

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – SECOND SESSION

THE PUBLIC INVESTMENTS COMMITTEE

SPECIAL REPORT ON THE RECAPITALIZATION AND
BALANCE SHEET RESTRUCTURING OF TELKOM
KENYA LIMITED

APRIL, 2014

CLERK'S CHAMBERS
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NAIROBI

APRIL, 2014



Approved
P.L. A
29/4/14

Paper Lail

By the chairman
of PIC, Hon
Adam Kanyan
on Tuesday

29/4/2014

ACRONYMS AND ABBREVIATIONS

AG	Attorney General
BTS	Base Transceiver Station
Cap	Chapter
Capex	Capital Expenditures
CCK	Communication Commission of Kenya
CEO	Chief Executive Officer
FT	France Telkom
GoK	Government of Kenya
GPO	General Post Office
GSM	Global System for Mobile Communications
HHM	Hamilton, Harrison and Mathews
ICT	Information Communication Technology
IMF	International Monetary Fund
KCA	Kenya Communication Act
KP&TC	Kenya Post & Telecommunication Corporation
LLC	Limited Liability Company
NYSE	New York Stock Exchange
OrEA, S.A	Orange East Africa, S. A
PCK	Postal Corporation of Kenya
TKL	Telkom Kenya Limited

TABLE OF CONTENTS

1.0 Preface	1
2.0 Background on Telkom Kenya Limited.....	18
2.1 Privatization of TKL And Post Privatization Structure	20
3.0 Reports from Government Institutions	23
3.1 The Report of the Auditor-General.....	23
3.2 The Report of the Inspectorate of State Corporations	24
4.0 Evidence and Submissions By Witnesses	27
4.1 Evidence by the Attorney General.....	27
4.2 Evidence by the Chairman and Board of Directors Of Telkom Kenya Limited.....	34
4.3 Evidence by the Cabinet Secretary, the National Treasury.....	41
4.4 Evidence by the Cabinet Secretary, Ministry of Information, Communication & Technology.....	46
4.5 Evidence by the Communications Commission of Kenya.....	51
4.6 Evidence by Management of Telkom Kenya Limited.....	54
4.7 Evidence by Mobicom Limited	59
4.7 Evidence by the Privatization Commission of Kenya	60
4.8 Evidence by the Investments Secretary, National Treasury	63
4.9 Evidence by the Financial Secretary, National Treasury	72
5.0 Committee's General Observations	81
6.0 Committee Recommendations	87

1.0 PREFACE

Mr. Speaker Sir,

The Public Investments Committee is a Select Committee established under Standing Order No. 206 and is responsible for the examination of the working of public investments.

1.1 Mandate of the Committee

The Committee is mandated to:-

- (a) examine the reports and accounts of the public investments;
- (b) examine the reports, if any, of the Auditor General on the public investment;
- (c) Examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.

The Committee shall however not examine:-

- (a) Matters of major Government policy as distinct from business or commercial functions of the public investments;
- (b) Matters of day-to-day administration; and,
- (c) Matters for the consideration of which machinery is established by any special statute under which a particular public investment is established.

The procedure of a Select Committee and other related matters thereto is covered under Standing Order No. 173–203. The Committee has power, under the provisions of the Constitution, National Assembly (Powers and Privileges) Act

(Cap. 6), the State Corporations Act (Cap. 446) and the Public Audit Act (Cap. 412), to summon witnesses, examine them on oath and receive evidence.

1.2 Committee Membership

The Committee comprises of the following Members:-

- (1) Hon. Adan Keynan, CBS, MP - Chairperson
- (2) Hon. Kimani Ichung'wah, MP - Vice Chairperson
- (3) Hon. Sammy Mwaita, MP
- (4) Hon. Cornelly Serem, MP
- (5) Hon. Bare Shill, MP
- (6) Hon. Korei Ole Lemein, MP
- (7) Hon. Adan M. Noor, MP
- (8) Hon. Mithika Linturi, MP
- (9) Hon. Beatrice Nyaga, MP
- (10) Hon. John M. Nyaga, MP
- (11) Hon. Njogu Barua, MP
- (12) Hon. Irungu Kang'ata, MP
- (13) Hon. Onesmus Njuki, MP
- (14) Hon. Eng. John Kiragu, M.P
- (15) Hon. Johana Ngeno, MP
- (16) Hon. Mwadeghu Thomas, MP
- (17) Hon. Abdullswamad Sheriff, MP
- (18) Hon. Paul Otuoma, MP
- (19) Hon. John Aluoch Olago, MP
- (20) Hon. Francis Nyenze Mwanzia, MP
- (21) Hon. Dr. Oburu Oginga, MP

- (22) Hon. Major(Rtd) John K. Waluke, MP
- (23) Hon. Ogutu John Omondi, MP
- (24) Hon. Mary Keraa Sally, MP
- (25) Hon. Wafula Wamunyinyi, MP
- (26) Hon. Bernard Munyoki Kitungi, MP
- (27) Hon. Chrisanthus Wamalwa, MP

1.3 Committee Proceedings

The Committee held a total of ten sittings during which it closely examined and heard evidence from witnesses. The minutes of the Committee are hereto annexed and copies of the Hansard Report may be obtained at the National Assembly Library. In its inquiry into whether or not the affairs of the public investments were managed in accordance with sound business principles and prudent commercial practices, the Committee heard and received oral and or written evidence from the Managing Director Telkom Kenya Limited; Cabinet Secretary for Information and Communication Technology; Cabinet Secretary, the National Treasury; Investments Secretary, Financial Secretary, Communications Commission of Kenya, Privatization Commission of Kenya, Board of Directors of Telkom Kenya Limited, and other relevant witnesses.

The Committee also considered the Special Audit report of the Auditor-General and the report of the Inspectorate of State Corporations on the recapitalization and restructuring of the balance sheet of Telkom Kenya Limited. The records of evidence adduced, documents and notes received by the Committee form the basis of the Committee's observations and recommendations as outlined in the

Report and can be obtained in the Hansard reports of the Committee available in the National Assembly Library.

These observations and recommendations, if taken into account and implemented, will enhance accountability, effectiveness, transparency, efficiency, prudent investment and financial management and profitability in State Corporations and the public investments sector as a whole and guide in future restructuring and privatization of State Corporations.

1.4 Committee's General Observations

Below is a summary of the Committee's on the Privatization, Recapitalization and Restructuring of the balance sheet of Telkom Kenya Limited:-

1.4.1 The Communications Commission of Kenya presently Communications Authority of Kenya (CAK) and the privatization commissions were never involved in the restructuring and recapitalization of TKL balance sheet

1.4.2 The dilution of Government shareholding in TKL was in breach of the license agreement since the regulator, CCK, did not approve the restructuring. The Government never sought CCK's approval/authority when it was ceding further shares in Telkom Kenya Limited. The ceding of shareholding by the Government of Kenya to France Telkom is in breach of provisions of paragraph 23 of license No. TL/MCO/00004 granted by CCK.

1.4.3 The Minister for Finance delayed to operationalize the Privatization Act, Cap 485 C even after the President Assented to it. The then Minister for Finance, Hon Amos Kimunya, operationalized the Act through Legal

Notice No 339 of 2007 with the commencement date being 1st January, 2008.

- 1.4.4 The loss making trend by TKL can be attributed to poor planning and management strategies and failure by shareholders to invest in the capital intensive industry. For instance, as part of their market penetration strategy, Telkom Kenya Limited was charging Kshs. 1.00 shilling while the interconnectivity cost was Kshs.1.5 shilling therefore making losses.
- 1.4.5 The privatization of Telkom Kenya was not bearing fruit as the organization has been incurring losses and that the Government had lost its shareholding from 40% to 30% as result of expensive restructuring that required injection of additional capital due to the way the agreement, negotiations and financing was done.
- 1.4.6 Participative decision making by the management and shareholders was needed to address the issues that Telkom Kenya was facing. According to the CEO, he was not aware of the decision and agreements that were entered into by the shareholders.
- 1.4.7 While privatization is important, there is need for a joint effort by the Ministries to protect strategic infrastructure and Government investments in the country.
- 1.4.8 The issue of Telkom Kenya Limited was akin to share fixing arising from the fact that the Government only managed to raise Kshs. 2.5 billion of the required Kshs. 4.9 billion and could not raise the balance of Kshs. 2.4 billion.
- 1.4.9 Alcazar Capital LLC, whose ownership remains suspicious, mysteriously pulled out of the partnership with France Telecom during the negotiations

for recapitalization and restructuring of the balance sheet of TKL with the Government of Kenya.

- 1.4.10 The Ministry of Finance and the Ministry of ICT did not involve stakeholders such as the Privatization Commission; and the Communication Authority of Kenya (formerly CCK) in the negotiations thus did not protect the public interest during TKL restructuring.
- 1.4.11 Telkom Kenya failed to notify the Communication Commission of Kenya (Communications Authority of Kenya) contrary to provisions of paragraph 23 of License No. TL/MCO/00004 granted by CCK on its change of share structure as stipulated in the license thereby making the organization's operations following the change of share structure illegal.
- 1.4.12 The State Law Office was not involved in the initial stages of the transaction contrary to section 19 of the Office of the Attorney General Act. The Attorney General however approved the Shareholder Agreement. The Ministry of Finance had used the services of private consultants for financial and legal consultancies contrary to section 19 of the Office of the Attorney General Act No. 49 of 2012 and Government Circular No: AG/1/2005 of 29th June, 2005.
- 1.4.13 A Cabinet paper seeking approval of the Cabinet for the proposed recapitalization and balance sheet restructuring was jointly sponsored by the then Minister for Finance and the then Minister for Information and Communication.
- 1.4.14 Telkom Kenya Limited was insolvent in 2012 necessitating the need by the shareholders to recapitalize and restructure the balance sheet of the company.

- 1.4.15 The Cabinet had approved the recapitalization and balance sheet restructuring of Telkom Kenya Limited on 22nd November 2012
- 1.4.16 The Government ownership in companies is normally held in trust by the permanent Secretary Treasury.
- 1.4.17 The Treasury entered into an agreement to provide Kshs. 4.9 billion without a budgetary provision. The Government paid Kshs. 2.5 billion but no provision was made in the budget for the Kshs. 2.4 billion. The Treasury committed the Government without budgetary provision and failed to factor the commitment in the supplementary budgets of 2012/2013.
- 1.4.18 The Investments Secretary had requested for resources to cater for the Government commitment of Kshs. 2.4 billion for Telkom Kenya Limited recapitalization and balance sheet restructuring.
- 1.4.19 The Treasury failed to allocate funds to cater for Government commitment in the recapitalization and balance sheet restructuring of TKL leading to the dilution of government shareholding to 30%.
- 1.4.20 Government shareholding in TKL was diluted from 40% to 30% due to failure by the Government to provide funds as agreed between the shareholders when restructuring the balance sheet of Telkom Kenya Limited. The Treasury failed to ensure that the commitment of Kshs. 2.4 billion was factored into the subsequent supplementary budgets of 2012/2013.
- 1.4.21 The National Treasury did not apply due diligence in the identification of France Telkom as a strategic investor during the bidding for privatization of Telkom Kenya Limited. Alcazar Capital LLC which was in partnership with France Telkom remains a mystery and its real owners not known

- 1.4.22 The ownership of Alcazar Capital LLC purportedly owned by Agility Group Company, one of the companies in consortium with France Telecom is not known.
- 1.4.23 The true shareholders of Orange Participations, S.A and OrEA S.A have not been fully disclosed. The conduct of France Telkom, Orange Participations, S.A and OrEA S.A during the privatization (bidding), recapitalization and balance sheet restructuring was suspicious.
- 1.4.24 The circumstances and reasons that led to drastic disinvestment of Alcazar Capital LLC (a Company that was purportedly owned by the Agility Group) in OrEA on 2nd August, 2012 are not known. The consideration paid to Alcazar Capital LLC on exit from TKL is also unknown.
- 1.4.25 Telkom Kenya Limited paid salaries of employees of Mobicom, a private Company for one year. This was at time when TKL was making losses and required new financial injections by the shareholders including GoK.
- 1.4.26 Telkom Kenya Limited has been and is still being audited by private auditors. In the past the Auditor General has not been able to audit TKL due to the minority shareholding by the Government. There is need to amend part III of the Public Audit Act, 2003 and the State Corporation Act, Cap 446, Laws of Kenya to comply with Article 229(5) of the Constitution to provide for an express provision for the Auditor General to audit all Government investments including where GoK shareholding is less than 50 %.
- 1.4.27 There is a need for an amendment to Companies Act Cap 486 requiring all shareholders in registered companies in Kenya whether privately owned, public or which the Government has shares to be named and

identified in the records of the Registrar of Companies so as to make it easier to identify parties in investigations.

1.4.28 There is a clear lack of clarity about the market valuation of TKL even at the privatization stage. The basis of value of Kshs. 50.98 billion that was used at the time of privatization of TKL is not known and has never been made public.

1.5 Committee's Recommendations

Arising from the evidence adduced by witnesses and the observations thereof, the Committee recommends, that:-

- 1.5.1 EACC to investigate officials from the Ministry of Finance/National Treasury and the Ministry of Information, Communication and Technology who were involved in the entire process of privatization, recapitalization and restructuring of the balance sheet of Telkom Kenya Limited from the year 2007 to date.
- 1.5.2 Ethics and Anti-Corruption Commission should investigate the National Treasury for committing the Government to sign a recapitalization and restructuring agreement without making sure there is an adequate budgetary provision contrary to Section 26 (6) of the Public Procurement and Disposal Act, 2005.
- 1.5.3 Ethics and Anti-corruption Commission should investigate the ownership, identity, legal existence and location of Alcazar Capital LLC and determine their role in privatization and subsequent suspicious exit from TKL during the recapitalization and restructuring of the balance sheet of TKL. This should shed more light to the Kenyan public on circumstances surrounding their entry and subsequent suspicious exit from TKL

- 1.5.4 EACC should investigate the true ownership, identity and legal existence of Orange Participations, S.A and OrEA S.A.
- 1.5.5 The Government reconsiders its privatization of Telkom Kenya Limited and the recapitalization and restructuring agreement in light of the loss making trend by TKL. Further the shareholders should review the performance of the Board of Directors and top management at TKL.
- 1.5.6 EACC should investigate the assets of TKL pre-and post privatization with a view to establishing the actual value of assets owned by TKL and possible recovery of assets misappropriated by various individuals during the establishment and subsequent privatization of TKL. The same investigations should extend to all top past and present management of TKL and the officials involved in the division of assets and liabilities of the defunct KPTC among the three entities namely: Postal Corporation of Kenya (PCK or Posta); Communication Commission of Kenya (CCK) and Telkom Kenya Ltd (TKL).
- 1.5.7 The National Treasury engaged private legal and financial consultants without the approval of the Attorney General as required by law. The then Accounting Officer Ministry of Finance/Treasury should be held accountable for failure to follow due process of the law in engaging legal consultants since this was contrary to section 17 of the Office of the Attorney General Act No. 49 of 2012 and Government Circular No: AG/1/2005 of 29th June, 2005.
- 1.5.8 The Government never sought CCK's approval/authorization when it was ceding further shares in Telkom Kenya Limited. The ceding of shareholding by the Government of Kenya to France Telkom was in breach of license provisions. The Directors (Principal Secretaries, State

department for Information, Communication and Technology (ICT) and the National Treasury) who sit at the Board of TKL on behalf of the Government of Kenya should be held responsible for contravention of the provisions of paragraph 23 of License No. TL/MCO/00004 granted by CCK.

- 1.5.9 The ceding of shares by Government of Kenya to TKL was illegal and the Government should therefore regain its rightful shareholding at TKL prior to the recapitalization and restructuring process.
- 1.5.10 There is a clear lack of clarity about the market valuation of TKL even at the privatization stage. The basis of value of Kshs. 50.98 billion that was used at the time of privatization of TKL is not known and has never been made public. The National Treasury and the Auditor General should undertake an audit and valuation of the assets of TKL to determine the financial and economic worth of TKL pre and post privatization.
- 1.5.11 EACC undertakes investigations to determine the circumstances that led to the drastic and suspicious disinvestment of Alcazar Capital LLC (a Company that was purportedly owned by the Agility Group) in OrEA on 2nd August 2012 a few months prior to the recapitalization and restructuring of TKL.
- 1.5.12 Ethics and Anti-Corruption should investigate the rationale and the role of formation of OrEA, Orange Participation S.A; Alcazar Capital LLC; and Agility Group in the bid for France Telkom in the privatization, recapitalization and restructuring of the balance sheet of Telkom Kenya Limited.

1.5.13 The Government should either:-

- (i) Renegotiate with the aim of recovering a higher shareholding of at least 35.1 % in line with its contribution of Kshs. 2.5 billion and the recapitalization and restructuring agreement; or
- (ii) The Cabinet Secretary, National Treasury should ensure that the Kshs. 2.5 billion that was paid by National Treasury is refunded together with interest at market rate back dated to 1st January, 2013.

1.5.14 EACC should investigate circumstances under which Mr. Ashif Kassam and Mr. Mohammed Nyaoga were appointed as Directors by GoK in Telkom Kenya Limited. The Commission should investigate further as to whether there was conflict of interest in the appointment of Mr. Ashif Kassam as the Director representing GoK in Telkom Kenya and at the same time acting as financial consultant for GoK in the restructuring and recapitalization of TKL.

1.5.15 All future GoK privatization must be guided by the Privatization Act and other relevant laws and the Office of the Attorney General should be fully involved in all Government contracts and negotiations in accordance to Office of the Attorney General Act.

1.5.16 Any future engagement between the Government of Kenya and France Telkom, Orange Participations, S.A and OrEA S.A. should be scrutinized thoroughly properly with due diligence undertaken.

1.5.17 The Government should relook at the policy on privatization of key and strategic public investments with a view to ensuring that due diligence are properly carried out and the public interest is fully protected at all times.

- 1.5.18 National Treasury and the Auditor-General should ensure that Telkom Kenya Limited recovers all salaries of employees of Mobicom Ltd paid for by Telkom Kenya Limited.
- 1.5.19 The Cabinet Secretary for ICT should terminate with immediate effect the contract under which Telkom Kenya Limited manages a state-owned National Fibre Network (NOFBI). This is to protect public interest concerns and the future of ICT in Kenya
- 1.5.20 The Communications Authority of Kenya should develop an implementation framework for sharing of infrastructure by telecom services operators and in the wider telecommunication sector.
- 1.5.21 The Competition Authority should investigate claims of uncompetitive and protectionist behavior by some operators in the telecommunication sector. In addition it should undertake a study on the efficiency of the telecommunications market in Kenya with a view to providing measures to address the failures in the market and report to Parliament.
- 1.5.22 Part III of the Public Audit Act, No. 12 of 2003 and part IV of the State Corporation Act, Cap 446, Laws of Kenya be amended to comply with Article 229 (5) of the Constitution to provide for an express provision to the Auditor General to audit all Government investments including where GoK shareholding is less than 50 %.
- 1.5.23 The Companies Act, Cap 486, be amended to make it mandatory for all shareholders in registered companies in Kenya whether privately owned, public or which the Government has shares to be named and identified in the records of the Registrar of Companies.

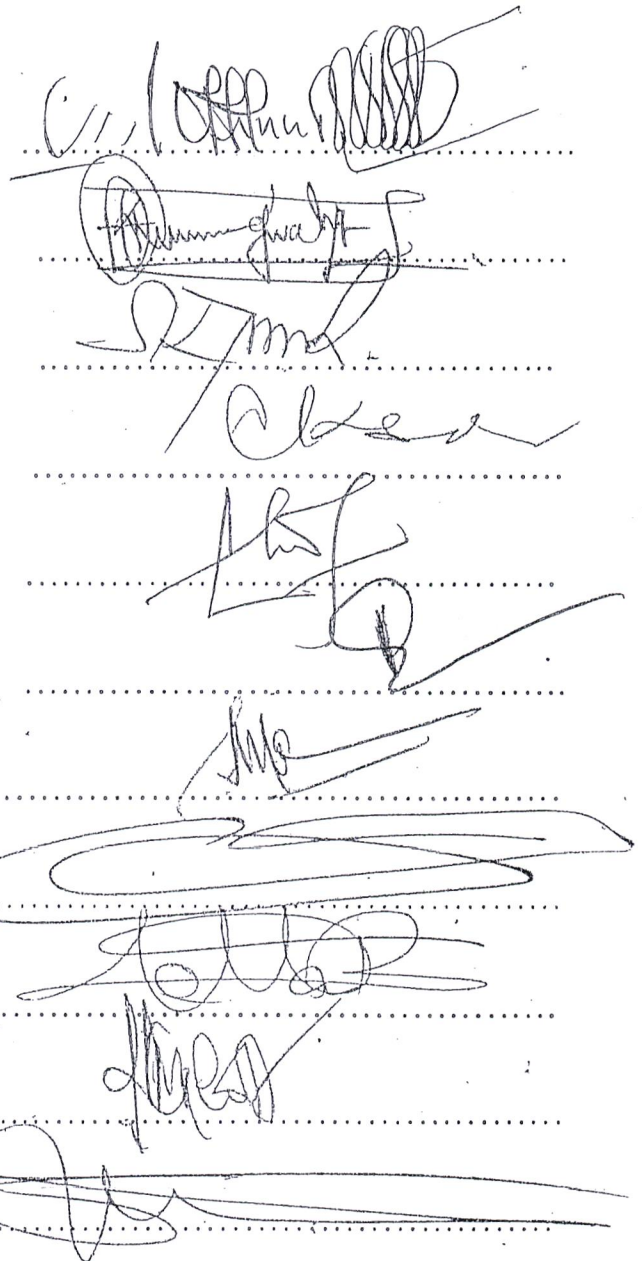
1.6 Acknowledgement

The Committee wishes to record its appreciation to the Office of the Speaker and the Clerk of the National Assembly for facilitation. The Committee is grateful to all the witnesses who appeared and adduced evidence before it. Further, the Committee is indebted to the staff of the National Assembly, Kenya National Audit Office, the Inspectorate of State Corporations and the Department of Government Investments and Public Enterprises (The National Treasury) for the services they rendered to the Committee. It is their commitment and dedication to duty that made the work of the Committee and production of this Report possible.

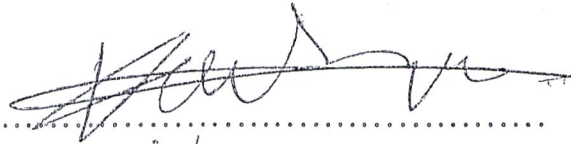
ADOPTION OF THE SPECIAL REPORT OF THE PUBLIC INVESTMENTS COMMITTEE ON THE RECAPITALIZATION AND RESTRUCTURING OF THE BALANCE SHEET OF TELKOM KENYA LIMITED

We the Members of the Public Investments Committee have pursuant to Standing Order 199 adopted this report and affix our signatures to affirm our approval and confirm its accuracy, validity and authenticity:-

1. Hon. Adan Keynan, CBS, MP
2. Hon. Kimani Ichung'wah, MP
3. Hon. Sammy Mwaita, MP
4. Hon. Cornelly Serem, MP
5. Hon. Bare Shill, MP
6. Hon. Korei Ole Lemein, MP
7. Hon. Adan M. Noor, MP
8. Hon. Mithika Linturi, MP
9. Hon. Beatrice Nyaga, MP
10. Hon. John M. Nyaga, MP
11. Hon. Njogu Barua, MP



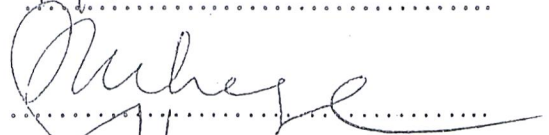
12. Hon. Irungu Kang'ata, MP



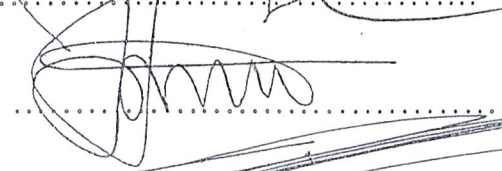
13. Hon. Onesmus Njuki, MP



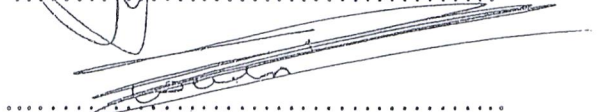
14. Hon. Eng. John Kiragu, M.P



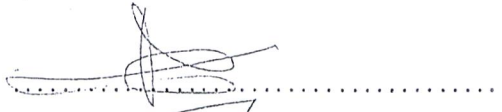
15. Hon. Johana Ngeno, MP



16. Hon. Mwadeghu Thomas, MP



17. Hon. Abdullswamad Sheriff, MP



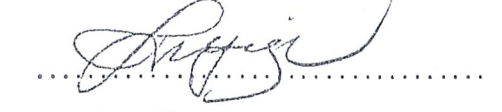
18. Hon. Paul Otuoma, MP



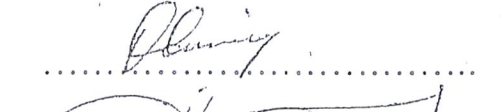
19. Hon. John Aluoch Olago, MP



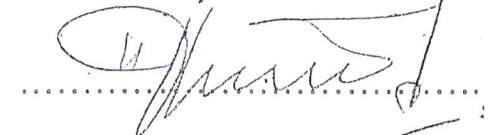
20. Hon. Francis Nyenze Mwanzia, MP



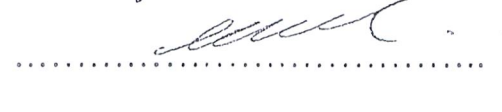
21. Hon. Dr. Oburu Oginga, MP



22. Hon. Major (Rtd) John K. Waluke, MP



23. Hon. Ogutu John Omondi, MP



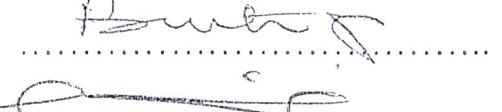
24. Hon. Mary Keraa Sally, MP



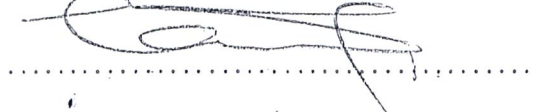
25. Hon. Wafula Wamunyinyi, MP



26. Hon. Bernard Munyoki Kitungi, MP



27. Hon. Chrisanthus Wamalwa, MP



Mr. Speaker,

On behalf of the Members of the Public Investments Committee, I beg to table the special Report of the Committee on the recapitalization and restructuring of the balance sheet of Telkom Kenya Limited pursuant to Standing Order 199.

Sign:

HON. ADAN. W. KEYNAN, CBS, MP
CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE

Date:

2.0 BACKGROUND ON TELKOM KENYA LIMITED

- 2.1 Telkom Kenya Ltd (TKL) traces its origin to the defunct Kenya Posts and Telecommunication Corporation (KP&TC). In the year 1996, the Government in collaboration with IMF issued a Policy Framework Paper articulating the policy reform agenda for the Country. The reforms in the communication sector were based on relevant studies that were undertaken for this purpose and culminated in the enactment of the Kenya Communication Act, 1998.
- 2.2 The Act provided the legal basis for the restructuring of KP&TC which was launched in the year 1999 leading to the creation of The Postal Corporation of Kenya (PCK or Posta), The Communication Commission of Kenya (CCK) and Telkom Kenya Ltd (TKL).
- 2.3 The Postal Corporation of Kenya also known as Posta Kenya was established in 1999 following the privatization of the giant Kenya Post & Telecommunication Corporation (KP&TC). The Company is responsible for postal services in Kenya.
- 2.4 The CCK presently Communications Authority of Kenya was established under the Kenya Communications Act (KCA) No. 2 of 1998 to be the sole regulator in the communication industry.
- 2.5 Its initial mandate was regulation of the telecommunications and postal/courier sub-sectors, and the management of the country's radiofrequency spectrum but through amendments to the Kenya Communications (Amendment) Act 2009, CCK's regulatory scope and jurisdiction was enhanced and effectively transformed to a converged regulator. As a result, Communications Authority of Kenya is now responsible for facilitating the development of the information and

communications sectors (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce.

2.6 This responsibility entails:-

- (i) Licensing all systems and services in the communications industry, including telecommunications, postal/courier and broadcasting.
- (ii) Managing the country's frequency spectrum and numbering resources,
- (iii) Facilitating the development of e-commerce.
- (iv) Type approving/accepting communications equipment meant for use in the country
- (v) Protecting consumer rights within the communications environment.
- (vi) Managing competition in the sector to ensure a level playing ground for all players,
- (vii) Regulating retail and wholesale tariffs for communications services
- (viii) Managing the Universal Access Fund
- (ix) Monitoring the activities of licensees to enforce compliance with the license terms and conditions as well as the law.

2.7 Telkom Kenya Ltd was established as a telecommunications operator under the Companies Act (Cap 486) Laws of Kenya, in April, 1999. The Company provides integrated communications solutions in Kenya with the widest range of voice and data services as well as network facilities for residential and business customers.

Privatization of TKL and Post Privatization Structure

(a) Privatization of Telkom Kenya Limited

2.8 The privatization of TKL was undertaken through a bidding process to identify a strategic partner to purchase 51 % of the shares. The following firms registered with TKL and purchased the bid documents:

- (i) France Telecom S.A
- (ii) Telkom South Africa
- (iii) Reliance Communications of India
- (iv) LAP Green Network
- (v) Alcazar Capital Limited
- (vi) MTNL (India)
- (vii) VSNL Tata (India)
- (viii) Sudatel (Sudan)

2.9 The following parties presented their bids (including technical and financial proposals) prior to the submission deadline:

- (i) France Telecom S.A
- (ii) Telkom South Africa (TSA)
- (iii) Reliance Communications of India; and
- (iv) LAP Green Network

2.10 The 4 bids were subjected to technical evaluation and three bidders technically qualified while LAP Green Network did not meet the technical qualifications. The financial bids for the 3 technically qualified firms were opened on 16th November, 2007 and were as follows:

- (i.) France Telecom S.A (now in consortium with Alcazar Capital Limited) - US \$ 390 million
- (ii.) Telkom South Africa (TSA)- US \$ 282.8 million; and

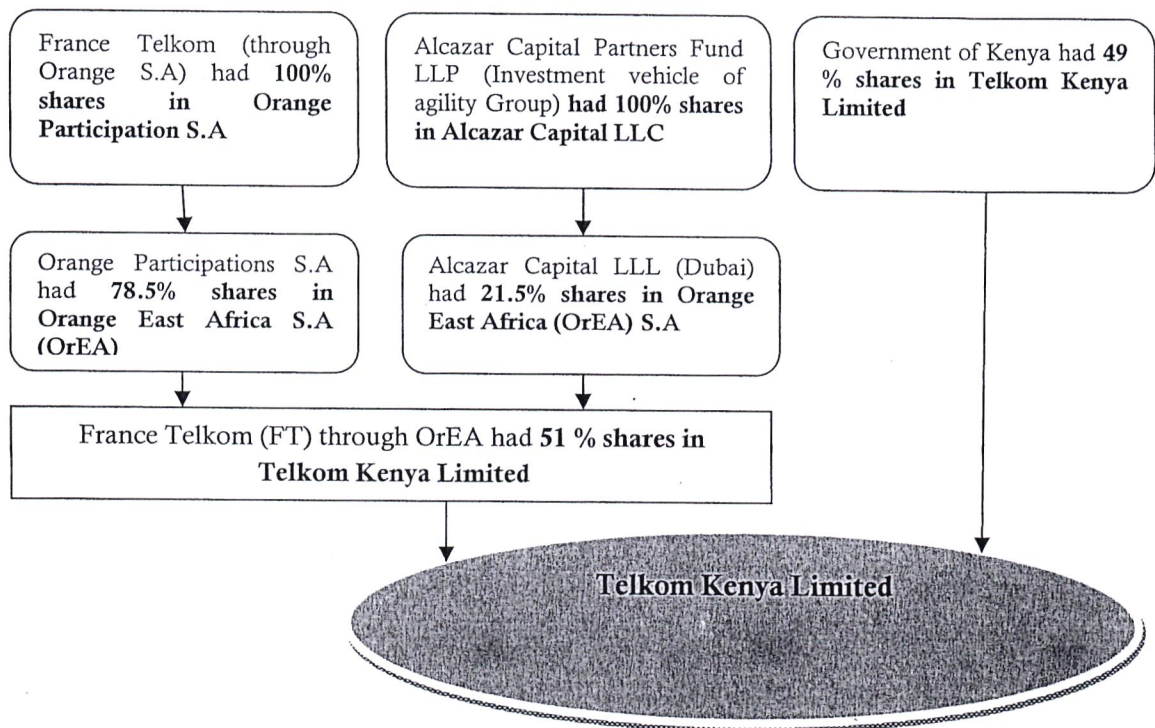
(iii.) Reliance Communications of India –US \$ 221.001 million

2.11 As per the Request for Proposals (RfPs), France Telecom S.A in Consortium with Alcazar Capital Limited through Orange East Africa limited (OrEA) presented the highest financial bid of US \$ 390 million and was therefore awarded the tender to purchase 51% shares of TKL.

2.12 France Telecom (FT) started its operations on 21st December 2007 and subsequently launched its Orange Brand in Kenya.

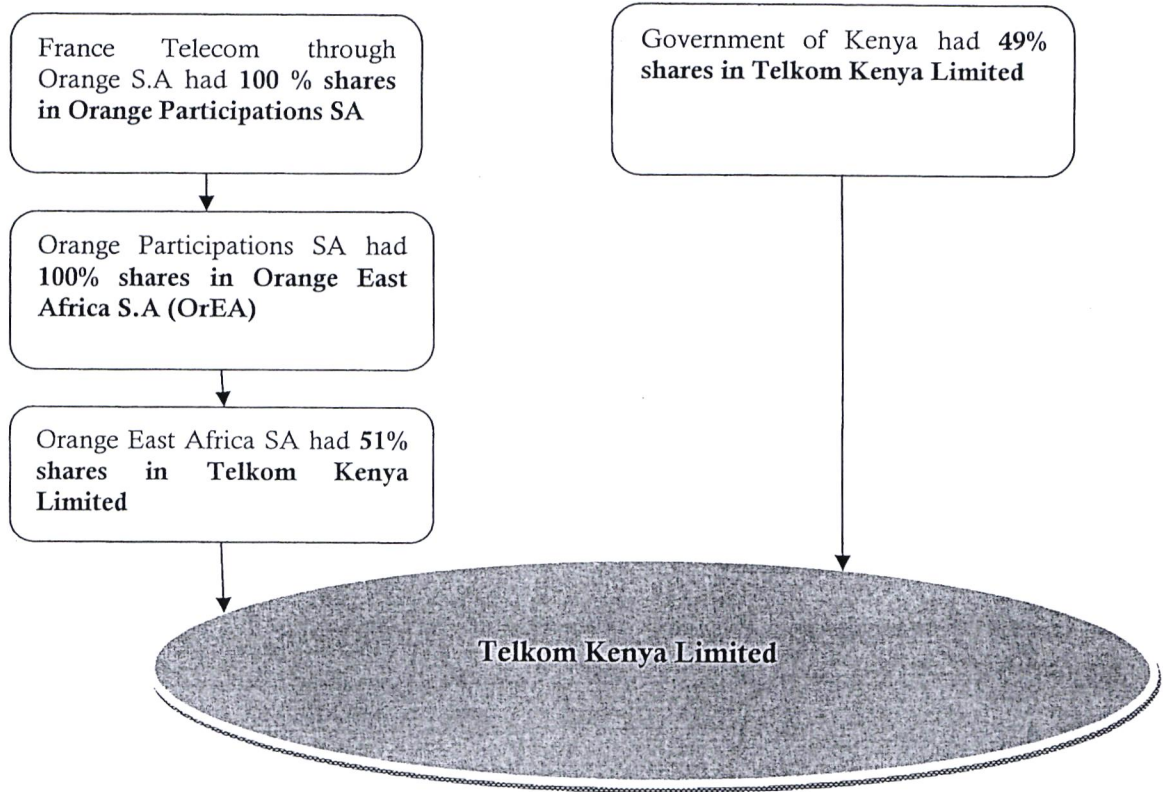
(b) Post Privatization Structure of TKL

2.13 The ownership structure of Telkom Kenya Limited from 21st December 2007 (immediately after privatization) can be illustrated as shown below.



2.14 The ownership structure of Telkom Kenya Limited changed when Alcazar Capital LLC mysteriously exited and its shares purchased by Orange

Participation SA. The ownership structure at Alcazar Capital LLC exit date from OrEA on 2nd August 2012 is shown below:



3.0 REPORTS FROM GOVERNMENT INSTITUTIONS

3.1 THE REPORT OF THE AUDITOR-GENERAL

The Auditor General submitted a report to the Committee on the recapitalization and restructuring of the balance sheet of Telkom Kenya Limited . He informed the Committee that:-

3.1.1 Government shareholding in Telkom Kenya Limited has dropped from 49 % to 30 %

3.1.2 The National Treasury has injected about Kshs. 6.9 Billion into TKL.

3.1.3 Kshs. 4.9 billion was agreed to be paid and budgeted for however this was never done. The Government only managed to release Kshs. 2.5 billion as at 31st December, 2012.

3.1.4 The Auditor General as per the Public Audit Act, 2003 does not audit Telkom Kenya Limited since it is not a statutory body due to less than 50 % shareholding by GoK. However, Article 229 (5) of the Constitution of Kenya provides that the Auditor General may audit such an entity.

3.1.5 The Auditor General was summoned by the Treasury on its role in auditing Telkom Kenya Limited.

Committee's Observations

3.1.6 The Committee made the following observations:

- (i) Telkom Kenya Limited has been and is still being audited by private auditors. In the past the Auditor General has not been able to audit TKL due to the minority shareholding by the Government. There is need to amend the Public Audit Act, 2003 and the State Corporation Act, Cap 446,

Laws of Kenya to comply with Article 229(5) of the Constitution to provide for an express provision for the Auditor General to audit all Government investments including where GoK shareholding is less than 50 %.

- (ii) There is an urgent need for the Auditor- General to undertake audit and verification of all assets owned by Telkom Kenya Limited.
- (iii) Government shareholding in Telkom Kenya Limited has dropped from 49 % to 30 %.
- (iv) The National Treasury has injected about Kshs. 6.9 Billion into TKL.
- (v) Kshs. 4.9 billion was agreed to be paid and budgeted for however this was never done. The Government only managed to release Kshs. 2.5 billion as at 31st December, 2012.

3.2 THE REPORT OF THE INSPECTORATE OF STATE CORPORATIONS

The Inspector General of State Corporations submitted a report to the Committee on the recapitalization and restructuring of Telkom Kenya Limited. In the report he informed the Committee that:-

3.2.1 In 1996 the Government issued the policy framework paper to provide for reforms in the telecommunications sector relating to Kenya Post and Telecommunications Corporation (KPT&C) which was followed by the Kenya Communications Act, which culminated in the split of KPT&C to Telkom Kenya Limited, Postal Corporation and Communications Commission of Kenya.

3.2.2 Telkom Kenya Limited (TKL) was licensed to enter the communications market on 15th July, 1999 with five years exclusive rights to operate in Nairobi and run long distance internet and GPMC services. The monopoly ended in June 2004 with the onset of liberalization of the industry

3.2.3 TKL has been making loses attributed to loss of market share, incompatible and obsolete technologies and bloated workforce comprising semi-skilled and non skilled cadres. In 2006 TKL's debt portfolio stood at Kshs. 63 billion including unpaid taxes among other debts. To address the challenges, the Government through Cabinet approval decided to restructure the company into a learner and more competitive institution before privatization. To fund the exercise the Government agreed to acquire 65% of TKL stake in Safaricom in exchange of the required resources. The government later in 2008 floated 25% of the acquired Safaricom shares through IPO earning Kshs. 51 billion.

3.2.4 The privatization process was done through competitive bidding whereby in November, 2007 France Telkom consortium through Orange East Africa Limited emerged as the highest bidder offering USD 390 Million and consequently acquired 51% stake of TKL shares and a new brand of orange was launched. The acquisition was meant to give TKL an impetus for growth but this did not materialize as the newly branded TKL was unable to gain significant market share. The financial performance of the company has not been impressive as it continues making loses thus eroding the capital base. In the period 2010 – 2011 the company was technically insolvent and to fund its operations in the face of the huge losses it resulted

to shareholder loans. The Government of Kenya loan to TKL stood at Kshs. 6.9 billion as at 31st December, 2012.

3.2.5 The shareholders agreed to restructure the company in the face of imminent insolvency through the following measures:-

- (a) Conversion of GoK loans amounting to Kshs 6.9 billion to equity and France Telkom to reciprocate on pro-rata basis according to its shareholding strength of 51% or 5.1 billion.
- (b) France Telkom to write off its own share of loan to the company amounting to Kshs. 33.6 billion and in exchange the government to cede 9% of its shareholding.
- (c) Both shareholders to fund the company to the tune of Kshs. 10 billion. As a result France Telkom funded the company to the tune of Kshs. 5.1 billion and GoK was to fund TKL with Kshs. 4.9 billion but only managed to raise Kshs. 2.5 billion by the agreed deadline of 30th December, 2012 forcing the government to cede a further 10% of its shareholding.

3.2.6 It was not indicated how the restructuring contributed towards improving the operations of the company since it continued making loses to the tune of Kshs. 8 billion by the end of September, 2013.

3.2.7 The conversion of GoK loan of Kshs. 6.9 billion into equity did not help in bolstering Government's shareholding, instead the Government was forced to cede 9% of its shareholding on account of France Telkom writing off its loans amounting to Kshs. 33.6 billion.

3.2.8 The forfeiture of 10% of Government shareholding on account of failure to meet the deadline was punitive if not a design to systematically edge

out the Government from ownership of the company. At the time of privatization the Government retained 49% shareholding which has systematically reduced to 30% or 35,614,848 out of 118,716,160 shares.

Committee's Observations

3.2.9 The Committee observed that:-

- (i.) The restructuring failed to improve the operations of the company since it continued making loses to the tune of Kshs. 8 billion by the end of September, 2013.
- (ii.) At the time of privatization the Government retained 49% shareholding which has systematically reduced to 30% or 35,614,848 out of 118,716,160 shares.
- (iii.) The forfeiture of 10% of Government shareholding on account of failure to meet the deadline was punitive if not a design to systematically edge out the Government from ownership of the company

4.0 EVIDENCE AND SUBMISSIONS BY WITNESSES

4.1 EVIDENCE BY THE ATTORNEY GENERAL

The Attorney General, Prof. Githu Muigai, appeared before the Committee on 13th November, 2013 to adduce evidence on the recapitalization and balance sheet restructuring of Telkom Kenya Limited (TKL). He informed the Committee that:-

4.1.1 The performance of TKL has for a long time been a major concern for the Government since the liberalization of the ICT sector in the 1990's. As a result of the poor performance, the Government privatized the Company

in the year 2007 by selling 51% stake to France Telkom and retaining a 49% stake. In spite the privatization move, TKL's performance continued on a downwards spiral contrary to the expectation of shareholders.

4.1.2 Article 156 (4) (a) of the Constitution mandates the Attorney General to be the principal adviser on all issues touching on Government departments including but not limited to Government commercial matters by ensuring that commercial contracts or agreements are legally sound and that they conform to the Constitution and Cabinet directions, where applicable. The advice given by the office of the Attorney General is limited to the legality of the contracts or agreements.

4.1.3 The commercial viability or soundness of a commercial contract is outside the ambit of the Attorney General's office as such matters are within the mandate of other institutions such as the National Treasury. Government Ministries, Departments and Agencies (MDA) are permitted to seek private counsel subject to obtaining approval from the Attorney General.

4.1.4 The Attorney General's office was not privy to the negotiations that led to the conclusion of the technical and commercial deals as the Ministry of Finance (National Treasury) sought legal counsel from the private sector. The Attorney General's office was however involved in confirming that the subsequent agreements drafted by the independent legal counsel were sound from a legal perspective and complied with the conditions issued by Cabinet (*Annex I*).

4.1.5 The Ministry of Finance (National Treasury) hired the services of Hamilton, Harrison and Mathews Advocates (HHM) to provide legal consultancy services and Mr. Ashif Kassam of RSM Ashvir was hired to provide financial consultancy services in drafting agreements in respect of TKL shareholding issues. This was done without prior clearance by the Attorney General's office as required by Government Circular AG/1/2005 of 29th June, 2005. The Attorney General, however granted to the Ministry a post-facto "no objection" but advised that in future no such engagements should be made without full compliance to the law (*Annex 2*).

4.1.6 In the year 2010, the shareholders of TKL (GoK and France Telkom) entered into a cooperation agreement to deal with a number of issues underlying TKL's poor performance, including warranty claims (relating to financial health) so as to make TKL more competitive in the market. Between the year 2010 and 2012, France Telkom acting through its local subsidiary, Orange East Africa, boosted TKL's poor balance sheet through substantial shareholder loans amounting to over Kshs. 33 billion. The GoK similarly made direct shareholder loans to TKL during the same period but at a significantly lower threshold compared to France Telkom.

4.1.6 The capital input by the two shareholders did not improve the financial position of TKL and by the start of the 2012/2013 Financial Year, TKL was still technically insolvent.

4.1.7 Under Clause 9 of the shareholders agreement dated 21st December 2007, the parties agreed that TKL should be recapitalized and restructured under the following terms:-

(i) France Telkom would write off its Kshs. 33 billion shareholder loans to TKL in exchange for Government diluting its shareholding in TKL by 9% thus reducing the Government shareholding to 40% and increasing France Telkom shareholding to 60%.

(ii) The shareholders would together provide additional capital injections into TKL amounting to Kshs. 10 billion pro-rated to their shareholding structure of 49:51. This meant that the Government of Kenya was to provide Kshs. 4.9 billion while France Telkom was to make available Kshs. 5.1 billion.

(iii) GoK would write off its shareholder loans within the broad framework of this arrangement and that this transaction should be achieved in a tax neutral manner.

4.1.8 These agreements had public interest implications which required Cabinet approval and in November, 2012 the Cabinet approved a recapitalization and restructuring programme targeting TKL's balance sheet (*Annex 3*). The aim of this was to provide the Company with operating capital and critical investments to bring it back to profitability. Under the terms of the restructuring and recapitalization agreement, the following would occur assuming that each shareholder made available its full share of the agreed fresh capital:-

- (a) The outstanding shareholder loans provided up to December, 2012 to TKL would be converted into ordinary shares to be issued to each respective shareholder in a ratio reflective of their exposure to TKL.
- (b) The conversion would result in a new shareholding structure of 60% for France Telkom and 40% for GoK.
- (c) The capital injections would not have an impact on the preceding shareholding structure implying that GoK stake in TKL would remain at 40%.
- (d) Under Clause 6 of the agreement, GoK would have no further obligation to provide loans or equity injections into TKL after the Financial Year 2012/2013.
- (e) Under Clause 6.3 and 9.2 of the agreement, GoK's shareholding was not to be diluted any further unless GoK expressly consented to any dilution.
- (f) GoK reserved matters under clause 6.3 implying that GoK pre-eminence prior to certain systemic decisions being taken was assured and secured despite its lower shareholding.

4.1.9 Telkom Kenya Limited's Articles of Association dated 21st December 2007 empowered the Company to undertake such restructuring as was undertaken in December, 2012. The preceding agreements, particularly with respect to the shareholding structure, were conditioned on each shareholder making available its pro-rated contribution on time i.e. by 31st December, 2012. While France Telkom made fully its capital injection of Kshs. 5.1 billion by 31st December, 2012, the GoK failed to meet its total

obligation and only provided Kshs. 2.5 billion by the agreed timeline thus further reducing its shareholding by 10% to 40 %.

4.1.10 The agreement provided for a claw back of Government shareholding to the original 40% if it paid into TKL the balance of Ksh.2.4 billion by 30th June, 2013. Due to lack of budgetary provision for the balance of Kshs. 2.4 billion in its Financial Year 2012/2013 budget, the Government could not exercise the claw back provision.

4.1.11 The primary stakeholders in TKL are its investors, employees, customers and suppliers. According to the annual returns filed in the Registrar of Companies the shareholders of TKL as at 2013 are:-

Name	Address	Nationality	Shares
PS/Treasury	P.O.Box 3007, Nairobi	Kenyan	35,614,848
Orange East Africa, S.A	6 Place d'Alleray, 75505 Paris Cedex 15 , France	French	83,101,307
Micheal Barre	2, All'eedela Fontaine en L'air 78210 Saint Cyr L'ecolle	French	1
Mickael Ghossein	P.O. Box 3007 Nairobi	French	1
Marc Rennard	41 Rue des Fraisiers 91370 Varriers le Buisson, France	French	1
Olivier Froissart	25 rue Lamennai's Chaville France	French	1
Orange Participations	6 Place d'Alleray, 75505 Paris Cedex 15, France	French	1

4.1.12 The Attorney General's office did not give the names of the shareholders of Orange East Africa, S.A; and Orange Participations who hold shares in TKL as they are foreign companies and thus their details are not available at the companies' registry in Kenya.

Committee's Observations

4.1.13 The Committee made the following observations:-

- (i) The Government made available Kshs. 2.5 billion against its total obligation of Kshs. 4.9 billion. The failure by Government to pay up the balance of Kshs. 2.4 billion led to the dilution of GoK shareholding in TKL from 40% to 30% on 31st December, 2012.
- (ii) The Government had up to 30th June, 2013 to claw-back its lost shareholding threshold if it paid into TKL the balance of Kshs. 2.4 billion.
- (iii) The National Treasury violated section 17 of the Office of the Attorney General Act, (No. 49 of 2012) and the requirements of Government Circular AG/1/2005 of 29th June, 2005 on Government Legal Advisory Services in seeking the provision of transactional legal advisory services of Hamilton Harrison and Mathews without obtaining prior clearance of the AG even though the approval was granted after the services had been sourced.
- (iv) The Attorney General should not have given a post facto approval for the hire of private legal services.

- (v) The Government has not made any effort to pay up the balance of Kshs. 2.4 billion to claw back its shareholding neither has it made any claims from TKL to recover the Ksh.2.5 billion that it paid as at 31st December, 2012.
- (vi) The restructuring and recapitalization agreement provided that “*GoK would be entitled to a lower ownership threshold adjusted to the %age of its actual contribution*”. This provision was not fully followed to the letter whereby the Government shareholding should have only dropped to 35.1 % and not 30% by 31st December, 2012.
- (vii) The shareholders of OrEA S.A; and Orange Participations who hold shares in TKL are not in the record at the Registrar of Companies at the office of the Attorney General and are not known to the Kenyan public.
- (viii) The recapitalization and restructuring agreement was presided over by the Treasury which has a fiduciary responsibility to protect public interest in such investment decisions.

4.2 EVIDENCE BY THE CHAIRMAN AND BOARD OF DIRECTORS OF TELKOM KENYA LIMITED

Mr. Edward Njoroge, Chairman and Board of Directors of Telkom Kenya Ltd appeared before the Committee on 27th November, 2013 to adduce evidence on the restructuring of Telkom Kenya Limited. They informed the Committee that:-

4.2.1 In accordance with the shareholders agreement, signed in 2007, GoK (holding 49% of TKL shares) was entitled to nominate four directors while Orange East Africa, S.A (holding 51% shares) was entitled to nominate five directors.

4.2.2 The Directors of TKL are:

List of Directors of Telkom Kenya Limited as at 2013

S/No.	Name	Institution
1.	Principal Secretary, National Treasury	GoK
2.	Principal Secretary, ICT	GoK
3.	Ashif Kassam	GoK
4.	Mohammed Nyaoga	GoK
5.	Edward njoroge	OrEA
6.	Daniel Delestre	OrEA
7.	Sebastian Fayard	OrEA
8.	Olivier Froissart	OrEA
9.	Gerard Ries	OrEA

4.2.3 Mr. Edward Njoroge nominated by OrEA to join the Board of Telkom Kenya Ltd in April 2011 and was appointed Chairman in a subsequent Board meeting held on 7th April, 2011 in line with the Memorandum of Association and Articles of Association of the said Company.

4.2.4 The main role of the Board of Directors is to provide:-

- (a) The strategic direction of the Company.
- (b) Approval for the necessary policies and procedures to run the Company
- (c) Oversight accountability to the Company

(d) Fiduciary and duty of care responsibilities for and on behalf of the stakeholders

4.2.5 The consolidated statement of total assets, total liabilities and net assets of TKL from the first year of privatization to the recent audited accounts for the period ending 31st December 2012 for TKL is as follows:-

Consolidated Statement of Telkom Kenya Limited in Kshs. Millions

Narration	31-12-2008	31-12-2009	31-12-2010	31-12-2011	31-12-2012
Total Assets	38,957	42,175	48,759	44,434	43,715
Total Liabilities	26,697	40,736	57,508	69,981	27,056
Net Assets	12,260	1,439	(8,749)	(25,547)	16,659
Capex	9,800	8,415	5,197	8,242	932

4.2.6 The net assets of the Company dropped from Kshs. 12.26 billion in 2008 to negative Kshs. 25.547 billion by the end of 2011, which meant that TKL was technically insolvent in the Year 2011.

4.2.7 The Company was privatized in 2008 and it started posting losses from the first year after privatization. The management of the Company through the Board requested for shareholders loans.

4.2.8 The Government contributed a total of Kshs. 5 billion as loans to TKL from 2009 up to year 2012 while OrEA S.A as the other shareholder contributed an amount of Euros 445.7 million (an equivalent of Kshs. 50.2 billion) in the same period.

4.2.9 The Government of Kenya holds 35,614,848 shares out of the total 118,716,160 shares which is equivalent to a 30% stake in TKL as per the annual returns for the period ended December, 2012.

4.2.10 France Telecom Group is a listed Company on the NYSE Euro next Paris and on the New York Stock Exchange and it is 27% owned by French Government. Orange Participations S.A (a fully owned subsidiary of France Telecom Group) set up OrEA, S.A in France to bid for the purchase of TKL. The other shareholders of OrEA was Alcazar which was 100% owned by Agility Group. On 2nd August 2012, Agility Group disinvested in OrEA leaving Orange Participations S.A as the sole shareholder of OrEA.

4.2.11 The shareholders of Mobicom Ltd are: **Messrs. Paul W. Ndungu - 45 %;**
Joel K. Kibe - 45 %; and Jacob Anyona (deceased) -10 %.

4.2.12 TKL was insolvent at the balance sheet date of 31st December 2012 and the Company continued to make losses. The Board of TKL had either to declare the Company insolvent or alternatively get the shareholders to write off or capitalize their loans.

4.2.13 In Board meetings, the issue of insolvency of TKL was discussed at length under Minutes No. FB/12/9/12, FB/15/12 and FB7/7/3/12. The Board in their meetings requested the shareholders to fund the needs of the Company for the year 2012 which was Kshs. 10 billion pro-rata to their

shareholding, implying that OrEA would pay Kshs. 5.1 billion and GoK would pay Kshs. 4.9 billion. The Board was not party to the negotiations as these were negotiations between the shareholders.

4.2.14 On 21st December 2012, the Funding and Restructuring Agreement (the “agreement”) relating to TKL was signed between GoK, TKL and OrEA, S.A and France Telkom. TKL was a party to this Agreement in its capacity as beneficiary of the funding. OrEA had by this time fulfilled its obligation to pay into TKL its pro-rata share of the 2012 funding needs of Kshs. 5.1 billion. GoK agreed to fund its share by making payments to TKL in two tranches. The first tranche was received by TKL prior to December 2012 (Kshs. 2.5 billion) and it was agreed that second tranche of Kshs. 2.4 billion would be paid into TKL on or before the end of June 2013.

4.2.15 The conversion of the shareholders loans of TKL was to be undertaken in two steps, namely:

(a) Step 1:- The outstanding loans as of December 2012 of the GoK (Kshs.7.1 billion) and part of the loans of OrEA S.A (Kshs.16.6 billion) would be converted into new shares of TKL resulting in OrEA owning 70% of TKL’s shares and GoK owning 30% of TKL shares. The rest of the loans provided by OrEA (Ksh. 33.6 billion) be written off /cancelled provided that;

(b) Step 2:- Should GoK pay the second tranche into TKL on or before end of June 2013, then the ownership ratio in TKL would be adjusted in

order to ensure that OrEA's shareholding in TKL is reduced to 60% and GoK shareholding is increased to 40%. However, if GoK failed to meet its payment obligations to TKL by end of June 2013, then there would be no adjustment to the ownership ratio.

4.2.16 The Funding and Restructuring Agreement led to the improvement of TKL capital structure with shareholders equity rising from negative Kshs.25.547 billion in 2011 to Kshs. 16.659 billion in 2012.

4.2.17 The performance of TKL has been well below expectations over the past five years and the poor performance has been attributed to challenges facing TKL in its operations including:-

- (i) Unfair competition in the market characterized by dominance by one player;
- (ii) Pricing structure characterized by considerable drop in mobile call costs following the price wars as well as the extreme reduction of mobile termination rate;
- (iii) Regulatory environment especially in the areas of mobile money transfers and high frequency fees;
- (iv) Cable cuts due to vandalism and civil/road works; high cost of way leaves ;
- (v) Litigations 70 % of which arose pre-privatization which creates a heavy burden on the Company;
- (vi) Bad debts and delayed payments by Parastatals and GoK;

- (vii) Delayed VAT refunds: the Company has a total of Kshs. 563 million due to it by Kenya Revenue Authority.

Committee's Observations

4.2.18 The Committee made the following observations:-

- (i) The true shareholders of Orange Participations, S.A and OrEA S.A have not been fully disclosed and so are the circumstances and reasons as to why Alcazar Capital LLC disinvested in OrEA on 2nd August, 2012 as well as the amount of money paid to Alcazar Capital LLC received following its disinvestment.
- (ii) The Board of Directors was not party to the negotiations that led to the Funding and Restructuring Agreement dated 21st and 27th December 2012. There is need for full disclosure of the names of the negotiators to this agreement and the terms of engagement including the fees paid for the assignment.
- (iii) Following the shareholders Agreement of 21st December, 2012 the GoK paid Kshs. 2.5 billion and failed to pay Kshs. 2.4 billion and therefore lost 10 % stake in TKL without due consideration of the pro-rata basis upon which the total obligation of Kshs.10 billion signed in the agreement was premised.
- (iv) The National Treasury deliberately failed to avail the GoK balance of Kshs.2.4 billion six months after signing the agreement. This failure exposed the GoK to the huge loss of 10 % stake in TKL from 40 % to 30 %.

- (v) There is a clear lack of clarity about the market valuation of TKL even at the privatization stage. The basis of the value of Kshs. 50.98 billion that was used at the time of privatization of TKL is not justified.
- (vi) Mr. Ashif Kassam was hired by the Treasury as a financial consultant during the recapitalization and restructuring of the balance sheet of TKL and later appointed as a Director in TKL representing Government of Kenya. This is conflict of interest.
- (vii) The Privatization Act, 2005 which would have guided the privatization process of Telkom Kenya Limited and indeed Safaricom which was an offshoot of TKL was held in abeyance for over two years by the then Minister for Finance, Hon. Amos Kimunya after its enactment by Parliament and Assent by the President. This led to the privatization process of these two companies taking place in an unregulated environment.
- (viii) There was lack of full disclosure by France Telecom at the bidding stage for purchase of TKL that it was not representing a consortium but was in partnership with Alcazar Capital LLC, a Company registered in Dubai.

4.3 EVIDENCE BY THE CABINET SECRETARY, THE NATIONAL TREASURY

Mr. Henry Rotich, Cabinet Secretary, the National Treasury appeared before the Committee on 19th September, 2013 to adduce evidence on the recapitalization

and restructuring of the balance sheet of Telkom Kenya Ltd. He informed the Committee that:-

- 4.3.1 The Government plays a role of a shareholder in companies where it has invested as provided for in the Company law. The Government carries the shareholder responsibilities and may be called upon by its co-shareholder to address challenges that may be facing the companies it has invested in.
- 4.3.2 In 2007, the Government became a minority shareholder as it sold 51% of the shares in Telkom Kenya Limited to Orange East Africa and therefore Telkom Kenya ceased being a Corporation under the State Corporations Act.
- 4.3.3 Telkom Kenya Limited launched its GSM network in the 2nd half of 2008. The Company has made significant investment in the expansion of its network, IT and management systems, rationalization and training of staff and in capacity and brand building.
- 4.3.4 The funding of the Company's investments came from the shareholders loans with Orange East Africa providing 90 % of the loan. A joint Memorandum by the Minister for Finance and the Minister for Information Communication was drawn requesting the cabinet to approve the capitalization and balance sheet restructuring of TKL (*Annex 3*). The Cabinet approved the recapitalization and restructuring of the balance sheet of Telkom Kenya Limited in November 2012 (*Annex 4*).

4.3.5 Despite the significant investments, the Company has been posting losses which necessitated the need for the shareholders to inject capital. As a result the shareholders decided to develop a sustainable business plan for 2012 to 2016 as well as have balance sheet restructuring to restore the Company's solvency position. The shareholders decided to provide financial support to the Company in 2012 and to restructure the Company's balance sheet.

4.3.6 As per the shareholding agreement, the Company would get loans from its shareholders as per the shareholders pro-rata. The Government of Kenya however, did not provide its portion of the loans and France Telecom had contributed 90% of the funding hence the dilution of GoK shareholding.

4.3.7 In 2012, the Company had accumulated liabilities and required Kshs. 10 billion from its shareholders on pro-rata basis. OrEA provided its full share of Kshs. 5.1 billion while GOK only provided Kshs. 2.5 billion which had been approved in the expenditure estimates for financial year 2012/2013, leaving a balance of Kshs. 2.4 billion.

4.3.8 The shareholders loans as at 30th June, 2013 stood at GOK; Kshs. 4.4 billion and France Telecom; Kshs. 44 billion, implying that if loans were to be recapitalized, Government shareholding would be diluted to 13 %.

4.3.9 The Government team held negotiations with France Telecom (FT) and agreed that GoK would cede 9 % shareholding from 49 % to 40 % and the

GoK shares be converted to equity, bringing shareholding structure to 40 % for GoK and 60 % for France Telkom.

- 4.3.10 With the GoK failing to provide the balance of Kshs. 2.4 billion, a further dilution of 30% of its shares was agreed upon. The balance of the FT loans amounting to Kshs. 33.5 billion would be written off in full.
- 4.3.11 The balance sheet restructuring process was to be completed by the Telkom Kenya Financial year which ends on 31st December. The funding and restructuring agreement was to be finalized by 18th December, 2012 and on 21st December, 2012 the conversion agreement was signed (*Annex 5*).
- 4.3.12 Further negotiations provided that in event that GoK may not provide Kshs. 2.4 billion, it was agreed that conversion of loans to equity would still be done and more of the loans of FT would be capitalized leading to further dilution of GoK shareholding to 30% and OrEA at 70%. However, GoK would have an opportunity to get back to 40% shareholding if it provided Kshs. 2.4 billion by 30th June 2013.
- 4.3.13 The restructuring proposal was approved by the Cabinet on 22nd November, 2012, while the Balance Sheet restructuring was cleared by the Attorney General on 20th December, 2012.
- 4.3.15 The first restructuring of TKL was undertaken within the context of privatization through the sale of 60% shareholding in Safaricom to GOK.

The privatization of TKL was completed before the Privatization Act(Cap 485C) was operational with the process being undertaken by an Inter-ministerial Committee chaired by the Treasury.

4.3.16 The Government had other pressing obligations such as funding election hence the failure to provide the balance of Kshs. 2.4 billion.

4.3.17 Alcazar Capital LLC was a private equity firm which operated in Dubai.

Committee's Observations

4.3.18 The Committee made the following observations, that:-

- (i) It would have been prudent for the Government to provide the balance of Kshs. 2.4 billion to avoid the GOK shareholding going down to 30 % from 40% thereby the Government losing 10 %.
- (ii) The failure by the Government to clear the balance of Kshs. 2.4 billion caused the employees financial insecurity through job losses, loss of tax payer's money and the sovereignty as the Company majority shareholders are foreigners.
- (iii) The shareholding agreement gave France Telecom more powers in terms of management as well as greater shareholding in TKL.
- (iv) France Telkom provided 90% of the loans raising questions as to why FT would have been so philanthropic to provide the lion's share of the loans whereas it would have been provided on a pro-rata basis.

- (v) Telkom Kenya Limited, despite having public shareholding, was not audited by the office of the Auditor General.
- (vi) The National Treasury committed Government to provide Kshs. 4.9 billion without factoring it in the budget. The National Treasury failed to provide for the allocation of Kshs. 2.4 billion in the two supplementary budgets of 2012/2013 financial year. This was the balance of the commitment that the Government signed for in the agreement dated 27th December 2012.
- (vii) Due diligence was not followed in the dilution of Government shareholding in TKL and the provisions of the agreement were not strictly adhered to.

4.4 EVIDENCE BY THE CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION AND TECHNOLOGY

Dr. Fred Matiangi, the Cabinet Secretary for Information, Communication and Technology appeared before the Committee on 10th October, 2013 to adduce evidence on the recapitalization and restructuring of Telkom Kenya Limited. He informed the Committee that:-

4.4.1 The enactment of the Communications Commission of Kenya Act, 1998 ushered in reforms in the communications sector that were initiated by the Government in 1996 in collaboration with the IMF. The Act formed the

basis for the restructuring of KP & TC which was launched in 1999 and led to the separation of the Corporation into three entities:-

- (a) Kenya Postal Corporation of Kenya – Postal Corporation of Kenya Act, 1998
- (b) Communications Commission of Kenya (CCK) – Communication industry regulator
- (c) Telkom Kenya Limited (TKL) – Created under the Companies Act.

4.4.2 The Communications Commission of Kenya in July, 1999 issued licenses to TKL in all areas of its operations and to ensure that the Company was able to compete effectively in the telecommunications market, it was granted a five (5) year license to operate exclusively in Nairobi and given a monopoly on long distance, internet backbone and Global Mobile Personal Communications Services (GMPCS). The exclusivity period ended in 2004 with the liberalization of the telecommunications industry which brought in Safaricom, Kencell and Econet (YU). Despite the five (5) year monopoly the Company's profitability continued to decline due to loss of market share, rising levels of debt and a bloated workforce.

4.4.3 Under the shareholders agreement signed during the privatization process, Orange East Africa (OrEA) owned 51 % of the Company and responsible for the management. OrEA has also made investments in IT and managements systems, rationalization and training of staff and brand building. Most of the funding has been provided by loans, the majority of which have been provided by shareholders with France Telkom providing about 90 % of the funding. Despite the huge investments, the Company

has not been able to make a turn around and has instead continued to post huge losses.

4.4.4 The Company faces the following operational challenges:-

- (a) Short terms loans from shareholders, the bulk of which is in Euros posing an exchange risk to the Company.
- (b) Vandalism including frequent copper and fibre cuts causing frequent disruption of services.
- (c) Fragmentation of the market by four operators' thus stiff competition.

4.4.5 During the privatization of Telkom Kenya Limited, eight companies purchased bid documents but only four met the bids submission deadline and only three qualified in the technical evaluation stage. France Telecom presented the highest financial bid and was awarded the tender to purchase 51% of Telkom Kenya Limited shares. France Telecom started its operations on 21st December, 2007 and subsequently launched its orange brand in Kenya. The firms that qualified in the technical evaluation stage were:-

- (a) France Telecom S.A (in consortium with Alcazar Capital LLC) - USD 390 Million,
- (b) Telkom South Africa – USD 282.8 Million
- (c) Reliance Communications of India – USD 221.001 Million

4.4.6 The investments in TKL have been provided by shareholders through loans. Based on the shareholders agreement, funding was to be provided on a pro-

rata basis but due to the tight budget position the Government of Kenya has not been able to fund its portion of the loans. As a result France Telecom has provided about 90 % of the shareholders funding through loans that have been converted to equity resulting in dilution of Government shareholding in the Company. The current shareholding in Telkom Kenya Limited is such that France telecom has 70% shareholding while the Government of Kenya has 30% shareholding thus making TKL more of a private Company due to the minority shareholding of the Government.

4.4.7 The Ministry of Information, Communication and Technology is responsible for ICT policy formulation and together with the National Treasury has been involved in developing the framework for the privatization of Telkom Kenya Limited.

4.4.8 The two Ministries are Government representatives on the Board of Directors of the Company however the ICT Ministry only sits at the Board to offer policy advice and not in the capacity of being a representative of the Government.

4.4.9 The Government and by extension the People of Kenya, had spent a lot of resources and time in building the assets and other investments in Telkom Kenya Limited. The privatization of Telkom Kenya means that the country has lost national strategic assets. While privatization is not a bad policy per se, it is important that good decisions are made and that value for money is realized and national security interests are safeguarded.

4.4.10 Privatization of TKL and the dilution of Government shares in TKL means that the telecommunication sector in Kenya is in the hands of foreigners since all the companies in the telecommunication sector are controlled by foreign interests. Under an agreement TKL was allowed to manage 5,000 kilometers of fibre optic cable that was installed using Government funds.

Committee's Observations

4.4.11 The Committee made the following observation, that:-

- (i) Telkom Kenya Limited has been making losses even after privatization thus necessitating a restructuring of its balance sheet. Privatization of the Company has not therefore attained the objective for which it was privatized.
- (ii) The Government failed to provide its share of funding as provided for in the shareholders agreement dated 27th December, 2012 leading to dilution of Government shareholding from 40 % to 30 % as 31st December 2012.
- (iii) Due to strategic consideration and national security concerns, there was need for the Government to retain its shareholding in TKL at 49 %.
- (iv) The Government should re-consider the leasing or management of the fibre optic cable that was established using public funds.

(v) The Principal Secretary, Ministry of Information, Communication and Technology and Treasury sit as Directors in the Board of TKL representing the Government implying therefore that any decision made at the TKL Board was known by the two lead Ministries.

4.5 EVIDENCE BY THE COMMUNICATIONS COMMISSION OF KENYA

Mr. John Omo, the Acting Director-General, Communications Commission of Kenya (CCK) presently Communications Authority of Kenya (CAK) appeared before the Committee on 28th August, 2013 to adduce evidence on the restructuring and recapitalization of Telkom Kenya Limited. He informed the Committee that:-

4.5.1 The CCK was not involved in the privatization, restructuring and recapitalization of Telkom Kenya Limited. The role of CCK is only limited to regulating the industry and licensing of telecommunication operators including Telkom Kenya Limited.

4.5.2 According to the license issued to Telkom Kenya Limited, the Commission has to be notified of the intention by Government to cede shareholding. The Commission granted the Government permission to cede its shareholding in Telkom Kenya in the initial entry of Orange Telkom. It is a condition on the license that the ceding of shareholding be notified to the Communications Commission of Kenya and its concurrence sought (*Annex 6*). The Government did not however seek CCK's authorization on further ceding of shareholding in Telkom Kenya after the initial shareholding.

- 4.5.3 Through privatization foreigners can own greater shareholding in public entities but where CCK's authorization is required then the Government has to seek the permission of the regulator before ceding any shares in the public entity or Corporation concerned.
- 4.5.4 The license issued to Telkom Kenya Limited is similar to those that Safaricom and other large players in the industry received. Telkom currently has the following licenses for a period of 25 years; content service provider, applications service provider, network facilities provider tier 1, international gateway systems and services, and submarine cable landing licence. The regulator (CCK) and National Environment Management Authority (NEMA) promote the sharing of resources by industry players and has advised key players to work towards the sharing of facilities such as ducts, masts etc.
- 4.5.5 Promotions by various key players in the industry have not had any negative impact on Government revenue. CCK ensures that promotions do not interfere with healthy competition throughout the period of the promotion. Telkom and other players had in the past written to CCK individually complaining of unfair competition. The Commission investigated the matter and communicated to them.
- 4.5.6 Telkom Kenya was making losses since they were charging less than the interconnectivity charges. Telkom is charging 1.00 shilling while the interconnectivity cost is 1.5 shillings.

4.5.7 CCK had advertised for regional Telkom operators but there were no bidders and the idea fizzled out.

Committee's Observations

4.5.8 The Committee made the following observations:-

- (i) The Communications Commission of Kenya was never involved in the privatization of Telkom Kenya Limited.
- (ii) The dilution of Government shareholding in TKL was in breach of provisions of paragraph 23 of license No. TL/MCO/00004 granted by CCK since the regulator (CCK) was not consulted. The Government never sought CCK's approval/authorization when it was ceding further shares in Telkom Kenya Limited.
- (iii) The ceding of shareholding by the Government of Kenya to France Telkom is in breach of provisions of paragraph 23 of license No. TL/MCO/00004 granted by CCK TO TKL.
- (iv) The loss making trend by TKL can be attributed to poor planning and management strategies and failure by shareholders to invest in the capital intensive industry. For instance, as part of their market penetration strategy, Telkom Kenya Limited was charging Kshs. 1.00 shilling while the interconnectivity cost was Kshs.1.5 shilling therefore making losses.

4.6 EVIDENCE BY MANAGEMENT OF TELKOM KENYA LIMITED

Mr. Michael Ghossein, Chief Executive Officer, Telkom Kenya Limited appeared before the Committee on 25th June, 2013 and gave evidence on restructuring, financial status and debts of Telkom Kenya Limited. He informed the Committee that:-

4.6.1 There are four (4) GSM players in the market and that only one (1) of the operators was making profits while the other three (3) operators are making losses in a monopolistic practice. Comparatively, Safaricom has 2,500 sites while Telkom has only 900 sites. Further, Safaricom Kenya Limited has 80 % of market share volume, 98 % share of the money transfer business, 93 % of SMS, and 76 % of data.

4.6.2 The players in the industry operate with no clear guidelines from the regulator, Communications Commission of Kenya.

4.6.3 Telkom Kenya faces a number of challenges among them, lack of regulative guidelines on the part of CCK to allow sharing of sites, price wars by players in the market, vandalism of copper cables for fixed lines, sabotage by competitors, destruction of cables by road contractors (51% of the cables have been destroyed by road contractors) and costs incurred as a result of litigation with customers for services not provided.

4.6.4 Telkom Kenya decided to migrate to the fibre systems as a result of problems faced with copper cables. The Company has huge operating costs

such as energy, CCK fees, interconnection fees, legal fees and hiring of security.

4.6.5 The Company receives revenue of Kshs. 9.785 billion, out of which operating costs cover Kshs. 6.9 billion without including marketing and advertisement costs.

4.6.6 Telkom Kenya needed Kshs. 8 billion (to be provided by France Telkom) to remain afloat and that the management was anticipating profitability despite the challenges facing the organization.

4.6.7 The asset and liabilities of Telkom Kenya prior and after privatization were as follows:-

TKL (Million Kshs.)	31/12/2008	21/12/2009	31/12/2010	21/12/2011	31/12/2012
Total Assets	38,957	42,175	48,759	44,434	43,715
Total Liabilities	26,697	40,736	57,508	69,981	27,056
Equities	12,260	1,439	(8,749)	(25,547)	16,659

4.6.8 Government capitalization in Telkom Kenya post privatization is as follows:-

GoK loans (Millions)	2008	2009	2010	2011	2012
Amount	0	2,500	1,000	0	2,500

Date of signature		23/09/2009	20/12/2010		10/08/2012
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4.6.9 The Directors of OrEA are Mr. Eddy Njoroge, Mr. Daniel Delestre, Mr. Sebastien Foyer, Mr. Gerald Rice, Mr. Marc Rennard and the Directors from the GoK were Mrs. Esther Koimett, Mr. Ashif Kassam, Mr. Mohamed Nyaoga and Mr. Joseph Tiampaty. The current Government shareholding is 35,614,848 shares out of the total 118,716,160 which is equivalent to 30% stake of Telkom Kenya Limited.

4.6.10 He was not privy to the shareholding structure of the Company.

4.6.11 Telkom Kenya Limited is owed Kshs. 1.6 billion by the Government of Kenya and another Kshs. 563 million by Kenya Revenue Authority. Telkom Kenya is not paying dividends as it is, currently, not making profit.

4.6.12 TKL had 18,000 employees and the Company did retrenchment in phases. In 2009, 3,000 – 4,000 employees were released with benefits. However, there is a court case on employees benefit claiming Kshs. 3 - 4 billion.

4.6.13 Alcazar, a Company incorporated in Dubai had a consortium with France Telecom during the time of bidding for the 51% shareholding worth USD 395 Million. Alcazar is no longer a shareholder of Telkom Kenya and as at June, 2012, TKL was owned by the Government of Kenya and Orange East Africa.

4.6.14 The CEO as a shareholder holds one nominal share of the five shares that are held in trust. He did not sign the Shareholders Loan Agreement with the Government of Kenya but his Deputy had signed on his behalf. The management was not part of the negotiations since they were not part of the Board.

4.6.15 Telkom Kenya did not notify Communications Commission of Kenya on its change in shareholding structure.

4.6.16 Mobicom Kenya Limited is owned by Mr. Paul Ndungu and Mr. Joel Kibe. The Company is not a shareholder in Telkom Kenya but is TKL network distributor.

Committee's Observations

4.6.17 The Committee made the following observations, that:-

- (i) The privatization of Telkom Kenya was not bearing fruit as the organization has been incurring losses and that the Government has lost its shareholding from 49% to 30% as a result of expensive recapitalization and restructuring that requires injection of additional capital.
- (ii) Participative decision making by the management and shareholders was needed to address the issues that Telkom Kenya is facing. According to the CEO, he was not aware of the decision and agreements that were entered into by the shareholders implying that he was not involved.

- (iii) The Management had expressed concerns over alleged unfair competition by other operators in the market.
- (iv) The Government should reconsider any decision aimed at injecting additional capital into Telkom Kenya Limited due to the Company's loss making trend.
- (v) While privatization was important, there was a need for a joint effort to protect key infrastructure and Government investments in the country from foreign acquisition.
- (vi) The issue of Telkom Kenya Limited is a keen to share fixing arising from the fact that the Government only managed to raise Kshs. 2.5 billion of the required Kshs. 4.9 billion and could not raise the balance of Kshs. 2.4 billion.
- (vii) Alcazar Capital LLC, whose ownership remains unknown, pulled out of the partnership with France Telecom during the negotiations with the Government of Kenya. Reasons for its divestiture and the consideration it received are not clear.
- (viii) Telkom Kenya failed to notify the Communications Commission of Kenya on its change of share structure as stipulated in paragraph 23 of license No. TL/MCO/00004 granted by CCK thereby making the organization's operations and current shareholding illegal.

- (ix) The management was running the organization with no knowledge of its on goings following claims by the CEO that he was not part of the negotiations.

4.7 EVIDENCE BY MOBICOM LIMITED

Mr. Joel Kibe, Managing Director Mobicom Ltd appeared before the Committee on 11th November, 2013 to adduce evidence on the privatization and restructuring of Telkom Kenya Limited (TKL). He informed the Committee that:-

- 4.7.1 The shareholders of Mobicom Kenya Limited are, Paul Ndungu, the late Anyona and Joel Kibe. Currently there are only Two Directors namely Paul Ndungu; and Joel Kibe.
- 4.7.2 Telkom Kenya Limited is performing poorly. Due to the current operations and poor performance of TKL, the Government should only have limited shareholding in the Company. There is need for a clear road map on the Telkom Kenya Limited business.
- 4.7.3 Mobicom was a key distributor of Safaricom Kenya Limited but was approached by Mr. Ashif to assist in the roll out of Telkom Kenya Limited due to Mobicom's vast experience in distribution. When Mobicom joined TKL, the expectation was to roll out 2, 000 BTS's but so far less than 1,000 BTS's have been rolled out by TKL. Mobicom was also promised, as part of the deal to leave Safaricom, a single dealership /only distributor in addition to TKL paying staff salaries for Mobicom employees for one year.

4.7.4 Mobicom is not a shareholder in Telkom Kenya but is TKL main network distributor.

4.7.5 While working with Safaricom Limited, Mobicom used to earn a residual income of Kshs. 12 million per month. This has decreased with the partnership with TKL.

Committee's Observations

4.7.6 The Committee made the following observations:-

- (i) Mobicom Limited is not a shareholder in Telkom Kenya Limited but was contracted to distribute TKL products.
- (ii) TKL is performing poorly and has not met its target of rolling out 2,000 BTS's.
- (iii) The Government should re-assess TKL business.
- (iv) TKL paid employees of Mobicom, a private Company, salaries for one year yet it was seeking shareholding recapitalization and restructuring of its balance sheet.

4.8 EVIDENCE BY THE PRIVATIZATION COMMISSION OF KENYA

Mr. Solomon Kitungu, Executive Director, Privatization Commission appeared before the Committee on 27th August, 2013 to adduce evidence on the privatization of Telkom Kenya Limited. He informed the Committee that:-

- 4.8.1 The Privatization Commission is established under section 3 of the Privatization Act, 2005. The Commission commenced its operations in January, 2008 following the gazettelement of Legal Notice No. 397 of 4th December, 2007.
- 4.8.2 There is a list of public sector assets approved by the Cabinet to be considered for privatization and subsequently privatized once the approval process is completed. The current privatization programme was approved by Cabinet on 11th December, 2008 and gazetted on 14th August, 2009.
- 4.8.3 The privatization process involves several steps among them; approval of the privatization programs by the cabinet, preparation of a detailed privatization proposal by the Commission, approval of a detailed privatization proposal by the Cabinet and presentation to Finance, Planning and Trade Committee of Parliament, transaction implementation.
- 4.8.4 The process that took place at Telkom (K) Ltd was restructuring and not privatization. This involves re-issuance and transfer of shares. The Commission was not aware of the transfer of shares in Telkom Kenya.
- 4.8.5 The Commission was not involved in the privatization of Telkom Kenya since it took place before the Privatization Act, 2005 was operationalized. Privatization should only be on what is in the privatization programme (25 States Corporations) as approved by Cabinet.

4.8.6 Any action being undertaken in Telkom Kenya Limited involving transfer of shares or shareholding is illegal.

Committee's Observations

4.8.7 The Committee made the following observations:-

- (i) Telkom Kenya was privatized prior to the operationalization of the Privatization Act 2005 however; the Act was in place by the time of the restructuring and recapitalization which was done without the involvement of the Privatization Commission. The restructuring of Telkom took place in December, 2012 and early 2013.
- (ii) The Telkom Kenya Limited issue revolves around the transfer of shares and restructuring of the balance sheet which led to the dilution of Government shareholding and therefore the Privatization Commission should have been involved.
- (iii) The Government/Minister for Finance took long to operationalize the Privatization Act (Cap 485 C) even after the President assented to it. The then Minister for Finance, Hon. Amos Kimunya, operationalized the Act through Legal Notice No. 339 of 2007 with the commencement date being 1st January, 2008.

4.9 EVIDENCE BY THE INVESTMENTS SECRETARY, THE NATIONAL TREASURY

Ms. Esther Koimett, the Investments Secretary, in her written submission dated 16th April, 2014 on the restructuring and capitalization of Telkom Kenya Limited (TKL) informed the Committee that:-

4.9.1 In 2006 the Government hired the International Finance Corporation (IFC) through the direct procurement method to provide advisory services for the privatization of TKL. IFC is not allowed to participate in competitive bids for advisory services floated by Governments because it is part of the World Bank Group and is owned by Governments including the Government of Kenya (GoK) and any Government seeking to hire IFC would have to go through a direct procurement process. It is on this context that GoK hired IFC to provide financial advisory services for the TKL transaction. Governments hired IFC for the following reasons;-

- (i) Speed of execution;
- (ii) IFC has grants that it uses to hire their advisors for the transaction;
- (iii) IFC brings a high level of professionalism and transparency to a transaction;
- (iv) Brings convening power to a project as it has the backing of the World Bank Group; and
- (v) IFC approaches a transaction from a developmental view point.

- 4.9.2 IFC hired and funded the rest of the complement of advisors required for the transaction such as the legal, regulatory and environment; social and labour; technical telcom strategy; and accounting. In hiring the consultants IFC goes through a competitive process following its rules and it is through this process that Hamilton Harrison and Mathews (HHM) were hired as the local lawyers for the TKL privatization transaction.
- 4.9.3 The Attorney General is the legal advisor to the Government and Treasury always requests the Attorney General to appoint an officer to be part of the Government team that is handling a transaction (*Annex 7*). The Permanent Secretary/Treasury wrote to the Attorney General (AG) on March 26th 2012 requesting him to appoint a senior officer and on 11th April, 2012, the AG responded, nominating Ms. Dorcas Achapa, Deputy Solicitor General to be part of the negotiating team (*Annex 8*). As is practice the Government team is always supported by commercial lawyers and given tight timelines treasury hired HHM who had institutional memory having provided legal advisory services during the privatization of the company and during the negotiations relating to warranty claims by France Telecom.
- 4.9.4 The restructuring and recapitalization for TKL was necessitated by an insolvency situation which the directors resolved to escalate to the shareholders for resolution. France Telkom (OrEA) had a strong legal and financial capacity at their disposal as a commercial entity and therefore had a strong well laid out strategy. It was therefore necessary for the Government to hire both legal and financial services to develop its own strategy and to prepare for the negotiations with FT (OrEA).

4.9.5 Given the timelines that Treasury was facing, the nature of the issues and the huge value at risk, it was prudent to hire services from advisors with knowledge of the issues and historical perspective of the transaction. A proposal was made to the Accounting Officer, Ministry of Finance (**Annex 9**) to engage HHM to provide legal advisory services as they had been advisors to the Government on this transaction. Further a proposal was made to hire Mr. Ashif Kassam of RSM Ashvir on account that Mr. Kassam was a Government director on the Board of TKL and understood the issues well in addition to having been part of the advisory team on the claim of warranties where Government was able to avoid liability on the claim. In hiring Mr. Kassam the Government had taken due-care to establish that there was no conflict of interest.

4.9.6 The proposal to hire HHM and Mr. Kassam as legal and financial experts respectively on direct procurement together with the terms of reference was presented to the Ministerial Tender Committee for consideration and approval in accordance with section 74 of the Public Procurement and Disposal Act, 2005 and the Regulations made thereunder (*Annex 10*). The Ministerial Tender Committee on 7th June, 2012 awarded the legal advisory consultancy to HHM and the financial advisory services to Mr. Ashif Kassam (*Annex 11*). These procurements and others done within the period 1st April – 30th June, 2012 were submitted by the Ministry of Finance to the Public Procurement Oversight Authority in accordance with section 9 of the Public Procurement and Disposal Act, 2005 (*Annex 12*).

4.9.7 The Ministry of Finance on 20th June 2012 wrote to the Attorney General for clearance of the contracts (*Annex 13*). The AG provided his comments

with concerns that his approval had not been obtained before commencement of the procurement of legal services (*Annex 14*). The Permanent Secretary/Treasury wrote to the AG informing him that his comments had been incorporated in the contract and providing the context within which the legal services were being procured and offered an apology for having initiated the process before receiving his clearance and also indicating that the procurement was through the ministerial tender committee and reported to the Public Procurement and Oversight Authority (*Annex 15*). The AG provided his “no objection” for the appointment of HHM vide letter dated 13th December, 2012 (*Annex 2*)

4.9.8 As at December 2011, TKL was insolvent with shareholders equity standing at negative Kshs. 25.547 billion and with loans amounting to Kshs. 52.470 billion. The company further required an additional Kshs. 10 billion to finance its operations in 2012. Given these scenarios the company had either to be liquidated or restructure its balance sheet. The shareholders (GoK and OrEA) responsibly decided to provide financial support to the company for 2012 and restructure the company’s balance sheet and as a result it was agreed that the shareholders would jointly provide the required Kshs. 10 billion to the company pro-rata to their shareholding as provided for in the Shareholders Agreement (SHA) i.e. GoK Kshs. 4.9 billion & OrEA (FT) Kshs. 5 billion. At the time of restructuring FT had contributed approximately 90% of the funding and the Government had not provided its portions of the loans.

4.9.9 During the negotiations the shareholders reviewed the 5 year business plan and balance sheet restructuring. on the part of Government the Ministry of

Information and Communications and the Kenya ICT Board was tasked to review the plan with a view to identifying opportunities that could assist in the growth of the top line revenues (*Annex 16*). The review was done and a revised business plan agreed upon. Most of the loans were shareholder loans out of which 90% were FT loans meaning that if a straight forward conversion of the loans to equity was done then the resulting shareholding structure would dilute GoK shareholding from 49% to 13% and even in the scenario that the government provided its full share of the Kshs. 4.9 billion for 2012 and if all the loans were capitalized, GoK shareholding would still be diluted to 17%. To avoid a significant dilution of GoK shareholding the Government team had to negotiate hard and an agreement was reached to the effect that GoK would accept a 9% dilution on the following terms:-

- (i) All GoK shareholder loans would be converted to equity and an equivalent amount of the OrEA shareholder loans would also be converted to equity to bring the shareholding structure to 40% for GoK and 60% for OrEA;
- (ii) FT and GoK would fund the Kshs. 10 billion on a pro-rata basis pre-restructuring i.e. FT would provide Kshs. 5.1 billion while GoK would provide Kshs. 4.9 billion.
- (iii) It is noted that currently only Kshs. 2.5 billion that has been provided for in the FY 2012/2013. Therefore, should government not be able to provide the additional Kshs. 2.4 billion, GoK would be diluted further to 30%;

(iv) The balance of the FT loans amounting to Kshs. 33.5 billion would be written off in full.

The transaction was to be implemented by 31st December 2012 which is the end of TKL Financial Year to deal with the insolvency situation and therefore the funding and restructuring agreement was agreed to be finalized by 18th December, 2012.

4.9.10 A Cabinet paper seeking approval of the Cabinet for the proposed recapitalization and balance sheet restructuring was jointly sponsored by the Minister for Finance and the Minister for Information and Communication. The transaction having been duly approved by the Cabinet on 22nd November 2012 (**Annex 4**) and cleared by the Attorney General on 20th December, 2012 (**Annex 1**) was executed by the parties on 23rd December, 2012. The Permanent Secretary to the Treasury signed on behalf of the Government of Kenya (**Annex 5**). The Government ownership of shares and other investment is owned by the Permanent Secretary to the Treasury pursuant to section 3 of the Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101 of the Laws of Kenya. Under part III of the Public Financial Management Act this is now the Cabinet Secretary to the Treasury.

4.9.11 Once the two shareholders decided to fund the company, the Investments Secretary requested that an amount of Kshs. 5 billion be provided to TKL as loan and again on 22nd November, 2012 the Investments Secretary requested for Kshs. 2.4 billion (*Annex 17A, B, & C*). to be provided as a loan to TKL under the revised estimates 2012/2013 indicating that FT

had provided its full amount while GoK had only provided Kshs. 2.5 billion out of the total Kshs. 4.9 billion (*Annex 18*). On 22nd March, 2013 the Investments Secretary brought the issue of TKL to the Minister for Finance, who is the final authority in deciding what items get in the budget, indicating the implications of failure to provide the resources (dilution of shareholding by 10% and loss of one board seat) (*Annex 19*). On 30th May, 2013 the Investments Secretary once again wrote to the Cabinet Secretary requesting for the Kshs. 2.4 billion. The funds were not available due to competing priorities such as elections, devolution, infrastructure and social programs, on the limited resource envelope.

4.9.12 The specific Cabinet approval for the dilution of Government shareholding in TKL was done on 22nd November 2012 as follows:-

- (i) *From 49% to 40% in the event that GoK is able to provide Kshs. 4.9 billion to fund the company in 2012. It is noted that only Kshs. 2.5 billion of the required Kshs. 4.9 billion was provided for in the current GoK printed estimates and has been disbursed.*
- (ii) *From 49% to 30% in the event that GoK is not able to provide the balance of Kshs. 2.4 billion in F 2012/2013.*

Under the specific approval the Minister for Finance, Minister for Information and Communication and the Attorney General were directed to take necessary action.

Committee's Observations

4.9.13 The Committee observed that:-

- (i) A Cabinet paper seeking approval of the Cabinet for the proposed recapitalization and balance sheet restructuring was jointly sponsored by the then Minister for Finance and the then Minister for Information and Communication.
- (ii) Telkom Kenya Limited was insolvent in 2012 necessitating the need by the shareholders to recapitalize and restructure the balance sheet of the company.
- (iii) The Cabinet had approved the recapitalization and balance sheet restructuring of Telkom Kenya Limited on 22nd November 2012.
- (iv) It would have been prudent for the Government to provide the balance of Kshs. 2.4 billion to avoid the GOK losing 10% and its shareholding going down to 30 % from 40%.
- (v) The failure by the Government to clear the balance of Kshs. 2.4 billion caused the employees financial insecurity through job losses, loss of tax payer's money and the sovereignty as the Company majority shareholders are foreigners.
- (vi) The shareholding agreement gave France Telecom more powers in terms of management as well as ownership through greater shareholding in TKL.
- (vii) France Telkom provided 90 % of the loans raising questions why FT would have been so philanthropic to provide the lion's share of the loans whereas it would have been provided on a pro-rata basis.

- (viii) The Investments Secretary had requested for resources to cater for the Government commitment of Kshs. 2.4 billion for Telkom Kenya Limited recapitalization and balance sheet restructuring.
- (ix) The National Treasury committed Government to provide Kshs. 4.9 billion without factoring it in the budget. The National Treasury failed to provide for the allocation of Kshs. 2.4 billion in the two supplementary budgets of 2012/2013 Financial Year. This was the balance of the commitment that the Government signed for in the agreement dated 22nd December, 2012.
- (x) The Treasury failed to allocate funds to cater for Government commitment in the recapitalization and balance sheet restructuring of TKL despite requests made by the Investments Secretary leading to the dilution of Government shareholding to 30%.
- (xi) Due diligence was not followed in the dilution of Government shareholding in TKL and the provisions of the agreement was not strictly adhered to.
- (xii) Treasury procured the legal consultancy services of HHM without seeking prior approval from the Attorney General. They were however granted *post facto* approval by the Attorney General.
- (xiii) The ICT Board failed to undertake due diligence in providing market surveys.

4.10 EVIDENCE BY THE FINANCIAL SECRETARY, THE NATIONAL TREASURY

Mr. Mutua Kilaka, the Financial Secretary in his written submission on the restructuring and capitalization of Telkom Kenya Limited (TKL) informed the Committee that:-

4.10.1 Under the former Constitution there was a distinction between treasury and the Ministry of Finance though under one Minister. Treasury functions were functions under the mandate of the Minister for finance and the permanent secretary treasury while the Ministry provided administrative and support services for which the Financial Secretary was the accounting officer. The Investment function was a treasury function and was exercised by the permanent secretary to the treasury as a body corporate under section 3 of the Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101 Laws of Kenya and the Minister for Finance.

4.10.2 As the Accounting Officer, Ministry of Finance his role was only limited to the procurement of the financial and legal services for the recapitalization and restructuring of Telkom Kenya limited which was done in accordance with the public procurement and disposal act, 2005 and regulations. The issues relating to request for budget allocations to cater for the Government commitments in the recapitalization of Telkom Kenya limited were Treasury issues handled competently by the Minister for Finance, Permanent Secretary to the Treasury and the DGIPE.

4.10.3 In 2006 the Government hired the International Finance Corporation (IFC) through the direct procurement method to provide advisory services for the privatization of TKL. IFC is not allowed to participate in competitive bids for advisory services floated by Governments because it is part of the World Bank Group and is owned by Governments including the Government of Kenya (GoK) and any Government seeking to hire IFC would have to go through a direct procurement process. It is on this context that GoK hired IFC to provide financial advisory services for the TKL transaction. Governments hire IFC for the following reasons;-

- (i) Speed of execution;
- (ii) IFC has grants that it uses to hire their advisors for the transaction;
- (iii) IFC brings a high level of professionalism and transparency to a transaction;
- (iv) Brings convening power to a project as it has the backing of the World Bank Group; and
- (v) IFC approaches a transaction from a developmental view point.

4.10.4 IFC hired and funded the rest of the complement of advisors required for the transaction such as the legal, regulatory and environment; social and labour; technical telcom strategy; and accounting. In hiring the consultants IFC goes through a competitive process following its rules and it is through this process that Hamilton Harrison and Mathews (HHM) were hired as the local lawyers for the TKL privatization transaction.

4.10.5 The Attorney General is the legal advisor to the Government and Treasury always requests the Attorney General to appoint an officer to be part of the Government team that is handling a transaction (*Annex 7*). The Permanent Secretary/Treasury wrote to the Attorney General (AG) on March 26th 2012 requesting him to appoint a senior officer (annex) and on 11th April, 2012 , the AG responded, nominating Ms. Dorcas Achapa, Deputy Solicitor General to be part of the negotiating team (*Annex 8*). As is practice the Government team is always supported by commercial lawyers and given tight timelines treasury hired HHM who had institutional memory having provided legal advisory services during the privatization of the company and during the negotiations relating to warranty claims by France Telkom.

4.10.6 The restructuring and recapitalization for TKL was necessitated by an insolvency situation which the directors resolved to escalate to the shareholders for resolution. France Telkom (OrEA) had a strong legal and financial capacity at their disposal as a commercial entity and therefore had a strong well laid out strategy. It was therefore necessary for the Government to hire both legal and financial services to develop its own strategy and to prepare for the negotiations with FT(OrEA).

4.10.7 Given the timelines that Treasury was facing, the nature of the issues and the huge value at risk, it was prudent to hire services from advisors with knowledge of the issues and historical perspective of the transaction. A proposal was made to the Accounting Officer, Ministry of Finance (*Annex 9*) to engage HHM to provide legal advisory services as they had been advisors to the Government on this transaction. Further a proposal was

made to hire Mr. Ashif Kassam of RSM Ashvir on account that Mr. Kassam was a Government director on the Board of TKL and understood the issues well in addition to having been part of the advisory team on the claim of warranties where Government was able to avoid liability on the claim. In hiring Mr. Kassam the Government had taken due care to establish that there was no conflict of interest.

4.10.8 The proposal to hire HHM and Mr. Kassim as legal and financial experts on direct procurement together with the terms of reference was presented to the Ministerial Tender Committee for consideration and approval as per the Public Procurement and Disposal Act, 2005 and attendant regulations (*Annex 10*), the Ministerial Tender Committee on 7th June, 2012 awarded the legal advisory consultancy to HHM and the financial advisory services to Mr. Ashif Kassam (*Annex 11*). These procurements and others done within the period 1st April – 30th June, 2012 were submitted by the Ministry of Finance to the Public Procurement Oversight Authority as required by law (*Annex 12*).

4.10.9 The Ministry of Finance on 20th June 2012 wrote to the Attorney General for clearance of the contracts. The AG provided his comments with concerns that his approval had not been obtained before commencement of the procurement of legal services. The Permanent Secretary/Treasury wrote to the AG informing him that his comments had been incorporated in the contract and providing the context within which the legal services were being procured and offered an apology for having initiated the process before receiving his clearance. The AG provided his no objection

for the appointment of HHM vide letter dated 13th December, 2012 (*Annex 2*)

4.10.10 As at December 2011, TKL was insolvent with shareholders equity standing at negative Kshs. 25.547 billion and with loans amounting to Kshs. 52.470 billion. The company further required an additional Kshs. 10 billion to finance its operations in 2012. Given these scenarios the company had either to be liquidated or restructure its balance sheet. The shareholders (GoK and OrEA) responsibly decided to provide financial support to the company for 2012 and restructure the company's balance sheet and as a result it was agreed that the shareholders would jointly provide the required Kshs. 10 billion to the company pro-rata to their shareholding as provided for in the Shareholders Agreement (SHA) i.e. GoK Kshs. 4.9 billion and OrEA (FT) Kshs. 5 billion. At the time of restructuring FT had contributed approximately 90% of the funding and the Government had not provided its portions of the loans.

4.10.11 During the negotiations the shareholders reviewed the 5 year business plan and balance sheet restructuring. On the part of Government the Ministry of Information and Communications and the Kenya ICT Board was tasked to review the plan with a view to identifying opportunities that could assist in the growth of the top line revenues (*Annex 16*). The review was done and a revised business plan agreed upon. Most of the loans were shareholder loans out of which 90% were FT loans meaning that if a straight forward conversion of the loans to equity was done then the resulting shareholding structure would dilute GoK shareholding from 49% to 13% and even in the scenario that the government provided its full

share of the Kshs. 4.9 billion for 2012 and if all the loans were capitalized, GoK shareholding would still be diluted to 17%. To avoid a significant dilution of GoK shareholding the Government team had to negotiate hard and an agreement was reached to the effect that GoK would accept a 9% dilution on the following terms:-

- (i) All GoK shareholder loans would be converted to equity and an equivalent amount of the OrEA shareholder loans would also be converted to equity to bring the shareholding structure to 40% for GoK and 60% for OrEA;
- (ii) FT and GoK would fund the Kshs. 10 billion on a pro-rata basis pre-restructuring i.e. FT would provide Kshs. 5.1 billion while GoK would provide Kshs. 4.9 billion. At the time of negotiations only Kshs. 2.5 billion had been provided for in the FY 2012/2013 budget and to deal with the risk that GoK would not be able to provide the additional Kshs. 2.4 billion it was agreed that GoK would be diluted further to 30% and in the event that it was not able to provide Kshs. 2.4 billion;
- (iii) The balance of the FT loans amounting to Kshs. 33.5 billion would be written off in full.

The transaction was to be implemented by 31st December 2012 which is the end of TKL Financial Year to deal with the insolvency situation and therefore the funding and restructuring agreement was agreed to be finalized by 18th December, 2012.

4.10.12 A Cabinet paper seeking approval of the Cabinet for the proposed recapitalization and balance sheet restructuring was jointly sponsored by the Minister for Finance and the Minister for Information and Communication. The transaction having been dully approved by the Cabinet on 22nd November 2012(*Annex 3*) and cleared by the Attorney General on 20th December, 2012 (*Annex 1*) was executed by the parties on 23rd December, 2012. The Permanent Secretary to the Treasury signed on behalf of the Government of Kenya (*Annex 5*). The Government ownership of shares and other investment is owned by the Permanent Secretary to the Treasury pursuant to the Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101 of the Laws of Kenya. Under section 88 and 89 of the Public Financial Management Act, 2012 this is now the Cabinet Secretary to the Treasury.

4.10.13 Once the two shareholders decided to fund the company, the Investments Secretary requested that an amount of Kshs. 5 billion be provided to TKL as loan (*Annex 17 A, B & C*) and again on 22nd November, 2012 the Investments Secretary requested for Kshs. 2.4 billion to be provided as a loan to TKL under the revised estimates 2012/2013 indicating that FT had provided its full amount while GoK had only provided Kshs. 2.5 billion out of the total Kshs. 4.9 billion (*Annex 18*). On 22nd March, 2013, the Investments Secretary brought the issue of TKL to the Minister for Finance, who is the final authority in deciding what items get in the budget, indicating the implications of failure to provide the resources (dilution of shareholding by 10% and loss of one board seat) (*Annex 20*). On 30th May, 2013 the Investments Secretary once again

wrote to the Cabinet Secretary requesting for the Kshs. 2.4 billion. The funds were not available due to competing priorities such as elections, devolution, infrastructure and social programs, on the limited resource envelope.

4.10.14 The specific Cabinet approval for the dilution of Government shareholding in TKL was done on 22nd November 2012 as follows:-

(i) *From 49% to 40% in the event that GoK is able to provide Kshs. 4.9 billion to fund the company in 2012. It is noted that only Kshs. 2.5 billion of the required Kshs. 4.9 billion was provided for in the current GoK printed estimates and has been disbursed.*

(ii) *From 49% to 30% in the event that GoK is not able to provide the balance of Kshs. 2.4 billion in F 2012/2013.*

Under the specific approval the Minister for Finance, Minister for Information and Communication and the Attorney General were directed to take necessary action.

Committee's Observations

4.10.15 The Committee observed that:-

- (i) The Minister for Finance and the Minister for ICT co-sponsored a Cabinet paper on the recapitalization and balance sheet restructuring of TKL.
- (ii) Telkom Kenya limited was insolvent in 2012 necessitating the need by the shareholders to recapitalize and restructure the balance sheet of the company.

- (iii) The Cabinet had approved the recapitalization and balance sheet restructuring of Telkom Kenya Limited.
- (iv) It would have been prudent for the Government to provide the balance of Kshs. 2.4 billion to avoid the GoK losing 10% and its shareholding going down to 30 % from 40%.
- (v) The Investments Secretary had requested for resources to cater for the Government commitment of Kshs. 2.4 billion for Telkom Kenya Limited recapitalization and balance sheet restructuring.
- (vi) The failure by the Government to clear the balance of Kshs. 2.4 billion caused the employees financial insecurity through job losses, loss of tax payer's money and the sovereignty as the Company majority shareholders are foreigners.
- (vii) The shareholding agreement gave France Telecom more powers in terms of management as well as ownership through greater shareholding in TKL.
- (viii) France Telkom provided 90 % of the loans raising questions why FT would have been so philanthropic to provide the lion's share of the loans whereas it would have been provided on a pro-rata basis.
- (ix) The National Treasury committed Government to provide Kshs. 4.9 billion without factoring it in the budget. The National Treasury failed to provide for the allocation of Kshs. 2.4 billion in the two supplementary budgets of 2012/2013 Financial Year. This was the balance of the commitment that the Government signed for in the agreement dated 22nd December, 2012.

- (x) The then Minister for Finance failed to allocate funds to cater for Government commitment in the recapitalization and balance sheet restructuring of TKL leading to the dilution of government shareholding to 30%.
- (xi) Due diligence was not followed in the dilution of Government shareholding in TKL and the provisions of the agreement was not strictly adhered to.
- (xii) Treasury procured the legal consultancy services of HHM without seeking approval from the Attorney General. They were however granted *post facto* approval by the Attorney General.

5.0 COMMITTEE'S GENERAL OBSERVATIONS

The Committee made the following observations from the evidence adduced and documents submitted:-

- 5.1 The Communications Commission of Kenya presently Communications Authority of Kenya (CAK) and the privatization commissions were never involved in the restructuring and recapitalization of TKL balance sheet
- 5.2 The dilution of Government shareholding in TKL was in breach of the license agreement since the regulator, CCK, did not approve the restructuring. The Government never sought CCK's approval/authority when it was ceding further shares in Telkom Kenya Limited. The ceding of shareholding by the Government of Kenya to France Telkom is in breach

of provisions of paragraph 23 of license No. TL/MCO/00004 granted by CCK.

- 5.3 The Minister for Finance delayed to operationalize the Privatization Act, Cap 485 C even after the President Assented to it. The then Minister for finance, Hon Amos Kimunya, operationalized the Act through Legal Notice No 339 of 2007 with the commencement date being 1st January, 2008.
- 5.4 The loss making trend by TKL can be attributed to poor planning and management strategies and failure by shareholders to invest in the capital intensive industry. For instance, as part of their market penetration strategy, Telkom Kenya Limited was charging Kshs. 1.00 shilling while the interconnectivity cost was Kshs.1.5 shilling therefore making losses.
- 5.5 The privatization of Telkom Kenya was not bearing fruit as the organization has been incurring losses and that the Government had lost its shareholding from 40% to 30% as result of expensive restructuring that required injection of additional capital due to the way the agreement, negotiations and financing was done.
- 5.6 Participative decision making by the management and shareholders was needed to address the issues that Telkom Kenya was facing. According to the CEO, he was not aware of the decision and agreements that were entered into by the shareholders.

- 5.7 While privatization is important, there is need for a joint effort by the Ministries to protect strategic infrastructure and Government investments in the country.
- 5.8 The issue of Telkom Kenya Limited was akin to share fixing arising from the fact that the Government only managed to raise Kshs. 2.5 billion of the required Kshs. 4.9 billion and could not raise the balance of Kshs. 2.4 billion.
- 5.9 Alcazar Capital LLC, whose ownership remains suspicious, mysteriously pulled out of the partnership with France Telecom during the negotiations for recapitalization and restructuring of the balance sheet of TKL with the Government of Kenya.
- 5.10 The Ministry of Finance and the Ministry of ICT did not involve stakeholders such as the Privatization Commission; and the Communication Authority of Kenya (formerly CCK) in the negotiations thus did not protect the public interest during TKL restructuring.
- 5.11 Telkom Kenya failed to notify the Communication Commission of Kenya (Communications Authority of Kenya) contrary to provisions of paragraph 23 of License No. TL/MCO/00004 granted by CCK on its change of share structure as stipulated in the license thereby making the organization's operations following the change of share structure illegal.

- 5.12 The State Law Office was not involved in the initial stages of the transaction contrary to section 19 of the Office of the Attorney General Act. The Attorney General however approved the Shareholder Agreement. The Ministry of Finance had used the services of private consultants for financial and legal consultancies contrary to section 19 of the Office of the Attorney General Act No. 49 of 2012 and Government Circular No: AG/1/2005 of 29th June, 2005.
- 5.13 A Cabinet paper seeking approval of the Cabinet for the proposed recapitalization and balance sheet restructuring was jointly sponsored by the then Minister for Finance and the then Minister for Information and Communication.
- 5.14 Telkom Kenya Limited was insolvent in 2012 necessitating the need by the shareholders to recapitalize and restructure the balance sheet of the company.
- 5.15 The Cabinet had approved the recapitalization and balance sheet restructuring of Telkom Kenya Limited on 22nd November 2012
- 5.16 The Government ownership in companies is normally held in trust by the permanent Secretary Treasury.
- 5.17 The Treasury entered into an agreement to provide Kshs. 4.9 billion without a budgetary provision. The Government paid Kshs. 2.5 billion but no provision was made in the budget for the Kshs. 2.4 billion. The Treasury

committed the Government without budgetary provision and failed to factor the commitment in the supplementary budgets of 2012/2013.

- 5.18 The Investments Secretary had requested for resources to cater for the Government commitment of Kshs. 2.4 billion for Telkom Kenya Limited recapitalization and balance sheet restructuring.
- 5.19 The Treasury failed to allocate funds to cater for Government commitment in the recapitalization and balance sheet restructuring of TKL leading to the dilution of government shareholding to 30%.
- 5.20 Government shareholding in TKL was diluted from 40% to 30% due to failure by the Government to provide funds as agreed between the shareholders when restructuring the balance sheet of Telkom Kenya Limited. The Treasury failed to ensure that the commitment of Kshs. 2.4 billion was factored into the subsequent supplementary budgets of 2012/2013.
- 5.21 The National Treasury did not apply due diligence in the identification of France Telkom as a strategic investor during the bidding for privatization of Telkom Kenya Limited. Alcazar Capital LLC which was in partnership with France Telkom remains a mystery and its real owners not known
- 5.22 The ownership of Alcazar Capital LLC purportedly owned by Agility Group Company, one of the companies in consortium with France Telecom is not known.

- 5.23 The true shareholders of Orange Participations, S.A and OrEA S.A have not been fully disclosed. The conduct of France Telkom, Orange Participations, S.A and OrEA S.A during the privatization (bidding), recapitalization and balance sheet restructuring was suspicious.
- 5.24 The circumstances and reasons that led to drastic disinvestment of Alcazar Capital LLC (a Company that was purportedly owned by the Agility Group) in OrEA on 2nd August, 2012 are not known. The consideration paid to Alcazar Capital LLC on exit from TKL is also unknown.
- 5.25 Telkom Kenya Limited paid salaries of employees of Mobicom, a private Company for one year. This was at time when TKL was making losses and required new financial injections by the shareholders including GoK.
- 5.26 Telkom Kenya Limited has been and is still being audited by private auditors. In the past the Auditor General has not been able to audit TKL due to the minority shareholding by the Government. There is need to amend part III of the Public Audit Act, 2003 and the State Corporation Act, Cap 446, Laws of Kenya to comply with Article 229(5) of the Constitution to provide for an express provision for the Auditor General to audit all Government investments including where GoK shareholding is less than 50 %.
- 5.27 There is a need for an amendment to Companies Act Cap 486 requiring all shareholders in registered companies in Kenya whether privately owned,

public or which the Government has shares to be named and identified in the records of the Registrar of Companies so as to make it easier to identify parties in investigations.

5.28 There is a clear lack of clarity about the market valuation of TKL even at the privatization stage. The basis of value of Kshs. 50.98 billion that was used at the time of privatization of TKL is not known and has never been made public.

6.0 COMMITTEE'S RECOMMENDATIONS

Arising from the evidence adduced by witnesses and the observations thereof, the Committee recommends, that:-

- 6.1 EACC to investigate officials from the Ministry of Finance/National Treasury and the Ministry of Information, Communication and Technology who were involved in the entire process of privatization, recapitalization and restructuring of the balance sheet of Telkom Kenya Limited from the year 2007 to date.
- 6.2 Ethics and Anti-Corruption Commission should investigate the National Treasury for committing the Government to sign a recapitalization and restructuring agreement without making sure there is an adequate budgetary provision contrary to Section 26 (6) of the Public Procurement and Disposal Act, 2005.
- 6.3 Ethics and Anti-corruption Commission should investigate the ownership, identity, legal existence and location of Alcazar Capital LLC and determine their role in privatization and subsequent suspicious exit from TKL during the recapitalization and restructuring of the balance sheet of

TKL. This should shed more light to the Kenyan public on circumstances surrounding their entry and subsequent suspicious exit from TKL

- 6.4 EACC should investigate the true ownership, identity and legal existence of Orange Participations, S.A and OrEA S.A.
- 6.5 The Government reconsiders its privatization of Telkom Kenya Limited and the recapitalization and restructuring agreement in light of the loss making trend by TKL. Further the shareholders should review the performance of the Board of Directors and top management at TKL.
- 6.6 EACC should investigate the assets of TKL pre-and post privatization with a view to establishing the actual value of assets owned by TKL and possible recovery of assets misappropriated by various individuals during the establishment and subsequent privatization of TKL. The same investigations should extend to all top past and present management of TKL and the officials involved in the division of assets and liabilities of the defunct KPTC among the three entities namely: Postal Corporation of Kenya (PCK or Posta); Communication Commission of Kenya (CCK) and Telkom Kenya Ltd (TKL).
- 6.7 The National Treasury engaged private legal and financial consultants without the approval of the Attorney General as required by law. The then Accounting Officer Ministry of Finance/Treasury should be held accountable for failure to follow due process of the law in engaging legal consultants since this was contrary to section 17 of the Office of the Attorney General Act No. 49 of 2012 and Government Circular No: AG/1/2005 of 29th June, 2005.
- 6.8 The Government never sought CCK's approval/authorization when it was ceding further shares in Telkom Kenya Limited. The ceding of

shareholding by the Government of Kenya to France Telkom was in breach of license provisions. The Directors (Principal Secretaries, State department for Information, Communication and Technology (ICT) and the National Treasury) who sit at the Board of TKL on behalf of the Government of Kenya should be held responsible for contravention of the provisions of paragraph 23 of License No. TL/MCO/00004 granted by CCK.

- 6.9 The ceding of shares by Government of Kenya to TKL was illegal and the Government should therefore regain its rightful shareholding at TKL prior to the recapitalization and restructuring process.
- 6.10 There is a clear lack of clarity about the market valuation of TKL even at the privatization stage. The basis of value of Kshs. 50.98 billion that was used at the time of privatization of TKL is not known and has never been made public. The National Treasury and the Auditor General should undertake an audit and valuation of the assets of TKL to determine the financial and economic worth of TKL pre and post privatization.
- 6.11 EACC undertakes investigations to determine the circumstances that led to the drastic and suspicious disinvestment of Alcazar Capital LLC (a Company that was purportedly owned by the Agility Group) in OrEA on 2nd August 2012 a few months prior to the recapitalization and restructuring of TKL.
- 6.12 Ethics and Anti-Corruption should investigate the rationale and the role of formation of OrEA, Orange Participation S.A; Alcazar Capital LLC; and Agility Group in the bid for France Telkom in the privatization, recapitalization and restructuring of the balance sheet of Telkom Kenya Limited.

6.13 The Government should either:-

- (iii) Renegotiate with the aim of recovering a higher shareholding of at least 35.1 % in line with its contribution of Kshs. 2.5 billion and the recapitalization and restructuring agreement; or
- (iv) The Cabinet Secretary, National Treasury should ensure that the Kshs. 2.5 billion that was paid by National Treasury is refunded together with interest at market rate back dated to 1st January, 2013.

6.14 EACC should investigate circumstances under which Mr. Ashif Kassam and Mr. Mohammed Nyaoga were appointed as Directors by GoK in Telkom Kenya Limited. The Commission should investigate further as to whether there was conflict of interest in the appointment of Mr. Ashif Kassam as the Director representing GoK in Telkom Kenya and at the same time acting as financial consultant for GoK in the restructuring and recapitalization of TKL.

6.15 All future GoK privatization must be guided by the Privatization Act and other relevant laws and the Office of the Attorney General should be fully involved in all Government contracts and negotiations in accordance to Office of the Attorney General Act.

6.16 Any future engagement between the Government of Kenya and France Telkom, Orange Participations, S.A and OrEA S.A. should be scrutinized thoroughly properly with due diligence undertaken.

6.17 The Government should relook at the policy on privatization of key and strategic public investments with a view to ensuring that due diligence are properly carried out and the public interest is fully protected at all times.

- 6.18 National Treasury and the Auditor-General should ensure that Telkom Kenya Limited recovers all salaries of employees of Mobicom Ltd paid for by Telkom Kenya Limited.
- 6.19 The Cabinet Secretary for ICT should terminate with immediate effect the contract under which Telkom Kenya Limited manages a state-owned National Fibre Network (NOFBI). This is to protect public interest concerns and the future of ICT in Kenya
- 6.20 The Communications Authority of Kenya should develop an implementation framework for sharing of infrastructure by telecom services operators and in the wider telecommunication sector.
- 6.21 The Competition Authority should investigate claims of uncompetitive and protectionist behavior by some operators in the telecommunication sector. In addition it should undertake a study on the efficiency of the telecommunications market in Kenya with a view to providing measures to address the failures in the market and report to Parliament.
- 6.22 Part III of the Public Audit Act, No. 12 of 2003 and part IV of the State Corporation Act, Cap 446, Laws of Kenya be amended to comply with Article 229 (5) of the Constitution to provide for an express provision to the Auditor General to audit all Government investments including where GoK shareholding is less than 50 %.
- 6.23 The Companies Act, Cap 486, be amended to make it mandatory for all shareholders in registered companies in Kenya whether privately owned, public or which the Government has shares to be named and identified in the records of the Registrar of Companies.

MINUTES

MINUTES OF THE FORTY NINTH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON TUESDAY, AUGUST 27, 2013 IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS AT 9.30 AM

PRESENT:

1. Hon. Adan Keynan, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Bernard Munyoki Kitungi, M.P.
4. Hon. Beatrice Nyaga, M.P.
5. Hon. Mwadeghu Thomas, M.P.
6. Hon. Bare Shill, M.P.
7. Hon. Ogutu John Omondi, M.P.
8. Hon. Njogu Barua, M.P.
9. Hon. Paul Otuoma, M.P.
10. Hon. Sammy Mwaita, M.P.
11. Hon. Cornelly Serem, M.P.
12. Hon. Korei Ole Lemein, M.P.
13. Hon. Onesmus Njuki, M.P.
14. Hon. Eng. John Kiragu, M.P.
15. Hon. John Aluoch Olago, M.P.
16. Hon. Wafula Wamunyinyi, M.P.
17. Hon. Chrisanthus Wamalwa, M.P.

ABSENT WITH APOLOGY

1. Hon. Dr. Oburu Oginga, M.P.
2. Hon. Irungu Kang'ata, M.P.
3. Hon. Mary Keraa Sally, M.P.
4. Hon. Adan M. Nooru, M.P.
5. Hon. John M. Nyaga, M.P.
6. Hon. Francis Nyenze Mwanzia, M.P.

ABSENT WITHOUT APOLOGY

1. Hon. Abdullswamad Sheriff, M.P.
2. Hon. Mithika Linturi, M.P.
3. Hon. Major (Rtd) John Waluke, M.P.
4. Hon. Johana Ngeno, M.P.

IN – ATTENDANCE - NATIONAL ASSEMBLY

Mr. Rana Tiampati - Principal Clerk Assistant II

Mr. Rogers Munyoki - Audio Officer
Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

Mr. Charles Nyanyuki - Ag. Director
Mr. Obed Chweya - Manager
Mr. R. N. Bichanga - Manager

INSPECTORATE OF STATE CORPORATIONS

Mr. Inoti Mwangi - Senior Assistant Inspector General

THE NATIONAL TREASURY

Mr. Humphrey Mugu - Representative of Investments Secretary

MINUTE NO. 258 /2013 EVIDENCE: PRIVATIZATION COMMISSION

Mr. Solomon Kitungu, Executive Director, Privatization Commission appeared before the Committee to adduce evidence on the privatization of Telkom Kenya Limited.

MINUTE NO. 259/2013 BRIEF BY THE AUDITOR GENERAL

The Auditor General informed the Committee that:-

- (i) Government shareholding has dropped from 49% to 30%.
- (ii) Treasury has injected about Kshs. 6.9 Billion. However the Government undertook to honour its undertaking to retain the 49% which it has not.
- (iii) Kshs. 2.9 billion was agreed to be paid and budgeted however this was never done.
- (iv) Auditor General requested to quantify the value of Telkom Kenya Limited including assets, liabilities and others.
- (v) The Auditor General by tradition does not audit Telkom Kenya Limited as it is not a statutory body due to the low Government shareholding (less than 50%). However so long as the Government owns part of Telkom, it must be audited.

(vi) The Auditor General was summoned by the Treasury on the role in auditing Telkom Kenya Limited. The Auditor General undertook to brief the Committee in writing on the meeting between them and Treasury.

MINUTE NO. 260/2013 PRIVATIZATION OF TELKOM KENYA LIMITED

Mr. Kitungu briefed the Committee as follows, that:-

- (i) The Privatization Commission is established under section 3 of the Privatization Act, 2005. The Commission commenced its operations in January 2008 following the gazettment of Legal Notice No. 397 of 4th December, 2007.
- (ii) There is a list of public sector assets approved by the Cabinet to be considered for privatization and subsequently privatized once the approval process is completed. The current privatization programme was approved by cabinet on 11th December, 2008 and gazetted on 14th August, 2009. (list tabled)
- (iii) The privatization process involves several steps among them; approval of the privatization programme by the Cabinet, preparation of a detailed privatization proposal by the Commission, approval of a detailed privatization proposal by the Cabinet and presentation to Finance, Planning and Trade Committee of Parliament, transaction implementation.

The Committee further heard that:-

- (iv) There was restructuring of Telkom (K) and not privatization which involves re-issuance and transfer of shares.
- (v) The Commission was not involved in the privatization of Telkom Kenya since it took place before the Act was operationalized.
- (vi) Privatization should only be on what is in the privatization programme (25 States Corporations) as approved by Cabinet.
- (vii) The Commission was not aware of the transfer of shares in Telkom Kenya.
- (viii) Any act being undertaken in Telkom Kenya involving transfer of shares or shareholding is illegal.

MINUTE NO. 261 /2013 COMMITTEE OBSERVATIONS

The Committee made the following observations:-

- (i) Telkom Kenya was not privatized since the Privatization Act was not operationalized at the time.

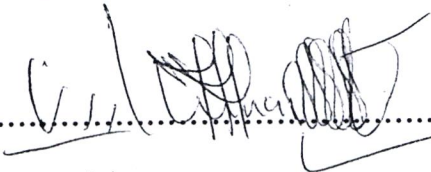
- (ii) The definition of privatization limits the process which was undertaken
- (iii) Further privation of Telkom took place in December 2012 and early 2013.
- (iv) The Government reneged on its undertaking to pay some money to Telkom Kenya Limited.
- (v) The Telkom issue revolves around the transfer of shares and rights issue.

MINUTE NO. 262/2013 MEETING WITH THE ATTORNEY GENERAL

The Members raised concern that the Attorney General had failed to appear before the Committee. The Committee resolved to invite the Attorney General together with all the other witnesses lined up on the privatization of Telkom Kenya Limited.

MINUTE NO. 263/2013 ADJOURNMENT

The meeting was adjourned at Ten Minutes past Twelve O'clock.

Signed:.....
(Chairperson)

Date:.....10/3/2014.....

MINUTES OF THE FIFTY FIRST SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON WEDNESDAY, AUGUST 28, 2013 IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS AT 3.00 PM

PRESENT:

1. Hon. Adan Keynan, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Bernard Munyoki Kitungi, M.P.
4. Hon. Beatrice Nyaga, M.P.
5. Hon. Bare Shill, M.P.
6. Hon. Paul Otuoma, M.P.
7. Hon. Irungu Kang'ata, M.P.
8. Hon. Cornelly Serem, M.P.
9. Hon. Onesmus Njuki, M.P.
10. Hon. Sammy Mwaita, M.P.
11. Hon. Mithika Linturi, M.P.
12. Hon. Francis Nyenze Mwanzia, M.P.
13. Hon. Mwadeghu Thomas, M.P.

ABSENT WITH APOLOGY

1. Hon. Dr. Oburu Oginga, M.P.
2. Hon. John Aluoch Olago, M.P.
3. Hon. Mary Keraa Sally, M.P.
4. Hon. Adan M. Nooru, M.P.
5. Hon. John M. Nyaga, M.P.
6. Hon. Johana Ngeno, M.P.
7. Hon. Korei Ole Lemein, M.P.
8. Hon. Eng. John Kiragu, M.P.
9. Hon. Ogutu John Omondi, M.P.
10. Hon. Wafula Wamunyinyi, M.P.
11. Hon. Chrisanthus Wamalwa, M.P.
12. Hon. Njogu Barua, M.P.

ABSENT WITHOUT APOLOGY

1. Hon. Abdullswamad Sheriff, M.P.
2. Hon. Major (Rtd) John Waluke, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

Mr. Nicholas Emejien - Principal Clerk Assistant I
Mr. Rogers Munyoki - Audio Officer
Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

Mr. Charles Nyanyuki - Ag. Director
Mr. Justus Kimiri - Manager

INSPECTORATE OF STATE CORPORATIONS

Mr. Patrick Muturi - Assistant Inspector General

THE NATIONAL TREASURY

Mr. Humphrey Mugu - Representative of Investments Secretary

MINUTE NO. 285/2013 EVIDENCE: COMMUNICATIONS COMMISSION OF KENYA (CCK)

Mr. John Omo, the Acting Director General, Communications Commission of Kenya appeared before the Committee and the briefed it on the privatization of Telkom Kenya and the role of the Communications Commission in the privatization of Telkom.

MINUTE NO. 286 / 2013 EVIDENCE ON THE PRIVATIZATION OF TELKOM KENYA LIMITED

Mr. John Omo, the Acting Director General, CCK accompanied by Mr. Christopher Kemei, Director CCK and Mr. Matano M. Ndaro, Director CCK appeared before the Committee to adduce evidence on the role of the Communications Commission of Kenya in the privatization of Telkom Kenya Limited. He informed the Committee that:-

- (i) The Communications Commission of Kenya was not involved in the privatization of Telkom Kenya Limited (TKL). Its role is only limited to the licensing of Telkom Kenya Limited and as a regulator of the industry.

- (ii) According to the license issued to Telkom Kenya Limited, the Commission has to be notified of the intention by Government to cede shareholding. The Commission granted the Government permission to cede its shareholding in Telkom Kenya in the initial entry of Orange Telkom. It is a condition on the license that the ceding of shareholding be notified to the Communications Commission of Kenya and its concurrence sought.
- (iii) The Government did not however seek CCK's authorization on further ceding of shareholding in Telkom Kenya after the initial shareholding.
- (iv) The license issued to Telkom Kenya Limited is similar to those that Safaricom and other large players in the industry received.
- (v) The regulator (CCK) and NEMA promote the sharing of resources by industry players and has advised key players to work towards the sharing of facilities such as ducts, masts etc.
- (vi) Promotions by various key players in the industry have not had negative impact on Government revenue. CCK ensures that promotions do not interfere with healthy competition throughout the period of the promotion. Telkom and other players had in the past written to CCK individually complaining of unfair competition. The Commission investigated the matter and communicated to them.
- (vii) CCK had advertised for regional Telkom operators but there were no bidders and the idea fizzled out.

The Committee further heard that it is possible for foreigners to own greater shareholding in public entities but where CCK's authorization is required then the Government has to seek the permission of the regulator before ceding any shares in the public entity or Corporation concerned.

MINUTE NO. 287/2013

COMMITTEE OBSERVATIONS

The Committee made the following observations:-

- (i) The Communications Commission of Kenya was never involved in the privatization of Telkom Kenya Limited.
- (ii) The Government never sought CCK's approval/authorization when it was ceding further shares in Telkom Kenya Limited.
- (iii) The ceding of shareholding to France Telkom is in breach of licence provisions.
- (iv) Telkom Kenya was making losses since they were charging less than the interconnectivity charges. Telkom is charging 1.00 shilling while the interconnectivity cost is 1.5 shillings.

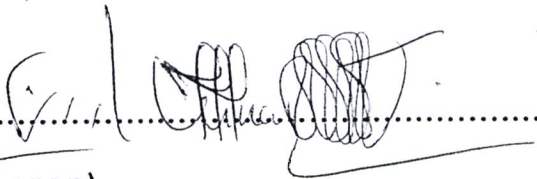
The Communications Commission of Kenya undertook to provide a detailed brief on the privatization of Telkom Kenya Ltd in two weeks time.

MINUTE NO. 288/2013 **ANY OTHER BUSINESS**

The Committee considered its program of activities for the upcoming week and adopted it.

MINUTE NO. 289/2013 **ADJOURNMENT**

The meeting was adjourned at Twenty Five Minutes past Four O'clock.

Signed: 
(Chairperson)

Date: 10/3/2014

MINUTES OF THE 62ND SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD AT COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS ON
MONDAY, SEPTEMBER 18, 2013 AT 3.30 PM

PRESENT:

- | | | |
|--------------------------------------|---|-------------------------|
| 1. Hon. Adan Keynan, MP | - | Chairperson |
| 2. Hon. Kimani Ichung'wah, MP | - | Vice Chairperson |
| 3. Hon. Francis Nyenze, MP | | |
| 4. Hon. Cornelly Serem, MP | | |
| 5. Hon. Bare Shill, MP | | |
| 6. Hon. Korei Ole Lemein, MP | | |
| 7. Hon. Adan M. Nooru, MP | | |
| 8. Hon. John M. Nyaga, MP | | |
| 9. Hon. Njogu Barua, MP | | |
| 10. Hon. Irungu Kang'ata, MP | | |
| 11. Hon. Onesmus Njuki, MP | | |
| 12. Hon. Mwadeghu Thomas, MP | | |
| 13. Hon. Paul Otuoma, MP | | |
| 14. Hon. John Olago Aluoch, MP | | |
| 15. Hon. Dr. Oburu Oginga, MP | | |
| 16. Hon. Major (Rtd) John Waluke, MP | | |
| 17. Hon. Ogutu John Omondi, MP | | |
| 18. Hon. Mary K. Sally, MP | | |
| 19. Hon. Wafula Wamunyinyi, MP | | |
| 20. Hon. Bernard Munyoki Kitungi, MP | | |
| 21. Hon. Chrisanthus Wamalwa, MP | | |

ABSENT WITH APOLOGY

1. Hon. Beatrice Nyaga, MP
2. Hon. Johana Ngeno, MP

ABSENT

1. Hon. Sammy Mwaita, MP
2. Hon. Mithika Linturi, MP
3. Hon. Eng. John Kiragu, MP
4. Hon. Abdullswamad Sheriff, MP

IN-ATTENDANCE

KENYA NATIONAL ASSEMBLY

- | | | |
|----------------------|---|---------------------|
| 1. Ms. Esther Nginyo | - | Clerk Assistant III |
|----------------------|---|---------------------|

2. Ms. Rahab Chepkilim - Hansard recorder
3. Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

1. Mr. Ronald Bichanga - Manager, Audit
2. Mr. Justus Ole Kimiri - Senior Supervisor

MINUTE NO. 352 / 2013 EVIDENCE: TELKOM KENYA LIMITED

Mr. Michel Ghossein Managing Director Telkom Kenya Ltd (TKL), accompanied by:-

- (i) Ms. Bonny Okumu, Company Secretary (TKL),
- (ii) Mr. George Mlaghui, Acting Chief of Communications,
- (iii) Edward Wachira – CEO , GDCC

appeared before the Committee to adduce evidence on the Privatization of Telkom Kenya Limited.

MINUTE NO. 353/2013 PERSONS ACCOMPANYING TELKOM (K) CEO

The Committee noted that contrary to introductions made by TKL, some of the persons accompanying the TKL CEO were not employees of Telkom Ltd and as a result the Committee directed that proper introductions and identification be done by all the witnesses. The committee further directed that witnesses be put under oath.

MINUTE NO. 354/2013 EVIDENCE BY THE CHIEF EXECUTIVE OFFICER

The Chief Executive Officer informed the Committee, that:-

- (i) The asset and liabilities of Telkom Kenya prior and after privatization were as follows;

TKL (million Kshs.)	31/12/2008	21/12/2009	31/12/2010	21/12/2011	31/12/2012
Total Assets	38,957	42,175	48,759	44,434	43,715
Total Liabilities	26,697	40,736	57,508	69,981	27,056
Equities	12,260	1,439	(8,749)	(25,547)	16,659

- (ii) Government capitalization in Telkom Kenya post privatization is as follows;

GOK loans in Millions	2008	2009	2010	2011	2012
Amount	0	2,500	1,000	0	2,500
Date of signature		23/09/2009	20/12/2010		10/08/2012

- (iii) The current Government shareholding is 35,614,848 shares out of the total 118,716,160 which is equivalent to 30% stake of Telkom Kenya Limited.
- (iv) The current shareholders of Orange East Africa (SA) are 100% owned by Orange SA formerly France Telecom S.A.
- (v) The challenges facing Telkom Kenya include; stiff competition in the sector, pricing structures, regulatory environment, vandalism of cables, way leaves, litigation, bad debt and delayed payments by Government and parastatals, delayed VAT refunds and impact of cost of living.
- (vi) He was not privy to the shareholding structure of the company.
- (vii) The role of France Telkom in the privatization process was to negotiate with the Government of Kenya.
- (viii) Telkom Kenya Limited is owed Kshs. 1.6 billion by the Government of Kenya and another Kshs 563 million by Kenya Revenue Authority.
- (ix) TKL had 18,000 employees and the company did retrenchment in phases. In 2009, 3000 – 4,000 employees were released with benefits. However, there is a court case on employees benefit claiming Kshs. 3-4 billion.
- (x) Alcazar a company incorporated in Dubai had a consortium with France Telecom 51% worth USD 395 Million during the time of bidding however Alcazar is no longer a shareholder of Telkom Kenya and as at June, 2012, TKL was owned by the Government of Kenya and Orange East Africa.
- (xi) The CEO as a shareholder holds one nominal share of the five shares that are held in trust. He did not sign the Shareholders Loan Agreement with the Government of Kenya but his Deputy had signed on his behalf but the management was not part of the negotiation since they were not part of the Board.
- (xii) Telkom Kenya is not paying dividends as it currently not making profit.
- (xiii) The shareholders of France Telkom are Mr. Eddy Njoroge, Mr. Daniel Delestre, Mr. Sebastien Foyer, Mr. Gerald Rice, Mr. Marc Rennard and the Shareholders from the GOK were Mrs. Esther Koimett, Mr. Ashif Kassam, Mr. Mohamed Nyaoga and Mr. Joseph Tiampaty.
- (xiv) Telkom Kenya did not notify Communications Commission of Kenya on its change in share holding structure.
- (xv) Mobicom Kenya Limited is owned by Mr. Paul Ndungu and Mr. Joel Kibe. The company is not a shareholder in Telkom Kenya but is TKL network distributor.

MINUTE NO. 355/2013 COMMITTEE OBSERVATIONS

The Committee observed that:-

- (i) The issue of Telkom Kenya Limited was a case of share fixing arising from the fact that the Government only managed to raise Kshs. 2.4 billion of the required Kshs. 4.9 billion and could not raise the balance of Kshs. 2.5 billion.

- (ii) Alcazar Capital Limited, whose ownership remains unknown pulled out of the partnership with France Telecom during the negotiations with the Government of Kenya.
- (iii) Telkom Kenya failed to notify the Communication Commission of Kenya on its change of share structure as stipulated in the CCK Act thereby making the organization's operations following the illegal.
- (iv) The management was running the organization with no knowledge of its going on following claims by the CEO that he was not part of the negotiations.

The Committee was concerned how Mobicom Ltd changed working with Safaricom Ltd to partner with Telkom Kenya Limited in network distribution.

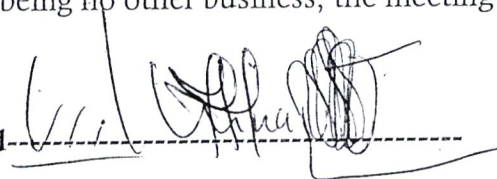
MINUTE NO. 356/2013 ADDITIONAL INFORMATION

The Committee directed that management provides the following information in writing by 28th September, 2013:-

- Chronology of events leading to the current status of Telkom Kenya Ltd;
- Directorship of Telkom Kenya;
- Directorship of Alcazar Limited;
- Directorship of Mobicom;
- Number of shares held by Alcazar;
- How much was paid by France Telecom for the shares of Alcazar Ltd; and
- The action that Telkom Kenya would take against the lawyers for not advising them in the transaction.

MINUTE NO. 357/2013 ADJOURNMENT

There being no other business, the meeting adjourned at Forty Minutes past Five O'clock.

Signed- 
(Chairperson)

Date: 10/3/2014

MINUTES OF THE 63RD SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON THURSDAY, 19TH SEPTEMBER, 2013 IN COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 3.00 P.M.

PRESENT

1. Hon. Adan Keynan, MP - Chairperson
2. Hon. Kimani Ichung'wah, MP - Vice Chairperson
3. Hon. Sammy Mwaita, MP
4. Hon. Bare Shill, MP
5. Hon. Korei Ole Lemein, MP
6. Hon. John M. Nyaga, MP
7. Hon. Irungu Kang'ata, MP
8. Hon. Onesmus Njuki, MP
9. Hon. Mwadeghu Thomas, MP
10. Hon. Olago Aluoch, MP
11. Hon. Major (Rtd) John Waluke, MP
12. Hon. Ogutu John Omondi, MP
13. Hon. Mary K. Sally, MP
14. Hon. Wafula Wamunyinyi, MP
15. Hon. Bernard Munyoki Kitungi, MP
16. Hon. Chrisanthus Wamalwa, MP

ABSENT

1. Hon. Francis Nyenze, MP
2. Hon. Cornelly Serem, MP
3. Hon. Adan M. Nooru, MP
4. Hon. Mithika Linturi, MP
5. Hon. Beatrice Nyaga, MP
6. Hon. Njogu Barua, MP
7. Hon. Eng. John Kiragu, MP
8. Hon. Johana Ngeno, MP
9. Hon. Abdullswamad Sheriff, MP
10. Hon. Paul Otuoma, MP
11. Hon. Dr. Oburu Oginga, MP

IN-ATTENDANCE:

KENYA NATIONAL ASSEMBLY

1. Mr. Nicholas Emejen - Principal Clerk Assistant I
2. Ms. Esther Nginyo - Clerk Assistant III

3. Mr. Rodgers Kilungya - Hansard reporter
4. Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

1. Mr. Obed Chweya - Senior Manager
2. Ms. Mercy Mukiri - Manager Audit
3. Mr. Charles Kinuthia - Assistant Manager

MINUTE NO. 458/2013: PRELIMINARIES

The Chairperson called the meeting to order and prayers were said by Hon. Muthomi Njuki, MP.

MINUTE NO. 259/2013: CABINET SECRETARY, NATIONAL TREASURY

Mr. Henry Rotich, Cabinet Secretary, the National Treasury appeared before the Committee to adduce evidence on the recapitalization and restructuring of the balance sheet of Telkom Kenya Ltd. He informed the Committee that:-

- (i) The Government plays a role of a shareholder in companies where it has invested as provided for in the Company law. The Government carries the shareholder responsibilities and may be called upon by its co-shareholder to address challenges that may be facing the companies it has invested in.
- (ii) In 2007, the Government became a minority shareholder as it sold 51% of the shares in Telkom Kenya Limited to Orange East Africa and therefore Telkom Kenya ceased being a Corporation under the State Corporations Act.
- (iii) Telkom Kenya Limited launched its GSM network in the 2nd half of 2008. The Company has made significant investment in the expansion of its network, IT and management systems, rationalization and training of staff and in capacity and brand building.
- (iv) The funding of the Company's investments came from the shareholders loans with Orange East Africa providing 90 % of the loan. A joint Memorandum by the Minister for Finance and the Minister for Information Communication was drawn requesting the cabinet to approve the capitalization and balance sheet restructuring of TKL. The Cabinet approved the recapitalization and restructuring of the balance sheet of Telkom Kenya Limited in November 2012.

- (v) Despite the significant investments, the Company has been posting losses which necessitated the need for the shareholders to inject capital. As a result the shareholders decided to develop a sustainable business plan for 2012 to 2016 as well as have balance sheet restructuring to restore the Company's solvency position. The shareholders decided to provide financial support to the Company in 2012 and to restructure the Company's balance sheet.
- (vi) As per the shareholding agreement, the Company would get loans from its shareholders as per the shareholders pro-rata. The Government of Kenya however, did not provide its portion of the loans and France Telecom had contributed 90% of the funding hence the dilution of GoK shareholding.
- (vii) In 2012, the Company had accumulated liabilities and required Kshs. 10 billion from its shareholders on pro-rata basis. OrEA provided its full share of Kshs. 5.1 billion while GOK only provided Kshs. 2.5 billion which had been approved in the expenditure estimates for financial year 2012/2013, leaving a balance of Kshs. 2.4 billion.
- (viii) The shareholders loans as at 30th June, 2013 stood at GOK; Kshs. 4.4 billion and France Telecom; Kshs. 4.4 billion, implying that if loans were to be recapitalized, Government shareholding would be diluted to 13 %.
- (ix) The Government team held negotiations with France Telecom (FT) and agreed that GoK would cede 9 % shareholding from 49 % to 40 % and the GoK shares be converted to equity, bringing shareholding structure to 40 % for GoK and 60 % for France Telkom.
- (x) With the GoK failing to provide the balance of Kshs. 2.4 billion, a further dilution of 30% of its shares was agreed upon. The balance of the FT loans amounting to Kshs. 3.5 billion would be written off in full.
- (xi) The balance sheet restructuring process was to be completed by the Telkom Kenya Financial year which ends on 31st December. The funding and restructuring agreement was to be finalized by 18th December, 2012 and on 21st December, 2012 the conversion agreement was signed.
- (xii) Further negotiations provided that in event that GoK may not provide Kshs. 2.4 billion, it was agreed that conversion of loans to equity would still be done and more

of the loans of FT would be capitalized leading to further dilution of GoK shareholding to 30% and OrEA at 70%. However, GoK would have an opportunity to get back to 40% shareholding if it provided Kshs. 2.4 billion by 30th June 2013.

- (xiii) The restructuring proposal was approved by the Cabinet on 22nd November, 2012, while the Balance Sheet restructuring was cleared by the Attorney General on 20th December, 2012.
- (xiv) The first restructuring of TKL was undertaken within the context of privatization through the sale of 60% shareholding in Safaricom to GOK. The privatization of TKL was completed before the Privatization Act(Cap 485C) was operational with the process being undertaken by an Inter-ministerial Committee chaired by the Treasury.
- (xv) The Government had other pressing obligations such as funding election hence the failure to provide the balance of Kshs. 2.4 billion.

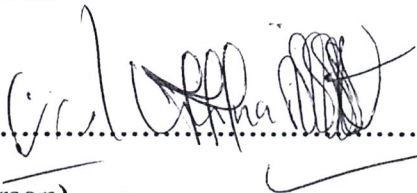
MINUTE NO. 260/2013 - COMMITTEE OBSERVATIONS

- i. The Committee made the following observations, that:-
 - (i) It would have been prudent for the Government to provide the balance of Kshs. 2.4 billion to avoid the GOK shareholding going down to 30 % from 40% thereby the Government losing 10 %.
 - (ii) The failure by the Government to clear the balance of Kshs. 2.4 billion caused the employees financial insecurity through job losses, loss of tax payer's money and the sovereignty as the Company majority shareholders are foreigners.
 - (iii) France Telkom provided 90% of the loans raising questions as to why FT would have been so philanthropic to provide the lion's share of the loans whereas it would have been provided on a pro-rata basis.
 - (iv) The National Treasury committed Government to provide Kshs. 4.9 billion without factoring it in the budget. The National Treasury failed to provide for the allocation of Kshs. 2.4 billion in the two supplementary budgets of 2012/2013 financial year. This was the balance of the commitment that the Government signed for in the agreement dated 27th December 2012.

- (v) Due diligence was not followed in the dilution of Government shareholding in TKL and the provisions of the agreement were not strictly adhered to.

MINUTE NO. 361/2013: ADJOURNMENT

There being no other business, the meeting was adjourned at Twenty Five Minutes past Four O'clock.

Signed.......... Date: 10/3/2014.....
(Chairperson)

MINUTES OF THE 82ND SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON THURSDAY, OCTOBER 24, 2013 IN COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 9.30AM

PRESENT:

1. Hon. Adan Keynan, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Ogutu John Omondi, M.P.
4. Hon. Onesmus Njuki, M.P.
5. Hon. Paul Otuoma, M.P.
6. Hon. John Aluoch Olago, M.P.
7. Hon. Dr. Oburu Oginga, M.P.
8. Hon. Njogu Barua, M.P.
9. Hon. Abdullswamad Sheriff, M.P.
10. Hon. Korei Ole Lemein, M.P.
11. Hon. Chrisanthus Wamalwa, M.P.
12. Hon. John M. Nyaga, M.P.
13. Hon. Eng. John Kiragu, M.P.
14. Hon. Bernard Munyoki Kitungi, M.P.
15. Hon. Major (Rtd) John Waluke, M.P.
16. Hon. Johana Ngeno, M.P.
17. Hon. Sammy Mwaita, M.P.
18. Hon. Beatrice Nyaga, M.P.
19. Hon. Mithika Linturi, M.P.

ABSENT WITH APOLOGY

1. Hon. Wafula Wamunyinyi, M.P.
2. Hon. Francis Nyenze Mwanzia, M.P.
3. Hon. Mwadeghu Thomas, M.P.
4. Hon. Adan M. Nooru, M.P.
5. Hon. Bare Shill, M.P.
6. Hon. Irungu Kang'ata, M.P.
7. Hon. Mary Keraa Sally, M.P.
8. Hon. Cornelly Serem, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

Mr. Nicholas Emejen – Principal Clerk Assistant I

Ms. Esther Nginyo - Clerk Assistant III
Rahab Chepkilim - Audio Officer
Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

Mr. Charles Nyanyuki - Acting director, Audit
Mr. Ronald bichanga - Manager Audit
Mr. Obed Chweya - Ag. Manager, Audit

**MINUTE NO. 467/2013 EVIDENCE: MINISTRY OF INFORMATION,
COMMUNICATION AND TECHNOLOGY**

The Cabinet Secretary, Ministry of Information, Communication and Technology, Mr. Fred Matiangi accompanied by:-

- (i) Joseph Tiampati - Principal Secretary
- (ii) Paul Mugambi
- (iii) Daniel Obaru - Policy Expert
- (iv) Henry Mungasia - Director Administration
- (v) Vincent Adul - Policy Expert

appeared before the Committee to adduce evidence on the restructuring and privatization of Telkom Kenya limited.

Failure by the Cabinet Secretary to honor Committee Invitations

Members expressed concern that the Cabinet Secretary had failed to attend committee meetings in spite of three consecutive invitations. The Cabinet Secretary apologized to the Committee for having failed to attend Committee Meetings. He informed the Committee that his absence was occasioned by national duties assigned by the President and that he had written to the Committee requesting rescheduling.

The Committee considered the apology by the Cabinet Secretary and resolved to indulge the Cabinet Secretary.

The Cabinet Secretary briefed the Committee as follows:-

(i) Restructuring of Kenya Post and Telecommunication Corporation (KPTC)

- (a) The enactment of the Communications Commission of Kenya Act, 1998 ushered in reforms in the communications sector that were initiated by the government in 1996 in collaboration with the IMF. The act formed the basis for the restructuring of the KP &

TC which was launched in 1999 and led to the separation of the corporation into three entities:-

1. Kenya Postal Corporation of Kenya – Postal Corporation of Kenya Act, 1998
2. Communications Commission of Kenya (CCK) – Communication industry regulator
3. Telkom Kenya Limited (TKL) – Created under the Companies Act.

(b) The Communications Commission of Kenya in July, 1999 issued licenses to TKL in all areas of its operations and to ensure that the company was able to compete effectively in the telecommunications market it was granted a 5 year license to operate exclusively in Nairobi and given a monopoly on long distance, internet backbone and Global Mobile Personal Communications Services (GMPCS). The exclusivity period ended in 2004 with the liberalization of the telecommunications industry which brought in Safaricom, Kencell and Econet (YU).

(c) Despite the 5 year monopoly the company's profitability continued to decline due to loss of market share, rising levels of debt and a bloated workforce.

(ii) Telkom Kenya Limited post privatization

Under the shareholders agreement signed during the privatization process Orange East Africa (OrEA) owned 51% of the company and is responsible for the management. OrEA has also made investments in IT and managements systems, rationalization and training of staff and brand building. Most of the funding has been provided by loans, the majority of which have been provided by shareholders with France Telkom providing about 90% of the funding. Despite the huge investments the company has not been able to make a turn around and has instead continued to post huge losses.

(iii) Operational challenges facing Telkom Kenya Limited - The company faces the following operational challenges:-

- (a) Short terms loans from shareholders, the bulk of which is in Euros posing an exchange risk to the company.
- (b) Vandalism – frequent copper and fibre cuts causing frequent disruption of services.
- (c) Fragmentation of the market by four operators thus stiff competition.

(iv) Privatization of Telkom Kenya Limited

During the privatization of Telkom Kenya Limited eight companies purchased bid documents but only four met the bids submission deadline and only three qualified in the technical evaluation:-

- (a) France Telecom S.A (in consortium with Alcazar Capital Limited) - US\$ 390 Million,
- (b) Telkom South Africa – US\$ 282.8 Million
- (c) Reliance Communications of India – US\$ 221.001 Million

France Telecom presented the highest financial bid and was awarded the tender to purchase 51% of Telkom Kenya Limited shares. France Telecom started its operations on 21st December, 2007 and subsequently launched its orange brand in Kenya.

(v) Shareholders in Telkom Kenya Limited and their shareholding

The investments in TKL have been provided by shareholders through loans. Based on the shareholders agreement, funding from shareholders was to be provided on a pro rata basis but due to the tight budget position the Government of Kenya has not been able to fund its portion of the loans. As a result France Telecom has provided about 90% of the shareholders funding through loans resulting in dilution of Government shareholding in the company as a result of France Telecom provided loans being converted to equity.

The current shareholding in Telkom Kenya Limited is as follows:-

- France telecom – 70% shareholding
- Government of Kenya - 30% shareholding

TKL is therefore a private company since the government is a minority shareholder

(vi) Role of the Ministry in the privatization of Telkom Kenya Limited

The Ministry of Information Communication Technology is responsible for ICT policy formulation and together with the National Treasury has been involved in developing the framework for the privatization of Telkom Kenya Limited. The two Ministries are Government representatives on the Board of Directors of the Company. ICT Ministry only sits at the Board to offer policy advisory and not a representative of the Government.

The Cabinet Secretary requested that the session be in camera due to security concerns and sensitivity of the matter. The Committee considered the request and pursuant to Article 118 and Standing Order 198 the meeting was held in camera.

The Cabinet Secretary informed the Committee that the Government and by extension the people of Kenya had spent a lot of resources and time in building the assets and other investments in Telkom Kenya Limited. The privatization of Telkom Kenya means that the country has lost national fundamental/assets. While privatization is not a bad policy per se

it is important that good decisions are made and that value for money is realized and national security interests are safeguarded.

He further informed the Committee that the privatization of TKL and the dilution of Government shares in TKL means that the telecommunication sector in Kenya is in the hands of foreigners since all the companies are controlled by foreign interests. Under an agreement TKL was allowed to manage 5,000 kilometers of fibre optic cable that was installed using government funds. The Cabinet Secretary raised concern that a private individual had been issued with frequencies belonging to security agencies.

The Committee considered the information by the cabinet secretary and resolved that the public be invited since the issues discussed did not warrant an in camera session.

Members raised concern that the dilution of government shareholding in TKL was in breach of license agreement since the regulator CCK's was not consulted.

The Committee directed that the Cabinet Secretary prepares a detailed brief on the privatization of Telkom Kenya Limited and attach the following documents and information:-

- (a) Minutes of meeting that authorized the dilution of Government shares in TKL,
- (b) Letters inquiring into the dilution of Government shareholding in TKL,
- (c) Recapitalization agreement
- (d) Shareholders agreement,
- (e) Alcazar shareholding the its owners,
- (f) Mobicom shares in TKL,
- (g) Agreement to manage fibre optic cables.
- (h) TKL assets register before and after privatization.

Members observed that there was need fro the government to renegotiate and increase its shareholding in TKL to 49%. The Committee requested that Attorney General conducts a special audit on TKL – privatization, TKL assets prior and after privatization, recapitalization, Government shareholding, management of fibre optic cables, valuation of shares and valuation report.

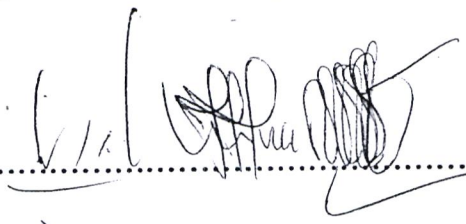
MINUTE NO. 468/2013 - ANY OTHER BUSINESS

The Committee resolved that the following be invited to appear before it so as to finalise on the issue of Telkom Kenya Limited:-

- (a) Chairman of TKL and the Board of Directors;
- (b) The Attorney General; and
- (c) Mobicom Kenya Limited.

MINUTE NO. 469/2013 ADJOURNMENT

There being no other business, the meeting adjourned at Forty Five Minutes past Eleven O'clock.

Signed:.......... Date: 10/3/2014

(Chairperson)

MINUTES OF THE 90TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD AT COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS ON
MONDAY, NOVEMBER 11, 2013 AT 4.00 PM

PRESENT:

1. Hon. Adan Keynan, MP - Chairperson
2. Hon. Kimani Ichung'wah, MP - Vice Chairperson
3. Hon. Francis Nyenze, MP
4. Hon. Cornelly Serem, MP
5. Hon. Bare Shill, MP
6. Hon. Korei Ole Lemein, MP
7. Hon. Adan M. Nooru, MP
8. Hon. John M. Nyaga, MP
9. Hon. Njogu Barua, MP
10. Hon. Irungu Kang'ata, MP
11. Hon. Onesmus Njuki, MP
12. Hon. Mwadeghu Thomas, MP
13. Hon. Paul Otuoma, MP
14. Hon. John Olago Aluoch, MP
15. Hon. Dr. Oburu Oginga, MP
16. Hon. Major (Rtd) John Waluke, MP
17. Hon. Ogutu John Omondi, MP
18. Hon. Mary K. Sally, MP
19. Hon. Wafula Wamunyinyi, MP
20. Hon. Bernard Munyoki Kitungi, MP
21. Hon. Chrisanthus Wamalwa, MP

ABSENT WITH APOLOGY

1. Hon. Beatrice Nyaga, MP
2. Hon. Johana Ngeno, MP

ABSENT

1. Hon. Sammy Mwaita, MP
2. Hon. Mithika Linturi, MP
3. Hon. Eng. John Kiragu, MP
4. Hon. Abdullswamad Sheriff, MP

IN-ATTENDANCE

KENYA NATIONAL ASSEMBLY

1. Ms. Esther Nginyo - Clerk Assistant III
2. Ms. Rahab Chepkilim - Hansard recorder
3. Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

1. Mr. Ronald Bichanga - Manager, Audit
2. Mr. Justus Ole Kimiri - Senior Supervisor, Audit

MINUTE NO. 503/ 2013 EVIDENCE: MOBICOM LIMITED

Mr. Joel Kibe, Managing Director Mobicom Ltd accompanied by his lawyer Mr. James Kamau appeared before the Committee to adduce evidence on the Privatization of Telkom Kenya Limited. He informed the Committee that:-

- (i) The shareholders of Mobicom Kenya Limited are, Paul Ndungu, the late anyone and Joel Kibe. Currently there are only two directors.
- (ii) Telkom Kenya Limited is performing poorly. Due to the current operations and poor performance of TKL the Government should only have limited shareholding in the company. There is need for a clear road map on the Telkom Kenya Limited business.
- (iii) Mobicom was a key distributor of Safaricom Kenya Limited but was approached by Mr. Ashif on the roll out of Telkom Kenya Limited due to Mobicom's vast experience in distribution. He expected to roll out 2000 BTS's but so far less than 1000.BTS's have been rolled out by TKL. Mobicom was also promised as part of the deal to leave Safaricom a single dealership /only distributor and payment of its staff salaries for one year.
- (iv) Mobicom is not a shareholder in Telkom Kenya but is TKL network distributor.
- (v) While working with Safaricom Limited, Mobicom used to earn a residual income of Kshs. 12 million per month. This has decreased with the partnership with TKL.

MINUTE NO. 504/2013 ADDITIONAL INFORMATION

The Committee directed that Mr. Joel Kibe provides a comprehensive report on the following:-

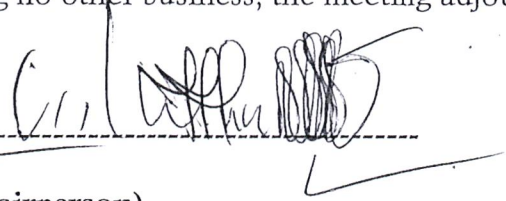
- Incentives offered to Mobicom by TKL before leaving Safaricom Limited;

- Reasons as to why TKL has not expanded as envisaged – 2,000 BTS against the current 1,000 BTS;
- Margin of profit made by Mobicom while working with Safaricom and TKL;

MINUTE NO. 505/2013 ADJOURNMENT

There being no other business, the meeting adjourned at Thirty Minutes past Five O'clock.

Signed: _____



(Chairperson)

Date: _____

10/3/2014

MINUTES OF THE 94TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON WEDNESDAY, NOVEMBER 13, 2013 IN COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 10.00 A.M

PRESENT:

1. Hon. Adan Keynan, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Francis Nyenze Mwanzia, M.P.
4. Hon. Cornelly Serem, M.P.
5. Hon. Adan M. Nooru, M.P.
6. Hon. Mithika Linturi, M.P.
7. Hon. John M. Nyaga, M.P.
8. Hon. Onesmus Njuki, M.P.
9. Hon. Johana Ngeno, M.P.
10. Hon. Abdullswamad Sheriff, M.P.
11. Hon. Ogutu John Omondi, M.P.
12. Hon. Paul Otuoma, M.P.
13. Hon. John Aluoch Olago, M.P.
14. Hon. Mary Keraa Sally, M.P.
15. Hon. Major (Rtd) John Waluke, M.P.

ABSENT WITH APÖLOGY

1. Hon. Wafula Wamunyinyi, M.P.
2. Hon. Mwadeghu Thomas, M.P.
3. Hon. Bare Shill, M.P.
4. Hon. Irungu Kang'ata, M.P.
5. Hon. Dr. Oburu Oginga, M.P.
6. Hon. Bernard Munyoki Kitungi, M.P.
7. Hon. Chrisanthus Wamalwa, M.P.
8. Hon. Sammy Mwaita, M.P.
9. Hon. Njogu Barua, M.P.
10. Hon. Korei Ole Lemein, M.P.
11. Hon. Eng. John Kiragu, M.P.
12. Hon. Beatrice Nyaga, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

Mr. Nicholas Emejien – Principal Clerk Assistant I

Mr. Joash Kosiba – Fiscal Analyst
Ms. Rahab Chepkilim - Audio Officer
Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

Mr. Isaac Ngayai - Manager, Audit
Mr. Obed K. Chweya - Senior Assistant Manager, Audit

INSPECTORATE OF STATE CORPORATIONS

Jane M. Weru – Assistant Inspector General

**MINUTE NO. 512/2013 EVIDENCE BY THE ATTORNEY GENERAL ON THE
PRIVATIZATION OF TELKOM KENYA LIMITED**

The Attorney General, Prof. Githu Muigai appeared before the Committee to brief it on the restructuring and privatization of Telkom Kenya Limited.

He briefed the Committee as follows:-

Privatization of Telkom Kenya Limited

(i) The privatization of Telkom Kenya Limited by the Government in 2007 was as a result of concerns in the performance of Telkom Kenya Limited. Through privatization the Government sold 51% of its stake to France Telecom and retaining 49% equity ownership.

Share purchase agreement between the Government of Kenyan and France Telecom

(ii) In 2010 TKL shareholders, GoK and France telecom entered into a cooperation agreement to make Telkom Kenya Limited more competitive in the market and address underlying issues of poor performance including warranty claims.

(iii) France Telkom I the period 2010 – 2012 through its local subsidiary orange east Africa continued to shore up TKL's balance sheet through shareholder loans amounting to Kshs. 33 billion. The Government of Kenya did a similar action but at a lower threshold compared to France Telecom. Despite these capital inputs TKL was technically insolvent in the beginning of FY 2012/2013.

(iv) Under clause 9 of the shareholders agreement of 21st December 2007 the parties agreed to recapitalize and restructure TKL in a tax neutral manner by:-

- Providing additional capital injection into TKL amounting to Kshs. 10 billion, pro rated to their capital shareholding structure of 49:51 (France Telecom Kshs. 5.1 Billion and GoK 4.9 Billion)
 - France Telecom writing off its 33 Billion shareholder loans to TKL in exchange for government diluting its shareholding by 9%.
 - Government writing off its shareholder loans within the broad framework of this agreement.
- (v) The Cabinet in December, 2012 approved the recapitalization and restructuring program of TKL with the aim of providing the company with operating capital and critical investment to bring it back to profitability.
- (vi) France telecom made its capital injection of Kshs. 51 billion by 31st December, 2012 but the Government of Kenya did not meet its deadline and only made available Kshs. 2.5 Billion against its total obligation of Kshs. 4.9 Billion. With this level of capital injection, the targeted shareholding of 60%:40% could not be achieved.
- (vii) The agreement had in its provisos anticipated a situation where one party would not have made its prorated contribution and provided as follows:-
- Government of Kenya (GoK) would be entitled to a lower ownership threshold adjusted to the percentage of its actual contribution.
 - GoK would be entitled to claw back its lost shareholding threshold if it paid into TKL the balance of Kshs. 2.4 billion by 30th June, 2013.
- (viii) The Government was unable to pay its balance of Kshs. 2.4 billion as it had only provided for Kshs.2.5 billion in its budget estimates for the financial year 2012/2013. Consequently by December 31st 2012 the Government shareholding in TKL dropped to 30%. Thus by the Government failing to meet its entire financial obligation by exercising the claw back option, GoK ceded a further 10% of its target shareholding on TKL while France Telecoms shareholding increased to 70%.

Stakeholders in Telkom

- (ix) The primary stakeholders in Telkom Kenya Limited are its investors, employees, customers and suppliers.

Current shareholding in Telkom Kenya Limited

- (x) The shareholders of TKL according to the 2013 returns are:-

- (a) Treasury/GoK – 35,614,848 Shares
- (b) Orange East Africa S.A. – 83,101,307 shares
- (c) Michael Barre – 1 share
- (d) Michael Ghossein – 1 share
- (e) Marc Rennard 1 share
- (f) Olivier Froissart – 1 share
- (g) Orange participations – 1 share

Shareholders of companies that have shares in Telkom Kenya limited.

- (xi) The office of the Attorney General is not in a position to give the shareholders of Orange East Africa S.A. and orange participation who hold shares in TKL as they are foreign companies and thus their details are not available from the companies registry.

Role of the Attorney General in the privatization of Telkom Kenya Limited

- (xii) The role of the Attorney General in commercial matters is to ensure that commercial contracts or agreements are legally sound and conform to Cabinet directions where applicable. The commercial viability or soundness of a commercial contract is outside the ambit of the AG's office as such matters are within the mandate of other institutions such as the National Treasury.
- (xiii) The advice given by the Attorney General in commercial matters is limited to the legality of contracts or agreements and conformity to Cabinet directions if any. Ministries are however permitted to seek private counsel subject to gaining approval from the Attorney General.
- (xiv) The Attorney General's office was not privy to the negotiations that led to the conclusion of the technical and commercial deal as the Ministry of Finance sought independent legal counsel from the private sector. The Attorney General's office was however involved in confirming that the subsequent agreements drafted by the independent legal counsel were sound from a legal perspective and complied with the conditions issued by the Cabinet.
- (xv) The Ministry of Finance sought clearance of the Attorney General after they had already contracted legal and financial consultancies. The Ministry had already hired the services of Hamilton, Harrison and Mathews (HHM) to provide legal support and Mr. Ashif Kassam of RSM Ashvir to provide financial support.

(xvi) The Attorney General vetted the draft agreements for conformance with Cabinet conditions and for contractual soundness and subsequently granted the legal clearance sought on the basis that the agreements were legally sound from a legal perspective and conformed to the relevant Cabinet decision.

(xvii) Good commercial and financial advice was not fully provided and appreciated. Prudent financial and legal advice was not offered.

MINUTE NO. 513/ 2013 – COMMITTEE OBSERVATIONS

The Committee observed that:-

- (i) The State Law Office was not involved in the transaction contrary to the State Law Office Act.
- (ii) Treasury failed to factor in the Government financial obligation of Kshs. 2.5 Billion in the 2011/2012 Budget.
- (iii) The ownership of Alcazar Plc, one of the companies in consortium with France Telecom is not known.
- (iv) The GoK should consider renegotiate the contract in light of the issues of compliance of the law and agreement governing shareholders and licensing taking into account that TKL is a strategic asset.

The Committee directed that the Attorney General provides the details of the shareholders of Alcazar PLC

MINUTE NO. 514/2013 ADJOURNMENT

There being no other business, the meeting adjourned at Fifty Minutes past Eleven O'clock.

Signed:

Date: 10/3/2014

(Chairperson)

**MINUTES OF THE 100TH SITTING OF THE PUBLIC INVESTMENTS
COMMITTEE HELD ON WEDNESDAY, 27TH NOVEMBER, 2013 IN
COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS AT 3.00 PM**

PRESENT:

1. Hon. Adan Keynan, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Sammy Mwaita, MP
4. Hon. Cornelly Serem, MP
5. Hon. Bare Shill, MP
6. Hon. Korei Ole Lemein, MP
7. Hon. Adan M. Nooru, MP
8. Hon. Mithika Linturi, MP
9. Hon. John Nyaga, MP
10. Hon. Irungu Kang'ata, MP
11. Hon. Eng. John Kiragu, MP
12. Hon. Onesmus Njuki, MP
13. Hon. Johana Ng'eno, MP
14. Hon. Mwadeghu Thomas, MP
15. Hon. Dr. Paul Otuoma, MP
16. Hon. Major (Rtd) John Waluke, MP
17. Hon. Ogutu John Omondi, MP
18. Hon. Mary Keraa Sally, MP
19. Hon. Bernard Munyoki Kitungi, MP

ABSENT WITH APOLOGY

1. Hon. Francis Nyenze, M.P.
2. Hon. Olago Aluoch, MP

ABSENT

1. Hon. Beatrice Nyaga, M.P.
2. Hon. Njogu Barua, MP
3. Hon. Abdullswamad Sheriff, MP
4. Hon. Dr. Oburu Oginga, MP
5. Hon. Wafula Wamunyinyi, MP
6. Hon. Chrisanthus Wamalwa, MP

IN - ATTENDANCE

NATIONAL ASSEMBLY

Mr. Nicholas Emején - Principal Clerk Assistant I

Ms. Esther Nginyo - Clerk Assistant
Mr. Rogers Munyoki - Audio Officer
Mr. Michael Njenga - Parliamentary Intern

KENYA NATIONAL AUDIT OFFICE

Mr. Charles Nyanyuki - Ag. Director
Mr. Obed Chweya - Senior Manager
Mr. R.N. Bichanga - Manager

INSPECTORATE OF STATE CORPORATIONS

Mr. Maingi Inoti - Senior Assistant Inspector General

MINUTE NO. 570/2013 EVIDENCE: TELKOM KENYA LIMITED

Mr. Edward Njoroge, Chairman, Telkom Kenya Limited Board, accompanied by Mr. Ashif Kassam, Director, Mr. Mohammed Nyaoga, Director, Mr. Daniel Delestre, Director, Mr. Sebastien Fayard, Director, Mr. Olivier Froissart, Director, Mr. Gerald Ries, Director, Mrs. Esther Koimett, Investment Secretary and Alternate Director, The National Treasury, Ms. Bonnie Okumu, Company Secretary and Ms. Joyce Karanja, Legal Officer appeared before the Committee to adduce evidence on the Telkom Kenya Restructuring. The Chairman informed the Committee that;

- (i) The Board was grateful for the opportunity availed to it to clarify to the Committee on issue of the balance restructuring which had been misunderstood as the privatization of Telkom Kenya Ltd (TKL).
- (ii) According to the Shareholders Agreement signed in 2007, the Government of Kenya (GOK) with 49% shareholding was entitled to nominate four (4) directors while Orange East Africa (OrEA) with 51% shareholding was entitled to nominate five (5) directors to the Board.

(iii) The following were the Directors Telkom Kenya Limited as introduced:

- Cabinet Secretary of Treasury (Alternate is the Investment Secretary _ Mrs. Esther Koimett)
- Principal Secretary – Mr. Joseph Tiampati
- Mr. Ashif Kassam
- Mr. Mohammed Nyaoga

- Mr. Daniel Delestre
- Mr. Sebastien Fayard
- Mr. Olivier Froissart
- Mr. Edward Njoroge

(iv) The main roles of the Board of Directors were to provide the strategic direction of the Company, to approve the necessary policies and procedures to run the company, to provide oversight accountability for the company and to provide fiduciary and duty of care responsibilities for and on behalf of all stakeholders.

(v) On assets and liabilities of TKL prior and after privatization, the net assets of the Company had dropped from Kshs. 12,260 in 2008 to a negative Kshs. 25,547 by the end of 2011.

(vi) The government capitalization in TKL post privatization was 6 billion up to 2012. Including the interest for the period, the total owing to GOK was Kshs. 7.1 billion.

(vii) The current Government Shareholding as at 9th May, 2013 was 35,614,848 shares out of total 118,716,160 shares in the Company representing 30% stake in TKL.

(viii) At the time of the bid for TKL, Orange Participations S.A. (a fully owned subsidiary of France Telecom) set up Orange East Africa S.A (OrEA) registered in France. The other shareholder of OrEA with 21.5% was Alcazar, owned a 100% by Agility Group. In 2012, Agility disinvested in OrEA leaving Orange Participation as the only shareholder of OrEA.

(ix) Mobicom had never been a shareholder of TKL or OrEA directly or indirectly.

(x) Alcazar Capital LLC that owned 21.5% shareholding of OrEA until 2012 was different from Alcazar Capital Limited registered in the Dubai International Financial Center which is a management company that had never held shares of TKL nor or OrEA directly or indirectly.

(xi) The shareholders of Mobicom included;

- | | | |
|-----------------------------|---|-----|
| a). Paul W. Ndungu | - | 45% |
| b). Joel K. Kibe | - | 45% |
| c). Jacob Anyona (deceased) | | 10% |

- (xii) By Decembwe, 2011, TKL was insolvent and in 2012, the Board had the options of either declaring it insolvent or getting the shareholders to write off or capitalize their debt. The Board requested the shareholders to finance the needs of the Company for 2012 to a tune of Kshs. 10 billion on a pro rata basis. OrEA would pay Kshs. 5.1 billion while GOK would pay Kshs. 4.9 billion.
- (xiii) OrEA paid up its pro rata share of Kshs. 5.1 billion while the GOK agreed to fund its share in 2 tranches – the first tranche of Kshs. 2.5 billion was received in December , 2012 while the second tranche of Kshs. 2.4 billion was to be received on or before the end of June 2013.
- (xiv) It was also agreed that there would be 2 steps for the conversion of shareholders' loans into TKL shares; the outstanding loans as of December 2012 of the GOK (Kshs. 7.1 billion) and part of the loan for OrEA (Kshs. 16.6 billion) to be converted into new TKL shares with GOK owning 30% and OrEA 70% of the shares. In the second step, if GOK paid its second tranche of Kshs. 2.4 billion, the ownership ratio of TKL would be adjusted to 40% GOK and 60% OrEA. The GOK however failed to meet its obligation and hence there was no ownership ratio adjustment.
- (xv) The performance of TKL was below expectations over the past 5 years.
- (xvi) The challenges facing TKL included
- Competition issues
 - Pricing structures
 - Regulatory environment
 - Cable cuts due to vandalism.
 - High wayleaves cost.
 - Litigation
 - Bad debts and delayed payments by parastatals and GOK
 - Delayed VAT refunds
 - Impact of cost of living and related expense.

- (xvii) The Attorney General as the Legal Advisor had been informed about restructure through a correspondence and had in turn allocated an officer from his office to handle the matter (correspondence to be availed by the Investment Secretary)..
- (xviii) The business had been valued for USD 300 million, however, France Telecom bid for USD 390 million.
- (xix) TKL had disposed off some of its land to finance the business. Other non-core assets would also be disposed off.
- (xx) OrEA would continue investing in the business with the hope that market situation would change with Orange being a global Brand.
- (xxi) France Telecom invested in Kenya due to the country's strategic position, stability and growth potential.
- (xxii) The government could not honour its Kshs. 2.4 billion obligation as the time, there were other urgent and pressing needs.
- (xxiii) The money that was provided by the shareholders was to be used in financing capital expenditure and the losses that the company was incurring.

MINUTE NO. 571/ 2013 - COMMITTEE OBSERVATIONS

The Committee observed that should Telkom Kenya Limited have been run profitably, the government investments would have borne profit.

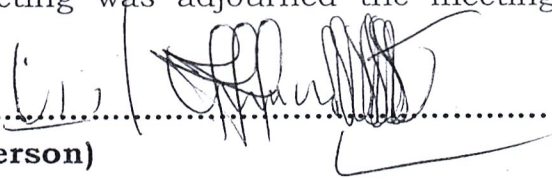
Further, the Committee observed that no due diligence was conducted in the privatization process and therefore, it appeared like there was a scheme to run the company at a loss and later sell it off.

MINUTE NO. 571/2013 - ADDITIONAL INFORMATION

The Committee directed the Directors to provide it with the TKL Asset Register and the correspondence written to the Attorney General seeking legal opinion.

MINUTE NO. 572/2013 - ADJOURNMENT

The meeting was adjourned the meeting at Thirty Five Minutes past Six O'clock.

Signed: 
 (Chairperson)

Date: 10/3/2014

MINUTES OF THE 48TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON WEDNESDAY APRIL 23RD 2014, IN MOMBASA, SAROVA WHITE
SANDS IN MOMBASA AT 2.30 PM

PRESENT:

Hon. Adan Keynan, CBS M.P. – **Chairperson**
Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
Hon. Francis Nyenze Mwanzia, M.P.
Hon. Bare Shill, M.P.
Hon. Adan M. Nooru, MBS, M.P.
Hon. Chrisanthus Wamalwa, M.P.
Hon. Abdullswamad Sheriff, M.P.
Hon. John M. Nyaga, M.P.
Hon. Dr. Paul Otuoma, EGH, M.P.
Hon. Beatrice Nyaga, M.P.
Hon. Cornelly Serem, M.P.
Hon. Dr. Oburu Oginga, M.P.
Hon. John Aluoch Olago, M.P.
Hon. Johana Ngeno, M.P.
Hon. Onesmus Njuki, M.P.
Hon. Mithika Linturi, M.P.
Hon. Mwadeghu Thomas, M.P.
Hon. Irungu Kang'ata, M.P.
Hon. Bernard Munyoki Kitungi, M.P.
Hon. Eng. John Kiragu, M.P.
Hon. Njogu Barua, M.P.
Hon. Sammy Mwaita, M.P.
Hon. Korei Ole Lemein, M.P.
Hon. Ogutu John Omondi, M

ABSENT WITH APOLOGY

Hon. Major (Rtd) John Waluke, M.P.
Hon. Mary Keraa Sally, M.P.
Hon. Wafula Wamunyinyi, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

Mr. Nicholas Emejen	Principal Clerk Assistant
Mr. Abdullahi Aden	First Clerk Assistant
Mr. Joash Kosiba	Fiscal Analyst
Mr. Wilson Dima	Legal Officer

OFFICE OF THE AUDITOR GENERAL

Mr. Kalinda Mulli – Office of the Auditor General

INSPECTORATE OF STATE CORPORATIONS

Mr. Nelson Kweya - Inspector in the Office of the Inspectorate of State Corporations

MINUTE. NO. 112 /2014 - ADOPTION OF THE REPORT ON THE
RECAPITALIZATION AND BALANCE SHEET
RESTRUCTURING OF TELKOM KENYA
LIMITED

The Committee considered its Report on the Recapitalization and Balance Sheet Restructuring of Telkom Kenya Limited and unanimously adopted it after being proposed by Hon. Bare Shill, MP and seconded by Hon. Chrisanthus Wamalwa, MP.

MINUTE NO. 113 /2014 ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at Thirty Minutes past Six O'clock.

Signed: 

Date: 

(Chairperson)

ANNEXES



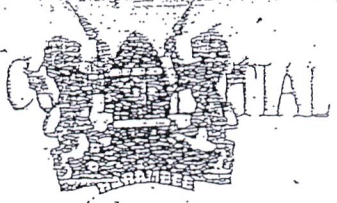
ANNEX 1



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EX-14

PERMANENT SECRETARY / TREASURY
MINISTRY OF FINANCE



(3)

(1)

21 DEC 2012

RECEIVED THE STATE LAW OFFICE

P. O. Box 30007, NAIROBI OFFICE OF THE ATTORNEY-GENERAL

Your Ref: _____

Date: 20 December 2012

Our Ref: AG/CONF/27/C/62 VOL.V

Mr. Joseph K. Kinyua, CBS
Permanent Secretary
Ministry of Finance
NAIROBI

Dear

RE: PROPOSED RECAPITALIZATION AND RESTRUCTURING OF THE
BALANCE SHEET OF TELKOM KENYA LIMITED (TKL)

Reference is made to your letter Ref.ZZ/MOF/331/02 dated 18 December 2012 on the above subject matter, in which you requested our legal opinion on the acceptability of the draft Funding and Restructuring Agreement proposed to be entered into between the Permanent Secretary to the Treasury and Orange East Africa S.A and France Telecom S.A. and Telkom Kenya Limited ("TKL").

In forming this opinion, we have been guided by the following parameters:

- a) Under this arrangement, and as embedded in clause 6 of the draft Restructuring Agreement, we note that Government is to have no further obligations to provide loans or equity injections into TKL after 2013.
- b) In tandem with clause 6.3 and clause 9.2 of the Shareholder's Agreement, we note that clause 6 of the proposed Restructuring Agreement provides that there is to be no further dilution of

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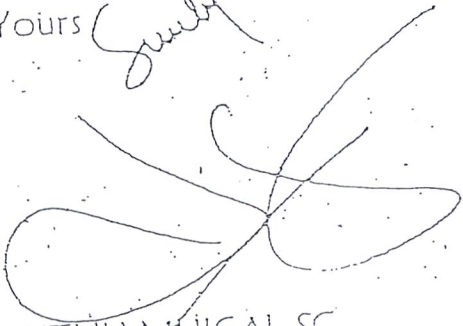
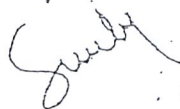
CONFIDENTIAL

Government's interest in TKL unless the Government expressly consents thereto:

- c) Note is also taken that the proposed arrangement do not water down Government's rights under clause 6.3 of the Shareholders Agreement, on shareholder reserved matters.
- d) It is also noted that the proposed Restructuring Agreement does not deal with tax matters; in keeping with the requirements of the Cabinet decision made at the 17th Cabinet Meeting 2012, held on 22nd November 2012, pursuant to Cabinet Memorandum CAB(12)130 submitted jointly by the Minister for Finance and the Minister for Information and Communications, which approved the restructuring of TKL's balance sheet in a tax-neutral manner, and note, in this respect, that clause 4.3 of the said agreement states that the transaction does not create any cash detriment or liability for TKL.
- e) Note has additionally been taken that the Cooperation Agreement entered into in 2010 is terminated on ground that all matters covered by it are now resolved.
- f) Finally, we have looked at the TKL Articles of Association dated 21st December 2007, and noted that they empower the TKL Board of Directors to approve action such as the one presently contemplated.

In the circumstances, and taking into account that it reflects and documents the consensual understanding of two contracting parties possessed of requisite legal capacity, and contracting lawfully, we find the proposed draft Funding and Restructuring Agreement acceptable from a legal point of view, and hereby clear it for execution.

Yours



GITHU MUIGAI, SC

ATTORNEY GENERAL

CONFIDENTIAL

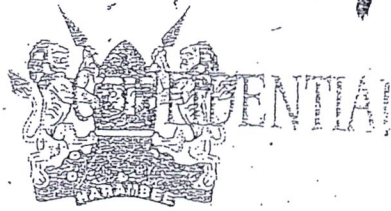
ANNEX 2

629
PERMANENT SECRETARY/TREASURY
MINISTRY OF FINANCE

14 DEC 2012

RECEIVED

P. O. Box 30007, NAIROBI



ANNEX II

(4)
(2)

CONFIDENTIAL
THE STATE LAW OFFICE

OFFICE OF THE ATTORNEY-GENERAL

ZZ/MOF 331/02

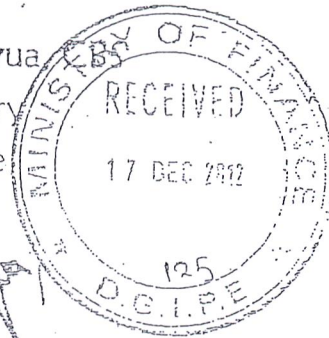
Your Ref:

13th December 2012

Date:

Our Ref: AG/CONF/2/C/62 VOL.V

Mr. Joseph K. Kinyua
Permanent Secretary
Ministry of Finance
NAIROBI



Dear *Joseph Kinyua*

RE: CLEARANCE OF CONTRACTS FOR LEGAL AND FINANCIAL CONSULTANCIES IN RESPECT OF TELKOM KENYA LIMITED SHAREHOLDER ISSUES

Reference is made to the previous correspondence exchanged between our offices on the above subject resting with your letter dated 13th September 2012.

We have duly taken note of the circumstances that guided the Ministry to arrive at the decision of hiring the firm of M/S Hamilton, Harrison and Mathews for provision of legal services as contained in the minutes of the Ministerial Tender Committee meeting No. MTC/46/2011 of 7th June 2012.

In view of the above, we have no objection to the appointment of the firm.

However, the Ministry is advised to ensure that future appointments of external lawyers adheres to the guidelines contained in the Government

11 ~~SECRET~~

CONFIDENTIAL

Legal Advisory Services circular AG/1/2005 issued by my office dated 29th June 2005.

Yours: *Githu Muigai*

Githu Muigai
GITHU MUIGAI
ATTORNEY GENERAL

CONFIDENTIAL

ANNEX 3



ANNEX 13



6
3

OFFICE OF THE PRESIDENT
PERMANENT SECRETARY, SECRETARY TO THE CABINET
AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address "Rais"
Telephone: Nairobi 2227411
When replying please quote

P.O. Box 62345-00200
NAIROBI

Ref. No. OP/CAB.58/4A
and date

22nd November, 2012..... 20.....

Hon. (Prof.) Githu Muigai, ~~MP~~
Attorney General,
State Law Office,
NAIROBI

Mr. Joseph K. Kinyua, CBS
Permanent Secretary,
Ministry of Finance,
NAIROBI

Dr. Bitange Ndemo, CBS
Permanent Secretary,
Ministry of Information & Communications,
NAIROBI

Dear ~~Hon~~ *WAZIRI*

CABINET MEMORANDUM ON PROPOSED RECAPITALIZATION AND
RESTRUCTURING OF THE BALANCE SHEET OF TELKOM KENYA
LTD

I refer to the Seventeenth Cabinet Meeting 2012, held on 22nd November, 2012 during which Cabinet Memorandum CAB(12)130, jointly submitted by the Minister for Finance and the Minister for Information and Communications was presented and discussed.

I wish to inform you that Cabinet considered the contents of the Memorandum and:

- i) Approved the Capitalization and Balance Sheet Restructuring of Telecom Kenya Ltd. (TKL) which involves:
 - a) The conversion into equity of all the shareholder loans provided to TKL by GOK. These loans currently stand at

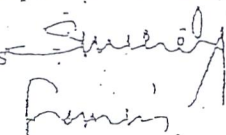
SECRET

approximately Kshs.6.9 billion. Concurrently, France Telecom Group (FT) will convert a portion of its loans to equity on a pro-rata basis. Currently the FT Loans are in the region of Kshs.44 billion.

- b) Provision by GOK, through the Supplementary Budget in FY 2012/2013, of an additional Kshs.2.4 billion towards the capitalization of TKL. This will ensure that Government, as a shareholder provides its portion of shareholder loans to fund the company for 2012 and also ensures that GOK stake does not get diluted below 40%.
- c) Retention by GOK of 40% shareholding, as it enables GOK to retain its blocking vote.
- ii) Approved that France Telecom will in exchange write off the balance of its shareholder loans (which will be in the range of Kshs.28 - 30 billion) depending on whether GOK provides Kshs.2.5 billion or Kshs.4.9 billion in FY 2012/13.
- iii) Approved the dilution of GOK shareholding in TKL as follows:
- a) From 49% to 40% in the event that GOK is able to provide Kshs.4.9 billion to fund the company in 2012. It is noted that only Kshs.2.5 billion of the required Kshs.4.9 billion was provided for in the current GOK printed estimates and has been disbursed.
- b) ~~From 49% to 30% in the event that GOK is not able to provide the balance of Kshs.2.4 billion in FY2012/13.~~
- iv) Approved that this transaction be undertaken in a tax neutral manner.
- v) Noted that under the approved business plan for the period 2012 - 2016, the negotiated position is that GOK will not be called upon to provide any more shareholder loans.
- vi) Directed the Minister for Finance, the Minister for Information and Communications and the Attorney-General to take the necessary action.

Please proceed and initiate action along the lines of the Cabinet decision.

Yours


F. T. KIMEMIA, CBS
PERMANENT SECRETARY/SECRETARY TO THE
CABINET AND ACTING HEAD OF PUBLIC SERVICE

13
Copy to:

Hon. Samuel Poghisi, EGH, MP
Minister for Information & Communications,
NAIROBI

Hon. Robinson Njeru Githae, EGH, MP
Minister for Finance,
NAIROBI

~~SECRET~~

ANNEX 4





⑤ ④

CABINET MEMORANDUM ON THE PROPOSED RECAPITALIZATION AND BALANCE SHEET RESTRUCTURING OF TELKOM KENYA LIMITED (TKL)

(A Joint Memorandum by the Minister for Finance and the Minister for Information and Communication)

I Purpose

1. The purpose of this Memorandum is to (i) brief the Cabinet on the challenges facing Telkom Kenya Limited (TKL) and (ii) seek Cabinet approval for the proposed Recapitalization and Balance Sheet Restructuring of the TKL.

II Background

2. The Policy Framework Paper (PFP) issued by the Government in collaboration with the IMF in 1996 articulated the policy reform agenda for the country for the period 1996 – 1998. One of the reform actions related to the Kenya Posts and Telecommunications Corporation (KP&TC)
3. The reforms in the Communications sector were based on relevant studies that were undertaken for this purpose and culminated in the enactment of the Kenya Communication Act, 1998, which formed the basis for the restructuring of Kenya Posts and Telecommunications Corporation (KP&TC). The restructuring process launched in 1999 led to the separation of the traditional national operator, KP&TC into 3 institutions, namely:
 1. Postal Corporation of Kenya (Posta), which was created under the Postal Corporation of Kenya Act, 1998.

SECRET

- ii. Communications Commission of Kenya (CCK) as the independent regulatory authority for the communications industry in Kenya, and
 - iii. Telkom Kenya Ltd (TKL) which was created under the Companies Act.
4. Consequently, on 15th July, 1999, TKL was issued by the CCK with licenses in all areas of its operations. In order to ensure that the company was able to effectively compete in the telecommunications market, it was granted a 5 year license to exclusively operate in Nairobi and given a monopoly for Long Distance, Internet Backbone and GPMC's services. This exclusivity period ended on June 2004.
 5. Initial efforts to privatize TKL commenced in late 1999. The intention at the time was to ensure that a private sector operator would come in during the monopoly period and have an opportunity to turn round the company before being exposed to competition from the mobile operators who did not have any legacy issues to deal with. Unfortunately the privatization process was not successful.
 6. Despite the 5 year monopoly, the company's financial performance continued to deteriorate and in 2002/03 and 2003/4 it incurred losses of about Ksh. 2.2 billion and Ksh. 1.3 billion, respectively. TKL was effectively on the verge of bankruptcy and its business prospects were bleak under increased competition from the private mobile telephony players.
 7. The liberalization of the telecoms industry facilitated the entry of 3 new, purely GSM operators, namely Safaricom, Celtel and Econet (Yu) who had obtained a third mobile license when the market was saturated.
 8. In 2007, while the TKL privatization transaction was ongoing, the telecommunications regulatory regime was upgraded to one of unified licenses. Although a necessary step in the evolution of the

regulatory regime, this further increased competition in the country's telecommunication sector by allowing the 4 operators to offer the same services. This completely eroded TKL's monopoly advantage it used to enjoy.

9. In an effort to address the challenges that faced the company then, the Government undertook a comprehensive study of the company aimed at identifying the causes of the challenges and proposing solutions.

10. The findings of the study indicated that the declining profitability was attributed to the loss of market share, rising levels of debt, a bloated workforce (comprising mainly of semi-skilled and non-core staff such as security personnel, telegraphists, cleaners and clerical assistants), default by Government institutions on their telephone bills and high interconnection charges due to mobile operators. The company's debt by 2006 was in excess of Ksh. 63 billion which included over Ksh. 20 billion in tax liabilities and penalties. There was also a huge pension deficit (in the region of Ksh. 9 billion).

11. On the network side, one of the other key findings was that the company had a network with many suppliers of technology ("spaghetti network") and the various technologies were not talking to each other. In addition, the network was supported by a manual accounting and administration infrastructure. TKL was, therefore, not able to operate efficiently despite being a telecommunication company.

Cabinet Approval for Restructuring

12. Based on the recommendations of the Restructuring Study to address the company's deteriorating balance sheet, as well as the losses and significant overstaffing that had accumulated during its monopoly years, the Government decided to restructure Telkom into a leaner and a more competitive company before privatizing it.

13. A decision was also taken to transfer the 60% shareholding held by

SECRET

TKL in Safaricom to GOK in exchange for the resources required to repay its liabilities and restructure its balance sheet, thus enabling TKL to be privatized free of major liabilities, including Government debts and pension deficit. In essence, therefore, TKL paid for its restructuring through the sale of its 60% shareholding in Safaricom to Government. As the Government did not want to "sell-cash", the transfer was priced at an amount equivalent to the funds required for the restructuring, which was lower than the valuation price. Government, therefore, retained value in this transaction.

14. The Government subsequently, floated 25% of Safaricom shares in June 2008. This was the largest initial public offering (IPO) in East Africa raising Ksh. 51 billion (about US\$800 million) for the Government.

PRIVATIZATION OF TKL

15. The privatization of TKL was done through a transparent bidding process for 51% of the shares. The following parties registered with TKL and purchased the bid documents:

1. France Telecom S.A
2. Telkom South Africa
3. Reliance Communications of India
4. LAP Green Network
5. Alcazar Capital Limited
6. MTNL (India)
7. VSNL Tata (India)
8. Sudatel (Sudan).

16. The following parties presented their bids (including technical and financial proposals) prior to the submission deadline:

1. France Telecom S.A
2. Telkom South Africa (TSA)
3. Reliance Communications of India; and
4. LAP Green Network.

SECRET

17. The 4 bids were subjected to technical evaluation. With the exception of LAP Green Network, the other 3 bidders technically qualified.
18. Financial criteria required that each of the bidders have at least a turnover of US\$300 million in telecommunications services in the last fiscal year, good financial standing and capacity to invest in the expansion of TKL.
19. The financial bids for the 3 technically qualified firms were opened on 16th November, 2007 and were as follows:
1. France Telecom S.A. (in consortium with Alcazar Capital Limited (FT) - US \$390 million;
 2. Telkom South Africa (TSA) - US\$ 282.8 million; and
 3. Reliance Communications of India (RC) - US\$ 221,001 million.
20. As per the Request for Proposals (RfPs), the France Telecom consortium presented the highest financial bid of US \$ 390 million and was therefore awarded the tender to purchase 51% of the TKL's shares. FT started its operations on 21st December 2007 and subsequently launched its Orange Brand in Kenya. Orange is a strong and reputable global brand in the telecoms industry, especially in GSM and Broadband. FT is a Fortune 500 company and is listed on the Paris Stock Exchange.

TKL POST PRIVATIZATION

21. Following the privatization of TKL, the company is now owned 51% by Orange East Africa (OrEA) and 49% by GoK. Under the Shareholders' Agreement signed as part of the Privatization, OrEA is responsible for the management of the company.
22. The company launched its GSM network in the 2nd half of 2008, and has since made significant investments in the expansion of its network (both 2G and 3G). The company has also made investments in IT and management systems, rationalization and

SECRET

training of staff, and capacity and brand building. Most of this funding has been provided by loans, the majority of which have been provided by shareholders. Of the shareholders' loan, FT has contributed approximately 90% of the funding.

23. Despite this significant investment the company has not been able to achieve sufficient revenues to meet operating costs including recovery of the capital investment. It has therefore continued to post huge losses.

FINANCIAL AND OPERATIONAL CHALLENGES

24. Overview of the financial performance of the company in 2011:

- (a) Negative earnings before interest, tax, depreciation and amortisation (EBITDA) of Ksh 4.4 billion and a loss before tax of Ksh 18.4 billion.

The major contributors to the loss were Depreciation and Amortization of Ksh 8.6 billion and Finance Costs of Kshs 5.0 billion.

- (b) As a result of these losses, the shareholders' funds stood at a negative Ksh 25.7 billion, meaning that unless the shareholders inject capital, the company will not be able to meet its financial obligations as they fall due and would therefore be insolvent.

25. Operational Challenges Facing the Company

The following challenges have faced the company from the start:

- (i) As a result of the losses and the conditions in the global financial markets the company has had to rely on very expensive short-term funding mainly from its shareholders. The bulk of these loans are in Euros posing exchange risk to the company.

SECRET

- 9
- (ii) Vandalism - The Company has suffered significantly from frequent copper and fibre cuts causing frequent disruption of service. This has had a negative impact on the business from a reputational standpoint and a financial perspective (loss of revenue during the disruption, high repair and relocation costs and additional security costs).
 - (iii) Legacy issues such as a unionized staff (with low productivity, low morale and a lack of willingness to change) in a market where its competitors' staff are not unionized.
 - (iv) Fragmentation of the market by 4 operators, some of whom have in some cases resorted to "predatory pricing" to capture market share, thereby resulting in significantly low Average Revenue Per User (ARPU), which cannot sustain investment and provide an optimal return to shareholders. It is instructive to note that of the 4 operators, 3 posted significant losses and the one that posted profits had an EBITDA margin of 35%, which, when compared to its revenue market share of over 80% and volume of traffic, should be posting an EBITDA margin of over 50%. Overall the industry lost value last year, and this trend continues into 2012.
26. The shareholders (FT and the Government) have held lengthy discussions aimed at finding a lasting solution to the challenges facing the company. These discussions mainly covered (i) the development of a sustainable Business Plan for 2012 to 2016 and (ii) Balance Sheet Restructuring to restore the company to a solvency position.
- (i) The Business Plan: As part of the discussions the shareholders have reviewed the 5 year Business Plan. In this regard the Treasury requested the Ministry of Information and Communications and the Kenya ICT Board to review the plan with a view to identifying opportunities that could assist in the growth of the top line revenues; the feedback of which was discussed at a workshop held in Nairobi in April 2012 and a revised Business Plan agreed upon.

SECRET

(ii) Funding of the Business Plan: Under the approved Business plan for the period 2012 – 2016, the negotiated position is that GoK will not be called upon to provide any more shareholder loans.

(iii) The Balance Sheet Restructuring:

The main challenge facing the company as indicated above is the huge debt portfolio on its Balance Sheet. Some key figures from the audited financial statements for the year ended 31st Dec 2011 are as follows:

	Ksh billion
• Fixed assets and investment property	34.411
• Other investments and long-term assets	0.287
• Current assets	9.736
• Borrowings	(52.470)
• Other liabilities	(17.511)
• Shareholders' equity	(25.547)
<hr/>	
• <i>Borrowing comprise</i>	<i>Ksh billion</i>
• Bank loans and overdraft	12.767
• Shareholders' loans	
○ FT	35.553
○ GoK	4.150
• Total	52.470

27. Strategic Plan - 2012 - 2016

Key highlights of the revised plan:

(i) Profitability: Company to become EBITDA positive from 2013 and return to profitability in 2015 on the assumption that post-balance-sheet-restructuring and the write-off /

capitalization of loans the related finance costs (interest and forex losses on loans) will be eliminated.

- (ii) Capital investments in the network: Ksh 17 billion over the 5-yr period.
- (iii) Management Structure: It has been agreed that the Board will review the current management structure that currently has France Telkom expatriates on all the critical roles to replace them with Kenyans who have deeper market insight. This will serve in two crucial important roles:
 - a. Develop a deeper management orientation towards local insights that are crucial in unlocking the Kenya market opportunity
 - b. Improve morale among local staff by providing a sense of ownership of the company. This will positively impact service delivery.

28. Proposals for Recapitalization/Write-off of Shareholders Loans and Balance Sheet Restructuring:

(i) Funding for 2012

To fund its capital requirements and pay off some accumulated liabilities, the company requires, in 2012, Ksh 10 billion. The two shareholders have been requested by the Board of Directors of TKL to provide this on a pro-rata basis, of which FT have already provided their share of Ksh 5.1 billion.

GoK has also provided Ksh 2.5 billion which is in the approved Estimates for FY 2012/2013. An additional Ksh 2.4 is required to meet the Government portion of Ksh 4.9 billion. As will be seen from the proposed Balance Sheet restructuring it will be important that GoK fully funds its portion of Ksh 4.9 billion.

SECRET

(ii) Balance Sheet Restructuring

As at 30th June 2012, the shareholder loans in the company (including the new funding in 2012 and accrued interest) stand at:

FT Group	44.0 billion
GoK	4.4 billion

(GoK Loans now stand at Ksh. 6.9 billion following the disbursement of the Ksh. 2.5 billion in paragraph 27. (i) above)

FT Group's loans include the Shs 5.1 billion which it provided in the first half of the year towards the 2012 financial requirements of the company. Once the GoK provides the balance of its share to bring the total to Ksh 4.9 billion, its loans will increase to Ksh 9.3 billion.?

- 29. Based on the Shareholders' Agreement the funding from the shareholders was to be provided on a pro-rata basis. However, due to its tight budget position, GoK has in the past not been able to fund its portion of the loans. Even with GoK funding the entire Ksh 4.9 billion of its 2012 commitment, its percentage funding will only be 17.4%, against the required funding of 49% in line with its shareholding.
- 30. If all the current shareholder loans (FT Ksh. 44 billion and GoK ksh.6.9 billion) were capitalized on a pro rata basis the Government holding would be diluted to 13%. Even in the scenario that the Government provides its full share of Ksh 4.9 billion and if all loans were capitalized GoK shareholding would be diluted to 17%.
- 31. Therefore to avoid a significant dilution of the GoK shareholding as indicated in paragraphs 28 & 29, we have negotiated the following package:

SECRET

- In the event GoK is able to provide the Ksh. 2.4 billion by Dec 18th then the additional capitalization of the 2012 loans will take place by December 18th 2012 at the target 40% GoK, 60% OrEA.
- However, if GoK is not able to provide the Ksh. 2.4 billion then the additional capitalization will still be done but more of the loans of FT will be capitalized. This will lead to further dilution of Government resulting in the following shareholding structure: 30% GoK, 70% OrEA.
- Simultaneously, FT will write-off its residual loans. These write-offs are significant and are in the region of Ksh. 30 billion.
- GoK will however have an opportunity to go back to the 40% if it is able to provide the Ksh. 2.4 billion by 30th June 2013 i.e. the end of the FY 2012/2013 - this would give the Government an opportunity to seek additional resources through the supplementary budget.
- The restructuring to be undertaken in a tax neutral manner.

32. REQUEST TO THE CABINET

The Cabinet is requested to note the contents of this Memorandum and to:

- (i) Approve the Capitalization and Balance Sheet Restructuring of TKL (as articulated in paragraph 30 above); this involves:-

- a) The conversion into equity of all the shareholder loans provided to TKL by GOK. These loans currently stand at

SECRET

- (i) GoK will accept a 9% dilution (from 49% to 40%) on the following terms:
- a. All the GoK shareholder loans will be converted to equity and an equivalent amount of the FT shareholder loans will also be converted to equity to bring the shareholding structure to GoK 40% OrEA (FT Group) 60%.
 - b. FT and GoK will fund the Ksh. 10 billion on a pro rata basis pre-restructuring i.e. FT will provide Ksh. 5.1 billion, while GoK will provide Ksh 4.9 billion.
 - c. It is noted that currently there is only Ksh. 2.5 billion that has been provided in the FY 2012/2013. Therefore, should Government not be able to provide the additional Ksh 2.4 billion, GoK will be diluted further to 30%.
 - d. The balance of the FT loans will be written off in full.
 - e. The Architecture of the Restructuring is as follows:
 - Recognizing that FT has already provided its Ksh 5.1 billion to fund the company's operations for the FY 2012. GoK will provide, by end August, the Ksh 2.5 that is in the FY2012/2013 Estimates. This has already been done.
 - This will be followed immediately by the shareholder loan conversion (capitalization) to achieve the Target 40% GoK : 60% OrEA shareholding structure. This will be done in the hope that GoK will be in a position to provide the additional Ksh. 2.4 billion by 18th December 2012.
 - In the meantime, the remaining shareholder loans from FT will continue to subsist.

approximately Ksh. 6.9 billion. Concurrently, France Telecom Group (FT) will convert a portion of its loans to equity on a pro-rata basis. Currently the FT Loans are in the region of Ksh. 44 billion. (See paragraph 27. (ii))

b) Provision by GoK, through the Supplementary Budget in FY 2012/2013, of an additional Kshs. 2.4 billion towards the capitalization of TKL as indicated in paragraph 30 (b) and (c) (3rd bullet). This will ensure that Government as a shareholder provides its portion of shareholder loans to fund the company for 2012 and also ensures that GoK does not get diluted below 40%.

c) It is important that GOK retains 40% shareholding as it enables GOK to retain its blocking vote on shareholder reserved matters as stipulated in the Shareholders Agreement.

(ii) In exchange for France Telecom writing off the balance of its shareholder loans (which will be in the range of Ksh. 28 – 30 billion, depending on whether GoK provides Ksh. 2.5 billion or Ksh. 4.9 billion in FY 2012/13)

(iii) Approve the dilution of GoK shareholding in TKL as follows:

a. From 49% to 40% in the event that GoK is able to provide Ksh. 4.9 billion to fund the company in 2012. It is noted that only Ksh. 2.5 billion of the required Ksh. 4.9 billion was provided for in the current GOK printed Estimates and has been disbursed.

b. From 49% to 30% in the event that GOK is not able to provide the balance of Ksh. 2.4 billion in FY2012/13.

(iv) Approve that this transaction be undertaken in a tax neutral manner.

SECRET

(v) Note that under the approved Business plan for the period 2012 - 2016, the negotiated position is that GoK will not be called upon to provide any more shareholder loans.

Direct the Minister for Finance, the Minister for Information and Communication and the Attorney General to take the necessary action.

Hon. Robinson Njeru Githae, E.G.H., M.P.
MINISTER FOR FINANCE

Signed _____

Date _____

Hon. Samuel Poghishio, E.G.H., M.P.
MINISTER FOR INFORMATION & COMMUNICATIONS

Signed _____

Date _____

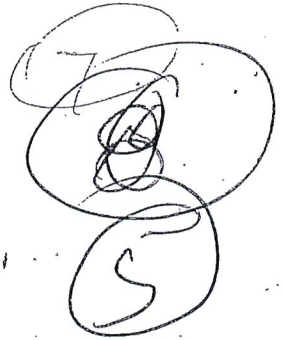
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ANNEX 5

ANNEX 16

CONVERSION AGREEMENT

DATED 21st December 2012



BETWEEN

TELKOM KENYA LIMITED

AND

THE PERMANENT SECRETARY TO THE TREASURY ON BEHALF OF THE GOVERNMENT
OF KENYA

ALLOTMENT AND ISSUE OF SHARES

(to be filed under section 54 of the Companies Act)

CH Coulson Harney
ADVOCATES

Unit A, Nairobi Business Park, Ngong Road, P.O. Box 10643 - 00100, Nairobi, Kenya | www.coulsonharney.com
| Tel +254 (0)20 2899000 | Fax +254 (0)20 2899100

THIS AGREEMENT is made on 21st December 2012 between:

- (1) TELKOM KENYA LIMITED whose registered office is at Telkom Plaza, Ralph Bunche Road, P.O. Box 30301, Nairobi-00100, Kenya (the "Company"); and
- (2) THE PERMANENT SECRETARY TO THE TREASURY ON BEHALF OF THE GOVERNMENT OF KENYA, whose address is Treasury Building, Harambee Avenue, P.O. Box 30007, Nairobi 00100, Kenya (the "Government");

WHEREAS:

- (A) The Government is a shareholder of the Company.
- (B) The Company has an outstanding loan balance due to the Government.
- (C) The Government is now willing to convert the outstanding loan, amounting to KES. 7,122,479,600 (the "Loan"), into shares in the Company.

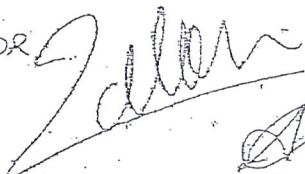
IT IS AGREED as follows:

1. The Company will increase its authorised share capital from KES. 100,000 divided into 5,000 ordinary shares of KES. 20 each to KES. 2,374,323,200 divided into 118,716,160 ordinary shares of KES. 20 each by the creation of an additional 118,711,160 ordinary shares of KES. 20 each, such new shares to rank *pari passu* in all respects with the existing issued ordinary shares of KES. 20 each in the share capital of the Company.
2. The Company will issue and allot to the Government 35,642,398 shares of KES. 20 each (the "Shares") in the capital of the Company for a consideration of KES. 7,122,479,600 to be paid by capitalisation of the Loan and the Shares shall be credited as fully paid at a par value of KES. 20 each with a balance of KES. 180 per share being credited to the Company's share premium account (resulting in each share being issued at a value of KES. 200 each).
3. Upon the Shares being duly allotted and issued to QrEA by the Company, the Company shall be fully discharged of any and all liability in connection with the Loan.
4. The Company shall duly stamp this agreement and a copy of it shall be filed with the Registrar of Companies for the purposes of section 54 of the Companies Act (Cap 486).
5. This agreement is conditional upon (i) the increase of the Company's authorised share capital envisaged under paragraph 1 above and (ii) the Shares being duly allotted and issued to the Government by the Company as set out in paragraph 2 above.
6. This agreement is governed by and shall be construed in accordance with Kenyan law and the parties submit to the jurisdiction of the Kenyan courts.

IN WITNESS this agreement has been duly executed.

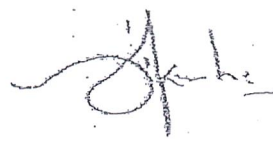
Sealed with the Common Seal of
TELKOM KENYA LIMITED
in the presence of:

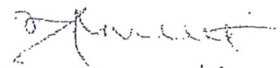
CEO/
DIRECTOR



COMPANY SECRETARY

Signed by The Permanent Secretary to the
Treasury on behalf of THE GOVERNMENT
OF KENYA
in the presence of:



Witness: 
Name: Samuel Kamukiti
Address: Box 30007 Nairobi
Occupation: INVESTMENT SECRETARY



ANNEX 6





Communications
Commission
of Kenya

LICENCE

GRANTED BY

THE COMMUNICATIONS COMMISSION OF KENYA

TO

TELKOM KENYA LIMITED

FOR THE

CONSTRUCTION, INSTALLATION AND OPERATION OF
MOBILE CELLULAR SYSTEMS

AND

PROVISION OF MOBILE CELLULAR SERVICES

IN

THE REPUBLIC OF KENYA

LICENCE NO. TL/MCO/00004

~~X/NNE X 6~~



REPUBLIC OF KENYA

MOBILE CELLULAR LICENCE



Communications
Commission
Of Kenya

GRANTED BY THE

COMMUNICATIONS COMMISSION OF KENYA

John Omo
[Signature]
28/8/13
TO

TELKOM KENYA LIMITED

Paper Land by John Omo, Secretary Cell
+ 28/8/13

TABLE OF CONTENTS

Contents	Page
THE LICENCE TERMS.....	2
THE LICENCE CONDITIONS.....	6
1. CONDITION 1: EXPANSION OF THE LICENSED SYSTEMS.....	6
2. CONDITION 2: REQUIREMENT TO PROVIDE LICENSED SERVICES.....	6
3. CONDITION 3: UNIVERSAL PROVISION OF TELECOMMUNICATIONS SERVICES.....	6
4. CONDITION 4: THIRD PARTY SERVICE PROVISION.....	6
5. CONDITION 5: PROVISION OF CUSTOMER INFORMATION SERVICES.....	7
6. CONDITION 6: PROVISION OF MAINTENANCE SERVICES.....	7
7. CONDITION 7: INTERRUPTIONS TO THE LICENSED SERVICES.....	7
8. CONDITION 8: PUBLIC EMERGENCIES.....	8
9. CONDITION 9: PUBLIC SAFETY.....	8
10. CONDITION 10: ACCESS TO SITES AND RECORDS.....	8
11. CONDITION 11: INSTALLATION OF CALL LOGGING EQUIPMENT.....	9
12. CONDITION 12: CHARGES, TERMS AND CONDITIONS.....	9
13. CONDITION 13: QUALITY OF SERVICE REQUIREMENTS.....	9
14. CONDITION 14: BILLING ACCURACY.....	10
15. CONDITION 15: INTERCONNECTION.....	10
16. CONDITION 16: RADIO-COMMUNICATIONS.....	11
17. CONDITION 17: PRIVACY AND CONFIDENTIALITY.....	11
18. CONDITION 18: FAIR TRADING.....	12
19. CONDITION 19: PROHIBITION ON UNDUE DISCRIMINATION.....	12
20. CONDITION 20: ACCOUNTING REQUIREMENTS.....	13
21. CONDITION 21: REQUIREMENT TO PROVIDE INFORMATION.....	14
22. CONDITION 22: INSPECTION.....	14
23. CONDITION 23: NOTIFICATION OF CHANGE IN SHAREHOLDING.....	15
24. CONDITION 24: PRE-NOTIFICATION OF JOINT VENTURES.....	15
25. CONDITION 25: DISPUTE SETTLEMENT.....	16
26. CONDITION 26: NUMBERING AND NUMBER PORTABILITY.....	16
27. CONDITION 27: FORCE MAJEURE.....	17
28. CONDITION 28: LICENCE FEES.....	17
ANNEX A: RADIO FREQUENCY SPECTRUM.....	18
ANNEX B: SYSTEM EXPANSION REQUIREMENTS.....	18
ANNEX C: QUALITY OF SERVICES REQUIREMENTS.....	20
ANNEX D: PENALTIES.....	21
ANNEX E: COMPLIANCE REPORTING.....	21

THE LICENCE TERMS

The Communications Commission of Kenya (the "Commission"), in accordance with the Kenya Communications Act of 1998 (the "Act"), hereby authorises Telkom Kenya Limited (the "Licensee") to construct, install and operate mobile cellular telecommunications systems as described herein (the "Licensed Systems") and to provide mobile cellular telecommunications services as described herein (the "Licensed Services") in accordance with the Conditions set out in this Licence.

1. The Licensed Systems are:
 - 1.1. mobile radio-communications systems by means of radio frequency spectrum as described in A Radio Frequency Licence and
 - 1.2. any other telecommunications systems, as may be agreed between the Licensee and the Commission.
2. The Licensed Services are the provision of services to the Licensee's Subscribers/Customers by means of the Licensed Systems of:
 - 2.1. mobile radio-communications services and
 - 2.2. any other communications service which the Licensee is under an obligation to provide under this Licence provided that a separate licence is not required.
3. The Licensee is authorised to connect the Licensed Systems to:
 - 3.1. other telecommunications system run under a licence granted by the Commission in accordance with the Act and
 - 3.2. any telecommunications apparatus, which is, approved for connection by the Commission in accordance with its Type Approval and Certification requirements.
4. All equipment or devices comprising the Licensed System shall in all respects be of an approved industrial standard, type approved by the Commission and conforming to the Commission's regulations, ITU recommendations and such other internationally recognized standards for such equipment or devices as may be issued from time to time.
5. The Licensee shall submit to the Commission for notification details pertaining to the network configuration and any proposed upgrades thereafter before embarking on system installation/upgrading;
6. This Licence is issued on..... (the "Effective Date") under licence number TL/MCO/00004
7. This Licence is granted for a period of fifteen (15) years (the "Licence Period") with effect from the Effective Date unless it is revoked earlier in accordance with the Licence Conditions herein.
8. Notwithstanding Clause 7 above, the Commission may at any time revoke this Licence by giving six (6) months' notice in writing in any of the following circumstances:

- 8.1. if the Licensee agrees in writing with the Commission that this Licence should be revoked;
- 8.2. if the Licensee does not provide evidence of commencement of the provision of the Licensed Services nine (9) months from the Effective Date. The Licensee shall submit such evidence by completing a Compliance Report in accordance with Annex E of this Licence in order to satisfy the Commission that the Licensee has complied with this requirement.
- 8.3. if any amount payable under Conditions 28 is unpaid forty-five (45) days after the Commission notifies the Licensee that the payment is overdue, such notification not to be given earlier than fourteen (14) days after the date on which the payment is due;
- 8.4. if the Licensee has breached a Condition in this Licence and the breach is of a material nature, and the Licensee has failed to comply with any notice issued by the Commission under the Act or under the Kenya Communications Regulations, 2001 ("the Regulations") and thereafter has been given by the Commission a further sixty (60) days in which to make representations in relation to the matters set out in the earlier notice which the Commission has taken into account or matters which the Licensee believes are relevant and the Commission appears not to have taken into account;
- 8.5. if the Licensee is dissolved or enters into liquidation, bankruptcy or equivalent proceedings or makes a general assignment for the benefit of creditors; and
- 8.6. if the Licensee fails to notify the Commission of any of the events specified in Condition 23 or 24 and the Commission has given written notice to the Licensee that the Commission intends to revoke the Licence on the grounds set out in Condition 23 or 24 respectively.

After the end of the six (6) months' notice, the Commission shall publish a notice in the Kenya Gazette stating that it intends to revoke this Licence and setting out the reasons on which this intention is based. Revocation shall take effect seven (7) days following publication of the notice in the Kenya Gazette;

9. The Commission shall renew this Licence following the expiry of the Licence Term for an additional ten (10) years provided that the Commission has carried out a formal review to determine whether or not the licence should be renewed, which review shall be concluded two (2) year prior to the expiry of the Licence Period.
10. Any word, phrase or expression used in this Licence shall, unless the context requires otherwise, have the same meaning as it has in the Act.
11. Words importing the singular shall include the plural and vice versa; words denoting persons shall include bodies corporate and unincorporated associations of persons and vice versa.

12. The Licensee shall not assign, delegate, transfer or encumber in any manner the rights, interests or obligations under this Licence without the prior, express and written consent of the Commission, such consent not to be unreasonably withheld or delayed.
13. This Licence and the Licensee are subject to the provisions of the Act including, but not limited to, licence modifications and enforcements.
14. In this Licence the following terms shall have the following meanings:
 - 14.1. "Act" means the Kenya Communications Act 1998 any successor legislation and any subsequent amendments made thereto;
 - 14.2. "Compliance Report" means a report to be prepared annually by the Licensee detailing its performance in respect to a licence area it is obliged under this Licence to report to the Commission on;
 - 14.3. "Compliance Certificate" means a certificate to be issued by the Commission to a licensee following the receipt of a Compliance Report in respect of its compliance of each area it is obliged under this licence to report to the Commission on;
 - 14.4. "Customer" means a person provided with the Licensed Systems and/or Services by the Licensee;
 - 14.5. "Data Service" means a telecommunications service which consists of conveyance of messages in real time which does not include two-way speech, by means of the Licensed Systems without:
 - 14.5.1. any additional service having been provided in respect of the conveyance of those messages; and
 - 14.5.2. any deliberate removal or addition to the information content of those messages;
 - 14.6. "Emergency Organisation" means the relevant public police, fire, ambulance and coastguard services for that locality;
 - 14.7. "Government" means the Government of the Republic of Kenya;
 - 14.8. "ITU" means the International Telecommunications Union
 - 14.9. "Maintenance Services" means carrying out repairs and ensuring that the telecommunications system or apparatus performs in accordance with its specifications;
 - 14.10. "Mobile Cellular Radio-Communications Service" means any telecommunications service, including, for the avoidance of doubt, Basic Voice Services and Value-Added and Data Services, which consists in the conveyance of traffic by means of the Mobile Cellular Radio-Communications Systems;

- 21
- 14.11. "Mobile Cellular Radio-Communications Systems" means radio-communications cellular network/s whereby reception or emission is by means of telecommunications apparatus which enable the handing over of traffic from one cell to another countrywide;
- 14.12. "Regulations" means the Kenya Communications Regulations, 2001 and its subsequent amendments;
- 14.13. "Service Level Agreement" means an agreement between the Subscriber or other licensed operator and the Licensee defining the nature of the services to be provided and establishing a set of parameters to be used in measuring the agreed service level;
- 14.14. "Subscriber" means any end-user provided with the Licensed Services by the Licensee;
- 14.15. "Telecommunications Traffic" includes, for avoidance of doubt, both voice and data traffic;
- 14.16. "Universal Service" means any service which may be prescribed to the Licensee by the Commission as a Universal Services from time to time to meet the country's communications Universal Services Obligations;
- 14.17. "Voice Service" means a telecommunications service whereby real-time two-way speech conversation is conducted by means of the Licensed Systems without:
- 14.17.1. any additional service having been provided in respect of the real-time two-way speech conversation; and
- 14.17.2. any deliberate removal or addition to the information content of that real-time two-way speech conversation..

THE LICENCE CONDITIONS

1. CONDITION 1: EXPANSION OF THE LICENSED SYSTEMS

- 1.1. The Licensee shall fulfil the system expansion requirements set out in Annex B of this Licence (the "System Expansion Requirements") and/or as otherwise required by the Commission from time to time.
- 1.2. The Licensee shall ensure that it maintains information in a form prescribed by the Commission for the purposes of satisfying the Commission that the Licensee is meeting the System Expansion Requirements.
- 1.3. The Licensee shall be liable to pay such penalties, if any, as set out in Annex D for failure to meet the System Expansion Requirements.

2. CONDITION 2: REQUIREMENT TO PROVIDE LICENSED SERVICES

- 2.1. The Licensee shall provide, by means of the Licensed Systems, the Licensed Services to any person who reasonably requests the provision of such services;
- 2.2. The obligation in 2.1 above shall not apply in the event that, it is not, in the Commission's view, reasonable to require the Licensee to provide the service requested by means of the Licensed Systems in the particular circumstances, including, but not limited to circumstances:
 - 2.2.1. beyond the Licensee's control;
 - 2.2.2. where the provision of the service would expose any person engaged in its provision to undue risk to health or safety; and
 - 2.2.3. where it is not reasonably practicable or economically feasible.

3. CONDITION 3: UNIVERSAL PROVISION OF TELECOMMUNICATIONS SERVICES

The Licensee shall provide or participate in the provision of Universal Services, as may be specified by the Commission from time to time.

4. CONDITION 4: THIRD PARTY SERVICE PROVISION

- 4.1. The Licensee shall permit any licensed telecommunications operator/service provider to connect its telecommunications system to the Licensed Systems so as to enable the provision of the said operator's/service provider's licensed services by means of the Licensed Systems.
- 4.2. The obligation in 4.1 shall not apply in the event that it is not, in the Commission's view, reasonable to require the Licensee to comply with such an obligation in the particular circumstances, including, but not limited to circumstances:
 - 4.2.1. beyond the Licensee's control;

- 92
- 4.2.2. where the provision of the service would expose any person engaged in its provision to undue risk to health or safety;
 - 4.2.3. where it is not reasonably practicable (including where the Licensee is not in a position to provide service in a particular area by reason of the fact that its systems are not sufficiently built out).

5. CONDITION 5: PROVISION OF CUSTOMER INFORMATION SERVICES

- 5.1. Within nine (9) months from the Effective Date, the Licensee shall establish and maintain efficient information services to assist any person regarding its products, services (including directory assistance services) and any other reasonable questions relating to the Licensed Services.
- 5.2. The obligation in 5.1 shall not apply in the event that it is not, in the Commission's view, reasonable to require the Licensee to provide the service requested by means of the Licensed Systems in the particular circumstances, including, but not limited to circumstances:
 - 5.2.1. beyond the Licensee's control;
 - 5.2.2. where the provision of the service would expose any person engaged in its provision to undue risk to health or safety, and
 - 5.2.3. where it is not reasonably practicable (including where the Licensee is not in a position to provide service in a particular area by reason of the fact that its systems are not sufficiently built out).

6. CONDITION 6: PROVISION OF MAINTENANCE SERVICES

- 6.1. The Licensee shall provide or ensure the provision of Maintenance Services, on the reasonable request of any person to whom it provides the Licensed Services, in respect of any telecommunications system licensed under the Act;
- 6.2. The obligation in 6.1 shall not apply in relation to any relevant system or apparatus, which is beyond economic repair or the components are no longer available.
- 6.3. The obligation in 6.1 shall not apply in the event that it is not, in the Commission's view reasonable for the Licensee to maintain the apparatus

7. CONDITION 7: INTERRUPTIONS TO THE LICENSED SERVICES

- 7.1. Subject to 7.3 and 7.4 below, the Licensee shall not intentionally interrupt the operations of the Licensed Systems or any part thereof, or the Licensed Services, in the normal course of business, nor shall it in the normal course of business suspend the provision of any type of Licensed Service without having first sought approval from the Commission in writing and subsequently providing reasonable advance notice to persons affected by such interruption or suspension.
- 7.2. In the event of an unintentional/unforeseen interruption of the Licensed Services or part thereof, which are significant in nature, the Licensee shall inform the public and

notify the Commission in writing within 24 hours outlining the cause of such interruption and the steps being undertaken to rectify such interruption.

7.3. The provision in 7.1 shall not apply if, the interruption or suspension is to a person to whom the Licensee provides the Licensed Service and whose system or apparatus or use thereof is endangering the integrity of the Licensed Systems.

7.4. The provision in 7.1 shall not apply if the interruption of service is as provided for under the relevant interconnection and or commercial agreements between the Licensee and the Customer.

8. CONDITION 8: PUBLIC EMERGENCIES

8.1. In case of a situation of emergency or local, regional or national crisis such as earthquakes, floods and similar events which require special attention on the part of the Licensee, the Licensee shall provide the necessary services to the Government giving priority to the support activities required to overcome the emergency. For this purpose, the Licensee shall co-ordinate with and follow the instructions of the Commission in accordance with Section 88 of the Act.

8.2. Within nine (9) months following the Effective Date, the Licensee shall submit to the Commission its plan for procedures and operations it shall follow in the event of any such emergency and shall update such plan upon request by the Commission.

8.3. In case the emergency or crisis is related to aspects of national security, the Licensee shall co-ordinate with the competent entity indicated by the Commission and provide the necessary services in accordance with the instructions of the Commission or the competent entity indicated thereby in accordance with Section 88 of the Act.

8.4. The Licensee may be entitled to reimbursement by the Government of its direct costs for the provision of the services mentioned in 8.1 and 8.2 above if the Commission is convinced such costs are reasonable after evidence of such incurred costs is provided thereof.

9. CONDITION 9: PUBLIC SAFETY

9.1. The Licensee shall in respect of the Licensed Systems including but not limited to apparatus, equipment, installations possessed, operated, maintained or used under the Licence, take all proper and adequate safety measures to safeguard life against any danger, including radiation emanating from the Licensed Systems.

9.2. The Licensee will ensure that the provision of the Licensed Services should not become a health, environmental or a safety hazard and is not in contravention of any statute, rule or regulation and public policy.

10. CONDITION 10: ACCESS TO SITES AND RECORDS

10.1. Pursuant to the Act and any other legislation in force, the Licensee shall upon request provide unlimited access to all equipment sites and operational areas to duly

authorised staff of the Commission, any person authorised by the Commission or law enforcement agency in order for them to effectively perform their duties.

- 10.2. The Licensee shall establish and maintain information records in regard to its operations, in a format prescribed by the Commission from time to time, for a minimum period of two (2) years from the date such records came into being, for purposes of availing such information to the Commission, any person authorised by the Commission or any law enforcement agency upon request.

11. CONDITION 11: INSTALLATION OF CALL LOGGING EQUIPMENT

- 11.1. The Licensee shall install call logging facility within the Licensed Systems to enable the capture of call data records of all traffic through the system and submit the said records to the Commission upon request.
- 11.2. The Licensee shall retain call data records generated by the call logging equipment for at least two (2) years from the date on which they came into being.
- 11.3. The Licensee shall be required to reasonably demonstrate to the Commission that the call logging equipment and the associated records are tamper proof.

12. CONDITION 12: CHARGES, TERMS AND CONDITIONS

- 12.1. The Licensed Services shall be provided on standard terms and conditions (which must include provision for an effective dispute resolution mechanism). A copy of the current version of which shall be provided to any person who reasonably requests.
- 12.2. The Licensee shall file, with the Commission, the charges and the standard terms and conditions (excluding special offers and promotions) upon which it proposes to offer the Licensed Services prior to the date on which it is proposing to effect them.

13. CONDITION 13: QUALITY OF SERVICE REQUIREMENTS

- 13.1. Within nine (9) months of the Effective Date, the Licensee shall meet the quality of service requirements set forth in Annex C or as otherwise required by any Regulations (the "Quality of Service Requirements").
- 13.2. In the event that the Licensee fails to meet the Quality of Service requirements, the Commission shall notify the Licensee of its failure to do so and require it to remedy the failure within a specified time not being less than two (2) months. If the Licensee fails to comply with the requirements set out in the notice within the specified time, the Licensee shall pay such penalties to the Commission, if any; as set out in Annex D.
- 13.3. The Licensee shall ensure that it submits an Annual Compliance Report as set out in Annex E and maintains information records for the purposes of satisfying the Commission that the Licensee is meeting the Quality of Service Requirements.

13.4. The obligations in 13.1 and 13.2 shall not apply in the event that it is not reasonable to require the Licensee to meet the quality of service requirements in the particular circumstances, including but not limited to:-

- 13.4.1. beyond the Licensee's control;
- 13.4.2. where the provision of the service would expose any person engaged in its provision to undue risk to health or safety;
- 13.4.3. where it is not reasonably practicable (including where the Licensee is not in a position to provide service in a particular area by reason of the fact that its systems are not sufficiently built out).

14. CONDITION 14: BILLING ACCURACY

14.1. The Licensee shall, prior to the commencement of Licensed Services, establish a procedure to ensure the accuracy of its billing system, which must be submitted to the Commission for approval which approval shall not be unreasonably delayed or withheld and in any event, the Commission shall give its approval or disapproval within three (3) months from date of receipt of the said submission;

14.2. Where the Commission gives the terms of its approval or disapproval, pursuant to Condition 14.1., it is agreed that the Licensee shall take all reasonable steps to comply with such terms issued by the Commission within the shortest time possible but in any event not more than thirty (30) days from the date the terms are issued.

14.3. The Licensee shall not render any bill in respect of any Licensed Service unless every amount stated in the bill is derived in accordance with the procedure agreed with the Commission in 14.1.

14.4. The Licensee shall keep such records as may be necessary or may be determined by the Commission to be necessary for the purpose of satisfying the Commission that the billing process has the characteristics required above and shall retain any records for more than two (2) years from the date on which they came into being.

14.5. In order for the Commission to be satisfied that the billing process has the characteristics required as set out above, the Commission (or an independent auditor appointed by the Commission at its own discretion) may require the Licensee to:

- 14.5.1. furnish the Commission with any information it reasonably requires;
- 14.5.2. on reasonable notice, allow the Commission (or any person authorised by the Commission) access to any relevant premises of the Licensee; and
- 14.5.3. on reasonable notice, allow the Commission (or any person authorised by the Commission) to examine or test the whole or any part of the billing process.

15. CONDITION 15: INTERCONNECTION

Interconnection procedures shall be in accordance with the Regulations.

16. CONDITION 16: RADIO-COMMUNICATIONS

- 16.1. Subject to the Regulations, the Licensee shall utilize the radio frequency spectrum set out at Annex A and/or in a Radio Frequency Licence for the purposes of providing the Licensed Services.
- 16.2. Prior to using any radio-communications apparatus in the running of telecommunications networks or the provision of telecommunications services, the Licensee must obtain type approval/acceptance from the Commission of such radio-communications apparatus.
- 16.3. The Licensee shall ensure that the radio-communications apparatus are designed, constructed, maintained and used, so that such apparatus conform to the Regulations, the International Telecommunications Union (ITU) requirements and the requirements of other planning and regulatory authorities in Kenya
- 16.4. Except in cases of emergency, the Licensee shall not permit or suffer any person to use the radio-communications apparatus unless the person is under the control of, and authorised by, the Licensee.
- 16.5. The Licensee shall permit any person authorised by the Commission to access and to inspect or test Radio-communications Apparatus at any reasonable time or when an emergency situation exists, at any time, for the purpose of verifying compliance with the terms of the Licence, or investigating sources of radio interference.
- 16.6. The Licensee shall restrict the operation of, or close down and cease to operate, the Station or any Radio-communications Apparatus upon reasonable notice in accordance with the determination of a person authorised by the Commission for the period specified in the determination.

17. CONDITION 17: PRIVACY AND CONFIDENTIALITY

- 17.1. The Licensee shall use all reasonable endeavours to ensure the privacy and confidentiality of proprietary information and business secrets obtained in the course of its business from any person to whom it provides the Licensed Services by establishing and implementing reasonable procedures for maintaining confidentiality of such information.
- 17.2. The Licensee shall maintain sufficient information on its confidentiality procedures to satisfy the Commission, at its reasonable request, that the requirements of 17.1 are being met.
- 17.3. The Licensee shall not use or allow to be used any apparatus comprised in the Licensed Systems (except for the purpose of law enforcement, national interest or where it is in accordance with any statute in force in Kenya) which is capable of recording, silently monitoring, or intruding into its Customers communications traffic unless the Licensee complies with 17.4 and 17.5 below.

17.4. Except for the purposes of law enforcement, the Licensee shall make every reasonable effort to inform the parties whose traffic is to be recorded, silently monitored or intruded into before commencing the recording, silent monitoring or intrusion, that the traffic is to be or may be recorded, silently monitored or intruded into.

17.5. The Licensee shall maintain a record of the means by which the parties have been informed that their traffic is to be or may be recorded, silently monitored or intruded into. The Licensee shall furnish the Commission with such information on request.

18. CONDITION 18: FAIR TRADING

18.1. Without prejudice to other obligations imposed on the Licensee under this Licence, the Licensee shall not engage in any activities, whether by act or omission, which have, or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in Kenya (or a part of it), in relation to any business activity relating to the Licensed Services. Without limiting the generality of the foregoing, any such act or omission shall include:

18.1.1. any abuse by the Licensee, either independently or with others, of a dominant position in Kenya which unfairly excludes or limits competition between the Licensee and any other party;

18.1.2. entering into any contract or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition in Kenya; or

18.1.3. effecting anti-competitive changes in the telecommunications market in Kenya, and in particular, anti-competitive mergers and acquisitions in the communications sector.

18.2. In the event it appears to the Commission that the Licensee is in breach of 18.1, the Commission shall give written notice to the Licensee:

18.2.1. stating that the Commission is investigating a possible contravention,

18.2.2. setting out detailed reasons why it appears to the Commission that there is a breach by the Licensee of this Condition, and

18.2.3. setting out the steps the Commission believes the Licensee should take in order to remedy the alleged breach and giving the Licensee a reasonable time in which to correct the alleged breach. The Commission shall allow the Licensee thirty (30) days from the date of the notice to make representations to the Commission, before the Commission takes any action

19. CONDITION 19: PROHIBITION ON UNDUE DISCRIMINATION

19.1. Subject to 19.3 without prejudice to the obligations imposed on the Licensee under this Licence, the Licensee shall not (whether in respect of the rates or other terms and conditions applied or otherwise) show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description in respect to the provision of the Licensed Services.

19.2. Subject to 19.3 the Licensee may be deemed to have shown such undue discrimination if it unfairly favours to a material extent a business carried on by it in

relation to the provision of the Licensed Services so as to place at a significant competitive disadvantage persons competing with that business.

19.3. The Licensee shall not be deemed to have shown undue discrimination to the extent that:

- 19.3.1. there are different classes of Customers (e.g. corporate, service providers or/and consumers) in respect of which different services are reasonably applicable;
- 19.3.2. a Customer does not meet the Licensee's credit checking standards or has behaved in a fraudulent manner;
- 19.3.3. it is due to matters beyond the Licensee's control;
- 19.3.4. the provision of service would expose any person engaged in its provision to undue risk of health or safety; or
- 19.3.5. it is not, in the Commissions' view, reasonably practicable or technically feasible (including where the Licensee is not in a position to provide service in a particular area by reason of the fact that its systems are not sufficiently built out).

19.4. Any question relating to whether any act done or course of conduct amounts to undue preference or undue discrimination shall be determined by the Commission.

20. CONDITION 20: ACCOUNTING REQUIREMENTS

- 20.1. The Licensee shall submit to the Commission within nine (9) months after the Effective Date a proposal for accounting principles which relates solely to the running of the Licensed Systems and the provision of the Licensed Services and which allows the recording of investments, expenses and revenues in accordance with accounting principles generally accepted in Kenya.
- 20.2. The Commission shall approve or disapprove the proposed accounting principles within three (3) months after its submission and may, in case of disapproval, propose modifications or order the Licensee to adopt a prescribed accounting principles within a reasonable time period but in no event later than one (1) year from the date of approval.
- 20.3. Within sixty (60) days of the end of each fiscal year of the Licensee, the Licensee shall deliver to the Commission the balance sheet of the Licensee as at the end of such fiscal year and the related statements of operations, equity and cash flows of the Licensee, in each case accompanied by a report thereon of independent auditors stating that such financial statements fairly present the financial position of the Licensee at the dates indicated and were prepared in accordance with accounting principles approved by the Commission in accordance with 20.2 above.
- 20.4. The Commission may request the Licensee to submit other accounting information it may require in order to effectively supervise and enforce the terms of this Licence, if the Licensee fails to comply with its obligations under 20.1 above or if the accounting principles established by the Licensee fail to achieve the objectives set forth in that subsection; and

20.5. Where the Commission deems it necessary and appropriate to supervise compliance with the provisions of other Conditions of this Licence, it may order the Licensee to provide the Licensed Services through a separate division or divisions, a separate branch or branches or a separate subsidiary or subsidiaries.

21. CONDITION 21: REQUIREMENT TO PROVIDE INFORMATION

21.1. The Licensee is required to maintain such information as will enable the Commission to carry out its functions under the Act in such manner and at such times as the Commission may request.

21.2. The Commission shall have the right to request the Licensee to submit periodic reports, statistics and other data as well as request additional information with a view to supervise and enforce effectively the terms of this Licence.

21.3. In particular, by the 15th July of every year, the Licensee shall submit a Compliance Report detailing the performance of the previous operational year ended 30th June and as the Commission shall prescribe.

21.4. The Commission shall review the Compliance Report and;

21.4.1. If the Licensee is in compliance with the Licence, issue the Licensee with a Compliance Certificate in respect to each area of compliance for the year under review;

21.4.2. If the Licensee is not in compliance with the Licence, require the Licensee to remedy the area of non-compliance or levy appropriate penalties in that respect in accordance with the provisions of this Licence and the Act.

21.5. In making a request for information, the Commission will ensure that no undue burden is imposed on the Licensee in procuring and furnishing such information, unless the Commission considers such information is essential to enable it to exercise its functions under the Act.

21.6. The Commission shall have the right to publish information which it receives under this Condition unless, following representations by the Licensee, the Commission is satisfied that the information is of such confidential nature that disclosure would have a material adverse effect on the Licensee's business.

22. CONDITION 22: INSPECTION

The Licensee shall permit the Commission (or a person authorised by the Commission) to inspect the Licensee's systems, premises, facilities, files, records and other data to enable it to exercise its functions under the Act.

23. CONDITION 23: NOTIFICATION OF CHANGE IN SHAREHOLDING

23.1. Subject to 23.3 below, the Licensee shall notify the Commission of:

23.1.1. any change in the proportion of the shares held directly in a Licensee by any person;

23.1.2. the acquisition of any shares and such shares not being shares already listed in any stock exchange held directly in a Licensee by a person not already holding shares, and the proportion of such shares held by that person immediately before acquisition.

23.2. The Licensee shall notify the Commission prior to any entity acquiring ownership or control of all or a majority of the stock of the Licensee such that the Licensee shall stand as a subsidiary in relation to that entity.

23.3. The Licensee shall be obliged to notify the Commission of any acquisition of shares or change in shareholding of the Licensee by any person and such shares not being shares already listed in any stock exchange only if, by reason of that acquisition or change, the total number of shares in the Licensee held by that person together with any shares held by any nominee or trustee for that person immediately after the change or acquisition:

23.3.1. exceeds 15 per cent of the total number of shares in the Licensee (where it does not exceed 15 per cent prior to that change or acquisition);

23.3.2. exceeds 30 per cent of the total number of shares in the Licensee (where it does not exceed 30 per cent prior to that change or acquisition);

23.3.3. exceeds 50 per cent of the total number of shares in the Licensee (where it does not exceed 50 per cent prior to that change or acquisition).

23.4. In any case referred to in 23.1 or 23.2 above, notification shall be given by a date, which is thirty (30) days prior to the taking effect of such change or acquisition, as the case may be.

23.5. In instances referred to in 23.2 and 23.3 above, if the Commission disapproves of the change in shareholding notified to it, it shall notify the Licensee within thirty (30) days of receipt of notification. The Commission may within sixty (60) days of notifying the Licensee of its disapproval, having taken into account representations made by interested parties, and giving reasons for its decision, prohibit the change in shareholding where it believes it is in the public interest to do so.

24. CONDITION 24: PRE-NOTIFICATION OF JOINT VENTURES

24.1. Unless the Commission otherwise agrees, the Licensee shall notify the Commission not later than thirty (30) days before the taking effect of any of the agreements or arrangements to which this Condition applies giving particulars of the agreements and/or arrangements. The agreements or arrangements are an agreement with any person for the establishment or control of any body corporate for the purpose of:

- 24.1.1. the running of a telecommunications system which requires a licence under the Act;
- 24.1.2. providing telecommunications services in Kenya which necessarily involve the running of such a system;
- 24.1.3. the production of telecommunications apparatus for supply in Kenya where that production would lead, in the Commission's view, to a monopoly situation which would not otherwise exist in relation to the supply of telecommunications apparatus of any description in Kenya;
- 24.1.4. an agreement for the establishment of a partnership for any of those purposes and in those circumstances; and
- 24.1.5. any other agreement or arrangement in the nature of the joint venture for the purpose of running a telecommunications system which requires a licence under the Act or for the purpose of providing telecommunications services in Kenya which necessarily involve the running of such a system.

24.2.24.1. above applies in relation to an agreement or arrangement for the establishment or control of any body corporate or partnership where the Licensee has or is to have not less than twenty (20%) per cent of the voting power in any organ controlling that body.

25. CONDITION 25: DISPUTE SETTLEMENT

The dispute settlement mechanism set out in the Act shall apply to any dispute or disputes that arise out of the provisions of this Licence.

26. CONDITION 26: NUMBERING AND NUMBER PORTABILITY

26.1. The Licensee shall operate and apply a numbering plan assigned to it by the Commission in relation to the operation of the Licensed Systems and the provision of the Licensed Services (the "Numbering Plan") unless and until the Commission, upon reasonable notice, prescribes a new numbering plan (the "Numbering Plan") amending or replacing the Initial Numbering Plan. Any new numbering plan must contain transitional provisions.

26.2. Prior to the Numbering Plan being prescribed by the Commission, the Licensee and the Commission shall from time to time consult with each other, in relation to the running of the Licensed Systems and the provision of the Licensed Services, with respect to:

- 26.2.1. the arrangement for the allocation and re-allocation of numbers within the Numbering Plan; and
- 26.2.2. any developments of, or additions to, or replacements of the Numbering Plan.
- 26.2.3. The Licensee may where necessary levy reasonable charges in relation to allocation of numbers with the Commission's prior approval.

26.3. The Licensee shall fulfill any requirements, which the Commission may impose from time to time in relation to numbering including but not limited to requirements to facilitate number portability.

27. CONDITION 27: FORCE MAJEURE

27.1. Where in its opinion, the Licensee is impeded, hindered or otherwise prevented from carrying out any obligation contained herein, or as required by the Commission, by an act of God, fire, flood, natural disaster, action of Government, state of war, civil common or insurrection, riots, embargo, industrial disputes or any other cause beyond the control of the Licensee, the Commission may exempt the Licensee from performing such obligation for so long as and to the extent that the performance of the obligation is affected by such force majeure.

27.2. The Licensee shall take all reasonable steps to minimize the impact of the force majeure on the performance of its obligations and where any Licensed Systems are damaged by such force majeure, shall take reasonable steps to repair or rebuild such systems once the force majeure has ceased or been eliminated.

28. CONDITION 28: LICENCE FEES

28.1. The Licensee shall pay to the Commission:

28.1.1. before the grant of this Licence

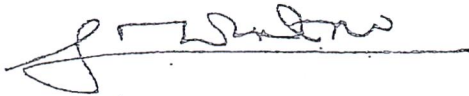
28.1.1.1. United States dollars fifty five million (USD 55,000,000) as an initial licence fee and

28.1.1.2. Kenya shillings five million (KShs. 5,000,000), as upfront annual operating fee.

28.1.2. on 1st July of each year, an annual operating fee equivalent to zero-point-five percent (0.5%) of the audited annual gross revenues accruing from the Licensed Services during the previous financial year or Kenya shillings five million (KShs. 5,000,000) only whichever is higher, and

28.1.3. any other fee payable under this Licence including but not limited to frequency fees.

Signed for and on behalf of Communications Commission of Kenya



Director General
Communications Commission of Kenya

20.12.2007


Date

17

collected by -

Name: RICHARD GITONGA Date: 20/12/07

ID - NO: 10086284

Sign: 

ANNEX A: RADIO FREQUENCY SPECTRUM

The Licensee shall provide the Licensed Services utilising the assigned frequency in the following bands:

FREQUENCY BAND	ASSIGNED BANDWIDTH	REMARKS
1. 900 MHz	2 X 7.5 MHz	
2. 1800 MHz	2 X 10 MHz	

ANNEX B: SYSTEM EXPANSION REQUIREMENTS

The Licensee shall meet the following rollout obligations:

1. Subscriber Rollout

Period from Effective Date	Subscriber Rollout
Year 1	134,746
Year 2	357,077
Year 3	700,000
Year 4	1,300,000
Year 5	2,000,000

2. Network Coverage

Period from Effective Date	Areas/District	Major Roads/Highways
By Year 3	<ul style="list-style-type: none"> • Nairobi and Greater Environs including Thika, Athi River, Ngong and Limuru • Kisumu • Nakuru • Naivasha • Eldoret • Machakos • Nanyuki • Mtitu Andei • Voi • Malindi • Mombasa and Costal strip from Diani to Malindi • Malindi • Meru • Kericho • Nyeri 	<ul style="list-style-type: none"> • Nairobi – Thika Road • Nairobi - Athi River • Nairobi – Limuru • Nairobi - Ngong • Nairobi – Mombasa Highway • Nairobi – Eldoret Highway Nairobi – Kisumu Highway

2. Network Coverage

Period from Effective Date	Areas/District	Major Roads/Highways
By Year 5	<ul style="list-style-type: none"> • Gilgil • Kabarnet • Molo • Njoro • Magadi • Embu • Meru • Kitale • Kisii • Siaya • Busia • Bungoma • Kakamega • Webuye • Mumias • Kerugoya • Kilifi • Migori • Diani • Kwale • Nyahururu • Muranga • Kajiado • Namanga • Karatina • Ahero • Kitui • Lamu • Lokichoggio • Garissa • Narok • Maseno • Sagana 	<ul style="list-style-type: none"> • Kilifi – Malindi Road • Nairobi – Nyeri Road • Ahero – Kisii Road • Embu – Meru Road • Eldoret – Kitale Road • Nairobi – Namanga Road • Kisumu – Busia Road

ANNEX C: QUALITY OF SERVICES REQUIREMENTS

The Licensee shall provide services in conformance with its Licence at service quality levels equal to the ones shown in the table below.

The Licensee shall submit to the Commission the said service quality information at quarterly (3 months) intervals, the figures being the average of the three months.

QUALITY OF SERVICE

No.	Quality of Service Parameters	Targets
1.	Call block rate	1.8%
2.	Call drop rate	2%
3.	Call set up time	<4s
4.	Network availability	99.9%

DEFINITIONS

1. Call block rate - Percentage of communications failed at first attempt.
2. Call drop rate - Percentage of calls cut after communication has been set up between the mobile and the called fixed phone.
3. Call set up time - Average delay between the sending of a called number by the mobile phone (Ok function of the phone) to a fixed phone, and the moment when the called phone rings.
4. Network availability - This is the percentage of time, during when the signal is available for a mobile located in specific areas.

ANNEX D: PENALTIES

The Licensee shall be subject to penalties as described in the Act.

Non-compliance with a Licence Condition constitutes a contravention; in particular, failure to meet System Expansion Requirements or any Quality of Service commitment is a contravention.

A penalty shall only be applicable if the Licensee contravenes the Licence Conditions including but not limited to failure by the Licensee to meet the System Expansion Requirements in Condition 1 above or to comply with Quality of Services (QoS) commitments in Condition 13 above.

System Expansion Requirements shall be assessed and penalties imposed where applicable after three (3) years from the Effective Date.

The Commission shall require the Licensee to remedy any contravention within a three-month period. In the event that the Licensee fails to remedy any contravention within this period, the Licensee may be subject to a penalty of Kenya Shillings five hundred thousand (KShs. 500,000) per month, for every contravention. Such a penalty shall continue to be applied for every month or part thereof during which the contravention continues.

ANNEX E: COMPLIANCE REPORTING

At the end of each operational year, the Licensee shall submit a Compliance Report in a format agreed with and/or as directed by the Commission. The Licensee shall be entitled to receive an annual Compliance Certificate from the Commission detailing the performance during the years under review.

100
100
100

ANNEX 7

REPUBLIC OF KENYA

MINISTRY OF FINANCE

Telegraphic Address: 22921
FINANCE-NAIROBI
FAX NO. 2219365
Telephone: 2252299
When replying please quote



THE TREASURY

P O BOX 30007

NAIROBI

Ref: ZZ 331/02

Date: March 26, 2012

Hon Prof Githu Muigai, FCI Arb, M.P.

Attorney General

State Law Office

NAIROBI

Dear

Hon. Muigai,

RE: TELKOM KENYA LIMITED SHAREHOLDER ISSUES

The Telkom Kenya Limited (TKL) is jointly owned by Orange East Africa (OrEA) 51% and GOK 49%. The majority shareholder in OrEA is France Telecom (FT).

TKL is currently facing serious financial challenges which the Directors have escalated to the shareholders. We are currently in the process of reviewing the issues with a view to coming up with a Government position and negotiating with FT as appropriate.

As some of the issues are legal in nature, we request you to nominate an experienced officer preferably Ms Dorcas Achapa who previously worked with my team during negotiations between Government and OrEA on the claims lodged by OrEA under the Warranties provided by GOK in the Share Purchase Agreement. These were resolved successfully with minimal cost to GOK and I am confident that the same team will be able to handle the current issues effectively.

Yours

Sincerely

Joseph K. Kinyua, CBS
PERMANENT SECRETARY/TREASURY



ANNEX 8



481

PERMANENT SECRETARY
OFFICE OF DEPUTY PRIME MINISTER &
MINISTRY OF FINANCE

13 APR 2012

RECEIVED
Telephone: Nairobi 222437225/335
Telefax: Nairobi 222437225/335
When replying please quote

CONFIDENTIAL
THE STATE LAW OFFICE



ATTORNEY-GENERAL'S CHAMBERS
P. O. Box. 40112-00100
NAIROBI, KENYA

Ref. No. AG/CONF/2/C/62 VOL. V

11th April, 2012

Mr. Joseph K. Kinyua, CBS
Permanent Secretary
The Treasury
P.O. Box 30007 -00100
NAIROBI



Dear

RE: TELKOM KENYA LIMITED SHAREHOLDER ISSUES

I refer to your letter reference No. ZZ331/02 dated March 26, 2012 on the above mentioned subject.

I have nominated Ms. Dorcas Achapa, Deputy Solicitor General to be part of the negotiations team.

Yours

GITHU MUIGAI
ATTORNEY GENERAL

Copy: Dorcas Achapa, MBS
Deputy Solicitor General

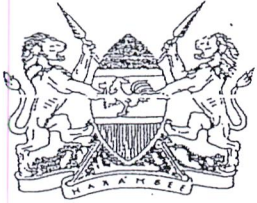
CONFIDENTIAL



ANNEX 9



AMERS



DEPARTMENT OF GOVERNMENT
INVESTMENT AND PUBLIC ENTERPRISES

INTERNAL MEMO

2
9

File No. ZZ 331/02

Date : March 13, 2012

To: The Financial Secretary
Cc: The Permanent Secretary/Treasury
From: The Investment Secretary
Subject: Telkom Kenya Limited (TKL) – Procurement of Legal & Financial Services

I.S.
Bring this procurement before MTC justifying which procurement method as required by the law & regulations (Public Procurement & Disposal Act)
Mwaka

14/3/12

- TKL is jointly owned by Orange East Africa (OrEA) 51% and GOK 49%. The majority shareholder in OrEA is France Telecom (FT). TKL is currently facing serious financial challenges.
- At a Board meeting held on 7th March 2012 the Board decided to escalate this issue to the shareholders for resolution. It was therefore resolved that an Extraordinary General Meeting (EGM) of the shareholders be called.
- During informal discussions that we have been having with FT representing OrEA, it has become increasingly clear to us that FT have been taking a lot of legal advise and has a well laid strategy. They are therefore ready to push their strategy and the EGM appears to be in line with the laid down strategy.
- During the board meeting of the 7th March we tried unsuccessfully to ask that the issues of an emergency nature such as the funding of the company be discussed and resolved informally while the long term issues that may require to be discussed and resolved at a General Meeting of shareholders be postponed to give the GOK enough time to consult on the issues.

5. Unfortunately we were unsuccessful and all we could do was to refuse to consent to short notice for the EGM. The EGM will now take place around 2nd of April 2012.
6. Against the above background we need to urgently procure both legal and financial services to support us in developing our own strategy and the attendant negotiations that we will be having with our co-shareholder both at the AGM and post the AGM until a resolution is found.
7. Given the nature of the issues and the timelines we are facing, we propose to hire the team that worked with us on the warranty claims last year as they understand the issues and will be able to come on board instantaneously.
8. We will therefore be making a request to the Ministerial Tender Committee to procure, on a direct procurement basis, the services of (i) Hamilton Harrison & Mathews (HHM) to provide legal services and (ii) Mr Ashif Kassam of RSM Ashvir to provide financial services.
9. On the required technical support, the Permanent Secretary, Ministry of Information & Communication is supporting us through the officials of the Kenya ICT Board.

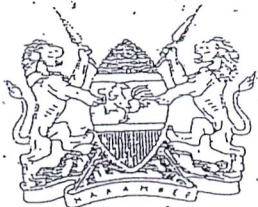
Submitted for your briefing and facilitation.

Thank you.


ESTHER KOIMETT, CBS

ANNEX 10





DEPARTMENT OF GOVERNMENT
INVESTMENT AND PUBLIC ENTERPRISES

3
10

INTERNAL MEMO

File No. ZZ/MOF 331/02 Date: March 14, 2012

To: The Chairman
Ministerial Tender Committee

From: The Investment Secretary

Subject: TELKOM KENYA LIMITED (TKL) – PROCUREMENT OF LEGAL &
FINANCIAL SERVICES

Please refer to folio (1) on the above subject;

- TKL is jointly owned by Orange East Africa (OrEA) 51% and GOK 49%. The majority shareholder in OrEA is France Telecom (FT). TKL is currently facing serious financial challenges.
- At a Board meeting held on 7th March, 2012 the Board decided to escalate this issue to the shareholders for resolution. It was therefore resolved that an Extraordinary General Meeting (EGM) of the shareholders be called.
- During informal discussions that the GoK has been having with FT representing OrEA, it has become increasingly clear to us that FT have been taking a lot of legal advice and has a well laid strategy. They are therefore ready to push their strategy and the EGM appears to be in line with the laid down strategy.
- During the board meeting of the 7th March the Government representative tried unsuccessfully to ask that the issues of an emergency nature such as the funding of the company be discussed and resolved informally while the long term issues that may require to be

discussed and resolved at a General Meeting of shareholders be postponed to give the GOK enough time to consult on the issues.

5. Unfortunately we were unsuccessful and all we could do was to refuse to consent to short notice for the EGM. The EGM will now take place around 2nd of April, 2012.
6. Against the above background we need to urgently procure both legal and financial services to support us in developing our own strategy and the attendant negotiations that we will be having with our co-shareholder both at the AGM and post the AGM until a resolution is found.
7. Given the nature of the issues and timelines we are facing, we propose to hire the team that worked with us on the warranty claims last year as they understand the issues and will be able to come on board instantaneously.
8. On the required technical support, the Permanent Secretary, Ministry of Information & Communication is supporting us through the officials of the Kenya ICT Board.
9. We are therefore making a request to the Ministerial Tender Committee to procure, on a direct procurement basis, the services of (i) Hamilton Harrison & Mathews (HHM) to provide legal services and (ii) Mr. Ashif Kassam of RSM Ashvir to provide financial services.

In view of the above, we seek MTC approval for direct procurement of the services of (i) Hamilton Harrison & Mathews (HHM) to provide legal service and (ii) Mr. Ashif Kassam of RSM Ashvir to provide services in line with sec (74) of the Public Procurement and disposal Act due to:

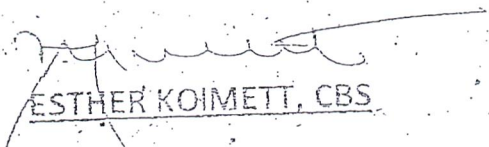
- i. The urgency of the required services
- ii. Procuring of the services through any other method is not feasible due to time constraint and the complexity of the issues at hand.

- iii. The aforementioned Consultants have historical memory of issues since they worked with the Government on the warrant claims by FT last year
- iv. The move by FT was unforeseen.

The terms of reference for the Advisors will include:

- i. To review the current financial position of the company and its business plan to assess the financial viability of the TKL.
- ii. To determine the rights and obligations under the Shareholders Agreements and the Articles of the Company. This will include determining the sequence of events that need to be undertaken at the shareholder level to recapitalise or liquidate the company.
- iii. To review the Management Agreement between TKL and France Telkom Group (FTG) and to assess the impact of the performance by the FT in providing the management services as stipulated in the agreement.
- iv. To review and quantify the current and future capital requirements of TKL and also determine the potential insolvency balance of TKL if the company were to be placed in liquidation.
- v. Based on the emerging issues determine the options available to the government and the negotiating strategy that should be adopted by the Government
- vi. To assist the Government with negotiations with FT pre-EGM and post-EGM to ensure that all emerging issues are dealt with conclusively.

Thank you.


ESTHER KOIMETT, CBS

ANNEX 11



REPUBLIC OF KENYA
MINISTRY OF FINANCE



THE TREASURY
P.O. Box 30007
NAIROBI
KENYA

Telegraphic Address: 22921
FINANCE-NAIROBI
Fax No.: 330426
Telephone: 252299
When replying please quote

REF: MTC/1.M/VOL.VI (45.2a)

Investment Secretary
DGIPE

RE: MTC COMMUNICATION FOR AUTHORITY TO USE DIRECT
PROCUREMENT FOR PROVISION OF CONSULTANCY SERVICES FOR
LEGAL AND FINANCIAL SERVICES

The Ministerial Tender Committee at its Meeting No. MTC/46/2011- 2012 held on Thursday 7th June, 2012 under Matters Arising 2a discussed application for authority to use direct procurement for Provision of Consultancy Services for Legal and Financial Services.

After noting the Departmental and Secretariat comments the Committee further noted that:-

- The Negotiation team agreed with the consultant that if the duration period is extended should be regarded as a discount to the Ministry.
- The contracts to be cleared by the Attorney General Office.

In view of the above observations, the Committee granted authority to use Direct Procurement Method as follows:-

A. Financial Advisory Consultant

Item Description:	Provision of Financial Advisory Services
Consultant:	M/s Ashif Kassam
Payment per day:	Kshs 200,000.00
Duration:	Sixty (60No) days.
Total Cost:	Kshs. 12,000,000.00 inclusive taxes
Remarks:	Direct procurement due to the urgency of the services.

B. Legal Advisory Services

Item Description: Provision of Legal Advisory
Consultant: M/s Hamilton, Harrison and Mathews
Payment per day: Kshs 200,000.00
Duration: Forty (40No) days.
Total Cost: Kshs. 8,000,000.00 inclusive taxes
Remarks: Direct procurement due to the urgency of the services.
Please take the appropriate action.



N. M. MGHENDI
SECRETARY/MTC

ANNEX 12

31

M. N. M. G. H. E. N. D. I.

REPUBLIC OF KENYA

MINISTRY OF FINANCE

Telegraphic Address: 22921
FINANCE-NAIROBI
Fax No.: 330426
Telephone: 252299
When replying please quote



15 12

THE TREASURY
P.O. Box 30007
NAIROBI
KENYA

REF: ZZ 307/02/N (61)

18th July, 2012

Director General,
Public Procurement Oversight Authority,
PO Box 50535
NAIROBI.

RE: PROCUREMENT CONTRACTS FOR THE PERIOD ENDING
30TH JUNE, 2012

Attached are the details of the contracts entered into by the Ministry and Contractors for the period ending 30th June 2012.


N.M.MGHENDI
FOR: FINANCIAL SECRETARY

MINISTRY OF FINANCE
PROCUREMENTS FOR THE PERIOD BETWEEN 1ST APRIL 2012 TO 30TH JUNE 2012.

S/NO	Item Description	Value of the tender	Reasons for Direct Procurement	MTC
1	Enhancement, Support and Realignment of e-PromIS	USD 610,193	Due to continuity of phase 2 of the service	MTC/38/2011-2012
2	Procurement of M9000 Servers licenses from The Copy Cat Ltd	USD 3,040,911	Urgency of the licenses and being the manufacturer/supplier of the licenses	MTC/41/2011-2012
3	Procurement of Consultancy Services for implementation of the New Chart of Account for the IFMIS System	USD 250,000	Due to the firms previous developer and being the dealer of the equipment	MTC/41/2011-2012
4	Procurement of Consultancy Services for Legal & Financial Services	Kshs 20,000,000.00	Urgency of the assignment and the consultants had background information and experience on all process involving Telkom Kenya Ltd	MTC/46/2011-2012
5	Connectivity services from Telkom Kenya Limited to link various commissions formed under the new Constitution to facilitate IFMIS access	Kshs 1,160,000.00	Urgency for all the Ministries/Departments to access IFMIS System	MTC/48/2011-2012
6	Procurement of Event organizer for the Africa Capacity Building Foundation	Kshs 8,067,800.00	Urgency due to the time given to organize for the ACBF Governors Function of which Kenya is the host for 2012	MTS/48/2011-2012

Confirmed and signed by the Head of Procuring Entity

Name: *J. M. M. M. M. M. M.* Sign: *[Signature]*

Annex 1- Copies of the Negotiation Reports

Annex 2- Copies of the MTC Minutes

Jes FS

Date: *19/7/12*

ANNEX 13



34
13

ANNEX 7

REPUBLIC OF KENYA
MINISTRY OF FINANCE

13

Telegraphic Address: 22921
FINANCE-NAIROBI
FAX NO. 2213524/330426
Telephone: 2252299
When replying please quote



THE TREASURY
P.O. Box 30007
NAIROBI

Ref: ZZ/MOF/331/02

Date: 20th June, 2012

Hon. Prof. Githu Muigai, FCI Arb, MP
Attorney General
State Law Office
NAIROBI

Dear *Hon. Muigai,*

RE: CLEARANCE OF CONTRACTS FOR LEGAL AND FINANCIAL CONSULTANCIES IN RESPECT OF TELKOM KENYA LIMITED SHAREHOLDER ISSUES

Thank you for your letter ref. AG/CONF/2/C/62 Vol.V dated 11th April, 2012 appointing Ms. Dorcas Achapa to support us in our shareholder discussions with France Telkom (FT) in respect of our joint investment in Telkom (K) Ltd.

As discussed, we have also hired the services of Hamilton, Harrison and Mathews (HHM) to provide legal support and Mr. Ashif Kassam of RSM Ashvir to provide the financial support necessary to ensure adequate preparedness on the part of the GoK to hold informed Shareholder discussions with the OrEA (FT).

By way of Background HHM were the legal advisors during the Privatization of TKL and they also advised government during the claim of warranties claims which as mentioned in my letter of 26th March, 2012 were resolved with minimal costs to GoK. Mr. Kassam was the financial advisor on the claim of warranties which as indicated were resolved with minimal cost to government.

Submitted for your legal clearance, please find herewith the draft contracts.

Thank you for your support.

Yours Sincerely,



JOSEPH K. KINYUA, CBS
PERMANENT SECRETARY/TREASURY

ANNEX 14

45

~~ATTORNEY 9~~

PERMANENT SECRETARY/TREASURY
 MINISTRY OF FINANCE
 30 AUG 2012
RECEIVED
 P. O. Box 30007, NAIROBI



166

(17) (14)

THE STATE LAW OFFICE
OFFICE OF THE ATTORNEY-GENERAL

our Ref: ZZ/MOF/331/02 (15)

Date: 29th August, 2012

ur Ref: AG/CONF/2/C/62 VOL. V (25)

Mr. Joseph K. Kinyua, CBS
 Permanent Secretary
 Ministry of Finance
 P. O. Box 30007-00100
 NAIROBI



I.S.

Mutua
 fua -
 See Me

 31/8/12

Dear

**RE: CLEARANCE OF CONTRACTS FOR LEGAL AND FINANCIAL
 CONSULTANCIES IN RESPECT OF TELKOM KENYA LTD.
 SHAREHOLDER ISSUES**

I refer to the above matter and your letter dated 16th August, 2012.

First, I would like to draw your attention to the contents of circular AG/1/2005 of 29th June, 2005 on Government legal advisory services. Ministries and departments are required to obtain the Attorney-General's approval and issuance of no objection where the need arises for engagement of private advocates. I have not been consulted on this matter so far.

Second; having studied the draft contracts, we have generated the following comments:

A. CONTRACT FOR LEGAL ADVISORY SERVICES BETWEEN GOK AND M/S HAMILTON, HARRISON AND MATHEWS

1. Title Page

The Government as a party should be referred to as the Government of the Republic of Kenya represented by the Ministry of Finance.

2. Preamble

The Government should be referred to as in the title page and the words "Office of the Deputy Prime Minister" deleted. The year of signing the contract should be amended accordingly.

The word "Ltd" should be included in the name "Orange East Africa".

The sentence in (b) is incomplete.

3. Article 5 Consultant's Personnel

Article 5(a) provides that except as the client may otherwise agree, no changes shall be made in the key personnel. Appendix C lists Jennifer Mbaluto as an associate at HH&M and one of the key personnel. However from the information provided on the HH&M website, Jennifer is no longer a part of their team. The client (Ministry of Finance) therefore needs to obtain from the consultant an updated list of key personnel for this project.

4. Article 11

The professional indemnity amount should also be written out in words.

5. Article 14(3)

It would be advisable for the contract to provide a ceiling on reimbursements for agreed items to keep expenditure by the Consultant to a minimum/reasonable.

6. Article 15 (2)

Has the Consultant already begun carrying out the services?

7. Article 22 (2) Dispute Settlement

The statement "The decision of the arbitrator shall be binding and final between the parties" should be added.

8. Appendix A

It would be advisable to provide the meaning of the abbreviations used.

B. CONTRACT FOR FINANCIAL/ACCOUNTS EXPERT ADVISORY SERVICES

1. Title page

The Government should be described as in 1 above.

2. The contract refers to the financial advisor in the second person in some parts and as a consultant in others. It would be advisable to maintain the word Consultant for consistency and clarity.

3. Clause 1.6

The word "to" before GoK should be deleted.

4. Clause 3.3

This article provides that remuneration for the Consultant is pegged to that of similar legal advisory services provided to the Privatization Commission. The benchmark should be that of similar financial advisory services.

5. Clause 4.3

The title should read "Consultant's Responsibility"

6. Clause 11

The title should be "Dispute Resolution"

7. Clause 13

The word initiating should be replaced with "initialling".

We are yet to receive minutes of the Ministerial Tender Committee which approved the direct procurement as requested in our letter dated 24th August, 2012.

The Ministry also needs to confirm whether they have reported the direct procurement of the proposed services to the Public Procurement Oversight Authority, within fourteen (14) days of the notification of the award of the contract, in compliance with Regulation 62(3) of the Public Procurement and Disposal Regulations, 2006, as the value of the proposed contracts exceeds five hundred thousand shillings.

Yours

GITHU MUIGAI
ATTORNEY-GENERAL

ANNEX 15



REPUBLIC OF KENYA

MINISTRY OF FINANCE

Telegraphic Address: 22921
FINANCE-NAIROBI
FAX NO. 2219365
Telephone: 2252299
When replying please quote



THE TREASURY
P O BOX 30007
NAIROBI

Ref: ZZ/MOF 331/02

Date: September 13, 2012

Hon Prof Githu Muigai, FCI Arb, M.P.
Attorney General
State Law Office
NAIROBI

Dear *Hon. Muigai,*

RE: CLEARANCE OF CONTRACTS FOR LEGAL AND FINANCIAL CONSULTANCIES IN RESPECT OF TELKOM KENYA LIMITED SHAREHOLDER ISSUES

Please refer to your letter ref AG/CONF/2/C/62 Vol. V (25) dated 29th August 2012 in response to my letter ref ZZ/MOF 331/02(15) dated 16th August 2012 and my earlier letter ref ZZ/MOF 331/02 dated 20th June 2012 on the above subject.

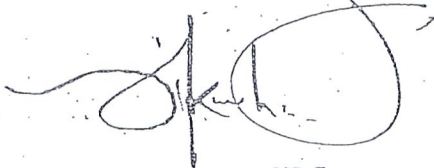
We thank you for your valuable comments which we have incorporated. We also apologise for having initiated the procurement before consulting you.

We wish to confirm that the procurement of the consultants was discussed by the Ministerial Tender Committee at its meeting No. MTC/46/2012-2012 extracts of the minutes are herewith enclosed. The procurement method was reported to the Public Procurement Oversight Authority as provided for under Regulation 62 (3) of the Public Procurement and Disposal Regulations, 2006.

We confirm that the consultants have continued to offer their services awaiting clearance of the contract, this was necessitated by the urgent nature of the assignment. By way of background, France Telecom had pushed for an Extra Ordinary General Meeting which was scheduled for 16th March 2012 to discuss the solvency situation of the company.

Given the nature of issues and the timelines we were facing, there was need to bring on board both legal and financial advisors who had previously dealt with these matters to assist us prepare a Government Strategy and safeguard the Government position. You will recall that we also sought for a Senior and experienced officer from your office to be part of the team, and you did assign Ms Dorcas Achapa.

Once again thank you.

Yours Sincerely


Joseph K. Kinyua, CBS
PERMANENT SECRETARY/TREASURY

Encls.

ANNEX 16

REPUBLIC OF KENYA



MINISTRY OF INFORMATION AND COMMUNICATIONS
Office of the Permanent Secretary

Telephone: +254-020-4920000/100

Fax: 315147

If calling or telephoning as

When replying please quote:

Ref. No. MIC/G/11/2

Mrs. Esther Koimett, CBS
Investment Secretary
Office of the Deputy Prime Minister
and Ministry of Finance
NAIROBI

Dear *Esther,*

RE: TELKOM KENYA LTD BUSINESS PLAN REVIEW

In response to a letter ref: ZZ/MOF331/02 dated 8th March, 2012; I hereby appoint the following to review the TKL Business Plan and submit their value addition propositions to the plan on 26th March, 2012.

- i) Mr. Paul Kukubo Chief Executive Officer Kenya ICT Board
- ii) Mr. Victor Kyalo Deputy Chief Executive Officer, Kenya ICT Board
- iii) Ms. Eunice Maranya
- iv) Mr. Brian Longwe ICT Consultant
- v) Mr. Muriuki Mureithi Summit Strategies
- vi) Mr. Abraham Ondeng Undersecretary, Ministry of Information and Communications

Yours *Sincerely,*

Seahung
Bitange Ndemo, PhD, CBS
PERMANENT SECRETARY



Teleposta Towers
P.O. Box 30025-00100
NAIROBI

15th March, 2012

*Noted
PA*

ANNEX 12

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ANNEX 17

ANNEX 17
17

INTERNAL MEMO

Department Of Government Investment and Public Enterprises

FILE NO: DGIPE/FB/255 A

DATE: 30th March, 2012

TO : Director, BSD

: Director, EAD

FROM : Investment Secretary

SUBJECT: REQUEST FOR ADDITIONAL FUNDING OF MTEF BUDGET 2012/2013.

The department has submitted both Recurrent and Development MTEF Budget Estimates for the financial year-2012/13. However the Ministry of Finance budgetary ceiling is not adequate to meet the additional funding required for the Treasury specific requirements of Government Investments, reforms and infrastructure development for strategic State Corporations. The details of the additional funding are as follows;

1. Equity Participation in International Organizations-KShs 1.646 billion.

The Government has outstanding equity participation in ADB, EADB PTA and Sheffer Afrique. In the approved budget for 2011/12 there was no provision factored for the Country's Commitment in these organizations. We are currently in arrears in the four institutions.

- ❖ ADB:- The Board of Governors of the African Development Bank during the 2010 Annual General Meeting authorized the Sixth General Capital Increase. Kenya is entitled to a subscription of 63,491 new shares consisting of 3,809 paid up shares and 59,682 callable shares. The total value for 3,809 paid up shares at par value of UA 10,000 is UA 38,090,000 (Kshs.3, 809,000,000).

Treasury accepted to take up the total 3,809 paid up shares value at Kshs.3,086,000,000 payable in 12 installments with an annual payment of Kshs.320 million. The first installment was paid in 2010. The total amount required in 2012/13 is Kshs 320,000,000.

- ❖ EADB : The Governing Council of East African Development Bank approved increase of share capital in the Bank. Class A shareholders under which Kenya falls were to inject US\$ 90m spread over a period of five (5) years with an annual payment of US\$ 4,500,000. The payments

commenced in 2009. We are in arrears as at 30th September 2011 of US\$ 1,606,690.46. The amount due for 2011/12 is US \$ 4,500,000 and same amount for 2012/13. The total amount required in 2012/13 including arrears is Kshs 880,000,000.

❖ PTA; Treasury made a commitment to increase the shareholding with PTA Bank in 2010. The total payable amount was US\$12,104,178 to be paid in five (5) years installments commencing in 2009 with annual payment is US\$ 2,420,836. The total amount required in 2012/13 is Kshs 210,000,000.

❖ Shelter Afrique- The Company's share capital is to be increased from USD 50 million to USD 100million. In order to retain the current GOK shareholding (13.25%) a capital injection of Kshs 536 million is required. We propose that the amount of Kshs 236million be factored in the 2012/13 budget and the balance in two subsequent years.

2. Kenya Airways Rights Issue- Kshs 5.5 billion

In the approved budget there was a provision of Kshs 2.5billion for share subscription in Kenya Airways. KQ plans to raise through a rights issue Kshs 24 billion from the existing shareholders, to fund its fleet expansion programme. We understand that this amount was removed in the Supplementary Budget. To subscribe for its rights the GOK would need to pay a total of Kshs 5.5billion to receive further 159.3million new shares in Kenya Airways that is required to maintain 23% Shareholding. We propose that the total amount of Kshs 5.5 billion be provided for in the 2012/13 MTEF Budget for the GOK to retain the 23% shareholding.

3. De La Rue- Kshs 700 million.

In the 2011/12 approved budget there is a provision of Ksh 500million for equity participation in De La Rue, which was removed during supplementary budget. The total amount required for the Government to pay for its share of acquiring De La Rue is Kshs 700million. We are requesting that an amount of Kshs 700million be provided in the 2012/13 MTEF budget to cover the total contract cost of Ksh 700million.

4. Kenya Railways Corporation- Kshs 4.890 billion

KRC requires a total of Kshs 4.890 in the financial year 2012/13 for completion of the ongoing implementing of modernization and expansion of the Rail Commuter Services.

5. Kenya Ports Authority- Kshs 9.360 billion.

Kenya Ports Authority signed a dredging works contract on 1st February, 2011 upon formal confirmation from Treasury that the funds would be factored in the 2011/12 Financial Year's Budget. The total cost for the project was Kshs 5.2 billion, though Kshs 1.4 billion has been released through the Parent Ministry there is a balance of Kshs 3.8 billion. However no budgetary provision was made in the 2011/12 Financial Year. We proposed that total amount of Kshs 3.8 billion be factored in the 2012/13 Budget.

In addition KPA is implementing the Mombasa Port Development Project (2nd Container Terminal). The contractor cannot proceed due to the presence of the Project Affected Persons (PAPs) on the access to the site. KPA requires Kshs 380 million for compensation to relocate the PAPs and give access to the contractor in the 2012/13 MTEF Budget.

KPA has had a long outstanding debt from the GOK of Kshs 680 million. In 1994 KPA contracted M/S Dredgco Kenya limited to undertake maintenance dredging for the Port. The contract was to be funded by the then Ministry of Transport and Communication. The receivable has remained outstanding in the books of KPA and PIC has recommended that the Government clear the long outstanding debt. KPA has sent a reminder based on PIC recommendation and requested for Kshs 680 million to be factored in 2012/13 budget to clear the long outstanding debt.

Furthermore KPA has made a request for dredging funds to facilitate Development of liquefied Natural Gas (LNG) facility and Gas Fired Electricity Generation Plant (GFEGP) at Dongo Kundu area in Mombasa requires funds. A total of KShs 4.5 billion will be required for both projects. This will be face II of the dredging and may be finance through donor funds from Belgium.

Total requirement for KPA

	Total cost- KShs Million	Required in 2012/13
Ongoing Dredging	5,200	3,800
PAP	380	380
Outstanding Debt	680	680
Belgium Funded dredging	4,500	4,500
Total	10,760	9,360

6. Lamu Port- Kshs 5 billion

Following the launch of the LAPSSSET Project it is necessary to provide resources in the MTEF Budget to fund the development of the Lamu Port. The financial requirement for the Port will be firmed up later. The funds could be provided under the implementing Ministries but the department wishes to flag this requirement to avoid last minute surprises.

7. Kenya Broadcasting Corporation. Kshs 1.4 billion

KBC has made a request for Government support amounting to Kshs 1.4 billion to be applied as follows:- (i) Kshs 1 billion to finance migration from Medium Wave (MW) technology to Frequency Modulation (FM) Technology and (ii) Kshs 400million to finance Public Broadcasting which is a public service obligation. We have proposed a budgetary provision of Kshs 1.4 billion in FY 2012/13.

8. National Cereals and Produce Board Kshs 2.2 billion

The issue of NCPB balance sheet restructuring has been outstanding for sometimes. It is noted that in July 2007 the MoA submitted a draft Cabinet Memorandum which, among other things, recommended that the Government should compensate NCPB for the alleged loss of Kshs.2.2 billion on GOK instructions to sell maize at a lower price than the purchase price. The amount has been outstanding in their books as funds owed by the GOK for years.

In order to address the current undercapitalization of NCPB, and considering the key role NCPB plays in the sector the Board requires financial support by the Government within the MTEF Budget Framework. We propose that, a sum of Kshs. 1.2 billion be factored in the 2012/13 Financial Year Estimates and an additional Kshs. 1 billion in 2013/14.

9. Open Window System (Kentrade)-Kshs 380 million

In the approved budget for 2011/12 there is a provision of Kshs 200million for the Open Window System Project. The total amount required for Phase one is USD 4,435,351. An additional amount of Kshs 380 million is required to purchase the software. Kentrade has initiated the procurement process. We are requesting that the additional amount of Kshs 380m be provided in the 2012/13 MTEF budget to cater for the total contract cost of Ksh 580 million.

10. National Oil Corporation of Kenya Kshs 1.5 billion

NOCK requires GOK capital injection for trading and mainly for the expansion of the retail network. The Corporation has no storage facility in Mombasa which makes doing business for the only State oil marketer expensive and

difficult. They have been operating on borrowed funds which are expensive. This would increase profitability and ultimately payment to exchequer. We therefore propose that the amount of Kshs 1.5 billion be provided in the 2012/13 MTEF Budget.

11. Loan to KPCU- KShs 750 million.

The Government negotiated a full and final settlement of Kshs 500million with KCB for them to lift the receivership of KPCU. The balance of Kshs 250million was intended to finance the restructuring and the receivership cost. This request was not factored in the F/Y 2011/12 approved budget, due to budgetary constraint. We propose that the amount of Kshs 750m be provided in the 2012/13 MTEF Budget.

12. Loan to Telkom K. Ltd - Kshs. 5 billion.

Telkom is still faced with serious financial problems and would require further financial support from its shareholders for the stability of the Company. The Company has requested for an additional shareholder loan of Kshs.5 billion.

13. Loan to IDB- KSHS 500 million.

IDB has requested for GOK financial support in form of Government loan of upto a maximum of Kshs 500 million for on-lending to Small and Medium Size Enterprises (SMEs). The request was considered and recommended through a joint memo by DGIPE, DMD and EAD but due to financial constraint the request has not been funded in the last two subsequent budget years. IDB financial position has not improved and they have made a similar request of a loan of Kshs 500million in the 2012/13 MTEF budget.

This is submitted for consideration as requirements for additional funding in the 2012/13 MTEF Budget.


Esther Koimett, CBS

CC: Permanent Secretary/Treasury

: Financial Secretary

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PERMANENT SECRETARY/TREASURY
MINISTRY OF FINANCE

29 NOV 2012

Department of Government Investment and Public Enterprises

RECEIVED

P. O. BOX 30007, NAIROBI
FILE NO: DGIPE/FB/255 C

Gathinwa
I will not be on
this week pce for
on my behalf
INTERNAL MEMO We have
also requested
Sh700M for De ha Ruo - see
DATE: 22nd November, 2012
attached
copy
29/11
3/12/12

TO : Director, BSD
: Director, EAD

FROM : Investment Secretary

RE: REVISED BUDGET ESTIMATES-2012/2013-REQUEST FOR ADDITIONAL FUNDING

This is in reference to CFOs' memo on revised budget ref. MOF/282/18/02 'M' dated 12th November, 2012.

The department has submitted both Recurrent and Development Revised Budget Estimates for the financial year 2012/13. However there were some budgetary requirements which were not provided for in the printed estimates that may need consideration as followings:-

1. Kenya Railways Corporation- Kshs 1.4 billion

In 2011/2012 printed estimates the budgetary allocation for KRC was Kshs 2.8 billion. Kshs 1.4 was disbursed during the year but Kshs 1.4 was not released due to liquidity constraints towards the end of the financial year though the payment had been processed. It was therefore held as a pending bill to be a first charge in the current F/Y as the Corporation had made commitment. The funds are needed for completion of the ongoing implementing of Commuter Rail Services.

2. Kenya Ports Authority- Kshs 500 million.

Kenya Ports Authority signed a dredging works contract on 1st February, 2011 upon formal confirmation from Treasury that the funds would be factored in the 2011/12 Financial Year's Budget. The total cost for the project was Kshs 5.2 billion, though Kshs 1.4 billion has been released through the Parent Ministry. There is a balance of Kshs 3.8 billion. In the current year's Budget there is an allocation of Kshs 500 million. We proposed that additional amount of Kshs 500 million be factored in the 2012/13 Revised Budget.

3. Capital Injection to Consolidated Bank of Kenya Ltd.- Kshs 500 million

Consolidated Bank of Kenya requires financial support of Kshs 500 million from the GOK to boost the Bank's Capital ratio in order to comply with the banking Act and Central Bank of Kenya Prudential Guidelines. The request was made during the 2012/13 budget but could not be provided for due to budgetary constraint. They have indicated the Bank seriously needs the financial intervention.

4. KPLC Outstanding Dividend Arrears - Kshs 1.59 billion

KPLC has requested that the dividends arrears payable to Treasury be netted off against claims of refund to the Company. We propose that Kshs 1.59 billion be allocated to KPLC to be financed by dividends withheld.

5. Loan to Telkom K. Ltd- 2.4 billion

The Cabinet has approved the restructuring of Telkom Kenya Ltd which includes providing Shareholders support to the company of Kshs. 10 billion to be provided prorata to the Shareholders Shareholding position i.e Kshs. 5.1 billion by France Telecom (FT) and Kshs. 4.9 billion by GoK.

So far FT has provided its shareholders' loan of Kshs. 5.1 billion while GoK has provided Kshs. 2.5 billion leaving a balance of Kshs. 2.4 billion.

We now request that Kshs. 2.4 billion be provided in the Supplementary Estimates.

This is submitted for consideration as requirements for additional funding in the 2012/13 Revised Budget.

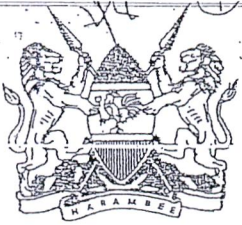
Thank you.

Esther Koimett, CBS

CC: Permanent Secretary/Treasury

: Financial Secretary





INTERNAL MEMO

REF : ZZ/MOF 331/02

DATE : 22nd March, 2013

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TO : The Hon Minister for Finance

The minister has raised important and fundamental issues. I am encouraged by his response.

From : The Permanent Secretary/Treasury

Forwarded for MPT's consideration and guidance. Sis we are so tight that it would be promising what we know

From : The Investment Secretary

Let us do well through. At out policy note to

SUBJECT : Financial Restructuring Support to Telkom (K) Ltd

guide him is of essence.

Please refer to the above subject;

JKK 2/4/13

we cannot honour by June 2013.

- We draw your attention to the provisions of the Restructuring Agreement between GoK and France Telecom, SA (FT) both shareholders of TKL.
- One of the pillars of the Restructuring Agreement was that both shareholders would fund the operational needs of the company to the tune of Ksh. 10 billion for FY 2012 pro rata to their shareholding of 49%:51%. In this regard FT provided their full portion of Kshs. 5.1 billion while GoK was only able to provide Kshs. 2.5 billion leaving a balance of Ksh. 2.4 billion.
- The agreement provides for a dilution to 40% from the Government shareholding of 49% upon payment of the total financial support of Ksh 4.9 Billion. This is in consideration for FT writing off a significant portion of its shareholder loans in excess of (Kshs ~~3.0 billion~~).
- It is noted that, in the event that the Government is unable to provide the remaining Kshs 2.4 Billion the Restructuring Agreement provides for a further dilution of 10% which will take GOK shareholding down to 30%.

JKK 26/3/13
PS
you know as we as do that 30.6% is ok - it can only be covered w. 2 of 1-7-12 17.3% the only

PS (No 3) - Is this a pure investment? - Is this a strategic investment? ... index that can happen 17

28/3/13

5. Under the Agreement, GoK has up to 30.06.13 i.e end of FY 2012/2013 to provide the balance. This is therefore to request for your approval to enable the Ministry of Finance include the outstanding Kshs. 2.4 Billion in the FY 2012/2013 Supplementary Estimates II.
6. In the Event this amount is not provided, it is noted that GoK shareholding in Telkom Kenya will come down to 30%. One of the implications of this dilution is that GoK will have to cede one Board position to FT. Currently GoK has four (4) Directors in the TKL Board.

Submitted for your consideration and approval/guidance.

Thank you.


ESTHER KOIMETT, CBS
INVESTMENT SECRETARY

ANNEX 18

29 NOV 2012

Department of Government Investment and Public Enterprises

I will not be in this week on my behalf
INTERNAL MEMO We have also requested

(S) 18
U. [Signature]

RECEIVED

P. O. BOX 30007, NAIROBI
FILE NO: DGIPE/FB/255 C

8:00 AM to 4:00 PM - see

DATE: 22nd November, 2012

attached copy 29/11/12

TO : Director, BSD
: Director, EAD

(1)

IS/AG

FROM : Investment Secretary

See me jointly around lunch hour on Monday next

RE: REVISED BUDGET ESTIMATES-2012/2013-REQUEST FOR ADDITIONAL FUNDING

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work with file. J.K.K. 29.11.12

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Thank you.

Esther Koimett, CBS

CC: Permanent Secretary/Treasury

: Financial Secretary



III. DEVELOPMENT EXPENDITURE ESTIMATES 2012/13

(II. Details of the foregoing

Code	Title	Approved Expenditure 2011/12 KShs.	Estimates 2012/13 KShs.	External Receipts 2012/13				SRCF	
				Grants		Loans			
				ALA	REVENUE	ALA	REVENUE		
0023	Department of Government Investment and Public Enterprises								
01	Headquarters								
0000001 - 3111403 - 00001001 - 071004	Research		2,000,000						001
4110500	Other Domestic Lending and On-Lending		2,500,000,000						
0000001 - 4110503 - 00001001 - 071004	Telcom Kenya		2,500,000,000						001
	NET EXPENDITURE FOR SUBHEAD 01		6,757,000,000						
02	Economic Recovery, Poverty Alleviation and Regional Development Programme								
2510100	Subsidiaries to Non-Financial Public Enterprises		8,000,000,000						
0000001 - 2510101 - 00001001 - 071004	Irrigation Board		8,000,000,000						001
	NET EXPENDITURE FOR SUBHEAD 02		8,000,000,000						
03	Kenya Trade Network								
2630200	Capital Grants to Government Agencies and other Levels of Government		380,000,000						
0000001 - 2630201 - 00001001 - 071004	Capital Grants to Semi-Autonomous Government Agencies		380,000,000						001

is not been able to investment in GSM

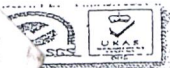
e company from the

nkable business plan. in the global financial ely on very expensive hareholders. The bulk exchange risk to the

red significantly from s causing frequent a negative impact on il standpoint and a revenue during the n costs and additional

zed staff (with low ck of willingness to petitors' staff are not

4 operators, some of to "predatory pricing" g in significantly low which cannot sustain optimal return to ate that of the 4



ISO 9001:2008 Certified.

6. As a result of these challenges the company eroded its shareholder value leading to insolvency. Consequently the two shareholders agreed on a restructuring process that was implemented on 31.12.2012. Under this restructuring process

- (i) GOK converted its loans amounting to Kshs 6.9 Billion into equity. Similarly, France Telecom converted a proportionate amount based on their 51% shareholding to equity.
- (ii) FT wrote off the balance of its loans in the region of Kshs 30 Billion in exchange for GOK agreeing to cede 9% of its shareholding.
- (iii) Both GOK and FT were to fund the company to the tune of Kshs 10 Billion for FY 2012. FT fully funded its portion of Kshs 4.9 Billion while GOK was only able to provide Kshs 2.5 Billion of its Kshs 4.9 Billion.

However, GOK has upto June 30th 2013 to provide the balance of Kshs 2.4 Billion. In the event GOK is not able to provide this amount by the agreed deadline it will cede a further 10% of shareholding. It is therefore highly likely that by 1st July 2013 GOK shareholding in TKL will crystallize at 30%. Under the Memorandum & Articles of Association of the company this will trigger the loss of one Board seat.

7. The performance of TKL is not likely to improve in the short term. Our view is that FT may not have figured out this market and may in fact have given up on it. There are indications that they are in the process of seeking a buyer for their stake. We note however that both Airtel and Yu have also not been able to achieve profitability although there are indications that Airtel is now on the right track and is being perceived as the strongest competitor to Safaricom.



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