



Submission to ICASA: “Draft General Licence Fee Regulations”

Government Gazette No. 31542, Notice 1305, 24 October 2008

Submission Date: 5 December 2008

INTRODUCTION

1. On 22 September 2008, the Independent Communications Authority of South Africa (“the Authority”) published Notice No. 1305 regarding “Draft General Licence Fee Regulations” (“the Notice”) in the Government Gazette No. 31542.
2. Neotel thanks ICASA for the opportunity to comment on the Notice and would like an opportunity to participate further, should ICASA hold public hearings.
3. Neotel notes the background provided in the Notice and the development of a set of principles underpinning the revision/formulation of licence fees. To this end, Neotel’s submission will first address a number of general principles followed by specific comments to the proposed regulation and an overview of the impact on Neotel.

GENERAL COMMENTS

4. Neotel’s general comments raise a number of conceptual issues with respect to the approach and underlying assumptions of the proposed licence fee regulations.

Purpose and effect of licence fees

5. Neotel supports the regulatory aim and objective of licence fees.
6. The setting of licence fees has received global regulatory attention. The International Telecommunication Union (ITU) has in association with Infodev and the World Bank, developed a “Regulatory Toolkit” which deals *inter alia*, with licensing procedures and classifications.
7. The ITU has also established numerous study groups tasked with looking at questions pertaining to licensing in a converged environment. For example ITU-D Study Group 1, which comprises of membership from operators and regulators, who share experiences pertaining to the study group question.¹ The ITU has also dedicated an

¹ For a list of questions under study between 2006-2010, see http://www.itu.int/ITU-D/study_groups/SGP_2006-2010/SG1/SG1-index.html

annual edition of *Trends in Telecommunication Reform*² to the questions and challenges of licensing in an era of convergence. This provides considerable detail on licensing issues, taking into consideration different licensing approaches and licence classifications.

8. Governments and national regulatory agencies (NRA's) maintain that high telecommunications prices have created a barrier to communications penetration. NRA's are thus concerned with ensuring that market entry barriers are reduced and that the fees to be paid pursuant to that licence, or which may be necessitated by the administrative processing of a licence application, amendment or renewal are proportional to the process.³
9. However, if not correctly conceptualised and administered, licensing fees, fixed, variable or administrative, in any industry or sphere of commercial activity, rather than act merely as a regulatory "tax" with a directed purpose, can have an ultimate effect on the price charged to consumers, impede investment in the sector, deleteriously affect roll-out to underserved areas and risk sustainability of new entrants and smaller market players.
10. Such fees can operate as a "double tax" as companies in other sectors of the economy only pay income and company taxes and are not subject to licensing fees, which can also affect the overall competitiveness of the communications sector in the wider economy.
11. For this reason, it is imperative that the underlying basis for licensing fees be correctly calculated, based on sound economic principles and rationally connected to the policy outcome sought to be achieved. If the policy intent is increased competition and services penetration, the underlying fee structure that animates access to the sector and sustainability of companies, specifically new entrants, needs to reflect that intent in real terms.
12. Global financial markets are under strain and investment in infrastructure faces more challenges than it has in previous years, across multiple sectors. Mindful of this reality, coupled with the goals to stimulate investment and infrastructure build out in the market, Neotel submits that the Authority should reconsider the imposition of licence fee proposals that may place additional strain on the ability of licensees to attract investor interest and confidence.
13. Licence fee setting exercises as a general rule should be done in the context of the global opportunities and challenges facing telecommunications markets. Regard should be had to current interest rates, lenders requirements, cost of capital and return on investment in addition to domestic market conditions and developments.

² ITU, *Trends in Telecommunication Reform - Licensing in an Era of Convergence*, (2004)

³ See for example the COMESA Licensing Guidelines

http://programmes.comesa.int/index.php?option=com_content&view=article&id=42&Itemid=52&lang=en

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14. To this end, Neotel supports the revision of licence fees to align them with the principles proposed in the Notice. However, Neotel submits that the overall quantum of the annual and administrative fees requires reconsideration.
15. Neotel also has implementation concerns regarding proposed timeframes in the draft regulations as well as reservations about the penalties proposed for contravention. Neotel elaborates further in this regard below.
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Authority's scope

16. The Authority's legal and practical sphere of operations, scope, mandate and role is set out in the Independent Communications Authority Act No 13 of 2000, as amended ("ICASA Act") and the Electronic Communications Act No. 35 of 2006 ("ECA"). The Authority's role in the collection of licence fees must conform to the fundamental principle of legality which requires that the exercise of public power must be authorised by law.⁴
17. While ICASA is mandated to licence and regulate within the sector and to prescribe fees attendant to that objective, as a matter of legal principle and regulatory best practice, ICASA is not empowered to, nor should it become, a *general collection agency* for state revenue.
18. Such collected revenue must have a rational connection to the activities within ICASA's sphere of responsibility and to the costs of regulating the sector. These fees should, in addition, reflect the policy outcomes sought to be achieved through regulation at a particular point in the sector's development.
19. To this end, Neotel is concerned that section 5(7)(a)(iii) and the proposed regulations contained in the Notice, more appropriately fall within the sphere of contemplation of a general money Bill envisaged by section 77 of the Constitution. This requires promulgation according to the procedure set out in section 75 of the Constitution, rather than as sector regulation in terms of section 5(7)(a) of the ECA.
20. Money Bills impose general national taxes, levies, duties or surcharges. The amounts sought to be collected through the draft licence fee regulations appear to exceed the amounts that ought to be recovered by ICASA and exceed its operating expenses sufficiently for this to qualify as a general tax, duty, levy or surcharge. This requires a separate process in accordance with the procedure established by section 75 of the Constitution, which read with section 74(2)(a) of the Constitution requires that a money Bill can only be introduced by the "Cabinet member responsible for national financial matters", namely the Finance Minister. Understandably, this situation if correctly interpreted may require legislative remedial correction.

⁴ Hoexter, *Administrative Law in South Africa*, 2007 at pp 226-227. See also *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 17 and 20; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) paras 34, 35 and 54; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 1 (CC) paras 612-615.

Section 93(1) – No less favourable principle

21. Section 93(1) of the ECA establishes the principle that existing licences may only be converted in terms of the ECA on “no less favourable terms”. As such, all existing licences have a right to be issued with converted ECS, ECNS and radio frequency licences, which subject only to consistency with the ECA, must cumulatively be *on no less favourable terms* to the licences held under the Telecommunications Act.⁵
22. There are obviously various changes necessitated by the licence conversion process, but Neotel has assumed throughout the conversion process anticipated by the ECA, that the central principle of licence conversion for existing licences as contained in section 93(1) will be upheld and implemented.
23. Neotel is of the view that the only logical interpretation that can be applied to the words “on no less favourable terms” in section 93(1) is the “same or substantially similar” terms and conditions to Neotel’s current PSTS licence, subject only to ensuring that existing licences comply with the Act as envisaged by section 93(4)(b).
24. The proviso in section 93(4)(b) must anticipate a situation where there is non-compliance as a result of conversion, not a situation where there is compliance but the conversion is used to significantly alter the material terms and quantum of that compliance, without any sound legal or economic basis.
25. Rules of statutory interpretation require that a logical and sensible interpretation be applied to legislation: “i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute, as well as the matter of the statute, its apparent scope and purpose, and within limits, its background”.⁶
26. It could not have been the intention of the legislature for the licence conversion process to so materially depart from the rights and obligations under the previous licensing regime, so as to significantly alter the terms of market entry and presence.
27. Neotel entered the South African communications market based on various forecasts, business plans and scenarios. Its licence was granted by the Authority, with due regard had to these assumptions, based on a business plan that was approved by ICASA in the licence application process.
28. A material change to the amount and the method of calculating its licence fee is a significant departure from the “no less favourable” principle envisaged by the ECA. Such departure may also violate the principle of just administrative action mandated by Section 33 of the Constitution and the Promotion of Administrative Justice Act.⁷ We elaborate further below at paragraphs 104 - 109 (“Purpose of Regulations”).

⁵ No. 103 of 1996, as amended.

⁶ *Desert Place Hotel Resort (Pty) Ltd v Northern Cape Gambling Board* (2007) 3 SA187 (SCA) para 8; *Standard Bank Investment Corporation Limited v Competition Commission* (2002) 2 SA 797 (SCA) para 4.

⁷ No. 3 of 2000

29. Moreover, clause 7.3.3 of the Neotel PSTS licence⁸ explicitly provides that, “the annual licence fee may be adjusted downward or waived by the Authority where the Authority determines that the Licensee has substantially exceeded the Roll-out Targets in any given year by more than 50% (percent).”
30. Other provisions in the licence refer only to the calculation of the licence fee and the manner and date of payments. Clause 7.3. thus appears to cater for the full extent of the applicable conditions for the annual, variable licence fee. Explicit reference is made only to a downward adjustment or waiver of fee by the Authority where a specific condition pertaining to roll-out is met. Nowhere does the PSTS licence issued, contemplate that the licence fee may be revised upwards.
31. This, read with section 93(1) of the ECA requires that the Authority must convert existing licences to comply with the ECA, but such “compliance” does not authorise the Authority (even with regard to section 93(4)(b)) to so significantly alter the terms of the licence as to render them on conversion, substantially less favourable terms to the existing licence.
32. In addition, not only does the Notice propose terms less favourable than the current licence, there is insufficient evidence and motivation for this change to satisfy the requirements of 93(4)(b). As Neotel has stated above, 93(4)(b) anticipates situations where as a result of conversion, there is non-compliance by licences with the Act, and to remedy that situation, the Authority may grant rights and impose obligations to ensure compliance.
33. Section 93(4)(b) does not apply to situations where there is compliance (applicable licence fee payments) but the terms of that compliance (with respect to quantum), are sought to be revised. This situation is correctly addressed via the licence amendment process envisaged by section 10 of the ECA.
34. Section 10 specifically provides that the Authority may amend an individual licence after consultation with the licensee,⁹ to make the terms and conditions of the individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type.¹⁰ This section clearly thus acknowledges the principle underpinning that of “no less favourable terms” envisaged in section 93(1) of the ECA.
35. In addition to creating a legal framework *less favourable* only to certain existing licensees, the proposed Notice creates a significantly *more favourable* environment to certain similarly situated licensees on conversion. Currently, Mobile operators MTN and Vodacom, have a licence fee contribution in their existing licences of 5% of net operational income (NOI); Cell C has a licence fee contribution requirement of 1% of audited licence fee income (NOI), while Telkom is currently required to contribute

⁸ Government Gazette No. 28483, GN 197, 8 February 2006.

⁹ Section 10(1)

¹⁰ Section 10(1)(a)

0.1% of net revenues, and Neotel, 0.1% net invoiced sales realised from PSTS revenue.¹¹

36. On conversion, all the above licensees will hold the same scope of licence and thus be similarly situated licensees. The Notice will have the effect of granting a significant advantage to only two of a number of similarly situated licensees, hence affording Vodacom and MTN, *more favourable* licence conversion terms than Telkom, Neotel and Cell C (amongst others).
37. This form of undue discrimination cannot have been the intention of the legislature. The final licence fee revised regulations cannot be more onerous on any single operator while at the same time, having the effect of being more favourable to other, similarly situated licensees in the same licence class.
38. The only manner in which Neotel submits that a streamlined licence fee proposal can survive legally, for the purposes of collecting an annual variable licence fee, is via a licence amendment process envisaged in section 10 of the ECA. This would also require a full calculation of current fees and a metric or threshold for collection in which no single licensee is disadvantaged or “worse off” than their current position under the Telecommunications Act, post conversion.
39. In other words, this would require the Authority to seek out the standard for a collection measure that does not prejudice any single operator, (currently 0.1% of net revenues) and apply this as the required standard across the board. Given the amounts historically collected annually for the National Revenue Fund (over R1 billion plus), this would not disadvantage the NRF, while still allowing the Authority to fulfill the objects of the Act, without prejudicing any single operator. The proportionality of the approach will also encourage company profitability.
40. While this proposal above will indeed benefit some operators, it importantly will not prejudice other (notably in some cases, smaller) operators or new entrants, in law. The current proposals on the other hand contained in the Notice, suggest that the attempt to streamline the percentage collection per year will result in a reduction for MTN and Vodacom that will be off-set by Telkom, Neotel and Cell C, along with new I-ECNS providers that may now be licensed. This anomaly can only serve to discourage competition and network investment.
41. While Neotel remains committed to the licence conversion process and attendant revisions to regulation that may be necessitated, Neotel fully reserves its rights in regard to a licence conversion on no less favourable terms to its existing licence.

¹¹ This submission is confined to comparisons of Telkom, Neotel, Cell C, MTN and Vodacom. This should not be construed that Neotel does not perceive significant impact on other new entrants or existing licence holders as a result of the proposed Notice and draft regulations.

42. In this regard, Neotel calculates that the total, overall licence fee contribution post conversion for Neotel, should be no greater than the sum of 0.1% of net invoiced sales derived from licensed activity, plus a sum no greater than 0.2% of annual turnover (or such other percentage as may be determined by the Minister after consultation with licensees) for contribution to the Universal Service and Access Fund in terms of section 89 of the ECA.

43. Neotel further reserves its rights with respect to the possible lacuna in law that may arise from the fact of converted “thin licences”, which **final** form has not been subject to consultation as yet, or Gazetted. This may give rise to a situation where existing licences, on conversion, are no longer deemed valid, yet converted “thin”, licences under the ECA also do not vest Neotel (or other licensees) with the rights necessary to place these licences on terms no less favourable to those to which Neotel (and other licensees) are currently subject.

Contextual cost analysis

44. As a matter of principle and best practice, such regulations should be developed with an overarching view of the total regulatory levies and associated costs of holding a licence in the SA communications sector. Typically, an infrastructure licensee (PSTS, PLMN, or when converted, an individual ECNS) would pay fees on that licence, a VANS/ECS licence, spectrum licences and make contributions to the universal service fund.

45. It is critical in the formulation of a market friendly and pro-consumer approach, for the Authority to consider the full gamut of other fees and taxes that are levied on operators, external to the communications regulatory environment, including environmental taxes, construction taxes in respect of poles, masts, base stations etc, taxes on equipment (importation duties) etc.¹² These fees and charges cumulatively become substantial and have an impact on the cost of conducting business, on tariffs for services as well as the sustainability of the licence.

46. ICASA has stated its commitment to “reducing the costs of doing business” and “lowering barriers to entry”. These are laudable objectives and even more critical if ICASA wishes to stimulate investment by new entrants in a market that is relatively concentrated and reaching saturation in various service segments. Yet for reasons outlined above, the Notice does not evidence this commitment in its current form.

¹² Tax and the Digital Divide - publication by the GSM Association (2005)

47. Neotel notes the framework adopted for the formulation of the draft licence fee regulations and largely agrees with the principles underpinning this formulation. Our comments in respect of each follow below:

I. Licensees in possession of an individual licence should pay a larger proportion of their revenues towards fees as compared to those in possession of class licences, in view of the wider scope of operation.

48. The principle appears to be based on the assumption that any operation of wider scope than a class licence will necessarily have higher revenues. This assumption is somewhat tenuous because there is no correlation between value of licence, duration of licence and comparative return on investment in the same period as a similarly situated licensee.

49. Neotel submits that ICASA should consider the principle as a set percentage of revenue regardless of scope of operations. A national operation also requires higher set up costs, higher capex commitments, higher risk based on scale and the nature of the investment and longer periods to return on investment.

50. A licensee that has higher revenues in any given year pays a higher annual variable amount based on the percentage figure set. If a company performs poorly or has reduced revenue in any particular year, its annual variable fee for that year will decline accordingly. The nature and scope of the operation should not in essence be a determining factor in the methodology. Correctly stated, the Notice should not refer to “a larger portion of their revenues”.

II. The duration of the licence should be recognised as a significant factor when determining the value of the licence

51. Our comments above have reference. Neotel has similar concerns about the economic assumptions underpinning this claim. It appears to be based on the fact that every licence granted for a significant period of time will necessarily yield (the same) annual increased profits and it appears to take little account of the initial years of investment prior to profitability.

52. While Neotel agrees that this principle has a place in setting the licence fee framework, its application should however allow for a phased in, graded, payment structure for the annual, variable licence fee that takes account of the initial investment constraints of profitability yields. Other tools include an exemption from annual licence fees on a specified initial amount of profit. This would be in line with the promotion of a policy that encourages investment (via “regulatory holidays” for a defined period for example) and which aims to lower barriers to entry for new market players and supports the principles of asymmetric regulation for new entrants.¹³

¹³ See, OFTEL, Review of Telecommunications Licence Fees in the UK (1998).
http://www.Ofcom.org.uk/static/archive/oftel/publications/1995_98/licensing/fee1198.htm

III. Licensees with revenue below a certain threshold (e.g. R 1 000 000.00 per annum should pay marginal annual licence fees as a measure to support start ups and SMME's

53. Neotel supports the "threshold principle" in line with our comments above, but would request ICASA to provide a definition of what a "marginal annual licence fee" would entail. From a Neotel perspective however, this principle may have the unintended consequence of benefitting some start ups and new entrants while being disadvantageous to others that are new entrants in terms of their market entry, but have start up operations exceeding the threshold minimum. The same challenges are faced by all new entrants in a concentrated and highly saturated market and the scale of investment alone should not be determinative of the Authority's efforts to promote some form of asymmetrical regulation as a start up concession.

IV. At a minimum, the licence fees need to cover the cost of regulating the market"

54. For the reasons stated below, Neotel submits that this principle, while correct in many respects, has limited application currently in the South African communications sector. ICASA is wholly funded via budgetary appropriations from Parliament and the national treasury, for its operations. ICASA currently collects approximately R2 billion in licence and application fees for the national fiscus, while its parliamentary allocation for the 2007/8 financial year was R234 million.¹⁴

55. As such, Neotel submits that the cost of regulating the market is already paid for by the annual funding allocation that ICASA receives from Parliament. The allocation covers operational expenditure including inter alia, salaries, the cost of acquiring radio monitoring equipment, software-based frequency management tools and further education and training for ICASA personnel, and other operational requirements. Given Neotel's comments made above with respect to the total regulatory and associated costs placed on operators, the Notice in its current form, imposes a *de jure* double general tax on operators, as the funds that National Treasury allocates to ICASA are also partially derived from the corporate taxes that licensees pay to the SA Revenue Service.

56. Therefore, while ICASA currently does not retain any portion of the licence fee revenue it collects, the assertion that it should in essence, *recover its costs* of regulation, is only applicable to the extent that it recovers the cost of ICASA's annual operating budget from National Treasury. As the annual licence fee collections currently exceed this significantly, and the proposed collections will exceed this even more significantly, Neotel urges caution in how the notion of cost recovery and activity based costing ("ABC") is employed by ICASA via the licence fee regime, to ensure that ICASA does not become a revenue collection agency for the state, as this is not the Authority's intended role.

¹⁴ ICASA Annual Report, 2007/2008.

57. Neotel draws ICASA's attention to the *OFCOM Statement of Principles* regarding licence and administration fees.¹⁵ This statement covers the basis of cost allocation to determine the total costs recoverable from a sector and the way in which individual licence fees are determined. The UK Communications Act requires that, "charges must be "objectively justifiable and proportionate" and that OFCOM must ensure that "the relationship between meeting the cost of carrying out those functions and the amounts of the charges is transparent".¹⁶ If provided with cost justifications, transparency and rational linkages between the various licence fees and collections to offset budgetary appropriation, Neotel supports the principle of cost recovery or "minimum costs" as part of the principles of setting licence fees.

V. *The licence fee should be structured in a manner that promotes a competitive ICT sector, and should not constitute a barrier to market entry*"

VI. *The licence fees should facilitate the establishment of an environment conducive to network investments*"

58. Neotel supports the inclusion of these principles in the framework for setting licence fees. However, as stated above, the current construction of the proposed licence framework does not support the policy goal intended by the inclusion of such a principle. By application, principle VI is in conflict with principle I which as currently formulated may have the effect – and unintended consequence – of discouraging network investment, if scale alone is to be a determining factor of a "larger portion of revenues". Similarly, as we stated in paragraphs 44 -46 above, the Notice takes no account of the total costs levied on operators internally within the sector and external to the communications regulatory environment.

59. Neotel submits that the Authority should consider a practical implementation of this principle through a reasonable licence fee structure. As currently drafted, the net effect of the draft regulations for most operators suggests significant increases in annual contributions, material (and possibly unlawful) alterations to existing licence terms and conditions and disproportionate administrative action (not rationally connected to an underlying objective). While Neotel strongly supports revisions necessitated by conversion and re-regulation in terms of the ECA, the percentage increase proposed could serve to severely prejudice the operations, business planning and funding arrangements for licensees, particularly new entrants.

60. In this regard, Neotel urges the Authority to undertake a regulatory impact assessment on the implementation of the proposed licence fee regulations. Most widely known for their practice in the UK, OFCOM undertakes impact assessments to ensure that in implementing a regulatory decision, a wide range of options is considered, (including, where applicable, not regulating); to ensure that these options are clearly presented; that the impacts that would flow from each option are analysed carefully and that the costs associated with the chosen option do not outweigh the benefits.

¹⁵ Licence and Administration Fees - Statement of Principles for Broadcasting Act Licences and Telecommunications Regulation, at http://www.Ofcom.org.uk/about/accoun/statement_principles.pdf

¹⁶ Ibid. The cost apportionment process is also intended to allocate a share of costs to activities such as spectrum management that are funded by grants from the central government.

VII. The administrative fee structure should be as simple as possible

VIII. The licence fees should be calculated in a transparent manner

61. Neotel supports the inclusion of these principles in line with international best practice. Neotel welcomes an indication as to how the principle of transparency in calculation will be implemented.

IX. The licence fees should be offset against commitments to construct ECN and provide ECS in rural and under-serviced areas

62. Neotel in principle supports the proposal that licence fees should be offset against commitments to construct ECN and provide ECS in rural and under-serviced areas. This could be a positive step, depending on how it is conceptualised, structured and implemented. If the view that licence fees are a tax on licensees is accepted, an offset against licence fees for rolling-out infrastructure in underserved areas could act as the necessary catalyst to encourage operators to provide services to under-served communities.

63. As part of this initiative and in terms of section 88(1)(b) of the ECA, ICASA should also consider how operators can take advantage of funds in the Universal Service and Access Fund to subsidise them for rolling-out infrastructure in underserved areas.

64. Neotel suggests however, that this principle can only be applied alongside a wholesale revision to the existing community service obligations and their current application/implementation, which in turn may require a licence amendment process as envisaged by section 10 of the ECA.

65. The Notice and the underlying principles do not propose an adjustment period for licensees to implement accounting practices and processes internally to deal with revenue splits from different licensed activities. New entrants may require a delayed implementation period to facilitate the development of the internal processes required. Neotel submits that the proposed regulations should consider such an implementation period in their final form.

66. Neotel submits that the metric for measuring the annual, variable licence fee be based on a percentage of net profit after tax, based on an incremental annual increase, recognising the nature of new entrant infrastructure investment and time period to investment returns.

67. This may include an exempted, fixed amount per annum for an initial period and when an agreed threshold has been met for new entrants, the incremental annual variable fee, as a percentage of profit, should become applicable.

68. The income to be considered should be income derived only from communication services and not income by way of interest, dividend, capital gains, sale of assets, consulting services, etc.

69. Neotel proposes in the alternative, that whatever charging structure is employed (revenue, income, profit, turnover), the figure needs to amount to the same (or substantially similar) outcome to the figure Neotel is currently required to pay in terms of its licence issued on December 2005 (0.1% of net invoiced sales), i.e. such that the licence is converted on no less favourable terms.

ANNUAL LICENCE FEES

70. Neotel's comments above on the principles where relevant, have reference.

71. Having regard to the Infodev/ITU ICT Regulation Toolkit, annual or recurring licence fees can be fixed or based on revenue depending on the regulatory environment, institutional design of the regulator and prevailing market conditions.¹⁷ These may include:

- a) Administration fees, based on cost recovery for regulators;
- b) Cost-based spectrum management fees;
- c) Discretionary administration of spectrum fees (i.e. not cost based); established on a one time or periodic basis (e.g. annually);
- d) Revenue sharing fees such as a premium, royalties or highest bid 'auction fees' paid to a government or regulatory authority for an authorization, and unrelated to the administrative costs of regulation;
- e) Other special fees bundled with authorization fees, such as access deficit charges, universal service fees, industry taxes etc; such fees should be separated from administrative fees.

72. The proposed annual licence fee in the Notice approximates the revenue sharing fee, essentially a "rent" paid to a government or regulator for the right to operate a network, provide a service or use a limited resource, such as radio spectrum or numbers. These fees may be set based on arbitrary numbers, benchmarking or market-based 'auction fees'.

73. Neotel notes the assertion that the Authority's operating expenses are projected to increase at a rate of 24% per annum for the first five years. Thereafter, the rate of increase is reduced to 8% for the remaining five years.

74. With full recognition for ICASA's independence and functioning, Neotel submits with respect that if such a significant increase in annual licence fees is to be linked to the Authority's operating expenses, it is incumbent on the Authority to provide some form of transparent accounting to Parliament (and the contributing licensees), which details and justifies 24% increase in operating costs for the regulator and matches those costs to the licence fees sought to be obtained.

¹⁷ Infodev/ITU, Chapter 5, "fees", *ICT Regulation Toolkit* (2007) at <http://www.ictregulationtoolkit.org/en/Section.636.html>

75. Neotel is however, mindful of the challenges presented to the Authority in terms of operating expenses. Based on clear justification, Neotel would support a proposal to Parliament for ICASA to achieve an increased budgetary allocation for the next five years, or a proposal that ICASA be authorised (and the law amended) to allow the Authority to retain a percentage of the licence fees collected to address these costs, subject to clear accounting to Parliament.
76. Regulators that generally factor in operational costs beyond the budgetary allocation, are permitted by their regulatory regimes to retain a percentage of licence fees collected or have loan arrangements applicable for their expansion. Ofcom for example sought to recover a percentage of its costs in 2006 (for the 2007 year) for restructuring from the former regulators to Ofcom, and for the cost incurred by Ofcom since its establishment under the Office of Communications Act 2002. This was done to offset loan funding (for 2003-2004) for the restructuring from the UK Department of Trade and Industry. These loans became repayable from March 2004 to March 2008.¹⁸
77. Such arrangements are not present in the SA communications sector. In instances where budgetary shortfalls have been experienced by the regulator in the past for unforeseen circumstances, (e.g. the Cell C licence court review proceedings in 2000) further representation was made to Parliament for the purpose of an increased or contingency allocation.
78. While Neotel notes that “increased regulatory costs” have been cited for the proposed increases, if cost recovery is to be considered as a factor in establishing licence fees, the current collection of licence fees still offsets the operating costs of ICASA by significant orders of magnitude. No evidence of the impact of these increased costs (budget being exceeded, overspend, financial shortages) have been shown to substantiate the significant proposed increase.
79. Neotel refers ICASA to our points above with regard to the evidence required to ensure that administrative action by ICASA in altering the licence fee regime does not suffer from arbitrariness or lack a rational connection to its objective.
80. At the same time, Neotel is supportive of the right of national government to collect revenue for state allocation. If this is however, the intended governmental purpose of the Notice, Neotel again refers the Authority to our comments in paragraphs 19 - 20 above, regarding the correct procedure for the passage of a money Bill.
81. Finally, Neotel also notes that reference is made to benchmark comparisons with foreign jurisdictions. Neotel would like clarity on which jurisdictions have been used

¹⁸ Ofcom Tariff Tables, 2006/07, issued 31 March 2006. Ofcom is required in terms of the Schedule to the Office of Communications Act 2002, to balance its expenditure with its income in each financial year. Ofcom is required to raise income from each of the sectors it regulates to covers the costs to be incurred in regulating that sector. Ofcom must also apportion its common operating costs – those which do not relate directly to any one sector – in a proportionate manner across each of those sectors. Ofcom raises its funds from television broadcast licence fees; radio broadcast licence fees; administrative charges for electronic networks and services and the provision of broadcasting and associated facilities; and funding to cover Ofcom’s operating costs for spectrum management in the form of grant-in-aid from the Department of Trade and Industry (DTI). Grant-in-aid covers the costs of regulating and managing the UK radio spectrum and those statutory functions and duties which Ofcom must discharge under the Communications Act but for which the Act provided no matching revenue stream, e.g. statutory public interest test for media mergers and ex post Competition Act investigations in relation to networks and services.

and what criteria were chosen to inform the choice of benchmark. While benchmarks do have limited application, a desktop survey of a number of countries suggests that the proposed annual, variable fee for an ECNS and ECS licence substantially exceeds that charged in many other countries.¹⁹

ADMINISTRATIVE FEES

82. Neotel notes that the Authority has considered activity based costing (“ABC”) in the “formulation of the administrative fees, inflation, the new competitive framework provided by the ECA and other relevant factors.” For ease of reference, our comments here also address proposals in Schedule 1 of the Notice.

83. Neotel also seeks clarification on what “other relevant factors” have been considered in the formulation of administrative fees?

84. Activity Based Costing (ABC) is a method for developing cost estimates in which the project is subdivided into discrete, quantifiable activities or a work unit. With its roots in the manufacturing sector, ABC is generally used as a tool for understanding product and customer cost and profitability. ABC has predominantly been used to support strategic decisions such as pricing, outsourcing and identification and measurement of process improvement initiatives. It is useful in instances where the number of activities is uncertain or may change during the estimate process. However, the main purpose of ABC is to provide information to management and to avoid assigning any cost in an arbitrary manner.²⁰

85. Notwithstanding the above, the proposal for some form of ABC in determining the actual costs of regulation is welcomed and is certainly not unique. The South African Telecommunications Regulatory Authority (“SATRA”) undertook a similar exercise in 1997-1998 to determine the cost of processing licence applications. By virtue of the monopoly in fixed and the duopoly in mobile, such applications were limited only to Value-added Network Services (“VANS”) which were the only unrestricted licence class. This model linked the actual cost of the application to the final administrative fee charged to a licensee for the *processing* of that application.

86. Undoubtedly a review of this sort is timely and logically there may be inflationary, higher costs associated with the current processing of applications. However, Neotel remains concerned that ICASA’s application of ABC seeks to recover costs for administrative fees in excess of those incurred. Moreover, no justification has been proffered of the impact of “increased regulatory costs”, such as budget being exceeded, overspend, financial shortages, etc which might substantiate the significant proposed increase.

¹⁹ For example, Luxembourg, Spain and Ireland - 0.2%; Kenya 0.5%; Austria 0.1-0.2% and Greece 0.25-0.5% of revenue. Malaysia charges 0.5% of gross turnover less applicable rebates provided the fee is not less than 0.15% of the gross turnover of the preceding financial year. Uganda charges an annual licence fee of US \$10,000 and an annual levy of 1% of gross annual revenue from licensed services for the equivalent class of licences to an I-ECNS (public service provider licence).

²⁰ Kaplan, Robert S. and Bruns, W. *Accounting and Management: A Field Study Perspective* (Harvard Business School Press, 1987) and http://en.wikipedia.org/wiki/Activity-based_costing

87. Neotel again notes that ICASA's operating budget is currently based on budgetary appropriations from Parliament. It is assumed that inflation and the ECA would have been factored into the process of parliamentary appropriation. That said, Neotel would strongly support a proposal that the Authority be authorised to retain a percentage of licence fees collected for its operations, to enable efficient and effective management of the Authority in a dynamic sector where skills and human resources remain at a premium.
88. However, until such proposal is approved via legislative amendment, Neotel seeks clarity on how administrative fees and their projected increases operate within the current framework of annual budgetary appropriation, particularly where the revenue collected by the Authority annually from the sector, far exceeds that Parliamentary appropriation.
89. The collection of a revenue share or royalty is a separate issue. Neotel does not dispute the right of government to collect revenues in excess of ICASA's operational costs that flow to the fiscus. However, if the Authority's rationale as proffered for the increase is based on increased operating costs, the amounts currently contained in Schedule 1 of the Notice appear disproportionately high.
90. Notwithstanding concerns about this regulation usurping the role of a general money Bill, if this proposal is to be realised, it would be useful for the Authority to provide a clear breakdown of the costs anticipated to show proportionality between the action and its intended outcome.

SCHEDULE 1: ADMINISTRATIVE FEES

Individual Licences

91. With regard to applications for ***amendment and transfer of individual licences***, the proposed fee of R250 000 is of concern for the following reasons:
- a) The fee does not appear to cater for the differences between ECNS and ECS licences and between ECNS/ECS and broadcasting licences;
 - b) The fee does not appear to cater for any differences in complexity in the processing of applications for amendment or applications for transfer. It is questionable whether the activities required to evaluate a transfer application (largely possible on a written application) can be equated with a licence amendment (which historically has seen a need for more complex evaluation and possibly public hearings). Having regard to section 10 of the ECA, it is apparent that the ECA anticipates at least eight possible reasons for which the Authority and a licensee might amend a licence. These include: streamlining different licences in the same class; ensuring fair competition; frequency management purposes; technological change; a finding of the Complaints and Compliance Committee necessitating change; to comply with the objects of the Act; for universal service or access as a result of changed circumstances in the market or a finding under Chapter 10 of the Act. It is extremely likely that an I-ECNS licence holder will,

during the course of its licence duration, face a licence amendment either at the behest of the Authority or of its own request, and that each of these situations, varying in complexity, require very different levels of analysis and administrative costing.

- c) For new entrants and smaller players, the proposed amendment and transfer fees will act as a significant barrier to logical commercial integration and/or market consolidation. In certain cases of smaller players, these fees may well serve to discourage initial investment in the sector.

92. With regard to applications for **renewal of individual licences**, the proposed fee of 60% of the application fee applicable at the time of submission of renewal is problematic, as it appears to link the renewal fee to a currently unknown application fee, which will presumably be set on a case by case basis via an ITA and which also appears to apply only to *initial applications for licences*.

93. As such, if the renewal fee is linked to an initial application fee at the time of submission of renewal, this assumes that an ITA for that licence class will be in existence. However, recent legal events as a result of the Altech Judgement seem to suggest that all further ITA's for infrastructure licences (I-ECNS) for example, are unlikely, post conversion in January 2009.²¹ In other words, does ICASA envisage further ITA's in any of these licence classes, specifically I-ECNS? If not, Neotel questions if the criterion of "as specified in ITA" is still a relevant one for determining the renewal fee?

94. Moreover, how is a renewal fee to be determined for an existing licence that is converted in terms of section 93 of the ECA, given that the renewal fee is linked in the Notice to an *initial application fee* applicable at the time of submission of renewal? Both questions raise further concerns in that a current licensee is facing a situation in which it is impossible to forecast for the costs of a licence renewal.

95. Finally, Neotel questions the need for a renewal fee at all when the costs of renewal can effectively be considered part of the annual fee for that year as is done in many other jurisdictions.

Class licences

96. With regard to the administrative fees proposed for **class licences** contained in Schedule 1, Neotel supports the application of low fees in accordance with the objects of the Act and the principles underpinning the licence fee framework. Neotel however questions why there is a differential between applications for initial registrations, amendment and transfer of class ECNS and ECS licences, as compared with broadcasting services and how such a differential is calculated?

²¹ *Altech Autopage Cellular (Pty) Ltd and the Chairperson of ICASA et al, TPD, Case No 20002/08 29 August 2008 and 31 October 2008.*

97. Neotel further questions whether the section for applications of transfer should correctly reflect “community broadcasting services” rather than “broadcasting services”?
98. Neotel also questions the amount of R5000.00 proposed for special temporary authorizations. Will this apply to test/trial licences generally for ECN and ECS licences or does it contemplate only the former “special event broadcasting licences” and does it only apply if the temporary authorization is for a minimum period of three months?
- a) Should it apply to both above, Neotel does not support the principle of paying for trial/test licences, given that no commercial benefit is derived from a limited trial during the trial phase, nor is any material administrative time required from the Authority in a commercial trial unless it is spectrum dependent. Moreover, typically a trial may run for a period of 6 months, with extensions, depending on equipment availability etc. It remains unclear why a charging principle should apply to such activity given the principles underpinning the licence fee framework?
 - b) If the cost applies to former “special event broadcasting licences”, Neotel assumes that such event would need to take place for a minimum period of three months to require a fee? If this is the case, it may be useful to make this more explicit in order to ensure that temporary authorizations for non-governmental organisations and specific community/public interest events, spanning periods from a day to a month at a time, are not required to pay the proposed fee.
99. Neotel submits that the imposition of a pricing principle – however calculated - attaching to a notification for licence exemption, defeats the purpose underpinning the exemptions contemplated by section 6 of the ECA (not for profit, resale, private network use, etc).
100. Neotel also questions whether sufficient benchmarking with other regulators and in other markets has been undertaken and if so, why there is such a marked departure from the types of fees found elsewhere. While Neotel accepts that benchmarks have limited application, a desktop survey of a number of countries suggests that the proposed administrative fees for amendment and transfer of I-ECNS licences substantially exceed that charged in other countries. For example, Uganda has an application processing fee of \$2500; Tanzania - \$10 000 (USD) for international services and \$5000 for national (network facility) services); Kenya - for the equivalent of I-ECNS licensees of \$126.00 (USD) and Malaysia has an application fee for I-ECNS equivalent licences (communication and multimedia) of \$2700 (USD).
101. In principle and in summary, under the current environment, ICASA receives its budget based on its business plan submitted to Parliament. Its activities are assumed to be catered for under the budgetary allocation. ICASA is entitled to claim the costs of regulating the sector back for the national fiscus via licence fee process. The exact quantification thereof however, needs to be reflected in a transparent manner that evidences a rational connection between the costs of processing the application at hand (be it de novo, a renewal or transfer) and the fee charged to the licensee.

DEFINITIONS

102. As a general comment, it is unclear why the definitions section stops at the letter “L”. There are other relevant definitions that may need to be included. Neotel suggests that this may have been a typographical error, but would suggest that when corrected, further opportunity to comment on the remaining definitions be granted. Neotel lists its concerns with current definitions provided, below:

- a) “**Agency Fees**”: Neotel suggests that the word “agent” in the definition be defined;
- b) “**Applicable interest rate**”: Neotel suggests that further definition be provided to the term “main commercial banks” and that these banks be specifically listed if clear criterion are not applied;
- c) “**Gross revenue**”: Neotel supports the principle that the definition includes revenue generated only from licensed activity. To this end, Neotel questions the inclusion of various items that are not revenue producing activities and also questions the inclusion of items (b) leasing of infrastructure; (c) installation charges; (e) late fees; (f) handsets and (h) through (m), which do not constitute revenue from licensed activities. As such Neotel proposes that the definition of “gross revenue” simply read “means revenues generated from licensed activities”, although clear boundaries of licenced activities would then have to be defined.

103. Neotel is thus concerned that there also appears to be a lack of any guiding principle for informing the current deductions in and between different licence categories and what method the Authority wishes to use to calculate or determine revenues?

PURPOSE OF REGULATIONS

104. Neotel supports the purpose of the draft regulations as stated in regulation 2(1)(a) and (b), subject to section 33 of the Constitution and the PAJA requirements.

105. Neotel entered the sector on the basis of various fundamentals (such as licence fees) remaining constant as per the operator licence and based on the fact that there would be no significant changes to that licence that materially impact the business plan, finance and lending arrangements. To have such a material change occur via regulation would mean that licensees have made, and must make in the future, commercial decisions without being able to predict with any certainty whether a material basis of those decisions will arbitrarily be altered.

106. It is a fundamental principle of the rule of law that persons should be able to regularise their affairs with reasonable certainty provided their activities have not been prohibited by a law of general application.²²
107. It is important to note that ICASA is mindful of this concern in that the Notice itself makes reference at page 3, point (3) to “industry’s need for a comprehensive licence fee framework to be incorporated into their business plans and processes”.
108. Neotel supports the inclusion of this principle and the resulting implementation of an annual, variable licence fee that does not materially depart from business fundamentals at the time that the initial PSTS licence was issued.
109. Notwithstanding Neotel’s reservation of rights in regard to the Notice, Neotel envisages that should these proposals eventuate in their current form, Neotel and similarly situated operators, should be entitled to re-negotiate the reduction of their fixed, licence fee and the payment terms thereof.

APPLICATION AND EXEMPTIONS

110. ICASA proposes exempting licensees who roll-out ECN in identified areas from paying their annual licence fee for three (3) years from the date they receive their licence. Such licensees would be required to pay their annual licence fee beginning in year four (4) from the date of receipt of their licence. Neotel supports the intention and principles underpinning regulation 3(2)(a) and (b). This is a positive step towards stimulating investment and lowering barriers to market entry.
111. Neotel seeks clarity however, as to whether this concession applies only to ECNS licensees who are granted and issued a licence in terms of Chapter 3 of the ECA, post conversion or whether this applies to all converted licences and operators that have already rolled-out or are in the process of rolling-out services prior to the publication of this regulation? That is, whether it includes existing licences to be converted pursuant to section 93 of the Act?
112. Depending on the intended application, Neotel submits that the Authority should provide clarity as to what the “areas identified” by the Authority will include and consider a similar concession for existing operators that may have good cause to benefit from such concession.
113. Neotel further submits however, that a wholesale review of community service obligations and areas considered to be under-serviced in the country, would need to be completed before regulation 3 could have any meaningful effect and application. A Policy Direction from the Minister of Communications may also be required in this regard, in terms of section 3(1)(b) of the ECA.

²² See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47; *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC), para 56.

114. With respect to regulation 3(3)(b), Neotel suggests that some basis should be provided for determining “such other percentage as the Authority determines”. The proposal is linked to a Consumer Price Increase (“CPI”), which should be sufficient to cover the increases (if required) on an annual basis for operating costs. The Notice as currently drafted, suffers from vagueness and lacks a rational basis in order to fulfil PAJA requirements. Neotel suggests that the increase be limited to a Stats SA, CPI increase only.
115. Neotel supports the exemptions of certain licensees from the payment of annual licence fees. However, this exemption should also include small class ECS licensees below a particular revenue threshold (not just a (undefined) marginal annual licence fee). This would be in line with international trends and the positive policy goal of stimulating SMME development.
116. Neotel supports the exemption being applied to the public broadcaster, but questions why in the interests of parity in the market and competition principles, this exemption should also apply to the commercial and competitive activities of the public broadcaster?
117. It appears from the draft Regulations that spectrum licence fees are excluded from their ambit. Neotel requests clarity as to how ICASA plans to address spectrum licence fees?
118. Finally, Neotel urges the Authority to consider options for application and exemption of licence fees not considered here. For example, allowing an exemption for the payment of fees for a period of time for new entrants; developing a framework based on proportional differences in licence fees based on the size of a company’s revenue (as is done in the UK and Canada), or considering exemptions for an initial amount of “taxable” profit from a licence fee perspective, which would entail setting a reasonable minimum threshold.²³ This can be used effectively to ensure that the goals underpinning the licence fee framework and the objects of the ECA are given effect to.

PAYMENT OF FEES

119. Draft regulation 4(1) proposes that licence fees are to be paid quarterly, 45 days from the end of the quarter. Neotel submits that this is a significant deviation from the current annual payment timeframe and is arguably, unduly onerous.
120. Moreover, how will a quarterly system take into account adjustments required? Will the quarterly payments require an exact amount (a quarter) of the final figure or only relate the preceding 3 months accounted for? How will the process account for adjustments such that a licensee is not penalised?
121. Neotel refers the Authority to our cumulative concerns regarding regulations 4,6 and 7, which link penalties to adjustments. This is highly problematic given the

²³ Ofcom for example, allows new entrants a two year exemption from the payment of fees while they develop their business, roll-out network and secure market presence.

concerns outlined directly above and also given that delays are sometimes as a result of factors beyond the control of the licensee (for example, auditors being unable to meet the specified timeframes.)

122. Neotel respectfully submits that the current **annual** payment practice should remain in place.
123. Neotel further submits that the 45 calendar day timeframe for payment of annual fees proposed in regulation (4)(1)(b) should be extended to 90 days, as the 45 day proposed period is too short in terms of current commercial operations.
124. Neotel submits that draft regulation 4(1)(c) is problematic as currently drafted and is too onerous on licensees. This is exacerbated by linking the requirement to a potential R1 million penalty for non-compliance. Private companies simply do not have the reporting infrastructure in place to comply with 3 month submission requirement for AFS.
125. Neotel supports the current practice which allows for submission of audited financial statements (“AFS”) within six (6) months from financial year end.
126. This 6 month period is in line with requirements of the South African *Companies Act*,²⁴ whereby private companies are required to submit an AFS within 6 months after the end of its financial year.²⁵ The Authority may wish to consider a 3 month period only for publicly listed companies, which are required in terms of the *Companies Act* to submit an AFS to the Registrar of Companies within 3 months of their financial year end.²⁶
127. Neotel supports an electronic payment system as proposed in regulation 4(1)(d).

ALLOWABLE DEDUCTIONS

128. Neotel notes the list of allowable deductions as proposed in draft regulation 5 and raises a number of questions in this regard:
 - a. Why are interconnection charges not an allowable deduction in the case of an ECNS? Is it the assumption that ECNS licensees do not interconnect?
 - b. What is the precise meaning of “discounts” in regulation 5(1)(b) and 5(2)(b)?
 - c. Does the Authority not consider facilities and leased lines as an input to ECS licensees as well as ECNS licensees?
129. Some of the deductions listed appear to be special items that do not align with current accounting best practices. To comply with the proposed licensed revenues less deductions as drafted, licensees would have to create a new format for

²⁴ No. 61 of 1973.

²⁵ Section 304(2)

²⁶ Section 304(1)

accounting. This imposes fairly onerous requirements on new entrants for example but by not aligning the deductions to an AFS/IFRS standard, such statements may be difficult to audit.

130. Neotel submits that channel commissions, incentives, rebates, referral fees and payments to third parties which results in the earning of revenue, and other direct costs (depreciation on equipment) should also be allowable deductions. Moreover, all inputs from other licensees (ECS on ECNS), should be included as allowable deductions by operators against gross revenues. Finally, adjustment for bad debts should also be included as an allowable deduction.
131. At the level of principle, Neotel proposes that the “matching principle” in accounting be adopted for inclusion in determining allowable deductions.²⁷ That is, that allowable deduction should include all expenses that have enabled the business to derive the gross revenue in question.
132. Neotel also questions why agency fees and commissions actually paid is an allowable deduction for broadcasting services that is not granted to ECNS licensees?
133. Further, Neotel questions why there is differential treatment in allowable deductions that have similar application and why no justification is proffered as to why the different treatment between ECNS and Broadcasting Service licensees?

INTEREST

134. Neotel notes the proposals for interest payments in regulation 6 and that the payment of interest is linked to the manner prescribed in regulation 4. Neotel refers the Authority to our comments and questions with regard to regulation 4 in paragraphs 119-124 above (“Payment of Fees”).
135. ICASA proposes charging a sliding interest calculation according to the number of days that a licensee’s quarterly licence fee payment falls due. Neotel questions the time periods provided in which the Authority proposes to begin levying interest on outstanding licence fees. These time periods are too short to meet a reasonableness standard, including the 14 day period for imposing the maximum interest penalty for outstanding amounts.
136. Neotel suggests that the time periods should be expanded considerably. In general business practice for example, all creditors charge interest only after a 30 day period. A simpler 30 day requirement would enable smoother accounting and payment processes in respect to licence fees.

²⁷ The matching principle requires a company to match expenses with related revenues in order to report a company's profitability during a specified time period.

137. Neotel submits that in both instances anticipated in regulation 6(1)(b) and (c) that the applicable interest rate plus 3 and 5 % respectively is excessive and disproportionate.
138. Neotel submits that the Authority should utilise the SA Revenue Services interest rate on outstanding taxes duties and levies (currently 15%),²⁸ or the prime lending rate plus 1% (whichever is the lesser), or a recognised Interbank standard, such as the Johannesburg Interbank Agreed Rate (JIBAR), although a daily calculated rate may prove to be difficult to implement.
139. Neotel questions the applicability of implementing a revenue split on ECS and ECNS licensees. Currently, licensees classify revenues according to accounting standards such as GAAP or IFRS. Revenue per licensed activity is not currently reported for all licensees in the absence of RFS or COACAM requirements. A new accounting standard based on a revenue split, will require some time to implement.
140. Neotel suggests that the Authority consider an implementation period that aligns with the constraints of establishing a reporting system to meet the current proposal. Such time period should be between 18-24 months, or at a minimum, in excess of a full financial year's grace.

CONTRAVENTIONS AND PENALTIES

141. Neotel notes the proposals in draft regulation 7 with some concern. Specifically, for a licensee to have to pay 25% of the capital amount of the licence fee due as a penalty for late payment exceeding 21 days, is unduly excessive and disproportionate and is unlikely to survive legal review. Again, Neotel suggests that the penalties used by the South African Revenue Services for companies (10% on the capital sum) are instructive.
142. Moreover, the time periods as defined in regulation 6 are questionable as to their practicality and 21 days in the instance of a penalty of this magnitude is entirely disproportionate. Neotel suggests that all the time periods proposed in regulation 6 and 7 be reviewed for more practical implementation. Ultimately, the intention of the penalty is to serve as a disincentive for non-compliance. The penalty should not operate as a trigger for technical insolvency in the event of a default in an instance where compliance with the time period is extremely onerous. At the very least, the 21 day period should be extended to 60 days if such a severe penalty is to remain a possibility.
143. **Ad regulation 7(2)(a):** reference is made to regulation 6(2) which does not exist and reference to contravening regulation 3(2) does not make logical sense. Neotel directs the Authority to our concerns with respect to compliance with regulation 4(1)(c) and our comments thereto.

²⁸ SARS Table of Interest Rates: applicable rate since 01.09.2008 on outstanding taxes, duties and levies and interest rates payable in respect of refunds of tax on successful appeals and certain delayed refunds.

144. **Ad regulation 7(2)(b):** Neotel submits that there is a typographical error in referring to 7(1)(a) and assumes the Authority means 7(2)(a). Notwithstanding the error, the reference remains vague and unclear as to precisely which acts or omissions the penalty refers and Neotel suggests further clarity in this regard.
145. **Ad regulation 7(2)(c):** Neotel submits that proper reference should be made to “these” not “the” regulations. Notwithstanding the error, Neotel submits that the penalties separately and cumulatively are excessive overreach and further require clearer formulation in drafting.

SHORT TITLE AND COMMENCEMENT

146. Neotel notes the proposal in draft regulation 8, notably, that Schedule 2 of these regulations will come into effect in 1 April 2009.
147. As a matter of practicality, the commencement date of the regulations and the issue of the converted and new licences should be streamlined to simplify accounting practices.
148. Alternatively, the current system should continue until 30 September 2008 or 31 March 2010 (depending on the actual finalisation of licence conversion), when proposed changes can commence on a uniform basis amongst all converted licences.

IMPACT ON NEOTEL

149. Neotel has completed an analysis of the current and proposed licence fees proposed in the Notice, from a market and Neotel perspective, including revenues, profitability and peak funding.
150. This includes an overview of the current situation with different licence fees that has emanated from managed liberalisation and the graded and controlled entry of operators into the market at different levels of market maturity. The analysis also includes an overview of the situation that will emerge with the imposition of a harmonised licence fee for all players as well as an evaluation of the impact on the five incumbent telecommunication operators and the market as a whole.²⁹
151. Our key findings are as follows:
- a) The draft licence fee regulations if implemented in their current form, would strengthen already strong mobile network operators (Vodacom and MTN);
 - b) The draft licence fee regulations adversely affect the smallest mobile operator (Cell C), so-called PSTS operators and their customers (Neotel, Telkom);

²⁹ This analysis has not factored in the advent of licence fee income derived from the so-called VANS market.

- c) The draft licence fee regulations if implemented in their current form, have a significant, adverse impact on Neotel's funding and business plan;
- d) The draft licence fee regulations if implemented in their current form, eliminate asymmetry and thereby penalise new entrants and smaller operators and their customers, specifically Neotel and Cell C.

CONCLUSION

152. Neotel supports the Authority's efforts to ensure that the ECA is implemented within the legislated timeframe. Licence fees are a critical element of the licence conversion and ECA implementation process.

153. At a conceptual level, as a new entrant, the calculation of licence fees is critical for the viability and sustainability of the operator. Lower or no licence fees facilitates infrastructure investment and the provision of more and diverse services as a result of more availability of revenue to dedicate to network investment. Higher revenue retained for network investment and expansion, results in greater access and higher usage. This stimulates competition, innovation, service delivery and profitability. The more efficiently profitable an operator, the greater their overall contribution to the fiscus from licence fees, value-added tax, income and company taxes. However, a disproportionately high licence fee that hinders network investment at the early stage of the operator life-cycle will have the opposite effect. The ultimate result may be less revenue generation, less diversity, less competition and an overall reduction in consumer welfare and public interest objectives.

154. As such, Neotel remains concerned that the draft licence fee regulations in their current form will have an extremely adverse impact on the operations of Neotel as well as the operations of smaller market players and those seeking entry into the South African market, with the above effects as a possible consequence.

155. **In summary, Neotel submits:**

- a) **That the proposed Notice violates section 93(1) of the ECA and the right to have an existing licence converted on no less favourable terms;**
- b) **That whatever charging metric and applicable percentage is adopted, it does not materially affect the calculation of the current licence fee over a defined period in accordance with business planning and certainty;**
- c) **That the Authority should employ gross profit as a metric for measuring annual variable fees;**
- d) **That the current proposed administrative fees in Schedule 1 of the Notice are excessive;**
- e) **That from a PAJA perspective, adequate motivation for the proposed increases to both annual, variable and administrative fees has not been provided, nor has it been demonstrated that the significant change in quantum, rather than the fact of the licence fee, is necessary to ensure that existing licences comply with section 93(4)(b) of the ECA;**

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- f) That the definition of gross revenue requires reconsideration along with the allowable deductions proposed;
 - g) That the proposed scheme for the payment of fees on a quarterly basis, interest charges and penalties require further discussion and reconsideration;
 - h) That the regulations should provide for a specified time frame in which a new entrant may be exempt from paying an annual, variable fee or for a initial portion of profit exempt from licence fee contributions;
 - i) That different operator licence fees and charging principles should be correctly reviewed through a section 10 licence amendment process envisaged by the ECA.
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156. To this end, Neotel urges the Authority to reconsider the draft general licence fees regulations as currently proposed and afford licensees and prospective market entrants a further opportunity to comment on such proposals. If the goal is to promote a competitive ICT sector, reduce barriers to entry and create an environment conducive to network investments, the licence fees should reflect that policy goal and seek to adjust the current framework in favour of that objective.

157. Neotel remains at the Authority's disposal to assist with this process and thanks the Authority for its efforts to ensure the implementation of the ECA.

