



BOTSWANA TELECOMMUNICATIONS AUTHORITY (BTA)

RULING NO 2 OF 2000

(Pursuant to section 19 as read with section 55 of the Telecommunications Act, 1996 (15 of 1996).

RULING ON USKO BOTSWANA'S COMPLAINT AGAINST BTC IN THE MATTER CONCERNING BTC'S REFUSAL TO PROVIDE LEASED LINES BETWEEN USKO BOTSWANA AND ITS CORPORATE CUSTOMER (WATER UTILITIES CORPORATION)

PER C. M. LEKAUKAU, EXECUTIVE CHAIRMAN OF THE BOTSWANA TELECOMMUNICATIONS AUTHORITY.

1 This ruling arose out of a complaint lodged by USKO Botswana (USKO), an Internet Service Provider (ISP), duly licensed in terms of the Telecommunications Act, 1996 [No. 15 of 1996] (the "Act") against the Botswana Telecommunications Corporation (BTC). In its complaint USKO made the following allegations;

1.1 That the manner in which BTC launched a new service called Virtual Point of Presence (VPOP) on 7 August 2000 was unfair and discriminatory in that it was launched without prior sufficient notice to Internet Service Providers (ISPs), in particular USKO, and that trials for the new service were carried out using only one ISP, Botsnet, which is wholly owned by BTC. USKO felt that BTC had afforded Botsnet preferential treatment in that other ISPs were neither forewarned of the forthcoming service nor given an opportunity to test it; and

1.2 That BTC has unreasonably and/or contrary to the letter and spirit of the Act refused to provide leased line connection between USKO and its client, Water Utilities Corporation (WUC), and that instead of providing service as requested, BTC approached WUC and offered to provide the service directly to it.

2 I have decided to give a reasoned ruling on the dispute because it raises fundamental legal and policy issues which I think BTA must restate

for the avoidance of any doubt in the future. The issues raised by this dispute are critical to the achievement of the objectives of the Act, in particular the provision of telecommunication services under a competitive environment.

3 The Authority has decided, after due consideration of documents filed of record, that there is no need for an oral hearing in this matter. There is certainly no fundamental dispute of fact between the parties. In respect of the issue raised in paragraph 1.1, I am of the view that the documents filed are sufficient to enable the Authority to make a finding of fact. The same applies to the issue raised in paragraph 1.2. By a letter ref. GCM.08. (24). 00 dated 28 August 2000 to the BTA, BTC expressly admitted that it had refused to provide the connection between USKO and its client, WUC. In the same letter, BTC also admitted to having approached WUC with the offer that it (BTC) could provide WUC with leased line capacity directly rather than through USKO. Thus the issue to be determined is one of whether a refusal to provide service on the part of BTC could be justified.

4 The regulatory framework for the provision of telecommunication

services in Botswana was drastically altered in 1996 following the passing of the Telecommunications Act, 1996 ("BTA Act") and the Botswana Telecommunications Corporation (Amendment) Act, 1996 [No. 16 of 1996] which amended various sections of the Botswana Telecommunications Act (Cap.72:02). The Telecommunications Act, 1996¹⁶ inter alia, provides for the regulation of the provision of telecommunication services in Botswana and the licensing of the telecommunication services providers in the country. Most importantly, the Act establishes the BTA as an independent regulator to enforce its provisions. The 1996 amendment to the BTC Act abolished the monopoly that BTC had been enjoying in the provision of telecommunication services since its formation by repealing section 13 of the Botswana Telecommunications Corporation Act.

5 The BTA Act gives BTA wide powers designed to ensure the provision of efficient telecommunications in the country (section 17(1)). Section 17(1)(c) of the Act, in particular, enjoins the Authority to promote and maintain competition among persons engaged in commercial activities for or in connection with the provision of telecommunication services. It is indisputable that both BTC and USKO are entities engaged in commercial activities for the provision of telecommunications services as contemplated by this provision of the Act. Accordingly, it is within the powers of the

Authority to ensure that their commercial activities do not impede competition in the telecommunications sector. I must emphasize that BTA is not promoting competition for its own sake. The promotion of competition is intended to achieve an overarching goal, which is the efficient provision of telecommunication services in the country so as to satisfy reasonable demands for such services (section 17(1) and 17(2)(b)).

6 The legislature in its wisdom recognized that there would inevitably be disputes not only between consumers and service providers, but also between providers of telecommunication services as the number of such providers increase in the market. Accordingly section 19 of the Act gives the Authority the power to “settle any dispute that may arise between licensees, between licensees and other service providers, between licensees and members of the public”. Section 19 is supplemented by section 55 which, inter alia, mandates the Authority to consider any complaint which relates to telecommunication services provided in Botswana or telecommunication equipment supplied in Botswana “which is the subject of a representation (other than one appearing to the Authority to be frivolous) made to the Authority by or on behalf of a person appearing, to the Authority, to have an interest in the matter.” These two sections of the Act

empower the Authority to issue rulings and orders on the subject of a complaint before it where any of the parties and/or all the parties have referred the matter to the Authority because of lack of an amicable settlement.

7 The two sections of the Act referred to in the preceding paragraph are of singular relevance to the current dispute. Once there is a complaint or dispute within the ambit of the above sections, the Authority can rightly assume jurisdiction. That is, the Authority may generally make a determination on any dispute or complaint once it is shown that such a dispute or complaint is –

7.1 a dispute between service providers, or between service providers and members of the public who in most cases would be consumers of telecommunication services;

7.2 the subject of the dispute or complaint relates to the provision of telecommunication services or telecommunication equipment supplied in Botswana;

7.3 the subject of the complaint or dispute is one which does not appear to the Authority to be frivolous; and

7.4 the party lodging the complaint has, in the opinion of the Authority, an interest in the matter.

8 These requirements appear to me to require no elaboration. I wish, however, to make two observations. Firstly the provision of section 55 (1) does not apply to a telecommunication service the provision of which does not require a licence under the Act (section 55 (2)). Second, the determination as to whether a complaint is frivolous or not is to be made by the Authority. This, however, does not mean that such a decision should be an arbitrary one. The Authority must consider the circumstances of each case paying particular attention to whether the act or omission that led to the complaint if proved could compromise the objectives of the Act and/ or the overall telecommunications policy in Botswana having regard to the provisions of the "Telecommunications Policy for Botswana" of 1995, such regulations, directives and/or guidelines that may have been issued by the Authority under the relevant provisions of the Act and the provisions of the licences of the service providers which are parties to the dispute.

9 The current dispute meets all the conditions isolated in paragraphs 7 and 8. The dispute is certainly between licensed service providers. It involves a telecommunication service the provision of which requires a licence under the Act. It is my considered view that the subject matter of the dispute cannot by any stretch of imagination be said to be frivolous. As I have had occasion to emphasize to BTC in our letter reference BTA/6/1/1 IV (7) PSA of 24 November 1999, the reselling of leased capacity is the very essence of the existence of ISPs such as the complainant in this matter. An allegation that a request for provision of leased lines was refused by BTC, which allegation is accepted as a fact by BTC is, therefore, a serious matter which cries out for BTA's intervention since it prima facie constitutes a threat to the existence of the complainant's business. The interest that USKO has in the matter, that is, the provision of leased line capacity between itself and WUC is therefore self-evident. Similarly, an allegation that BTC gives Botsnet, its subsidiary, favourable treatment as compared to other ISPs appear to the Authority not to be a frivolous one since if the allegation is true, that would compromise fair competition between ISPs. I turn to deal with the substantive issues raised by this complaint as they appear from paragraph 11 above.

10 The Authority is not convinced of the merit of the allegation that BTC did not give USKO an opportunity to test the new service (VPOP). On the contrary, I believe BTC's explanation contained in its letter of 15 August 2000 in which it (BTC) indicated that it informed USKO on 27 July 2000 of the imminent launch of the VPOP. It also evident from a copy of an electronic mail of April 13 2000 from USKO to BTC that USKO had not objected to being left out in tests that were carried out in Francistown and Gaborone. I have not received any representation that would lead me to doubt the validity or reasonableness of the explanation given by BTC for its inability to carry out tests on VPOP in Lobatse USKO's preferred place for carrying out tests. According to BTC, it could not carry out tests in Lobatse due to technical reasons as per its letter ref. GCM.08. (24). 00). of 28 August 2000.

11 Despite my conclusion in paragraph 10 above, I wish to point out that BTC must in future ensure that the manner in which it treats ISPs is transparent and non-discriminatory. The fact that BTC owns one of the competitors in the internet service provision business makes this requirement particularly important. As earlier indicated, Botsnet is a BTC wholly owned ISP. In order to facilitate efficient and fair competition in the

telecommunications industry, BTC as the dominant operator, should fairly distribute services by, inter alia, informing all ISPs, and not only its subsidiary, of the launching or imminent launching of new services. It should exercise transparency by effectively communicating with all ISPs so that whatever services and/or plans it undertakes that are likely to have an impact on the market do not come to them as a surprise as this would hamper competition. In a situation like the one under consideration, BTC could have, for example, held a meeting with all the ISPs in order to find a non discriminatory way of testing the new service through a consensus built option with all the service providers. I am sure that there are other ways of achieving transparency and non discrimination.

12 I now wish to turn to deal with the very important question of whether the denial of service, which as earlier pointed out is not disputed by BTC, can be justified. I am of the firm view that BTC's refusal to provide leased line connection between USKO and WUC cannot be justified on two critical grounds;

12.1 BTC, as a dominant public telecommunication service provider is under an obligation to provide service to anybody who desires such

service and is willing and able to pay for the service requested unless it (BTC) is unable to provide the required service due to a justifiable reason. I will shortly show in paragraph 14 below why in BTA's considered view, reasons advanced by BTC to justify the denial of service in this matter not justifiable.

12.2 BTC is currently the dominant owner of the service, which was requested. In other words, BTC is ~~de facto~~ controller of 'ports of entry' into Botswana's telecommunications market, in particular, the Internet service provision business. It is indisputable that BTC owns essential infrastructure for the provision of telecommunication services in general and Internet service in particular. Leased lines are an essential infrastructure in that without them, ISPs would not be able to reach their customers and/or be able to carry on their business. A denial of the provision of leased capacity would accordingly serve as a very effective but unwelcome barrier to new entrants to the telecommunications market in the country. Needless to say that if BTA allows such a situation to prevail, the consequences would be contrary to the spirit and letter of the

Act and the tenet of the telecommunications policy in the country. It is common cause that the tenet of the telecommunications policy is the promotion of the provision of telecommunication services under a competitive environment. Effective competition generally presupposes the existence of multiple service providers. It is pertinent in this regard to recall that the "Telecommunications Policy for Botswana, 1995" (pages 16 and 17) recognises that in "a free and open telecommunications market anyone who wants to make use of the infrastructure should be able to do so." Such access would, only be restricted by considerations referred to in paragraph 12.1 above. BTC is accordingly precluded from giving frivolous reasons for its refusal to provide leased lines capacity to other operators.

13 BTC as a dominant operator in the provision of leased capacity, which, as I indicated in preceding paragraph, is an essential facility or infrastructure for the carrying out of the business of Internet service provision, cannot be allowed to use the facility while denying it to other service providers without objective justification or grant access to its

competitors only on terms less favourable than those which it gives to its own services and/ or its subsidiaries and associates.

14 BTC justified its refusal to install leased lines between WUC and USKO in a letter addressed to BTA, which letter has already been referred to in paragraph 3 above. Its position is that leased lines are offered only on a point to point basis i.e. between BTC and the end user to be used for the internal corporate traffic only and that, therefore, BTC could not terminate a link intended for WUC at a third party's premises more so that ISPs do not have any obligation to ensure that their customers use leased lines only for the transmission of data. I have already indicated that BTC's view that it provides leased lines for internal corporate use only is unacceptable in that it deliberately ignores the fact ISPs mainly exist by, and for, the reselling of leased line capacity. I use the adjective "deliberately" because I cannot imagine that BTC, given its size and history as the hitherto only provider of telecommunication services in the country and a current owner of an ISP is not aware of the essence of ISP business. I must express the Authority's indignation at BTC's conduct in this matter. The argument advanced by BTC for denial of service in this matter that ISPs have no way of ensuring that their customers use leased capacity for transmission of data only is, for

example, an explicit intrusion into the jurisdiction of the Authority a regulator. The Act vests licensing of telecommunication service providers in the Authority. This implies the power to determine which services, and under what conditions, the licensee should provide. Whatever regulatory power BTC had, had been removed by the amendment of its Act in 1996 as I have stated in paragraph 4 above.

15. BTC's attitude towards the provision of service to other operators particular ISPs is becoming a matter of concern to this Authority as there have been a number of complaints from ISPs. In instances where a service is provided it is often so poor that ISPs customers invariably complain of poor quality of service. I wish to draw the attention of operators to clause 8.6 of the Telecommunications Policy for Botswana (December 1995) by the Ministry of Works, Transport and Communications which Ministry also supervises BTC on behalf of the Government as shareholder which clause advocates for the sharing of infrastructure in order to avoid duplication and in order to rationalize the use of existing networks.

16. The Telecommunications Policy clearly shows that Government, who is also the shareholder in BTC, has

prescribed that infrastructure sharing should inter alia, be mandatory. The rationale for this prescription comes from the fact that this infrastructure was built by BTC on behalf of the nation through a monopolistic business whereby everyone in the nation, including the service providers contributed funds either directly through Government's cash injection in the form of equity, Public Service Debt Fund loans, Government guarantees or through monopolistically set tariffs. I have already indicated in paragraph 12.1 the grounds which BTC can reasonably refuse to provide service and or share infrastructure. It ultimately remains to be determined by this Authority whether its reasons are justifiable. must emphasize that BTC is precluded from giving its subsidiaries preferential treatment by the licence under which it operates. BTC is required to conduct its core business separate from the businesses of its subsidiaries or associates. BTC should be more concerned with creating a rapid turnover of business as a wholesaler rather than abusing its dominant position in the retail business. Wholesaling is still a monopolistic market for BTC as owners of the infrastructure and therefore a niche

market, which can maximise BTC's returns if exploited properly.

17 In the premises, and having duly considered all the factors relevant to this dispute including submissions by the concerned parties, I hereby order and direct that –

17.1 BTC should provide leased lines to USKO Botswana and WUC as requested within 30 days of the date of this ruling

DELIVERED IN GABORONE THIS 28TH DAY OF DECEMBER
2000.

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C. M. LEKAUKAU
EXECUTIVE CHAIRMAN