UGANDA COMMUNICATIONS COMMISSION

IN THE MATTER OF THE UGANDA COMMUNICATIONS ACT, 2013

AND IN THE MATTER OF A COMPLAINT

BY

UBUNTU TOWERS UGANDA LIMITED

AGAINST

AMERICAN TOWERS CORPORATION LIMITED

AND

AIRTEL UGANDA LIMITED

DECISION OF THE COMMISSION

1.0 Background to the Complaint

On 30th November 2021, the Uganda Communications Commission ("Commission") received a complaint ("the Complaint") from Ubuntu Towers Uganda Limited ("Ubuntu") alleging breach of rules of fair competition by both American Tower Corporation Ltd ("ATC"), as successor to Eaton Towers Uganda Limited's ("Eaton") contracts in Uganda, and Airtel Uganda Limited ("Airtel").

The Complaint was submitted under section 55(2) of the Uganda Communications Act, 2013 (the Act) and Regulation 14(1)(a) of the Uganda Communications (Competition)Regulations 2019 ("Competition Regulations").

Specifically, Ubuntu alleges that clauses 2.4.2 and 2.4.3 of the Master Tower Sharing Agreement ("MTSA") which was signed between Eaton and Airtel on the 5th of September 2014 bestowed upon ATC a Right of First Refusal(ROFA), contrary to various provisions of the Act and the Competition Regulations, insofar as they materially distort and have the potential to lessen competition in the communications sector in Uganda contrary to the spirit and intent of the Act and the Competition Regulations.

It is the Complainant's contention that the said clauses in the MTSA both in purpose and effect, violate section 53(2) of the Act and regulations 6, 7, and 9 of the Competition Regulations in the following ways:

(1) The clauses perpetrate exclusive dealing between Airtel and ATC insofar as Airtel is expressly restricted from appointing any other person to build new sites without first offering such sites to ATC, contrary to the object and spirit of regulation 7(2)(d) of the Competition Regulations.

(2) Tying the provision of service on unreasonable contractual condition contrary to regulations 7(1)(e) and 7(1)(h) of the Competition Regulations.

(3) The clauses give ATC undue preference over other licensees in the sector with respect to acquisition of business to build new sites for Airtel, contrary to regulations 9(1)(b) and 9(1)(c) of the Competition Regulations.

(4) Restricts Airtel's choice of provider of tower infrastructure services and lessens competition contrary to section 53(1) of the Act and regulation 6(1)(d) of the Competition Regulations.

(5) The clauses amount to abuse of dominant powers by ATC insofar as they impose restrictions on Airtel's bargaining power and choice of provider of tower infrastructure services in Uganda contrary to section 53(2)(a) of the Act and regulation 6(1)(b) of the Competition Regulations.

(6) The Clauses are a vertical restraint between ATC and Airtel contrary to regulation 7(4) of the Competition Regulations.

(7) The clauses have the potential to result into price abuse by ATC, insofar as the agreement ties the parties to one another and denies Airtel an opportunity to negotiate lower prices with other alternative tower infrastructure providers, which may result into higher downstream prices contrary to regulation 7(1)(a) of the Competition Regulations.

(8) The clauses have the potential to deter entry of other players in the tower infrastructure market since they restrict Airtel, one of the biggest consumers of tower infrastructure services in Uganda, from obtaining tower construction services without first giving the same opportunity to ATC.

2.0 Competition Notice

Following receipt of the complaint, the Commission, in accordance with sections 5(1)(b),(n), 45, 52 and 55(3) of the Act and Regulation 14 of the Competition Regulations undertook a preliminary review of the issues raised by the

Complainant and determined that based on the information provided, there was reason to suspect that there is a contravention of the rules of fair competition under the Act and the Regulations by both ATC and Airtel and it was necessary for the Commission to investigate the matter.

Pursuant to Regulation 14 (5) of the Competition Regulations, on 29th December 2021, the Commission issued a Competition notice to both ATC and Airtel. In the Competition Notice, both ATC and Airtel were allowed 14 days to submit their written responses to the issues raised in the complaint, but both ATC and Airtel requested the Commission to extend this period to at least thirty (30) days in accordance with section 55(4) of the Act.

The Commission obliged and granted both parties up to 29th January 2022 for them to submit their respective written representations. Airtel submitted its representation on 28th January 2022 while ATC filed theirs on 27th January 2022.

3.0 Hearing of the Parties.

In accordance with the principle of fair hearing as enshrined in Article 28 of the Constitution of Uganda, on the 11th of February 2022, the Commission invited Ubuntu, Airtel and ATC to appear before the Commission for a hearing of this matter. The hearing took place on 18th February 2022 at UCC House, Bugolobi.

During the hearing, the Complainant was represented by Mr. George Samula, the Chief Legal Officer, Mr. Harold Muzinda and Mr. Onzia Ronald. ATC was represented by Ms. Dorothy Ssemanda, the Chief Finance Officer, Mr. Mark Turyamureba, the Head Legal/Company Secretary, Mr. Timothy Kansiime and Mr. Michael Magambo, the Chief Executive Officer. Airtel was represented by Mr. Denis Kakongo, the Director Legal and Regulatory Affairs, Mr. Michael Opwonya and Mr. Phanindra.

4.0 Issues for resolution.

From the deliberations at the hearing between the Complainant and the management of ATC and Airtel, and the written submissions by all the parties, the Commission deduced the following issues for determination:

(1) *Whether clauses 2.4.2 and 2.4.3 (Right of First Refusal (ROFR) clauses) in the Master Tower Service Agreement (MTSA) that was signed on 5th September 2014 by Airtel and TOWERCO (Now ATC) are anti-competitive*

(2) *Whether the conduct of ATC amounts to dominance and an abuse of dominance?*

(3) *Whether ATC and Airtel's conduct amount to undue preference and are discriminatory.*

(4) *Whether the Commission has powers and rights to review earlier approvals under the ATC-EATON merger.*

(5) *Whether estoppel is applicable against the conduct of Ubuntu staff.*

5.0 Mandate of the Commission with respect to Competition matters.

Before delving into the substance of this dispute, it is important to first set out clearly the legal mandate of the Commission with respect to competition matters in the Communications sector in Uganda.

The Commission is established under section 4 of the Act as the regulator in the development of a modern communications sector that includes telecommunications, broadcasting, radio communications, postal communications, data communication and infrastructure deployment. Section 5 of the Act stipulates the statutory functions of the Commission and specifically, sections 5(1) (b), (j) (n) provide as follows:

Section 5. Functions of the Commission

(1) The functions of the Commission include-

(b) To monitor, inspect, license, supervise, control and regulate communications services.

(j) To receive, investigate and arbitrate complaints relating to communications services, and take necessary action.

(n) To promote competition, including the protection of operators from acts and practices of other operators that are damaging to competition, and to facilitate the entry into markets of new and modern systems and services.

In addition to that general mandate, Part IX of the Act is specifically titled- Fair Competition and Equality of treatment, and goes on to break down in the details, the legal mandate of the Commission in competition matters under sections 52 to 59 of the Act.

For ease of reference, sections 52, 53 and 55 of the Act, which are the most relevant to this dispute, are reproduced hereunder.

52. Commission to promote fair competition.

The Commission shall, in the performance of its functions under this Act, promote, develop and enforce fair competition and equality of treatment among all operators in any business or service relating to communication.

53. Unfair competition prohibited.

(1) An operator shall not engage in any activities, which have or are intended or are likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communications services.

(2) For the purposes of subsection (1), the acts or omissions include-

(a) any abuse by an operator, independently or with others of a dominant position which unfairly excludes or limits competition between the operator and any other party;

(b) entering into an agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition; or

(c)effecting anticompetitive changes in the market structure and, in particular, anticompetitive mergers and acquisition in the communications sector.

55. Breach of fair competition.

(1) The Commission may, by its own motion, investigate any operator who commits any act or omission in breach of fair competition.

(2) A person may complain to the Commission against a breach of fair competition by an operator.

(3) The Commission shall, if it appears that a breach of competition has been committed, investigate the act or omission and give written notice to the operator stating—

(a) that the Commission is investigating a possible breach of fair competition;

(b) the reasons for the suspicion of a contravention or breach, including any matter of facts or law which are relevant to the investigation;

(c) further information required from the operator in order to complete the investigation; and

(d) where appropriate, the steps to be taken in order to remedy the breach.

(4) The operator may, within thirty days from the date of the notice, make representations in response to the notice.

(5) Any person affected by the contravention or breach of fair competition may make a representation to the Commission in relation to the contravention or breach.

(6) The Commission shall, after considering any representations of the operator or any other person, fix a date on which to make a decision on the matter.

(7) The Commission may, upon satisfaction that an operator is competing unfairly—

(a) order the operator to stop the unfair competition;

(b) require the operator to pay a fine not exceeding ten percent of the annual turnover of the operator; (c) declare any anticompetitive agreements or contracts null and void.

(8) Subsection (6) shall not affect in any way the right of a person to take any other action against the operator under this Act or any other law.

(9) Any person aggrieved by the decision of the Commission under this section may appeal to the tribunal.

(10) This section shall not limit or in any way affect the obligations of an operator under any condition of a licence.

In addition to the above provisions in the Act, in 2019, the Minister of ICT and National Guidance in exercise of powers conferred under section 93 of the Act, issued the Uganda Communications (Competition) Regulations SI No. 93 of 2019, with the clear objective of reinforcing the provisions of Part IX of the Act on fair competition. The ground objective of the Competition Regulations is to nurture fair competition in the communication sector in Uganda and to clearly define the powers and mandate of the Commission in handling complaints and/or investigations relating to fair competition.

Specifically, Regulation 6 details the rules of fair competition and provides that the rules of fair competition shall, to the extent practicable as determined by the Commission, be based on the principles of national, regional and international competition law practices relating to the prohibition of-

(a) anti-competitive agreements, decisions or concerted practices;
(b) abuse of dominant position;
(c) anti-competitive mergers, take-overs, consolidations, acquisitions or such anti-competitive changes in the market structure resulting from changes in ownership, control, composition and structure of the operators; and
(d) all other practices and acts which lead or would lead to a substantial lessening of competition, including unfair methods of competition, unfair or deceptive acts or practices, the purpose of effect of which is to distort competition in the communications market.

Moreover, regulation 6(2) of the same Competition Regulations clearly provides that an operator or authorised person shall not engage in any activity, whether by act or omission, which has or is intended to or is likely to have the effect of unfairly

preventing, restricting or distorting competition where the acts or omission is done in the course of, or as a result of, or in connection with, any business activity relating to communications services.

Regulation 7 lists examples of acts of unfair competition, and Regulation 14(9) of the Competition Regulations goes on to provide as follows:

Regulation 14(9) The Commission shall, in making a decision on a matter concerning fair competition-

(a) not be bound by technicalities, legal forms or rules of evidence;

(b) act as speedily as proper consideration of the matter allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits and fair settlement of the dispute;

(c) inform itself of any matter relevant to the dispute in any way it thinks appropriate; and

(d) require an operator to sign an undertaking to cease and desist from any future similar conduct.

Finally, Regulation 15(2) of the Competition Regulations instructively provides that:

Where the Commission determines that an operator has breached fair competition under the Act or these Regulations, the Commission shall take the following enforcement actions-

(a) direct the operator to cease engaging in the conduct by issuing a cease and desist order;
(b) order the operator to stop the unfair competition;
(c) direct the operator to take specific remedial action;
(d) impose a financial penalty on the operator not exceeding 10% of the annual turnover of the operator;
(e) declare any anticompetitive agreements, contracts null and void or, where an operator has been designated as dominant, apply any of the remedies prescribed under the Act; and
(f) publish the results of the investigations in a newspaper of wide circulation and other media.

In addition to the above provisions of the law, all operators in the communications sector are required, in their respective license agreements, to always abide by the Act, Regulations and other laws of Uganda, including the rules on fair competition.

It is therefore beyond dispute that the Commission is clothed with adequate legal mandate to entertain this complaint and to make an appropriately decision depending on the evidence at hand.

It is also important to note that from a conceptual perspective, competition law is generally intended to prevent market distortion caused by anti-competitive practices on the part of businesses. Competition law seeks to ensure a fair

marketplace for consumers and producers by prohibiting unethical practices designed to garner greater market share than what could be realised through honest competition. This is what part IX of the Act seeks to achieve in the communications sector in Uganda.

6.0 Resolution of the Issues

We now turn to resolve the issues that were deduced from the facts of this matter and the representation by the respective parties.

Issue 1: Whether clauses 2.4.2 and 2.4.3 (Right of First Refusal (ROFR) clauses) in the Master Tower Service Agreement (MTSA) that was signed on 5th September 2014 by Airtel and TOWERCO (Now ATC) are anti-competitive

The Complainant contended that the decision by Eaton (now ATC) and Airtel to include the Right of First Refusal (ROFR) clauses in the MTSA was anti-competitive and contrary to spirit of section 53 of the Uganda Communications Act, 2013 and Regulations 6 and 7 of the Uganda Communications (competition) Regulations, 2019.

In response, both ATC and Airtel acknowledged that the impugned clauses 2.4.2 and 2.4.3 indeed exist in the MTSA agreement that was signed by the parties on 5th September 2014.

In paragraph 1.1 and 1.2 of its written representation, Airtel specifically stated that:

1.1 *Eaton Towers Uganda Limited acquired our sister company, Uganda Towers Limited, along with the towers, on 5th September 2014. Under the transaction, it was agreed between the parties that Airtel would commit to exclusively offer all the new site build requirements to Eaton Towers for a period of ten(10) years expiring in 2024. The rationale, at the time, was to enable Eaton Towers to recover the CAPEX investment in the purchase of the towers by way of lease back. Eaton Towers Limited has since been acquired and merged into ATC with the approval of UCC.*

1.2 *The Right of First Refusal (ROFR) was therefore an integral part of the transaction(Sale and lease back) agreement with similar provisions incorporated in the MTSA.*

ATC's response was also in substance similar to what Airtel stated as reproduced above, noting that at the time when Eaton Towers Uganda Limited ("**Eaton Towers**") purchased tower Sites from Airtel, it was agreed between the two parties that Airtel would commit to exclusively offer all the build

requirements to Eaton Towers for ten (10) years in order for Eaton to recover the CAPEX invested for the sale and leaseback acquisition.

ATC maintained that the ROFR was an integral part of the sale and lease back agreement and a similar provision was incorporated in the MTSA as per the intentions of the parties. Any amendment to this provision would now require ATC to renegotiate the terms of the MTSA with Airtel. The terms of the MTSA could not be renegotiated because of the approval conditions issued by the Commission for the ATC-Eaton Towers merger, wherein ATC was expressly barred from varying the terms of existing Master Service Agreements with its customers. Further, as per the terms of the MTSA, the ROFR would only be operational for a period of ten (10) years, within which it was expected that Eaton Towers (now ATC) would have been able to recover the CAPEX invested for the sale and lease back acquisition. The MTSA and consequently the ROFR is due to expire in 2024, which is only two (2) years away.

It was further submitted that at the time Eaton Towers and Airtel entered the MTSA, on 5th September 2014, Eaton Towers and ATC had an equal market share in Uganda and the validity of the clauses was and had never been challenged by any party or the Commission. It is therefore surprising that a claim that the impugned provisions of the MTSA are stifling competition is now being made, seven (7) years later by a party that had knowledge of the existence of these clauses.

Further, prior to acquiring Airtel's Sites, both Eaton Towers and Airtel sought and obtained the approval of the Commission for their intended transaction. In this regard, the Commission was provided with all their contracts for review and approval. The Commission did not object to any of the provisions including clauses 2.4.2 and 2.4.3 of the MTSA that Ubuntu Towers is now seeking to challenge

On its part, Airtel largely concurred with the submissions of ATC, and added that while clauses 2.4.2 and 2.4.3 exist, there has been absolute goodwill in extending the business to new entrants like Ubuntu. Airtel showed that over the last 6 months, 53 tower build orders have been confirmed with Ubuntu.

Analysis by the Commission

Before determining this issue, there is need to reproduce Clauses 2.4.2 and Clause 2.4.3 of the MTSA to better appreciate the facts.

The Clause States:-

> *2.4.2 During the Term, Airtel grants to TOWERCO (EATON and by extension its successors) a right of first refusal to build any New Sites for Airtel, which sites (once completed) shall then form part of TOWERCO's tower portfolio in the Territory.*

2.4.3 During the Term, Airtel shall not appoint any other person to build such New Sites, without first offering such sites to TOWERCO to build, on terms which are no worse than the terms and conditions upon which Airtel is prepared to contract any other person to build the New Sites.

This is the clause that contains what is referred to as 'The Right of First Refusal (ROFR)'. The Commission reviewed the MTSAs and established that clauses 2.4.2 and 2.4.3 indeed exists in Airtel's MTSA with Eaton and its successors ATC.

A reading of these clauses clearly shows that the intention of the Eaton and Airtel, and by extension, ATC was to restrict Airtel from giving any contract for building new sites to a different tower company, if Eaton (now ATC) could build the same sites on the same terms and conditions as was offered by that other 3rd party. The intention of the parties was to keep this restriction in force for a period of 10 years, effective 5th September 2014 to 4th September 2024.

In practical terms, if applied, these clauses would leave new tower companies in a weaker position insofar as they would either have to bid and quote low amounts below what ATC could build the same sites, as the only way through which they can outcompete ATC, or they would have to accept to build sites in places or locations that ATC may not be interested in.

The latter position was confirmed by Ubuntu in its submissions, noting that most of the orders they received from Airtel were in respect to site locations that ATC was not interested in, and these are mostly in hard-to-reach places or locations with bad terrain.

The Commission notes that the ROFR expire in two years' time, that is, on 4th September 2024. This means that if these clauses are left as they are in the MTSA, Ubuntu towers and any other holders of infrastructure licenses may continue to be disadvantaged by this restrictive clause.

From both ATC and Airtel's representations, it is apparent that the objective of the ROFR was to enable Eaton to recover the CAPEX investment in the purchase of the towers it had bought from Uganda Towers Limited.

The question that the Commission therefore needs to answer is whether these clauses are in line with the spirit of Part IX of the Act and the Competition Regulations.

It has already been stated herein above that section 53(1) of the Act expressly prohibits operators from engaging in any activities which have, or are intended or are likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communication services.

Section 53(2)(b) of the Act goes on to provide that acts or omissions which are prohibited include the entering into an agreement or engaging in any concerted

practice with any other party, which unfairly prevents, restricts or distorts competition.

Regulation 7(1)(e) of the Competition Regulations states that unfair competition can be inferred where one makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the object of the contracts.

From the above provisions of the law, it is apparent that where an operator, either individually or jointly with another, enter any contract which has the effect of preventing, restricting or distorting competition in relation to any business activity in the communication sector is uncompetitive and prohibited.

In the case of ***T-Mobile Netherlands BV and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit Case-8/08*** the European Court of Justice (ECJ) held inter alia that:

> *The definitions of 'agreements', 'decisions by associations of undertaking', and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the form in which they manifest themselves....that the criteria laid down in the court's case law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice.* (Refer to paragraphs 23-24).

In the same case, the ECJ further held that:

> *A concerted practice or agreement is deemed to pursue an anti-competitive object for purpose of Article 81(1) EC, where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or direct link between the concerted practice and consumer prices.* [Paragraph 43- Emphasis Ours]

In the complaint at hand, the parties have indeed acknowledged that the object of the impugned clauses was to commit Airtel to exclusively offer all the new site build requirements to Eaton (and its successors) for a period of 10 years, and this was done in order to enable Eaton (now ATC), to recover the CAPEX investment it incurred in the transaction to purchase Uganda Towers' business.

From whatever angle one looks at this clause, it becomes irresistibly clear that the intention of the parties was to give ATC an advantage in securing all contracts for building new sites for Airtel for a period of 10 years. The only exception would be where ATC decided to exercise its right to refuse any such offers/requests.

Considering that Airtel currently commands about 40% of the total new sites build-up demand in the communications sector in Uganda, it is clear that these clauses

had the effect to appreciably prevent, restrict and distort competition in the communication sector, contrary to the spirit and letter of section 53(1) of the Act and regulation 6(2) of the Competition Regulations.

The Commission further finds that the impugned clauses were unfair and contrary to the law insofar as they restricted the rights of other licensed tower operators from freely negotiating and/or engaging with Airtel for possible business in building new sites, except with ATC's blessing.

Indeed, just like the Complainant stated in their complaint and during the hearing, the impugned clauses placed the complainant and other tower operators at a disadvantage because they could only be given business to build new sites for Airtel after ATC had rejected such offers. This explains the claims by the complainant that majority of the sites that Airtel reportedly contracted them to build were those in problematic/less attractive places, and which ATC had first rejected to work on.

The Commission further observes that whereas Airtel belaboured to argues that they had equally contracted Ubuntu to build some new sites, the fact that the impugned clauses obliged Airtel to first allow ATC to exercise the right of first refusal only points to unfairness and anti-competitive conduct.

The Commission accordingly resolves this issue in the affirmative.

Effect of the ROFR on entry

In the process of resolving this issue, the Commission observed that the Complainant claimed that the ROFR also had an effect on entry into the tower market, and indeed the Commission reviewed the potential exclusionary effect of the clauses.

It is the Commission's finding that the exclusive partnership with a major buyer of Cell Site Passive Infrastructure (CSPI) services significantly reduces the market entry opportunities for new operators in the CSPI market, particularly noting that presently, Airtel commands more than 40% of the new site build demand, and therefore excluding it from the target market for new players like Ubuntu means that the entry opportunity and market contestability is significantly diminished.

Vertical restraining effects of ROFRs

Ubuntu argued that the ROFR presents vertical restraints in the industry on account of ATC and Airtel's presence at different levels of the production chain.

In response, both ATC and Airtel denied existence of any vertical restraints. They argued that the impugned clauses do not amount to a vertical restraint because there are no exclusive dealings between ATC and Airtel.

Vertical restraints are competition restrictions in agreements between firms or individuals at different levels of the production and distribution process. Vertical restraints are to be distinguished from so-called "horizontal restraints", which are

found in agreements between horizontal competitors. Vertical restraints can take numerous forms, ranging from a requirement that dealers accept returns of a manufacturer's product, to resale price maintenance agreements setting the minimum or maximum price that dealers can charge for the manufacturer's product.

According to paragraph 24 of the European Commission Guidelines on Vertical Restraints 2010/C 130/01, a vertical agreement is an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or concerted practice, at a different level of production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

From the facts at hand, it is apparent that both ATC and Airtel operate at different levels of production. ATC operates in the tower market, providing infrastructure services through which Airtel and other licensed Mobile Network Operators (MNO) provide telecommunication services to final consumers of communications services in Uganda. On the other hand, Airtel holds a National Telecom operator's license, which authorises it to provide a range of telecommunication services, but predominantly provides mobile communication services to the public.

It can therefore be deduced that the ROFA clauses are indeed vertical restraints.

However, even in the European Union, it is generally understood that for most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or both levels(see para 23 of the European Commission Guidelines on Vertical Restraints 2010/C 130/01).

This means that not all vertical restraints are illegal per se. Their illegality can only arise if they pose anti-competitive effects to the market.

The question that the Commission is therefore required to answer is whether, from the facts of this case, the restriction that was imposed on Airtel in MTSA, not to order for new site building services from other licensed tower operator in Uganda, without first giving such order to ATC for a period of ten years, appreciably lessens or materially distorts competition in the cell site tower market in Uganda.

Based on the responses from both ATC and Airtel, it is apparent that the objective of the ROFR was to enable Eaton to recover the CAPEX investment in the purchase of the towers it had bought from Uganda Towers Limited. This means that the clear objective of the parties was to ringfence and guarantee for Eaton, and now ATC, the financial benefit from building new sites for Airtel for a period of ten years, except in the isolated cases where ATC would consider such new orders commercially unviable. In other words, Eaton (now ATC) did not want its business

with Airtel to be 'cannibalised' by other licensed tower service providers in Uganda for a period of Uganda.

In a related English case of ***Arriva The Sires Ltd v London Luton Airport Operations Ltd [2014] EWHC 64,*** the High Court of Justice of the Chancery Division was tasked to, *inter alia*, decide whether Luton Airport was legally right to grant a right of first refusal to the National Express, over the operation of other services on the routes between Luton Airport and other destinations in London. On its part, Luton Airport argued that it was commercially justified to grant the right of first refusal to National Express in order to prevent National Express from being challenged by other competing coach service providers on the route between Luton Airport to Central London. It was argued that National Express did not want their passenger numbers being 'cannibalised' by competing services because that would undermine the basis on which they were prepared to pay the minimum guaranteed sum they committed to under the new concession.

While deciding on this issue, Mrs Justice Rose held that:

> *I agree with ATS that this is not a legitimate justification for the inclusion of this clause and that this right of first refusal distorts competition in the downstream market-indeed that is its intention.....There was no justification here for protecting National Express from the erosion of their customer base if a rival service was introduced to another London route and some passengers found it more convenient to travel to that destination rather than to Victoria.***[Para 123- Emphasis ours]**

Picking from the above reasoning, it is the Commission finding that there was no legal justification for Airtel to give Eaton (now ATC), the right of first refusal with respect to orders for new sites for a whopping period of ten years. This provision, by its nature and object, had a direct effect of undermining fair competition in the tower market, insofar as it would expose other tower operators to the unfortunate commercial position of always being considered only after ATC had rejected a particular order. This is further worsened by the fact that Airtel currently commands an estimated 40% of the total new sites build-up demand in the communications sector in Uganda, and ATC controls over 90% of the tower market in Uganda.

With these clauses in the MTSA, it would mean that other licensed tower operators in Uganda stand virtually no realistic opportunity to obtain new orders for building towers from Airtel, until after ATC has exercised its right of first refusal over such orders.

The clauses have the potential to further increase ATC's control on the tower market, while at the same time deny new entrants a chance to fairly compete for business from Airtel, which in the end, will only result into further anti-competitiveness in the sector.

It is therefore our finding that the subject clauses are indeed a vertical restraint and in view of their overall effect on the competitiveness in the tower sector, they contravene section 53(1) of the Act as well as Regulations 6(2), 7((e), (h) and (k) of the Competition Regulations.

Issue 2: Whether ATC is a dominant firm, and if yes, whether it is abusing its dominant position

While Ubuntu hinged some of its submissions on an alleged position of dominance by ATC, ATC argued that it has not been designated by the Commission as a dominant operator in the provision of tower services and therefore dominance claims are misplaced.

The Commission observes that although the last telecommunications market definition was done more than 5 years ago, the current market figures show that ATC's tower portfolio is about 3,700, which translates into a market share of 87% of the total national tower inventory, and its annual revenues of UGX 284 Billion, which accounts for more than 90% of the CSPI market revenues. Based on the above facts, it is deducible that whereas the Commission has not yet designated ATC as a dominant operator in CSPI market segment in accordance with Regulation 10 of the Competition Regulations, it is apparent that ATC exhibits all features of an operator with significant market power in the tower market in Uganda.

As such, in accordance with regulation 14(9)(a) and (c) of the Competition Regulations and the spirit of Article 126(2)(e) of the Constitution of Uganda, the Commission's analysis of ATC's conduct in this matter shall be undertaken, with a conscious that ATC commands a significant position in the tower sector in Uganda, although it has not yet been designated as a dominant operator in accordance with regulation 10 of the Competition Regulations.

The focus of the Commission's inquiry in this complaint is to establish the extent to which the alleged clauses present anti-competitive effects in the market.

Issue 3: Whether ATC and Airtel's conduct amount to undue preference and are discriminatory.

Ubuntu posited that the ROFR provide ATC with an unmerited preference and insights into the pricing of competitors. The disclosure of potential tower-build competitor terms is a pre-requisite to the enforcement of the ROFR. As earlier mentioned, the clauses allow ATC to cherry-pick between different infrastructure build orders to the commercial disadvantage of new entrants.

It is, therefore, the Commission's finding the ROFA clauses significantly undermine the contestability of the tower market contrary to spirit of fair competition as captured in the Part IV of the Act and the Competition Regulations.

Issue 4: Whether the Commission has powers and rights to review earlier approvals under the ATC-EATON merger.

In the response to this issue, ATC and Airtel submitted that the Commission should not review the MTSAs since the Commission already approved the ATC-Eaton merger and the commercial terms therein. They further argued that since the MTSA was submitted to the Commission for approval before it was signed by the parties, the Commission cannot turn around and hold the clauses in that agreement to be contrary to the law.

While the Commission is aware of the terms of the ATC-Eaton regulatory approval of 28th November 2019, it is our finding that the Commission's legal and regulatory mandate cannot be fettered merely because the subject agreement was earlier approved by the Commission. There is no restriction to a market correcting intervention based on new information and/or complaints brought before the Commission. A non-interventionist decision by the Commission at this time would be to abdicate of the Commission's higher-order goals of market expansion and promotion of competition in the sector.

In addition, it is a well settled principle of law that a public body cannot be estopped from exercising its statutory mandate, merely because of its prior decisions. As such, doing so would amount to fettering the statutory mandate of the Commission which would be contrary to the spirit and object of the law as was held by Justice Egonda Ntende in ***K.M Enterprises & Others v Uganda Revenue Authority HCCS No. 599 of 2001***,

> *'Exercise of statutory powers and duties cannot be fettered or overridden by agreement, estoppel, lapse of time, mistake and such other circumstances. To hold otherwise would suggest that an agreement between the parties can amend an Act of Parliament, and thus change what Parliament ordained by allowing the defendant's servants to choose to act, or operate outside or contrary to the provision of the law, willy-nilly. And that cannot be.'*

The foregoing notwithstanding, approval of the MTSA agreement or any other agreements between operators by the Commission does not stop the Commission from entertaining a specific complaint challenging the legality of the entire agreement or any part of it.

Accordingly, the Commission finds that it has powers and is duly mandated to investigate this agreement and to make an appropriate decision in accordance with the law.

This issue is resolved in the affirmative.

Issue 5: Whether estoppel is applicable against the conduct of Ubuntu staff.

ATC submitted that the author of the complaint (the Chief Legal Officer, Mr. George Ssamula for Ubuntu) was part of the EATON tower management team which operated and implemented the MTSA then, and therefore he is estopped from contending that the clauses violate the Uganda Communications Act and Competition Regulations.

Whilst this argument could contractually have some legal weight, there is nothing in law that prevents a former employee of one entity from working for another licensed operator in the sector, and if in the course of working for another operator, the interests of the new employer require such employee to take measures that might be morally considered unfair to his former employer, that cannot operate as a legal bar to such employee doing what is right. Besides, the agreement in issue was executed between legal persons, and not the individual employees, and the Commission licenses operators not the employees in the licensed entities. ATC's argument does not therefore hold legal force.

It is the Commission's finding that since the complaint raises material conduct issues that are in breach of different clauses of the Act and the Competition regulations, the fact that these were presented by ATC's former employee, does not dilute the substance of the issues at hand and in accordance with Regulations 14(9)(a) this claim is rejected.

This issue is therefore resolved in the negative.

5.0 Conclusion and Directives

It has already been noted that according to Regulation 15(2) of the Competition Regulations, where the Commission determines that an operator has breached the rules of fair competition under the Act or the Regulations, the Commission shall take the following enforcement actions-

(g) direct the operator to cease engaging in the conduct by issuing a cease and desist order;
(h) order the operator to stop the unfair competition;
(i) direct the operator to take specific remedial action;
(j) impose a financial penalty on the operator not exceeding 10% of the annual turnover of the operator;
(k) declare any anticompetitive agreements, contracts null and void or, where an operator has been designated as dominant, apply any of the remedies prescribed under the Act; and
(l) publish the results of the investigations in a newspaper of wide circulation and other media.

In view of the above instructive provision of the law and the findings in issues 1, 3, 4 and 5 above, the Commission therefore concludes as follows:

(a) Clauses 2.4.2 and 2.4.3 of the MTSA that was executed by and between Eaton (now ATC), Airtel and Uganda Tower Limited, on the 5th September 2014 contravenes sections 53(1) and 2(b) of the Act and Regulation 6(1)(a) and (2) of the Competition Regulations insofar as it would restrict and distort competition in the manner in which Airtel awards contract for building of new tower sites for a period of 10 years therefrom.

(b) The implementation of the subject clauses by both ATC and Airtel since 5th September 2014 has appreciably distorted competition in the tower market in Uganda and exposed the Complainant to unfairness competition in the award of contracts for building of new towers/sites for Airtel.

WHEREFORE, in accordance with section 55(7) of the Act and Regulation 15(2) of the Competition Regulations, the Commission hereby DIRECTS as follows:

1. Clauses 2.4.2 and 2.4.3 of the MTSA Agreement between ATC and Airtel are hereby declared NULL and VOID for being anti-competitive contrary to section 53(1) and 2(b) of the Act and regulation 6(1)(a) and (2) of the Competition Regulations. The parties must immediately expunge the said clauses from the MTSA.

2. Both ATC and Airtel are WARNED against engaging in any retributive or otherwise retaliatory act or omission against the Complainant for presenting this complaint to the Commission.

3. Both ATC and Airtel are directed to CEASE and DESIST from engaging in any anti-competitive practices.

4. All parties are required to comply with the directives contained herein within thirty (30) days from the date hereof.

5. Any party who may be aggrieved by this decision may appeal within thirty (30) days from the date of this decision.

Delivered at UCC House - Bugolobi, Kampala, this.....4..... day of May 2022

For and on behalf of the Uganda Communications Commission.

Irene Kaggwa Sewankambo
Ag. EXECUTIVE DIRECTOR