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AN EXAMINATION OF THE LEGAL AND REGULATORY FRAMEWORKS FOR INTERCONNECTIVITY AGREEMENTS IN THE NIGERIAN TELECOMMUNICATIONS SECTOR

BY

**ARIYOOSU D. A.
AND
ADEKILEKUN M.T. ***

I. Introduction

In the telecommunications sector of the economy, the competing and complementary technologies are wired, wireless and satellite. Obviously, the consumer determines the types of transmission he or she wants, and at what speed and clarity, where necessary.¹⁵⁰ In any given nation, telecommunications operators provide the technological means for a fee, presumably in a manner affordable, simple, flexible and transparent to all subscribers so as to enhance their economic productivity and personal pleasure.

As a result of the economic productivity and development, the pivotal and dynamic roles being played, it cannot be an overstatement to say that telecommunication is the engine of the world economy with transactions in millions of naira being done everyday over the telephone, by fax, by electronic mail and the

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¹⁵⁰ Mobolaji Aluko: "Resolving the Interconnectivity Battle in Nigeria- Some Suggestions." [http:// www.com./ publication/ aluko/resolving-interconnectivity.htm](http://www.com/publication/aluko/resolving-interconnectivity.htm)kwenu!, accessed 20 October 2005.

internet¹⁵¹. In order to ensure that existing multiple telecommunications operators play fair and square and act responsibly among themselves and satisfy the subscribers within the articulated national interest, a national regulatory authority exists with the primary responsibility of regulating the telecommunications sector in a given economy¹⁵². It cannot be gainsaid that the world is fast becoming a global village and a necessary tool for this process is evidently communications of which telecommunication is a key player.

The quantum development in the telecommunications industry all over the world is very rapid as one innovation replaces another in a matter of weeks. A major breakthrough among the competing and complementary technologies in this regard is the Wireless Telephone System (WTS) which comes in either fixed wireless telephone lines or the Global System for Mobile Communications (GSM).

What is special about telecommunications is interconnectivity as telecommunications systems have to be technically compatible with one another and have to be actually interconnected, and this results in there being a major emphasis on international standards and harmonization¹⁵³.

To a large extent, the benefit from telecommunications depends on the ability to communicate with others in changing circumstances and in response to a need that may not be foreseeable¹⁵⁴.

This paper seeks to examine the rules and regulations governing interconnection agreements among the various telecommunications

¹⁵¹Telecommunications & Information Technology Practice Group, www.itlaw.law.strath.ac.uk/distlearn/downloads, accessed 18 October 2005.

¹⁵² The Nigerian regulatory authority or body is Nigerian Communications Commission established vide Section 3(1) of the Nigerian Communications Act 2003 while the International Regulatory Authority is the International Telecommunication Union (ITU). The ITU is an agency of the United Nations (UN).

¹⁵³ Colin D. Long, *Telecommunications Law and Practice* (2nd Edn, Sweet & Maxwell, London 1995) 3

¹⁵⁴ Ibid

service providers, to determine the problems of interconnect agreements and how the problems can be solved.

II. Definition of Terms

It is necessary to define the topical word, “*interconnectivity*”, in this discourse. The word “*Interconnectivity*” is a concept that is used in various fields such as biology, society, ecology, telecommunications, network theory, etc. The concept can be summarized as that part of a system that interacts with and rely on one another simply by the fact that they occupy the same system, and that a system is difficult or sometimes impossible to analyse through its individual parts considered alone¹⁵⁵. It is a concept or word derived from “interconnect”, meaning “to connect with one another”¹⁵⁶.

When viewing interconnectivity in relation to telecommunications network, the word is better understood by defining the word “interconnection”, which is used interchangeably with the two words “interconnectivity” and “interconnect”. The word “interconnection” is defined as:

The physical and logical linking and connection of communications systems used or operated by the same or different licensees in order to convey messages to and from the respective systems for the provision of service.¹⁵⁷

A similar but more elaborate and comprehensive definition has equally been given in the Telecommunications Networks Interconnection Regulations¹⁵⁸ as follows:

¹⁵⁵ Wikipedia Foundation, Inc. <http://en.wikipedia.org/wiki/interconnectivity> accessed 20 October 2005

¹⁵⁶ Robbert K. Morrow, Telecommunications Network Encyclopaedia Britanica. *Ultimate Reference Suite*. Chicago: Encyclopaedia Bratanica 2008

¹⁵⁷ s 157 of the Nigerian Communications Act 2003.

¹⁵⁸ See Regulation 19 of the Telecommunications Networks Interconnection Regulations 2003. Note that the definition as quoted in the Telecommunications Networks Interconnection Regulations 2003 is merely for definition purpose without more as the Regulations have been repealed by the Telecommunications Networks Interconnection Regulations 2007.

Interconnection means the physical and logical linking of telecommunications networks used by the same or a different telecommunications operator in order to allow the user of one telecommunications operator to communicate with the user of the same or another telecommunications operator to access services provided by telecommunications operator and the services may be provided by the parties involved or other parties who have access to the telecommunications networks.

From the above definitions of interconnection, it can be said that interconnection or interconnectivity agreement is an agreement freely entered into and in good faith by two or more telecommunications operators or licensees for the purpose of providing telecommunications services.

III. Historical Background of Telecommunications Systems in Nigeria

The telephone was invented less than 120 years ago by Alexander Graham Bell. In those years, the telecommunications network grew to become the largest man-made machine ever made, handling more than 1000 billion calls a year and encompassing the whole globe.¹⁵⁹

The most rapid period of growth was the result of the combination of the development in electronics, the development of digital communications and the convergence of telecommunications and computing technologies, the development of optical fibres and the application of micro-electronics to radio communications.¹⁶⁰ The earliest systems were telegraph systems, which were a form of digital system. Telephony was analogue from its inception up to the early 1970s when developments in computing began to be transferred across into telecommunications.¹⁶¹

Until the early 1980s, in almost all countries telecommunication was the subject of monopoly supply with the public network

¹⁵⁹ Colin D. Long (n 4) 4.

¹⁶⁰ Ibid.

¹⁶¹ Colin D. Long (n 4) p 5.

operator normally being a state owned corporation. This monopoly culture was in contrast to the competitive culture of the new computing industry, which used, to a large extent, the same technology and saw rapid reductions in costs and improvements in capabilities.¹⁶² The need for interconnectivity at an international level was not through the International Telecommunication Union¹⁶³. Historically, Nigerian telecommunications standards were dictated by British practice from the colonial times to the early 1970s. However, it should be emphasized that the journey to success in Nigeria's telecommunications milieu has been long and tortuous.

Telecommunications facilities in Nigeria were first established in 1886 by the colonial administration¹⁶⁴. At Independence in 1960, with a population of roughly 40 million people in the country, the country had about 18,724 phone lines for use.¹⁶⁵ Between 1960 and 1985, the telecommunications sector consisted of the department of Post and Telecommunications (P&T) in charge of the internal network and a limited liability company, the Nigerian External Telecommunication (NET) Limited, responsible for the external telecommunications services.¹⁶⁶ At that period, telephone penetration remained poor and the quality of service was largely unsatisfactory. The system was invaluable, congested, expensive and customer unfriendly.

Arising from the foregoing, in January 1985, the P&T Department was split into Postal and Telecommunications Divisions which was later merged with NET to form Nigerian Telecommunications Limited (NITEL). Until 1999 NITEL had a monopoly on the telecommunications sector, and on assumption of office in 1999, the President Olusegun Obasanjo Administration swung to gear to make a reality the 'complete deregulation' of the telecommunications sector, most especially the much touted granting of licences to Global Systems for Mobile

¹⁶² 13 Ibid.

¹⁶³ Ibid.

¹⁶⁴ Revisiting Nigeria's Telecommunications Industry; www.nigeriabusinessinfo.com, accessed 21 December 2006.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid

Communications (GSM) service providers.¹⁶⁷ Thus, in August 2001 the GSM services were launched commercially and several GSM operators have been licensed.¹⁶⁸

IV. Rights and Obligations of Interconnection

The overriding objective of the national telecommunications policy is to achieve the modernization and rapid expansion of the telecommunications network and services. This will enhance national economic and social development, and integrate Nigeria internally as well as into the global telecommunications environment. Telecommunications service should accordingly be efficient, affordable, reliable and available to all. And it is as a result of the whole essence and objective of telecommunications policy that the Federal Government of Nigeria actively liberalized the telecommunications market and encourages participation of the private sector at all levels.¹⁶⁹ Accordingly, a regulatory body was established under the Ministry of Communications (MOC) as the Nigerian Communications Commission (NCC). Indeed, the NCC was the result of Decree No. 75 of 1992 (the Nigerian Communications Commission Decree No. 75 of 1992) which was later repealed by Nigerian Communication Act No. 19 of 2003 (hereinafter referred to as "the Act"). The functions of the commission, inter alia, include the general responsibility for economic and technical regulation of the communication industry¹⁷⁰ and it is this part of economic and technical regulation that requires every licensed telecommunications operator to have mandatory access to technically adequate and economically efficient interconnection with all other operators. As a result of

¹⁶⁷ Ibid

¹⁶⁸ Osondu C. Nwokor; Regulatory Challenges in the Nigerian GSM Market; Being a paper presented at NBA 2004

Annual Bar General/Delegate Conference at Abuja. The Federal Government, through the Nigerian Communications Commission, has granted licences to MTN Nig. Communications Ltd, Globacom, Multilinks, NITEL, Etisalat, Reltel (which was later changed to Zoomobile), Econet Wireless Nigeria Ltd (which was later changed to V-Mobile, Celtel and now Zain), among others.

¹⁶⁹ Mobolaji Aluko (n 1)

¹⁷⁰ Section 4 (1) of the Nigerian Communications Act 2003

this, in exercise of the power conferred on it by Section 26 of the Nigerian Communications Commission Act 1992, as amended, and of all other powers enabling it in that behalf that NCC with the approval of the Minister of Communications made the Telecommunications Networks Interconnection Regulations 2003¹⁷¹ The Regulations provide for the rights and obligations of any telecommunications operator to interconnection. Accordingly, the Regulations provide as follows:

A licensed telecommunications operator shall on receipt of a request for interconnection from another licensed telecommunications operator have an obligation to interconnect its telecommunications network with that licensed telecommunications operator's network in accordance with the principles of Section 97 of the Act, these Regulations and any Guidelines on interconnection adopted by the Commission.¹⁷²

It should, however, be noted that the commission (i.e. NCC) may in its discretion limit the obligation required under the above quoted Regulation in any of the following circumstances:

- (a) If an interconnection agreement is prohibited by law.
- (b) If the licence issued to an operator does not authorize the services for which interconnection is requested.
- (c) If the requested interconnection is rendered impossible as a result of technical specifications.
- (d) If such interconnection would endanger life or safety
- (e) If such interconnection would result in injury or harm to the property of the licensed telecommunications operator.
- (f) If such interconnection would hinder the quality of services provided by the licensed operator¹⁷³

¹⁷¹ Its commencement date is 20th May, 2003. However, the Regulations have been repealed by the Telecommunications Networks Interconnection Regulations 2007, and for the purpose of this work the current regulations, that is the Telecommunications Networks Interconnection Regulations 2007 shall be cited and is hereinafter referred to simply as the Regulations, for ease of reference

¹⁷² Regulation 1(1). See also Section 96 of the Act.

¹⁷³ See Regulation 1 (5).

V. Agreements on Networks Interconnection

To date, internationally, no consistent set of guidelines has emerged for network interconnection agreements. Each nation has tackled the issue of interconnection and evolved its own approach in keeping with its own legal principles and regulatory framework.

¹⁷⁴Interconnection Agreements among operators are negotiated freely and in good faith and each negotiating party cannot intentionally mislead the other part or coerce the other party into making an agreement that it would not otherwise have made or intentionally obstruct negotiations.¹⁷⁵

Another essential feature of interconnection agreement is that the agreement must be in writing. Thus Regulation 3 (3) ¹⁷⁶provides:

The interconnection agreement shall be in writing and comply with-

- (a) the provisions of the Act, these Regulations and any guidelines on interconnection adopted by the commission; and
- (b) the principle of neutrality, transparency, nondiscrimination, fair competition, cost orientation, universal coverage, access to information, equality of access and equal terms and conditions.

VI. Check-List of Interconnection Terms and Conditions

An interconnection agreement would normally be expected to cover certain issues, and in particular, each interconnection agreement shall contain mutual obligations and responsibilities of the interconnection telecommunications operators to protect the interest of the users as well as the interconnecting operators.¹⁷⁷

The following are some of the issues and provisions to be covered in the Telecommunications Interconnection Agreements:

- (i) Description of interconnection service to be provided
- (ii) Terms of payment, including procedure of payment

¹⁷⁴ Ibid.

¹⁷⁵ Regulation 3 (1).

¹⁷⁶ See also Section 97 (1) of the Nigerian Communication Act 2003.

¹⁷⁷ Regulation 3 (4) and Schedule to the Regulations.

- (iii) Points of interconnection i.e. the parts of the two networks at which they are to be interconnected
- (iv) Force majeure
- (v) Intellectual property rights
- (vi) Dispute resolution procedure
- (vii) Operation and maintenance procedures
- (viii) Confidentiality of non-public part of the agreement
- (ix) Publication and access to interconnection agreements
- (x) Duration and renegotiation of agreements
- (xi) Assignment of agreements
- (xii) Training of staff
- (xiii) Termination procedure.¹⁷⁸

VII. Interconnection Procedure

There is no universal procedure for interconnection. In Nigeria, by the communal reading of Regulation 5 (1) and (2), where the requesting telecommunication network operator desires to interconnect its telecommunications networks with that of requested party, a request shall be made to the requested party, and any request so made shall be made in writing and contain sufficient information in relation to the types of interconnection; the suggested date for the commencement of negotiation; the date from which the interconnection is required and an estimate of the interconnection capacity required. Similarly, such request must be brought to the notice of the commission by the requesting party. Thereafter the requested party shall inform the requesting party in writing within 14 days of the receipt of a request for interconnection if it shall be able to supply the form of interconnection requested and within the time frame requested by the requesting party.¹⁷⁹

It should be noted that it is not automatic that once a requesting party makes its request, the requested party must accept. A request may be refused on reasonable grounds and shall be justified in

¹⁷⁸ Regulation 3(4); and schedule to the Regulations

¹⁷⁹ Regulation 5 (3)

writing by the party requested to provide the interconnection and the commission shall be notified accordingly.¹⁸⁰

Where the parties are unable to agree within 28 days from the date of first request as to the date upon which to commence negotiations, the commission has the power to compel both parties to commence negotiations on an interconnection agreement on a date as may be prescribed by the commission.¹⁸¹ It is however humbly submitted that this power of the commission appears to be too coercive in nature as parties ought to freely enter into an agreement and not by compulsion or coercion, if the agreement must be honoured and respected by the parties.

VIII. Filing and Registration of Interconnection Agreements

As part of the interconnection procedure, after the parties have crossed the hurdle of negotiations, the interconnection agreement shall be made in compliance with the provision of regulation 3. All interconnection agreements shall be filed and registered with the commission not later than 30 days from the date of the execution of the interconnection agreement.¹⁸²

By section 79 (2) of the Act, it is the duty of the commission to register the written agreement if it is satisfied that the agreement is consistent with:

- (a) The object of the Act i.e. to create and provide a regulatory framework for the Nigerian communications industry and all matters related thereto
- (b) Any relevant instrument under the Act, and
- (c) Any relevant provisions of the Act or its subsidiary legislation

Similarly, by the cumulative effects of Section 98 (2) and (3) of the Act, the parties to the agreement are bound to furnish the commission with any additional information that the commission may require in respect of such interconnection agreement and upon evaluating the agreement, the commission may require the parties

¹⁸⁰ Regulation 5 (4)

¹⁸¹ Regulation 5 (7)

¹⁸² See also Section 98(1) of the Act

thereto to revise the agreement if, in its opinion, the agreement is inconsistent with the Act, the regulation or the interconnection guidelines or the integrity of the public network.

It is the duty of commission to maintain a register of all interconnection agreements and the contents of such register are as provided in Section 80 (2) of the Act which provides:

The register shall contain:

- (a) The names of the parties to the agreement
- (b) A general description of the matter pertaining to the agreement, and
- (c) The date of the agreement, but not the terms and conditions of the agreement.

IX. Amendment of Interconnection Agreements

With the approval of the commission, the parties to interconnection agreement are at liberty to amend or modify such agreement. Where such an amendment is necessary, the parties must give a written notice to that effect to the commission accompanied by a copy of the proposed amendment or modification to the agreement. A situation may arise whereby the commission will refuse to give its approval to the amendment or modification sought. In such a situation, Regulation 4 (2) provides as follows:

Where the commission does not request additional information on the modification or does not rule on the amendment or modification of the interconnection agreement within 30 days of the receipt of the notice, then the amendment or modification shall be deemed to be approved by the commission

The above quoted provision is, no doubt, a clear expression of the legislative intention to curtail the powers of the commission so that the default of the commission should not be visited on the parties to interconnection agreement once the parties have fulfilled their own obligations.

X. Termination of Interconnection Agreement and Disconnection

It cannot be disputed that the procedure for termination of interconnection agreement is a vital issue in the agreement. The

termination of any interconnection therefore must be strictly in line with the terms and conditions of the interconnection agreement between the parties.¹⁸³

Thus, a party wishing to terminate the agreement is duty bound to give the other party a 6-month written notice of its intention to terminate the agreement specifying the grounds of termination.¹⁸⁴ Similarly, in the case of any breach of the terms and conditions of the agreement, the requested party shall give to the requesting party three months written notice to remedy the breach and if the party in breach fails to remedy the breach within the period the requested party may then terminate the agreement without giving further notice.¹⁸⁵

No operator shall however terminate any interconnection agreement without the written consent of the commission first sought and obtained.¹⁸⁶

Regarding a situation where the commission fails or refuses to give its consent to any operator wishing to terminate or discontinue the interconnection agreement after notice has been given it, the Regulations do not provide remedy for the aggrieved party. It is therefore humbly submitted that once the party wishing termination or discontinuance has fulfilled his own obligation and conditions, the fault or neglect of the commission to give consent ought not to be visited on the party, rather consent should be deemed to have been given and the termination shall become effective after a reasonable period of time so that a willing operator would not be forced to continue operating with an unwilling operator.

XI. Resolving Interconnectivity Disputes

The problem of interconnection among network service providers usually revolves round sharing the revenue that accrues from calls generated from one network that terminates in another network. Failure to agree by the interconnecting parties may resort to the

¹⁸³ Regulation 4 (5)

¹⁸⁴ Regulation 4 (6)

¹⁸⁵ Regulation 4 (7)

¹⁸⁶ See Section 100 of the Act 2003 and Regulation 4 (8)

regulatory authority resolving the dispute. The regulatory authority may be prepared to play a role in resolving the contractual dispute.¹⁸⁷ But in practice, most regulatory authorities have their resources stretched quite enough by dealing with specific tasks assigned to them under the law. In some cases, the contracting parties may need to have recourse to the court of law or other alternative dispute resolution procedures such as arbitration, conciliation, mediation or multi-door court house/room.¹⁸⁸

In Nigeria, interconnect problems began making headlines at the inception of GSM service in late 2001 when the Nigerian Telecommunications Limited said it did not have enough capacity to interconnect operators.¹⁸⁹ Today, the matter has grown so bad that the foundation of the country's telecommunications industry is becoming threatened as the survival of many operators is threatened by the development.¹⁹⁰ The problems start even right from the negotiating stage.

It is not uncommon that a disagreement ensues between telecommunications operators in respect of interconnection, and in such a case an attempt is first made to resolve the dispute between the parties through negotiations or other alternative dispute resolution mechanism. Where no agreement¹⁹¹ is reached in any interconnection negotiations between telecommunications operators within the specified period either party may appeal to the commission and the commission shall decide on the case, taking into consideration the interest of both parties.¹⁹² Such an appeal shall be made in writing, setting out the areas of agreement and dispute, including but not limited to when interconnection was requested, what telecommunications network or service offerings were requested and on what issues agreement failed to be reached.¹⁹³

¹⁸⁷ Colin D Long (n 4) p 200. See also Section 73 of the Act

¹⁸⁸ Ibid

¹⁸⁹ See The Punch. Tuesday, July 5, 2005 P. 36

¹⁹⁰ Ibid

¹⁹¹ See Section 74(1) of the Act

¹⁹² Regulation 17 (1)

¹⁹³ Regulation 17 (2). See also Section 75 (1) of the Act.

Upon filing an appeal by any of the interconnecting parties the following steps shall be taken:

- (a) The commission shall give the parties concerned the opportunity to state their case;
- (b) A preliminary enquiry phase shall be introduced when initial consideration is given, so that the commission can decide if there is a case to answer or to proceed to a detailed investigation;
- (c) The commission shall inform the complainant of the outcome of the preliminary enquiry phase within three weeks;
- (d) The preliminary enquiry phase shall be followed by an investigation phase involving the gathering of analysis and assessment of more detailed information;
- (e) The commission may require written argument with supporting facts and research, if necessary, to assist in clarifying the issues in dispute;
- (f) The commission may give representatives of business circles affected by the dispute the opportunity to state their case where appropriate
- (g) The commission may also consider inviting other interested parties to comment on the issues.¹⁹⁴

Having followed the above procedure, the commission shall decide on the dispute based on oral or written submissions and public proceedings. However, a decision can be reached without oral submission, subject to the agreement of the parties concerned.¹⁹⁵

It is important to note that the hearing of the proceedings of the commission in public is not at large. Where the presence of the public may pose a threat to public order, national security or an important business, the public may, at the request of any of the parties concerned or by a determination of the commission, be excluded from the proceedings or any part thereof.¹⁹⁶

¹⁹⁴ Regulation 17 (5)

¹⁹⁵ Regulation 17 (6)

¹⁹⁶ Regulation 17 (7) & (8)

The commission has time frame within which to conclude its hearing and will have due regard to the urgency of the matter before it. Thus, Regulation 17 (9) provides that the commission may, given the urgency of the case, issue an interim order before arriving at a decision and shall decide the case within four months, beginning from the date of the appeal.¹⁹⁷

Any party who is not satisfied with the decision of the commission may appeal to the Federal High Court for a review of the decision and a copy of the application shall be lodged with the commission within 30 days from the date of the decision but the decision of the commission remains binding pending the final determination of the appeal by the Federal High Court.¹⁹⁸

It should be noted that instead of following the above express statutory administrative procedure in settling interconnection problems, some operators head to Court. While some channel their grievances through the Federal High Court some approach the State High Court. It is humbly submitted that sidetracking the stated procedure is palpably of no moment as the law is settled beyond peradventure that where a statute provides for resort to an administrative remedy, the court cannot competently adjudicate on any suit arising therefrom unless the administrative remedy has been exhausted.¹⁹⁹ Thus in the case of *Blue-Chip Communications*

¹⁹⁷ Note that by Section 76 (1) of the Act the Commission may resolve the dispute by Alternative Dispute Regulation or such other means and upon such terms and conditions as it may deem fit

¹⁹⁸ Regulation 17 (12) & (13)

¹⁹⁹ See the following cases: *MTN Nigeria Communications Ltd v Nigerian Communications Commission* (2004) 1 TLR,5 at 15-16; *Lawal v Oke* (2001) 1NWLR (pt 711) 88 at 106- 107; *Faloye v Omoseni* (2001) 9NWLR (pt 717) 190 at 200-201; *Kasunmu v Shtta-Bay & Ors* (2007) ALLFWLR (pt 356) 741at 783; *Ojogbede v Ogundipe* (2008) ALLWLR (pt 399) 589 at 599; *Blue-Chip Communications Co Ltd v Nigerian Communications Commission* (2004) 1 TLR 23at 40; *Econet Wireless Nigeria Ltd v N.C.C.* (Unreported) Suit No. FHC/ABJ/CS/58/2004 delivered on 20th April, 2004 by His Loddship, Hon Justice B.F.M. Nyako. See also Section 88 (3) of the Act. Note that following the procedure stated in the statute for settlement of interconnection dispute is a condition precedent to the jurisdiction of the court before which the matter is brought and if the procedure is not followed the court lacks the prerequisite competence and jurisdiction to entertain the matter

*Co Ltd v Nigerian Communications Commission*²⁰⁰, the plaintiff applied for a third-Generation (3-G) Spectrum Mobile Licence from the defendant pursuant to the Nigerian Communications Act 2003. The defendant refused to grant the application, explaining that there is a Five-year Exclusivity Contract between it and the GSM operators by reason of which no mobile licence could be issued within the period. Being disgruntled by the defendant's decision, the plaintiff commenced an action at the Federal High Court, Abuja, challenging the defendant's decision. The issue arose whether the suit was competent in view of the fact that the plaintiff did not complain against the defendant administratively. In striking out the case, the Court, per Stephen Jonah Adah J., held:

There is no evidence of the fact of compliance in this case. The plaintiff in his affidavit never alleged that he has followed the process of review of the decision he has brought to Court in this case under the Communications Act 2003 before accessing this court.

*In this situation therefore the action is incompetent.*²⁰¹

It is equally of court's jurisdictional importance to note that it is immaterial whether telecommunications matters involve interconnection or not, once any matter arises out of the provision of the Nigerian Communications Act 2003, the Federal High Court has the exclusive original jurisdiction to entertain the matter,²⁰² after the prerequisite administrative procedure has been followed.

For ease of reference and clarity of purpose, Section 138 of the Nigerian Communications Act 2003 which confers exclusive jurisdiction on the Federal High Court in telecommunications matters states:

The Federal High Court shall have exclusive jurisdiction over all matters, suits and cases howsoever

²⁰⁰ (2004) 1 TLR, 23

²⁰¹ Blue- Chip Communications Co Ltd v Nigerian Communications Commission (2004) Supra at 41

²⁰² This is the effect of the combined reading of the provisions of Section 251 (1)(s) and 252 (2) of the Constitution of the Federal republic of Nigeria 1999 and Section 138 of the Nigerian Communications Act 2003. See also the case of Barrister Mike Nkwocha & Ors v MTN Nigeria Ltd & Ors (2004) 1 TLR, 1 at 4

arising out of or pursuant to or consequent upon this Act or its subsidiary legislation and all references to "Court" or "Judge" in this Act shall be understood and deemed to refer to the Federal High Court or Judge of the said court

Even though the above quoted statutory provision seems to be clear without a modicum of doubt that the Federal High Court has the exclusive original jurisdiction, the issue still remains whether the exclusivity or otherwise of the jurisdiction of the Federal High Court in this regard extends to or covers contract cases involving subscribers of telecommunications services and service provider or where the Nigerian Communications Commission, which apparently is an agency of the Federal Government is a party.

In *Barrister Mike Nkwocha & 2 Ors v MTN Nigeria Limited & 4 Ors*,²⁰³ the plaintiffs who were subscribers of GSM services of the defendants wanted a refund from the defendants for dropped/uncompleted calls resulting from network failures. They therefore approached the Federal High Court for redress. The issue was raised suo motu by the court whether the Federal High Court has jurisdiction to hear and determine the case which dwelt on contractual relations between the plaintiffs and the defendants. Relying on Section 138 of the Nigerian Communications Act 2003, it was held per B.F.M. Nyako J that the Federal High Court has exclusive jurisdiction.

However, in the recent Court of Appeal case of *Jeph C. Njikonye Esq v MTN Nig Communications Ltd*²⁰⁴ where a similar issue arose, it was held that since the dispute is founded on contract, it is the High Court of the FCT and not the Federal High Court that possesses the competence and jurisdiction to entertain the case.

With the greatest respect, it is humbly submitted that in *Njikonye's cse*, it is immaterial whether the dispute is founded on contract or not. Rather, what is material in determining the jurisdictional issue in the case is whether the suit was brought to enforce liability or duty created by the Nigeria Communications Commission Act.

²⁰³ (2004)1 TLR, 1 at 4

²⁰⁴ (2008) All FWLR (pt 413) 1343

The crucial issue now is whether provision of network service by licensed telecommunications service provider (like MTN Nig. Communications Ltd in *Nkwocha* and *Njikonye's* cases) is a duty created by the Nigerian Communications Act or put in a different language, whether the liability on the part of telecommunications service providers for offering telecommunications services is created by the Nigerian Communications Act. If the above two issues are answered in the affirmative, then any matter connected in with telecommunications service including network failure as in *Njikonye's* case can only be dealt with by the Federal High Court as the court having exclusive original jurisdiction to entertain it. There is no doubting the fact that certain matters in the Act relate to network services.

In the first instance, it is the function of the Nigerian Communications Commission to protect and promote *the interests of consumers (that is subscribers to telecommunications network services) against unfair practices including but not limited to matters relating to tariffs and charges for and the availability and quality of*²⁰⁵ *Communications services, equipment and facilities* (Brackets added for emphasis) It is submitted that the above-quoted function of the NCC has some connection with telecommunications network services, and if this submission is well grounded, then telecommunications service failure is a matter connected with or arising out of the Act, thus bringing it within the purview of Section 138 of the Act which confers exclusive jurisdiction on the Federal High Court. Similarly, the Commission is empowered to resolve complaints received from consumers of telecommunications services in relation to matters of customer service including quality of service.²⁰⁶ *"Matters of customer service"* or *'quality of service'*, it is submitted, encompasses and involves any matter arising out of network service, hence network service failure is a matter of customer service, thus

²⁰⁵ See generally Section 4 of the Nigerian Communications Act 2003 on functions of the Nigerian Communications Commission

²⁰⁶ See Section 105 (1) of the Act

still bringing the issue within the framework of Section 138 of the Act.

In view of the community effect of the above statutory provisions²⁰⁷, it is humbly submitted that matters of telecommunications network failure can only be dealt with by the Federal High Court as a court of original jurisdiction and not the State High Court or High Court of FCT. Hence the two questions earlier posed can conveniently be answered in the affirmative. This conclusion is in tandem with the settled law that in determining the jurisdiction of court, the enabling law vesting jurisdiction must be considered in the light of the subject matter of dispute.²⁰⁸

Therefore, even if the subject matter of dispute in *Njikonye*'s case arose out of contract, the Act which vests jurisdiction in the Federal High Court can only be given its clear and ordinary literal meaning, moreso when the Act derives its validity from the constitution.²⁰⁹

XII. Problem of Interconnect Indebtedness among Operators

Of all the disputes and problems facing Nigerian telecommunications industry, not in the least in seriousness is interconnection fees chargeable on telephone network by each operator for calls terminating on each other's network which has resulted in high degree of indebtedness among operators, particularly the GSM operators, given the fact that it has been one of the fastest growing sub-sector of the economy in the past couple of years.²¹⁰ The Economic and Financial Crimes Commission (EFCC) has sometimes questioned some telecommunications sector executives over billions interconnect fees allegedly owed to

²⁰⁷ That is, Sections 4, 105 (1) and 138 of the Act.

²⁰⁸ In *Nigerian Reinsurance Corporation V. Hon. Justice Rahila Cudjoe* (2008) ALL FWLR (pt 414) 1532 at 1550- 1551, the Court of Appeal, per Adekeye JCA in his leading judgment held that; "it is trite that jurisdiction is the cornerstone of adjudication. It is a fundamental and threshold issue of competence. In determining the jurisdiction of court, the enabling law vesting jurisdiction must be considered in the light of the subject- matter of dispute"

²⁰⁹ The commutative reading of Section 251(1)(s) and 252(2) of the Constitution of the Federal Republic of Nigeria 1999.

²¹⁰ The Punch, Thursday, July 5, 2005 P. 36

the Nigerian Telecommunications Limited (NITEL) by other Telecommunications operators. Other telecommunications operators also alleged that NITEL was owing them for interconnection to other respective networks.²¹¹

Because of the failure of some of the operators to respect the interconnect agreement, NITEL was unable to meet some of her financial obligations²¹² the resultant effect of which might be inability to meet up with the basic standard required for efficient formidable and effective telecommunications system. In fact, as a result of interconnect debt some operators have unilaterally cut others off while some have to use extra judicial means to collect their debt.²¹³

From the foregoing, it cannot be an overstatement to say that the problem of interconnect indebtedness which has bedevilled the telecommunications industry since the introduction of GSM in Nigeria is multidimensional. While, as said earlier, NITEL contended that several private Telecommunications operators owe it Billions of Naira, some other private telecommunications operators also contended that the NITEL and her Mobile subsidiary, the Nigerian Mobile Telecommunications Limited owe them Billions of Naira in interconnect service.²¹⁴

Some time ago, the operators in the Nigerian telecommunications industry met the industry's Regulatory body (the NCC) over the high Level of interconnect debt plunging the sector with the aim of giving opportunity to operators and other stakeholders to discuss the thorny issue of interconnect indebtedness.²¹⁵ This is a right step which was supposed to have been taken by the NITEL instead of heading to EFFC. Consequent upon the meeting, the NCC decided

²¹¹ The Punch, Thursday, June 16, 2005, back Page. The then Deputy General Manager, Corporate Communication of NITEL Mr. Tayo Ekundayo confirmed that NITEL was forced to write the EFFC in its desperation to recover the debt owed it by other operators.

²¹² But the issue remains whether NITEL can approach EFFC without first referring the dispute to NCC.

²¹³ The Punch, Tuesday, July 5, 2005 page 36.

²¹⁴ The Punch, Tuesday, June 5, 2005 cover page.

²¹⁵ Ibid.

to appoint external inspectors to reconcile the level of indebtedness among the operators.²¹⁶

XIII. Resolving Problem of Interconnect Fees Indebtedness

To resolve the problem of interconnect indebtedness among operators; the NCC has licensed some companies to act as interconnect clearing houses.²¹⁷ The job of the companies would be, *inter alia*, to provide infrastructure for interconnection, thereby saving operators the headache of having to sign agreements with one another.²¹⁸

The licensed clearing companies²¹⁹ are to provide, among others, interconnect points to operators such that once an operator is licensed, it would not have to sign endless number of agreements with existing operators but would simply go to the clearing house to get interconnected, provided it meets the required criteria.

XIV. Summary and Conclusion

The achievement of the goal of market-based competition in telecommunications vide interconnectivity agreements among operators requires that every operator has mandatory access to technically adequate and economically efficient interconnection with all other operators to achieve this aim, the regulatory body should be independent and government policy on interconnection should not be indiscriminately amended or repealed. Moreover, where amendment or repeal is inevitable, regard should be had to public policy and the need to protect the numerous telecommunications subscribers. At least the tariff chargeable should be as low as what the common man should afford. Every operator must allow all other operators full interconnection to its network at technically feasible and convenient point of interconnection, such that traffic may originate on the network and

²¹⁶ See the Punch, Wednesday, June 29, 2005, cover page.

²¹⁷ See the Punch, Tuesday, July, 5 2005 page 36

²¹⁸ Two, of the licensed clearing companies, Medallion Nigeria Limited and Interconnect Clearing House Nigeria Limited unveiled their services to the telecommunications industry. See the Punch, Tuesday July 5, 2005 pg 36

²¹⁹ That is the Medallion Nigeria Limited and Interconnection Clearing House Nigerian Limited

terminate on another, or otherwise pass across networks, without interference, signal deterioration, delay or restriction.

In the same vein, any payment for interconnection should be based on the actual costs of such interconnection and must apply in a non-discriminatory and competitively neutral manner

To the extent possible, the regulatory body should review all existing interconnection agreements to ensure that they meet the standards consistent with other interconnection agreements in the industry and standards practised globally, and for situations where negotiated agreements are unduly protracted, the regulatory body should serve and act timeously as arbitrator.

The regulatory body should also not relent in its effort to publish clear and appropriate studies and standards for any cost analysis required to support the development of equitable interconnection charges, and where adequate cost information is not readily available, the body should examine comparable interconnection pricing policies and price levels from international experience to establish benchmarks for operators' interconnection charges.

The idea of licensing some companies to act as interconnection clearing houses with a view to settling interconnect indebtedness is a welcome idea and highly appreciated. However, the idea should not jettison the clear and unequivocal interconnection agreements validly and legally entered into by the operators. Hence the regulatory body should ensure compliance with interconnection agreements which are not at variance with the enabling laws, and modes or methods of recovering interconnect indebtedness among operators should be part of the interconnect agreements without prejudice, however, to the right of the interconnecting parties to approach a court of law. Also the regulatory body should exercise its power cautiously, judiciously and in the overall best interest of the telecommunication industry

Interconnect agreements among the telecommunications operators has been the main focus of the work and much ink has been expended on the legal and regulatory framework of interconnection agreements. It is hoped that the mission of the NCC and other regulatory authorities in the global world to regulate the supply of telecommunications service and facilities to promote fair competition as well as encourage the development of other sub-

sectors in the industry is protected and respected by the government so that its aims and objectives of meeting up with the international standards would be achieved and the problem associated with interconnection mitigated or alleviated out rightly.