

IN THE SUPREME COURT OF BELIZE, A. D. 2017

CLAIM NO. 166 OF 2017

IN THE MATTER of an application for permission to apply for Judicial Review

AND IN THE MATTER of an application for Certiorari and Stay of the Decision pending determination

AND IN THE MATTER of a Decision of the Public Utilities Commission to demand licence fees, in respect of a licence which it has not issued, contrary to the Belize Telecommunications Act and the Telecommunications (Licensing, Classification, Authorisation, and Fee Structure) Regulations, 2002 (S. I. 110 of 2002)

BETWEEN:

(SPEEDNET COMMUNICATIONS LIMITED	APPLICANT
(
(AND	
(
(THE PUBLIC UTILITIES COMMISSION	RESPONDENT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Eamon Courtenay, S.C., of Courtenay Coye LLP for the Applicant

Mr. Fred Lumor, S.C., of Fred Lumor & Co. for the Respondent

D E C I S I O N

1. This is a “rolled –up” or combined application (by consent of the parties) seeking permission for judicial review as well as a substantive judicial review of a decision by the Public Utilities Commission (the “PUC”) dated February 21st, 2017 to demand spectrum fees from Speednet for the period 2010 to 2016. Speednet Communications Ltd (“Speednet”), the Applicant, is a company duly formed and existing under the Laws of Belize with registered office situate at Mile 2½ Philip Goldson Highway, Belize City, Belize. The Public Utilities Commission (“the PUC”), the Respondent, is a corporate body duly formed and existing under and by virtue of the Public Utilities Commission Act with general office situate at No. 41 Gabourel Lane, Belize City, Belize. The Applicant claims that the PUC has issued no licence to Speednet in respect of frequency authorization for the use of the 700 MHZ bands. Speednet further says that the Caribbean Court of Justice decided in CCJ Appeal No. BZCV 2015/001 ***Speednet Communications Ltd v. Public Utilities Commission*** [2016] CCJ 23 (AJ) that the PUC acted unlawfully in demanding that Speednet pay \$792,000 in licence fees. Thereafter Speednet demanded the refund of what it calculated to be due it based on the CCJ judgment. Speednet asserts that the PUC, in retaliation, “manufactured” the outstanding licence fees in order to set off the amount

ordered to be paid to it by the CCJ. The Respondent PUC for its part claims that Speednet applied for and was granted spectrum authorization (licence) in which the radio frequency bands were stated to be provisional. The PUC is therefore entitled to seek immediate payment of fees due under that licence in compliance with the law.

Leave to Apply for Judicial Review

2. Mr. Courtenay, SC, submits on behalf of the Applicant that the test for leave for judicial review to be granted by the court has been satisfied. Under Part 56 of the Supreme Court Civil Procedure Rules, the Applicant must prove that it has a “*sufficient interest*” in the subject matter of the application. The Affidavit of Ernesto Torres filed on behalf of the Applicant reveals that the decision of the PUC to demand \$1.44 million in spectrum fees from Spectrum shows that the Applicant is adversely affected by the PUC decision. Mr. Courtenay, SC, also claims that the Applicant has established that there is an arguable ground for judicial review having a realistic prospect of success (Sharma v Antoine [2006] UKPC at 14(4):

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject

to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex P Hughes (1992) 5 Admin LR 623, 628: Fordham Judicial Review Handbook, 4th Ed (2004) p426.”

There was no resistance to the application for leave for judicial review from Mr. Lumor, SC, who chose in his written and oral submissions to focus on contesting the substantive grounds of judicial review. Having perused the affidavit of the Applicant, I find that the Applicant has satisfied the test for leave to be granted. I therefore grant the permission for judicial review as requested.

The Applicant’s Submissions in Support of Application for Judicial Review

3. The grounds for judicial review set out by the Applicant are as follows:

- a) Decision Unlawful, Null and Void;
- b) Bad Faith and Improper Motive;
- c) Permanent Injunction.

Decision Unlawful, Null and Void

4. Mr. Courtenay, SC, argues that the PUC’s demand for spectrum fees for the period 2010 to 2016 coupled with its failure to issue a license for the frequency authorization for the use of 700 Mhz bands is unlawful, null and void. He refers to *Judicial Remedies in Public Law* by Clive Lewis Q.C.:

“...Judicial Review is concerned with ensuring that statutory bodies do not exceed the limits of the statutory powers conferred upon them.” Lewis continues by stating that judicial control is exercised over public bodies by way of the doctrine of *ultra vires*; and further that statutory bodies (such as PUC) *“...are only able to do those things expressly or impliedly authorized by statute; actions not authorized are regarded as ultra vires and of no legal effect.”* Mr. Courtenay, SC, therefore submits that the PUC’s issuance of a *“provisional license”* is an act not provided for in the Act or Regulations, was therefore *ultra vires*. The PUC was mandated to comply with the regulations in place and cannot act outside the powers granted to it by virtue of the Act and the regulations. Section 12 of the Act vests in the PUC *“control, planning, administration, management and licensing of the radio frequency spectrum”*. When exercising that power, the PUC is required to comply with the applicable standards and the requirements of the International Telecommunications Union and its Radio Regulations, as agreed to or adopted by Belize. Section 12 of the Act also empowers the PUC to prepare from time to time a spectrum allocation plan (SAP) in respect of any part of the spectrum. After complying with the process laid

out in the Act for the preparation of the SAP, the PUC *“shall cause such plan to be published in the Gazette.”*

5. The Director of Telecommunications (The predecessor of the PUC) caused the Belize National Frequency Spectrum Band Allocation Plan dated April 30th, 2001(the 2001 SAP) to be published in the Belize Gazette of 19th May, 2001. In keeping with the Act, the 2001 SAP, as published was expressly stated to *“confirm with the International Telecommunications Union and its Radio Regulations, Recommendations of the Inter-American Commission for Telecommunications-CITEL and the National Frequency Plan for Belize”*. Under that 2001 plan, frequency bands 614.000 - 806.000 is assigned to *“Broadcasting - UHF Channels 38 – 69”*. Mr. Courtenay argues that no evidence has been provided by the Respondent to demonstrate that the 2001 SAP has been amended and that plan remains in force.

6. The PUC, in the exercise of its powers as conferred upon it by section 56 of the Act, promulgated the Regulations. Regulation 7 describes the process to be followed when applying for frequency authorization. After considering the application, the PUC must, within 60 days, decide whether it will grant authorization or not. Regulation 7(7) states; *“where an application is*

approved the PUC shall issue the frequency authorization on payment of the prescribed fee. Where a license is refused, the PUC shall state in writing its reasons for refusal". Speednet applied for frequency authorization in the 700 MHz band pursuant to this Regulation 7. This regulation sets out an elaborate and controlled fee structure. Regulation 8(1) provides:

"8(1) Any person applying under these Regulations for an Individual License, a Class License, or a Frequency Authorization shall be required to pay the fees as set out in the Schedule as follows:

(a) On filing of the application, the Application fee;

(b) On grant of the license, the Initial Fee;

(c) At the end of the first calendar year, the Annual Fee; and

(d) Annually, after the first calendar year, the Annual Fee."

Mr. Courtenay, SC, contends that it is clear that Regulation 8(1) is expressed in mandatory terms and carefully calibrates when fees can lawfully be charged by the PUC, and when they are lawfully payable by service providers.

7. In 2011, when Speednet applied for frequency authorization for use of a portion of the 700 MHz band for mobile cellular, the 2001 SAP had assigned that portion of the spectrum to broadcasting. In order to lawfully assign the

frequencies applied for, it was necessary for the PUC to reassign the part of the Spectrum, assigned to broadcasting, to mobile cellular. The PUC informed that it was in the process of undertaking this reassignment. Mr. Courtenay, SC, submits that the PUC recognizing that the amendment to the 2001 SAP was required, purported to give Speednet provisional approval to use the frequency for which it had applied. The PUC also deferred charging Speednet any fees for the provisional use of the 700 frequencies. Neither the Act nor the Regulations provide for “provisional” authorization to be granted for use of any frequency of the 2001 SAP. The PUC acted *ultra vires* the law when it purported to grant to Speednet “Frequency Authorization...to use the following radio frequency bands as stated in your application”.

8. The PUC has not amended the 2001 Spectrum Plan to assign a portion of the 700 MHz band to mobile services. Speednet’s use of a portion of the 700 MHz band is allowed by the PUC, but not according to the regulatory framework now existing. Mr. Courtenay, SC, further argues that it was clear that it was expected that Speednet would “test” its equipment whilst the PUC amended the 2001 Spectrum Plan. The temporary arrangement would then have been cured. Due to the PUC’s failure to charge its duty to

manage the use of the spectrum, it has allowed Speednet to continue to use a portion of the 700 MHz frequency without the proper licence. What the PUC seeks to do is to impose a licence fee for use of a portion of the 700 MHz band by Speednet in circumstances where such use is unregulated. Mr. Courtenay SC further submits that to date, the PUC has neither granted Speednet a licence to use the 700 MHz frequency, nor has it refused to grant Speednet a licence. The fact is that Speednet has been using the said frequencies pursuant to the PUC letter of 29th July, 2013. That letter cannot be regarded as lawfully issued pursuant to Regulation 7. Speednet is operating and has been operating with *de facto* permission of the PUC: ***Belize Broadcasting Authority v. Courtenay*** (1986) 38 WIR 79.

9. It is also submitted that on a reading of Regulation 8, it is clear that none of the conditions stated therein as preconditions for the charging of the fees therein described have been met in the instant matter. Therefore the PUC cannot rely on Regulation 8 to charge fees to Speednet for the *de facto* use of the 700 MHz frequency. In ***British Steel PLC v. Customs and Excise Commissioners*** [1997] 2 ALL ER 366 @ 377, the Court of Appeal considered whether the Customs and Excise Commissioner's demand that British Steel pay duty was lawful. Sir Richard Scott stated:

“An unlawful demand for duty must, in a sense, always be an ultra vires demand. Whether the demand is based on ultra vires regulations, or on a mistaken view of the legal effect of valid regulations, or on a mistaken view of the facts of the case, it will, as it seems to me, be bound to be a demand outside the taxing power conferred by the empowering legislation.”

Mr. Courtenay, SC, therefore contends that the decision by the PUC to demand the spectrum fees is therefore unlawful, null and void.

Bad Faith and Improper Motive

10. Learned Counsel for the Applicant also submits that the Decision made by the PUC was made in bad faith and for an ulterior and improper motive. The decision of the PUC to exercise its taxing power was to achieve an object other than that which it claimed to be seeking. The PUC cannot lawfully demand spectrum fees from Speednet since Speednet did not receive spectrum approval in accordance with the Act and the Regulations:

Blackstone’s Civil Practice 2008.

He cites Webster J in ***AG v. Kenny Anthony*** Civil Appeal No. 31 of 2009 67 to 68 where the Court of Appeal in considering the elements of bad faith stated:

*“The allegation of bad faith carries with it, as is expected, allegations of dishonesty and improper use of the powers granted by the legislation. In **R v. Port Talbot** BC 14 Lord Nolan commented on the meaning of bad faith in this context as follows:*

*‘As Megaw LJ said in **Cannock Chase DC v Kelly** [1978] 1 ALL ER at 156, bad faith means dishonesty: ‘It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which in law is irrelevant.’*

*And in **Smith v. East Elloe Rural District Council and Others** Lord Radcliffe described mala fides, another way of saying bad faith, as – ‘... a phrase often issued in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud and corruption’.*

[68] There is no gainsaying the gravity of the allegation of bad faith, and the evidential burden on the respondent is commensurate with the seriousness of the allegation. Dishonesty and bad faith can be proved by inference from established facts, but the inference is not to be drawn from evidence which is equally consistent with mere negligence.”

11. The PUC has demanded spectrum fees from Speednet purportedly for Speednet’s use of a part of the spectrum when the PUC knows fully well

that it has not reassigned that part of the spectrum, it has not published an amended Spectrum Plan in the Gazette and it has not granted formal authorization to Speednet to use a part of the 700 MHz band of the Spectrum. The Decision is tainted by an ulterior motive- the intention to set off the spectrum fees against the debt owed as ordered by the CCJ judgment. Mr. Courtenay, SC, argues that this is an unlawful attempt to avoid honoring this judgment. A decision by a public authority will only be lawful if the *“permitted purpose is the true and dominant purpose behind the act”* even though a secondary advantage may be gained. It can be said that the dominant purpose behind the PUC seeking to recover the fees is to avoid honouring the CCJ judgment, by setting off these fees against the judgment debt. This purpose is not a lawful one since a license was not granted nor was the necessary spectrum authorization given. As a result of the absence of a true license or authorization, PUC cannot lawfully demand spectrum fees for a provisional license since no such license is afforded by the Act.

The Applicant therefore seeks a permanent injunction for restraint and relief against the actions of the Respondent, relief for which damages are not the appropriate remedy. The actions of the PUC have not ceased and

they have evinced an intention to recover the fees which they allege is owing to them. As a result of this, a permanent injunction is necessary. ***Procter v Bailey (1889) 42 Ch. D. 390*** “a permanent injunction requires the prospect of continuing or recurring injury to the claimant”. The Applicant also asks for declarations as per the pleadings as well as costs.

The Respondent’s Submissions on the Application for Judicial Review

12. Mr. Fred Lumor, SC, on behalf of the Respondent resists this application for judicial review. After a comprehensive review of the relevant Act and Regulations he says that the PUC admits that the Belize National Frequency Spectrum Band Allocation Plan dated 30th April, 2001 is the only Allocation Plan in existence and he cites Mr. Torres’ Affidavit evidence:

*“Frequency assignments are mandatory prior to **purchase** and **use** of equipment and are done by the office of Telecommunications (PUC).”*

Speednet applied for Spectrum Authorization in the form prescribed by the PUC in the form required under the Licensing, Classification, Authorization and Fee Structure Regulations. It is clear that Speednet did not make an application for a provisional licence or spectrum authorization. Speednet forwarded a check in the sum of \$4,000 made payable to the PUC as licence

fee as required by S.I. 110 of 2002. Speednet published notice of its application for a licence or spectrum authorization in accordance with S.I. 110 of 2002 and not a provisional licence. Mr. Lumor SC states that when Speednet applied for the licence on the PUC prescribed form, the following question was asked:

“Please provide a summary of any radio-based infrastructure which the Applicant currently has in place.”

Answer: “ An existing Nortel CDMA wireless network comprises of one MSC, one BSC, one Packet Data Node, one BS Management System and 29 base stations across the country.”

Mr. Lumor, SC, then says that the PUC in a letter dated 29th July, 2013 issued or granted the licence or frequency authorization to Speednet (Exhibit JB3). The letter in paragraph 1 states: *“In response to your application for Frequency Authorization [Licence] for the **use** of radio frequency spectrum in the 700 MHz band mad September 29th, 2011 ...”*

The letter of the PUC made reference to Speednet’s application for a licence (Frequency Authorization) to enable it to use radio frequency spectrum in the 700 MHz band. In paragraph 3 the PUC states:

“The granting of authorization [licence] to use the bands is provisional at this time so as not to unduly delay the deployment of your intended services, but will become formal upon the publication in the National Gazette of an amended Spectrum Allocation Plan that reassigns the relevant portion of the 700 MHz for Mobile Service as opposed to Broadcasting which the PUC has already initiated and is expected in relatively short course.”

Mr. Lumor, SC, argues that PUC granted the licence to Speednet (the Authorization) to use the frequency bands applied for, but stated that the **use** of the bands in the licence was provisional. Section 15(3) of the Telecommunications Act provides that a licence shall confer on the licensee the privileges but the privileges shall be subject to the obligations *“specified in the licence”*. He also refers to section 18 of the Act which speaks to other conditions for the grant of a licence, namely -

- i) The licensee shall pay to the PUC a licence fee annually;
- ii) Adhere strictly to the frequency bands assigned (in this case provisionally);
- iii) Abide by the regulations made pursuant to the Act S.I. 110 of 2002.

According to a letter dated July 29th, 2013 the fees that Speednet are required to pay are stated in paragraph 4:

“Upon such publication you are expected to immediately pay the required First Year Fee of \$4000. The Annual Fee is calculated at \$366,666.67. The End of First Year Fee is therefore calculated to be \$361,666.67 and will be due on the anniversary of the publication in the National Gazette of the amended Spectrum Allocation Plan. The Annual Fee will be due thereafter on subsequent anniversaries.”

13. Mr. Lumor, SC, says that the Amended SAP was not published by the PUC due to the representations made by two major telecommunications providers BTL and Speednet. He also says that the PUC as noted in the letter did not write off or waive any fees due in respect of the licence. It was expected that the amended Frequency Allocation Plan would have been published the PUC in relatively short course. It did not happen. To underscore that a licence was issued on the basis of Speednet’s application, the PUC in paragraph 1 of page 2 of its letter states:

“The PUC is granting the authorization [licence] in response to your original application, therefore no further application or payment of the Application Fee is required.”

Mr. Lumor, SC, also states that the PUC took the opportunity in its letter of July 29th, 2013 to remind Speednet of other outstanding obligations it failed

to fulfill. He says that Speednet relies on the principle that where an unlawful demand for tax was made by the state, the taxpayer was *prima facie* entitled, on the making of the payment pursuant to the demand to a common law restitutionary right of repayment: ***British Steel plc v. Customs and Excise Commissioners*** [1997] 2 All ER 366. He rebuts this contention by submitting that the principle enunciated in *British Steel* does not apply to the case at bar. The PUC maintains that Speednet applied for and was granted spectrum authorization (licence) in which the radio frequency bands assigned are stated. Those radio frequency bands were stated to be provisional. The PUC says that Speednet appears to put a different meaning on the contents of the letter in which the licence was granted. The PUC has no power to grant and did not grant a provisional licence. Even if the PUC failed to make immediate demand for the payment of the licence fees, it is entitled to seek immediate payment in compliance with the law. He goes on to argue that the PUC set-off the liability of Speednet owed by Speednet to the PUC. A set-off cannot be described as a decision made "*in bad faith and for an ulterior or improper purpose*". Set-off means "*A debtor's right to reduce the amount of debt by any sum the creditor owes the debtor; counter balancing sum owed by the creditor*".

14. Further the PUC is under strict statutory duty not to issue Frequency Authorization (licence) on a discriminatory basis; for instance charging fees for the licence and frequency bands whilst allowing Speednet to obtain the licence without payment (s.10 of S.I. 110 of 2002). Failure to charge and collect fees for frequency authorization (licence) is a criminal offence which exposes officers of the PUC and Speednet to criminal penalties. The PUC therefore respectfully asks the Court to dismiss this claim.

Decision

15. I wish to thank both Counsel for their extensive submissions which have greatly assisted the court in reaching its decision. At this juncture, I wish to reproduce the Chronology of Events which Counsel for the Applicant attached to his Speaking Notes, as that helps to put the dispute in proper perspective:

“Brief Chronology

30 April 2001 A “Belize National Frequency Spectrum Band Allocation Plan” (“the 2001 Spectrum Plan”) was published in the Belize Gazette dated 19th May 2001 by the Office of Telecommunications.

- 29 Sept 2011 Speednet Communications Limited (“Speednet”) applied to the PUC for frequency authorization for the use of radio frequency spectrum in the 700 MHz band.*
- 29 July 2013 The PUC replied to Speednet’s application by granting authorization for the use of the spectrum on a “provisional basis” and stated that authorization would become formal upon publication in the National Gazette of an amended Spectrum Allocation Plan.*
- 24 Nov. 2016 Speednet wrote a letter to the PUC inquiring whether an amended Spectrum Plan had been published in the Gazette and if so the date of publication.*
- 8 Dec. 2016 PUC replied stating that the last Spectrum Plan to be published was gazette in or about April 2002.*
- 15 Dec. 2016 Speednet wrote to the PUC outlining the historical background to the PUCs authorizing Speednet use of certain frequency assignments in the 700 MHz band on a “provisional basis”. Speednet requested the PUCs response on the status of the reassignment of the portion of the 700 MHz to Mobile Services, the amended Spectrum Allocation Plan and the formal authorization for Speednet’s use of the 700 MHz spectrum.*
- 21 Feb. 2017 PUC wrote to Speednet citing outstanding amounts due to Speednet from the PUC as a consequence of the*

Caribbean Court of Justice ruling in CCJ Appeal BZCV2015/001, as well as outstanding amounts purportedly due from Speednet to the PUC “as a consequence of spectrum fees unpaid by Speednet since 2010”.

The PUC stated that Speednet was required by law to pay for spectrum assignment for Mobile Cellular in the 700 MHz band from the date “the authorization” was granted. PUCs position was that the consequence of the CCJ ruling was that the PUC owed Speednet the sum of \$1,042,500.00 and that these sums should be set off against the outstanding spectrum fees allegedly owed by Speednet in the sum of \$1,440,000.00. The result therefore would be that Speednet would have an outstanding net balance of \$397,500.00 for the PUC.

3 March 2017 Speednet responded to PUC denying that it was liable for the payment of the spectrum fees. Speednet did not receive spectrum approval in accordance with the Act and Regulations and regarded the decision as unlawful. Speednet therefore disputed the liability and demanded that the Decision be revoked immediately.

3 March 2017 PUC sent a copy of the 2002 Spectrum Allocation Plan.

8 March 2017 PUC responded to the letter dated 3rd March, 2017 to indicate, among other things, that it expected Speednet

to either discontinue the use of the relevant radio frequency spectrum or, alternatively, continue its use and make the legally required payments detailed in its letter of 21st February, 2017.

9 March 2017 Speednet responded to the PUC nothing that the PUC had not revoked the Decision to demand the fees from Speednet and that it appeared that the PUC would not take the steps necessary to regularize the situation going forward. Further, that given the circumstances Speednet was left with no alternative but to apply to the Supreme Court for relief.

As at the date of this Application, Speednet has not received spectrum approval in accordance with the Act and Regulations. Further, to date, no amended Spectrum Allocation Plan has been published by the PUC.”

16. I will now reproduce the letter of July 29th, 2013 sent by Mr. John Avery, Chairman of the PUC in response to the request from Speednet applying for Frequency Authorization because this letter is the fulcrum on which this entire case turns:

“July 29th, 2013

*Mr. Ernesto Torres
Chief Executive Officer
Speednet Communications Limited*

Belize City Belize

Dear Mr. Torres,

We write in response to your application for Frequency Authorization for the use of radio frequency spectrum in the 700 MHz band, made September 29th, 2011 and your various correspondences in regards to the said subject matter since your application was made.

Please be advised that the Public Utilities Commission (PUC) hereby grants Frequency Authorization to Speednet Communications Limited for the use of the following radio frequency bands as stated in your application:

UL : 776-787 MHz(11MHz)

DL: 746-757 MHz(11MHz)

The granting of authorization to use these bands is provisional at this time so as not to unduly delay the deployment of your intended services, but will become formal upon the publication in the National Gazette of an amended Spectrum Allocation Plan that reassigns the relevant portion of the 700 MHz for Mobile Services as opposed to Broadcasting, which the PUC has already initiated and is expected in relatively short course.

Upon such publication, you are expected to immediately pay the required First Year fee of \$4,000. 00. The Annual Fee is calculated at \$366, 666.67. The End of First Year Fee is therefore calculated to be \$361, 666.67 and will be due on the anniversary of the publication in the National Gazette of the amended Spectrum Allocation Plan. The Annual Fee will be due thereafter on subsequent anniversaries.

The PUC is granting this authorization in response to your original application, therefore no further application or payment of the Application Fee are required.

Should you have any questions in regards to the above, please feel free to contact us.

The PUC now takes this opportunity to point out to you the following:

a) Speednet Communications Limited has not filed any Annual Reports and has not paid any Annual Licence Fee in respect of its 2011 and 2012 fiscal years;

b) Speednet Communications Limited has not paid any Annual Fees in respect of any authorized and assigned radio frequency spectrum since May 6, 2011 when the PUC received payment for frequencies assigned in the 7 GHz band for microwave backhaul links;

c) Speednet Communications Limited has still not applied for, received nor paid for Frequency Authorization for its microwave backhaul links in the 5 GHz band;

d) Speednet Communications Limited has not paid any related fees for Frequency Authorization granted by the PUC on June 4th, 2012 and on October 12, 2012, for additional microwave backhaul links in the 7GHz band;

We further advise you that we consider some of the matters raised in a) to d) above to be gross violations of the Public Utilities Commission Act, the Belize Telecommunications Act and Speednet Communications Limited's Licence and may lead to serious penal action, including the cancellation of such Licence.

The PUC now requires a written response within five (5) working days of the receipt of this letter, updating us on the status of the matters raised in a) to d) above.

Best regards,

*John P. Avery
Chairman, PUC Belize*

*CC.Kingsley Smith- Director, Telecommunications Sector
Renell Alamilla - Spectrum Officer*

This is the letter (“Exhibit JB3”) that the PUC is saying amounts to a licence granted to Speednet which entitles the PUC to collect fees owed by Speednet for their use of the 700MHz Frequency Authorization from 2010 until the present date.

17. I now look at the statute and the regulations which prescribe the legal framework within which the PUC is entitled to charge clients fees for use of frequencies.

Section 12 of the Telecommunications Act Chapter 229 of the Laws of Belize addresses the Spectrum Plan:

“12.(1) The PUC shall be vested with the control, planning, administration, management and licensing of the radio frequency spectrum.

(2) In controlling, planning, administering, managing and licensing the use of the radio frequency spectrum, the PUC shall comply with the applicable standards and the requirements of the International Telecommunication Union and its Radio Regulations, as agreed to or adopted by Belize.

(3) The PUC may from time to time prepare a spectrum allocation plan in respect of any part of the frequency spectrum.

(4) A frequency spectrum allocation plan shall -

(a) define how the radio spectrum shall be used;

(b) aim at ensuring that the radio frequency spectrum is utilized and managed in an orderly, efficient and effective manner;

(c) aim at reducing congestion in the use of frequencies and at protecting frequency users from any interference or other inability to make use of the frequencies assigned to them;

(d) avoid obstacles to the introduction of new technologies and telecommunication services;

(e) aim at providing opportunities for the introduction of the widest range of telecommunication services and the maximum number of users thereof as is practically feasible.

(5) In preparing a spectrum plan pursuant to this section, the PUC shall take into account existing uses of the radio frequency spectrum and any frequency bands in existence or in the course of preparation.

(6) The PUC shall give notice in the Gazette of its intention to prepare a plan and in such notice invite interested parties to submit their written representations to the PUC within such period as may be specified in such notice.

(7) After due consideration of any representations received pursuant to the notice referred to in subsection (6) the PUC shall adopt the frequency band plan in question, with or without amendment, and cause such plan to be published in the Gazette.

(8) The frequency spectrum allocation plan shall be available to the public at a prescribed fee.”

Section 18 of the Telecommunications Act Chapter 229 of the Laws of Belize reads as follows:

“The PUC shall, in granting the licence, require that the licensee –

(a) Pays a licence fee annually to the PUC;

(b) Adhere strictly to the assigned frequency bands issued;

(c) Upon request by the Government, collaborate with the Minister in matters of national security; and

(d) Abide by the regulations made pursuant to this Act.”

Looking now at the Telecommunications (Licensing Classification, Authorisation, and Fee Structure) Regulations as contained in Statutory Instrument No. 110 of 2002, in particular Regulation 7 entitled *“Frequency Authorization”*:

“7(1) An Application for a licence under this Part shall be made in writing in such form and in such manner, and shall contain such information and particulars.

(2)An application for a licence under this section shall be accompanied by a non-refundable fee as contained in the Schedule to these Regulations.

(3) Within fourteen days after making as application, the applicant shall publish a notice of the application in two local newspapers having national circulation.

(4) Upon receipt of an application for frequency authorization, the PUC shall review the application , notifying the applicant of any further information required to process such application.

(5) In deciding whether to approve a frequency authorization, the PUC shall take the following into account:

(a) the matters set out in the application;

(b) any submissions received from the public;

(c) any regional, national or international Spectrum Management Plan; and

(d) any other relevant matters.

(6) After review, the PUC shall decide whether the frequency authorization should be granted and issue its decision in writing no later than sixty days from receipt of the application.

(7) Where an application is approved the PUC shall issue the frequency authorization on payment of the prescribed fee. Where a licence is refused, the PUC shall state in writing its reasons for such refusal.”

Regulation 8 entitled Fee Structure governs the payment of fees as follows:

“8(1) Any person applying under these Regulations for an Individual Licence, a Class Licence , or a Frequency Authorisation shall be required to pay the fees as set out in the Schedule as follows:

(a) On filing of the application, the Application Fee;

(b) On grant of the licence, the Initial Fee;

(c) At the end of the first calendar year, the Annual Fee; and

(d) Annually, after the first calendar year, the Annual Fee.

(2) Any fees not covered above which may be applicable to a licensee shall be paid annually by the licensee in accordance with the fees listed in the Schedule.”

18. Having reviewed the statutory framework and the letter from the PUC to Speednet, I am satisfied that there was no licence granted to Speednet as prescribed by law. What the PUC did was allow Speednet to do a test run

on its equipment so as not to delay the application process. It was clearly a temporary situation which was to be rectified and formalized within a few months once the PUC took the next step to amend the Spectrum Allocation Plan, publish that Amended SAP in the Gazette and then collect the fee from Speednet as required by Regulation 7. The letter does not amount to Frequency Authorisation as set out in the Act or in the Regulations, and the language of the letter itself clearly recognizes that fact, which states that the permission to use the frequency is provisional *but will become formal* after publication of the amended SAP in the Gazette. Clearly, the Chairman of the PUC has laid out in the letter the steps to be taken as per the law *before* Frequency Authorisation can be formally granted to Speednet by the PUC. To date, there is no evidence that those requisite steps have been taken as there is no evidence that the Spectrum Allocation Plan has been amended to reflect the reassignment of the relevant portion of the 700 MHz from Broadcasting to Mobile Services, or that such amendment has been published in the Gazette. The PUC is not empowered to grant provisional licences under the statute or the regulations, and this has been conceded by Mr. Lumor, SC, on behalf of the PUC. It is authorized to either grant the license in accordance with the statute, or refuse to grant the

license also in accordance with the statute. Speednet paid the Application Fee and that fee was returned to it by the PUC saying now is not the time, we cannot accept this fee until we have taken certain legal steps. When one examines the factual matrix surrounding these events, especially the exchange of letters between the parties, it appears that Speednet was the party constantly chasing down and running behind the PUC as it sought to get itself properly regulated and licensed as per the Act and the Regulations. While the Court fully appreciates the point made by Mr. Lumor, SC, that the PUC was not wasting time sitting idly on its hands but was in fact delayed in part due to representations made by the two major service providers in Belize (Speednet and BTL), the fact remains that several years have passed since the PUC Chairman wrote this letter to Speednet in 2013, and in those intervening years, the PUC has still not complied with the Act or the Regulations and has instead allowed Speednet to continue to operate on the basis of *de facto* permission granted in that 2013 letter. I fully agree with Mr. Courtenay SC's submission that the case at bar is similar to that of ***Belize Broadcasting Authority v. Courtenay*** (1986) 38 WIR 79 where the Court of Appeal of Belize held that no objection could be taken on the ground that H's television station did not hold a licence and

was thus liable to prosecution as due application had been made for a licence, no effort had been made to close the station for want of a licence, and no steps had been taken to prosecute for operating a station for want of a licence; the authority must have acquiesced in the operation of the unlicensed station and in the circumstances H's *locus standi* could not be challenged. The PUC, not having carried out its own statutory duty by amending the SAP and publishing it in the Gazette, cannot therefore at this juncture legally demand fees from Speednet as it is not in a position to do so. In the present case, the PUC as a statutory body is only empowered to act within the confines of the statute; it has to first get its own house in order and do what it was legally required to do years ago under the Act and the Regulations. I therefore find in favor of Speednet on this application for judicial review on the ground that the decision of the PUC to demand spectrum fees for the period 2010 to the present is unlawful, null and void in view of its failure to issue a licence to Speednet in respect of frequency authorization for the use of the 700 MHz bands. Having found for the Applicant on this ground, there is no need for the court to consider the alternative ground of whether the PUC acted in bad faith. I therefore grant Speednet the relief it seeks. The decision of the PUC is quashed as unlawful,

null and void, and the permanent injunction is granted against the PUC seeking to collect spectrum fees from Speednet arising from that unlawful decision. Costs awarded to the Applicant to be paid by the Respondent to be agreed or assessed.

Dated this Friday, 2nd day of March, 2018

**Michelle Arana
Supreme Court Judge**