible), which is:

- entirely separate from the Minister responsible for communications;
- entirely independent from industry; and
- accountable to Parliament (or a Minister responsible for economic development generally).

The ICCC has all of these attributes now; PANGTEL does not. The report notes that its recommended model would replicate “in many respects, the model adopted by the ICCC”⁴. By contrast, “PANGTEL, whatever its merits, requires reform. It should be reformed, reconstituted and renamed...”⁵.

This is clear from the views of the ICT industry and others. The ICCC “receives a significant amount of support from industry participants and is recognised as a fiercely independent body.... The commission model appears relatively agile and accords with international best practice principles”⁶. On the other hand, “participants in the consultation process appear to have less faith in PANGTEL’s institutional structure”⁷, and “industry has little appetite to maintain the current regime and little support for PANGTEL in its current form”⁸.

² ICT Report, page 337

³ At page 328

⁴ Page 367

⁵ Page 364

⁶ Page 351

⁷ Page 351

⁸ Page 360

In light of these comments and analysis, why should the new ICT regulator be, in effect, a rebadged PANGTEL? What has the ICCC done wrong, to lose its regulatory responsibilities, and what prospects does PANGTEL offer for doing it right?

Perhaps it is because the ICCC has been “fiercely independent”, yet that is exactly the principal characteristic recommended for the new ICT regulator.

But the current apparent defects and deficiencies in PANGTEL seem enormous. There appear to be major problems with PANGTEL’s corporate governance. As the report notes, “as with the ICCC, PANGTEL has audit and reporting obligations pursuant to the *Audit Act* 1989 and the *Public Finance Management Act* 1992”⁹; however, unlike the ICCC, PANGTEL appears to have ignored those obligations.

The Report notes¹⁰: “We have been provided with very little evidence of effective financial reporting by PANGTEL.....the Auditor General was unable to form a final opinion [on PANGTEL’s 2005 finances] given the lack of quality financial information.....[on various amounts ranging from K3.8 million to K16 million]....We understand that the Auditor General was also unable to form a final opinion on the financial statements for the year ending 31 December 2004. PANGTEL was unable to provide details, as part of this review, of its costs in the financial years ending 2006 and 2007 or give a likely indication of costs for the 2008 financial year. Similarly.....PANGTEL has yet to submit outstanding reports required under section 63(5) of the *Public Finances Management Act* 1995 for tabling in Parliament”.

In light of this, it seems extraordinary that the Report recommends that PANGTEL form the basis of the new ICT regulator. It is fine to say that the new regulator should have strong accountability and transparency obligations, but it seems clear that PANGTEL has, to date, simply ignored those obligations. Why should it be any different under a new regime?

By contrast, the ICCC does comply with its obligations under the *Public Finances (Management) Act* and the *Audit Act*. There is no suggestion of impropriety or lack of compliance by the ICCC, which observes world’s best practice. Yet PANGTEL is recommended as the basis of the agency to be the new regulator. This does not seem logical, nor does it make sense.

PANGTEL also does not have a good track record in successfully undertaking the tasks it is required by law to do. The major technical regulation task is development of technical codes of conduct and technical standards. However, “A number of consultation participants have raised concerns about a lack of technical standards or codes on foot”¹¹. This is not surprising; as far as we are aware, in the twelve years of its existence, PANGTEL has promulgated no technical standards and has promulgated only one code of practice, for numbering, which was forced upon it by the ICCC when mobile competition was introduced, notwithstanding PANGTEL’s statutory obligation to develop a national numbering plan “as soon as practicable” after PANGTEL’s creation in 1996¹². PANGTEL’s draft Technical Interconnect Code has never been implemented as carriers have pointed out it is unworkable.

⁹ Page 325

¹⁰ At page 353

¹¹ Report, page 356

¹² Telecommunications Act section 81(1)

A far better alternative to reformulating PANGTEL as ICT regulator would be for the new regulator to be developed from the ICCC, which already has all the necessary institutional arrangements in place, as acknowledged by the Report. The most appropriate and least cost solution would be for the new ICT regulator to be developed from part of the ICCC and to be a division of the ICCC (as is the case with ICT regulation in Australia, where the ACCC's Telecommunications Division is effectively the ICT regulator), and incorporate into that division, those PANGTEL staff with the expertise necessary to undertake technical aspect of ICT regulation.

This solution would provide the following benefits:

- the ICCC would have the support of most of the ICT industry and ICT consumers
- there would be little cost; much less cost than reforming PANGTEL
- there would be no overlapping or jurisdictional problems
- the independence, accountability and transparency would be guaranteed without need for extensive legislative amendment
- the institutional arrangements would conform to world's best practice.

7.0 INFORMATION SECURITY

The Commission broadly agrees with the Information Security arrangements that have been recommended in the Draft Report and considers that as much as possible, information security laws, procedures and institutions that maybe introduced to safe guard personal, business and national electronic information must conform to international best practice. The Commission does acknowledge that PNG may potentially lack the financial and technical capacity and human resources to monitor and enforce these laws, however, notwithstanding this, at the very least, the Commission supports that laws are introduced and administrative arrangements put in place to address information security issues.

8.0 TECHNICAL REGULATION

8.1 EXISTING REGULATORY REGIME

The Commission generally agrees with the recommendation 8.1 through 8.6 of Chapter 8 but notes that there are technical regulatory issues that have been outstanding for a while. The technical regulator does not seem to have the capability to effectively administer and police some aspects of the industry. Concerted efforts have to be made when the new ICT regulator is required to have the capacity to effectively manage those issues that have been outstanding for a while. Many of the obligations under section 2 have not been fully operational or implemented to date.

8.2 INTERNATIONAL BEST PRACTICE

Adopting international best practice without due consideration to PNG context would not be practical. A copy paste approach to policy, guidelines or codes would be inappropriate. This would show a lack of competency of the personnel's in technical regulation and therefore would require appropriate knowledge and skills to provide sound advice inline with the regulatory framework.

8.3 KEY ISSUES AND CONCERNS

It is a concern that the development of technical codes and rules should be home-grown to reflect PNG's communications needs with world standard organisations such as the ITU being taken as reference to suit PNG context. There could have been discrepancy between the two regulators because of the differing views that Commission holds in regards to the relevant legislations and PNG's goals and aspirations

The Commission has been concerned that the legislations do not impede deployment of consumer friendly and accessible technology. It is the Commission's interest to maintain transparency as the principal telecommunications regulator to demarcate on important technical regulatory issues and issues such as ISM band.

8.4 OBSERVATION AND ANALYSIS

It is not the Commission's prime function to collect fees and fines even though fees collected constitute a part of the budget. Regulatory functions have not been spread evenly across the sector but tend to concentrate on those areas where maximum fees and fines can be derived. For example an annual licence fee for a cable television operator has mere K100.00 whilst the technical regulator from its management of Spectrum Act collects about K24, 000.00.

The revenue collected by the Commission in this industry is shared with the technical regulator. For regulatory efficiency, fee or rate charged should be drastically reduced and part funding should be requested from the Government. Large regulatory fee have contributed to the increase in cost of telecommunications goods and services and have been impediment to innovation and quality of service.

PART E TIMING AND IMPLEMENTATION

9.0 TRANSITIONAL ARRANGEMENTS

9.1 TRANSITIONAL ARRANGEMENTS FOR LICENSING

The Commission agrees that the move to open competition be comprehensive and implemented on a timely basis. The migration of licences under the new proposed regime can only be a feasible option for the existing carriers if such is undertaken with no additional cost or obligation being imposed. The ICCC has the capacity to facilitate a least cost migration of licences to the new three tier licensing arrangements proposed.

Migration of licences to the new proposed arrangement should not impose any unreasonable costs on the existing licensed operators and further recognise that under the existing arrangements where carrier licensing is vertical, the new proposed arrangement would require clear operational separation to facilitate effective competition.

9.2 TRANSITIONAL ARRANGEMENTS FOR INSTITUTIONAL REFORMS

As noted above, before the new licensing arrangement is implemented, there needs to be proper separation guidelines in place to provide certainty to those considering entry as content providers or service providers from any anticompetitive behaviour from existing carriers who will own and operate their own networks and end products. Figure 2¹³ does not provide any clarity to existing general and mobile carriers as to whether or not they will be allowed to provide content if they desire using their infrastructure.

The Commission does not agree that PNGTEL has the industry confidence to take on these responsibilities. In fact the magnitude of reforming needed of PANGTEL to provide the regulatory independence and accountability would be greater than that required to extend the responsibilities of ICCC to cover the new arrangements. The ICCC does not see any justification in transferring powers to PANGTEL.

Authorised by

Thomas Abe
Commissioner & CEO

¹³ See page 431