

September 2, 2019

The Chairman,
Association of Licensed Telecommunications Operators of Nigeria (ALTON),
Stop Centre Building, No. 5, Amodu Ojikutu Street,
Off Saka Tinubu Street,
Victoria Island,
Lagos.

Attention: Gbolahan Awonuga

Dear Sir,

COURT JUDGEMENT ON CASES OF MULTIPLE TAXATION AGAINST STATE GOVERNMENTS' DEMANDS

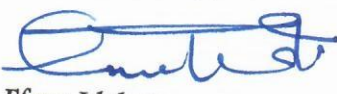
The above subject matter refers.

IHS Nigeria Limited instituted two (2) Legal actions against spurious demand notices issued by Ogun and Abia State Governments and judgments were delivered in favour of IHS Nigeria Limited (See Attached).

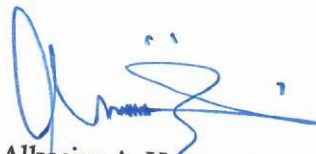
The aforementioned judgments are a positive development to your members and the industry at large as the cases will serve as useful authorities in the event that any other state government make similar regulations.

Thank you

Yours faithfully,



Efosa Idehen
Director, Compliance Monitoring & Enforcement
For: Executive Vice-Chairman/CEO



Alkasim A. Umar
Head, Compliance Monitoring

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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE UMUAHIA JUDICIAL DIVISION
HOLDEN AT UMUAHIA
ON WEDNESDAY THE 30TH DAY OF MAY, 2018
BEFORE HIS LORDSHIP HON. JUSTICE D.E. OSIAGOR
JUDGE

SUIT NO: FHC/UM/CS/146/16

BETWEEN:

IHS NIGERIA LIMITED
AND

PLAINTIFF

1. ATTORNEY GENERAL OF THE FEDERATION
2. ABIA STATE GOVERNMENT
3. ATTORNEY GENERAL OF ABIA STATE
4. ABIA STATE HOUSE OF ASSEMBLY
5. NIGERIAN COMMUNICATION COMMISSION (NCC)

DEFENDANTS

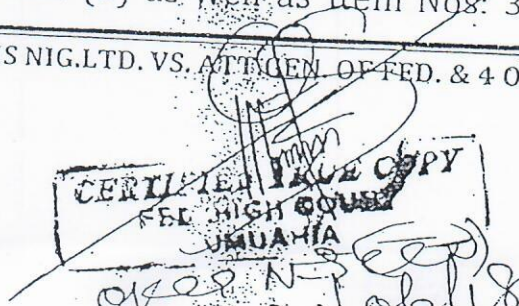
JUDGMENT

By an amended Originating Summons brought Pursuant to Section 251(1)(B) of the Constitution of the Federal Republic of Nigeria 1999 as Amended, Order 3 of the Federal High Court Rules, 2009 and under the inherent Jurisdiction of the Court, the Plaintiff, IHS Nigeria Limited, has sued the Attorney-General of the Federation, the Abia State Government, Attorney General of Abia State, Abia State House of Assembly, and the Nigerian Communication Commission, asking for the determination of some questions demanding these reliefs:

- a. A DECLARATION that the 2nd, 3rd and 4th Defendants, their agents, servants, privies, assigns, or appointees either jointly or severally DO NOT have any powers, authority or constitutional legislative powers to enact or enforce "Section 26(2) of the Abia State Basic Environmental Law No. 1 of 2004, Section 5 (1) and (2) as well as Item Nos: 32, 33,

JUDGMENT.FHC/UM/CS/146/16; BETWEEN: IHS NIG.LTD. VS. ATT GEN. OF FED. & 4 ORS.

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- d. A DECLARATION by this Honourable Court restraining the 5th Defendant (NCC) from demanding and collecting revenue on the areas already demanded and collected by the agents of 2nd and 3rd defendants.
- e. A DECLARATION that the Demand Notices issued by the 2nd and 3rd defendants through their agency known as Abia State Environmental Protection Agency (ASEPA) Revenue Committee of Telecommunication to IHS Nigeria Limited (the Plaintiff) demanding for the payment of "Environmental Support fee" is not only ultra vires, but unconstitutional, null and void and of no effect whatsoever having regards to Section 1(1), Section 1(3), Section 4(3), Section 4(5) and Item Nos: 46, 66 and 68 of the second Schedule of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999 as amended.
- f. A DECLARATION that Section 24(1), Fourth Schedule item No. 16 (under Commercial services Establishments) of The Registration of Business premises (Amended) Law 2013 enacted by the 2nd, 3rd and 4th Defendants is unconstitutional and ultra vires as it touches on Telecommunication in view of the Constitution of the Federal Republic of Nigeria 1999 as amended particularly Section 1(1), Section 1(3), Section 4(3), Section 4(5) and Item Nos: 46, 66 and 68 of the second Schedule (Part 1) of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999 as amended.
- g. A DECLARATION that the Demand Notices issued by the 2nd and 3rd Defendants through Ministry of Trade and Investment and Abia State Board of Internal Revenue to IHS Nigeria Limited (the Plaintiff) demanding for the payment of "Business Premises Registration for

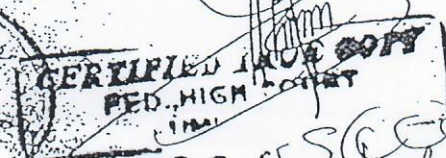


k. AN ORDER of perpetual injunction restraining the 2nd, 3rd and 4th Defendants through their agency known as Abia State Environmental Protection Agency (ASEPA) Revenue Committee on Telecommunication, or any other agency from demanding for the payment of "Environmental Support fee: from the Plaintiff as such action is Ultra vires and unconstitutional having regards to Section 1(1), Section 1(3) Section 4(3), Section 4(5) and Item Nos: 46, 66 and 68 of the second schedule of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999 as amended.

l. AN ORDER of perpetual Injunction restraining the 2nd, 3rd and 4th Defendants through their agents Ministry of Trade and Investment, Board of Internal Revenue or any other agency from implementing Section 24(1), Fourth Schedule item No. 16 (Under Commercial Services Establishments) of the Registration of Business premises (Amendment) Law 2013 enacted by the 2nd and 3rd Defendants.

m. AN ORDER of perpetual Injunction restraining the 2nd, 3rd and 4th Defendants through their agents, Ministry of Trade and Investment, Board of Internal Revenue, or any other agency from demanding for the Registration of Business premises for each and every Telecommunication Mast/Base Station as such action is unconstitutional and or excessive, repetitive, harsh, oppressive, draconian and unfriendly to investment.

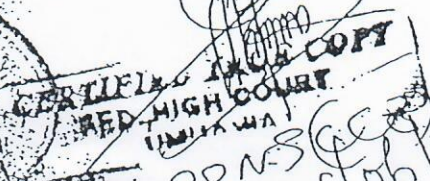
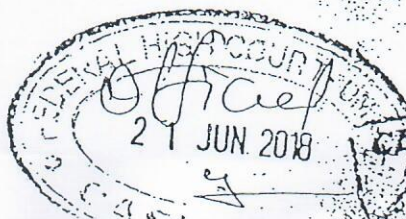
According to the facts stated in the affidavit in support of the application, MTN Communication limited, Emerging Markets Telecommunications Services Limited (Etisalat) and other telecommunication Companies transferred their towers and Cellular Masts to the Plaintiff following a directives and guidelines



According to it, by item Nos: 46.66 and 68 of the second schedule Part 1 of the exclusive legislative list of the Constitution, every matter related, incidental or supplementary to telecommunication is placed in the exclusive legislative list of the Federal Government thus, only the Federal Government has the legislative powers to legislate on those areas to the exclusion of any other state.

The Plaintiff therefore argued that considering the Provisions of the Nigerian Communication Act, 2003, it is not within the legislative, and administrative purview of the 2nd, 3rd and 4th Defendants to issue guideline for the installations of telecommunication masts/base station contrary to the guidelines issued by the 5th Defendant pursuant to section 4(1) (n) of the Nigerian Telecommunication Act, 2003, and that Section 5(1) and (2) of the Abia State Basic Environmental (Amendment No. 1) Law No. 7 of 2013 is inconsistent with the provisions of Section 4(1) (n) of the Nigerian Communication Act 2003. The Plaintiff further argued, relying on the case of *Phoenix Motors Ltd V. N.P.F.M.B.* (1993) 1 NWLR (Pt. 277) pg. 718 and the case of *A.G. Federation V. A.G. Lagos State* (2013) LPELR - 26974 SC, that the 2nd, 3rd and 4th Defendants do not have the legislative competence to enact laws, imposing taxes, levies, fees, penalties and or fines on telecommunication critical infrastructures.

It was also argued as well that the 2nd, 3rd and 4th Defendants, their agents, servants, privies, assigns or appointees either jointly or severally do not have the powers, authorities or constitutional legislative powers to enact or enforce "Section 26(2) of the Abia State Basic Environmental Law No. 1 of 2004, Section 5(1) and (2) as well as item Nos: 32, 33, 34, 35, 36 and 37 of schedule 1 of the Abia State Basic Environmental (Amendment No. 1) Law No. 7 of 2013



installation of Telecommunication masts and base transmission stations because the 2nd-4th Defendants are purportedly asking for the same revenue.

The 2nd and 3rd Defendants in response filed a Counter Affidavit, Notice of Preliminary Objection and a combined Written Address in opposition to the Originating Summons brought before the Court by the Claimant.

In the Written Address in support of their Preliminary Objection, two issues for determination were raised: Viz:

- (1). *Whether the Honourable Court has jurisdiction to entertain the instant suit based on the Claims before the Honourable Court or,*
- (2). *Whether the legality of the Abia State Basic Environment Law No.1 of 2004, Abia State Environmental (Amendment No. 1) Law No. 7 of 2013 and the Abia State Registration of Business Premises (Amendment) Law, 2013 fall under Section 251 of the Constitution of the Federal Republic of Nigeria, more so, that the claims questions the legality of these Laws which are primarily against the State parties to wit; the Abia State Government, Attorney General of Abia State and the Abia State House of Assembly.*

The 2nd and 3rd Defendants argued that jurisdiction is determined by the reliefs Claimed by the Plaintiff. Arguing with a plethora of cases, they stated that there is a misjoinder of the 1st and 5th Defendants as no claim or cause of action in the 12 reliefs is pleaded by the Plaintiff. In their reliefs A-I embossed in PARAGRAPHS 4-6 of the originating Summons against the 1st and 5th defendants. Citing the Case of MTN Communication Ltd. V. Abia State Government (2016) 1 NWLR (Pt. 1494) at pg. 502, Ahmed V. Ahmed (2013) 56 NSCQR at 54 at 55 paragraphs B-A among others, they argued that the Plaintiff had deliberately sued the 1st and 5th Defendants just to make



Abia State which are not stated in the exclusive or concurrent legislative lists, thereby making it residual.

They concluded by stating that Environment, business or registration are not mentioned in either of the exclusive or legislative lists, thus item 68 of the exclusive list cannot be stretched to accommodate the relief of the Plaintiff which to them is untenable.

In the 5th Defendant's Written Address against the Plaintiff's amended Originating Summons, the 5th Defendant faulted the prayer of the Plaintiff asking the Court to restrain the 5th Defendant from demanding and collecting revenue on the installation of the telecommunication Masts and Base Transmission station because the 2nd-4th Defendants are purportedly asking for the same revenue.

The 5th Defendant, raised three issues for determination.

In arguing the first issue raised, it was submitted that though the National Assembly has the power to legislate on matters of telecommunication masts, base stations etc., it has no power to legislate on telecommunication mast sites, environmental support fee and state business premises registration; as it is within the competence of the Abia State House of Assembly.

It was further contended in the second issue among other things, that no foundation was laid in relief (d) of the originating Summons of the Plaintiff as there is no how the alleged unconstitutional Laws of the 2nd-4th defendants affects the Constitutional actions of the 5th Defendant.

On the third issue raised, the 5th Defendant similarly argued that the Court has no jurisdiction to hear the matter because the Plaintiff made a claim not supported by pleaded facts or evidence. The 5th Defendant further argued that it is not a proper party and cannot be joined to confer jurisdiction in the Court.



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Court. See Goldmark Nigeria Ltd & Ors. V. IBAFON Company Ltd & Ors. (2012) LPELR-9349 (SC), NEPA v. Edegero (2002) 18 NWLR (Pt. 798).


The 2nd-4th Defendants had raised a Preliminary issue to the Jurisdiction of this Court to try the matter. They had argued that there is no cause of action against the 5th Defendant and that the Plaintiff had only joined the 1st and 5th Defendants only to Confer this Court with jurisdiction to try this matter.

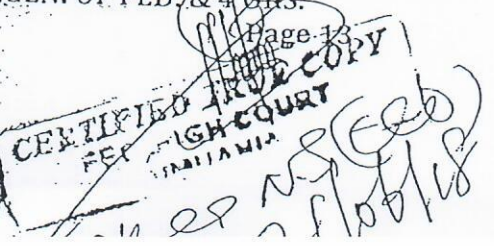
Indeed the action before this Court was brought via an originating summons as there is no dispute on questions of facts or the likelihood of such dispute. In the case of Dapianlong V. Dariye (2007) LPELR - 928 (SC). The Supreme Court affirmed per Onnoghen JSC that in actions commenced by originating summons, pleadings are not required rather affidavit evidence are employed.

However, in the case of Ayilara V. Federal Ministry of Works(2013) LPELR-20772 (CA), the Court of Appeal stated that when cases are tried upon affidavit evidence, the facts or depositions in such affidavit have to be proved like averments in pleadings. See UBN V. Astra Builders (W.A.) Ltd (2010) 2 SCNJ 84; And Ezechukwu V. Onwuka (2001) FWLR (Pt. 50) 1713..

The above principles point to the fact that the Court in order to consider the Claim and Cause of action must look at the affidavit evidence before it which though not a pleading, operates as one for an Originating Summons application.

From the processes filed before this Court, it is clear that the Plaintiff is praying for a relief against the 5th Defendant which is to the effect that the 5th defendant should be restrained from collecting tax from the Plaintiff as the 2nd-4th defendants is demanding same revenue. For the Court to grant such relief, it then means that the Plaintiff must have a case against the 1st and 5th

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and the Relief sought therein. In that case which was sought by way of originating Summons, the emeritus law lord reasoned that the Court process to be used is the affidavit in support of the Originating Summons and that the Court will not examine the Counter-Affidavit or statement of Defence even, if filed" Per Agube J.C.A. (pp 54-56; paragraphs F-E) ACN V. INEC (2007) 18 NWLR Pt. 1065-SC.

It is the Plaintiff's cause of action as endorsed in his Claim or affidavit that determines Court jurisdiction.

Now Section 251(1)(b) of the Constitution states that the federal High Court shall have exclusive jurisdiction on matters connected with or pertaining to the taxation of Companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal Taxation. See A.G. Lagos State V. A.G. Federation & ors. (2014) LPLER-22701 (SC).

The Crux of the matter before this Court bothers on the demand notices for payments from a Company registered under CAMA.

This is conferred by Section 251(1)(b) of the Constitution, as amended, and therefore under the jurisdiction of this Court. Being that the application before this Court is originating summons dealing with the interpretation of items in the exclusive list of the Federal Government, it is not out of place, for the Federal High Court to assume jurisdiction over the matter. It is the Court holding by virtue of Section 251(1)(b) of the 1999 Constitution as amended that this Honourable Court has Jurisdiction to try this. Kunle Dinka Ademola V. Attorney-General of the Federation & Anor. 2015 LPELR - 24784 (CA).

In this issue, where a Federal Government Agency is a party to a proceeding, a Court is mandated to look at both party and subject matter jurisdictional aspects of it. See Obiuweubi V. C.B.N. (2011) 7 NWLR (pt. 1247) 465.



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This Claim relates to taxation of a Communication mast site. Even in the event that the Matters come partly within the jurisdiction of both Federal High Court and State High Court, following AMC V. NPA (1987) 1 NWLR Pt. 51 at 475, both Courts can assume jurisdiction. The Preliminary Objection, is hereby dismissed.

On the substantive Claims, certain preliminary points of law that need no equivocation need to be kept in view whilst analysing the questions for determination:

- (1) The National Assembly is conferred with the exclusive legislative competence over communication and telegraphic matters and all incidentals thereto. See Exclusive legislative list Section 46, 66 of 2nd schedule to 1999 Constitution as amended.
- (2) Pursuant to the above the Nigerian Communication Act LFN 2004 was promulgated to oversee and regulate the Communication Industry in Nigeria. See Sections 1(b) and 70 of the Act.
- (3) Tenement rates imposed on Companies do not amount to double taxation - See Bamak Pharmacy Ltd. & ors. V. Abuja Municipal Area Council (2010) LPELR 3850 (CA) cited with approval by VALENTINE B. ASHI -J. of the Federal Capital territory High Court in Planned Shelter Ltd. V. Abuja Municipal Area, Council & 5 Ors. (Suit No. FCT/HC/CV/2625/16). See Fourth Schedule item 1(J).
- (4) Item 7, part II of Taxes and levies approved list for collection Act schedule listed Business Premises registration fee as part of taxes and levies collectable by the State Government and item 8 - Development levy from Individuals.



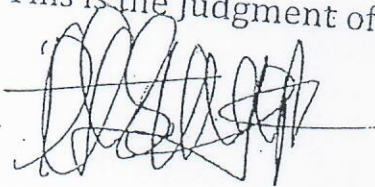
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Mast Sites is unconstitutional and contrary to the Nigerian Communication Act.

- (3) The Numerous Demand Notices issued by the 2nd and 4th Defendants are hereby set aside.
- (4) A perpetual Injunction is hereby ordered restraining the 2nd, 3rd and 4th Defendants, their agents from demanding the payment of Environmental Support Fee from the Plaintiff with respect to their sites.
- (5) A perpetual Injunction is also ordered against the 2nd and 3rd Defendants from demanding under item 16 of Registration of Business premises law for Plaintiffs Telecommunication Mast site.
- (6) Claims against 1st and 5th Defendants are hereby dismissed as they were unsubstantiated and unsupportable by the facts and the law as it is the exclusive responsibility of the 5th Defendant to regulate the Telecommunication mast sites.

This is the Judgment of the Honourable Court.



D.E. OSIAGOR
JUDGE
30/05/2018



Appearances:

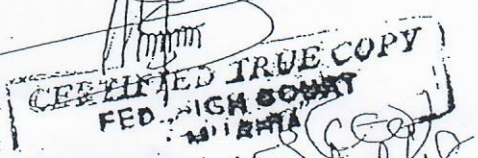
C.C. Nwachukwu for the Plaintiff

C. Ogwo- Chief State Counsel with C.I. Onwuchekwa State Counsel for 2nd and 3rd Defendants.

Mrs. O.C. Chukwuemeno for the 5th Defendant.

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2013 to include item 16 Mobile Communication Mast/Station site without the impute or approval, of the Joint Tax Board established under Section 86 of the personal Income Tax Act LFN 2004.

Under our Constitutional Democracy, under no guise nor pseudo name should a tier of government trespass into other tier of government's legislative competence or jurisdiction.

Therefore the demand notices on the telephone mast sites are hereby set aside for being ultra vires, null and void and of no effect.

I will therefore answer the queries posed in the originating summons as follows:-

Q 1: Answered in the affirmative.

Q 2: This question assumes that 2nd, 3rd and 4th Defendants issued guidelines for the installation of telecommunication Mast site contrary to 5th Defendant guidelines; the 2nd, 3rd and 4th Defendant did not issue Guidelines which were pursuant to Section 4 of NCA 2003 issued by the 5th Defendant.

Q 3: Section 5(1) and (2) of the Abia State Basic Environmental (Amendment No. 1) law No. 7 of 2013 is not inconsistent with the provisions of Section 4(1)(n) of the Nigerian Communication Act 2003. The State can under its physical planning and development powers issue guidelines for installation, building and establishment of Mast base Station in consonance with the Chapter 5 of the Guidelines of 2009 issued by Nigerian Communication Commission but not annual taxing of Communication base stations.

Q 4: The 2nd, 3rd and 4th Defendants lack the legislative competence to enact laws imposing taxes, levies, fees on Telecommunication critical

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Therefore, the Abia State House of Assembly having powers to legislate on Environmental Matters like prior approvals for building and erection of Masts, business Premises Fees is one thing, amending the laws to incorporate Communication Mast sites as business premises and being mandated to pay for Environmental tax under schedule 1 is another legislative competence found lacking.

Guidelines on Technical specifications for the installation of Telecommunications Masts and Towers were issued on the 9th of April 2009 pursuant to the Nigerian Communication Act of 2003.

Wherein each mast was mandated under Chapter 5(iii) to be in conformity with the plan of the particular area and the general plan of the Community. These envisage taxes, fees, levies chargeable prior to installation or erection as they fall within the purview of physical planning and Development.

The demand notices issued by the 2nd - 3rd Defendants numbering about 453 denote one demand Notice to one communication mast site. I agree with the Plaintiff that these are oppressive.

The Telecommunication mast/installations and or Basic Station do not operate alone on its own rather they are critical infrastructure used jointly with other mast/installations in furtherance of a simple Business of telecommunication.

Charging Telephone Mast Station as a business premises is akin to charging every power infrastructure commonly called or referred to as transformer in the neighbourhood as a business premises. It is not. These infrastructures are supporting the Companies that mount them with a distinct chargeable office in each state.

This is multiplying of taxes.

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planning and Environmental matters - see AG Lagos State V. AG Federation (2003), 12 NWLR (Pt. 833) 1 at 156.

Clearly these matters that fall within the domain of the State Assemblies are necessary permits, Licenses or approvals bordering on physical planning and development control.

As Identified by the 2nd - 4th Defendants' Counsel, the Abia State Basic Environmental Law in its preamble states "A law to make provision for the establishment, regulation and enforcement of environmental sanitation practice in Abia State and for purposes connected there with".

For the notices served on the Plaintiff to come within the purview of this law and also not offend the Nigerian Communication Act (Section 135), it must conform to the following:

- (1) Be taxes paid for telecommunication Mast sites before installation or erection (See Section 135 NCA).
- (2) Environmental support tax is made payable by corporate bodies involved in air/and or water pollution (see Section 25 of Abia State Basic Environmental law - vis a vis Schedule I. (See also Section 20 of same law).
- (3) Section 5 of the Abia State Basic of Environmental (Amendment No. 1) law 2013 imposes on Telecommunications Companies duty to obtain prior approval (one off tax) and environmental impact Assessment) before establishment.

On Business Premises Law Section 2 of the Principal law on interpretation of Business Premises provides:

"Law on Registration of Business Premises and Matters therewith, laws of Abia State of Nigeria 2005,

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2) Section 5 of ABIA STATE BASIC ENVIRONMENTAL (AMENDMENT No. 1) Law, 2013. Provides:

- “.....
- (1) No Telecommunications operator shall site, install, build or establish only mast station or any signal sensitive device without prior approval from the Agency.
 - (2) They shall conduct the appropriate Environmental impact Assessment (EIA) in respect of each base/state”---

SECTION 9: schedule 1 of the principal law is hereby repealed and replaced with a new schedule I to read thus:

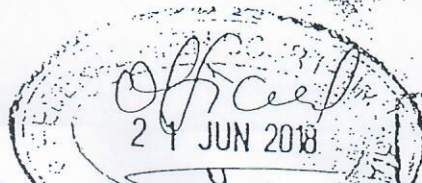
SCHEDULE I

SANITATION, DISPOSAL AND USER FEES FOR TENEMENT PROPERTIES AND BUSINESS ORGANIZATIONS.

No. 32 Telecommunication Mast/Base Station	N120,000:00
And also 33: Telecommunication main office	24,000:00
34: Telecommunication Branch Office	10,000:00
35: Telecommunication Branch Office(Medium)	5,000:00
36: Telecommunication main office (small)	2,000:00
37: Telecommunication Agencies	5,000:00

(3) Whilst also items 46, 66 and 68 of the second schedule part I in the exclusive legislative list of 1999 Constitution as amended provides:

- 46: Post telegraphs and telephone
- 66: Wireless broadcasting and television
- 68: Any matter incidental or supplementary to any matter mentioned elsewhere in this list.



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